No. D074370

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

Shirli Fabbri Weiss, Trustee, on Behalf of the Shirli Fabbri Weiss Trust,

Petitioner and Appellant,

vs.

City of Del Mar and Torrey Pacific Corporation,

Respondents and Real Party in Interest.

San Diego Superior Court, No. 37-2017-00034936-CU-WM-CTL
Hon. Randa Trapp

APPELLANT'S APPENDIX
Volume 1 of 1, Pages 1-237 of 237

---

*Kathryn E. Karcher, SBN 125073
Karcher Harmes PS
401 B Street, Suite 2450
San Diego, California 92101
(206) 335-1631
kathryn@karcherappeals.com

Attorneys for Petitioner and Appellant
Shirli Fabbri Weiss, Trustee, on Behalf of the Shirli Fabbri Weiss Trust

APPELLANT'S APPENDIX CHRONOLOGICAL INDEX				
Tab	**Description**	**Date**	**Vol.**	**Page**
1	Summons and Verified Petition for Writ of Administrative Mandamus (CCP 1094.5)	09/19/2017	1	10
2	Notice and Acknowledgment of Receipt - Civil	12/20/2017	1	26
3	Notice and Acknowledgment of Receipt - Civil	12/20/2017	1	27
4	City of Del Mar's Answer to Verified Petition For Writ of Administrative Mandamus	01/18/2018	1	28
5	Respondent City of Del Mar and Real Party in Interest Torrey Pacific Corporation's Joint Notice of Motion and Motion to Dismiss Verified Petition For Writ of Administrative Mandamus (CCP 1094.5) For Failure to Timely Serve Summons Pursuant to Government Code § 65009; Memorandum of Points and Authorities in Support Thereof	01/23/2018	1	40
6	Declaration of Christopher W. Garrett in Support of Respondent City of Del Mar and Real Party in Interest Torrey Pacific Corporation's Joint Motion to Dismiss Petitioner's Verified Petition for Writ of Mandamus (CCP 1094.5) For Failure to Timely Serve Summons Pursuant to Government Code § 65009	01/23/2018	1	56
	Exhibit A - Email string - Dated 12/13/2017			59
	Exhibit B - Letter from Christopher W. Garrett - Dated 12/15/2017			62

APPELLANT'S APPENDIX CHRONOLOGICAL INDEX				
Tab	**Description**	**Date**	**Vol.**	**Page**
(6)	Exhibit C - Notice of Acknowledgment and Receipt - Civil - Dated 12/19/2017		1	64
7	Declaration of Brian Staver in Support of Respondent City of Del Mar and Real Party in Interest Torrey Pacific Corporation's Joint Motion to Dismiss Petitioner's Verified Petition for Writ of Mandamus (CCP 1094.5) For Failure to Timely Serve Summons Pursuant to Government Code § 65009	01/23/2018	1	67
	Exhibit A - Resolution No. 2016-09			70
8	Respondent and Real Party in Interest Torrey Pacific Corporation's Verified Answer to Verified Petition For Writ of Administrative Mandamus (CCP & 1094.5)	01/30/2018	1	78
9	Petitioner Shirli Fabbri Weiss' Objections to the Declaration of Brian Staver Filed in Support of the Joint Motion to Dismiss Verified Petition For Writ of Mandamus	03/29/2018	1	87
10	Petitioner Shirli Fabbri Weiss' Amended Opposition to the Joint Motion to Dismiss Verified Petition For Writ of Mandamus With Table of Contents and Authorities	04/02/2018	1	91
11	Respondent City of Del Mar and Real Party in Interest Torrey Pacific Corporation's Joint Reply in Support of Motion to Dismiss	04/06/2018	1	110

APPELLANT'S APPENDIX CHRONOLOGICAL INDEX				
Tab	**Description**	**Date**	**Vol.**	**Page**
12	Declaration of Ashley Jones in Support of City of Del Mar and Torrey Pacific Corporation's Joint Reply in Support of Motion to Dismiss	04/06/2018	1	126
	Exhibit A - Email string - Dated 08/10/2017			132
	Exhibit B - Letter from Mark C. Mazzarella - Dated 09/14/2017			136
	Exhibit C - Letter from City of Del Mar - Dated 10/05/2017			140
13	Respondent City of Del Mar and Real Party in Interest Torrey Pacific Corporation's Joint Request for Judicial Notice in Support of Joint Reply in Support of Motion to Dismiss	04/06/2018	1	142
	Exhibit A - 1987-1988 Regular Session, Chapter 218 (Senate Bill No. 497)			148
14	City of Del Mar and Torrey Pacific Corporation's Joint Response to Petitioner's Objection to Declaration of Brian Staver Filed in Support of Joint Motion to Dismiss	04/06/2018	1	151
15	Tentative Rulings	04/18/2018	1	158
16	Petitioner Shirli Fabbri Weiss' Objections and Sur-Reply to Respondents' Presentation of New Issues, Arguments and Evidence Not Raised in the Moving Papers or Petitioner's Opposition Brief	04/19/2018	1	160

APPELLANT'S APPENDIX CHRONOLOGICAL INDEX				
Tab	**Description**	**Date**	**Vol.**	**Page**
17	Declaration of Mark C. Mazzarella in Support of Petitioner Shirli Fabbri Weiss' Objections and Sur-Reply Brief to Respondents' Presentation of New Issues, Arguments and Evidence Not Raised in the Moving Papers or Petitioner's Opposition Brief	04/19/2018	1	168
	Exhibit A - Email - Dated 04/18/2018			170
18	Minute Order	05/10/2018	1	173
19	Order and Judgment of Dismissal	05/29/2018	1	176
	Exhibit A - Minute Order - Dated 05/10/2018			182
20	Notice of Entry of Judgment	06/07/2018	1	185
	Exhibit A - Order and Judgment of Dismissal - Dated 05/24/2018			186
	Exhibit 1 - Minute Order - Dated 05/10/2018			191
21	Notice of Appeal (Unlimited Civil Case)	06/07/2018	1	199
22	Notice Designating Record on Appeal (Unlimited Civil Case)	06/15/2018	1	202
23	Register of Actions	09/28/2018	1	235

APPELLANT'S APPENDIX ALPHABETICAL INDEX				
Tab	**Description**	**Date**	**Vol.**	**Page**
14	City of Del Mar and Torrey Pacific Corporation's Joint Response to Petitioner's Objection to Declaration of Brian Staver Filed in Support of Joint Motion to Dismiss	04/06/2018	1	151
4	City of Del Mar's Answer to Verified Petition For Writ of Administrative Mandamus	01/18/2018	1	28
12	Declaration of Ashley Jones in Support of City of Del Mar and Torrey Pacific Corporation's Joint Reply in Support of Motion to Dismiss	04/06/2018	1	126
	Exhibit A - Email string - Dated 08/10/2017			132
	Exhibit B - Letter from Mark C. Mazzarella - Dated 09/14/2017			136
	Exhibit C - Letter from City of Del Mar - Dated 10/05/2017			140
7	Declaration of Brian Staver in Support of Respondent City of Del Mar and Real Party in Interest Torrey Pacific Corporation's Joint Motion to Dismiss Petitioner's Verified Petition for Writ of Mandamus (CCP 1094.5) For Failure to Timely Serve Summons Pursuant to Government Code § 65009	01/23/2018	1	67
	Exhibit A - Resolution No. 2016-09			70

APPELLANT'S APPENDIX ALPHABETICAL INDEX				
Tab	**Description**	**Date**	**Vol.**	**Page**
6	Declaration of Christopher W. Garrett in Support of Respondent City of Del Mar and Real Party in Interest Torrey Pacific Corporation's Joint Motion to Dismiss Petitioner's Verified Petition for Writ of Mandamus (CCP 1094.5) For Failure to Timely Serve Summons Pursuant to Government Code § 65009	01/23/2018	1	56
	Exhibit A - Email string - Dated 12/13/2017			59
	Exhibit B - Letter from Christopher W. Garrett - Dated 12/15/2017			62
	Exhibit C - Notice of Acknowledgment and Receipt - Civil - Dated 12/19/2017			64
17	Declaration of Mark C. Mazzarella in Support of Petitioner Shirli Fabbri Weiss' Objections and Sur-Reply Brief to Respondents' Presentation of New Issues, Arguments and Evidence Not Raised in the Moving Papers or Petitioner's Opposition Brief	04/19/2018	1	168
	Exhibit A - Email - Dated 04/18/2018			170
18	Minute Order	05/10/2018	1	173
22	Notice Designating Record on Appeal (Unlimited Civil Case)	06/15/2018	1	202
2	Notice and Acknowledgment of Receipt - Civil	12/20/2017	1	26
3	Notice and Acknowledgment of Receipt - Civil	12/20/2017	1	27
21	Notice of Appeal (Unlimited Civil Case)	06/07/2018	1	199

APPELLANT'S APPENDIX ALPHABETICAL INDEX				
Tab	**Description**	**Date**	**Vol.**	**Page**
20	Notice of Entry of Judgment	06/07/2018	1	185
	Exhibit A - Order and Judgment of Dismissal - Dated 05/24/2018			186
	Exhibit 1 - Minute Order - Dated 05/10/2018			191
19	Order and Judgment of Dismissal	05/29/2018	1	176
	Exhibit A - Minute Order - Dated 05/10/2018			182
10	Petitioner Shirli Fabbri Weiss' Amended Opposition to the Joint Motion to Dismiss Verified Petition For Writ of Mandamus With Table of Contents and Authorities	04/02/2018	1	91
16	Petitioner Shirli Fabbri Weiss' Objections and Sur-Reply to Respondents' Presentation of New Issues, Arguments and Evidence Not Raised in the Moving Papers or Petitioner's Opposition Brief	04/19/2018	1	160
9	Petitioner Shirli Fabbri Weiss' Objections to the Declaration of Brian Staver Filed in Support of the Joint Motion to Dismiss Verified Petition For Writ of Mandamus	03/29/2018	1	87
23	Register of Actions	09/28/2018	1	235

APPELLANT'S APPENDIX ALPHABETICAL INDEX				
Tab	**Description**	**Date**	**Vol.**	**Page**
5	Respondent City of Del Mar and Real Party in Interest Torrey Pacific Corporation's Joint Notice of Motion and Motion to Dismiss Verified Petition For Writ of Administrative Mandamus (CCP 1094.5) For Failure to Timely Serve Summons Pursuant to Government Code § 65009; Memorandum of Points and Authorities in Support Thereof	01/23/2018	1	40
11	Respondent City of Del Mar and Real Party in Interest Torrey Pacific Corporation's Joint Reply in Support of Motion to Dismiss	04/06/2018	1	110
13	Respondent City of Del Mar and Real Party in Interest Torrey Pacific Corporation's Joint Request for Judicial Notice in Support of Joint Reply in Support of Motion to Dismiss	04/06/2018	1	142
	Exhibit A - 1987-1988 Regular Session, Chapter 218 (Senate Bill No. 497)			148
8	Respondent and Real Party in Interest Torrey Pacific Corporation's Verified Answer to Verified Petition For Writ of Administrative Mandamus (CCP & 1094.5)	01/30/2018	1	78
1	Summons and Verified Petition for Writ of Administrative Mandamus (CCP 1094.5)	09/19/2017	1	10
15	Tentative Rulings	04/18/2018	1	158

SUM-100

SUMMONS
(CITACION JUDICIAL)

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

2017 SEP 19 A 8:28

CLERK-SUPERIOR COURT
SAN DIEGO COUNTY, CA

NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):
CITY OF DEL MAR, AND DOES 1 THROUGH 10

YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):
SHIRLI FABBRI WEISS, TRUSTEE, on behalf of the SHIRLI FABBRI WEISS TRUST

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (*www.courtinfo.ca.gov/selfhelp*), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (*www.lawhelpcalifornia.org*), the California Courts Online Self-Help Center (*www.courtinfo.ca.gov/selfhelp*), or by contacting your local court or county bar association. **NOTE:** The court has a statutory lien for waived fees and costs on any settlement or arbitration award of $10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case.

*¡**AVISO!** Lo han demandado. Si no responde dentro de 30 dias, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.*

*Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (*www.sucorte.ca.gov*), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.*

*Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (*www.lawhelpcalifornia.org*), en el Centro de Ayuda de las Cortes de California, (*www.sucorte.ca.gov*) o poniéndose en contacto con la corte o el colegio de abogados locales. AVISO: Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de $10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.*

The name and address of the court is:
(El nombre y dirección de la corte es): SAN DIEGO SUPERIOR COURT
330 WEST BROADWAY
SAN DIEGO, CA 92101

CASE NUMBER:
(Número del Caso):
37-2017-00034936-CU-WM-CTL

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):
MARK C. MAZZARELLA, ESQ. 1620 FIFTH AVE SUITE 600 SAN DIEGO, CA 92101 619-238-4900

DATE: SEP 20 2017
(Fecha)

Clerk, by V. Contreras, Deputy
(Secretario) *(Adjunto)*

(For proof of service of this summons, use Proof of Service of Summons *(form POS-010).)*
(Para prueba de entrega de esta citatión use el formulario Proof of Service of Summons, *(POS-010)).*

[SEAL]

NOTICE TO THE PERSON SERVED: You are served
1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of *(specify):*
3. ☐ on behalf of *(specify):*

under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (authorized person)
☐ other *(specify):*

4. ☐ by personal delivery on *(date):*

SHORT TITLE: WEISS v. CITY OF DEL MAR	CASE NUMBER:

INSTRUCTIONS FOR USE

- This form may be used as an attachment to any summons if space does not permit the listing of all parties on the summons.
- If this attachment is used, insert the following statement in the plaintiff or defendant box on the summons: "Additional Parties Attachment form is attached."

List additional parties *(Check only one box. Use a separate page for each type of party.)*:

☐ Plaintiff ☐ Defendant ☐ Cross-Complainant ☐ Cross-Defendant

TORREY PACIFIC CORPORATION

Real Party In-Interest

Form Adopted for Mandatory Use
Judicial Council of California
SUM-200(A) [Rev. January 1, 2007]

ADDITIONAL PARTIES ATTACHMENT
Attachment to Summons

MAZZARELLA & MAZZARELLA LLP
Mark C. Mazzarella (SBN 082494)
Rebecca L. Reed (SBN 275833)
1620 Fifth Avenue, Suite 600
San Diego, California 92101
Telephone: (619) 238-4900
Facsimile: (619) 238-4959
Mark@mazzarellalaw.com
Rebecca@mazzarellalaw.com

Attorneys for Petitioner
SHIRLI FABBRI WEISS TRUSTEE
SHIRLI WEISS FABBRI TRUST

FILED
CIVIL BUSINESS OFFICE 9
CENTRAL DIVISION
2017 SEP 19 A 9:28
CLERK-SUPERIOR COURT
SAN DIEGO COUNTY, CA

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO - CENTRAL DIVISION

SHIRLI FABBRI WEISS, TRUSTEE, on behalf of the SHIRLI FABBRI WEISS TRUST, Petitioner, v. CITY OF DEL MAR and DOES 1 THROUGH 10, Respondents. TORREY PACIFIC CORPORATION Real Party In-Interest	CASE NO. **37-2017-00034936-CU-WM-CTL** **VERIFIED PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS (CCP 1094.5)**

NATURE OF THE CASE

1. Petitioner Shirli Weiss, as Trustee of the Shirli Fabbri Weiss Trust (hereinafter "Petitioner" or "Weiss Family Trust"), petitions this Court for a writ of mandate under California Code of Civil Procedure Section 1094.5, directed to Respondent City of Del Mar (hereinafter "Respondent") to set aside Respondent's denial, reflected in Respondent's Resolution 2017-5, of Petitioner's Application TVS2016-001 for restoration and preservation of Petitioner's scenic view (hereinafter "Petitioner's Application") which was brought pursuant to Respondent's Trees, Scenic Views and Sunlight Ordinance as set forth in the Del Mar Municipal Code, Chapter 23.51. (hereinafter "Scenic View Ordinance")

JURISDICTION

2. The Court has jurisdiction over this action pursuant to sections 1085, 1094.5, and 187 of the California Code of Civil Procedure.

3. Venue for this action properly lies in San Diego County Superior Court because Respondent and the subject property are located in San Diego County.

PARTIES

4. Petitioner is the Trustee of the Weiss Family Trust created September, 2009 and is an individual residing at 116 Spinnaker Court Del Mar, California 92014, fee ownership of which is held by the Weiss Family Trust.

5. Respondent, is a California Municipal Corporation, and is a local government agency and political subdivision charged with the authority to regulate and administer land use activities within its boundaries, subject at all times to the obligations and limitations of all applicable state, federal, and other laws, including the Del Mar Municipal Code. At all times mentioned herein, the Respondent has been and is now the agency charged with administering the Scenic View Ordinance. Pursuant to the Scenic View Ordinance, and the Del Mar Municipal Code (hereinafter "DMMC"). Respondent has the final responsibility and authority to conduct evidentiary hearings and to render decisions which grant or deny Applications for the restoration and preservation of scenic views as defined in the Scenic View Ordinance ("Scenic Views") such as Petitioner's Application.

6. Petitioner is informed and believes and thereon alleges that Real Party in Interest Torrey Pacific Corporation (hereinafter "Torrey Pacific" or "Tree Owner") is, and at all times mentioned herein was, a California Corporation with its principal place of business at 171 Saxony Road, Suite 109 Encinitas, CA 92024, and holds fee title to the real property located at 110 Stratford Court, Del Mar, California ("Stratford Court Property"), which is to the immediate south of Petitioner's property.

7. Petitioner is informed and believes and thereon alleges that Brian Staver ("Staver") is an individual residing in the County of San Diego, State of California who has an interest in Torrey Pacific. At all times pertinent to the Complaint, Staver acted as agent of Torrey Pacific.

Petitioner is further informed and believes that the stockholders of Torrey Pacific are the descendants of Ralph and Marion Staver (the "Stavers"), former residents of Del Mar, now deceased. At various times in the proceedings involving Petitioner's application to the City of Del Mar, as set forth below, Torrey Pacific has referred to the descendants of the Stavers as the "Staver Family" and has referred to the Staver Family and Torrey Pacific interchangeably as owning the Statford Court Property. In its filings with the City Planning Commission and City Council objecting to Petitioner's application as described herein, Torrey Pacific has repeatedly pointed out to the Del Mar City Planning Commission and City Council that Ralph Staver was a former member of the Del Mar City Council and that the real parties in interest in Torrey Pacific are his descendants.

8. Petitioner is currently unaware of the true names and capacities of Respondents DOES 1 through 10, inclusive and therefore sues said parties by such fictitious names. Upon information and belief, DOES 1 through 10 are agents of the CITY, state, or federal government who are in some manner responsible for the conduct described in this Petition, or other persons or entities presently unknown to Petitioner who claim some legal or equitable interest in the subject matter of this Action. Petitioner will amend this Petition to show the true names and capacities of Does 1 through 10 when such names and capacities become known.

STATEMENT OF FACTS

9. The Scenic View Ordinance, Chapter 23.51 of the DMMC provides at Section 23.51.010 that the City of Del Mar recognizes that Scenic Views contribute to the "special character of Del Mar and to the overall quality of life enjoyed by residents, property owners, and visitors in Del Mar." At Section 23.51.010 (C), the Scenic View Ordinance specifically notes that Scenic Views of the ocean provide "a variety of significant and tangible benefits for residents. . . ." Pursuant to Section 23.51.010 (E) of the Scenic View Ordinance, its purpose is to acknowledge the benefits derived from Scenic Views and to provide a process by which persons may seek to restore and preserve Scenic Views that they had when they purchased or occupied their properties or within the prior ten years, that have subsequently become unreasonably obstructed by the growth of Trees or Vegetation on a neighbor's property within 300 ft. from their

property boundary.

10. Section 23.51.020 (M) of the Scenic View Ordinance defines "Scenic View" as: ". . . a view of the ocean, lagoons, canyons, the community and its landscapes and urban forest character, or other scenic vistas, from the Primary Living Area of a residence." "Primary Living Area" is defined in Section 23.51.020 (J) as ". . . that [single] portion of a residence from which a Scenic View is observed most often by the occupants and guests at the residence."

11. Section 23.51.030 of the Scenic View Ordinance articulates the right accorded residents of Del Mar to restoration and preservation of their Scenic Views. It provides that a person ". . . shall have the right to seek restoration and preservation of Scenic Views . . . that existed at the time they purchased or occupied a property or in the last ten years, whichever is shorter, when such Scenic Views from the Primary Living Area, . . . have subsequently been unreasonably obstructed by the growth of Trees or Vegetation located within the Del Mar City limits and 300 feet of the Applicant's property boundary."

12. The procedure for filing an application seeking restoration and preservation of Scenic Views is set forth in Section 23.51.040 of the Scenic View Ordinance which provides the conditions that must be fulfilled before an application may be deemed filed. Subsection B2 of that section requires the applicant to make reasonable efforts to resolve any dispute before submitting an application for restoration and preservation of the applicant's Scenic View to the City. If such efforts to resolve the dispute have been made and are unsuccessful, after paying the required $3,780. fee to the City, the applicant is entitled to a public hearing before the City's Planning Commission to request that the City enforce the Scenic View Ordinance by adopting a Resolution requiring the restoration and preservation, at the applicant's expense, of her Scenic View. The applicant and any member of the public is entitled to present evidence pertinent to the application at the hearing.

13. Section 23.51.030 of the Scenic View Ordinance sets forth the time parameters that the Planning Commission must consider in determining whether unreasonable obstruction has occurred. Specifically, that section mandates that the Planning Commission consider whether unreasonable obstruction has occurred "subsequent" to the purchaser's purchase, occupancy, or

within ten years, whichever is shorter. That section does not require that unreasonable obstruction must exist at the time of the hearing on the application for obvious reasons: if obstruction at the time of the hearing was a criterion, a Tree Owner could moot an application by a trimming the obstructing Trees or Vegetation in a manner that temporarily restored a Scenic View, thereby forcing the property owner to have to file serial applications every time the Scenic View became obstructed. Section 23.51.100 of the Scenic View Ordinance provides that the decision of the Planning Commission can be appealed to the City Council, and that: "The provisions of Section 1094.5 of the California Code of Civil Procedure are applicable to judicial review of the City of Del Mar's decisions pursuant to this Chapter."

14. Petitioner is the owner in fee of the condominium property at 116 Spinnaker Court (the "Spinnaker Property"), a condominium within the Del Mar Woods condominium development, located in the City. Petitioner's Application was first filed on August 30, 2016, and sought both restoration and preservation of a Scenic View consisting of a white water view of the ocean which Petitioner had upon purchase, occupancy and within 10 years of her Application. Petitioner's Scenic View was visible to the southwest of the Spinnaker Property from a 44"x 34" window in the Petitioner's "Primary Living Area" as that term is defined in the Scenic View Ordinance, across the Stratford Court Property owned by Real Party in Interest Torrey Pacific and to the ocean. The Scenic View obstruction is within 300 ft. of the boundary of the Spinnaker Property. Petitioner purchased and legally occupied the Spinnaker Property on November 10, 2014, and physically occupied the Property in early January 2015.

15. In her Application filed on August 30, 2016 and updated on April 5, 2017, as well as at the hearing before the Planning Commission on her Application, which occurred on April 11, 2017, Petitioner showed that when she purchased and occupied the Spinnaker Property, it had a beautiful white water ocean view (the "Scenic View")[1] visible from the 44" x 34" window in the living room (the "Primary Living Area") that looks to the southwest. The same view was visible from the living room and bedroom balconies.

[1] All Capitalized terms have the same meaning as used in the Scenic View Ordinance, except where noted.

16. Petitioner's Scenic View was over 50% of Petitioner's total Scenic View as the term Scenic View is defined in the Scenic View Ordinance.

17. Petitioner showed that the Scenic View consists of an 18-20 ft. wide view corridor to the southwest across the property at 110 Stratford Court, within 300 ft. of Petitioner's property boundary. The Scenic View existed because of a substantial gap between two Eucalyptus trees referred to as Eucalyptus Trees E-19 and E-20 on the Randy R. Brown Survey submitted in the proceedings before the City by Torrey Pacific, dated "rev. 7/6/16" (the "Brown Survey"). The Scenic View was visible from the 44"x 34" southwest window of Petitioner's living room, which had been installed by the previous owner or the builder in the southwest corner of the living room to take advantage of the Scenic View.

18. At the time Petitioner purchased the Spinnaker Property, this Scenic View was a substantial and material factor in the purchase. Even minimal ocean views are prized among Del Mar property owners and prospective property owners, and significantly impact the purchase price of property within the City. Therefore, the obstruction of any material portion of an ocean view is significant and inherently unreasonable.

19. At the time of purchase and occupancy, the Trees and other Vegetation did not unreasonably obstruct the Scenic View. They looked neatly kept; and it was apparent that trees on either end of the Scenic View, Trees E-19 and E-20 had just been topped (the topping leaves the Trees in an unsightly condition, but this fact is not the focus of this Complaint). Petitioner showed in her Application and at the hearing that subsequent to Petitioner's purchase, her Scenic View became unreasonably obstructed by the overgrowth of Trees and Vegetation on 110 Stratford Court Property, a condition which existed when Petitioner's Application was filed on August 30, 2016 seeking restoration and preservation of Petitioner's Scenic View pursuant to section 23.51.030 =of the DMMC.

20. At the hearing before the Del Mar Planning Commission, Petitioner showed photographs of the Scenic View as it appeared on January 19, 2015, shortly after occupancy, photos taken July 4, 2016, showing unreasonable Scenic View blockage by that date, which was shortly before filing the Application, and photos taken on February 23 and 28, 2017, showing

unreasonable Scenic View blockage shortly before the Tree Owner trimmed the Trees and Vegetation in early March 2017, which occurred shortly before the then scheduled date of the hearing before the Planning Commission, of March 14, 2017, and before the actual date of the Planning Commission hearing, April 11, 2017. In addition, the Planning Commission entered into the evidence the Brown Survey, which depicted the heights of the Vegetation, according to Torrey Pacific, that were measured and existed as of November, 2015, which Torrey Pacific represented were the same heights that existed regarding the Vegetation as of November 2014 trimming.

21. It was undisputed in the Planning Commission proceedings that after Petitioner purchased the Spinnaker Property within a few days after Torrey Pacific had trimmed Trees and Vegetation in the Scenic View in November of 2014. Following the November 2014 trim, Torrey Pacific decided not to trim the Trees and Vegetation in Petitioner's Scenic View for over 12 months between November 2015 and November 2016 and disclaimed any obligation or agreement with anyone to do so. Petitioner alleges on information and belief that he reason for this was that Torrey Pacific had determined to find a way to block the scenic views of the residents of Del Mar Woods because several had filed applications for restoration and preservation of their scenic views and because Torrey Pacific wished to erect a wall of unbroken Vegetation between its property and Del Mar Woods, despite the Scenic View Ordinance. And, that was the effect of Real Parties' conduct. During the 12 months that the Tree Owner did no trimming of the Trees and Vegetation, the Tree Owner made submissions to the City seeking to completely block the Scenic View available to Petitioner and other residents of the Del Mar Woods. Torrey Pacific also did not trim or lace Tree E-20 other than top it for approximately 16 months between November 2015 and March, 2017.

a. By May of 2016, the Trees and Vegetation in Petitioner's Scenic View had become wildly overgrown, unreasonably obstructing the Scenic View.

b. In addition, Torrey Pacific has submitted a Plan to the Planning Commission seeking to erect an unbroken 25 ft. to 40 ft. wall of Trees and Vegetation to completely block Petitioner's Scenic View and that of other property owners in Del Mar Woods;

c. In addition, the Tree Owner erected "story poles" giving notice of its desire and intent to unreasonably block all Scenic Views with an unbroken wall of Trees and Vegetation.

22. In May and June of 2016, Petitioner contacted Torrey Pacific and alerted its lawyers that Petitioner's Scenic View had been unreasonably obstructed. In compliance with section 23.51.040 (B) (3) of the Scenic View Ordinance, Petitioner proposed mediation before a professional mediator to resolve the issues.[2] However, Torrey Pacific would not mediate the dispute, forcing Petitioner to pay a$3,780.00 fee to the City in order to bring her application before the Planning Commission. Petitioner asked the City to find that Petitioner had complied with Petitioner's obligation to seek mediation. City confirmed that Petitioner had so complied in an October 11, 2016 letter to Torrey Pacific.

23. The hearing on Petitioner's Application, TVS2016-001, (which had been postponed a number of times for various reasons), was reset for Tuesday, March 14, 2017. Just before the scheduled March 2017 hearing, Torrey Pacific had the Trees and Vegetation in the Petitioner's Scenic View corridor trimmed so as to substantially (if temporarily) restore the Scenic View to the condition it had been in at time of her purchase and occupancy. The extent to which the Trees and Vegetation were trimmed by Torrey Pacific was determined based on both the photographs of the Spinnaker Property that Petitioner had taken in January of 2015, shortly after occupancy, and it used the height measurements of the Trees and Vegetation in the Scenic View that it had taken in November of 2015, as shown in the Brown Survey, when it trimmed the Trees and Vegetation in the Scenic view close to the hearing on another application seeking restoration and preservation of the Scenic View. The trimming performed in March 2017 was an "out of the ordinary" trimming. Previously, when the Tree Owner did choose to trim, it trimmed in May and November.

24. The hearing before the Planning Commission was again briefly postponed and took place on April 11, 2017. Appellant established the following, through (a) photographs; (b)

2

the documented evidence of the height of the Trees and Vegetation as it existed in November 2015, admitted in the submissions of the Tree Owner (in the Brown Survey), which was analyzed in the declaration testimony of Petitioner's expert, certified arborist Marc Wiesniewski, and (c) testimony, in compliance with section 23.51.030:

- the nature and extent of the Scenic Views from Appellant's Primary Living Area
- that existed at the time Appellant purchased and occupied the Spinnaker Property
- had, subsequent to purchase and occupancy, been unreasonably obstructed by the growth of the Tree Owner's Trees and Vegetation
- which were located within the Del Mar City limits and within 300 feet of the applicants' property boundary.

25. Thus, Petitioner made the showing required by Sections 23.51.030 of the Scenic View Ordinance by focusing on the unreasonable obstruction of Petitioner's Scenic Views that had occurred on several occasions throughout 2016 and in 2017, "subsequent" to her purchase and occupancy and subsequent to the trimming that had occurred in November 2015. Petitioner acknowledged that her Scenic View had been temporarily substantially restored in March of 2017, but without any Preservation Plan agreement with Torrey Pacific. Petitioner sought from the City, a resolution that her Scenic Views had been substantially obstructed and adopting a Preservation Plan of periodic trimming of the Vegetation in Petitioner's Scenic View corridor, at her expense, four times a year, to heights and widths that existed at the time of her occupancy.

26. Petitioner's Application was denied by the Planning Commission in a split vote of 3-2. The members of the Planning Commission who voted to deny the Application, however, instead of applying section 23.51.030 and determining that Petitioner's view had been unreasonably obstructed subsequent to purchase and occupancy and within the last ten years, imposed a new condition contrary to the Scenic View Ordinance: they required that Petitioner show that *at the time of the hearing*, the Scenic View was unreasonably obstructed. In other words, they focused on the *current condition* of the Scenic View as of the date of the Planning Commission hearing, and decided in effect, that since Torrey Pacific had temporarily restored the Scenic View shortly before the April 11, 2017 Planning Commission hearing, there was no

unreasonable obstruction within the meaning of the term as used in Section 23.51.030, and denied Petitioner's application for an ongoing restoration and preservation plan,

27. The majority of the Planning Commission members' findings constituted a legal mis-reading of the Scenic View Ordinance, was contrary to the law, was not supported by the evidence and was arbitrary and capricious. As a result of the misapplication of the Scenic View Ordinance, every time the Trees and Vegetation on the Stratford Court Property grows to unreasonably obstruct the Petitioner's Scenic View in the future, Petitioner would be required to pay another $3,780 fee and file a new application in order to get the Scenic View restored. In addition, as a result of the Planning Commission's erroneous interpretation of the Scenic View ordinance, Torrey Pacific could again undermine and thwart Petitioner's application by just again trimming the obstructing Vegetation just before the next hearing, forcing Petitioner to file serial applications. As a case in point, despite the March 2017 trimming, the Trees and Vegetation in Petitioner's Scenic View are, at the time of this filing, wildly overgrown and substantially and unreasonably block Petitioner's Scenic View. The erroneous interpretation of the Scenic View Ordinance by the Planning Commission, if allowed to stand, would effectively eliminate the purpose of the preservation plans contemplated in the Scenic View Ordinance, since in the place of mandated periodic trimming of any obstructing Trees and Vegetation, periodic filing of applications would be required.

28. During the Planning Commission hearing, some of the Planning Commission members made reference to what the Tree Owner had "agreed" to do or was obligated to do under Resolution 2016-09, which was a Resolution adopted in response to an application pursuant to the Scenic View Ordinance by one of Petitioner's neighbors whose Scenic View was essentially the same as Petitioner's. However, it is undisputed that (a) the Tree Owner has not entered into any Agreement with Petitioner or with anyone that requires it to trim the Vegetation in Petitioner's Scenic View Corridor; (b) prior Resolutions adopted by the Planning Commission, which do not apply to Petitioner, do not require the Tree Owner to maintain or preserve Petitioner's Scenic View by trimming the Trees and other Vegetation that grows in Petitioner's Scenic View and in fact allow the Tree Owner to block the Scenic View, and in any event, other Resolutions cannot

be deemed binding on Petitioner pursuant to Petitioner's rights to due process under federal and California law. Accordingly, there is no agreement or resolution that gives Petitioner relief from the unreasonable Scenic View obstruction of her Scenic View.

29. Final determination was made at the Planning Commission hearing held on Tuesday, April 11, 2017. Petitioner's Application was denied 3-2. The Resolution reflecting the 3-2 determination to deny Petitioner's Application, Resolution 2017-05, was emailed to Petitioner on April 19, 2017.

30. On April 25, 2017Petitioner timely filed an appeal with the City Council and sought *de novo* review of the 3-2 denial of Petitioner's Application by the Planning Commission pursuant to Section 23.51.100 of the Scenic View Ordinance, seeking both restoration and preservation of her Scenic View. In her appeal seeking *de novo* review, Petitioner showed that (1) the majority of the Planning Commission who voted to deny her application committed factual and legal error; (2) one of the Planning Commission members had an undisclosed bias against enforcing the Scenic View Ordinance, (3) the Staff of the City had given erroneous and equivocal guidance on legal issues, (4) the majority members who had voted to deny the application had been guided by irrelevant and incorrect information, and (5) the findings of the majority members voting to deny the application were not supported by any substantial evidence in the record. The decision of the Planning Commission, therefore, was contrary to the law, was an abuse of discretion, and denied Petitioner a fair trial.

31. *De novo* review was granted by the City on June 7, 2017. Petitioner's Application was heard *de novo* before the City Council on July 17, 2017.

32. At the July 17, 2017 hearing, the City Council split 2-2 on whether the Petitioner's view had been unreasonably obstructed, which had the effect of reinstating the erroneous Resolution of the Planning Commission. As shown by the transcript of the City Council's deliberation, (1) two of the City Council members finding no unreasonable obstruction of the Scenic View, applied an erroneous legal interpretation of the Ordinance; (2) the findings of the two members of the City Council who found against unreasonable obstruction of the Scenic View were not supported by the evidence; (3) two of the City Council members finding no

unreasonable obstruction of the Scenic View were persuaded by erroneous and irrelevant factors (4) two of the City Council members finding no unreasonable obstruction of the Scenic View failed to apply the statutory factors, or even discuss them, that governed unreasonable obstruction, (5) two of the City Council members finding no unreasonable obstruction of the Scenic View applied the wrong timing and simply compared the view that existed at the time of the Planning Commission hearing (post trimming) with the view that existed upon purchase and occupancy. In addition, the City Council failed to address Petitioner's argument that one member of the planning commission had demonstrated bias that tainted the entire proceedings at the Planning Commission level and therefore the Planning Commission's determination could not be allowed to stand in any event.

33. The findings of the City Council members who voted to deny the application were arbitrary and capricious, an abuse of discretion and not supported by the evidence. In addition, one of the City Council members that voted against the application had previously found that the same Scenic View had been unreasonably obstructed upon the earlier application of another applicant, then had voted to adopt a preservation plan that had the effect of even further obstructing the Scenic View.

FIRST CAUSE OF ACTION

(Administrative Mandamus as to the City)

34. Petitioner realleges Paragraphs 1 through 33, which are incorporated herein by reference as though fully set forth herein.

35. Petitioner did everything required of her pursuant to the Scenic View Ordinance to perfect her right to obtain the benefits of the Scenic View Ordinance and in particular to obtain a resolution by the City requiring Real Party in Interest to trim the Trees and Vegetation which unreasonably block her Scenic View and adopting a remediation plan requiring periodic trimming o the Trees and Vegetation at Petitioner's expense on a quarterly basis in the future, according to the evidence submitted by Petitioner to the City.

36. Petitioner has exhausted the available administrative remedies required to be pursued by her.

37. Respondent's denial of Petitioner's Application is invalid under California Code of Civil Procedure Section 1094.5 in that: (1) Respondent failed to grant petitioner a fair trial; (2) Respondent acted contrary to the law, (3) Respondent committed prejudicial abuse of discretion; (4) Respondent's decision is not supported by the evidence

38. Petitioner has no other plain or speedy remedy in the ordinary course of law.

WHEREFORE, Petitioner requests relief as follows:

1. Issuance of a Writ of Administrative Mandamus pursuant to CCP Section 1094.5 compelling Respondent to set aside its Resolution denying Petitioner's Application and issuing a new and different Resolution granting Petitioner's Application; or in the alternative, compelling Respondentto set aside its Resolution denying Petitioner's Application and conducting a new hearing before an impartial appropriate body, on Petitioner's Petition, guided by a correct interpretation of the ordinance in accordance with the Order of this Court;
2. For an award of costs of suit and attorneys' fees incurred herein; and
3. For such other and additional relief as may be just and proper.

Dated: September 18, 2017

MAZZARELLA & MAZZARELLA, LLP

By:_____

MARK C. MAZZARELLA, ESQ.
Attorney for Petitioner, Shirli Fabbri Weiss

VERIFICATION

I, Shirli Fabbri Weiss, declare:

I am the Trustee of the Shirli Fabbri Weiss Trust dated September, 2009, Petitioner in the above-entitled action, and I have been authorized to make this verification on its behalf.

I have read the foregoing Verified Petition for Writ of Mandate and know the contents thereof of my personal knowledge, except as to those matters which are alleged on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and that this verification was signed on the 18th day of September, 2017 in San Diego, California.

Shirli Fabbri Weiss

FILED
BUSINESS OFFICE 18

POS-015

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):	FOR COURT USE ONLY
Mazzarella & Mazzarella, LLP Mark C. Mazzarella, Esq. (SBN 082494) Rebecca L. Reed, Esq. (SBN 275833) 1620 Fifth Ave, Suite 600 San Diego, CA 92101 TELEPHONE NO.: 619-238-4900 FAX NO. (Optional): 619-238-4959 E-MAIL ADDRESS (Optional): mark@mazzarellalaw.com ATTORNEY FOR (Name): Petitioner	2017 DEC 20 P 12:57 CLERK-SUPERIOR COURT SAN DIEGO COUNTY, CA DEC 20 '17 AM 11:42
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Diego STREET ADDRESS: 330 West Broadway MAILING ADDRESS: same CITY AND ZIP CODE: San Diego, CA 92101 BRANCH NAME: Central	
PLAINTIFF/PETITIONER: SHIRLI FABBRI TRUSTEE DEFENDANT/RESPONDENT: CITY OF DEL MAR; TORREY PACIFIC CORPORATION	
NOTICE AND ACKNOWLEDGMENT OF RECEIPT—CIVIL	CASE NUMBER: 37-2017-00034936-CU-WM-CTL

via PDF

TO (insert name of party being served): CITY OF DEL MAR

NOTICE

The summons and other documents identified below are being served pursuant to section 415.30 of the California Code of Civil Procedure. Your failure to complete this form and return it within 20 days from the date of mailing shown below may subject you (or the party on whose behalf you are being served) to liability for the payment of any expenses incurred in serving a summons on you in any other manner permitted by law.

If you are being served on behalf of a corporation, an unincorporated association (including a partnership), or other entity, this form must be signed by you in the name of such entity or by a person authorized to receive service of process on behalf of such entity. In all other cases, this form must be signed by you personally or by a person authorized by you to acknowledge receipt of summons. If you return this form to the sender, service of a summons is deemed complete on the day you sign the acknowledgment of receipt below.

Date of mailing: December 11, 2017

Rebecca L. Reed, Esq.
(TYPE OR PRINT NAME)

(SIGNATURE OF SENDER—MUST NOT BE A PARTY IN THIS CASE)

ACKNOWLEDGMENT OF RECEIPT

This acknowledges receipt of *(to be completed by sender before mailing)*:

1. [✓] A copy of the summons and of the complaint.
2. [ ] Other *(specify)*:

(To be completed by recipient):

Date this form is signed: 12-19-17

Randy J. Risner for
(TYPE OR PRINT YOUR NAME AND NAME OF ENTITY, IF ANY, ON WHOSE BEHALF THIS FORM IS SIGNED)

Devaney Pate Morris & Cameron
Attorneys For: City of Del Mar

(SIGNATURE OF PERSON ACKNOWLEDGING RECEIPT, WITH TITLE IF ACKNOWLEDGMENT IS MADE ON BEHALF OF ANOTHER PERSON OR ENTITY)

POS-015

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):	FOR COURT USE ONLY
Mazzarella & Mazzarella, LLP Mark C. Mazzarella, Esq. (SBN 082494) Rebecca L. Reed, Esq. (SBN 275833) 1620 Fifth Ave, Suite 600 San Diego, CA 92101 TELEPHONE NO.: 619-238-4900 FAX NO. (Optional): 619-238-4959 E-MAIL ADDRESS (Optional): mark@mazzarellalaw.com ATTORNEY FOR (Name): Petitioner	FILED Clerk of the Superior Court DEC 20 2017 By: V. Contreras, Deputy
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Diego STREET ADDRESS: 330 West Broadway MAILING ADDRESS: same CITY AND ZIP CODE: San Diego, CA 92101 BRANCH NAME: Central	
PLAINTIFF/PETITIONER: SHIRLI FABBRI TRUSTEE DEFENDANT/RESPONDENT: CITY OF DEL MAR; TORREY PACIFIC CORPORATION	
NOTICE AND ACKNOWLEDGMENT OF RECEIPT—CIVIL	CASE NUMBER: 37-2017-00034936-CU-WM-CTL

via PDF

TO (insert name of party being served): Torrey Pacific Corporation

NOTICE

The summons and other documents identified below are being served pursuant to section 415.30 of the California Code of Civil Procedure. Your failure to complete this form and return it within 20 days from the date of mailing shown below may subject you (or the party on whose behalf you are being served) to liability for the payment of any expenses incurred in serving a summons on you in any other manner permitted by law.

If you are being served on behalf of a corporation, an unincorporated association (including a partnership), or other entity, this form must be signed by you in the name of such entity or by a person authorized to receive service of process on behalf of such entity. In all other cases, this form must be signed by you personally or by a person authorized by you to acknowledge receipt of summons. If you return this form to the sender, service of a summons is deemed complete on the day you sign the acknowledgment of receipt below.

Date of mailing: December 13, 2017

Leigh Sanders
(TYPE OR PRINT NAME)

▶ Leigh Sanders
(SIGNATURE OF SENDER—MUST NOT BE A PARTY IN THIS CASE)

ACKNOWLEDGMENT OF RECEIPT

This acknowledges receipt of *(to be completed by sender before mailing)*:

1. [✔] A copy of the summons and of the complaint.
2. [✔] Other *(specify)*:
   Notice of Case Assignment; Notice of Eligibility of to Efile and Assignment to Imagining Department; Alternative Dispute Resolution Information; Stipulation to Use Alternative Dispute Resolution; Civil Case Cover Sheet

(To be completed by recipient):

Date this form is signed: December 19, 2017

Christopher W. Garrett
(TYPE OR PRINT YOUR NAME AND NAME OF ENTITY, IF ANY, ON WHOSE BEHALF THIS FORM IS SIGNED)

▶ [signature]
(SIGNATURE OF PERSON ACKNOWLEDGING RECEIPT, WITH TITLE IF ACKNOWLEDGMENT IS MADE ON BEHALF OF ANOTHER PERSON OR ENTITY)

Form Adopted for Mandatory Use
Judicial Council of California
POS-015 [Rev. January 1, 2005]

Code of Civil Procedure, §§ 415.30, 417.10
www.courtinfo.ca.gov

DEVANEY PATE MORRIS & CAMERON
William C. Pate, Esq. (SBN 206983)
wpate@dpmclaw.com
Randy J. Risner, Esq. (SBN 172552)
rrisner@dpmclaw.com
Lesley A. Riis, Esq. (SBN 304615)
lriis@dpmclaw.com
402 W. Broadway, Suite 1300
San Diego, California 92102
Telephone: (619) 354-5030
Facsimile: (619) 354-5035

Attorneys for Respondent
CITY OF DEL MAR

Exempt from filing fee - Government code sections 6103 & 26857

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO - CENTRAL DISTRICT

SHIRLI FABBRI WEISS, TRUSTEE, on behalf of the SHIRLI FABBRI WEISS TRUST Petitioner, v. CITY OF DEL MAR and DOES 1 through 10, Respondents. TORREY PACIFIC CORPORATION Real Party in Interest	Case No.: 37-2017-00034936-CU-WM-CTL ICJ: Hon. Randa Trapp DEPT: C-70 **CITY OF DEL MAR'S ANSWER TO VERIFIED PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS** **IMAGED FILE** COMPLAINT FILED: 9/19/2017 TRIAL DATE: None set

Respondent CITY OF DEL MAR answers the Petition for Writ of Administrative Mandamus on file herein, as follows:

I.

NO VERIFICATION REQUIRED

1. Under the provisions of California Code of Civil Procedure section 446, the Answer by this answering Respondent need not be verified.

II.

RESPONSE TO ALLEGATIONS

1. As to Paragraph 1 of Petition, Respondent lacks sufficient information or belief to enable it to answer the allegations, and on that basis denies the allegations in said paragraph.

2. As to Paragraph 2 of Petition, Respondent admits that the Court has jurisdiction over this matter pursuant to California Code of Civil Procedure section 1094.6.

3. As to Paragraph 3 of Petition, Respondent admits the allegations therein.

4. As to Paragraph 4 of Petition, Respondent lacks sufficient information or belief to enable it to answer the allegations, and on that basis denies the allegations in said paragraph.

5. As to Paragraph 5 of Petition, Respondent admits the allegations therein.

6. As to Paragraph 6 of Petition, Respondent lacks sufficient information or belief to enable it to answer the allegations, and on that basis denies the allegations in said paragraph.

7. As to Paragraph 7 of Petition, Respondent lacks sufficient information or belief to enable it to answer the allegations, and on that basis denies the allegations in said paragraph.

8. As to Paragraph 8 of Petition, Respondent lacks sufficient information or belief to enable it to answer the allegations, and on that basis denies the allegations in said paragraph.

9. As to Paragraph 9 of Petition, Respondent alleges that Scenic Views Ordinance speaks for itself, and on that basis, denies each and every interpretation made by Petitioner therein.

10. As to Paragraph 10 of Petition, Respondent admits the allegations therein.

11. As to Paragraph 11 of Petition, Respondent alleges that Scenic Views Ordinance speaks for itself, and on that basis, denies each and every interpretation made by

Petitioner therein.

12. As to Paragraph 12 of Petition, Respondent alleges that Scenic Views Ordinance speaks for itself, and on that basis, denies each and every interpretation made by Petitioner therein.

13. As to Paragraph 13 of Petition, Respondent alleges that Scenic Views Ordinance speaks for itself, and on that basis, denies each and every interpretation made by Petitioner therein.

14. As to Paragraph 14 of Petition, Respondent admits that Petitioner filed her Application for restoration of scenic views (Application TVS16-001) on August 30, 2017. Respondent lacks sufficient information or belief to enable it to answer all other allegations, and on that basis denies all other allegations in said paragraph.

15. As to Paragraph 15 of Petition, Respondent lacks sufficient information or belief to enable it to answer the allegations, and on that basis denies the allegations in said paragraph.

16. As to Paragraph 16 of Petition, Respondent lacks sufficient information or belief to enable it to answer the allegations, and on that basis denies the allegations in said paragraph.

17. As to Paragraph 17 of Petition, Respondent lacks sufficient information or belief to enable it to answer the allegations, and on that basis denies the allegations in said paragraph.

18. As to Paragraph 18 of Petition, Respondent lacks sufficient information or belief to enable it to answer the allegations, and on that basis denies the allegations in said paragraph.

19. As to Paragraph 19 of Petition, Respondent denies the allegations therein.

20. As to Paragraph 20 of Petition, Respondent admits that Petitioner presented photographs of her alleged Scenic Views from January 19, 2015, July 4, 2016, and February 23, 2017. Respondent further admits that the Planning Commission reviewed a document

titled "Brown Survey" as an Exhibit to Petitioner's April 5, 2017 Update Letter and Supplement to her August 30, 2016 Application. Respondent denies all other allegations in said paragraph.

21. As to Paragraph 21 of Petition, Respondent lacks sufficient information or belief to enable it to answer the allegations, and on that basis denies the allegations in said paragraph.

22. As to Paragraph 22 of Petition, Respondent admits that Petitioner made reasonable efforts to resolve the dispute as set forth in Del Mar Municipal Code section 23.51.040(B). Respondent lacks sufficient information or belief to enable it to answer all other allegations, and on that basis denies all other allegations in said paragraph.

23. As to Paragraph 23 of Petition, Respondent lacks sufficient information or belief to enable it to answer the allegations, and on that basis denies the allegations in said paragraph.

24. As to Paragraph 24 of Petition, Respondent admits that a Planning Commission hearing was held on April 11, 2017 after being rescheduled from March 14, 2017. Respondent denies all other allegations in said paragraph.

25. As to Paragraph 25 of Petition, Respondent admits that Petitioner sought a resolution that her scenic views had been substantially obstructed and adopting a preservation plan of periodic trimming to occur four times a year, at her expense. Respondent denies all other allegations in said paragraph.

26. As to Paragraph 26 of Petition, Respondent admits that the Planning Commission denied Petitioner's Application by a split vote of 3-2. Respondent denies all other allegations in said paragraph.

27. As to Paragraph 27 of Petition, Respondent denies the allegations therein.

28. As to Paragraph 28 of Petition, Respondent admits that Resolution 2016-09 was referenced during the Planning Commission hearing. Respondent denies all other allegations in said paragraph.

29. As to Paragraph 29 of Petition, Respondent admits the allegations therein.

30. As to Paragraph 30 of Petition, Respondent admits that on April 25, 2017, Petitioner filed a timely appeal seeking de novo review of the Planning Commission's 3-2 denial of her Application under the Scenic Views Ordinance. Respondent denies the balance of the allegations within this paragraph.

31. As to Paragraph 31 of Petition, Respondent admits the allegations therein. De novo review was granted by the City on June 5, 2017.

32. As to Paragraph 32 of Petition, Respondent admits that at the July 17, 2017 the appeal was denied due to a lack of majority vote due to a 2-2 split. Respondent denies the balance of the allegations within this paragraph.

33. As to Paragraph 33 of Petition, Respondent denies the allegations therein.

FIRST CAUSE OF ACTION

(ADMINISTRATIVE MANDAMUS)

34. Paragraph 34 does not require a response.

35. As to Paragraph 35 of Petition, Respondent denies the allegations therein.

36. As to Paragraph 36 of Petition, Respondent lacks sufficient information or belief to enable it to answer the allegations, and on that basis denies the allegations in said paragraph.

37. As to Paragraph 37 of Petition, Respondent denies the allegations therein.

38. As to Paragraph 38 of Petition, Respondent lacks sufficient information or belief to enable it to answer the allegations, and on that basis denies the allegations in said paragraph.

III.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

(Failure to Exhaust Administrative Remedies)

39. As a separate affirmative defense to the Petition on file herein, Respondent

alleges that Petitioner failed to exhaust administrative remedies applicable and available to her prior to commencing this lawsuit. The failure to exhaust all applicable administrative remedies is a bar to the present action.

SECOND AFFIRMATIVE DEFENSE

(Failure to Submit Administrative Record)

40. As a separate affirmative defense to the Petition on file herein, Respondent alleges that Petitioner was required to produce the entire administrative record pursuant to Code of Civil Procedure section 1094.5, but has failed to do so. Petitioner's failure to produce the record is fatal to her Petition for Writ of Administrative Mandamus.

THIRD AFFIRMATIVE DEFENSE

(General Governmental Immunity)

41. As a separate affirmative defense to the Petition on file herein, Respondent asserts that the Petition, and each and every cause of action herein, is barred by the governmental immunity provision of California Government Code §815(a).

FOURTH AFFIRMATIVE DEFENSE

(Derivative Governmental Immunity)

42. As a separate affirmative defense to the Petition on file herein, Respondent asserts that the damages alleged in this Petition were caused by actions of a Del Mar employee within the scope of his or her employment, thereby barring any claim against Respondent based on those actions under California Government Code §815.2(b).

FIFTH AFFIRMATIVE DEFENSE

(Exercise of Discretion Within Scope of Employment - Government Code § 820.2)

43. As a separate affirmative defense to the Petition and each purported cause of action contained therein, Respondent alleges that the acts or omissions complained in the Petition were the result of the exercise of the discretion vested in public employees while acting in the scope of their public employment and whether or not such discretion was abused, Respondent is immune from liability herein under the provisions of Government

Code section 820.2.

SIXTH AFFIRMATIVE DEFENSE

(Reasonable Exercise of Mandatory Duty - Government Code § 815.6)

44. As a separate affirmative defense to the Petition on file herein, and each purported cause of action contained therein, Respondent is informed and believes and thereon alleges that to the extent that the Petition is based upon Del Mar employee(s) failure to discharge a mandatory duty, Respondent is immune from liability herein by reason of the Del Mar employee(s) exercise of reasonable diligence in discharging that duty under the provisions of Government Code section 815.6.

SEVENTH AFFIRMATIVE DEFENSE

(Failure to Mitigate)

45. As a separate affirmative defense to the Petition on file herein, Respondent is informed and believes and thereon allege that Petitioner has failed, refused, and neglected to reasonably mitigate Petitioner's damages, which bars or diminishes any recovery herein by Petitioner.

EIGHTH AFFIRMATIVE DEFENSE

(Good Faith)

46. As a separate affirmative defense to the Petition on file herein, Respondent is informed and believes and thereon asserts that all conduct attributed to it was conducted in good faith, which serves as a complete bar to this action.

NINTH AFFIRMATIVE DEFENSE

(Estoppel)

47. The Petition is barred by the doctrine of estoppel.

TENTH AFFIRMATIVE DEFENSE

(Waiver)

48. The Petition is barred by the doctrine of waiver.

///

ELEVENTH AFFIRMATIVE DEFENSE

(Ineligible for Attorney Fees)

49. Any claim for attorney's fees is barred because Petitioner cannot fulfill the requirements of any doctrine allowing for attorney's fees.

TWELFTH AFFIRMATIVE DEFENSE

(Acts in Accordance With Law and Substantial Evidence)

50. With respect to all actions referred to in the Petition, Respondent proceeded in the manner required by law, including but not limited to, all procedures enacted by Respondent and pursuant to state law; did not act arbitrarily, capriciously, or wholly without evidentiary support; did not abuse its discretion; and made all required findings, which supported Respondent's actions and were supported by substantial evidence.

THIRTIETH AFFIRMATIVE DEFENSE

(Statute of Limitations)

51. As a further, separate and affirmative defense to the Petition, and each cause of action therein, it is alleged that each of the causes of action alleged within the Petition are barred by the applicable statute of limitations.

THIRTIETH AFFIRMATIVE DEFENSE

(Laches)

51. The Petition is barred by the doctrine of laches as Petitioner unreasonably delayed raising the claims set forth in the Petition in a manner that resulted in prejudice to Respondent.

FOURTEENTH AFFIRMATIVE DEFENSE

(Failure to Timely Serve)

52. As a further, separate and affirmative defense to the Petition, the Petition is barred for Petitioner's failure to timely serve the Petition under Government Code section 65009.

///

FIFTEENTH AFFIRMATIVE DEFENSE

(Failure to Enforce an Enactment)

53. As a separate affirmative defense to the Petition on file herein, Respondent asserts that the claims in this Petition are predicated on Respondent's failure to enforce an ordinance, and are therefore barred by California Government Code §818.2.

SIXTEENTH AFFIRMATIVE DEFENSE

(Application Denial)

54. As a separate affirmative defense to the Petition on file herein, Respondent asserts that the claims in this Petition are predicated on Respondent's denial of Petitioner's Planning Commission application, and are therefore barred by California Government Code §818.4.

SEVENTEENTH AFFIRMATIVE DEFENSE

(No Right to Injunctive Relief)

55. Petitioner has failed to allege or establish facts sufficient to entitle her to injunctive relief.

EIGTEENTH AFFIRMATIVE DEFENSE

(Reservation of Additional Affirmative Defenses)

56. Respondent asserts that additional affirmative defenses may become necessary. Respondent has insufficient knowledge or information at this time. Respondent reserves the right to assert additional affirmative defenses in the event that discovery indicates that they would be appropriate.

///

///

///

///

///

///

WHEREFORE, Respondent prays that Petitioner take nothing by way of the Petition for Writ of Administrative Mandamus on file herein; for costs of suit herein incurred; and for such other and further relief as the court may deem just and proper.

Dated: January 18, 2018

DEVANEY PATE MORRIS & CAMERON

By: _____
William C. Pate
Randy J. Risner
Leslev A. Riis
Attorneys for Respondent CITY OF DEL MAR

PROOF OF SERVICE

Shirli Fabbri Weiss, et al. v. City of Del Mar, et al.
SUPERIOR COURT OF CALIFORNIA - COUNTY OF SAN DIEGO – CENTRAL
Case No. 37-2017-00034936-CU-WM-CTL

I, the undersigned, declare: That I am, and was at the time of service of the papers herein referred to, over the age of eighteen years, and not a party to the action; and I am employed in the County of San Diego, California. My business address is 402 W. Broadway, Suite 1300, San Diego, California 92101-8700.

On January 18, 2018, at San Diego, California, I served the following document(s) described as:

CITY OF DEL MAR'S ANSWER TO VERIFIED PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS

on the parties in said action by placing a true copy thereof in a separate sealed envelope for each addressee named hereafter, addressed to each such addressee respectively as stated on the attached service list, which reflects the address last given by each such addressee on any document filed in the action and served on this office.

SEE ATTACHED SERVICE LIST

☒ **BY MAIL:** I am readily familiar with our business practice for collecting, processing and mailing correspondence and pleadings with the United States Postal Service. Such correspondence and pleadings are deposited with the United States Postal Service on the same day that they are placed for mailing in the ordinary course of business. I sealed each envelope and, with the postage thereon fully prepaid, placed it for mailing in accord with our business' practice. (C.C.P. § 1013(a) and (b))

☒ **STATE COURT:** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 18, 2018, at San Diego, California.

Sabrina Scialpi

SERVICE LIST
Shirli Fabbri Weiss, et al. v. City of Del Mar, et al.
CASE NO. 37-2017-00034936-CU-WM-CTL

Mark C. Mazzarella Rebecca L. Reed Mazarella & Mazzarella 1620 Fifth Ave., Suite 600 San Diego, CA 92101 P:(619)238-4900 F:(619)238-4959 mark@mazzarellalaw.com rebecca@mazzarellalaw.com	Attorneys for Petitioner SHIRLI FABBRI WEISS TRUSTEE ; SHIRLI WEISS FABBRI TRUST
Christopher W. Garrett Jennifer K Roy Samantha K Seikkula Latham & Watkins LLP 12670 High Bluff Drive San Diego CA 92130 P:(858)523-5400 F:(858)523-5450 christopher.garrett@lw.com jennifer.roy@lw.com samantha.seikkula@lw.com	Attorneys for Real Party in-Interest TORREY PACIFIC CORPORATION

LATHAM & WATKINS LLP
Christopher W. Garrett (SBN 100764)
christopher.garrett@lw.com
Jennifer K. Roy (SBN 281954)
jennifer.roy@lw.com
Samantha K. Seikkula (SBN 307827)
samantha.seikkula@lw.com
12670 High Bluff Drive
San Diego, California 92130
Telephone: +1.858.523.5400
Facsimile: +1.858.523.5450

Attorneys for Real Party In-Interest
Torrey Pacific Corporation

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO – CENTRAL DIVISION

SHIRLI FABBRI WEISS, TRUSTEE, on behalf of the SHIRLI FABBRI WEISS TRUST, Petitioner, v. CITY OF DEL MAR and DOES 1 through 10, Respondents. TORREY PACIFIC CORPORATION Real Party-In-Interest	CASE NO. 37-2017-00034936-CU-WM-CTL **[IMAGED FILE]** **RESPONDENT CITY OF DEL MAR AND REAL PARTY IN INTEREST TORREY PACIFIC CORPORATION'S JOINT NOTICE OF MOTION AND MOTION TO DISMISS VERIFIED PETITION FOR WRIT OF MANDAMUS (CCP 1094.5) FOR FAILURE TO TIMELY SERVE SUMMONS PURSUANT TO GOVERNMENT CODE § 65009; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Hearing Date: April 13, 2018 Time: 11:00 a.m. Dept.: C-70 **Judge: Hon. Randa Trapp** **Action Filed: September 19, 2017**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 13, 2018 at 11:00 a.m. in Department C-70 of the San Diego Superior Court, Hall of Justice, located at 330 West Broadway, San Diego, CA 92101, Respondent City of Del Mar ("City") and Real Party in Interest Torrey Pacific Corporation ("Real Party") will and hereby does move to dismiss the Petition for Writ of Mandamus ("Petition") filed by Petitioner Shirli Fabbri Weiss on behalf of the Shirli Fabbri

Weiss Trust ("Petitioner"). The Petition, brought pursuant to Code of Civil Procedure ("CCP") section 1094.5, challenges the City's denial of Petitioner's application for relief under the Del Mar Trees, Scenic View, and Sunlight Ordinance, Del Mar Municipal Code Chapter 23.51 ("Ordinance"), and seeks to compel the City to issue a new resolution granting her application or, in the alternative, conduct a new hearing.

The City and Torrey Pacific's Motion will be based on the grounds that the Petition is subject to mandatory dismissal pursuant to Government Code section 65009 due to Petitioner's failure to effect service of summons on the City and Real Party within 90 days of the City's land use decision Petitioner seeks to challenge by its Petition.

This Motion is based on this Notice, the Memorandum of Points and Authorities, the Declaration of Christopher W. Garrett, and the Declaration of Brian Staver filed concurrently herewith, the Petition, and such other evidence, argument, and authority that may be presented at or before the hearing on this matter.

Dated: January 22, 2018

CITY OF DEL MAR

By _____
William C. Pate
Barry J. Schultz
Lesley A. Riis
Attorneys for Respondent
CITY OF DEL MAR

Dated: January 22, 2018

LATHAM & WATKINS LLP

By _____
Christopher W. Garrett
Jennifer K. Roy
Samantha K. Seikkula
Attorneys for Real Party In-Interest
TORREY PACIFIC CORPORATION

TABLE OF CONTENTS

Page

I. INTRODUCTION 4

II. STATEMENT OF FACTS 5

III. DISMISSAL OF PETITIONER'S ENTIRE ACTION IS APPROPRIATE 7

A. Petitioner Failed to Serve the Petition Within Government Code Section 65009's Time Limit 7

B. Government Code Section 65009 Applies to Petitioner's Claim for Relief Under the Scenic View Ordinance 8

C. Public Policy Requires That the Petition Be Dismissed as Untimely 11

IV. CONCLUSION 13

I. INTRODUCTION

Respondent City of Del Mar ("City") and Real Party in Interest Torrey Pacific Corporation ("Real Party") hereby move to dismiss Petitioner Shirli Weiss' (as Trustee of the Shirli Fabbri Weiss Trust) ("Petitioner") Petition for Writ of Mandamus ("Petition") on the grounds that Petitioner failed to effect service of a summons as required by the California Zoning and Planning Code. (Gov. Code § 65009.) Government Code section 65009(c)(1) required a summons to be served on the City and Real Party on or before ***October 16, 2017*** - 90 days after the City's July 17, 2017 land use decision challenged by this action. Petitioner did not seek to effectuate service until December 13, 2017 – 59 days after the time period had expired.

As a matter of law, "no action or proceeding shall be maintained . . . to attack, review, set aside, or annul any decision on the matters listed in Sections 65901 . . . unless . . . service is made on the legislative body within 90 days after the legislative body's decision." (Gov. Code § 65009, subds. (c)(1), (c)(1)(E).) In enacting strict time limitations for challenges to land use decisions, the express goal of the California Legislature is to provide "certainty for property owners and local governments[.]" (*Okasaki v. City of Elk* (2012) Cal.App.4th 1043, 1048.) The Petition seeks to overturn a decision of the Del Mar Planning Commission ("Planning Commission") denying the Petitioner's application for relief pursuant to the Trees, Scenic Views, and Sunlight Ordinance ("Ordinance") as set forth in Del Mar Municipal Code ("DMMC") Chapter 23.51, and is therefore subject to section 65009(c)(1)'s timing of service requirements.

As a zoning administrator, the Planning Commission's decision to deny Petitioner's application triggers the service requirements of Government Code section 65009. Accordingly, the Petition is now barred as a matter of law because Petitioner only sought to effectuate service of summons ***months*** after the 90-day limitation period had expired. The Petition conflicts with the Legislature's goal to provide certainty in land use decisions by continuing to create uncertainty for the City and Real Party long after the statute of limitations has passed. Given this defect in Petitioner's case, the City and Torrey Pacific respectfully submit that the Petition warrants immediate dismissal with prejudice in this action.

II. STATEMENT OF FACTS[1]

This case is about Petitioner's opposition to land use decisions involving Real Party's family property at 110 Stratford Court in the City of Del Mar (the "Stratford Property"). (Petition ¶¶ 6–7.) The Stratford Property is a 5.8 acre, oceanfront bluff-top property comprised of three parcels purchased between 1950 and 1969 by Ralph and Marian Staver, and developed with a single-family residence constructed in the early 1960s. (Staver Decl. ¶ 3.) Petitioner owns a condominium in the "Del Mar Woods" condominium complex directly north of the Stratford Property. (Petition ¶¶ 6, 14, 18.) Petitioner, along with other Del Mar Woods residents, have made numerous complaints to the City about the height and thickness of 40+ year old eucalyptus trees and other vegetation along the Stratford Property's northern boundary over the last 12 years. (Staver Decl. ¶ 4.) Since 2003, disputes over the trimming of the trees and vegetation have been heard by the Planning Commission at least five times, and on every occasion the Planning Commission has determined that the Real Party was not required to conduct any trimming that exceeded the trimming that they were already voluntarily and willingly conducting. (*Id.* ¶ 5.)

In November 2014, Petitioner purchased the property located directly north of the Stratford Property. (Petition ¶¶ 4, 21.) On August 30, 2016, Petitioner filed an application with the Del Mar Planning Commission under the Ordinance, which allows residents to seek a City resolution to facilitate the restoration of scenic views that have been unreasonably blocked by tree or vegetation growth on another property. (*Id.* ¶ 14, 15.)

On September 13, 2016, the Del Mar Planning Commission conducted a public hearing on a view protection application filed by other Del Mar Woods residents. Petitioner was not a party to this application, but spoke in support of the application at the hearing. Following public testimony, the Planning Commission adopted Resolution No. 2016-09 concluding that Real Party should maintain the exact trimming program they had already implemented. (Staver Decl. ¶ 6.)

---

[1] "As with a demurrer to a complaint in a civil action, when a trial court considers a motion to dismiss a petition for writ of mandate it assumes the truth of the petition's allegations." (*Royalty Carpet Mills, Inc. v. City of Irvine* (2005) 125 Cal.App.4th 1110, 1115 [citing Code Civ. Proc. § 1009].) Accordingly, the factual allegations in the Petition are taken as true for the purposes of this motion.

Under Resolution 2016-09, there is no obligation to trim the trees or vegetation lower, narrower, or more frequently than in Real Party's pre-existing trimming program. (*Ibid.*) By the enactment of Resolution 2016-09, the Planning Commission implemented a legally required trimming program in place that covers the trees and vegetation at issue. (*Ibid.*)

On April 11, 2017, the Planning Commission held a public hearing on Petitioner's separate application and denied Petitioner's application in full. (Petition ¶¶ 15–29.) The Planning Commission relied in part on the existence of Resolution No. 2016-09 as a basis for its decision, since Resolution No. 2016-09 addresses the same trees and vegetation complained of in Petitioner's application. (*Id.* ¶ 28.) The Planning Commission's Resolution reflecting the determination to deny Petitioner's application, Resolution No. 2017-05, was emailed to Petitioner on April 19, 2017. (*Id.* ¶ 29.)

On April 25, 2017, Petitioner appealed to the City Council seeking *de novo* review of the Planning Commission's denial of application. (*Id.* ¶ 30.) The City granted review and Petitioner's application was heard *de novo* before the City Council on July 17, 2017. (*Id.* ¶¶ 31–32.) At the July 17, 2017 hearing, the City Council split 2-2 on whether the Petitioner's view had been unreasonably obstructed, which reinstated Resolution No. 2017-05 and denied Petitioner's application. (*Id.* ¶ 32.)

This action was filed on September 19, 2017. However, Petitioner did not inform the City or Real Party of the filing of the lawsuit until much later, after the statute of limitations had run. On December 13, 2017, Real Party received a request from Petitioner's counsel to accept service. (See Garrett Decl. ¶ 3–5.) Accordingly, no summons was timely served on the City or Real Party, nor can a summons now be issued and timely served because Government Code section 65009(c)(1) bars any attempt by Petitioner to remedy this critical defect at this late date.

//

//

//

//

//

III. DISMISSAL OF PETITIONER'S ENTIRE ACTION IS APPROPRIATE

A. Petitioner Failed to Serve the Petition Within Government Code Section 65009's Time Limit

Petitioner has failed to effectuate service within Government Code section 65009's required 90-day time limit. As such, the Petition should be dismissed in order to provide the City with certainty regarding its land use decision.

While a motion to quash is the typical procedural pleading to test the validity of service of process, if "a mandatory time period has expired and no valid service can be made, a motion to dismiss is also proper." (*Bd. of Supervisors of Riverside Cty. v. Superior Court* (1994) 23 Cal.App.4th 830, 835 fn.4 [citations omitted].) Further, a motion to dismiss tests the legal sufficiency of a complaint or petition for relief. (*Timberlake v. Schwank* (1967) 248 Cal.App.2d 708, 709–10 ["An order granting [a motion to dismiss] is tantamount to an order sustaining a demurrer without leave to amend."].) By their terms, Government Code subdivisions 65009(c)(1), (c)(1)(E) provides that the action cannot be sustained:

> [N]o action or proceeding shall be maintained in any of the following cases by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body's decision . . . [t]o attack, review, set aside, void, or annul any decision on the matters listed in Sections 65901 and 65903, or to determine the reasonableness, legality, or validity of any condition attached to a variance, conditional use permit, or any other permit.

(Gov. Code § 65009(c)(1), (c)(1)(E) [emphasis added].) The express legislative intent of this Government Code section is to "provide certainty for property owners and local governments" regarding land use decisions. (Gov. Code § 65009, subd. (a)(3); see also *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 765–66 ["The express and manifest intent of section 65009 is to provide local governments with certainty, after a short 90-day period for facial challenges, in the validity of their zoning enactments and decisions."].)

Under section 65009, even if a petition is timely filed, the petition ***must be dismissed if it is not personally served as required by statute***. (*Royalty Carpet Mills, Inc. v. City of Irvine* (2005) 125 Cal.App.4th 1110, 1119–20.) After expiration of the limitations period, "all persons

are barred from any further action or proceeding." (Gov. Code § 65009, subd. (e); see *Travis*, *supra*, 33 Cal.4th at 767–68.) In choosing the statute's comprehensive language, "the Legislature foreclosed any and all attacks on the validity of such decisions unless timely brought and served within the limits set out in the statute. (*Gonzales v. County of Tulare* (1998) 65 Cal.App.4th 777, 786.) When a petitioner fails to serve the summons on time, such a failure ***may not*** be relieved due to mistake on the attorney's part or lack of notice regarding the limitation period. (See *Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 528–31.) Rather, the statute requires "strict compliance with the statute of limitations and service period" and courts routinely dismiss cases as untimely when the petitioner fails to meet the section 65009 service requirement. (See, e.g., *Wagner v. City of South Pasadena* (2000) 78 Cal.App.4th 943 950 [holding that service of a writ petition on the 91st day after a challenged decision did not meet the statutory requirements as it was a day late].) Further, dismissal is appropriate even where no party would be prejudiced by the delay in service. (*Royalty Carpet Mills, Inc.*, *supra*, 125 Cal.App.4th at 1125 ["There is no good cause exception in Government Code section 65009, and lack of prejudice or a desire to decide the matter on its merits does not permit avoidance of that statute's mandatory nature."].)

Here, for the summons to have been timely within 90 days of the Planning Commission's decision becoming final on July 17, 2017, the summons would have had to have been served on or by October 16, 2017. Petitioner failed to do so, and instead sought to effectuate service on December 13, 2017 — 59 days ***after*** service was required. Petitioner has not, and cannot now, satisfy the service of summons requirement mandated by Government Code section 65009(c)(1). Accordingly, the Petition should be dismissed as barred by Government Code section 65009.

B. Government Code Section 65009 Applies to Petitioner's Claim for Relief Under the Scenic View Ordinance

1. <u>The City Planning Commission Is a "Zoning Administrator" Whose Decisions Are Subject to Section 65009</u>

The Planning Commission is unquestionably a "zoning administrator" whose decisions trigger the application of Government Code section 65009. The terms of Government Code

section 65009 apply to "***any decision*** on the matters listed in Section[ ] 65901[.]" (Gov. Code § 65009 [emphasis added].) Section 65901 provides in relevant part:

> (a) The board of zoning adjustment or zoning administrator shall hear and decide applications for conditional uses or other permits when the zoning ordinance provides therefor and establishes criteria for determining those matters, and applications for variances from the terms of the zoning ordinance. The board of zoning adjustment or ***the zoning administrator may also exercise any other powers granted by local ordinance***, and may adopt all rules and procedures necessary or convenient for the conduct of the board's or administrator's business.

(Gov. Code § 65901(a) [emphasis added].)

Courts have determined that section 65009(c)(1)(E) applies to bodies acting as the city's zoning administrator where the local ordinance grants the body the authority to carry out the duties specified under state law. (*Stockton Citizens for Sensible Planning v. City of Stockton* (2012) 210 Cal.App.4th 1484, 1492 ["There is no question the Director is City's zoning administrator. Pursuant to section 65900 . . . the Stockton City Council, by local ordinance, created the office of Community Development Department Director and vested him or her with the authority to review development projects 'in compliance with' section 65901."].) Under Government Code section 65900, "[t]he legislative body of a city or county may, by ordinance, create and establish either a board of zoning adjustment, or the office of zoning administrator or both."

While the City does not have an explicitly titled "zoning administrator," the Planning Commission is undoubtedly a "zoning administrator" for the purpose of Government Code section 65009 because it was established pursuant to an ordinance to carry out the functions of state development law. (See DMMC §§ 30.01.020, 30.01.040.) The Planning Commission was established pursuant to DMMC section 2.34, and is charged with

> perform[ing] such duties as may be specified by ordinance, by resolution of the City Council or by the laws of the State of California. Further, the Planning Commission shall study and report to the City Council upon any matter referred to it by the City Council and shall keep the City Council currently advised of all matters pending, and shall furnish any specific information, reports or materials which the City Council may request.

(DMMC § 2.34.040.) Thus, the Planning Commission is the City's "zoning administrator" because the DMMC grants the Planning Commission the authority to perform the functions required by state development law.

2. The Ordinance Is an Exercise of Zoning Administrator Power Under Section 65901, and Any Challenge to the Planning Commission's Decision Is Therefore Subject to 65009's Service Requirements

Pursuant to Government Code section 65901, the "zoning administrator" may also exercise any other powers granted by local ordinance, and is not limited to pure "zoning-related" issues. (See *Stockton Citizens for Sensible Planning*, *supra*, 210 Cal.App.4th at 1494, 1499 [finding that by incorporating sections 65901 and 65903, 65009 is not limited to agency actions on variances and permits].) In addition, the short statute of limitation provided for in section 65009 applies to a "*broad range* of local zoning and planning decisions." (*Citizens for Beach Rights v. City of San Diego* (2017) 10 Cal.App.5th 1301, 1308 [emphasis in original].) Therefore, as the zoning administrator for the City, the Planning Commission's decisions related to its power to consider applications to restore scenic views that may be unreasonably obstructed by the growth and/or installation of trees under the Ordinance trigger Government Code section 65009. (See DMMC § 23.51 [providing for the Planning Commission's role in administering the ordinance].)

The Planning Commission was exercising its "powers granted by local ordinance" when it issued Resolution 2017-05 denying Petitioner's application to restore scenic views under the Ordinance on April 11, 2017. That determination became final on July 17, 2017, when the City Council left the Planning Commission's resolution intact. As a result, the Petition is subject to Government Code section 65009(c)(1)'s 90-day service of summons requirement. As stated above, Petitioner only sought to effectuate service on December 13, 2017, approximately two months ***after*** the 90-day time limit had expired. Accordingly, the Petition should be dismissed as barred by Government Code section 65009.

//

//

C. Public Policy Requires That the Petition Be Dismissed as Untimely

The Legislature's express goal in enacting Government Code section 65009 was to provide "certainty for property owners and local governments and to alleviate the chilling effect created by potential legal challenges." (*Okasaki v. City of Elk*, *supra*, 203 Cal.App.4th at 1048; see also *Wagner*, *supra*, 78 Cal.App.4th at 948–49.) Historically, the Legislature has chosen to ***shorten*** the limitation periods for statutes concerning land use decisions rather than extend or eliminate them. (*Wagner*, *supra*, 78 Cal.App.4th at 949 [noting that the Legislature chose to shorten the statute of limitations in section 65009's predecessor statute from 180 to 90 days to provide property owners with the "necessary confidence to proceed with approved projects"]; *Travis*, *supra*, 33 Cal.4th at fn. 3 [noting that section 65009 limitations period was reduced from 120 to 90 days].)

Courts consistently reinforce the Legislature's important public policy goals by strictly following the deadlines laid out in section 65009. (See, e.g., *Citizens for a Green San Mateo v. San Mateo County Community College District* (2014) 226 Cal.App.4th 1572, 1588 ["To ensure finality and predictability in public land use planning decisions, statutes of limitations governing challenges to such decisions are typically short."]; *General Development Co., L.P. v. City of Santa Maria* (2012) 202 Cal.App.4th 1391 [discussing the importance of following legislative intent in maintaining short limitations periods]; *Haro v. City of Solana Beach*, (2011) 195 Cal.App.4th 542, 551 [explaining that the goal of short statutes of limitation under Government Code section 65009 is to provide certainty for property owners and local governments]; *Citizens for Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91, 111 [discussing the legislature's policy of prompt resolution of challenges to public agencies' decisions concerning land use].) For example, in *Haro v. City of Solana Beach*, the court found that the policy favoring disposition of cases on the merits rather than on procedural grounds was outweighed by the "specific policy judgment" made by the Legislature regarding the need for a speedy resolution to land use claims. (*Haro*, *supra*, 195 Cal.App.4th. at 555.)

The uncertainty created by the Petition is antithetical to the express intent of the California Legislature. Over the past decade, Real Party's property rights have been repeatedly

challenged. (Staver Decl. ¶ 5.) Resolution 2016-09, approved by the Planning Commission last year, signaled an end to those challenges by formalizing the vegetation-trimming program that the Real Party already had in place. (*Id.* ¶ 6.) Yet still, Petitioner brought a nearly identical challenge. The Petitioner's challenge has undergone a review process including multiple public hearings and review by both the Planning Commission and the City Council. (Petition ¶¶ 23–26, 30–32.) With good reason, Real Party believed that the challenges had finally ended when no claims were properly served within the 90-day limitation period. Now, ***months*** after the applicable limitation period has run for properly bringing a claim, Petitioner seeks to extend its challenge in court and create continued uncertainty for Real Party.

The Petition creates similar uncertainty for the City. The City provided every opportunity for Petitioner to be heard before coming to the decision to deny Petitioner's application. (*Ibid.*) After the 90-day limitation period lapsed, the City should be able to depend on the finality of its decision. Otherwise, the City would remain open to legal challenge indefinitely, thereby frustrating the goal of the Legislature.

The DMMC provides the appropriate avenue for aggrieved parties to challenge vegetation they consider to be unreasonably blocking their scenic views. That process has run its course. Real Party should not have to defend its property rights in perpetuity against challengers who have already had a fair opportunity to seek relief. Dismissing the untimely Petition will provide certainty to Real Party and the City, as was intended by the Legislature.

//

//

//

//

//

//

//

//

//

IV. CONCLUSION

The City and Real Party respectfully submit that none of Petitioner's causes of action survive the application of Government Code section 65009. The Petition merits dismissal in its entirety for Petitioner's failure to effect service of summons on the City and Real Party by October 16, 2017, within 90 days of the City's decision to leave the Planning Commission's Resolution 2017-05 intact. For the aforementioned reasons, City and Real Party request the court dismiss the Petition with prejudice in this matter.

Dated: January 23, 2018

CITY OF DEL MAR

By _____
William C. Pate
Barry J. Schultz
Lesley A. Riis
Attorneys for Respondent
CITY OF DEL MAR,

Dated: January 23, 2018

LATHAM & WATKINS LLP

By _____
Christopher W. Garrett
Jennifer K. Roy
Samantha K. Seikkula
Attorneys for Real Party In-Interest
TORREY PACIFIC CORPORATION

LATHAM & WATKINS LLP
Christopher W. Garrett (SBN 100764)
christopher.garrett@lw.com
Jennifer K. Roy (SBN 281954)
jennifer.roy@lw.com
Samantha K. Seikkula (SBN 307827)
samantha.seikkula@lw.com
12670 High Bluff Drive
San Diego, California 92130
Telephone: +1.858.523.5400
Facsimile: +1.858.523.5450

Attorneys for Real Party In-Interest
Torrey Pacific Corporation

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO – CENTRAL DIVISION

SHIRLI FABBRI WEISS, TRUSTEE, on behalf of the SHIRLI FABBRI WEISS TRUST, Petitioner, v. CITY OF DEL MAR and DOES 1 through 10, Respondents. TORREY PACIFIC CORPORATION Real Party-In-Interest	CASE NO. 37-2017-00034936-CU-WM-CTL **[IMAGED FILE]** **PROOF OF SERVICE** Hearing Date: April 13, 2018 Time: 11:00 a.m. Dept.: C-70 Judge: Hon. Randa Trapp Action Filed: September 19, 2017

PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 12670 High Bluff Drive, San Diego, CA 92130.

On **January 23, 2018**, I served the following document described as:

- **RESPONDENT CITY OF DEL MAR AND REAL PARTY IN INTEREST TORREY PACIFIC CORPORATION'S JOINT MOTION TO DISMISS VERIFIED PETITION FOR WRIT OF MANDAMUS (CCP 1094.5) FOR FAILURE TO TIMELY SERVE SUMMONS PURSUANT TO GOVERNMENT CODE § 65009; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**
- **DECLARATION OF CHRISTOPHER W. GARRETT IN SUPPORT OF RESPONDENT CITY OF DEL MAR AND REAL PARTY IN INTEREST TORREY PACIFIC CORPORATION'S JOINT MOTION TO DISMISS PETITIONER'S VERIFIED PETITION FOR WRIT OF MANDAMUS (CCP 1094.5) FOR FAILURE TO TIMELY SERVE SUMMONS PURSUANT TO GOVERNMENT CODE § 65009**
- **DECLARATION OF BRIAN STAVER IN SUPPORT OF RESPONDENT CITY OF DEL MAR AND REAL PARTY IN INTEREST TORREY PACIFIC CORPORATION'S JOINT MOTION TO DISMISS PETITIONER'S VERIFIED PETITION FOR WRIT OF MANDAMUS (CCP 1094.5) FOR FAILURE TO TIMELY SERVE SUMMONS PURSUANT TO GOVERNMENT CODE § 65009**
- **PROPOSED ORDER GRANTING REAL PARTY IN INTEREST AND RESPONDENT'S JOINT MOTION TO DISMISS PETITION FOR WRIT OF MANDAMUS**

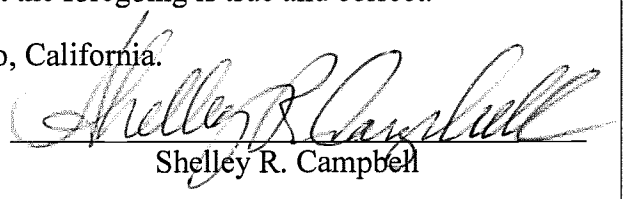
BY OVERNIGHT MAIL DELIVERY

I am familiar with the office practice of Latham & Watkins LLP for collecting and processing documents for overnight mail delivery by Federal Express. Under that practice, documents are deposited with the Latham & Watkins LLP personnel responsible for depositing documents in a post office, mailbox, subpost office, substation, mail chute, or other like facility regularly maintained for receipt of overnight mail by Federal Express; such documents are delivered for overnight mail delivery by Federal Express on that same day in the ordinary course of business, with delivery fees thereon fully prepaid and/or provided for. I deposited in Latham & Watkins LLP's interoffice mail a sealed envelope or package containing the above-described document and addressed as set forth below in accordance with the office practice of Latham & Watkins LLP for collecting and processing documents for overnight mail delivery by Federal Express:

Mark C. Mazzarella *mark@mazzarellalaw.com* Rebecca L. Reed *rebecca@mazzarellalaw.com* MAZZARELLA & MAZZARELLA LLP 1620 Fifth Avenue, Suite 600 San Diego, California 92101	Attorneys for Petitioners Shirli Fabbri Weiss Trustee Shrili Fabbri Weiss Trust
William C. Pate *wpate@dpmclaw.com* Barry J. Schultz *bschultz@dpmclaw.com* Lesley A. Riis *lriis@dpmclaw.com* DEVANEY PATE MORRIS & CAMERON LLP 402 W. Broadway, Suite 1300 San Diego, California 92101	Attorneys for Respondent City of Del Mar

I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **January 23, 2018** at San Diego, California.



Shelley R. Campbell

US-DOCS\98512680.1

LATHAM & WATKINS LLP
Christopher W. Garrett (SBN 100764)
christopher.garrett@lw.com
Jennifer K. Roy (SBN 281954)
jennifer.roy@lw.com
Samantha K. Seikkula (SBN 307827)
samantha.seikkula@lw.com
12670 High Bluff Drive
San Diego, California 92130
Telephone: +1.858.523.5400
Facsimile: +1.858.523.5450

Attorneys for Real Party In-Interest
Torrey Pacific Corporation

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO – CENTRAL DIVISION

SHIRLI FABBRI WEISS, TRUSTEE, on behalf of the SHIRLI FABBRI WEISS TRUST,

Petitioner,

v.

CITY OF DEL MAR and DOES 1 through 10,

Respondents.

TORREY PACIFIC CORPORATION

Real Party-In-Interest

CASE NO. 37-2017-00034936-CU-WM-CTL

[IMAGED FILE]

DECLARATION OF CHRISTOPHER W. GARRETT IN SUPPORT OF RESPONDENT CITY OF DEL MAR AND REAL PARTY IN INTEREST TORREY PACIFIC CORPORATION'S JOINT MOTION TO DISMISS PETITIONER'S VERIFIED PETITION FOR WRIT OF MANDAMUS (CCP 1094.5) FOR FAILURE TO TIMELY SERVE SUMMONS PURSUANT TO GOVERNMENT CODE § 65009

Hearing Date: April 13, 2018
Time: 11:00 a.m.
Dept.: C-70

Judge: Hon. Randa Trapp
Action Filed: September 19, 2017

DECLARATION OF CHRISTOPHER W. GARRETT

I, Christopher W. Garrett, declare:

1. I am an attorney duly licensed to practice law in the State of California and a partner in the law firm of Latham & Watkins LLP, counsel for Real Party in Interest Torrey Pacific Corporation ("Real Party") in the above-entitled case. I submit this declaration in support of Real Party's Motion to Dismiss.

2. As one of the attorneys responsible for representing Real Party, I am familiar with the procedural and substantive history of this action, and I have sufficient personal knowledge of the facts set forth herein that if called as a witness I could and would testify competently to the facts below under oath.

3. On December 13, 2017, I received a phone call from Rebecca Reed, counsel for the Petitioner in the above entitled matter, asking me to accept service on behalf of Real Party, and confirmed that request by email correspondence with Petitioner's counsel, without waiving the position that service was untimely. A true and correct copy of the December 13, 2017 email correspondence is attached hereto as Exhibit A.

4. On December 15, 2017, I memorialized Petitioner's request by letter, without waiving the position that service was untimely and stating that, because of the lapse in time, we had believed Petitioner had decided not to file a petition or pursue the case. I sent this letter to Petitioner by both Fedex and email. A true and correct copy of the December 15, 2017 letter is attached hereto as Exhibit B.

5. On December 19, 2017, I signed and executed the Acknowledgement of Receipt for Petitioner's attempted service on behalf of Real Party, and emailed the executed Acknowledgement of Receipt to Petitioner's counsel. A true and correct copy of the Acknowledgement of Receipt and email transmittal is attached hereto as Exhibit C.

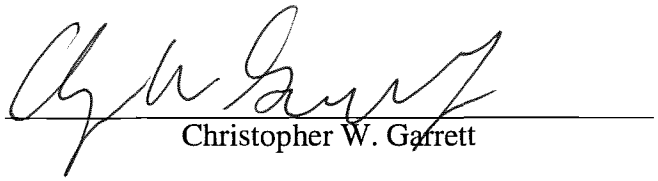
///

///

///

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

Executed on this 22nd day of January, 2018, in San Diego, California.



Christopher W. Garrett

EXHIBIT A

From: Rebecca Reed
To: Garrett, Christopher (SD)
Cc: ldevaney@dpmclaw.com; bschultz@dpmclaw.com; Roy, Jennifer (SD); Seikkula, Samantha (SD); Mark Mazzarella; Leigh Sanders
Subject: RE: Service of lawsuit
Date: Wednesday, December 13, 2017 12:11:44 PM
Attachments: image003.png

Thanks Chris. Nice speaking with you also. I appreciate your courtesy. Our paralegal will get a notice and acknowledgment over to you shortly.

Best,
Rebecca

Rebecca L. Reed, Esq.
(Admitted in CA and WA)

1620 Fifth Avenue, Suite 600
San Diego, CA 92101
Telephone: (619) 238-4900
Fax: (619) 238-4959
www.mazzarellalaw.com

NOTICE: This email message is for the sole use of the intended recipient(s) and may contain information that is confidential and protected from disclosure by the attorney-client privilege, as attorney work product, or by other applicable privileges. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply email and destroy all copies of the original message.

From: CHRISTOPHER.GARRETT@LW.com [mailto:CHRISTOPHER.GARRETT@LW.com]
Sent: Wednesday, December 13, 2017 10:25 AM
To: Rebecca Reed
Cc: ldevaney@dpmclaw.com; bschultz@dpmclaw.com; Jennifer.Roy@lw.com; Samantha.Seikkula@lw.com
Subject: Service of lawsuit

Rebecca,
Nice to speak with you today.
Confirming our phone call, I'm happy to accept service on behalf of my client in the administrative proceedings.

As discussed, we believe that the lawsuit and service is untimely. Under Government Code Section 65009 all land use lawsuits should have been served within 90 days of the City Council's decision. Our acceptance of service on behalf of our client is without waiving that position, and is intended to be a courtesy to avoid the time and expense needed for you to

serve our client directly.

Regards,
Chris

Christopher W. Garrett

LATHAM & WATKINS LLP
12670 High Bluff Drive
San Diego, CA 92130
Direct Dial: +1.858.523.5458
Fax: +1.858.523.5450
Email: christopher.garrett@lw.com
http://www.lw.com

This email may contain material that is confidential, privileged and/or attorney work product for the sole use of the intended recipient. Any review, disclosure, reliance or distribution by others or forwarding without express permission is strictly prohibited. If you are not the intended recipient, please contact the sender and delete all copies including any attachments.

Latham & Watkins LLP or any of its affiliates may monitor electronic communications sent or received by our networks in order to protect our business and verify compliance with our policies and relevant legal requirements.

Latham & Watkins LLP

EXHIBIT B

12670 High Bluff Drive
San Diego, California 92130
Tel: +1.858.523.5400 Fax: +1.858.523.5450
www.lw.com

LATHAM & WATKINS LLP

FIRM / AFFILIATE OFFICES
Barcelona, Beijing, Boston, Brussels, Century City, Chicago, Dubai, Düsseldorf, Frankfurt, Hamburg, Hong Kong, Houston, London, Los Angeles, Madrid, Milan, Moscow, Munich, New York, Orange County, Paris, Riyadh, Rome, San Diego, San Francisco, Seoul, Shanghai, Silicon Valley, Singapore, Tokyo, Washington, D.C.

December 15, 2017

VIA FEDEX AND EMAIL

Rebecca Reed
1620 Fifth Avenue, Suite 600
San Diego, CA 92101

Re: Weiss v. City of Del Mar

Dear Ms. Reed:

As we discussed on our call on December 13, 2017, we agree to accept service on behalf of our client, the Torrey Pacific Corporation, in connection with *Weiss v. City of Del Mar*. Nevertheless, we believe that such service is untimely under Government Code section 65009.

Several months ago, we became aware of an article in the Del Mar Times discussing a potential lawsuit Sherli Weiss intended on filing in connection with the City of Del Mar's ruling denying Ms. Weiss' scenic view ordinance appeal. However, because we did not hear anything further on the matter following the article, we believed Ms. Weiss decided not to file the petition or pursue the case.

Best regards,

Christopher W. Garrett

Christopher W. Garrett
of LATHAM & WATKINS LLP

cc: Brian Staver, Torrey Pacific Corporation
Barry J. Schultz, Devaney Pate Morris & Cameron
Jennifer K. Roy, Latham & Watkins

EXHIBIT C

From:	Garrett, Christopher (SD)
To:	Leigh Sanders
Cc:	Rebecca Reed; Seikkula, Samantha (SD); Roy, Jennifer (SD); Sanders, Karin (SD); Sherer, Christine (SD)
Subject:	RE: WEISS/CITY OF DEL MAR
Date:	Tuesday, December 19, 2017 2:33:39 PM
Attachments:	image001.png Torrey Pacific Notice and Acknowledgment.pdf

---

Leigh,
My apologies. For some reason I was expecting this to be mailed by paper copy to my office, and so I was not looking carefully at my emails.
I found your email and executed the Acknowledgment of Receipt, and I've attached the signed copy to this email.

Regards,
Chris

From: Leigh Sanders [mailto:leigh@mazzarellalaw.com]
Sent: Tuesday, December 19, 2017 11:35 AM
To: Garrett, Christopher (SD) <CHRISTOPHER.GARRETT@LW.com>
Cc: Rebecca Reed <Rebecca@mazzarellalaw.com>
Subject: WEISS/CITY OF DEL MAR

Hi Chris,

I just want to confirm that you received the Notice And Acknowledgement of Receipt I emailed over on December 13, 2017? Do you know when you will be able to return that to us?

Leigh Sanders
Office Administrator and Paralegal
1620 Fifth Avenue, Suite 600
San Diego, CA 92101
Telephone: (619) 238-4900
Fax: (619) 238-4959
www.mazzarellalaw.com

NOTICE: This email message is for the sole use of the intended recipient(s) and may contain information that is confidential and protected from disclosure by the attorney-client privilege, as attorney work product, or by other applicable privileges. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply email and destroy all copies of the original message.

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):
Mazzarella & Mazzarella, LLP
Mark C. Mazzarella, Esq. (SBN 082494) Rebecca L. Reed, Esq. (SBN 275833)
1620 Fifth Ave, Suite 600
San Diego, CA 92101
TELEPHONE NO.: 619-238-4900 FAX NO. (Optional): 619-238-4959
E-MAIL ADDRESS (Optional): mark@mazzarellalaw.com
ATTORNEY FOR (Name): Petitioner

FOR COURT USE ONLY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Diego
STREET ADDRESS: 330 West Broadway
MAILING ADDRESS: same
CITY AND ZIP CODE: San Diego, CA 92101
BRANCH NAME: Central

PLAINTIFF/PETITIONER: SHIRLI FABBRI TRUSTEE

DEFENDANT/RESPONDENT: CITY OF DEL MAR; TORREY PACIFIC CORPORATION

NOTICE AND ACKNOWLEDGMENT OF RECEIPT—CIVIL

CASE NUMBER: 37-2017-00034936-CU-WM-CTL

TO *(insert name of party being served)*: Torrey Pacific Corporation

NOTICE

The summons and other documents identified below are being served pursuant to section 415.30 of the California Code of Civil Procedure. Your failure to complete this form and return it within 20 days from the date of mailing shown below may subject you (or the party on whose behalf you are being served) to liability for the payment of any expenses incurred in serving a summons on you in any other manner permitted by law.

If you are being served on behalf of a corporation, an unincorporated association (including a partnership), or other entity, this form must be signed by you in the name of such entity or by a person authorized to receive service of process on behalf of such entity. In all other cases, this form must be signed by you personally or by a person authorized by you to acknowledge receipt of summons. If you return this form to the sender, service of a summons is deemed complete on the day you sign the acknowledgment of receipt below.

Date of mailing: December 13, 2017

Leigh Sanders
(TYPE OR PRINT NAME)

▶ Leigh Sanders
(SIGNATURE OF SENDER—MUST NOT BE A PARTY IN THIS CASE)

ACKNOWLEDGMENT OF RECEIPT

This acknowledges receipt of ***(to be completed by sender before mailing)***:

1. [✓] A copy of the summons and of the complaint.
2. [✓] Other *(specify)*:
   Notice of Case Assignment; Notice of Eligibility of to Efile and Assignment to Imagining Department; Alternative Dispute Resolution Information; Stipulation to Use Alternative Dispute Resolution; Civil Case Cover Sheet

(To be completed by recipient):

Date this form is signed: December 19, 2017

Christopher W. Garrett
(TYPE OR PRINT YOUR NAME AND NAME OF ENTITY, IF ANY, ON WHOSE BEHALF THIS FORM IS SIGNED)

▶ [signature]
(SIGNATURE OF PERSON ACKNOWLEDGING RECEIPT, WITH TITLE IF ACKNOWLEDGMENT IS MADE ON BEHALF OF ANOTHER PERSON OR ENTITY)

Form Adopted for Mandatory Use
Judicial Council of California
POS-015 [Rev. January 1, 2005]

Code of Civil Procedure, §§ 415.30, 417.10
www.courtinfo.ca.gov

LATHAM & WATKINS LLP
Christopher W. Garrett (SBN 100764)
christopher.garrett@lw.com
Jennifer K. Roy (SBN 281954)
jennifer.roy@lw.com
Samantha K. Seikkula (SBN 307827)
samantha.seikkula@lw.com
12670 High Bluff Drive
San Diego, California 92130
Telephone: +1.858.523.5400
Facsimile: +1.858.523.5450

Attorneys for Real Party In-Interest
Torrey Pacific Corporation

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO – CENTRAL DIVISION

SHIRLI FABBRI WEISS, TRUSTEE, on behalf of the SHIRLI FABBRI WEISS TRUST, Petitioner, v. CITY OF DEL MAR and DOES 1 through 10, Respondents. TORREY PACIFIC CORPORATION Real Party-In-Interest	CASE NO. 37-2017-00034936-CU-WM-CTL **[IMAGED FILE]** **DECLARATION OF BRIAN STAVER IN SUPPORT OF RESPONDENT CITY OF DEL MAR AND REAL PARTY IN INTEREST TORREY PACIFIC CORPORATION'S JOINT MOTION TO DISMISS PETITIONER'S VERIFIED PETITION FOR WRIT OF MANDAMUS (CCP 1094.5) FOR FAILURE TO TIMELY SERVE SUMMONS PURSUANT TO GOVERNMENT CODE § 65009** Hearing Date: April 13, 2018 Time: 11:00 a.m. Dept.: C-70 Judge: Hon. Randa Trapp Action Filed: September 19, 2017

DECLARATION OF BRIAN STAVER

I, Brian Staver, declare:

1. I am a representative of Real Party in Interest Torrey Pacific Corporation ("Real Party"). I submit this declaration in support of Real Party's Motion to Dismiss.

2. As a representative of Real Party and a member of the Staver Family, I have sufficient personal knowledge of the facts set forth herein that if called as a witness I could and would testify competently to the facts below under oath.

3. Real Party's property at 110 Stratford Court (the "Stratford Property") in the City of Del Mar (the "City") is a 5.8 acre, oceanfront bluff-top property comprised of three parcels purchased between 1950 and 1969 by members of my family, Ralph and Marian Staver. The Stratford Property was developed with a single-family residence constructed in the early 1960s.

4. Petitioner, along with other residents of the "Del Mar Woods" condominium complex, have made numerous complaints to the City about the height and thickness of 40+ year old eucalyptus trees and other vegetation along the Stratford Property's northern boundary over the last 12 years, despite my family's voluntary trimming program.

5. Since 2003, the Del Mar Planning Commission ("Planning Commission") has held at least five hearings concerning the trimming of these trees and vegetation. On every occasion, the Planning Commission has determined that Real Party was not required to conduct any trimming that exceeded the trimming that they were already voluntarily and willingly conducting.

6. On September 13, 2016, following public testimony, the Planning Commission adopted Resolution No. 2016-09. In pertinent part, Resolution No. 2016-09 states that tree trimming was required to continue "in a manner that is consistent with past trimming practice, on a bi-annual basis." The Resolution did not require Real Party to change the trimming program that it already voluntarily had in place. A true and correct copy of the September 13, 2016, Resolution No. 2016-09 is attached hereto as Exhibit A.

I declare under penalty of perjury under the laws of the State of California that the

foregoing is true and correct.

Executed on this 17 day of January, 2018, in San Diego, California.

Brian Staver

EXHIBIT A

RESOLUTION NO. 2016-09

A RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF DEL MAR, CALIFORNIA REGARDING TREES, SCENIC VIEWS AND SUNLIGHT APPLICATION **TVS-12-01**, A REQUEST FOR RESTORATION OF SCENIC VIEWS FROM PROPERTIES LOCATED AT 110, 118, 130 SPINNAKER COURT; 245, 257, 261 STRATFORD COURT; AND 234 DOLPHIN COVE COURT, IN DEL MAR, CALIFORNIA

WHEREAS, on July 30, 2012, the owners ("APPLICANT" hereinafter) of 28 individual residential condominium units located within the Del Mar Woods condominium complex ("AFFECTED PROPERTY" hereinafter), filed Trees, Scenic Views and Sunlight application TVS-12-01 ("APPLICATION" hereinafter) requesting that the Planning Commission determine that vegetation, including Blue Gum Eucalyptus trees, located along the northern property boundary of the property located at 110 Stratford Court (APN: 301-010-02, 25), owned by Torrey Pacific Corp. ("TREE OWNER" hereinafter), creates an "unreasonable" obstruction of scenic views from their primary living areas, and further, requested that the Planning Commission take action to restore the obstructed views; and

WHEREAS, notice of the filing of APPLICATION was mailed to the TREE OWNER on August 31, 2012; and

WHEREAS, on January 8, 2013, the Planning Commission held a public hearing on application TVS-12-01 which was duly noticed, and at which time all persons desiring to be heard were heard; and

WHEREAS, on January 8, 2013, the Planning Commission determined that most of the 28 participants in the APPLICATION had failed to submit sufficient documentation regarding their individual view blockage claims and continued the item, giving the condominium homeowners direction to summit revised information to be reviewed for completeness by City staff and a Planning Commission subcommittee comprised of Commissioners Bakker and Corcoran; and

WHEREAS, on December 3, 2014, representative members of the APPLICANTS submitted revised documentation on behalf of the condominium homeowners, resulting in a reduction of the number of home owners considered AFFECTED PROPERTY from 28 to seven condominium home owners, consisting of residences located at 110, 118, 130 Spinnaker Court; 245, 257, 261 Stratford Court; And 234 Dolphin Cove Court in the City of Del Mar; and

WHEREAS, on November 10, 2015, the Planning Commission held a public hearing on application TVS-12-01 which was duly noticed and at which time all persons desiring to be heard were heard and evidence was submitted and considered to include without limitation:

a. Written information submitted with the application, including information about attempts to resolve the dispute.
b. Written information submitted by the TREE OWNER.
c. Photographs and plans submitted by the APPLICANTS.
d. Oral testimony from Staff, the APPLICANTS, the TREE OWNER, and the public.
e. Staff report, dated November 10, 2015, which is incorporated by this reference as though fully set forth herein.
f. Additional information submitted during the hearing, including Council member disclosures; and

WHEREAS, Del Mar Municipal Code (DMMC) Section 23.51.050 (Trees, Scenic Views and Sunlight Ordinance) states that prior to rendering a decision in favor of the APPLICANT(S), the Planning Commission shall make the following findings of fact:

A. That the APPLICANT has contacted the Subject TREE OWNER and has made reasonable efforts to resolve the dispute as set forth in DMMC Section 23.51.040 B. Proof of the APPLICANT's efforts shall include documented attempts (registered mail, etc.) to reach and confer with the TREE OWNER, and documentation supporting efforts to mediate the dispute; and

B. That the Scenic View from or the Sunlight reaching the real property of the APPLICANT is unreasonably obstructed and the manner in which the Scenic View and/or Sunlight is obstructed. In determining whether the Scenic View from and/or Sunlight reaching the real property of the APPLICANT is unreasonably obstructed, the Planning Commission shall consider several factors, which include but are not limited to, the following:

1. The extent of alleged Scenic View obstruction, expressed as a percentage of the total Scenic View, and calculated by means of a surveyor's transit or by photographs or both:

2. Documentable evidence that demonstrates the Scenic Views and/or Sunlight that existed at the time the APPLICANT purchased or began occupying a property, or in the last ten years, whichever is shorter;

3. The quality of the pre-existing Scenic View(s) and/or Sunlight being obstructed;

4. That the implementation of a Restorative Action will not create an unreasonable infringement of the Subject TREE OWNER's privacy that could not be mitigated;

5. The extent to which the Subject Tree interferes with efficient operation of a APPLICANT's pre-existing solar energy systems;

6. The extent to which the Subject Tree causes shadows or reduces air circulation and/or light;

7. The extent to which the APPLICANT's Scenic Views and/or Sunlight has been diminished over time by factors other than Subject Tree growth;

8. The variety of Subject Tree, its projected rate of growth and maintenance requirements;

9. The aesthetic quality of the Subject Tree, including but not limited to species characteristics, size, growth, form and vigor;

10. The extent to which the location of the Subject Tree with respect to overall appearance, design, or use benefits the Subject TREE OWNER's property;

11. The extent to which soil stability is provided by the Subject Tree, considering soil structure, degree of slope and extent of the Subject Tree's root system per a report from a licensed soils engineer (if applicable);

12. The extent to which privacy (visual and auditory) and wind screening is provided by the Subject Tree to the owner and to neighbors;

13. The extent to which energy conservation and/or climate control is provided by the Subject Tree;

14. The extent to which wildlife habitat is provided by the Subject Tree;

15. Whether the Subject Tree is a "Protected Tree", as defined herein and in Chapter 23.50 (Trees);

16. The value of the Subject Tree to the community/neighborhood; and

17. Whether the Subject Tree is located on public right-of-way or City-owned property and

WHEREAS, on November 10, 2015, determinations of unreasonable scenic view obstruction were made by the Planning Commission in accordance with DMMC Section 23.51.050 A&B, a subcommittee consisting of Vice Chair McCay and Commissioner Haviland was appointed to work with City staff to develop an appropriate restoration plan for recommendation to the Commission, and the item was continued to a future Planning Commission meeting; and

WHEREAS, on May 10, 2016, the Planning Commission reviewed a draft resolution and reopened the public hearing on the item to receive comment regarding the Planning Commission Subcommittee's proposed restorative actions. The Planning Commission continued the item citing the need to reexamine the Subcommittee's proposed view restoration plan.

WHEREAS, on September 13, 2016, the Planning Commission review a draft resolution and reopened the public hearing on the item to receive comment regarding the Planning Commission Subcommittee's revisions to its proposed view restoration plan

.

NOW, THEREFORE, BE IT RESOLVED by the Planning Commission of the City of Del Mar, that:

Section 1: Determination that Unreasonable Scenic View Obstruction Has Not Occurred

Based upon substantial evidence submitted into the public record and presented at the public hearing on November 10, 2015, including written and oral staff reports public written and oral testimony, along with Planning Commissioner observations from the primary living areas of each potentially AFFECTED PROPERTY, in accordance with DMMC Section 23.51.050-B the Planning Commission of the City of Del Mar finds that no scenic views or sunlight is unreasonably obstructed from the primary living areas of the residences located at 110 Spinnaker Court, 245 Stratford Court, and 234 Dolphin Cove.

Section 2: Determination that Unreasonable Scenic View Obstruction Has Occurred

Based upon substantial evidence submitted into the public record and presented at the public hearing on November 10, 2015, including written and oral staff reports public written and oral testimony, along with Planning Commissioner observations from the primary living areas of each potentially AFFECTED PROPERTY, in accordance with DMMC Section 23.51.050-B the Planning Commission of the City of Del Mar finds that scenic views or sunlight are unreasonably obstructed from the primary living areas of the residences located at 118 Spinnaker Court, 130 Spinnaker Court, 257 Stratford Court, and 261 Stratford Court.

NOW, THEREFORE, BE IT FURTHER RESOLVED by the Planning Commission of the City of Del Mar, that:

Section 3: Environmental Determination

Pursuant to the authority and criteria contained in the California Environmental Quality Act (CEQA), the Planning Commission has analyzed the proposal and found that the project is listed among the classes of project that have been determined to have a less than significant adverse effect on the environment and are, therefore, exempt from the provisions of CEQA pursuant to CEQA Guidelines Section 15304 – Minor Alterations to Land. The Planning Commission further determined that none of the six exceptions to the use of a categorical exemption applies to his project (CEQA Guidelines Section 15300.2)

NOW, THEREFORE, BE IT FURTHER RESOLVED by the Planning Commission of the City of Del Mar, that:

Section 4: Restorative Action

A. The Sumner residence at 261 Stratford Court and the Sherman residence at 257 Stratford Court, have been affected by trees E1, E2, E3, E4, E5, E6, and E7. The owners of these two residences are each entitled to trim and lace the trees to the heights delineated in Exhibit A of this resolution, in a manner that is consistent with past trimming practice, on a bi-annual basis at their expense and in accordance with the procedures identified in DMMC Section 23.51.080. During the trimming process, no branches used to determine the "Elevation @Established Topping Location" as shown on the "Tree Exhibit Plat for: 110 Stratford Court" by Randy R. Brown may be removed or trimmed to an elevation that is lower than the established topping cut/height. All other vegetation located within proximity of the above-cited trees and within 20 linear feet south of the northern property line of 110 Stratford Court shall also be trimmed to a height no greater that that prescribed for the nearest Eucalyptus tree.

B. The Hunt residence at 130 Spinnaker Court is affected by trees E13, E14, E15, E16, E17, E18, E19, E20, E21, E22, E23, E24, and E25. The owner of this residence is entitled to trim and lace the trees to the heights delineated in Exhibit A of this resolution, in a manner that is consistent with past trimming practice, on a bi-annual basis at their expense and in accordance with the procedures identified in DMMC Section 23.51.080. During the trimming process, no branches used to determine the "Elevation @Established Topping Location" as shown on the "Tree Exhibit Plat for: 110 Stratford Court" by Randy R. Brown may be removed or trimmed to an elevation that is lower than the established topping cut/height. All other vegetation located within proximity of the above-cited trees and within 20 linear feet south of the northern property line of 110 Stratford Court shall also be trimmed to a height no greater that that prescribed for the nearest Eucalyptus tree.

C. The Ritman residence at 118 Surfview Court, is affected by trees E20, E21, E22, E23, E24, and E25 marked on the same map. The owner of this residence is entitled to trim and lace the trees to the heights delineated in Exhibit A of this resolution, in a manner that is consistent with past trimming practice, on a bi-annual basis at their expense and in accordance with the procedures identified in DMMC Section 23.51.080. During the trimming process, no branches used to determine the "Elevation @Established Topping Location" as shown on the "Tree Exhibit Plat for: 110 Stratford Court" by Randy R. Brown may be removed or trimmed to an elevation that is lower than the established topping cut/height. All other vegetation located within proximity of the above-cited trees and within 20 linear feet south of the northern property line of 110 Stratford Court shall also be trimmed to a height no greater that that prescribed for the nearest Eucalyptus tree.

D. The acquisition of tree service cost estimates shall be in accordance with the procedure identified in DMMC Section 23.51.080 A-1 for the first required trimming. The firm with the lower cost estimate shall be allowed to perform all subsequent bi-annual trimmings without need for resubmittal of a cost estimate; until such time that the cost of work changes or the initially chosen firm is not able to perform a required trimming within the prescribed time period.

PASSED AND ADOPTED by the Planning Commission of the City of Del Mar, this **13th day of September, 2016**, by the following vote:

AYES: Chair Bakker, Vice Chair McCay, Commissioner Haviland

NOES: None

ABSENT: Commissioners Countryman and Posner

ABSTAIN: None

TED BAKKER, Chair
Del Mar Planning Commission

Kathleen A. Garcia,
Director of Planning and Community Development

Exhibit A

Tree	Height
E1	28.3'
E2	30.8'
E3	32.0'
*E4	30.0'
E5	26.0'
E6	22.6'
E7	24.8'
E8	N/A
E9	N/A
E10	N/A
E11	N/A
E12	N/A
E13	21.8'
E14	21.6'
E15	21.1'
E16	19.4'
E17	21.9'
E18	23.0'
E19	22.3'
E20	18.9
E21	21.0'
E22	18.6'
E23	19.6'
E24	18.6'
E25	17.7

LATHAM & WATKINS LLP
Christopher W. Garrett (SBN 100764)
christopher.garrett@lw.com
Jennifer K. Roy (SBN 281954)
jennifer.roy@lw.com
Samantha K. Seikkula (SBN 307827)
samantha.seikkula@lw.com
12670 High Bluff Drive
San Diego, California 92130
Telephone: +1.858.523.5400
Facsimile: +1.858.523.5450

Attorneys for Real Party In-Interest
Torrey Pacific Corporation

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO – CENTRAL DIVISION

SHIRLI FABBRI WEISS, TRUSTEE, on behalf of the SHIRLI FABBRI WEISS TRUST,

Petitioner,

v.

CITY OF DEL MAR and DOES 1 through 10,

Respondents.

TORREY PACIFIC CORPORATION

Real Party-In-Interest

CASE NO. 37-2017-00034936-CU-WM-CTL

[IMAGED FILE]

RESPONDENT REAL PARTY IN INTEREST TORREY PACIFIC CORPORATION'S VERIFIED ANSWER TO PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS (CCP 1094.5)

Judge: Hon. Randa Trapp
Action Filed: September 19, 2017

Real Party in Interest Torrey Pacific Corporation ("Real Party") hereby responds to and answers the allegations of Petitioner Shirli Fabbri Weiss on behalf of the Shirli Fabbri Weiss Trust ("Petitioner") Petition for Writ of Administrative Mandamus ("Petition") filed against Respondent City of Del Mar ("City") and Real Party. Real Party responds and answers as follows:

1. Paragraphs 1, 27, 30, 32–33 contain various allegations characterizing Petitioner's position in this action, to which Real Party responds and answers that the Petition speaks for itself. Such paragraphs also contain allegations pertaining to events that are the subject of the Petition and that are described in the City's record of proceedings, to which Real Party responds and answers that the record of proceedings speaks for itself. Such paragraphs also contain conclusions or characterizations of municipal, state and/or federal law, to which Real Party responds and answers that the law speaks for itself. Real Party denies each and every remaining allegation contained or implied in such paragraphs.

2. Paragraphs 14–17, 19–26, 28, and 35–37 consist of various allegations pertaining to events that are the subject of the Petition and that are described in the City's record of proceedings, to which Real Party answers and responds that the record of proceedings speaks for itself. Such paragraphs also contain conclusions or characterizations of municipal, state, and/or federal law, to which Real Party responds and answers that the law speaks for itself. Real Party denies each and every remaining allegation contained or implied in such paragraphs.

3. Real Party admits the allegations in Paragraph 7 that Brian Staver is an individual residing in the County of San Diego, State of California, who has acted as an agent of Torrey Pacific. The remainder of Paragraph 7 consists of various allegations pertaining to events that are the subject of the Petition and that are described in the City's record of proceedings, to which Real Party responds that the record of proceedings speaks for itself. Real Party denies each and every remaining allegation contained or implied in Paragraph 7.

4. Paragraphs 29, and 31 consist of various allegations pertaining to events that are the subject of the Petition and that are described in the City's record of proceedings, to which Real Party responds that the record of proceedings speaks for itself. Real Party denies each and

every remaining allegation contained or implied in such paragraphs.

5. Paragraphs 2–3, and 9–13 contain conclusions or characterizations of municipal, state, and/or federal law, to which Real Party responds and answers that the law speaks for itself. Real Party denies each and every remaining allegation contained or implied in such paragraphs.

6. Real Party admits the allegation in Paragraph 5 that the City of Del Mar is a local government agency and political subdivision. Paragraph 5 also contains conclusions or characterizations of municipal, state, and /or federal law, to which Real Party responds and answers that the law speaks for itself. Real Party denies each and every remaining allegation contained or implied in Paragraph 5.

7. In answer to the allegations of Paragraphs 4, 8, and 38 Real Party responds and answers that it lacks information and/or belief sufficient to enable it to admit or deny the allegations contained such paragraphs, and on that basis, denies each and every such allegation.

8. In answer to Paragraph 18, Real Party responds and answers that it lacks information and/or belief sufficient to enable it to admit or deny the allegations contained in such paragraph, and on that basis, denies each and every allegation. Paragraph 18 also contains conclusions or characterizations of municipal, state, and/or federal law, to which Real Party responds and answers that the law speaks for itself. Real Party denies each and every remaining allegation contained or implied in such paragraphs.

9. Real Party admits the allegations contained in Paragraph 6.

10. In response to Paragraph 34, Real Party incorporates by reference its answers set forth herein responding to the paragraphs cross-referenced.

AFFIRMATIVE DEFENSES

As separate and distinct affirmative defenses to the Petition and to the alleged claims, and to each of them, Real Party alleges as follows:

FIRST AFFIRMATIVE DEFENSE

(Failure to Timely Serve)

11. The Petition is barred for Petitioner's failure to timely serve the Petition under Government Code section 65009.

SECOND AFFIRMATIVE DEFENSE

(Statute of Limitations)

12. The Petition is barred by the applicable statute of limitations, including, without limitation, Public Resources Code sections 21080.5 and 21167, and Code of Civil Procedure section 1094.6.

THIRD AFFIRMATIVE DEFENSE

(Failure to Exhaust Administrative Remedies; Issue Exhaustion)

13. Petitioners have not exhausted its administrative remedies, including issue exhaustion, as required by law, including without limitation the Public Resources Code, and the Government Code.

FOURTH AFFIRMATIVE DEFENSE

(Estoppel/Waiver/Unclean Hands)

14. Petitioners' action is barred by the equitable doctrines of estoppel, waiver, and/or unclean hands.

FIFTH AFFIRMATIVE DEFENSE

(Lack of Standing)

15. Petitioners lack standing to pursue these matters and, as a result, its action is barred.

SIXTH AFFIRMATIVE DEFENSE

(Laches)

16. Petitioners' action is barred by the doctrine of laches.

SEVENTH AFFIRMATIVE DEFENSE

(Failure to State a Claim)

17. Petitioners fail to state a cause of action upon which relief can be granted.

EIGHTH AFFIRMATIVE DEFENSE

(No Right to Injunctive Relief)

18. Petitioners have no right to injunctive relief.

NINTH AFFIRMATIVE DEFENSE

(Mootness)

19. Petitioners' purported causes of action, and each of them, are barred in whole or in part, as moot, because, among other things, the trimming required by the City resolutions that apply to the vegetation on Real Party's property has been completed.

TENTH AFFIRMATIVE DEFENSE

(There Is an Adequate Remedy at Law)

20. Petitioners have an adequate remedy at law.

ELEVENTH AFFIRMATIVE DEFENSE

(Res Judicata/Collateral Estoppel)

21. Petitioners' action is barred, in whole or in part, under the doctrines of res judicata and/or collateral estoppel.

TWELFTH AFFIRMATIVE DEFENSE

(No Prejudice to Petitioners)

22. Pursuant to existing law, including but not limited to Public Resources Code section 21168.5, the Petition, and each and every cause of action asserted therein, is barred, in whole or in part, because no prejudicial abuse of discretion has been committed.

THIRTEENTH AFFIRMATIVE DEFENSE

(Lack of Capacity)

23. Petitioners lack capacity to sue and defend.

FOURTEENTH AFFIRMATIVE DEFENSE

(Failure to Mitigate)

24. Real Party is informed and believes and thereon alleges that Petitioner has failed, refused, or neglected to reasonably mitigate Petitioner's damages, which bars or diminishes any recovery herein by Petitioner.

FIFTEENTH AFFIRMATIVE DEFENSE

(Reservation of Rights)

25. Real Party reserves the right to assert any additional affirmative defenses as may

be applicable to this action.

PRAYER FOR RELIEF

WHEREFORE, Real Party denies that any relief for or on behalf of Petitioner is appropriate, and Real Party prays for:

1. Judgment dismissing the Petition;
2. Costs and attorneys' fees to be awarded to the City and Real Party; and
3. Such other and further relief as the Court may deem appropriate.

Dated: January 30, 2018

Respectfully submitted,

LATHAM & WATKINS LLP
Christopher W. Garrett
Jennifer K. Roy
Samantha K. Seikkula

By _____
Christopher W. Garrett

Attorneys for Real Party in Interest
Torrey Pacific Corporation

VERIFICATION

I, Brian Staver, am a representative of Torrey Pacific Corporation ("Real Party"), and am authorized to make this verification for and on behalf of Torrey Pacific Corporation. I have read the foregoing REAL PARTY IN INTEREST'S VERIFIED ANSWER TO PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS ("Verified Answer"). The facts alleged in the foregoing Verified Answer are true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe them to be true. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this 29 th day of January, 2018, at San Diego, California.

Brian Staver

PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 12670 High Bluff Drive, San Diego, CA 92130.

On **January 30, 2018**, I served the following document described as:

REAL PARTY IN INTEREST TORREY PACIFIC CORPORATION'S VERIFIED ANSWER TO PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS

BY OVERNIGHT MAIL DELIVERY

I am familiar with the office practice of Latham & Watkins LLP for collecting and processing documents for overnight mail delivery by Federal Express. Under that practice, documents are deposited with the Latham & Watkins LLP personnel responsible for depositing documents in a post office, mailbox, subpost office, substation, mail chute, or other like facility regularly maintained for receipt of overnight mail by Federal Express; such documents are delivered for overnight mail delivery by Federal Express on that same day in the ordinary course of business, with delivery fees thereon fully prepaid and/or provided for. I deposited in Latham & Watkins LLP's interoffice mail a sealed envelope or package containing the above-described document and addressed as set forth below in accordance with the office practice of Latham & Watkins LLP for collecting and processing documents for overnight mail delivery by Federal Express:

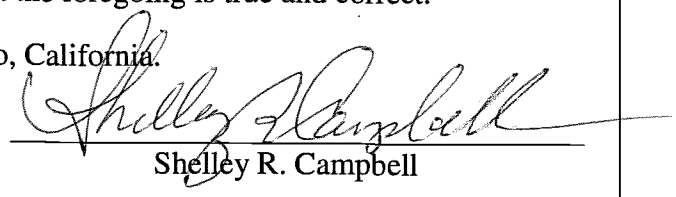
Mark C. Mazzarella *mark@mazzarellalaw.com* Rebecca L. Reed *rebecca@mazzarellalaw.com* MAZZARELLA & MAZZARELLA LLP 1620 Fifth Avenue, Suite 600 San Diego, California 92101	Attorneys for Petitioners Shirli Fabbri Weiss Trustee Shirli Fabbri Weiss Trust

William C. Pate
wpate@dpmclaw.com
Barry J. Schultz
bschultz@dpmclaw.com
Leslie E. Devaney
ldevaney@dpmclaw.com
DEVANEY PATE MORRIS & CAMERON LLP
402 W. Broadway, Suite 1300
San Diego, California 92101

Attorneys for Respondent
City of Del Mar

I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **January 30, 2018** at San Diego, California.



Shelley R. Campbell

US-DOCS\98208560

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
03/29/2018 at 11:27:00 AM
Clerk of the Superior Court
By Katelin O'Keefe, Deputy Clerk

MAZZARELLA & MAZZARELLA LLP
Mark C. Mazzarella (SBN 082494)
Daral B. Mazzarella (SBN 126864)
1620 Fifth Avenue, Suite 600
San Diego, California 92101
Telephone: (619) 238-4900
Facsimile: (619) 238-4959
Mark@mazzarellalaw.com

Attorneys for Petitioner
SHIRLI FABBRI WEISS TRUSTEE
SHIRLI WEISS FABBRI TRUST

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO - CENTRAL DIVISION

SHIRLI FABBRI WEISS, TRUSTEE, on behalf of the SHIRLI FABBRI WEISS TRUST, Petitioner, v. CITY OF DEL MAR and DOES 1 THROUGH 10, Respondents TORREY PACIFIC CORPORATION Real Party In-Interest	Case No. 37-2017-00034936-Cu-Wm-Ctl PETITIONER SHIRLI FABBRI WEISS' OBJECTIONS TO THE DECLARATION OF BRIAN STAVER FILED IN SUPPORT OF THE JOINT MOTION TO DISMISS VERIFIED PETITION FOR WRIT OF MANDAMUS Hearing Date: April 13, 2018 Time: 11:00 A.M. Department: C-70 Hon. Randa Trapp Action Filed September 19, 2017

Petitioner Shirli Fabbri Weiss, as Trustee of the Shirli Fabbri Weiss Trust ("Weiss"), hereby objects to and requests exclusion of the Declaration of Brian Staver ("Staver Declaration") submitted by Respondent City of Del Mar (the "City"), and Real Party In Interest Torrey Pacific Corporation ("Real Party") and (collectively "Movants") in Support of their Joint Motion to Dismiss Verified Petition for Writ of Mandamus on the following grounds:

1. The Declaration alleges facts irrelevant to the Motion and should be excluded under *Cal. Evid. Code* §210. The Declaration attempts improperly to put in evidence on a

motion to dismiss, Real Party's contentions and disputed version of facts that are irrelevant to the instant motion. The Motion presents an issue of law as to whether *CCP* §1094.6 (the statute of limitations expressly referenced in the View Ordinance at issue in the Petition), or that found in *Government Code* §65009 (which applies to zoning and certain land use such as housing projects), applies to the timing for seeking judicial review of the decision of the City on Weiss's application under the View Ordinance. The facts pertinent to the Motion to Dismiss are the date when the City issued its decision which Weiss challenges by the Complaint filed in this action, and the dates when the Complaint was filed and served. These facts are not in dispute and are subject to judicial notice. The merits of the Complaint are not at issue in this Motion, rather, as admitted (and then ignored) by Movants in their Footnote 1 of their moving brief, "....when a trial court considers a motion to dismiss a petition for writ of mandate, it assumes the truth of the petition's allegations" *Royalty Carpet Mills, Inc. v. City of Irvine* (2005) 125 *Cal App*. 4th , 1110, 1115. Therefore, any testimony or spin by Mr. Staver, an affiliate of Real Party, regarding the merits has no tendency to prove or disprove any disputed fact relevant to the motion, and therefore, should be excluded. *Cal. Evid. Code* §210.

2. The Declaration should be excluded pursuant to *California Evidence Code* §352. Considering the Staver Declaration at this stage is a waste of the court's time. The merits are not at issue at this stage, nor is Real Party's opinion of what happened, rather the Court must accept the assertions of the Verified Petition as true for purposes of the motion. The prior actions of the Planning Commission and City Council will be at issue in this merits of the case as well as the action and inaction of Real Party and its trimming and view blockage program. Real Party has transparently submitted the Staver Declaration solely to attempt to prejudice this court by implying that the issues raised in Weiss's Petition were resolved in a September 16, 2016 hearing on third party applications to which she was not a party, which did not involve her real estate

purchase and which did not receive any judicial review. Movants will have ample opportunity to attempt to justify the City's history of erroneous actions and Real Party's systematic blockage of its neighbor's scenic views .

However, were it relevant now, the Staver Declaration would demonstrate that Weiss was denied due process. As Movants admit, when denying Weiss the relief to which she is entitled under the View Ordinance, the City relied in significant part on decisions (also erroneous) it made in matters in which Weiss was not a party and which received no judicial review. The City cannot bootstrap its earlier erroneous decisions as a defense to the City's denial of Weiss' Application, especially using this Motion to Dismiss, which challenges only the timing of service of process under a statute which Weiss has shown is inapplicable to her Petition.

The Court should sustain Weiss's objection to the admission of the Staver Declaration.

Dated: March 29, 2018

MAZZARELLA & MAZZARELLA, LLP

Mark C Mazzarella, Esq.
Attorney for Petitioner Shirli Fabbri Weiss Trustee
Shirli Weiss Fabbri Trust

Superior Court of California,
County of San Diego
03/29/2018 at 11:27:00 AM
Clerk of the Superior Court
By Katelin O'Keefe, Deputy Clerk

Weiss v. City of Del Mar, et al.
San Diego Superior Court Case No. 37-2017-00034936-CU-Wm-CTL

PROOF OF SERVICE

I am employed in the county of San Diego, State of California. I am over the age of eighteen (18) years and am not a party to the within action; my business address is Mazzarella & Mazzarella, LLP, 1620 Fifth Avenue, Suite 600, San Diego, California 92101.

On **March 29, 2018**, I served the following document:

PETITIONER SHIRLI FABBRI WEISS' OPPOSITION TO THE JONT MOTION TO DISMISS VERIFIED PETITION FOR WRIT OF MANDATE;

PETITIONER SHIRLI FABBRI WEISS' OBJECTIONS TO THE DECLARATION OF BRIAN STAVER FILED IN SUPPORT OF THE JOINT MOTION TO DISMISS VERIFIED PETITION FOR WRIT OF MANDAMUS

on the parties in this action by placing a true copy thereof enclosed in a sealed envelope address as follows:

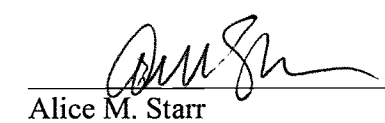
LATHAM & WATKINS, LLP
Christopher W. Garrett, Esq., Jennifer K. Roy, Esq., Samantha K. Seikkula, Esq.
12670 High Bluff Drive
San Diego, CA 92130
Attorneys for Real Party In-Interest Torrey Pacific Corporation

DEVANEY PATE MORRIS & CAMERON LLP
William C. Pate, Esq., Lesley A. Riis, Esq., Barry J. Schultz, Esq.
402 W. Broadway, Suite 1300
San Diego, CA 92101
Attorneys for Respondent City of Del Mar

_____ **By United States Mail.** I enclosed the document in a sealed envelope or package addressed to the persons at the addresses on the attached Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this Firm's business practice for collection 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.

XXX **By personal service (March 29, 2018).** I caused to be delivered such envelope by hand to the offices of the addressee(s) shown above.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **March 29, 2018**, at San Diego, California.



Alice M. Starr

MAZZARELLA & MAZZARELLA LLP
Mark C. Mazzarella (SBN 082494)
Rebecca L. Reed (SBN 275833)
1620 Fifth Avenue, Suite 600
San Diego, California 92101
Telephone: (619) 238-4900
Facsimile: (619) 238-4959
Mark@mazzarellalaw.com
Rebecca@mazzarellalaw.com

Attorneys for Petitioner

SHIRLI FABBRI WEISS TRUSTEE SHIRLI WEISS FABBRI TRUST

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
04/02/2018 at 08:00:00 AM
Clerk of the Superior Court
By Katelin O'Keefe, Deputy Clerk

SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO – CENTRAL DIVISION

SHIRLI FABBRI WEISS TRUSTEE, SHIRLI FABBRI WEISS TRUST, Petitioner and Plaintiff, vs. CITY OF DEL MAR and DOES 1 THROUGH 10, Respondents and Defendants. TORREY PACIFIC CORPORATION AND BRIAN STAVER, Real Parties-In-Interest	Case No.: **PETITIONER SHIRLI FABBRI WEISS' AMENDED OPPOSITION TO THE JOINT MOTION TO DISMISS VERFIEID PETITION FOR WRIT OF MANDAMUS WITH TABLE OF CONTENTS AND AUTHORITIES** Hearing Date: April 13, 2018 Time: 11:00 A.M. Department: C-70 Hon. Randa Trapp Action Filed September 19, 2017

TABLE OF CONTENTS

PAGE

I. INTRODUCTION 1

II. SUMMARY OF ARGUMENT 5

III. ARGUMENT 6

The City's Challenged Decision and the City's View Ordinance Have Nothing to Do With Planning, Zoning or Land Use 7

A. Sections 65009 and 65901 by their Express Terms Do Not Apply to this Case 7

PAGE

B. Section 65009 Only Applies to Zoning Ordinances that Come Before the Planning Commission or City Council When Sitting as Zoning Administrator 9

C. Defendant's Theory that Sections 65009 and 65901 Apply to Decisions Other Than Those Which Pertain to Planning and Zoning Finds No Support in Any Reported Case, and is Contracted by Many 11

D. Defendants' Contention Ignores the Provision in the DMMC which Expressly States that CCP §1096.4 Applies to Any Challenge to the City's Decisions Regarding the View Ordinance . . 14

IV. Conclusion 15

TABLE OF AUTHORITIES

CASES

PAGE

Arcadia Development Co. v. City of Morgan Hill (2008) 169 Cal.App.4th 253 . . . 13

County of Sonoma v. Superior Court (2010) 190 Cal.App.4th 1312, 118 Cal.Rptr.3d 915 11

Cumming v. City of Vernon (1989) 214 Cal. App.3d 921, 923 14

Garat v. City of Riverside (1991) 2 Cal. App. 4th 259, 289 12

Hensler v. City of Glendale, 8 Cal.4th 1 12

Morehart v. County of Santa Barbara (1994) 7 Cal. 4th 725, 743, fn. 11 12

People v. Johnson (2012) 53 Cal.4th 519, 528 136 Cal.Rptr.3d 54, 267 P.3d 1125 12

Save Our NTC, Inc. v. City of San Diego (2003) 105 Cal. App.4th 285 13

Stockton Citizens case, 210 Cal.App.4th at 1494, 1499 . . . . . 11, 15

Travis v. County of Santa Cruz (2004) 33 Cal.4th 757 16 Cal.Rptr.3d 404, 94 P.3d 538 . . . . . 11, 12, 13

PAGE

Wagner v. City of South Pasadena (2000) 78 Cal. App. 4th 943, 948-949 12

Western States Petroleum Assn. v. Superior Court (1995)
9 CalAth 559. 38 Cal. Rptr. 2d 139, 1995 3

STATUTES

PAGE

California Code of Civil Procedure §1094.6 ..... 4, 5, 6, 10, 14, 15

Government Code §65009 ..... 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

Government Code §65901 ..... 5, 7, 9 11, 12, 14, 15

Government Code §65903 ..... 9, 11, 12

Government Code §65906 9

ORDINANCES

PAGE

Del Mar Municipal Code - 51 DMMC §23.51 ..... 2, 3, 6, 14, 15

DMMC §2.34.040 10

DMMC Chptr 30 13

MAZZARELLA & MAZZARELLA LLP
Mark C. Mazzarella (SBN 082494)
Daral B. Mazzarella (SBN 126864)
1620 Fifth Avenue, Suite 600
San Diego, California 92101
Telephone: (619) 238-4900
Facsimile: (619) 238-4959
Mark@mazzarellalaw.com

Attorneys for Petitioner
SHIRLI FABBRI WEISS TRUSTEE
SHIRLI WEISS FABBRI TRUST

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO - CENTRAL DIVISION

SHIRLI FABBRI WEISS, TRUSTEE, on behalf of the SHIRLI FABBRI WEISS TRUST, Petitioner, v. CITY OF DEL MAR and DOES 1 THROUGH 10, Respondents TORREY PACIFIC CORPORATION Real Party In-Interest	Case No. 37-2017-00034936-Cu-Wm-Ctl PETITIONER SHIRLI FABBRI WEISS' AMENDED OPPOSITION TO THE JOINT MOTION TO DISMISS VERIFIED PETITION FOR WRIT OF MANDAMUS WITH TABLE OF CONTENTS AND TABLE OF AUTHORITIES Hearing Date: April 13, 2018 Time: 11:00 A.M. Department: C-70 Hon. Randa Trapp Action Filed September 19, 2017

I. INTRODUCTION

In November 2014, Petitioner Shirli Weiss as Trustee of the Shirli Weiss Trust ("Weiss" or "Petitioner"), purchased a condominium property with a scenic ocean view in a complex in Del Mar, California. The property enjoyed an ocean view from the primary living area, looking to the south through a large opening in a line of trees and other vegetation maintained by the property owner just to the south, Real Party In Interest, Torrey Pacific Corporation ("Real Party" or "Torrey"). Torrey is a development corporation owned by the Staver family, one of Del Mar's long-time and influential families with historic ties to Del Mar's City government. ("the Staver

Family"). As would be expected, the ocean view was essential to Weiss' decision to buy the condo, and was reflected in the price she paid.

In some California jurisdictions, homeowners have no right to scenic views absent CC&Rs or some other agreement. But, other jurisdictions, and specifically the City of Del Mar ("the City"), take an entirely different approach. The City recognizes that among the reasons people choose to live in Del Mar is its proximity to, and view of, the Pacific Ocean; and it has taken steps to empower residents to protect their views from neighbors who seek to block them with overgrown vegetation. The City's commitment is shown in its *Trees, Scenic Views & Sunlight Ordinance* adopted as Chapter 23.51 to the *Del Mar Municipal Code* by the City ("the View Ordinance" or "DMMC §23.51"), which begins:

> "23.51.010 Purpose. [Ord. 747, 780]
>
> A. The City recognizes that Trees, Scenic Views and plentiful Sunlight contribute to the special character of Del Mar and to the overall quality of life enjoyed by residents, property owners, and visitors in Del Mar. . . .
>
> "E. **The purpose of this chapter is to acknowledge the benefits derived from Trees, Scenic Views and plentiful Sunlight and to balance the goal of maintaining each of them when possible.** This chapter also provides a process by which persons may seek to restore Scenic Views and/or Sunlight that has been unreasonably obstructed by the growth and/or installation of Trees and Vegetation." [Emphasis added.]

The rights Weiss has to the restoration and preservation of her ocean view are found in DMMC §23.51.030, which provides:

> "23.51.030 Rights Established.
>
> A. A person shall have the right to seek **restoration and preservation** of Scenic Views or Sunlight **that existed at the time they purchased or occupied a property or in the last ten years, whichever is shorter,** when such Scenic Views from the Primary Living Area, or Sunlight available to the Primary Living Area or solar energy system of a residence, **have subsequently been unreasonably obstructed by the growth of Trees or Vegetation** located within the Del Mar City limits and 300 feet of the Applicant's property boundary."

When Weiss moved into her condo in early January 2015, her white water ocean view was visible through the large opening in Real Party's tree line. The trees and vegetation had been neatly trimmed in November, 2014, shortly before Weiss's purchase. As time passed, and the vegetation grew, Real Party failed to trim the vegetation in the gap and Weiss lost her white water

view entirely, and any ocean view was severely impaired.[1] Prior to filing her Application with the City to enforce her rights under the View Ordinance, Weiss requested mediation of the dispute as provided in Section 23.51.040 (B) (3). Real Party refused to mediate, forcing Weiss to pay the $4,780 fee to file her Application.

On August 30, 2017, Weiss filed her Application with the City in accordance with the View Ordinance in which she sought to have the City compel Real Party to restore and maintain, at Weiss' expense, the trees and vegetation framing her ocean view in the condition it was in when Weiss bought her home. She sought both "**restoration and preservation** of Scenic Views or Sunlight **that existed at the time [she] purchased or occupied a property**. . . ."

Notwithstanding the clear language and spirit of the View Ordinance and the evidentiary showing at the hearings, Weiss' Application was denied, first in a split 3-2 decision by the City's Planning Commission on April 11, 2017, and then in a 2-2 tie decision by the City Council on July 17, 2017. Weiss asserts in this action that the majority of the members of the Planning Commission and the two members of the City Council who voted against her application, misapplied the View Ordinance, and that the decisions of the Planning Commission and the City Council were contrary to the law, not supported by the evidence, were arbitrary and capricious and resulted in a denial of Weiss' constitutional right to due process. The City's refusal to act has permitted Real Party to maintain a virtually solid wall of vegetation over 20 feet high which blocks the ocean view Weiss had to the south of her property, in violation of her rights.

Weiss filed this action on September 19, 2017. Notices of acknowledgment of receipt of service were executed by Real Party and the City on December 19, 2017.

The only issue before the Court now is: Whether the applicable statute of limitations to Weiss's application is contained in *California Code of Civil Procedure* §1094.6 which applies to

[1] In its purported "Statement of Facts," Real Party and the City improperly references the declaration of Real Party's affiliate, Brian Staver, the vehicle through which Real Party attempts to put into evidence testimonynto try to justify the City's repeated failure to enforce its Ordinance, that is both irrelevant to this motion and strongly disputed. Among other things, the statements of Staver as well as the validity of the City's actions taken at its September 13, 2016 hearing are part of the dispute, and in any event the errors made by the City in its September 13, 2016 hearing on the applications of others have no binding effect on Weiss's separate application to the City, which is based on the view that she had when purchasing and occupying her Del Mar property. The Staver declaration is also outside the record in the case. Subject to very limited exemption not relevant here, a Writ of Mandate must be based on the record before the agency. *Western States Petroleum Assn. v. Superior Court* [(1995) 9 CalAth 559. 38 Cal. Rptr. 2d 139, 1995 For all these reasons, Weiss objects to the Staver declaration and it should be and stricken and disregarded.

"judicial review of the decision of a local government agency," or in *Government Code* §65009 (c)(1).. The City denied Weiss's Application on a 2-2 tie on July 17, 2017 (City Council member Terry ____ recusing himself); She filed her Petition on September 19, 2017 and acknowledgments of receipt of service were executed by Real Party and the City on December 19, 2017. Weiss contends that the applicable statute of limitations is contained in *California Code of Civil Procedure* §1094.6 which applies to "judicial review of the decision of a local government agency," such as Weiss seeks in this action. (*CCP* §1094.6). Real Party and the City do not dispute that Weiss filed her Petition within the time mandated by Section1094.6, and that section notably does not contain a limitation on service. Instead they contend *CCP* § 1094.6 does not apply, and seek to apply the statute of limitations contained in the ***California Zoning & Planning Code***, *Government Code* §65009(c)(1) , which requires a petitioner to both file and serve the City within ninety (90) days of the City's issuance of its challenged decision.

As discussed below, the City's *Municipal Code*, expressly states that a challenge to the View Ordinance is governed by *CCP* §1094.6. In contrast, the ninety (90) day statute of limitations in the *Zoning & Planning Code* on filing and service was adopted for a singular, and very limited purpose, as stated by the Legislature in *Government Code* §65009 (a) (1): "The legislature finds and declares that there currently is a housing crisis in California and it is essential to reduce delays and restraints upon ***expeditiously completing housing projects."*** [Emphasis added.] Given that its stated ***purpose*** is to reduce delay ***in completing new housing projects to ease the housing crisis***, it is not surprising that Section 65009 expressly limits its ***application*** to decisions which must be made by a local agency ***when approving new projects,*** and ***only*** those decisions. It has no application to a dispute between neighbors over obstruction of the view of the ocean from an existing home by a neighbor's overgrowth of vegetation.

Real Party and the City argue in effect that the exception for new projects in Section 65009 has both consumed the rule stated in Section 1094.6 and superseded and rendered null, the Municipal Code's express adoption of Section 1094.6 as applicable to petitions for judicial review of decisions under the View Ordinance . In what is a strained and misguided, albeit creative argument, they would have the ninety (90) day limitation on service of a complaint and the dismissal penalty contained in *Government Code* §§65009 and 65901apply to ***any decision*** by the City with regard to ***any and every ordinance*** covering the spectrum from signage in a strip mall center to washing cars with a garden hose. Such an interpretation not only defies common sense, it is directly contrary to the language of *Government Code* §§65009 and 65901, has no support in the authorities, contradicts the City's *Municipal Code*, which expressly states that the View Ordinance is governed by *CCP* §1094.6, and should be rejected summarily.

II. SUMMARY OF ARGUMENT

California Code of Civil Procedure §1094.6 establishes time limits for judicial review of the decision of a local government agency such as Weiss' action. Section 1094.6 requires a Complaint to be filed "not later than the 90th day following the date on which the decision [of the agency] becomes final" [§1094.6, subd. (b)]. However, if a petitioner files a request for preparation of the administrative record "within 10 days after the date the decision becomes final," the time to file the Complaint is extended "to not later than the 30th day following the date on which the record is either personally delivered or mailed to the petitioner or his attorney of record . . . ." [§1094.6, subd. (d)]. The City has not yet prepared the record. Section 1094.6 has no special provision regarding service of the Complaint. Therefore, Weiss has filed and served her Petition timely pursuant to *CCP* §1094.6.

The City and Real Party do not claim that Weiss has not filed the Petition in compliance with the time limits imposed by *Code of Civil Procedure* §1094.6 . Rather, they claim that this

action is governed instead by the ***California Zoning & Planning Code***, *Government Code* §65009(c)(1), which requires the agency to be ***served*** with the Complaint within ninety (90) days of the agency's challenged decision. This is the only challenge to the petition made by the Motion.For the reasons discussed below, **the *Zoning & Planning Code*** does not apply since the challenged decision has no more to do with "zoning or planning" than a citywide no-smoking ordinance, or an ordinance that requires dogs to be on a leash. The *Zoning & Planning Code* statute of limitations does not apply to this case. This is conclusively shown by the View Ordinance itself, which states:

> "23.51.100 Appeal. The decision of the Planning Commission may be appealed to the City Council pursuant to this Code. ***The provisions of Section 1094.6 of the California Code of Civil Procedure are applicable to judicial review of the City of Del Mar's decisions pursuant to this Chapter***. [Ord.780]" [Emphasis added.]

III. ARGUMENT

Real Party and the City know Section 65009, and its 90 day file and service limitation period, only apply to decisions which impact the approvals required for new housing projects; so they have erroneously characterized the City's denial of Petitioner's Application generally as a land use or zoning decision. But whether or not Real Party's existing trees are blocking the view from Weiss' existing condo, in violation of an ordinance ***that applies equally to every parcel in the City, and to every existing home***, has absolutely nothing to do with the type of building development, "land use" or planning addressed by the Government Code statute..

The fact that the Legislature's concerns about delaying future housing development has nothing to do with the View Ordinance is obvious. The View Ordinance looks to the past to determine the views to which a homeowner is entitled to have restored and preserved in the future. Neither the City nor Real Party ever contended that housing development would be delayed by enforcement of the View Ordinance.

The City's Challenged Decision and the City's View Ordinance Have Nothing To Do With Planning, Zoning or Land Use

As is clear from a reading of the View Ordinance, it is not a "land use or zoning ordinance" s the terms are used in the Government Code... It pertains to views from existing structures blocked by vegetation. Not surprisingly, the View Ordinance is not contained in Article 30 of the *Del Mar Municipal Code* which is where zoning and land use regulations are found.

The purpose of the View Ordinance is stated in DMMC §23.51.003 (E), which provides: "The purpose of this chapter is to acknowledge the benefits derived from Trees, Scenic Views and plentiful Sunlight and to balance the goal of maintaining each of them when possible." The View Ordinance has absolutely nothing to do with the land use and zoning decisions listed in Sections 65009 and 65901. It neither furthers the purpose of Section 65009; nor does it fall within any of the categories to which Section 65009, by its express terms, applies.

A. Sections 65009 and 65901 by their Express Terms Do Not Apply to this Case

, Defendants argue: "The Legislature's express goal in enacting *Government Code* §65009 was to provide "certainty for property owners and local governments and to alleviate the chilling effect created by potential legal challenges. . . ," citing *Okasaki v. City of Elk Grove* (2012) 203 Cal.App.4th at 1048. (Motion to Dismiss, page 11, lines 1-4) But Defendants fail to note that the Okasaki court added, *id.*: "Our holding merely reinforces the Legislative intent **that a challenge to certain local zoning or planning decisions** must be filed and served quickly to provide certainty for property owners and local governments. [Emphasis added.]

Section 65009 shortens the time to serve a petition for writ of mandate to ninety (90) days **in very limited and very specific situations**. Defendants avoided quoting the dispositive portions of Section 65009. Petitioner will, beginning with Section 65009(a), which reads:

(a) (1) The Legislature finds and declares that there currently is a housing crisis in California and it is essential to reduce delays and restraints upon **expeditiously completing housing projects**.

(2) The Legislature further finds and declares that a legal action or proceeding challenging a decision of a city, county, or city and county **has a chilling effect on the confidence with which property owners and local governments can proceed with projects.** Legal actions or proceedings filed to attack, review, set aside, void, or annul a decision of a city, county, or city and county **pursuant to this division**, including, but not limited to, the implementation of general plan goals and policies that provide incentives for affordable housing, open-space and recreational opportunities, and other related public benefits, **can prevent the completion of needed developments even though the projects have received required governmental approvals.**

(3) The purpose of this section is to provide certainty for property owners and local governments **regarding decisions made pursuant to this division**." [Emphasis added.]

The reason for the shortened time to serve a Petition for Writ of Mandamus in Section 65009 could not be more clearly expressed—to speed up the process from approval to completion of building **projects which are in the planning stage**. Section 65009 clearly does not apply to a dispute between owners of existing homes over their views of the ocean.

Section 65009(c)(1)(A) through(F) identifies the categories of decisions to which Section 65009 **does** apply:

(c) (1) Except as provided in subdivision (d)[Which pertains to development agreements], **no action or proceeding shall be maintained in any of the following cases by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body's decision:**

(A) To attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a **general or specific plan.** This paragraph does not apply where an action is brought based upon the complete absence of a general plan or a mandatory element thereof, but does apply to an action attacking a general plan or mandatory element thereof on the basis that it is inadequate.

(B) To attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a **zoning ordinance**.

(C) To determine the reasonableness, legality, or validity of any decision to adopt or amend any regulation attached to a **specific plan**.

(D) To attack, review, set aside, void, or annul the decision of a legislative body to adopt, amend, or modify a **development agreement.** An action or proceeding to attack, review, set aside, void, or annul the decisions of a legislative body to adopt, amend, or modify a development agreement shall only extend to the specific portion of the development agreement that is the subject of the adoption, amendment, or modification. This paragraph applies to development agreements, amendments, and modifications adopted on or after January 1, 1996.

(E) To attack, review, set aside, void, or annul any decision on **the matters listed in Sections 65901 and 65903,** or to determine the reasonableness, legality, or validity of any condition attached to a **variance, conditional use permit, or any other permit. [Emphasis added.]**

(F) Concerning any of the proceedings, acts, or determinations taken, done, or made prior to any of the decisions listed in subparagraphs (A), (B), (C), (D), and (E)."

Section 65009(c)(1)(a) through(F) identify the zoning and land use decisions to which the 90 day time limit applies. Prolonged litigation over an agency's decisions regarding general and specific plans, zoning ordinances, development agreements, variances, and conditional use permits would "**prevent the completion of needed developments,**" which is what Section 65009 is intended to avoid. Pursuant to Section 65009(c)(1)(E), the 90 day time limit also applies to the matters listed in Sections 65901 and 65903.

Section 65901, **which pertains to zoning decisions**, reads:

"(a) The board of **zoning** adjustment or **zoning** administrator shall hear and decide applications for **conditional uses or other permits when the zoning ordinance provides therefor** and establishes criteria for determining those matters, and applications for **variances from the terms of the zoning ordinance**. The board of **zoning** adjustment or the **zoning** administrator may also exercise any other powers granted by local ordinance, and may adopt all rules and procedures necessary or convenient for the conduct of the board's or administrator's business.

(b) In accordance with the **requirements for variances** specified in Section 65906, the legislative body of the city or county may, by ordinance, authorize the board of zoning adjustment or zoning administrator to decide **applications for variance** from the terms of the **zoning ordinance** without a public hearing on the application. That ordinance shall specify the kinds of variances which may be granted by the board of **zoning adjustment** or **zoning** administrator, and the extent of variation which the board of **zoning adjustment** or **zoning** administrator may allow. [Emphasis added.]

Section 65901, like Section 65009, by its clear and unambiguous terms, applies only to zoning decisions. Section 65903 pertains to appeals from zoning decisions. Neither have any application to view disputes between neighbors.

B. <u>Section 65009 Only Applies to Zoning Ordinances that Come Before the Planning Commission or City Council When Sitting as Zoning Administrator.</u>

Defendants argue that the Planning Commission and on appeal, the City Council, can sit

as Zoning Administrator, and then urges the court to make the giant leap that therefore any ordinance that comes before it is governed by Section 65009. The language of Section 65009 and 65901 does not support the sweeping conclusion that since the City can sit as the Zoning Administrator, ***any*** ordinance that comes before it is subject to Section 65009's 90 day service time limit, whether or not it has anything to do with section 65009, including whether it impact how quickly new projects get built. Assuming the Planning Commission and City act as the Zoning Administrator when dealing with zoning issues, that does not mean the they act as Zoning Administrator when dealing with all issues.

In contrast, the DMMC expressly states that Section 1094.6 governs any judicial review of the City's decisions relative to the View Ordinance. Defendants also ignore the fact that the Planning Commission can be asked by the City Council to decide issues other than zoning and planning.

The Duties of the Planning Commission are listed in DMMC §2.34.040, which reads:

> "The Planning Commission shall perform such duties as may be specified by ordinance, by resolution of the City Council or by the laws of the State of California. Further, the Planning Commission shall study and report to the City Council upon any matter referred to it by the City Council and shall keep the City Council currently advised of all matters pending, and shall furnish any specific information, reports or materials which the City Council may request."

The language in Section 65901(a) upon which Defendants' rely is: "The board of zoning adjustment or the zoning administrator may also exercise any other powers granted by local ordinance. . . ." Clearly the Planning Commission can and does function in capacities other than "planning." Resolving disputes between property owners over scenic views from existing homes does not involve "planning" within the statute. Section 65009 applies to the categories of "decisions" which impact real estate development, not the "decision makers." It makes no difference whether a Director of Planning, a Planning Commission, or a City Council makes the challenged decision. What matters is whether the decision pertains to planning and zoning as those terms are used in the statute.

Section 65901 clearly applies only to zoning. It uses the word "zoning" twelve times. Reliance on a few words extracted from the middle of a sea of "zoning" references is creative at best and intentionally misleading at worst. If Defendants' interpretation of Sections 65009 and 65901 were adopted, the 90 day service rule would apply equally to petitions for judicial review of non-smoking ordinances and ordinances prohibiting skateboards on the sidewalk if the City asked the Planning Commission to handle them, even though they would not have any impact on how quickly developers get their housing projects from approval to move-in, which is the stated purpose of Section 65009.

C. **Defendant's Theory that Sections 65009 and 65901 Apply to Decisions Other Than Those Which Pertain to Planning and Zoning Finds No Support in Any Reported Case, and is Contracted by Many**

Not a single reported decision supports Defendants' argument. Defendants cite the *Stockton Citizens* case, 210 Cal.App.4th at 1494, 1499, for the proposition that: "Pursuant to *Government Code* §65901, **the 'zoning administrator' may also exercise any other powers granted by local ordinance, and is not limited to pure 'zoning-related issues."** [Emphasis added.] (Motion to Dismiss, page 10, lines 7-9). The *Stockton Citizens* case is the only authority cited by Defendants in support of the contention that Sections 65009 and 65901 apply to issues that have nothing to do with zoning, such as the View Ordinance. However, the *Stockton Citizens* case does not stand for the proposition for which it is cited. The relevant discussion on page 1494 of the Court's opinion reads:

> "Contrary to plaintiffs' assertion, neither *County of Sonoma v. Superior Court* (2010) 190 Cal.App.4th 1312 [118 Cal.Rptr.3d 915] (*County of Sonoma*) nor *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757 [16 Cal.Rptr.3d 404, 94 P.3d 538] (*Travis*) hold that section 65009, subdivision (c)(1)(E), is limited to challenges concerning "agency action on variances and permits." In *County of Sonoma,* the court stated, "The case before us does *not* involve `any decision on the matters listed in Sections 65901 and 65903 ....' (§ 65009, subd. (c)(1)(E).) **Section 65901 concerns decisions by boards of zoning adjustment or zoning administrators on applications for permits or variances."** (*County of Sonoma, supra,* 190 Cal.App.4th at p. 1320, fn. 6, italics added.) Because section 65901's scope was not before the court in *County of Sonoma,* plaintiffs' reliance on

that case for the proposition that section 65901 is limited to actions on variances and permits is misplaced. (See *People v. Johnson* (2012) 53 Cal.4th 519, 528 [136 Cal.Rptr.3d 54, 267 P.3d 1125] ["`"[C]ases are not authority for propositions not considered."`"].) *Travis* involved an action to determine the validity of certain permit conditions, and likewise did not consider the scope of section 65901. (*Travis, supra,* 33 Cal.4th at p. 766.) **Accordingly, the court's statement in a footnote that "Government Code sections 65901 and 65903 provide for hearing and decision on, and administrative appeals concerning, applications for variances, conditional use permits, and other permits" (*id.* at p. 766, fn. 2) cannot be interpreted as limiting the scope of those sections as urged by plaintiffs."** [Emphasis added.]

In the *Stockton Citizens* case the decisions that were challenged pertained to the approvals for the building of a new Walmart store— classic land use decisions. The issue in the *Stockton Citizens* case was whether a letter from the City's Director of Community Development was a "decision by the City" which was sufficient to start the 90 day clock running. Any suggestion that the *Stockton Citizens* case supports the Defendants' Motion has no merit whatsoever.

There are **no** reported decisions which support Defendants' interpretation of Section 65009 and 65901; but there are many that contradict it. Among the many cases that contradict the City's and Real Party's argument is *Travis vs. County of Santa Cruz* (2002) 100 Cal.App.4th 613. In *Travis* the court accepted the Petitioner's contention that ". . . the statute, by its express terms, applies to a local legislative body's **decision to adopt or amend a zoning ordinance.**

(§65009, subd. (c)(1)(B)." *Id*, at page 625. [Emphasis added.] At page 623, the Court adds:

"In *Hensler*, the California Supreme Court concluded that section 65009 is the proper limitations statute where a party's "challenge is to the facial validity of **a land-use regulation**
. . . ." (*Hensler*, supra, 8 Cal.4th at p. 22.)
. . .
The purpose of such "relatively short limitation periods for . . . actions which challenge the validity of land use statutes, regulations, and/or decisions, is to permit and **promote sound fiscal planning by state and local governmental entities." (*Hensler, supra*, 8 Cal.4th at p. 27.)** More specifically, with respect to section 65009, its purpose is "to provide certainty for property owners and local governments **regarding decisions made pursuant to this division."** (§65009, subd. (a)(3). See, *Wagner v. City of South Pasadena* (2000) 78 Cal. App. 4th 943, 948-949; *Garat v. City of Riverside* (1991) 2 Cal. App. 4th 259, 289, disapproved on other grounds in *Morehart v. County of Santa Barbara* (1994) 7 Cal. 4th 725, 743, fn. 11.) [Emphasis added.]"

In *Arcadia Development Co. v. City of Morgan Hill* (2008) 169 Cal.App.4th 253, the Court again interpreted Section 65009 to apply only to zoning ordinances. "The parties agree that the instant action is governed by Section 65009, subdivision (c)(1)(B), which provides a 90 day statute of limitations for facial challenges **to a zoning ordinance."** [Emphasis added.] The *Del Mar Municipal Code*'s zoning ordinances are contained within Chapter 30, appropriately titled "Zoning," not in Chapter 23. The view ordinance is not a zoning ordinance.

The Court in *Arcadia* added:

> "Section 65009 imposes a relatively short statute of limitations on legal challenges to local land use decisions. (§65009, subd. (a)(2).) It does so in order to " 'provide certainty for property owners and local governments regarding decisions made pursuant to this division' (§65009, subd. (a)(3)) and thus to alleviate the 'chilling effect on the confidence with which property owners and local governments **can proceed with projects'** (*id.*, subd. (a)(2))." (*Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 765.)" [Emphsis added.]

In *Save Our NTC, Inc. v. City of San Diego* (2003) 105 Cal. App.4th 285, the Court noted: "SONTC argues that section 65009, subdivision (c)(1) does not apply to this action because it is not challenging a local decision adopting or amending a zoning ordinance, but rather attacking the City's failure to apply Proposition D to the surplus NTC property." The Court acknowledged that for Section 65009 to apply, a zoning ordinance—not just any ordinance—had to be challenged. In finding that a zoning ordinance was involved, and therefore Section 65009 applied, the Court wrote:

> "However, in arguing that Proposition D applies to the surplus property, SONTC also challenges the City's **zoning** decisions relating to the redevelopment site that were inconsistent with Proposition D. SONTC contends that this is not so because Proposition D is an "**overlay zone**" that applies in addition to, rather than instead of, the underlying **zoning** designations. However, under the circumstances presented, SONTC's argument is unavailing. Prior to the adoption of **the new base zoning ordinances**, the City developed the Reuse Plan, which called for the construction of structures in excess of the Proposition D height limitation and certified its mitigated negative declaration stating that Proposition D was inapplicable to the property. Thereafter, the City specifically adopted a new base **zoning** ordinance for the surplus NTC property that allowed building in excess of the height limitation and did not amend the Proposition D ordinance to incorporate the surplus

NTC property upon transfer from the federal government, as it did with other overlay **zoning** ordinances. **It is these decisions relating to the zoning of the surplus NTC property that provide the basis for this action."** [Emphasis added.]

There is a reason each and every reported decision that discusses the application of Sections 65009 and 65901 states in one way or another that Section 65009 applies only to planning and zoning ordinances. That is what the statute says—clearly and unambiguously. The View Ordinance is not a zoning ordinance. Any definition of "zoning" in any legal dictionary, statute or court opinion will describe one common characteristic—the application of different rules to different "zones" within a jurisdiction. The View Ordinance applies equally in all zones within the City of Del Mar, and equally to all parcels within various zones.

While there is no question that Section 65901 does not apply, were there one, any question regarding whether a statute of limitations more limited than that provided in Section 1094.6 is applicable must be decided in favor of the longer statute of limitation. As noted in *Cumming v. City of Vernon* (1989) 214 Cal. App.3d 921, 923: "Since the application of section 1094.6 drastically reduces the statute of limitations, we should avoid an interpretation which shortens the period even further."

D. <u>Defendants' Contention Ignores the Provision in the DMMC which Expressly States that *CCP* §1096.4 Applies to Any Challenge to the City's Decisions Regarding the View Ordinance</u>

Defendants' argument relies upon the extraction of a few words and their misleading application out of context and in a manner contrary to the rest of the statute. Defendants' interpretation is contrary to that given Sections 65009 and 65901 by every California Court that has addressed the issue, including the California Supreme Court and the Court of Appeal to which his case would be appealed. In addition, and perhaps most notably, Defendants have completely and conveniently ignored *Del Mar Municipal Code* §23.51.100, which provides:

"23.51.100 Appeal. The decision of the Planning Commission may be appealed to the City Council pursuant to this Code. **The provisions of Section 1094.6 of the California Code of Civil Procedure are applicable to judicial review of the City of Del Mar's decisions pursuant to this Chapter. [Ord.780]"** [Emphasis added.]

Thus DMMC 23.51.100 is defendant City's unequivocal statement to its residents of Del Mar that Section 1094.6 of the California Code of Civil Procedure is the limitations statute that applies to judicial review of decisions made under the View Ordinance, and that statute does not contain a limitation on service.

IV. CONCLUSION

Defendants' Motion must be denied for each of the following reasons.

First, the *Del Mar Municipal Code* expressly provides that any appeal involving the View Ordinance is governed by *CCP* §1094.6, a fact that the City and Real Party failed to bring to the Court's attention, or attempt to distinguish. That statute does not contain a limitation on service.

Second, on its face *Government Code* §65009 applies only to decisions pertaining to land use, zoning and permits issued in the development process. The View Ordinance has nothing to do with land use, zoning or permits, notwithstanding Defendant's mischaracterization of Weiss' action as a challenge of the City's "land use decision."

Third, any question regarding the meaning of the words used in Sections 65009 and 65901 must be resolved in light of the stated purpose for the 90 day service limitation—to speed up **new building** development. This case has nothing to do with new development.

Fourth, the only case Defendants cite to support their theory, *Stockton Citizens*, does not stand for the proposition claimed. Rather, all of the decisional authority, including the *Stockton Citizens* case, contradicts Defendants' interpretation of Sections 65009 and 65901. Every case that has applied Sections 65009 and 65901 has been a land use or zoning case.

March 30, 2018

MAZZARELLA & MAZZARELLA, LLP

Mark C. Mazzarella, Attorney for Petitioner

County of San Diego
04/02/2018 at 08:00:00 AM
Clerk of the Superior Court
By Katelin O'Keefe,Deputy Clerk

Weiss v. City of Del Mar, et al.
San Diego Superior Court Case No. 37-2017-00034936-CU-Wm-CTL

PROOF OF SERVICE

I am employed in the county of San Diego, State of California. I am over the age of eighteen (18) years and am not a party to the within action; my business address is Mazzarella & Mazzarella, LLP, 1620 Fifth Avenue, Suite 600, San Diego, California 92101.

On **March 30, 2018,** I served the following document:

PETITIONER SHIRLI FABBRI WEISS' AMENDED OPPOSITION TO THE JOINT MOTION TO DISMISS VERIFIED PETITION FOR WRIT OF MANDATE WITH TABLE OF CONTENTS AND AUTHORITIES;

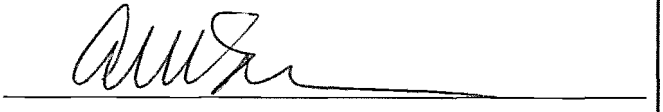
on the parties in this action by placing a true copy thereof enclosed in a sealed envelope address as follows:

LATHAM & WATKINS, LLP
Christopher W. Garrett, Esq., Jennifer K. Roy, Esq., Samantha K. Seikkula, Esq.
12670 High Bluff Drive
San Diego, CA 92130
Attorneys for Real Party In-Interest Torrey Pacific Corporation

DEVANEY PATE MORRIS & CAMERON LLP
William C. Pate, Esq., Lesley A. Riis, Esq., Barry J. Schultz, Esq.
402 W. Broadway, Suite 1300
San Diego, CA 92101
Attorneys for Respondent City of Del Mar

XXX ___ By OVERNIGT DELIVERY VIA FEDERAL EXPRESS I enclosed the document in a sealed envelope or package addressed to the persons at the addresses on the attached Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this Firm's business practice for collection 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 Federal Express with fees fully paid for delivery on Monday, April 2, 2018.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **March 30, 2018,** at San Diego, California.



Alice Starr

LATHAM & WATKINS LLP
Christopher W. Garrett (SBN 100764)
christopher.garrett@lw.com
Jennifer K. Roy (SBN 281954)
jennifer.roy@lw.com
Samantha K. Seikkula (SBN 307827)
samantha.seikkula@lw.com
12670 High Bluff Drive
San Diego, California 92130
Telephone: +1.858.523.5400
Facsimile: +1.858.523.5450

Attorneys for Real Party In-Interest
Torrey Pacific Corporation

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO – CENTRAL DIVISION

SHIRLI FABBRI WEISS, TRUSTEE, on behalf of the SHIRLI FABBRI WEISS TRUST,

Petitioner,

v.

CITY OF DEL MAR and DOES 1 through 10,

Respondents.

TORREY PACIFIC CORPORATION

Real Party-In-Interest

CASE NO. 37-2017-00034936-CU-WM-CTL

[IMAGED FILE]

RESPONDENT CITY OF DEL MAR AND REAL PARTY IN INTEREST TORREY PACIFIC CORPORATION'S JOINT REPLY IN SUPPORT OF MOTION TO DISMISS

Hearing Date: April 13, 2018
Time: 11:00 a.m.
Dept.: C-70

Judge: Hon. Randa Trapp
Action Filed: September 19, 2017

TABLE OF CONTENTS

Page

I. INTRODUCTION 5

II. GOVERNMENT CODE SECTION 65009 REQUIRES DISMISSAL 6

A. Government Code Section 65009 Is Not Limited to Housing Projects 6

B. Courts Have Routinely Applied Section 65009 to a Broad Variety of Projects 7

C. The Scenic View Ordinance Is Related to Planning, Zoning, and Land Use Because It Affects Property Rights and Allowable Uses 9

D. The Planning Commissioner Is the City's Zoning Administrator for the Purposes of Government Code Sections 65901 and 65009 10

E. The Specific Provisions in Section 65009 Control Over the General Provisions of Code of Civil Procedure Section 1094.6 11

III. CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

CASES

Arcadia Development Co. v. City of Morgan Hill
(2008) 169 Cal.App.4th 253 7

Avenida San Juan Partnership v. City of San Clemente
(2011) 201 Cal.App.4th 1256 8

In re C.H.
(2011) 53 Cal.4th 94 11

Citizens for Beach Rights v. City of San Diego
(2017) 10 Cal.App.5th 1301 10

Cumming v. City of Vernon
(1989) 214 Cal.App.3d 921 12

Gonzalez v. County of Tulare
(1998) 65 Cal.App.4th 777 12

Honig v. San Francisco Planning Dept.
(2005) 127 Cal.App.4th 520 12

Okasaki v. City of Elk Grove
(2012) 203 Cal.App.4th 1043 ..... 12, 13

Royalty Carpet Mills, Inc. v. City of Irvine
(2005) 125 Cal.App.4th 1110 ..... 8, 11

Save Our NTC. Inc. v. City of San Diego
(2003) 105 Cal.App.4th 285 7

Stockton Citizens for Sensible Planning v. City of Stockton
(2012) 210 Cal.App.4th 1484 ..... 7, 8, 10

Travis v. County of Santa Cruz
(2002) 100 Cal.App.4th 613 7

Travis v. County of Santa Cruz
(2004) 33 Cal.4th 757 ..... 7, 8, 9

STATUTES

Code Civ. Proc.
§ 1094.6 ..... 6, 11, 12, 13
§ 1094.6(g) 11, 12

Gov. Code
§ 65009 ..... *passim*
§ 65009(c)(1) 5
§ 65009(c)(1)(B) 8
§ 65009(c)(1)(E) 8, 10
§ 65901 ..... 6, 8, 11
§ 65901(a) 7, 11
§ 65903 8

MUNICIPAL CODES

Del Mar Mun. Code
§ 2.34 10
§ 23.04.015 10
§ 23.08.10 10
§ 23.33.030 10
§ 23.51 ..... 5, 9
§ 23.51.100 ..... 11, 13
§ 30.01.020 10
§ 30.01.040 10

RULES

Cal. R. Ct. 3.110 13

Cal. R. Ct. 3.110(b) 13

OTHER AUTHORITIES

S.B. 497 7

I. INTRODUCTION

The Del Mar Planning Commission's decision to deny Petitioner Shirli Weiss' (as Trustee of the Shirli Fabbri Weiss Trust) ("Petitioner") application for relief pursuant to the Trees, Scenic Views, and Sunlight Ordinance[1] ("Ordinance") is fundamentally a land use decision. This decision directly impacts how Real Party in Interest Torrey Pacific Corporation ("Real Party") can physically use its property and the finality and certainty of the City of Del Mar's ("City") adjudicative land use determinations. Therefore, functioning as a zoning administrator, the Planning Commission's decision to deny Petitioner's application to force Real Party to cut or remove vegetation on its own property and cede a "view easement" to Petitioner triggers the service requirements of Government Code section 65009.

Section 65009 favors finality to allow property owners to make decisions regarding the use of their property and allow cities to effectively plan based on its prior decisions. Finality is particularly necessary in this case, where Real Party has been defending "view restoration" applications concerning the same vegetation for ***fifteen years***. (Declaration of Brian Staver in Support of Motion to Dismiss, ¶ 5.)

The particular application at issue in this lawsuit was filed in August 2016 and references events and proceedings dating back to 2014. (See e.g., Pet. ¶¶ 21, 22, 23, 25.) On July 17, 2017, the City Council held its final hearing on Petitioner's application, affirming the Planning Commission's denial. Petitioner filed this lawsuit on September 19, 2017, but did not serve the lawsuit on the City and Real Party until December 13, 2017—despite Government Code section 65009(c)(1)'s requirement that service be effectuated within 90 days of the challenged decision, i.e., on or before October 16, 2017. In addition, Petitioner has not yet approved of the record of proceedings the City provided in August 2017, nor does there appear to be any schedule for the pending case's resolution, despite the long lapse in time since the City's final decision. Section 65009 was drafted with the intent of avoiding such a long delay in proceedings to afford property owners and municipalities with certainty in the validity of their decisions. No such certainty can

[1] Set forth in Del Mar Municipal Code ("DMMC") Chapter 23.51.

be afforded if this matter is allowed to proceed contrary to the express language of section 65009.

Government Code section 65009 applies to this proceeding because Petitioner challenges an adjudicative land use determination by a zoning administrator. Petitioner's Amended Opposition to the Joint Motion to Dismiss ("Opp.") misconstrues the DMMC, existing caselaw, and the Government Code in an attempt to avoid section 65009's requirements. Petitioner's arguments fail for the following reasons:

- Section 65009 is not limited to housing projects or challenges to zoning ordinances. Section 65009 applies to zoning administrator decisions concerning powers granted by local ordinance, as set forth in Government Code section 65901.
- The Ordinance grants the Del Mar Planning Commission the power to decide view restoration applications; as such, the Planning Commission's decision on Petitioner's application falls squarely under section 65901—and thus, section 65009.
- The specific filing and service requirements in Government Code section 65009 control over the more general provisions in Code of Civil Procedure section 1094.6.

The City and Real Party respectfully request that the Court grant Respondent and Real Party's Joint Motion to Dismiss.

II. GOVERNMENT CODE SECTION 65009 REQUIRES DISMISSAL[2]

A. Government Code Section 65009 Is Not Limited to Housing Projects

Petitioner contends that Government Code section 65009 only applies to housing and new projects. (Opp. at 4.) ***Petitioner ignores the plain language of section 65009, which expressly applies to "any decision on the matters listed in Section[ ] 65901[.]"*** (Gov. Code § 65009.) Section 65901 provides in relevant part:

(a) The board of zoning adjustment or zoning administrator shall hear and decide

[2] As an initial matter, Petitioner contends that the Declaration of Brian Staver is inadmissible as extra-record testimony. To the contrary, the Staver Declaration provides necessary context to understand how Real Party's property rights have been impacted, and therefore should be admitted. Further, because no administrative record has been lodged (despite the City's delivery of the record to Petitioner over six months ago), administrative record citations are unavailable. (Declaration of Ashley Jones ("Jones Dec."), ¶¶ 3-5.) Moreover, the Petition itself references the September 13, 2016, decision regarding Real Party's trimming obligations. (Pet., ¶ 28.)

> applications for conditional uses or other permits when the zoning ordinance provides therefor and establishes criteria for determining those matters, and applications for variances from the terms of the zoning ordinance. The board of zoning adjustment or ***the zoning administrator may also exercise any other powers granted by local ordinance***, and may adopt all rules and procedures necessary or convenient for the conduct of the board's or administrator's business.
>
> (Gov. Code § 65901(a) [emphasis added].)

Further, the legislative history of section 65009 further supports section 65009's applicability to the instant action. In 1987, Senate Bill 497 amended section 65009 to remove references to "housing" and replace them with more generic references to "projects" or "development":

> Existing law specifies limitations on the time for commencing a legal action or proceeding to attack, review, set aside, void, or annul various planning and zoning actions and decisions of a local legislative body . . . Certain of the legislative findings and declarations included in these provisions relate only to housing projects. ***This bill would, instead, make certain of these legislative findings and declarations applicable to developments in general.***

(Joint Request for Judicial Notice ("RJN"), Ex. A at p. 6 [Senate Bill 497].) The Legislature did not intend for section 65009 to apply only to housing, and thus expanded its scope to include a broad range of development projects and land use decisions in order to provide certainty and finality to property owners and municipalities. (*Id.*)

B. Courts Have Routinely Applied Section 65009 to a Broad Variety of Projects

Petitioner asserts that section 65009 applies exclusively to zoning ordinances. But even Petitioner's cited cases do not support this claim. (See *Travis v. County of Santa Cruz* (2002) 100 Cal.App.4th 613, *Arcadia Development Co. v. City of Morgan Hill* (2008) 169 Cal.App.4th 253; *Save Our NTC. Inc. v. City of San Diego* (2003) 105 Cal.App.4th 285.)

First, the City and Real Party do not dispute that section 65009 applies to zoning decisions. While it is true that section 65009 does "provide a 90-day statute of limitations for facial challenges to a zoning ordinance," section 65009 also applies in a variety of other circumstances such as the grant or denial of building permits, conformity determinations in specific plan areas, and the adoption of development agreements, among others. (See e.g., *Travis*, *supra*, 33 Cal.4th at 765; *Stockton Citizens for Sensible Planning v. City of Stockton*

(2012) 210 Cal.App.4th 1484, 1492; *Royalty Carpet Mills, Inc. v. City of Irvine* (2005) 125 Cal.App.4th 1110 [conditional use permit].) Moreover, when seeking to distinguish *Stockton Citizens*, *supra*, 210 Cal.App.4th at 1494 by arguing that the case limited the application of section 65009, Petitioner instead highlights language to the exact opposite:

> [T]he court's statement in a footnote that Government Code sections 65901 and 65903 provide for hearing and decisions on, and administrative appeals concerning, applications for variances, conditional use permits, and other permits' . . . ***cannot be interpreted as limiting the scope of those sections as urged by plaintiffs.***

(*Id.* [emphasis added].) *Stockton Citizens* does not purport to limit the scope of Government Code sections 65901 and 65903 and therefore does not limit the application of section 65009 to Petitioner's challenge.

Second, Petitioner's cited cases involve an entirely separate subsection of section 65009, subsection (c)(1)(B), than the subsection upon which City and Real Party base this Motion to Dismiss, subsection (c)(1)(E).[3] Subsection (c)(1)(B) applies to "direct attacks on ordinances", while subsection (c)(1)(E), through incorporation of Government Code section 65901, applies to "challenges to final administrative adjudications." (*Avenida San Juan Partnership v. City of San Clemente* (2011) 201 Cal.App.4th 1256 [distinguishing between subsections (c)(1)(B) and (c)(1)(E)].) Here, Petitioner challenges the City's final administrative adjudication of Petitioner's view restoration application. (Pet. ¶¶ 32–33, 38.) That challenge triggers the 90-day time limit for filing and service under subsection (c)(1)(E).

Third, Petitioner's reliance on *Travis* is misplaced. (Opp. at 12.) Petitioner's lengthy block quotes are from a portion of the Court of Appeal's decision that was ***corrected*** by the Supreme Court in *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757. The Supreme Court explained that one of the intended purposes of Section 65009 is:

> to alleviate the 'chilling effect on the confidence with which property owners and local governments can proceed with projects' created by potential legal challenges to ***local planning*** and zoning decisions.
>
> To this end, section 65009 establishes a short statute of limitations, 90 days, applicable to ***actions challenging several types of local planning and zoning***

[3] Both *Save Our NTC* and *Arcadia Development* involved claims under subsection (c)(1)(B).

> ***decisions***: the adoption of a general or specific plan; the adoption of a zoning ordinance; the adoption of a regulation attached to a specific plan; the adoption of a development agreement; and the grant, denial, or imposition of conditions on a variance or permit.

(*Travis*, *supra*, 33 Cal.4th at 765 [citations omitted] [emphasis added].) Thus, the adoption of a zoning ordinance is just one of many actions subject to section 65009—including the Planning Commission's adjudicative land use decision on Petitioner's view restoration application.

C. The Scenic View Ordinance Is Related to Planning, Zoning, and Land Use Because It Affects Property Rights and Allowable Uses

Petitioner challenges the City's denial of a "view restoration" application—i.e., a land use decision—issued pursuant to the City's Ordinance regulating scenic views and sunlight. The Ordinance directly affects planning, land use, and property rights because it grants the Planning Commission the authority to prescribe where vegetation may be planted on a parcel, how tall it may grow, and how it must be maintained. (See DMMC § 23.51.) Indeed, a determination by the City to grant a view restoration application could result in the creation of a "view easement" over a neighboring parcel, greatly affecting the allowable use and development of the property.

Petitioner argues that the Ordinance has "absolutely nothing to do with the land use and zoning decisions listed in Section 65009 and 65901."[4] (Opp. at 7.) ***The Petition itself undercuts this assertion.*** Paragraph 21 discusses how several applications were filed "for restoration and preservation of their scenic views" and alleges that Real Party did not trim its trees or vegetation, resulting in claimed obstruction of Petitioner's views. (Pet., ¶ 21.) Paragraph 21b discusses Real Party's submission of plans to the Planning Commission for approval of new vegetation. (*Id.*, ¶ 21b.) Paragraph 21c discusses the erection of "story poles" to show vegetation in the submitted plans. (*Id.*, ¶ 21c.) Paragraph 25 discusses how Petitioner sought a "preservation plan" from the City requiring trimming of vegetation to set heights. (*Id.*, ¶ 25.) Thus, the Scenic View

---

[4] Petitioner also alleges that Real Party and the City would apply section 65009's requirements to "any decision by the City with regard to any and every ordinance." (Opp. at 5 [emphasis in original omitted].) Petitioner's slippery slope argument is mere hyperbole. Real Party and the City simply ask that the Court apply section 65009 to a land use decision that is clearly subject to section 65009.

Ordinance has everything to do with land use because it establishes property rights to views and directly impacts property owners' ability use their property.

Petitioner further argues that because the Ordinance is not located in the "Zoning" chapter of the DMMC, the Ordinance does not relate to zoning, planning, or land use. (Opp. at 13.) ***Petitioner ignores that the Ordinance is located in Chapter 23, entitled "Building Construction."*** Among other things, Chapter 23 contains requirements for building and grading permits, permits for encroachment on rights-of-way and easements, design review permits, and land conservation permits—all land use decisions. (See e.g., DMMC §§ 23.04.015, 23.08.10, 23.33.030.) As explained here and in Real Party's Motion to Dismiss, Government Code section 65009 does not apply solely to zoning decisions. The Legislature intended Government Code section 65009 to apply to a "*broad range* of local zoning and planning decisions." (*Citizens for Beach Rights v. City of San Diego* (2017) 10 Cal.App.5th 1301, 1308 [emphasis in original].) Petitioner's claim that section 65009 is inapplicable because the Ordinance does not appear in a chapter entitled "Zoning" grossly misconstrues the goals of the Legislature.

D. The Planning Commission Is the City's Zoning Administrator for Purposes of Government Code Sections 65901 and 65009

The Ordinance's relationship to planning, zoning, and land use is demonstrated by the Planning Commission's oversight of the determination as the "zoning administrator" for the City. The Planning Commission was established to carry out the functions of state development law and duties specified by ordinance, such as the Ordinance at issue here. (See DMMC §§ 2.34, 30.01.020, 30.01.040; see also *Stockton, supra*, 210 Cal.App.4th at 1492 [Section 65009(c)(1)(E) applies to bodies acting as the city's zoning administrator where local ordinance grants the body the authority to carry out duties specified by state law].)

The Planning Commission was exercising its "powers granted by local ordinance" pursuant to section 65009(c)(1)(E) when it issued Resolution 2017-05 denying Petitioner's application to restore scenic views under the Ordinance on April 11, 2017. Further, in reaching its decision, the Planning Commission was forced to weigh privacy concerns and property rights issues in the same way it would for any other land use project. As discussed above, the City's

denial of Petitioner's view restoration application was inherently a land use decision because it established how Real Party may use its real property.

Petitioner argues that the Planning Commission does not act as a zoning administrator when dealing with issues other than zoning. (Opp. at 9–11.) This is a red herring. Here, the Planning Commission made a land use decision subject to Government Code section 65009. Section 65009 applies to "any decision on the matters listed in Section[ ] 65901[.]" (Gov. Code § 65009.) Petitioner ignores the plain language in Section 65901 stating that "the zoning administrator may also exercise any other powers granted by local ordinance," inherently inclusive of the Ordinance giving rise to this land use dispute. (Gov. Code § 65901(a); *Royalty Carpet Mills, supra*, 125 Cal.App.4th at 1123 [decision on conditional use permit subject to section 65009]; see also *In re C.H.* (2011) 53 Cal.4th 94, 103 [It is a "settled principle of statutory construction that courts should strive to give meaning to every word in a statute and to avoid constructions that render words, phrases or clauses superfluous"].)

Moreover, the Petition ***concedes*** that the City is "charged with the authority to regulate and administer land use activities within its boundaries, subject at all times to the obligations and limitations of all applicable state, federal, and other laws, including the Del Mar Municipal Code . . . Respondent has been and is now the agency charged with administering the [Ordinance]." (Pet., ¶ 5.) The Planning Commission exercised that authority as a zoning administrator in this dispute.

E. The Specific Provisions in Section 65009 Control Over the General Provisions of Code of Civil Procedure Section 1094.6

Petitioner claims that the statute of limitations provided in Code of Civil Procedure section 1094.6 controls over Government Code section 65009. (Opp. at 14–15.) Petitioner's argument is contrary to the plain language of section 1094.6.

Section 1094.6, subsection (g) provides: "[t]his section shall prevail over any conflicting provision in any otherwise applicable law relating to the subject matter, ***unless the conflicting provision is a state or federal law which provides a shorter statute of limitations, in which case the shorter statute of limitations shall apply***." [emphasis added.] As a result, although DMMC

section 23.51.100 states that section 1094.6 applies to challenges under the Ordinance, section 1094.6 itself dictates that the shorter statute of limitations mandated by Government Code section 65009 must also apply. (See *Okasaki v. City of Elk Grove* (2012) 203 Cal.App.4th 1043, 1045–46; *Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 529; *Gonzalez v. County of Tulare* (1998) 65 Cal.App.4th 777, 792.) This result is consistent with section 65009's goal of limiting the period of uncertainty landowners and municipalities have over real property resulting from pending legal challenges.

Petitioner's cited caselaw does not support its position, let alone discuss section 1094.6's interaction with other statutes. Petitioner's only cited case, *Cumming v. City of Vernon* (1989) 214 Cal.App.3d 921, only addressed whether section 1094.6's statute of limitations runs from when a decision becomes final or from when notice of a final decision is provided. (*Cumming, supra*, 214 Cal.App.3d at 923.) *Cumming* does not discuss the applicable limitations period when section 1094.6 interacts with another statute. Section 1094.6(g) itself explicitly answers that question: the shorter statute of limitations applies. (See *Okasaki v. City of Elk Grove* (2012) 203 Cal.App.4th 1043, 1045–46; *Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 529; *Gonzalez v. County of Tulare* (1998) 65 Cal.App.4th 777, 792.) For example, in *Honig, supra*, 127 Cal.App.4th at 529, the court rejected the claim that the interaction between 1094.6 and 65009 was "deceptive," and specifically flagged 1094.6(g) as providing sufficient "notice that a conflicting, shorter limitations provision relating to [land use matters] might exist." (*Id.* at 531.)

Additionally, section 1094.6 establishes a statute of limitations for the filing of a petition for writ of mandate but is "silent about the time within which such a filed petition must be served." (*Gonzalez, supra*, 65 Cal.App.4th at 792.) Accordingly, courts have found that ***section 65009 provides the applicable statute of limitations for service***, even when section 1094.6 also applies. (*Id.*; *Honig, supra*, 127 Cal.App.4th at 529–31.) Thus, Petitioner's December 13, 2017, service was untimely.

Petitioner also seems to suggest that because the administrative record has not been finalized, a longer statute of limitations period should apply.[5] (Opp. at 5.) *Okasaki v. City of Elk Grove* squarely addressed the situation in which the lack of an administrative record could trigger a longer statute of limitations period under section 1094.6. The *Okasaki* court concluded that the petitioner's failure to file within the 90-day limitations period of 65009(c)(1)(E) barred their claim, even though the city had not provided the administrative record when requested to do so. (*Okasaki*, *supra*, 203 Cal.App.4th at 1045–46.) The court explained: "[n]othing in [65009] provides for an extension of the deadline to secure an administrative record. The short limitations period permits the rapid resolution of legal challenges to local zoning and planning decisions." (*Id.* at 1048.) Thus, the court found that Government Code section 65009 controlled over the more general provisions in Code of Civil Procedure section 1094.6.

In any event, there would never be any question as to Petitioner's compliance with Section 65009 if Petitioner had completed service of process as required by the California Rules of Court ("CRC"). CRC 3.110(b) provides that service must be effectuated within 60 days of filing a complaint. Under the CRC, Petitioner was on notice that they should have served the City and Real Party by November 18, 2017. Instead, Petitioner waited until December, well beyond the 60-day requirement already applicable to almost all lawsuits filed in Superior Court.

//

//

//

//

//

//

//

---

[5] The City compiled and provided Petitioner with the administrative record in August 2017. (Jones Dec. ¶ 3.) Now, Petitioner apparently argues that the record provided in August 2017 did not constitute the entire record because a transcript was not included from the very 2016 hearings that Petitioner insists are of no consequence to its pleading. Even if the August 2017 record is considered incomplete, the Petition still would be time-barred under any cognizable interpretation of either section 1094.6 or 65009.

III. CONCLUSION

For the foregoing reasons, the Court should find Petitioner's claim time-barred under the DMMC 23.51.100, Code of Civil Procedure section 1094.6, Government Code section 65009, and California Rule of Court 3.110, and dismiss the Petition.

Dated: April 6 2018

CITY OF DEL MAR

By _____
William C. Pate
Barry J. Schultz
Lesley A. Riis
Attorneys for Respondent
CITY OF DEL MAR

Dated: April 6, 2018

LATHAM & WATKINS LLP

By _____
Christopher W. Garrett
Jennifer K. Roy
Samantha K. Seikkula
Attorneys for Real Party In-Interest
TORREY PACIFIC CORPORATION

PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 12670 High Bluff Drive, San Diego, CA 92130.

On **April 6, 2018**, I served the following document described as:

RESPONDENT CITY OF DEL MAR AND REAL PARTY IN INTEREST TORREY PACIFIC CORPORATION'S JOINT REPLY IN SUPPORT OF MOTION TO DISMISS

BY OVERNIGHT MAIL DELIVERY

I am familiar with the office practice of Latham & Watkins LLP for collecting and processing documents for overnight mail delivery by Federal Express. Under that practice, documents are deposited with the Latham & Watkins LLP personnel responsible for depositing documents in a post office, mailbox, subpost office, substation, mail chute, or other like facility regularly maintained for receipt of overnight mail by Federal Express; such documents are delivered for overnight mail delivery by Federal Express on that same day in the ordinary course of business, with delivery fees thereon fully prepaid and/or provided for. I deposited in Latham & Watkins LLP's interoffice mail a sealed envelope or package containing the above-described document and addressed as set forth below in accordance with the office practice of Latham & Watkins LLP for collecting and processing documents for overnight mail delivery by Federal Express:

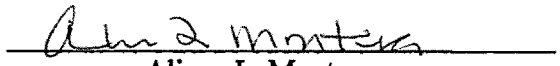
Mark C. Mazzarella *mark@mazzarellalaw.com* Rebecca L. Reed *rebecca@mazzarellalaw.com* MAZZARELLA & MAZZARELLA LLP 1620 Fifth Avenue, Suite 600 San Diego, California 92101	Attorneys for Petitioners Shirli Fabbri Weiss Trustee Shrili Fabbri Weiss Trust

William C. Pate
wpate@dpmclaw.com
Barry J. Schultz
bschultz@dpmclaw.com
Lesley A. Riis
lriis@dpmclaw.com
DEVANEY PATE MORRIS & CAMERON LLP
402 W. Broadway, Suite 1300
San Diego, California 92101

Attorneys for Respondent
City of Del Mar

I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **April 6, 2018** at San Diego, California.



Alison L. Montera

US-DOCS\100224305

LATHAM & WATKINS LLP
Christopher W. Garrett (SBN 100764)
christopher.garrett@lw.com
Jennifer K. Roy (SBN 281954)
jennifer.roy@lw.com
Samantha K. Seikkula (SBN 307827)
samantha.seikkula@lw.com
12670 High Bluff Drive
San Diego, California 92130
Telephone: +1.858.523.5400
Facsimile: +1.858.523.5450

Attorneys for Real Party In-Interest
Torrey Pacific Corporation

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO – CENTRAL DIVISION

SHIRLI FABBRI WEISS, TRUSTEE, on behalf of the SHIRLI FABBRI WEISS TRUST, Petitioner, v. CITY OF DEL MAR and DOES 1 through 10, Respondents. TORREY PACIFIC CORPORATION Real Party-In-Interest	CASE NO. 37-2017-00034936-CU-WM-CTL **[IMAGED FILE]** **DECLARATION OF ASHLEY JONES IN SUPPORT OF CITY OF DEL MAR AND TORREY PACIFIC CORPORATION'S JOINT REPLY IN SUPPORT OF MOTION TO DISMISS** Hearing Date: April 13, 2018 Time: 11:00 a.m. Dept.: C-70 Judge: Hon. Randa Trapp Action Filed: September 19, 2017

DECLARATION OF ASHLEY JONES

I, Ashley Jones, declare:

1. I am the City Clerk/Administrative Services Director at Respondent City of Del Mar ("City"). I submit this declaration in support of the City's Reply In Support of Motion to Dismiss.

2. As an employee of the City, I have sufficient personal knowledge of the facts set forth herein that if called as a witness I could and would testify competently to the facts below under oath.

3. On August 8, 2017, my colleague, Sarah Krietor, sent an email to Mark Mazzarella, counsel for the Petitioner, acknowledging that the City of Del Mar received his Public Records Act on July 26, 2017. I was copied on this email. Ms. Krietor stated that we would provide responsive videos and documents of the Planning Commission and City Council hearings, and attached Planning Commission Resolution 2016-09 as requested. On August 10, 2017, Ms. Krietor followed up on her August 8, 2017 email to provide additional documents and request clarification regarding the extent of Mr. Mazzarella's request. I was also copied on this email. A true and correct copy of these emails are attached hereto as Exhibit A.

4. On September 14, 2017, Ms. Krietor received a letter from Mr. Mazzarella requesting "all Resolutions that the City has passed originally adopting, or later applying the [Scenic View] Ordinance since it was adopted," including the record of proceedings for the Ordinance and any documents interpreting the Ordinance, as well as certain City Council and Planning Commission transcripts. I received a copy of this letter "for filing attention." The letter references an August 28, 2017 letter requesting a copy of the hearing transcripts relating to Petitioner's application. A true and correct copy of the September 14, 2017 letter is attached hereto as Exhibit B.

5. On October 5, 2017, Ms. Krietor sent a letter to Mr. Mazzarella, enclosing copies of all available City Council meeting and Planning Commission meeting agendas and minutes regarding the Scenic View Ordinance in response to the September 14, 2017 letter. I was copied on this letter. A true and correct copy of the October 5, 2017 letter is attached hereto as Exhibit

C.

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

Executed on this 6th day of April, 2018, in San Diego, California.

Ashley Jones

EXHIBIT INDEX

Exhibit	Description	Page(s)
A.	Email communications between S. Krietor and M. Mazzarella	5 - 8
B.	Letter from M. Mazzarella to S. Krietor, dated September 14, 2017	9 - 12
C.	Letter from S. Krietor to M. Mazzarella, dated October 5, 2017	13 - 14

PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 12670 High Bluff Drive, San Diego, CA 92130.

On **April 6, 2018**, I served the following document described as:

DECLARATION OF ASHLEY JONES IN SUPPORT OF CITY OF DEL MAR AND TORREY PACIFIC CORPORATION'S JOINT REPLY IN SUPPORT OF MOTION TO DISMISS

BY OVERNIGHT MAIL DELIVERY

I am familiar with the office practice of Latham & Watkins LLP for collecting and processing documents for overnight mail delivery by Federal Express. Under that practice, documents are deposited with the Latham & Watkins LLP personnel responsible for depositing documents in a post office, mailbox, subpost office, substation, mail chute, or other like facility regularly maintained for receipt of overnight mail by Federal Express; such documents are delivered for overnight mail delivery by Federal Express on that same day in the ordinary course of business, with delivery fees thereon fully prepaid and/or provided for. I deposited in Latham & Watkins LLP's interoffice mail a sealed envelope or package containing the above-described document and addressed as set forth below in accordance with the office practice of Latham & Watkins LLP for collecting and processing documents for overnight mail delivery by Federal Express:

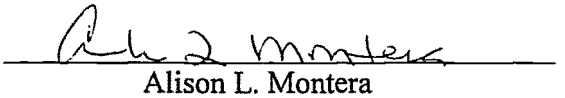
Mark C. Mazzarella *mark@mazzarellalaw.com* Rebecca L. Reed *rebecca@mazzarellalaw.com* MAZZARELLA & MAZZARELLA LLP 1620 Fifth Avenue, Suite 600 San Diego, California 92101	Attorneys for Petitioners Shirli Fabbri Weiss Trustee Shrili Fabbri Weiss Trust

William C. Pate
wpate@dpmclaw.com
Barry J. Schultz
bschultz@dpmclaw.com
Lesley A. Riis
lriis@dpmclaw.com
DEVANEY PATE MORRIS & CAMERON LLP
402 W. Broadway, Suite 1300
San Diego, California 92101

Attorneys for Respondent
City of Del Mar

I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **April 6, 2018** at San Diego, California.



Alison L. Montera

US-DOCS\100302405

EXHIBIT A

Lesley Riis

From: Sarah Krietor <Skrietor@delmar.ca.us>
Sent: Thursday, August 10, 2017 5:40 PM
To: Mark Mazzarella
Cc: Ashley Jones
Subject: RE: Public Records Act Request - City of Del Mar
Attachments: Attachments.html

Hi Mark,
I wanted to follow up with you on a few items related to your public records act request.

1. I just met with Matt Bator, the project planner for TSVS16-001, and he let me know that the transcripts for the April 11, 2017 and the September 13, 2016 Planning Commission hearing are included in the June 5th City Council staff report as part of Attachment D. I provided you this staff report on August 8, 2017. I did not realize these transcripts were included in the attachments of the staff reports. These transcripts are responsive to your request #2 and #6. I apologize for the contradiction in my initial email.

2. I would like clarification on request #4. Would you like all resolutions and determinations relevant to the Trees and Scenic Views Ordinance applications? Or would you like resolutions and determinations relevant to TSVS 16-001 only? Please let me know and I will provide you with the responsive documents as promptly as possible.

3. I have attached documents responsive to request #8 they are PowerPoint presentations for the June 5th and July 17th City Council meetings. There will be additional documents related to request #8 provided at a later date.

4. The proof of publication and the notice of public hearing for the July 17th City Council meeting appeal are attached. These are two records responsive to request #1.

I will provide you with more responsive documents as soon as possible.
Thank you!
Sarah

ShareFile Attachments Expires February 6, 2018

Item 10 - TVS16-001_De Novo Hearing (App...t).pptx	[illegible]
Item 10 - TVS16-001_De Novo Hearing (Staf...n).pptx	4.9 MB
Item 18 TVS16-001 Appeal (Staff Presentation).pptx	4.9 MB
Item 18_ TVS16-001 Appeal_Weiss.pptx	7 MB
Item 18_TVS16-001 Appeal_Torrey Pacific.pptx	9.5 MB
Legal Ad Proof of Publication.pdf	[illegible]

TSVS 2016-001 Notice of Public Hearing.pdf 199.9 KB

Download Attachments

City Manager uses ShareFile to share documents securely. Learn More.

From: Sarah Krietor
Sent: Tuesday, August 8, 2017 1:28 PM
To: 'Mark@mazzarellalaw.com' <Mark@mazzarellalaw.com>
Cc: Ashley Jones <ajones@delmar.ca.us>
Subject: Public Records Act Request - City of Del Mar

Hi Mark,
This email is to acknowledge that the City of Del Mar received your Public Records Act request related to TSVS 2016-001 on July 26th, 2017. We are working on providing you all documents responsive your request as promptly as possible. I anticipate we will be able to provide you with all documents responsive to your request by Friday, August 18, 2017 at the latest.

I plan to provide the documents on a rolling bases. Please see links to council videos and the attached responsive documents. We are more than happy to provide you with DVD's of the meetings. Would you like me to mail copies to your office at 1620 Fifth Ave., Suite 600, San Diego, CA 92101?

Lastly, the City does not have a certified transcript of the Planning Commission and Council proceedings, but our Administrative Services Director/City Clerk, Ashley Jones, could provide you with a certified statement that all video recordings are true copies of the actual proceedings.

Request #2: April 11, 2017 Planning Commission Hearing https://delmar.12milesout.com/video/meeting/2ee86dd7-d076-41fd-aeee-aec2d30b0ab4?t=1m37s (DVD copies can be mail to your office or picked up at City Hall, please let me know your preference)

Request #3: June 5, 2017 City Council initial consideration: https://delmar.12milesout.com/video/meeting/b7eaf5c9-9b8b-453b-92e1-5c5caa357862 (DVD copies can be mail to your office or picked up at City Hall, please let me know your preference)

Request #5: Planning Commission resolution 2016-09 (attached)

Request #7: June 5, 2017 City Council Staff report and the July 17, 2017 City Council staff report (this is only one item responsive to this request. All additional documents responsive to request #7 will be provided at a later date.)

ShareFile Attachments

Expires February 4, 2018

Item 10- TVS16-001 - De Novo Public Hearing.pdf	55.2 MB
Item 18 - TVS16-001_Initial Consideration.pdf	43.2 MB

Download Attachments

City Manager uses ShareFile to share documents securely. Learn More.

Sarah Krietor | Management Analyst
City of Del Mar | Administrative Services
1050 Camino del Mar
Del Mar, CA 92014
☎ 858.375.9517 | 🖷 858.755.2794 | skrietor@delmar.ca.us

Please consider the environment before printing this e-mail.

EXHIBIT B

Mazzarella & Mazzarella LLP

September 14, 2017

Via Email Only

Sarah Krietor
Management Analyst/Administrative Services
City of Del Mar
1050 Camino Del Mar
Del Mar, CA 92014

For Filing Attention:

Ms. Ashley Jones
Administrative Services Director/City Clerk
City of Del Mar
1050 Camino Del Mar
Del Mar, CA 92014

Re: Del Mar Municipal Code Chapter 23.51, TSVS Ordinance Application 2016-001; Applicant: Weiss Family Trust, Shirli Fabbri Weiss, Trustee, Application TVS16-001 Request for Complete Record of Proceedings Pursuant to California Code of Civil Procedure 1094.6

Dear Sarah:

I'm following up regarding your e-mail of September 5, 2017 to Ashley Jones and my assistant, Leigh Sanders. Two issues need to be addressed.

First, as indicated in my letter of August 28, 2017, we have requested that the City obtain a copy of the transcript of the Planning Commission Hearing of September 13, 2016 regarding Resolution 2016-09. That transcript should be included in the record of Ms. Weiss' Application since, without that document, much of what was said at the July 17, 2017 hearing cannot be considered in proper context. We have made arrangements for Veritext to bill us directly for the transcript.

In my August 28, 2017 letter I briefly summarized why we believe the requested transcript should be included in the record of Ms. Weiss' Application. Since writing that letter, I have reviewed the transcript of the City Council hearing I attended with Ms. Weiss on July 17,

1620 Fifth Avenue, Suite 600, San Diego, CA 92101 • Tel (619) 238-4900 • Fax (619) 238-4959 • www.mazzarellalaw.com

2017. The transcript of July 17, 2017 absolutely compels inclusion of the requested transcript of the September 13, 2016 hearing in this record. During the July 17, 2017 hearing, the tree owner's attorney, Chris Garrett, called Resolution 2016-09 "crucial" since it "regulates the exact same vegetation." (Transcript page 22, line 22-page 23, line 2) Mr. Garrett made further reference to Resolution 2016-09 at page 27, lines 9-12, and again at page 32, line 20, where Mr. Garrett argues: "So the resolution 2016-09 is explicit." Mr. Staver also argued to the Council that it would be "unreasonable" to conclude "all this history," including Resolution 2016-09, "does not matter. . . ." (Page 36, lines 12-18)

The fact that Mr. Garrett's and Mr. Staver's argument impacted the Council became clear during the Council's discussion. For example, Councilman Wordon commented: "I think it would be to [sic] to incorporate the Weiss property into the same provisions that are in that 2016-09 remediation order." (Page 44, line 22-24) He then says: "I think, frankly, Mr. Garrett's right. We're not in a position to go back and reopen that remediation order, and it doesn't make sense to have the Stavers have to deal with two different remediation orders that apply to the same trees." (Page 45, line12-16.) I could go on at length, since Resolution 2016-09 was central to the Council's deliberations. Clearly, the transcript of the September 13, 2016 hearing, which led to the City Council's adoption of Resolution 2016-09, is essential and should be included in the record in this matter.

The second open issue is you wanted clarification regarding whether by our request #4 we wanted resolutions related only to TSV 2016-001, in which case we have everything; or if we wanted all resolutions relating to the Trees and Scenic Views Ordinance in general, in which case not all records have been provided. The answer is we would like all Resolutions that the City has passed originally adopting, or later applying the Ordinance since it was adopted. We also request any recording of the proceedings at which the Ordinance was adopted or later applied. And, finally, we request any Resolutions passed the adoption of the Ordinance, which reference the intent to consider such an Ordinance, and any documents in which the Planning Commission's, City Council's, or any other agent of the City's interpretation of the meaning of any provision of the Ordinance is given and/or discussed. This would include any non-privileged interpretation provided by the City Attorney or outside counsel.

Mazzarella &
Mazzarella LLP

Please let me know if you wish to discuss these requests further, as I will make myself available at your convenience. In any event, please let me know if these items will be provided to us to be included in the record as requested.

Thank you.

Very truly yours,

Mark C. Mazzarella, Esq.

Cc: Shirli Weiss

EXHIBIT C

City of Del Mar

October 5, 2017

Mark Mazzarella
1620 5th Avenue, Suite 600
San Diego, CA 92101

Re: Public Records Request

Dear Mark Mazzarella,

Enclosed are copies of City Council Meetings and Planning Meetings recordings and a CD with records responsive to your request made on September 14, 2017. These files were also emailed to you on September 26, 2017.

Below is a list of meeting dates that we were unable to provide you recordings of due to the City's retention policy.

December 10, 2001- City Council Meeting
February 4, 2002 - City Council Meeting
March 3, 2002 - City Council Meeting
March 18, 2002 - City Council Meeting
May 6, 2002 - City Council Meeting
June 17, 2002 - City Council Meeting
July 1, 2002 - City Council Meeting
March 13, 2003 – The Trees, Scenic Views and Sunlight Board Meeting
January 22, 2004 - The Trees, Scenic Views and Sunlight Board Meeting
September 13, 2005 – The Planning Commission Meeting
October 11, 2005 - The Planning Commission Meeting

Below are all of the City Council Meetings and Planning Meeting recordings included in your package:

April 5, 2004 – City Council Meeting
June 6, 2005– City Council Meeting
June 20, 2005– City Council Meeting
April 17, 2006– City Council Meeting
June 10, 2008– The Planning Commission Meeting
July 8, 2008 - The Planning Commission Meeting
December 1, 2008– City Council Meeting
March 8, 2010– City Council Meeting
January 8, 2013 - The Planning Commission Meeting
September 9, 2015 - The Planning Commission Meeting
November 10, 2015 - The Planning Commission Meeting
January 12, 2016 - The Planning Commission Meeting
May 10, 2016 - The Planning Commission Meeting
September 13, 2016 - The Planning Commission Meeting

If you have any questions, please contact Sarah Krietor at (858) 375-9517 or skrietor@delmar.ca.us.

Sincerely,

Sarah Krietor
Management Analyst
CC: Ashley Jones, City Clerk/ Administrative Services Director

1050 Camino Del Mar, Del Mar, California 92014-2698. Telephone: (858) 755-9313 Fax: (858) 755-2794 www.delmar.ca.us

LATHAM & WATKINS LLP
Christopher W. Garrett (SBN 100764)
christopher.garrett@lw.com
Jennifer K. Roy (SBN 281954)
jennifer.roy@lw.com
Samantha K. Seikkula (SBN 307827)
samantha.seikkula@lw.com
12670 High Bluff Drive
San Diego, California 92130
Telephone: +1.858.523.5400
Facsimile: +1.858.523.5450

Attorneys for Real Party In-Interest
Torrey Pacific Corporation

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO – CENTRAL DIVISION

SHIRLI FABBRI WEISS, TRUSTEE, on behalf of the SHIRLI FABBRI WEISS TRUST, Petitioner, v. CITY OF DEL MAR and DOES 1 through 10, Respondents. TORREY PACIFIC CORPORATION Real Party-In-Interest	CASE NO. 37-2017-00034936-CU-WM-CTL **[IMAGED FILE]** **RESPONDENT CITY OF DEL MAR AND REAL PARTY IN INTEREST TORREY PACIFIC CORPORATION'S JOINT REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF JOINT REPLY IN SUPPORT OF MOTION TO DISMISS** Hearing Date: April 13, 2018 Time: 11:00 a.m. Dept.: C-70 Judge: Hon. Randa Trapp Action Filed: September 19, 2017

Pursuant to California Rules of Court, rule 8.252 and Evidence Code sections 452 and 453, Respondent City of Del Mar ("City") and Real Party in Interest Torrey Pacific Corporation ("Real Party") hereby request that the Court take judicial notice of the following document: Senate Bill No. 497, approved by Governor on July 22, 1987, filed with Secretary of State on July 23, 1987. A true and correct copy of the Senate Bill is attached hereto as **Exhibit A**.

MEMORANDUM OF POINTS AND AUTHORITIES

Evidence Code section 452 provides that judicial notice may be taken of the official acts of states and their laws and of "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452, subdivisions (a), (c), (h).) Evidence Code section 453 requires that the Court shall take judicial notice of any matter specified in Evidence Code section 452 upon the request of a party if such party gives all parties sufficient notice and furnishes the court with sufficient information to take judicial notice. (Evid. Code, § 453.)

Here, the City and Real Party seek judicial notice of Senate Bill 497 to rebut assertions made in Petitioner's Amended Opposition to the Joint Motion to Dismiss. Senate Bill 497 is relevant to this matter to rebut Petitioner's argument that Government Code section 65009 was only intended to apply to housing projects. (Amended Opp. Brief at 7-9.) The digest included in Senate Bill 497 specifically notes how the bill was amended to make section 65009 applicable to a broader range of developments. Therefore, the bill is relevant to demonstrate that Petitioner's argument is without merit.

Senate Bill 497 is "not reasonably subject to dispute and [is] capable of immediate and accurate determination by resort to sources of indisputable accuracy" (Evid. Code, § 452, subd. (h)), is an "official act of the legislative department . . . of [a] state of the United States" (Evid. Code, § 452, subd. (c)), and is the "statutory law of [a] state of the United States." (Evid. Code, § 452, subd. (a).) Judicial notice of Senate Bill 497 is proper under Evidence Code section 452, subdivisions (a), (c), and (h), because it is the statutory law of California as amended, with digest comments from a state legislator, and is immediately and accurately determinable.

CONCLUSION

Pursuant to Evidence Code sections 452 and 453, the City and Real Party hereby requests that the Court take judicial notice of Senate Bill 497.

Dated: April 6, 2018

CITY OF DEL MAR

By _____
William C. Pate
Barry J. Schultz
Lesley A. Riis
Attorneys for Respondent
CITY OF DEL MAR

Dated: April 6, 2018

LATHAM & WATKINS LLP

By _____
Christopher W. Garrett
Jennifer K. Roy
Samantha K. Seikkula
Attorneys for Real Party In-Interest
TORREY PACIFIC CORPORATION

EXHIBIT INDEX

Exhibit	Description	Page(s)
A.	Senate Bill No. 497	5 - 7

PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 12670 High Bluff Drive, San Diego, CA 92130.

On **April 6, 2018**, I served the following document described as:

RESPONDENT CITY OF DEL MAR AND REAL PARTY IN INTEREST TORREY PACIFIC CORPORATION'S JOINT REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF JOINT REPLY IN SUPPORT OF MOTION TO DISMISS

BY OVERNIGHT MAIL DELIVERY

I am familiar with the office practice of Latham & Watkins LLP for collecting and processing documents for overnight mail delivery by Federal Express. Under that practice, documents are deposited with the Latham & Watkins LLP personnel responsible for depositing documents in a post office, mailbox, subpost office, substation, mail chute, or other like facility regularly maintained for receipt of overnight mail by Federal Express; such documents are delivered for overnight mail delivery by Federal Express on that same day in the ordinary course of business, with delivery fees thereon fully prepaid and/or provided for. I deposited in Latham & Watkins LLP's interoffice mail a sealed envelope or package containing the above-described document and addressed as set forth below in accordance with the office practice of Latham & Watkins LLP for collecting and processing documents for overnight mail delivery by Federal Express:

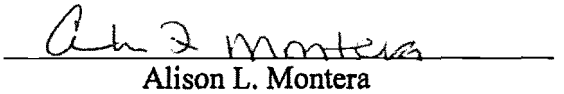
Mark C. Mazzarella *mark@mazzarellalaw.com* Rebecca L. Reed *rebecca@mazzarellalaw.com* MAZZARELLA & MAZZARELLA LLP 1620 Fifth Avenue, Suite 600 San Diego, California 92101	Attorneys for Petitioners Shirli Fabbri Weiss Trustee Shrili Fabbri Weiss Trust

William C. Pate
wpate@dpmclaw.com
Barry J. Schultz
bschultz@dpmclaw.com
Lesley A. Riis
lriis@dpmclaw.com
DEVANEY PATE MORRIS & CAMERON LLP
402 W. Broadway, Suite 1300
San Diego, California 92101

Attorneys for Respondent
City of Del Mar

I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **April 6, 2018** at San Diego, California.



Alison L. Montera

EXHIBIT A

DEERING'S CALIFORNIA ADVANCE LEGISLATIVE SERVICE
Copyright © 1987 by Matthew Bender & Company, Inc.
a member of the LexisNexis Group.
All rights reserved.

1987-1988 REGULAR SESSION
CHAPTER 218 (Senate Bill No. 497)

1987 Cal ALS 218; 1987 Cal SB 497; 1987 Cal Stats. ch. 218

[Approved by Governor July 22, 1987. Filed with Secretary of State July 23, 1987.]

Urgency legislation is effective immediately, Non-urgency legislation will become effective January 1, 1988

DIGEST: SB 497, L. Greene. Planning and zoning.

Existing law specifies limitations on the time for commencing a legal action or proceeding to attack, review, set aside, void, or annul various planning and zoning actions and decisions of a local legislative body. Existing law also authorizes public agencies, upon giving prescribed notice, to limit the issues which can be raised in any legal action or proceeding to the matters raised in testimony at the public hearing. Certain of the legislative findings and declarations included in these provisions relate only to housing projects.

This bill would, instead, make certain of these legislative findings and declarations applicable to developments in general.

SYNOPSIS: An act to amend *Section 65009 of the Government Code*, relating to local government.

TEXT: The people of the State of California do enact as follows:

[*1]
SECTION 1. *Section 65009 of the Government Code* is amended to read:

§ 65009. (a) (1) The Legislature finds and declares that there currently is a housing crisis in California and it is essential to reduce delays and restraints upon expeditiously completing housing projects.

(2) The Legislature further finds and declares that a legal action challenging a decision of a city, county, or city and county has a chilling effect on the confidence with which property owners and local governments can proceed with projects. Legal actions filed to attack, review, set aside, void, or annul a decision of a city, county, or city and county pursuant to this division can prevent the completion of needed developments even though the projects have received required governmental approvals.

(3) The purpose of this section is to provide certainty for property owners and local governments regarding decisions made pursuant to this division.

(b) (1) In an action or proceeding to attack, review, set aside, void, or annul a finding, determination, or decision of a public agency made pursuant to this title at a properly noticed public hearing, the issues raised shall be limited to those raised in the public hearing or in written correspondence delivered to the public agency prior to, or at, the public hearing, except where the court finds either of the following:

(A) The issue could not have been raised at the public hearing by persons exercising reasonable diligence.

(B) The body conducting the public hearing prevented the issue from being raised at the public hearing.

(2) If a public agency desires the provisions of this subdivision to apply to a matter, it shall include in any public notice issued pursuant to this title a notice substantially stating all of the following: "If you challenge the (nature of the proposed action) in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice, or in written correspondence delivered to the (public entity conducting the hearing) at, or prior to, the public hearing."

(3) The application of this subdivision to causes of action brought pursuant to subdivision (d) applies only to the final action taken in response to the notice to the city or county clerk. If no final action is taken, then the issue raised in the cause of action brought pursuant to subdivision (d) shall be limited to those matters presented at a properly noticed public hearing or to those matters specified in the notice given to the city or county clerk pursuant to subdivision (d), or both.

(c) Except as provided in subdivision (d), no action or proceeding shall be maintained in any of the following cases by any person unless the action or proceeding is commenced and service is made on the legislative body within 120 days after the legislative body's decision:

(1) To attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a general or specific plan. This paragraph does not apply where an action is brought based upon the complete absence of a general plan or a mandatory element thereof, but does apply to an action attacking a general plan or mandatory element thereof on the basis that it is inadequate.

(2) To attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a zoning ordinance.

(3) To determine the reasonableness, legality, or validity of any decision to adopt or amend any regulation attached to a specific plan.

(4) Concerning any of the proceedings, acts, or determinations taken, done, or made prior to any of the decisions listed in paragraphs (1), (2), and (3).

(d) An action or proceeding shall be commenced and the legislative body served within two years after the accrual of the cause of action as provided in this subdivision, if the action or proceeding meets both of the following requirements:

(1) It is brought in support of the development of housing projects which meet the requirements for housing for persons and families with low or moderate incomes set forth in Section 65915.

(2) It is brought with respect to actions taken pursuant to Article 10.6 (commencing with Section 65580) of Chapter 3 of this division, pursuant to Section 65589.5, 65863.6, 65915, or 66474.2 or pursuant to Chapter 4.2 (commencing with Section 65913).

A cause of action brought pursuant to this subdivision shall not be maintained until 60 days have expired following notice to the city or county clerk by the party bringing the cause of action, or his or her representative, specifying the deficiencies of the general plan, specific plan, or zoning ordinance. A cause of action brought pursuant to this subdivision shall accrue 60 days after notice is filed or the legislative body takes a final action in response to the notice, whichever occurs first. A notice or cause of action brought by one party pursuant to this subdivision shall not bar filing of a notice and initiation of a cause of action by any other party.

(e) Upon the expiration of the time limits provided for in this section, all persons are barred from any further action or proceeding.

(f) Notwithstanding Section 65700, this section shall apply to charter cities.

(g) Except as provided in subdivision (d), this section shall not affect any law prescribing or authorizing a shorter period of limitation than that specified herein.

(h) This section shall be applicable to those decisions of the legislative body of a city, county, or city and county made pursuant to this division on or after January 1, 1984.

EXPLANATORY NOTES CH 218:

Gov C § 65009. Amended subd (a)(2) by (1) deleting "housing" after "can proceed with" in the first sentence and before "projects have received" in the last sentence; and (2) substituting "developments" for "housing projects" after "completion of needed" in the last sentence.

LATHAM & WATKINS LLP
Christopher W. Garrett (SBN 100764)
christopher.garrett@lw.com
Jennifer K. Roy (SBN 281954)
jennifer.roy@lw.com
Samantha K. Seikkula (SBN 307827)
samantha.seikkula@lw.com
12670 High Bluff Drive
San Diego, California 92130
Telephone: +1.858.523.5400
Facsimile: +1.858.523.5450

Attorneys for Real Party In-Interest
Torrey Pacific Corporation

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO – CENTRAL DIVISION

SHIRLI FABBRI WEISS, TRUSTEE, on behalf of the SHIRLI FABBRI WEISS TRUST, Petitioner, v. CITY OF DEL MAR and DOES 1 through 10, Respondents. TORREY PACIFIC CORPORATION Real Party-In-Interest	CASE NO. 37-2017-00034936-CU-WM-CTL **[IMAGED FILE]** **CITY OF DEL MAR AND TORREY PACIFIC CORPORATION'S JOINT RESPONSE TO PETITIONER'S OBJECTION TO DECLARATION OF BRIAN STAVER FILED IN SUPPORT OF JOINT MOTION TO DISMISS** Hearing Date: April 13, 2018 Time: 11:00 a.m. Dept.: C-70 Judge: Hon. Randa Trapp Action Filed: September 19, 2017

Petitioner objects to the Declaration of Brian Staver ("Declaration") submitted in support of the City of Del Mar and Real Party's Joint Motion to Dismiss on the grounds that the Declaration alleges facts irrelevant to the Motion and would result in an undue consumption of the Court's time. (Evid. Code, §§ 210, 352.) Petitioner does not demonstrate any legal authority or factual support for its objections, which should be overruled for the following reasons.

A. The Declaration Is Relevant to Demonstrate Facts Underpinning the Motion

Petitioner's contention that the Declaration presents facts irrelevant to the instant motion lacks merit. The Declaration alleges facts relevant to establish that the issue at the center of Petitioner's complaint is a land use decision covered by Government Code section 65009, the basis for the Joint Motion to Dismiss. The Declaration describes the history of land use challenges to Real Party's trees and vegetation, demonstrating that Petitioner's complaint is but one in a long line of land use complaints. (Declaration ¶¶ 4-6.) The Declaration describes how the Planning Commission has held hearings on the trees and vegetation on Real Party's property, and reached determinations concerning the allowable height and trimming of vegetation. (*Id.*, ¶ 5.) Thus, the Planning Commission's decision directly impacts how Real Party continues to use its physical property and constitutes a land use decision.

Further, the Declaration contains facts relevant to the need for finality in a land use decision. The Declaration attaches Resolution 2016-09 in order to show that the City has taken specific action on the height and trimming of the subject trees in the past. The City's decision on Petitioner's separate application declined to alter the existing trimming program established in Resolution 2016-09. This is exactly the type of land use decision that Government Code section 65009 addresses in order to provide certainty and finality to property owners and municipalities. Nevertheless, Petitioner seeks to call into question the finality of Resolution 2016-09 ***years*** after its adoption.

Because the Declaration establishes facts relevant to establish that the Planning Commission's land use decision triggers the requirements of Government Code section 65009, it is relevant to the Motion to Dismiss.

//

B. Consideration of the Declaration Will Not Amount to Prejudicial Bias or an Undue Constraint on the Court's Time

Relying on Evidence Code section 352, Petitioner claims that accepting the Declaration would result in an undue consumption of the Court's time or prejudicial bias, but fails to explain how or why. In reality, neither of section 352's concerns are triggered by the Declaration. (Evidence Code § 352 ["A court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."].)

First, the Declaration is a single page, alleging only six paragraphs' worth of facts, attaching Resolution 2016-09. (Declaration, ¶ 6, Exhibit A.) Resolution 2016-09 and its supporting exhibit are only seven pages long. It is unclear how such short documents would "necessitate undue consumption of time." (Evidence Code § 352(a); cf. *Moore v. Mercer* (2016) 5 Cal.App.5th 424, 444 review denied (Jan. 11, 2017) [affirming exclusion of evidence for undue consumption of time where it would have opened a "Pandora's box of collateral issues" and been of "minimal probative value."].) The Declaration puts discrete facts into the record and in no way opens a "Pandora's box of collateral issues." (See *ibid.*) Rather, the Declaration fills the gaps in Petitioner's incomplete story.

Petitioner contends that the Declaration and City Resolution constitute "Real Party's opinion of what happened"[1] and relate to the merits of the case. Rather, the documents simply provide limited additional facts not contained in the Petition in order to demonstrate the

---

[1] Relatedly, Petitioner argues that when considering a Motion to Dismiss, a Court is to assume the truth of the petition's allegations, and therefore cannot consider additional evidence. (Objection to Dec. at 2.) Real Party and Respondent do not argue with the court's consideration of the petition, but *Royalty Carpet Mills, Inc. v. City of Irvine* (2005) 125 Cal.App.4th 1110 does not limit the Court to only the four corners of the Petition. The parties are not precluded from submitting evidence to promote a more fulsome understanding of the underlying Motion to Dismiss when such facts are not contained in the Petition itself. Further, because no administrative record has been lodged (despite the City's delivery of the record to Petitioner over six months ago), administrative record citations are unavailable. (Declaration of Ashley Jones ¶¶ 3-5.)

applicability of Government Code section 65009 to the underlying action and are not a "waste of the court's time." (Objection to Dec. at 2.)

Second, the Declaration describes the events omitted from the Petition in a highly factual manner. In general, "the 'undue prejudice' mentioned in Evidence Code section 352 refers to evidence which uniquely tends to evoke an emotional bias against the party as an individual and which has very little effect on the issues—it is not synonymous with 'damaging.' . . . In general, evidence is substantially more prejudicial than probative if it creates an intolerable risk to the fairness of the proceedings or the reliability of the outcome." (*Phillips v. Honeywell International, Inc.* (2017) 9 Cal.App.5th 1061, 1081 [letter in asbestos case that stated "if you have enjoyed a good life while working with asbestos products why not die from it" considered relevant and not prejudicial].)

The Declaration raises and attaches Resolution 2016-09 to describe the background of the dispute, which is closely related to the underlying issues in the Motion to Dismiss. The Declaration does not imply that the issues raised in the Petition were resolved by the Resolution as Petitioner argues, but simply notes that the Planning Commission did not require Real Party to change its voluntary trimming program already in place at the time of the resolution. It is unclear how Petitioner is prejudiced by a short City Resolution, or how such a Resolution would "evoke an emotional bias" against Petitioner. Further, Petitioner does not cite to any analogous caselaw to support for its erroneous position that the Declaration constitutes bias or an undue consumption on the court's time.

//

//

//

//

//

//

//

//

The Declaration is relevant to the instant action and does not result in an undue consumption on the Court's time or resources, nor does it result in prejudicial bias against Petitioner. Therefore, neither of the concerns from Evidence Code section 352 are invoked, and the Declaration should be admitted.

Dated: April 6, 2018

CITY OF DEL MAR

By _____
William C. Pate
Barry J. Schultz
Lesley A. Riis
Attorneys for Respondent
CITY OF DEL MAR

Dated: April 6, 2018

LATHAM & WATKINS LLP

By _____
Christopher W. Garrett
Jennifer K. Roy
Samantha K. Seikkula
Attorneys for Real Party In-Interest
TORREY PACIFIC CORPORATION

PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 12670 High Bluff Drive, San Diego, CA 92130.

On **April 6, 2018,** I served the following document described as:

CITY OF DEL MAR AND TORREY PACIFIC CORPORATION'S JOINT RESPONSE TO PETITIONER'S OBJECTION TO DECLARATION OF BRIAN STAVER FILED IN SUPPORT OF JOINT MOTION TO DISMISS

BY OVERNIGHT MAIL DELIVERY

I am familiar with the office practice of Latham & Watkins LLP for collecting and processing documents for overnight mail delivery by Federal Express. Under that practice, documents are deposited with the Latham & Watkins LLP personnel responsible for depositing documents in a post office, mailbox, subpost office, substation, mail chute, or other like facility regularly maintained for receipt of overnight mail by Federal Express; such documents are delivered for overnight mail delivery by Federal Express on that same day in the ordinary course of business, with delivery fees thereon fully prepaid and/or provided for. I deposited in Latham & Watkins LLP's interoffice mail a sealed envelope or package containing the above-described document and addressed as set forth below in accordance with the office practice of Latham & Watkins LLP for collecting and processing documents for overnight mail delivery by Federal Express:

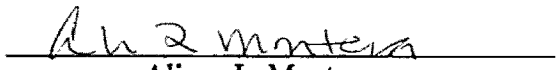
Mark C. Mazzarella *mark@mazzarellalaw.com* Rebecca L. Reed *rebecca@mazzarellalaw.com* MAZZARELLA & MAZZARELLA LLP 1620 Fifth Avenue, Suite 600 San Diego, California 92101	Attorneys for Petitioners Shirli Fabbri Weiss Trustee Shrili Fabbri Weiss Trust

William C. Pate
wpate@dpmclaw.com
Barry J. Schultz
bschultz@dpmclaw.com
Lesley A. Riis
lriis@dpmclaw.com
DEVANEY PATE MORRIS & CAMERON LLP
402 W. Broadway, Suite 1300
San Diego, California 92101

Attorneys for Respondent
City of Del Mar

I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **April 6, 2018** at San Diego, California.



Alison L. Montera

EVENT DATE: 04/20/2018 EVENT TIME: 11:00:00 AM DEPT.: C-70

JUDICIAL OFFICER: Randa Trapp

CASE NO.: 37-2017-00034936-CU-WM-CTL

CASE TITLE: SHIRLI FABBRI WEISS TRUSTEE ON BEHALF OF THE SHIRLI FABBRI WEISS TRUST VS CITY OF DEL MAR [IMAGED]

CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

EVENT TYPE: Motion Hearing (Civil)
CAUSAL DOCUMENT/DATE FILED: Motion to Dismiss, 01/23/2018

JOINT MOTION TO DISMISS VERIFIED PETITION FOR WRIT OF MANDAMUS by Respondent City of Del Mar and Real Party in Interest Torrey Pacific Corporation is GRANTED.

Petitioner's objections to the declarations are sustained. The court does not consider declarations when ruling on a Motion to Dismiss.

Request for Judicial Notice is granted.

The parties dispute whether the petition was timely served. Both agree it was timely filed on September 19, 2017 pursuant to Gov. Code § 65009(c)(1)(E) and/or CCP § 1094.6(b). Petitioner seeks to challenge a decision and appeal regarding her application for restoration and preservation of her view pursuant to the City of Del Mar's Trees, Scenic Views and Sunlight Ordinance. (Del Mar Municipal Code § 23.51) The Planning Commission ruled against petitioner; she appealed and the ruling was upheld at a City Council hearing on July 17, 2017. However, respondents were not served until December, 2017, more than 90 days after the July 17, 2017 decision by the City Council to uphold the decision by the Del Mar Planning Commission.

Del Mar Municipal Code §23.51.100 provides that "[t]he provisions of Section 1094 of the California Code of Civil Procedure are applicable to judicial review of the City of Del Mar's decisions pursuant to this Chapter."

Under CCP § 1094.6, any judicial review of any decision of a local agency or any commission only if the petition for writ of mandate is filed no later than the 90th day following the date the decision becomes final. (CCP § 1094.6(a), (b) [underlining added]). The statute also contains a provision allowing for extending the limitations period if the petitioner files a written request for preparation of the administrative record within 10 days after the decision becomes final. (See, CCP § 1094.6(d); *Okasaki v. City of Elk Grove* (2012) 203 Cal.App.4th 1043, 1049) There is nothing in the statute which dictates the time for service of the writ of mandate. (See, *Gonzalez v. County of Tulare* (1998) 65 Cal.App.4th 777, 787-788)

Under Gov. Code §65009(c)(1) ".....no action or proceeding shall be maintained in the following cases by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body's decision." Subsection (E) includes the service requirement "to attack, review, set aside, void, or annul any decision on the matters listed in Sections 65901 and 65903, or to determine the reasonableness, legality, or validity of any condition attached to a variance,

conditional use permit, or any other permit." [underlining added] Subdivision (e) of the statute provides that after expiration of the limitations period, all persons are barred from any further action or proceeding." (See, *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 765-766) There is no provision for extending the time for service. (See, *Gonzalez, supra*)

Gov. Code § 65009 contains expansive language which is intended to foreclose challenges to the facial validity of land use decisions unless promptly brought. (See, *Save Our NTC, Inc. v. City of San Diego* (2003) 105 Cal. App.4th 285, 291) Gov. Code § 65009(c)(1)(E) provides the 90 days filing/service requirement for "To attack, review, set aside, void, or annul any decision on the matters listed in Sections 65901..." Section 65901(a) refers to applications for permits, applications for variances and other powers granted by local ordinance. Here, petitioner is challenging the denial of a view restoration application, i.e. a land use decision, pursuant to a City Ordinance regulating scenic views and which grants the Planning Commission authority to regulate those views. The Planning Commission was exercising its "powers granted by local ordinance" pursuant to Gov. Code § 65009(c)(1)(E) when it denied petitioner's application to restore views on April 11, 2017. Petitioner appealed that ruling to the City Council but it was upheld on July 17, 2017.

Petitioner contends Gov. Code §65009 does not apply because it applies only to approvals required for new housing projects. She argues this case concerns a local ordinance that applies to every existing home. Instead, she contends CCP § 1094.6 applies and is incorporated in the Trees, Scenic View and Sunlight section of the Del Mar Municipal Code.

However, case law supports a finding that both may apply and because of the service limitations in Gov. Code § 65009(c) and the lack of service limitations in CCP § 1094.6, the two statutes can be harmonized, with CCP § 1094.6 applying generally and Gov. Code § 65009(c) applying more specifically in this case. In other words, the petition must be served within 90 days or else the petition is dismissed as untimely. (See, *Okasaki v. City of Elk Grove* (2012) 203 Cal.App.4th 1043, 1049; *Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 529-531; *Gonzalez v. County of Tulare* (1998) 65 Cal.App.4th 777, 787-788, 791)

It is undisputed that petitioner did not comply with the 90-day service requirement under Gov. Code § 65009(c)(1)(E)) Because the mandamus petition was not served upon respondents with the 90-day limits of Gov. Code 65009, even though the action was timely filed pursuant to CCP §1094.6, the Motion to Dismiss is granted, without leave to amend. (Gov. Code § 65009(e))

MAZZARELLA & MAZZARELLA LLP
Mark C. Mazzarella (SBN 082494)
1620 Fifth Avenue, Suite 600
San Diego, California 92101
Telephone: (619) 238-4900
Facsimile: (619) 238-4959
Email: mark@mazzarellalaw.com

Attorneys for Petitioner
SHIRLI FABBRI WEISS, TRUSTEE for the
SHIRLI WEISS FABBRI TRUST

FILED APR 19 '18 PM 2:4
San Diego Superior Court
APR 19 2018
Clerk of the Superior Court
By: E. Castenada

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO - CENTRAL DIVISION

SHIRLI FABBRI WEISS, TRUSTEE for the SHIRLI FABBRI WEISS TRUST, Petitioner, v. CITY OF DEL MAR and DOES 1 THROUGH 10, Respondents TORREY PACIFIC CORPORATION Real Party In-Interest	Case No. 37-2017-00034936-CU-WM-CTL **PETITIONER SHIRLI FABBRI WEISS' OBJECTIONS AND SUR-REPLY TO RESPONDENTS' PRESENTATION OF NEW ISSUES, ARGUMENTS AND EVIDENCE NOT RAISED IN THE MOVING PAPERS OR PETITIONER'S OPPOSITION BRIEF** Hearing Date: April 20, 2018 Time: 11:00 A.M. Department: C-70 Judge: Hon. Randa Trapp Action Filed September 19, 2017

Petitioner, Shirli Fabbri Weiss ("Weiss" or "Petitioner",) hereby submits this Objection to New Issues, Arguments and Evidence Not Raised in Respondents' Moving Papers or in Petitioner's Opposition Brief; and Petitioner's Sur-Reply Brief.

///

///

I.

THE COURT SHOULD REJECT RESPONDENTS' ATTEMPT TO INTRODUCE NEW ARGUMENTS AND EVIDENCE WHICH WERE NOT RAISED IN THE MOVING PAPERS OR THE OPPOSITION BRIEF AND TO WHICH WEISS OBJECTS; IF THE COURT CHOOSES TO ADMIT RESPNDENTS' SUBMISSIONS, THE COURT SHOULD CONSIDER WEISS' RESPONSE AS STATED HEREIN

As noted in *Balboa Ins. Co. v. Aguirre* (1983) 149 cal.App.3rd 1002, 1010: "The salutary rule is that points raised in a reply brief for the first time will not be considered unless good cause is shown for the failure to present them before. (Citations omitted.) See also, *Reichardt v. Hoffman* (1997) 52 Cal. App. 4th 754, 764 (in which the Court of Appeal refused to consider new issues raised in a reply brief) and *San Diego Watercraft v. Wells Fargo Bank, N. A.* (2002) 102 Cal.App. 4th 308, 310, 312 (in which the Court of Appeal reversed a summary judgment where the moving party had submitted a supplemental declaration for the first time in its reply papers).

Respondents' Reply Brief has raised new issues that were not included in Respondents' original moving papers, nor raised in Weiss' Opposition Brief. In addition, with their Reply Respondents submitted for the first time, the Declaration of Ashley Jones on a disputed issue of fact. Finally, on April 18, two (2) days before the hearing, Real Party has indicated the intent to use a document, i.e., an exhibit, at oral argument which was not mentioned in any of the briefing on the pending motion. To permit Respondents to raise new arguments in their Reply Brief and submit purported evidence on a disputed issue at the motion stage without providing Weiss sufficient opportunity to respond would be a violation of Weiss' due process rights. Weiss objects to the introduction of new issues, arguments and evidence for the first time in Respondents' Reply or at oral argument, and requests this Court disregard them and strike them from Respondents' Reply Brief. Similarly, Weiss requests that the Declaration of Ashley Jones be disregarded. In the event the court finds "good cause" for Respondents' late submission of new issues, arguments and evidence, (which it should not), Weiss requests that the court consider Weiss' response to those issues, arguments and evidence as stated herein below.

II.

THE NEW ISSUES RAISED AND EVIDENCE SUBMITTED BY RESPONDENTS FOR THE FIRST TIME IN THEIR REPLY BRIEF

A. Respondents argue for the first time in their Reply Brief that the City has "[ceded] a 'view easement' to Petition which triggers the service requirement of Government Code section 65009." (Reply Brief: page 5, lines 9-10 and page 9, line9-15)

Respondents did not argue in their moving papers that the City's resolution of the dispute between Petitioner and Real Party regarding Petitioner's rights pursuant to the View Ordinance "[ceded] a 'view easement' to Petitioner;" nor did Respondents argue that the purported denial of a "view easement" constituted a "land use decision" simply because compliance with the View Ordinance as sought by Weiss would have "affected the allowable use and development of the property." (Reply Brief: page 9, line 15) However, if a "view easement" was created by any decision made by the City, it was created by its decision to adopt the View Ordinance, not the decision to decline Petitioner's application to resolve the dispute between Petitioner and Real Party. As the statute shows, in order for the shortened service provisions of Government Code section 65009(c)(1) to apply, the challenged decision must be a " planning and zoning" decision within the meaning of that term as used in Division 1, and within subsection (c)(1), not just any one of hundreds of decisions that somehow has a relationship to the use of land. The fact that Government Code 65901 (incorporated into 65009 (c)(1)(E) acknowledges that a zoning administrator also can exercise powers under other ordinances, **does not bring decisions of those other ordinances within the shortened service period of 65009**. Otherwise all decisions of the Planning Commission and City Council under any ordinance would be subject to a shortened service period which would render most of 65009 superfluous. Respondents provide no cases supporting their "view easement" theory or holding that decisions made under the View Ordinance are governed by 65009.

B. Respondents new argument that Petitioner delayed approval of the Administrative Record and that such delay violates the intent of Section 65009 should be disregarded. (Reply Brief: page 5, line 22- page 6, line 2; page 6, footnote 2; and page 13, footnote 5)

Scrambling for a grounds to ask the Court to deny Petitioner's claim, Respondents seek to prejudice the court by making a new argument and submitting the self-serving Declaration of Ashley Jones suggesting that Petitioner is responsible for the delay in obtaining the Administrative Record needed to proceed with this case, while at the same time arguing that certification of the Record is not relevant to their motion. (Reply Brief: Page 6, footnote 2). The Court should disregard both Respondents' argument and the Jones Declaration. The status of the certification of the Record is a disputed issue of fact, as recognized by Respondents in the Reply Brief, at page 13, footnote 5. The Administrative Record was not delivered to Weiss over six (6) months ago or to this day and the City continues to dispute its obligation to supply portions of it. The only facts the court may consider on this motion are the allegations of the Verified Complaint, which Respondent admits must be taken as true for purposes of this motion. All factual disputes should be reserved for trial and the development of a full record, not snippets of incomplete and inaccurate "testimony."

C. Respondents argue that a number of issues included within Chapter 23 of the Del Mar Municipal Code, such as "grading permits," "encroachment permits" and "design review permits" are "all land use decisions" which fall within Section 65009's shortened service rule (Reply Brief: page 10, line 8)

Respondents' rely on *Citizens for Beach Rights v. City of San Diego* (2017) 10 Cal.App. 5th 1301, 1308 to support this newly raised argument. There is no good cause shown for not raising this argument earlier so that Petitioner could address it in the Opposition.

In the *Citizens for Beach Rights* case, the City's Engineering and Capital Projects Department submitted an application to the City's Developmental Services Department **for a Site Development Permit** to construct a new lifeguard station in South Mission Beach.

///

After a lengthy delay, the City determined that the Site Development Permit was still valid and issued a Building Permit in reliance upon the validity of the Site Development Permit. The Plaintiff's complaint was not served within 90 days of either the City's determination that the Site Development Permit was valid, or the City's issuance of the Building Permit. The Plaintiff argued it was seeking to invalidate **only** the Building Permit, and, therefore Section 65009 would not apply. The City argued that since the Building Permit depended upon the City's affirmation of the validity of the Site Development Permit, the Plaintiff effectively **was** attacking the Site Development Permit, and since an attack on a Site Development Permit, falls within Section 65009, Plaintiff's complaint was not timely served. The Court of Appeal agreed with the CityThe Court in *Citizens for Beach Rights* noted at page 1312 ". . . the purpose of Citizens' lawsuit is to stop construction by challenging the City's decision in 2015 to find that the SDP remained valid." The Court then concluded at page 1314, "In sum, we disagree with the trial court's conclusion that Citizens' lawsuit was not an attack on a 'decision,' as that term is used in Government Code section 65009, subdivision (c)(1)(E) and SDMC 121.0102. Citizens' claims - filed on August 26, 2015 - were made more than 90 days after the City **decided the SDP remained valid** and, **based on that decision**, issued a building permit to EC Contractors. Accordingly, Citizens' action was barred." [Emphasis added.]

The Respondents' new argument that the City's decision on Petitioner's Application, is like a decision by the City regarding "design review permits," and triggers the application of Section 65009 also misstates the law. In the case of *In PR/JSM Rivara LLC v. Community Redevelopment Agency of the City of Los Angeles,* (2009) 180 Cal.App. 4th 1475, the question before the Court was whether design guidelines were a zoning ordinance within the meaning of the Government Code. The developer Plaintiffs asserted that the design guidelines at issue regulated matters within the purview of zoning laws such as the use of structures and lands within

the Project Area and allowable density. They asserted the design guidelines were either a zoning ordinance or an amendment to a zoning ordinance, and the City and the Redevelopment Agency "*were required to approve the guidelines in accordance with the procedures established in the state's Planning and Zoning Law.*" The Agency and the City asserted that because the design guidelines merely implemented the redevelopment plan, the Government Code Zoning and Planning Law (which includes Section 65009) did not apply, and they did not need to comply with the procedural rules contained in Government Code Section 65000, et seq. **The Court of Appeal agreed with City and the Redevelopment Agency that Section 65000, et seq. did not apply to design guidelines**.

The Court leaves no doubt as to its holding, as reflected in the caption to Section III of its opinion, at page 1482, which reads: **"III. The Design Guidelines Are Not a Zoning Ordinance Within the Meaning of the Government Code."** This of course is directly contrary to the Respondents' new argument that "design review permits" are "land use decisions" and therefore, Section 65009 applies. In any event, the Weiss application was not an application for a design review permit. Section 65009 applies only to planning and zoning decisions specifically called out under 65009(c)(1), not to any decision that impacts a property owner's use of his land.

D. Respondents Raise the Fact that thePetition was not Served Within 60 Days as Required by California Rules of Court, Rule 3.110 (b), which Is Irrelevant to this Motion, For the First Time in Their Reply (Reply Brief: page 13, 1-17)

For the first time in their Reply Brief, Respondents argue that Weiss' failed to serve the Petition within 60 days of filing it, as required by CRC 3.110 (b), and imply this somehow justifies dismissal of the Complaint. However, the law is clear. Dismissal of a Complaint if not served within 60 days in compliance with Rule 3.110 (b) is not allowed. *Hawks v. Hawks* (2006) 141 C.A.4th 1435; *Tliche v. Van Quathem* (1998) 66 Cal. App. 4th 1056. It is misleading to suggest that Petitioner's not serving the Complaint within 60 days of filing is even relevant to this Motion or that it somehow supports the draconian remedy of dismissal without prejudice. In fact,

as the Court's file will reflect, the Complaint was served before any issuance of an Order to Show Cause and Respondents were in no way prejudiced by any delay.

E. Real Party's Intention to Use a Document in Oral Argument which Was Not Mentioned in the Pleadings Is Improper, Particularly in Light of the Likelihood that Real Party's Will Mislead the Court As to It's Relevance

On Wednesday, April 18, at 2:52 p.m. Weiss' attorney, Mark Mazzarella received an e-mail from one of Real Party's attorneys, Samantha Seikkula, a true and correct copy of which is attached hereto as Exhibit "A" and incorporated herein by this reference. As stated in Exhibit "A", Real Party's attorneys "may" use the two documents attached to the e-mail, the first of which is a "Notice" which they mischaracterize as a "demonstrative," during the oral argument set for Friday April 20, 2018 at 11:00 a.m. In the event that Respondents attempt to use that document, Petitioner objects to any reference to, use of, or consideration of the first of the two documents entitled.

Respondents did not refer to the Notice in either the Moving Papers or the Reply Brief, nor have they provided any foundation for the admission or consideration of the document by the Court. If Respondents do in fact submit the document at the hearing and the Court overrules Petitioner's objections, it should give no weight to the document. If the Court considers the document and gives it any weight, the Court should then allow Ms. Weiss an opportunity to address the inaccuracies in the document by declaration or testimony. Weiss would be highly prejudiced if the Court admits the erroneous document as evidence. At the very least if the Court allows the document in as evidence, the Court should grant Ms. Weiss leave to amend her Complaint to allege that the "Notice" form flatly mischaracterizes her Application.

III.

CONCLUSION

For the reasons set forth herein, Petitioner respectfully requests that the Court strike the arguments and evidence raised by Respondents for the first time in their Reply Brief. Petitioner would be prejudiced by the Courts admission of that evidence and argument which is not cured

by last minute briefing. In the event the Court finds "good cause" for Respondents' last minute strenuous attempts to escape judicial review of the merits, the Court should at least consider Petitioner's responses as set forth above. In any event, Petitioner respectfully submits the Petition should not be dismissed without leave to amend as Petitioner should be allowed in any event to amend to state facts that make clear that the City's challenged decision was not a planning and zoning decision within Government Code 65009.

Dated: April 19, 2018

Respectfully submitted,
MAZZARELLA & MAZZARELLA, LLP

Mark C. Mazzarella, Esq., Attorney for
PETITIONER SHIRLI FABBRI WEISS, TRUSTEE
on behalf of the SHIRLI FABBRI WEISS TRUST

MAZZARELLA & MAZZARELLA LLP
Mark C. Mazzarella (SBN 082494)
1620 Fifth Avenue, Suite 600
San Diego, California 92101
Telephone: (619) 238-4900
Facsimile: (619) 238-4959
Email: mark@mazzarellalaw.com

Attorneys for Petitioner
SHIRLI FABBRI WEISS, TRUSTEE for the
SHIRLI WEISS FABBRI TRUST

APR 19 '18 PM 2:41
FILED
San Diego Superior Court
APR 19 2018
Clerk of the Superior Court
By: E. Castaneda

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO - CENTRAL DIVISION

SHIRLI FABBRI WEISS, TRUSTEE for the SHIRLI FABBRI WEISS TRUST, Petitioner, v. CITY OF DEL MAR and DOES 1 THROUGH 10, Respondents TORREY PACIFIC CORPORATION Real Party In-Interest	Case No. 37-2017-00034936-CU-WM-CTL **DECLARATION OF MARK C. MAZZARELLA IN SUPPORT OF PETITIONER SHIRLI FABBRI WEISS' OBJECTIONS AND SUR-REPLY BRIEF TO RESPONDENTS' PRESENTATION OF NEW ISSUES, ARGUMENTS AND EVIDENCE NOT RAISED IN THE MOVING PAPERS OR PETITIONER'S OPPOSITION BRIEF** Hearing Date: April 20, 2018 Time: 11:00 A.M. Department: C-70 Judge: Hon. Randa Trapp Action Filed September 19, 2017

I, Mark C. Mazzarella, declare the following:

1. I am an attorney at law duly licensed to practice before the courts of the State of California and am a partner with the law firm of Mazzarella & Mazzarella, LLP, attorneys of

record for Petitioner Shirli Fabbri Weiss, Trustee on behalf of the Shirli Fabbri Weiss Trust, in the above-captioned case.

2. I have personal knowledge of the following facts and, if called upon as a witness, could competently testify thereto.

3. On Wednesday, April 18, at 2:52 p.m. I received an e-mail from one of Real Party's attorneys, Samantha Seikkula, a true and correct copy of which is attached hereto as Exhibit "A." As stated in Exhibit "A", Real Party's attorneys "may" use the two (2) documents attached to the e-mail, the first of which they mischaracterize as a "demonstrative," during the oral argument set for Friday April 20, 2018 at 11:00 a.m. In the event that Respondents attempt to use that document, (the "Notice"), Petitioner objects to any reference to, use of, or consideration of the first of the two documents, which is an evidentiary document, not a mere "demonstrative."

4. I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct of my personal knowledge, and that this Declaration is executed on April 19, 2018 at San Diego, California.

Mark C. Mazzarella, Esq.

Exhibit A

Mark Mazzarella

From:	Samantha.Seikkula@lw.com
Sent:	Wednesday, April 18, 2018 2:52 PM
To:	Mark Mazzarella
Cc:	CHRISTOPHER.GARRETT@LW.com; Jennifer.Roy@lw.com; lriis@dpmclaw.com
Subject:	Weiss v. City of Del Mar: Hearing Demonstratives
Attachments:	Notice of Application.pdf; Government Code Section 65009.pdf

Mr. Mazzarella,

Attached are two demonstratives we may use during the Motion to Dismiss hearing on Friday. Please let us know if you would like to discuss.

Best,

Samantha K. Seikkula

LATHAM & WATKINS LLP
12670 High Bluff Drive
San Diego, CA 92130
Direct Dial: +1.858.509.8457
Fax: +1.858.523.5450
Email: samantha.seikkula@lw.com
http://www.lw.com

This email may contain material that is confidential, privileged and/or attorney work product for the sole use of the intended recipient. Any review, disclosure, reliance or distribution by others or forwarding without express permission is strictly prohibited. If you are not the intended recipient, please contact the sender and delete all copies including any attachments.

Latham & Watkins LLP or any of its affiliates may monitor electronic communications sent or received by our networks in order to protect our business and verify compliance with our policies and relevant legal requirements.

Latham & Watkins LLP

Weiss v. City of Del Mar, et al.
San Diego Superior Court Case No. 37-2017-00034936-CU-Wm-CTL

FILED
San Diego Superior Court
APR 19 2018
Clerk of the Superior Court
By: E. Castaneda

PROOF OF SERVICE

I am employed in the county of San Diego, State of California. I am over the age of eighteen (18) years and am not a party to the within action; my business address is Mazzarella & Mazzarella, LLP, 1620 Fifth Avenue, Suite 600, San Diego, California 92101.

On **April 19, 2018**, I served the following document:

DECLARATION OF MARK MAZZARELLA

on the parties in this action by placing a true copy thereof enclosed in a sealed envelope address as follows:

LATHAM & WATKINS, LLP
Christopher W. Garrett, Esq., Jennifer K. Roy, Esq., Samantha K. Seikkula, Esq.
12670 High Bluff Drive
San Diego, CA 92130
Attorneys for Real Party In-Interest Torrey Pacific Corporation

DEVANEY PATE MORRIS & CAMERON LLP
William C. Pate, Esq., Lesley A. Riis, Esq., Barry J. Schultz, Esq.
402 W. Broadway, Suite 1300
San Diego, CA 92101
Attorneys for Respondent City of Del Mar

_____ **By United States Mail.** I enclosed the document in a sealed envelope or package addressed to the persons at the addresses on the attached Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this Firm's business practice for collection 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.

XXX **By personal service (April 19, 2018).** I caused to be delivered such envelope by hand to the offices of the addressee(s) shown above. also email

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **April 19, 2018**, at San Diego, California.

Alice M. Starr

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 05/10/2018 TIME: 09:37:00 AM DEPT: C-70

JUDICIAL OFFICER PRESIDING: Randa Trapp
CLERK: Anthony Shirley
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2017-00034936-CU-WM-CTL** CASE INIT.DATE: 09/19/2017
CASE TITLE: **Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust vs City of Del Mar [IMAGED]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

APPEARANCES

The Court, having taken the above-entitled matter under submission on 04/20/2018 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

JOINT MOTION TO DISMISS VERIFIED PETITION FOR WRIT OF MANDAMUS by Respondent City of Del Mar and Real Party in Interest Torrey Pacific Corporation is GRANTED.

Petitioner's objections to the declarations are sustained. The court does not consider declarations when ruling on a Motion to Dismiss.

Request for Judicial Notice is granted.

The parties dispute whether the petition was timely served. Both agree it was timely filed on September 19, 2017 pursuant to Gov. Code § 65009(c)(1)(E) and/or CCP § 1094.6(b). Petitioner seeks to challenge a decision and appeal regarding her application for restoration and preservation of her view pursuant to the City of Del Mar's Trees, Scenic Views and Sunlight Ordinance. (Del Mar Municipal Code § 23.51) The Planning Commission ruled against petitioner; she appealed and the ruling was upheld at a City Council hearing on July 17, 2017. However, respondents were not served until December, 2017, more than 90 days after the July 17, 2017 decision by the City Council to uphold the decision by the Del Mar Planning Commission.

Del Mar Municipal Code §23.51.100 provides that "[t]he provisions of Section 1094 of the California Code of Civil Procedure are applicable to judicial review of the City of Del Mar's decisions pursuant to this Chapter."

Under CCP § 1094.6, any judicial review of any decision of a local agency or any commission may be had only if the petition for writ of mandate is filed no later than the 90th day following the date the decision becomes final. (CCP § 1094.6(a), (b) [underlining added]). The statute also contains a provision allowing for extending the limitations period if the petitioner files a written request for preparation of the

administrative record within 10 days after the decision becomes final. (See, CCP § 1094.6(d); *Okasaki v. City of Elk Grove* (2012) 203 Cal.App.4th 1043, 1049) There is nothing in the statute which dictates the time for service of the writ of mandate. (See, *Gonzalez v. County of Tulare (*1998) 65 Cal.App.4th 777, 787-788)

Under Gov. Code §65009(c)(1) ".....no action or proceeding shall be maintained in the following cases by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body's decision." Subsection (E) includes the service requirement "to attack, review, set aside, void, or annul any decision on the matters listed in Sections 65901 and 65903, or to determine the reasonableness, legality, or validity of any condition attached to a variance, conditional use permit, or any other permit." [underlining added] Subdivision (e) of the statute provides that after expiration of the limitations period, all persons are barred from any further action or proceeding." (See, *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 765-766) There is no provision for extending the time for service. (See, *Gonzalez, supra*)

Gov. Code § 65009 contains expansive language which is intended to foreclose challenges to the facial validity of land use decisions unless promptly brought. (See, *Save Our NTC, Inc. v. City of San Diego* (2003) 105 Cal. App.4th 285, 291) Gov. Code § 65009(c)(1)(E) provides the 90 days filing/service requirement for "To attack, review, set aside, void, or annul any decision on the matters listed in Sections 65901..." Section 65901(a) refers to applications for permits, applications for variances and other powers granted by local ordinance.

Here, petitioner is challenging the denial of a view restoration application, i.e. a land use decision, pursuant to a City Ordinance regulating scenic views and a City Ordinance which grants the Planning Commission authority to decide view restoration applications. The Planning Commission was exercising its "powers granted by local ordinance" pursuant to Gov. Code § 65009(c)(1)(E) when it denied petitioner's application to restore views on April 11, 2017. Petitioner appealed that ruling to the City Council but it was upheld on July 17, 2017.

Petitioner contends Gov. Code §65009 does not apply because it applies only to approvals required for new housing projects, permits and variances. She argues this case concerns a local ordinance that applies to every existing home. Instead, she contends CCP § 1094.6 applies and is incorporated in the Trees, Scenic View and Sunlight section of the Del Mar Municipal Code.

However, case law supports a finding that both may apply and because of the service limitations in Gov. Code § 65009(c) and the lack of service limitations in CCP § 1094.6, the two statutes can be harmonized, with CCP § 1094.6 applying generally and Gov. Code § 65009(c) applying more specifically in this case. In other words, the petition must be served within 90 days or else the petition is dismissed as untimely. (See, *Okasaki v. City of Elk Grove* (2012) 203 Cal.App.4th 1043, 1049; *Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 529-531; *Gonzalez v. County of Tulare* (1998) 65 Cal.App.4th 777, 787-788, 791)

It is undisputed that petitioner did not comply with the 90-day service requirement under Gov. Code § 65009(c)(1)(E)) Because the mandamus petition was not served upon respondents with the 90-day limits of Gov. Code 65009, even though the action was timely filed pursuant to CCP §1094.6, the Motion to Dismiss is granted, without leave to amend. (Gov. Code § 65009(e))

IT IS SO ORDERED.

Randa Trapp

Judge Randa Trapp

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Central
330 West Broadway
San Diego, CA 92101

SHORT TITLE: Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust vs City of Del Mar [IMAGED]

CLERK'S CERTIFICATE OF SERVICE BY MAIL	CASE NUMBER: **37-2017-00034936-CU-WM-CTL**

I certify that I am not a party to this cause. I certify that a true copy of the attached minute order was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at San Diego, California, on 05/10/2018.

Clerk of the Court, by: A. Shirley, Deputy

JENNIFER ROY
LATHAM AND WATKINS
12670 HIGH BLUFF DR.
SAN DIEGO, CA 92130-3086

WILLIAM C PATE
DEVANEY PATE MORRIS & CAMERON LLP
402 WEST BROADWAY # 1300
SAN DIEGO, CA 92101

SAMANTHA K SEIKKULA
LATHAM & WATKINS LLP
12670 HIGH BLUFF DRIVE
SAN DIEGO, CA 92130

MARK C MAZZARELLA
MAZZARELLA & MAZZARELLA LLP
1620 FIFTH AVENUE # 600
SAN DIEGO, CA 92101

CHRISTOPHER W GARRETT
LATHAM & WATKINS, LLP
12670 HIGH BLUFF DRIVE
SAN DIEGO, CA 92130

☐ Additional names and address attached.

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
05/29/2018 at 10:17:00 AM
Clerk of the Superior Court
By Lee McAlister, Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO – CENTRAL DIVISION

SHIRLI FABBRI WEISS, TRUSTEE, on behalf of the SHIRLI FABBRI WEISS TRUST, Petitioner, v. CITY OF DEL MAR and DOES 1 through 10, Respondents. TORREY PACIFIC CORPORATION Real Party-In-Interest	CASE NO. 37-2017-00034936-CU-WM-CTL ICJ: Hon. Randa Trapp DEPT: C-70 **[~~PROPOSED~~] ORDER AND JUDGMENT OF DISMISSAL** Petition Filed: September 19, 2017 Trial Date: None set

On April 20, 2018, a hearing was held on Respondent City of Del Mar ("City") and Real Party in Interest Real Party in Interest Torrey Pacific Corporation ("Real Party") Joint Motion to Dismiss Petitioner Shirli Fabri Weiss' (as Trustee of the Shirli Fabbri Weiss Trust) ("Petitioner") Petition for Writ of Mandamus ("Petition") on the grounds that Petitioner failed to effect service of a summons as required by the California Zoning and Planning Code. (Gov. Code § 65009.) Mark C. Mazzarella of Mazzarella & Mazzarella, LLP appeared on behalf of Petitioner. Lesley A. Riis of Devaney Pate Morris & Cameron, LLP, appeared on behalf of Respondent City of Del Mar. Christopher W. Garrett of Latham & Watkins, LLP appeared on behalf of Real Party in Interest. After taking the matter under submission, the Court issued an order on May 10, 2018,

granting the Joint Motion to Dismiss. The Minute Order granting the Motion is attached hereto as Exhibit "A."

WHEREFORE, IT IS HEREBY ADJUDGED AND DECREED, that the Joint Motion to Dismiss the Petition for Writ of Mandamus is GRANTED. Judgment is hereby entered in favor of Respondent City of Del Mar and Real Party in Interest Torrey Pacific Corporation. Petitioner's Petition for Writ of Mandamus is dismissed with prejudice. Respondent and Real Party, through post trial motion and through a Memorandum of Costs, will establish entitlement, if any, to statutory costs to be determined at that time.

Dated: _____

_____
Hon. Randa Trapp

APPROVED AS TO FORM:

Dated: 5/24, 2018

MAZZARELLA & MAZZARELLA LLP

By: _____
Mark C. Mazzarella, Esq.
Daral B. Mazzarella, Esq.
Attorneys for Petitioner

Dated: _____, 2018

DEVANEY PATE MORRIS & CAMERON, LLP

By: _____
William C. Pate, Esq.
Lesley A. Riis, Esq.
Attorneys for Respondent CITY OF DEL MAR

Dated: _____, 2018

LATHAM & WATKINS LLP

By: _____
Christopher C. Garrett, Esq.
Jennifer K. Roy, Esq.
Samantha K. Seikkula, Esq.

Attorneys for Real Party In-Interest TORREY PACIFIC CORPORATION

granting the Joint Motion to Dismiss. The Minute Order granting the Motion is attached hereto as Exhibit "A."

WHEREFORE, IT IS HEREBY ADJUDGED AND DECREED, that the Joint Motion to Dismiss the Petition for Writ of Mandamus is GRANTED. Judgment is hereby entered in favor of Respondent City of Del Mar and Real Party in Interest Torrey Pacific Corporation. Petitioner's Petition for Writ of Mandamus is dismissed with prejudice. Respondent and Real Party, through post trial motion and through a Memorandum of Costs, will establish entitlement, if any, to statutory costs to be determined at that time.

Dated: _____

_____
Hon. Randa Trapp

APPROVED AS TO FORM:

Dated: _____, 2018

MAZZARELLA & MAZZARELLA LLP

By: _____
Mark C. Mazzarella, Esq.
Daral B. Mazzarella, Esq.
Attorneys for Petitioner

Dated: May 24, 2018

DEVANEY PATE MORRIS & CAMERON, LLP

By: _____
William C. Pate, Esq.
Lesley A. Riis, Esq.
Attorneys for Respondent CITY OF DEL MAR

Dated: _____, 2018

LATHAM & WATKINS LLP

By: _____
Christopher C. Garrett, Esq.
Jennifer K. Roy, Esq.
Samantha K. Seikkula, Esq.

Attorneys for Real Party In-Interest TORREY PACIFIC CORPORATION

granting the Joint Motion to Dismiss. The Minute Order granting the Motion is attached hereto as Exhibit "A."

WHEREFORE, IT IS HEREBY ADJUDGED AND DECREED, that the Joint Motion to Dismiss the Petition for Writ of Mandamus is GRANTED. Judgment is hereby entered in favor of Respondent City of Del Mar and Real Party in Interest Torrey Pacific Corporation. Petitioner's Petition for Writ of Mandamus is dismissed with prejudice. Respondent and Real Party, through post trial motion and through a Memorandum of Costs, will establish entitlement, if any, to statutory costs to be determined at that time.

Dated: 05/29/2018

Randa Trapp

Hon. Randa Trapp

APPROVED AS TO FORM:

Dated: _____, 2018

MAZZARELLA & MAZZARELLA LLP

By: _____
Mark C. Mazzarella, Esq.
Daral B. Mazzarella, Esq.
Attorneys for Petitioner

Dated: _____, 2018

DEVANEY PATE MORRIS & CAMERON, LLP

By: _____
William C. Pate, Esq.
Lesley A. Riis, Esq.
Attorneys for Respondent CITY OF DEL MAR

Dated: May 24, 2018

LATHAM & WATKINS LLP

By: Jennifer Roy
Christopher C. Garrett, Esq.
Jennifer K. Roy, Esq.
Samantha K. Seikkula, Esq.

Attorneys for Real Party In-Interest TORREY PACIFIC CORPORATION

PROOF OF SERVICE

Shirli Fabbri Weiss, et al. v. City of Del Mar, et al.
SUPERIOR COURT OF CALIFORNIA - COUNTY OF SAN DIEGO – CENTRAL
Case No. 37-2017-00034936-CU-WM-CTL

I, the undersigned, declare: That I am, and was at the time of service of the papers herein referred to, over the age of eighteen years, and not a party to the action; and I am employed in the County of San Diego, California. My business address is 402 W. Broadway, Suite 1300, San Diego, California 92101-8700.

On May 25, 2018, at San Diego, California, I served the following document(s) described as:

[PROPOSED] ORDER AND JUDGMENT OF DISMISSAL

on the parties in said action by placing a true copy thereof in a separate sealed envelope for each addressee named hereafter, addressed to each such addressee respectively as stated on the attached service list, which reflects the address last given by each such addressee on any document filed in the action and served on this office.

SEE ATTACHED SERVICE LIST

☒ **BY MAIL:** I am readily familiar with our business practice for collecting, processing and mailing correspondence and pleadings with the United States Postal Service. Such correspondence and pleadings are deposited with the United States Postal Service on the same day that they are placed for mailing in the ordinary course of business. I sealed each envelope and, with the postage thereon fully prepaid, placed it for mailing in accord with our business' practice. (C.C.P. § 1013(a) and (b))

☒ **STATE COURT:** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 25, 2018, at San Diego, California.

Sabrina Scialpi

SERVICE LIST
Shirli Fabbri Weiss, et al. v. City of Del Mar, et al.
CASE NO. 37-2017-00034936-CU-WM-CTL

Mark C. Mazzarella Rebecca L. Reed Mazarella & Mazzarella 1620 Fifth Ave., Suite 600 San Diego, CA 92101 P:(619)238-4900 F:(619)238-4959 mark@mazzarellalaw.com rebecca@mazzarellalaw.com	Attorneys for Petitioner SHIRLI FABBRI WEISS TRUSTEE ; SHIRLI WEISS FABBRI TRUST
Christopher W. Garrett Jennifer K Roy Samantha K Seikkula Latham & Watkins LLP 12670 High Bluff Drive San Diego CA 92130 P:(858)523-5400 F:(858)523-5450 christopher.garrett@lw.com jennifer.roy@lw.com samantha.seikkula@lw.com	Attorneys for Real Party in-Interest TORREY PACIFIC CORPORATION

Exhibit "A"

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 05/10/2018 TIME: 09:37:00 AM DEPT: C-70

JUDICIAL OFFICER PRESIDING: Randa Trapp
CLERK: Anthony Shirley
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2017-00034936-CU-WM-CTL** CASE INIT.DATE: 09/19/2017
CASE TITLE: **Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust vs City of Del Mar [IMAGED]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

APPEARANCES

The Court, having taken the above-entitled matter under submission on 04/20/2018 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

JOINT MOTION TO DISMISS VERIFIED PETITION FOR WRIT OF MANDAMUS by Respondent City of Del Mar and Real Party in Interest Torrey Pacific Corporation is GRANTED.

Petitioner's objections to the declarations are sustained. The court does not consider declarations when ruling on a Motion to Dismiss.

Request for Judicial Notice is granted.

The parties dispute whether the petition was timely served. Both agree it was timely filed on September 19, 2017 pursuant to Gov. Code § 65009(c)(1)(E) and/or CCP § 1094.6(b). Petitioner seeks to challenge a decision and appeal regarding her application for restoration and preservation of her view pursuant to the City of Del Mar's Trees, Scenic Views and Sunlight Ordinance. (Del Mar Municipal Code § 23.51) The Planning Commission ruled against petitioner; she appealed and the ruling was upheld at a City Council hearing on July 17, 2017. However, respondents were not served until December, 2017, more than 90 days after the July 17, 2017 decision by the City Council to uphold the decision by the Del Mar Planning Commission.

Del Mar Municipal Code §23.51.100 provides that "[t]he provisions of Section 1094 of the California Code of Civil Procedure are applicable to judicial review of the City of Del Mar's decisions pursuant to this Chapter."

Under CCP § 1094.6, any judicial review of any decision of a local agency or any commission may be had only if the petition for writ of mandate is filed no later than the 90th day following the date the decision becomes final. (CCP § 1094.6(a), (b) [underlining added]). The statute also contains a provision allowing for extending the limitations period if the petitioner files a written request for preparation of the

administrative record within 10 days after the decision becomes final. (See, CCP § 1094.6(d); *Okasaki v. City of Elk Grove* (2012) 203 Cal.App.4th 1043, 1049) There is nothing in the statute which dictates the time for service of the writ of mandate. (See, *Gonzalez v. County of Tulare* (1998) 65 Cal.App.4th 777, 787-788)

Under Gov. Code §65009(c)(1) ".....no action or proceeding shall be maintained in the following cases by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body's decision." Subsection (E) includes the service requirement "to attack, review, set aside, void, or annul any decision on the matters listed in Sections 65901 and 65903, or to determine the reasonableness, legality, or validity of any condition attached to a variance, conditional use permit, or any other permit." [underlining added] Subdivision (e) of the statute provides that after expiration of the limitations period, all persons are barred from any further action or proceeding." (See, *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 765-766) There is no provision for extending the time for service. (See, *Gonzalez, supra*)

Gov. Code § 65009 contains expansive language which is intended to foreclose challenges to the facial validity of land use decisions unless promptly brought. (See, *Save Our NTC, Inc. v. City of San Diego* (2003) 105 Cal. App.4th 285, 291) Gov. Code § 65009(c)(1)(E) provides the 90 days filing/service requirement for "To attack, review, set aside, void, or annul any decision on the matters listed in Sections 65901..." Section 65901(a) refers to applications for permits, applications for variances and other powers granted by local ordinance.

Here, petitioner is challenging the denial of a view restoration application, i.e. a land use decision, pursuant to a City Ordinance regulating scenic views and a City Ordinance which grants the Planning Commission authority to decide view restoration applications. The Planning Commission was exercising its "powers granted by local ordinance" pursuant to Gov. Code § 65009(c)(1)(E) when it denied petitioner's application to restore views on April 11, 2017. Petitioner appealed that ruling to the City Council but it was upheld on July 17, 2017.

Petitioner contends Gov. Code §65009 does not apply because it applies only to approvals required for new housing projects, permits and variances. She argues this case concerns a local ordinance that applies to every existing home. Instead, she contends CCP § 1094.6 applies and is incorporated in the Trees, Scenic View and Sunlight section of the Del Mar Municipal Code.

However, case law supports a finding that both may apply and because of the service limitations in Gov. Code § 65009(c) and the lack of service limitations in CCP § 1094.6, the two statutes can be harmonized, with CCP § 1094.6 applying generally and Gov. Code § 65009(c) applying more specifically in this case. In other words, the petition must be served within 90 days or else the petition is dismissed as untimely. (See, *Okasaki v. City of Elk Grove* (2012) 203 Cal.App.4th 1043, 1049; *Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 529-531; *Gonzalez v. County of Tulare* (1998) 65 Cal.App.4th 777, 787-788, 791)

It is undisputed that petitioner did not comply with the 90-day service requirement under Gov. Code § 65009(c)(1)(E)) Because the mandamus petition was not served upon respondents with the 90-day limits of Gov. Code 65009, even though the action was timely filed pursuant to CCP §1094.6, the Motion to Dismiss is granted, without leave to amend. (Gov. Code § 65009(e))

IT IS SO ORDERED.

Randa Trapp

Judge Randa Trapp

DEVANEY PATE MORRIS & CAMERON, LLP
William C. Pate, Esq. (SBN 206983)
wpate@dpmclaw.com
Lesley A. Riis, Esq. (SBN 304615)
lriis@dpmclaw.com
402 W. Broadway, Suite 1300
San Diego, California 92102
Telephone: (619) 354-5030
Facsimile: (619) 354-5035

Attorneys for Respondent
CITY OF DEL MAR

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
06/07/2018 at 04:24:00 PM
Clerk of the Superior Court
By E- Filing,Deputy Clerk

Exempt from filing fee - Government code sections 6103 & 26857

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO - CENTRAL DISTRICT

SHIRLI FABBRI WEISS, TRUSTEE, on behalf of the SHIRLI FABBRI WEISS TRUST Petitioner, v. CITY OF DEL MAR and DOES 1 through 10, Respondents. TORREY PACIFIC CORPORATION Real Party in Interest	Case No.: 37-2017-00034936-CU-WM-CTL ICJ: Hon. Randa Trapp DEPT: C-70 **NOTICE OF ENTRY OF JUDGMENT** **IMAGED FILE** COMPLAINT FILED: 9/19/2017 TRIAL DATE: None set

TO EACH PARTY HERETO AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 29, 2018, judgment was entered in favor of Respondent City of Del Mar and Real Party in Interest Real Party in Interest Torrey Pacific Corporation against Petitioner Shirli Fabri Weiss (as Trustee of the Shirli Fabbri Weiss Trust). A true and correct copy of the Judgment is attached hereto as Exhibit "A."

Dated: June 7, 2018

DEVANEY PATE MORRIS & CAMERON

By:
William C. Pate
Lesley A. Riis
Attorneys for Respondent CITY OF DEL MAR

Exhibit “A”

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
05/29/2018 at 10:17:00 AM
Clerk of the Superior Court
By Lee McAlister,Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO – CENTRAL DIVISION

SHIRLI FABBRI WEISS, TRUSTEE, on behalf of the SHIRLI FABBRI WEISS TRUST, Petitioner, v. CITY OF DEL MAR and DOES 1 through 10, Respondents. TORREY PACIFIC CORPORATION Real Party-In-Interest	CASE NO. 37-2017-00034936-CU-WM-CTL ICJ: Hon. Randa Trapp DEPT: C-70 **[PROPOSED] ORDER AND JUDGMENT OF DISMISSAL** Petition Filed: September 19, 2017 Trial Date: None set

On April 20, 2018, a hearing was held on Respondent City of Del Mar ("City") and Real Party in Interest Real Party in Interest Torrey Pacific Corporation ("Real Party") Joint Motion to Dismiss Petitioner Shirli Fabri Weiss' (as Trustee of the Shirli Fabbri Weiss Trust) ("Petitioner") Petition for Writ of Mandamus ("Petition") on the grounds that Petitioner failed to effect service of a summons as required by the California Zoning and Planning Code. (Gov. Code § 65009.) Mark C. Mazzarella of Mazzarella & Mazzarella, LLP appeared on behalf of Petitioner. Lesley A. Riis of Devaney Pate Morris & Cameron, LLP, appeared on behalf of Respondent City of Del Mar. Christopher W. Garrett of Latham & Watkins, LLP appeared on behalf of Real Party in Interest. After taking the matter under submission, the Court issued an order on May 10, 2018,

granting the Joint Motion to Dismiss. The Minute Order granting the Motion is attached hereto as Exhibit "1."

WHEREFORE, IT IS HEREBY ADJUDGED AND DECREED, that the Joint Motion to Dismiss the Petition for Writ of Mandamus is GRANTED. Judgment is hereby entered in favor of Respondent City of Del Mar and Real Party in Interest Torrey Pacific Corporation. Petitioner's Petition for Writ of Mandamus is dismissed with prejudice. Respondent and Real Party, through post trial motion and through a Memorandum of Costs, will establish entitlement, if any, to statutory costs to be determined at that time.

Dated: _____

_____
Hon. Randa Trapp

APPROVED AS TO FORM:

Dated: 5/24, 2018

MAZZARELLA & MAZZARELLA LLP

By: _____
Mark C. Mazzarella, Esq.
Daral B. Mazzarella, Esq.
Attorneys for Petitioner

Dated: _____, 2018

DEVANEY PATE MORRIS & CAMERON, LLP

By: _____
William C. Pate, Esq.
Lesley A. Riis, Esq.
Attorneys for Respondent CITY OF DEL MAR

Dated: _____, 2018

LATHAM & WATKINS LLP

By: _____
Christopher C. Garrett, Esq.
Jennifer K. Roy, Esq.
Samantha K. Seikkula, Esq.

Attorneys for Real Party In-Interest TORREY PACIFIC CORPORATION

granting the Joint Motion to Dismiss. The Minute Order granting the Motion is attached hereto as Exhibit "1."

WHEREFORE, IT IS HEREBY ADJUDGED AND DECREED, that the Joint Motion to Dismiss the Petition for Writ of Mandamus is GRANTED. Judgment is hereby entered in favor of Respondent City of Del Mar and Real Party in Interest Torrey Pacific Corporation. Petitioner's Petition for Writ of Mandamus is dismissed with prejudice. Respondent and Real Party, through post trial motion and through a Memorandum of Costs, will establish entitlement, if any, to statutory costs to be determined at that time.

Dated: _____

_____
Hon. Randa Trapp

APPROVED AS TO FORM:

Dated: _____, 2018

MAZZARELLA & MAZZARELLA LLP

By: _____
Mark C. Mazzarella, Esq.
Daral B. Mazzarella, Esq.
Attorneys for Petitioner

Dated: May 24, 2018

DEVANEY PATE MORRIS & CAMERON, LLP

By: _____
William C. Pate, Esq.
Lesley A. Riis, Esq.
Attorneys for Respondent CITY OF DEL MAR

Dated: _____, 2018

LATHAM & WATKINS LLP

By: _____
Christopher C. Garrett, Esq.
Jennifer K. Roy, Esq.
Samantha K. Seikkula, Esq.

Attorneys for Real Party In-Interest TORREY PACIFIC CORPORATION

granting the Joint Motion to Dismiss. The Minute Order granting the Motion is attached hereto as Exhibit "1."

WHEREFORE, IT IS HEREBY ADJUDGED AND DECREED, that the Joint Motion to Dismiss the Petition for Writ of Mandamus is GRANTED. Judgment is hereby entered in favor of Respondent City of Del Mar and Real Party in Interest Torrey Pacific Corporation. Petitioner's Petition for Writ of Mandamus is dismissed with prejudice. Respondent and Real Party, through post trial motion and through a Memorandum of Costs, will establish entitlement, if any, to statutory costs to be determined at that time.

Dated: 05/29/2018

Hon. Randa Trapp

APPROVED AS TO FORM:

Dated: _____, 2018

MAZZARELLA & MAZZARELLA LLP

By: _____
Mark C. Mazzarella, Esq.
Daral B. Mazzarella, Esq.
Attorneys for Petitioner

Dated: _____, 2018

DEVANEY PATE MORRIS & CAMERON, LLP

By: _____
William C. Pate, Esq.
Lesley A. Riis, Esq.
Attorneys for Respondent CITY OF DEL MAR

Dated: May 24, 2018

LATHAM & WATKINS LLP

By: _____
Christopher C. Garrett, Esq.
Jennifer K. Roy, Esq.
Samantha K. Seikkula, Esq.

Attorneys for Real Party In-Interest TORREY PACIFIC CORPORATION

Exhibit "1"

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 05/10/2018 TIME: 09:37:00 AM DEPT: C-70

JUDICIAL OFFICER PRESIDING: Randa Trapp
CLERK: Anthony Shirley
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2017-00034936-CU-WM-CTL** CASE INIT.DATE: 09/19/2017
CASE TITLE: **Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust vs City of Del Mar [IMAGED]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

APPEARANCES

The Court, having taken the above-entitled matter under submission on 04/20/2018 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

JOINT MOTION TO DISMISS VERIFIED PETITION FOR WRIT OF MANDAMUS by Respondent City of Del Mar and Real Party in Interest Torrey Pacific Corporation is GRANTED.

Petitioner's objections to the declarations are sustained. The court does not consider declarations when ruling on a Motion to Dismiss.

Request for Judicial Notice is granted.

The parties dispute whether the petition was timely served. Both agree it was timely filed on September 19, 2017 pursuant to Gov. Code § 65009(c)(1)(E) and/or CCP § 1094.6(b). Petitioner seeks to challenge a decision and appeal regarding her application for restoration and preservation of her view pursuant to the City of Del Mar's Trees, Scenic Views and Sunlight Ordinance. (Del Mar Municipal Code § 23.51) The Planning Commission ruled against petitioner; she appealed and the ruling was upheld at a City Council hearing on July 17, 2017. However, respondents were not served until December, 2017, more than 90 days after the July 17, 2017 decision by the City Council to uphold the decision by the Del Mar Planning Commission.

Del Mar Municipal Code §23.51.100 provides that "[t]he provisions of Section 1094 of the California Code of Civil Procedure are applicable to judicial review of the City of Del Mar's decisions pursuant to this Chapter."

Under CCP § 1094.6, any judicial review of any decision of a local agency or any commission may be had only if the petition for writ of mandate is filed no later than the 90th day following the date the decision becomes final. (CCP § 1094.6(a), (b) [underlining added]). The statute also contains a provision allowing for extending the limitations period if the petitioner files a written request for preparation of the

administrative record within 10 days after the decision becomes final. (See, CCP § 1094.6(d); *Okasaki v. City of Elk Grove* (2012) 203 Cal.App.4th 1043, 1049) There is nothing in the statute which dictates the time for service of the writ of mandate. (See, *Gonzalez v. County of Tulare* (1998) 65 Cal.App.4th 777, 787-788)

Under Gov. Code §65009(c)(1) ".....no action or proceeding shall be maintained in the following cases by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body's decision." Subsection (E) includes the service requirement "to attack, review, set aside, void, or annul any decision on the matters listed in Sections 65901 and 65903, or to determine the reasonableness, legality, or validity of any condition attached to a variance, conditional use permit, or any other permit." [underlining added] Subdivision (e) of the statute provides that after expiration of the limitations period, all persons are barred from any further action or proceeding." (See, *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 765-766) There is no provision for extending the time for service. (See, *Gonzalez, supra*)

Gov. Code § 65009 contains expansive language which is intended to foreclose challenges to the facial validity of land use decisions unless promptly brought. (See, *Save Our NTC, Inc. v. City of San Diego* (2003) 105 Cal. App.4th 285, 291) Gov. Code § 65009(c)(1)(E) provides the 90 days filing/service requirement for "To attack, review, set aside, void, or annul any decision on the matters listed in Sections 65901..." Section 65901(a) refers to applications for permits, applications for variances and other powers granted by local ordinance.

Here, petitioner is challenging the denial of a view restoration application, i.e. a land use decision, pursuant to a City Ordinance regulating scenic views and a City Ordinance which grants the Planning Commission authority to decide view restoration applications. The Planning Commission was exercising its "powers granted by local ordinance" pursuant to Gov. Code § 65009(c)(1)(E) when it denied petitioner's application to restore views on April 11, 2017. Petitioner appealed that ruling to the City Council but it was upheld on July 17, 2017.

Petitioner contends Gov. Code §65009 does not apply because it applies only to approvals required for new housing projects, permits and variances. She argues this case concerns a local ordinance that applies to every existing home. Instead, she contends CCP § 1094.6 applies and is incorporated in the Trees, Scenic View and Sunlight section of the Del Mar Municipal Code.

However, case law supports a finding that both may apply and because of the service limitations in Gov. Code § 65009(c) and the lack of service limitations in CCP § 1094.6, the two statutes can be harmonized, with CCP § 1094.6 applying generally and Gov. Code § 65009(c) applying more specifically in this case. In other words, the petition must be served within 90 days or else the petition is dismissed as untimely. (See, *Okasaki v. City of Elk Grove* (2012) 203 Cal.App.4th 1043, 1049; *Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 529-531; *Gonzalez v. County of Tulare* (1998) 65 Cal.App.4th 777, 787-788, 791)

It is undisputed that petitioner did not comply with the 90-day service requirement under Gov. Code § 65009(c)(1)(E)) Because the mandamus petition was not served upon respondents with the 90-day limits of Gov. Code 65009, even though the action was timely filed pursuant to CCP §1094.6, the Motion to Dismiss is granted, without leave to amend. (Gov. Code § 65009(e))

IT IS SO ORDERED.

Randa Trapp

Judge Randa Trapp

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO Central 330 West Broadway San Diego, CA 92101	
SHORT TITLE: Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust vs City of Del Mar [IMAGED]	
CLERK'S CERTIFICATE OF SERVICE BY MAIL	CASE NUMBER: **37-2017-00034936-CU-WM-CTL**

I certify that I am not a party to this cause. I certify that a true copy of the attached minute order was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at San Diego, California, on 05/10/2018.

Clerk of the Court, by: A. Shirley, Deputy

JENNIFER ROY
LATHAM AND WATKINS
12670 HIGH BLUFF DR.
SAN DIEGO, CA 92130-3086

WILLIAM C PATE
DEVANEY PATE MORRIS & CAMERON LLP
402 WEST BROADWAY # 1300
SAN DIEGO, CA 92101

SAMANTHA K SEIKKULA
LATHAM & WATKINS LLP
12670 HIGH BLUFF DRIVE
SAN DIEGO, CA 92130

MARK C MAZZARELLA
MAZZARELLA & MAZZARELLA LLP
1620 FIFTH AVENUE # 600
SAN DIEGO, CA 92101

CHRISTOPHER W GARRETT
LATHAM & WATKINS, LLP
12670 HIGH BLUFF DRIVE
SAN DIEGO, CA 92130

☐ Additional names and address attached.

PROOF OF SERVICE

Shirli Fabbri Weiss, et al. v. City of Del Mar, et al.
SUPERIOR COURT OF CALIFORNIA - COUNTY OF SAN DIEGO – CENTRAL
Case No. 37-2017-00034936-CU-WM-CTL

I, the undersigned, declare: That I am, and was at the time of service of the papers herein referred to, over the age of eighteen years, and not a party to the action; and I am employed in the County of San Diego, California. My business address is 402 W. Broadway, Suite 1300, San Diego, California 92101-8700.

On May 25, 2018, at San Diego, California, I served the following document(s) described as:

[PROPOSED] ORDER AND JUDGMENT OF DISMISSAL

on the parties in said action by placing a true copy thereof in a separate sealed envelope for each addressee named hereafter, addressed to each such addressee respectively as stated on the attached service list, which reflects the address last given by each such addressee on any document filed in the action and served on this office.

SEE ATTACHED SERVICE LIST

☒ **BY MAIL:** I am readily familiar with our business practice for collecting, processing and mailing correspondence and pleadings with the United States Postal Service. Such correspondence and pleadings are deposited with the United States Postal Service on the same day that they are placed for mailing in the ordinary course of business. I sealed each envelope and, with the postage thereon fully prepaid, placed it for mailing in accord with our business' practice. (C.C.P. § 1013(a) and (b))

☒ **STATE COURT:** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 25, 2018, at San Diego, California.

Sabrina Scialpi

SERVICE LIST
Shirli Fabbri Weiss, et al. v. City of Del Mar, et al.
CASE NO. 37-2017-00034936-CU-WM-CTL

Mark C. Mazzarella Rebecca L. Reed Mazarella & Mazzarella 1620 Fifth Ave., Suite 600 San Diego, CA 92101 P:(619)238-4900 F:(619)238-4959 mark@mazzarellalaw.com rebecca@mazzarellalaw.com	Attorneys for Petitioner SHIRLI FABBRI WEISS TRUSTEE ; SHIRLI WEISS FABBRI TRUST
Christopher W. Garrett Jennifer K Roy Samantha K Seikkula Latham & Watkins LLP 12670 High Bluff Drive San Diego CA 92130 P:(858)523-5400 F:(858)523-5450 christopher.garrett@lw.com jennifer.roy@lw.com samantha.seikkula@lw.com	Attorneys for Real Party in-Interest TORREY PACIFIC CORPORATION

PROOF OF SERVICE

Shirli Fabbri Weiss, et al. v. City of Del Mar, et al.
SUPERIOR COURT OF CALIFORNIA - COUNTY OF SAN DIEGO – CENTRAL
Case No. 37-2017-00034936-CU-WM-CTL

I, the undersigned, declare: That I am, and was at the time of service of the papers herein referred to, over the age of eighteen years, and not a party to the action; and I am employed in the County of San Diego, California. My business address is 402 W. Broadway, Suite 1300, San Diego, California 92101-8700.

On June 7, 2018, at San Diego, California, I served the following document(s) described as:

NOTICE OF ENTRY OF JUDGMENT

on the parties in said action by placing a true copy thereof in a separate sealed envelope for each addressee named hereafter, addressed to each such addressee respectively as stated on the attached service list, which reflects the address last given by each such addressee on any document filed in the action and served on this office.

SEE ATTACHED SERVICE LIST

☒ **BY MAIL:** I am readily familiar with our business practice for collecting, processing and mailing correspondence and pleadings with the United States Postal Service. Such correspondence and pleadings are deposited with the United States Postal Service on the same day that they are placed for mailing in the ordinary course of business. I sealed each envelope and, with the postage thereon fully prepaid, placed it for mailing in accord with our business' practice. (C.C.P. § 1013(a) and (b))

☒ **STATE COURT:** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 7, 2018, at San Diego, California.

Sabrina Scialdi

SERVICE LIST
Shirli Fabbri Weiss, et al. v. City of Del Mar, et al.
CASE NO. 37-2017-00034936-CU-WM-CTL

Mark C. Mazzarella Rebecca L. Reed Mazarella & Mazzarella 1620 Fifth Ave., Suite 600 San Diego, CA 92101 P:(619)238-4900 F:(619)238-4959 mark@mazzarellalaw.com rebecca@mazzarellalaw.com	Attorneys for Petitioner SHIRLI FABBRI WEISS TRUSTEE ; SHIRLI WEISS FABBRI TRUST
Christopher W. Garrett Jennifer K Roy Samantha K Seikkula Latham & Watkins LLP 12670 High Bluff Drive San Diego CA 92130 P:(858)523-5400 F:(858)523-5450 christopher.garrett@lw.com jennifer.roy@lw.com samantha.seikkula@lw.com	Attorneys for Real Party in-Interest TORREY PACIFIC CORPORATION

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: 82494
NAME: Mark C. Mazzarella, Esq.
FIRM NAME: Mazzarella & Mazzarella, LLP
STREET ADDRESS: 2550 Fifth Avenue, 9th Floor
CITY: San Diego STATE: CA ZIP CODE: 92103-6625
TELEPHONE NO.: (619) 238-4900 FAX NO.: (619) 238-4959
E-MAIL ADDRESS: mark@mazzarellalaw.com
ATTORNEY FOR (*name*): Shirli Weiss, as Trustee of the Weiss Family Trust

FOR COURT USE ONLY

FILED
Clerk of the Superior Court
JUN 07 2018
By: N. ZUAZO, Deputy

SUPERIOR COURT OF CALIFORNIA, COUNTY OF
STREET ADDRESS: 330 West Broadway
MAILING ADDRESS: 330 West Broadway
CITY AND ZIP CODE: San Diego, CA 92101
BRANCH NAME: Central Division

PLAINTIFF/PETITIONER: Shirli Fabbri Weiss as Trustee of the Weiss Family Trust
DEFENDANT/RESPONDENT: City of Del Mar and Torrey Pacific Corporation

[x] NOTICE OF APPEAL [ ] CROSS-APPEAL
(UNLIMITED CIVIL CASE)

CASE NUMBER:
37-2017-00034936-CU-WM-CTL

Notice: Please read *Information on Appeal Procedures for Unlimited Civil Cases* (Judicial Council form APP-001) before completing this form. This form must be filed in the superior court, not in the Court of Appeal. A copy of this form must also be served on the other party or parties to this appeal. You may use an applicable Judicial Council form (such as APP-009 or APP-009E) for the proof of service. When this document has been completed and a copy served, the original may then be filed with the court with proof of service.

1. NOTICE IS HEREBY GIVEN that (name): Shirli Fabbri Weiss, as Trustee of the Weiss Family Trust appeals from the following judgment or order in this case, which was entered on (*date*): May 25, 2018
   - [ ] Judgment after jury trial
   - [ ] Judgment after court trial
   - [ ] Default judgment
   - [ ] Judgment after an order granting a summary judgment motion
   - [ ] Judgment of dismissal under Code of Civil Procedure, §§ 581d, 583.250, 583.360, or 583.430
   - [ ] Judgment of dismissal after an order sustaining a demurrer
   - [ ] An order after judgment under Code of Civil Procedure, § 904.1(a)(2)
   - [ ] An order or judgment under Code of Civil Procedure, § 904.1(a)(3)–(13)
   - [x] Other (*describe and specify code section that authorizes this appeal*): Judgment after order granting motion to dismiss pursuant to Govt Code § 65009. CCP § 904.1(a)(1)

2. For cross-appeals only:
   a. Date notice of appeal was filed in original appeal:
   b. Date superior court clerk mailed notice of original appeal:
   c. Court of Appeal case number (*if known*):

Date: June 5, 2018

Mark C. Mazzarella, Esq.
(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-002 [Rev. January 1, 2017]

NOTICE OF APPEAL/CROSS-APPEAL (UNLIMITED CIVIL CASE)
(Appellate)

Cal. Rules of Court, rule 8.100
www.courts.ca.gov

FILED
Clerk of the Superior Court
JUN 07 2018
By: N. ZUAZO, Deputy

Weiss v. City of Del Mar, et al.
San Diego Superior Court Case No. 37-2017-00034936-CU-Wm-CTL

PROOF OF SERVICE

I am employed in the county of San Diego, State of California. I am over the age of eighteen (18) years and am not a party to the within action; my business address is Mazzarella & Mazzarella, LLP, 2550 Fifth Avenue, 9th Floor, San Diego, California 92103.

On **June 5, 2018**, I served the following document:

NOTICE OF APPEAL

on the parties in this action by placing a true copy thereof enclosed in a sealed envelope address as follows:

LATHAM & WATKINS, LLP
Christopher W. Garrett, Esq., Jennifer K. Roy, Esq., Samantha K. Seikkula, Esq.
12670 High Bluff Drive
San Diego, CA 92130
Attorneys for Real Party In-Interest Torrey Pacific Corporation

DEVANEY PATE MORRIS & CAMERON LLP
William C. Pate, Esq., Lesley A. Riis, Esq., Barry J. Schultz, Esq.
402 W. Broadway, Suite 1300
San Diego, CA 92101
Attorneys for Respondent City of Del Mar

__XX__ **By United States Mail.** I enclosed the document in a sealed envelope or package addressed to the persons at the addresses on the attached Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this Firm's business practice for collection 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.

_____ **By personal service.** I caused to be delivered such envelope by hand to the offices of the addressee(s) shown above.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **June 5, 2018**, at San Diego, California.

Alice M. Starr

Pay Appeal "D

SHIRLI FABBRI WEISS - SBN 79225
P.O. BOX 3268
RANCHO SANTA FE, CA 92067-3268

90-7162/3222

4186

DATE 6/1/18

PAY TO THE ORDER OF Clerk, Court of Appeal $ 775.00

Seven Hundred Seventy Five DOLLARS

Security Features Included. Details on Back.

CHASE
JPMorgan Chase Bank, N.A.
www.Chase.com

MEMO

⑆322271627⑆ 4902109085⑈4186

© DELUXE deluxe.com/checks

FINE LINE

SHIRLI FABBRI WEISS SBN 79225
P.O. BOX 3268
RANCHO SANTA FE, CA 92067-3268

90-7162/3222

4185

DATE 6/1/18

PAY TO THE ORDER OF Clerk of the Superior Court $ 100.00

— One Hundred — DOLLARS

Security Features Included. Details on Back.

CHASE
JPMorgan Chase Bank, N.A.
www.Chase.com

MEMO WEISS Appeal

⑆322271627⑆ 4902109085⑈4185

© DELUXE deluxe.com/checks

FINE LINE

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address):	FOR COURT USE ONLY
Mark C. Mazzarella, Esq., SBN 082494 Mazzarella & Mazzarella, LLP 2550 Fifth Avenue, 9th Floor San Diego, CA 92103-6625 TELEPHONE NO.: (619) 238-4900 FAX NO. (Optional): (619) 238-4959 E-MAIL ADDRESS (Optional): mark@mazzarellalaw.com ATTORNEY FOR (Name): Shirli Weiss, as Trustee of the Weiss Family Trust	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO STREET ADDRESS: 330 W. Broadway MAILING ADDRESS: 330 W. Broadway CITY AND ZIP CODE: San Diego, CA 92101 BRANCH NAME: Central Division	FILED Clerk of the Superior Court JUN 15 2018 By: V. Rodriguez, Deputy
PLAINTIFF/PETITIONER: Shirli Weiss, as Trustee of the Weiss Family Trust DEFENDANT/RESPONDENT: City of Del Mar and Torrey Pacific Corporation	
NOTICE DESIGNATING RECORD ON APPEAL (UNLIMITED CIVIL CASE)	Superior Court Case Number: 37-2017-00034936-CU-WM-CTL
RE: Appeal filed on (date): June 7, 2018	Court of Appeal Case Number (if known):

Notice: Please read *Information on Appeal Procedures for Unlimited Civil Cases* (form APP-001) before completing this form. This form must be filed in the superior court, not in the Court of Appeal.

TO: Clerk of the Superior Court of California, County of (name of county): SAN DIEGO

NOTICE IS HEREBY GIVEN that (name): Shirli Weiss, as Trustee of the Weiss Family Trust

The ☑ Appellant ☐ Respondent in the above case elects to proceed with the following record on appeal:

(check only one)

1. ☐ (Appendix Only; no Reporter's Transcript)
   a. elects under rule 8.124 of the California Rules of Court to prepare own appendix in lieu of a court-prepared clerk's transcript, **AND**
   b. elects to have no reporter's transcript. *(Date and sign below. Do not use pages 2 and 3.)*

2. ☑ (Appendix and Reporter's Transcript)
   a. elects under rule 8.124 of the California Rules of Court to prepare own appendix in lieu of a court-prepared clerk's transcript, **AND**
   b. elects a reporter's transcript as designated on page 3. *(Fill out only Section A on page 3. Do not use page 2.)*

3. ☐ (Appendix and Agreed or Settled Statement)
   a. elects under rule 8.124 of the California Rules of Court to prepare own appendix in lieu of a court-prepared clerk's transcript, **AND**
   b. elects an agreed or settled statement in lieu of a reporter's transcript. *(Fill out only Section B or C on page 3. Do not use page 2.)*

4. ☐ (Clerk's Transcript Only; no Reporter's Transcript)
   a. elects under rule 8.122 of the California Rules of Court to proceed with a clerk's transcript as designated on page 2. *(Fill out the clerk's transcript section on page 2. Do not use page 3.)* **AND**
   b. elects to have no reporter's transcript.

5. ☐ (Clerk's and Reporter's Transcripts)
   a. elects under rule 8.122 of the California Rules of Court to proceed with a clerk's transcript as designated on page 2. *(Fill out the clerk's transcript section on page 2)*, **AND**
   b. elects a reporter's transcript as designated on page 3. *(Fill out only Section A on page 3.)*

6. ☐ (Clerk's Transcript and Agreed or Settled Statement)
   a. elects under rule 8.122 of the California Rules of Court to proceed with a clerk's transcript as designated on page 2. *(Fill out the clerk's transcript section on page 2)*, **AND**
   b. elects an agreed or settled statement in lieu of a reporter's transcript. *(Fill out only Section B or C on page 3.)*

Date: June 14, 2018

Mark C. Mazzarella, Esq.
(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY)

CASE NAME: Weiss v. City of Del Mar, et al.	CASE NUMBER: 37-2017-00034936-CU-WM-CTL

NOTICE DESIGNATING CLERK'S TRANSCRIPT

(Cal. Rules of Court, rule 8.122)

I understand that if I do not pay for this transcript or obtain a waiver of costs (rule 3.50 et seq.), the transcript will not be prepared and, if I am the appellant, my appeal will be dismissed.

A. It is requested that the following documents in the superior court file be included in the clerk's transcript *(give the specific title of each document and the date of filing):*

(NOTE: Items 1–7 are required to be a part of the clerk's transcript and will automatically be included.)

Document Title	Date of Filing
1. Notice of appeal	
2. Notice designating record on appeal *(this document)*	
3. Judgment or order appealed from	
4. Notice of entry of judgment *(if any)*	
5. Notice of intention to move for new trial or motion to vacate the judgment, for judgment notwithstanding the verdict, or for reconsideration of an appealed order *(if any)*	
6. Ruling on item 5	
7. Register of actions *(if any)*	
8.	
9.	
10.	
11.	
12.	
13.	
14.	
15.	

☐ See additional pages.

B. It is requested that the following EXHIBITS admitted into evidence or marked for identification be copied into the clerk's transcript on appeal *(check only one box):*

1. ☐ All Exhibits
2. ☐ Specific Exhibits *(give the exhibit number [for example, Plaintiff's #1, Defendant's B, Respondent's A], a brief description, and admission status.):*

☐ See additional pages.

CASE NAME: Weiss v. City of Del Mar, et al.	CASE NUMBER: 37-2017-00034936-CU-WM-CTL

NOTICE DESIGNATING ORAL PROCEEDINGS

A. [✔] **REPORTER'S TRANSCRIPT** (Cal. Rules of Court, rule 8.130) *(check one):*

I understand that if I do not pay for this transcript, it will not be prepared and, if I am the appellant, my appeal will be dismissed.

Please indicate which method you are using.

1. [✔] Deposited the approximate cost of transcribing the designated proceedings with this notice as provided in rule 8.130(b)(1).
2. [ ] Attached a copy of a Transcript Reimbursement Fund application filed under rule 8.130(c)(1).
3. [ ] Attached the reporter's written waiver of a deposit.
4. [ ] A certified transcript under rule 8.130(b)(3).
   (To be lodged directly with the Court of Appeal, Second Appellate District.)

You must identify each proceeding you want included with the following information:

	Reporter's Name and contact information	Dept.	Date	Description	Prev. prepared?
i.	Carrie Lee Bolding, CSR #7795 T: (619) 632-7223 E: cb.26@hotmail.com	C-70	4/20/18	Motion Hearing	[X] Yes [ ] No
ii.					[ ] Yes [ ] No
iii.					[ ] Yes [ ] No
iv.					[ ] Yes [ ] No
v.					[ ] Yes [ ] No

[ ] See additional pages.

5. I request that the reporters provide *(check one):*
   a. [ ] My copy of the reporter's transcript in paper format.
   b. [ ] My copy of the reporter's transcript in computer-readable format.
   c. [ ] My copy of the reporter's transcript in paper format and a second copy in computer-readable format.

   (Code Civ. Proc., § 271; Cal. Rules of Court, rule 8.130(f)(4).)

CASE NAME: Weiss v. City of Del Mar, et al.	CASE NUMBER: 37-2017-00034936-CU-WM-CTL

B. ☐ **AGREED STATEMENT** *(check and complete either (a) or (b) below.)*

(a) ☐ I have attached an agreed statement to this notice.

(b) ☐ All the parties have agreed in writing (stipulated) to try to agree on a statement. *(You must attach a copy of this stipulation.)* I understand that, within 40 days after I file the notice of appeal, I must file either the agreed statement or a notice indicating the parties were unable to agree on a statement and a new notice designating the record on appeal.

C. ☐ **SETTLED STATEMENT UNDER RULE 8.137.** *(You must check (a), (b) or (c) below.)*

(a) ☐ The oral proceedings in the superior court were not reported by a court reporter

(b) ☐ The oral proceedings in the superior court were reported by a court reporter, but the appellant has an order waiving his or her court fees and is unable to pay for a reporter's transcript.

(c) ☐ I am requesting to use a settled statement for reasons other than those listed in (a) or (b). *(You must attach the motion required under rule 8.137(b) to this form.)*

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO - CENTRAL DIVISION

HONORABLE RANDA TRAPP, JUDGE

SHIRLI FABBRI WEISS TRUSTEE, ON BEHALF OF THE SHIRLI FABBRI WEISS TRUST, PETITIONER, V. CITY OF DEL MAR AND DOES 1 THROUGH 10, RESPONDENTS. TORREY PACIFIC CORPORATION REAL PARTY-IN-INTEREST	CASE NO. 37-2017-00034936-CU-WM-CTL

REPORTER'S TRANSCRIPT

APRIL 20, 2018

PAGES 1 - 28

APPEARANCES:

FOR THE PETITIONER: MAZZARELLA & MAZZARELLA
BY: MR. MARK MAZZARELLA
1620 FIFTH AVENUE SUITE 600
SAN DIEGO, CA 92101

FOR THE RESPONDENTS: DEVANEY PATE MORRIS & CAMERON
BY: MS. LESLEY RIIS
402 WEST BROADWAY SUITE 1300
SAN DIEGO, CA 92101

FOR REAL PARTY IN INTEREST: LATHAM & WATKINS
BY: MR. CHRISTOPHER GARRETT
12670 HIGH BLUFF DRIVE
SAN DIEGO, CA 92130

CARRIE LEE BOLDING, CSR NO. 7795
OFFICIAL REPORTER PRO TEMPORE

CERTIFIED TRANSCRIPT

1 SAN DIEGO, CALIFORNIA; FRIDAY, APRIL 20, 2018, 12:25 P.M.
2 * * * *
3
4 THE CLERK: NUMBER 65 ON THE COURT'S CALENDAR, WEISS
5 V. WEISS.
6 THE COURT: THIS IS WEISS VERSUS CITY OF DEL MAR.
7 YOUR APPEARANCES.
8 MR. MAZZARELLA: MARK MAZZARELLA FOR MS. WEISS.
9 THE COURT: GOOD AFTERNOON.
10 MS. RIIS: GOOD AFTERNOON, YOUR HONOR.
11 LESLEY RIIS ON BEHALF OF THE CITY OF DEL MAR.
12 MR. GARRETT: GOOD AFTERNOON, YOUR HONOR.
13 CHRIS GARRETT ON BEHALF OF REAL PARTY
14 IN INTEREST, TORREY PACIFIC.
15 THE COURT: THANK YOU.
16 THIS IS A JOINT MOTION TO DISMISS VERIFIED
17 PETITION FOR WRIT OF MANDAMUS.
18 THE COURT'S TENTATIVE IS TO GRANT. AND
19 PETITIONER ASKED TO BE HEARD.
20 MR. MAZZARELLA: YES, YOUR HONOR.
21 THIS IS A CASE WHICH REALLY RELIES HEAVILY ON
22 STATUTORY INTERPRETATION AND UNDERSTANDING THE MECHANISMS
23 THAT APPLY HERE AND BASICALLY THE STRUCTURE OF THE LAND
24 USE ZONING AND PLANNING LAWS. THAT IS CONTINUED IN THE --
25 I HAVE GONE THROUGH THIS IN THIS POWERPOINT. I WILL TRY
26 TO BE AS EFFICIENT AS I POSSIBLY CAN. BEFORE THAT GETS
27 STARTED, I CAN START ANYWAY.
28 THE LAW THAT WE'RE TALKING ABOUT HERE, 65009

1 AND 65901, ARE WITHIN DIVISION 1 OF TITLE 7 OF THE
2 GOVERNMENT CODE. TITLE 7 OF THE GOVERNMENT CODE, AS YOU
3 CAN SEE ON THE BOARD HERE, IS PLANNING LAND USE. IT IS A
4 VERY BROAD TOPIC, VERY BROAD SUBJECT, TITLE 7 IS.
5 DIVISION 1 IS MUCH MORE REFINED. IT IS THE PLANNING AND
6 ZONING PORTION OF THE TITLE. DIVISION 2 OF TITLE 7 IS A
7 SUBDIVISION MAP ACT, WHICH IS A BIG BODY OF LAW, AND
8 OBVIOUSLY SUBJECT TO A LOT OF DISPUTES. DIVISION 3 OF
9 TITLE 7 IS A SERIES OF LAWS THAT PERTAIN TO THE COUNTY OR
10 LOCAL AGENCY PREPARING MAPS THAT CAN THEN BE USED FOR
11 PLANNING PURPOSES.
12 65009 -- AS I GO THROUGH THIS, YOU WILL SEE
13 65009 ON ITS FACE ONLY APPLIES TO DECISIONS THAT ARE MADE
14 UNDER DIVISION 1. THERE MAY BE A HUGE UNIVERSE OF LAND
15 USE OUT THERE. AND WHETHER WE ARGUE ABOUT TRIMMING TREES
16 BEING LAND USE OR NOT REALLY DOESN'T MATTER, BECAUSE I
17 DON'T CARE IF IT'S LAND USE. IF IT'S NOT DIVISION 1 LAND
18 USE, 65009 DOES NOT APPLY, THE STATUTE OF LIMITATIONS DOES
19 NOT APPLY AND THE MOTION SHOULD BE DENIED. THAT IS
20 FUNDAMENTALLY THE ISSUE THAT WE'RE DEALING WITH HERE.
21 THEY ARE CLAIMING BY VIRTUE OF THE SERIES OF
22 REFERENCES HERE THAT I WILL COVER 65009 DOES APPLY TO
23 VIRTUALLY ANY DECISION BY THE CITY OR BY THE PLANNING
24 COMMISSION, NOT JUST DECISIONS THAT FALL WITHIN
25 DIVISION 1. THEY ARE ENUMERATED IN DIVISION 1. WE THINK
26 THAT IS WRONG FOR A NUMBER OF REASONS.
27 LET ME WALK YOU THROUGH THIS. FIRST, 65009
28 STATES THAT THE PURPOSE IS THAT BY ASSERTING PROPERTY

1 OWNERS AND LOCAL GOVERNMENTS REGARDING DECISIONS MADE
2 PURSUANT TO THIS DIVISION -- THERE IS ABSOLUTELY NO
3 QUESTIONS ABOUT THAT. LATER IN THE STATUTE IT SAYS IT
4 AGAIN. SO WE KNOW THAT 65009 ONLY APPLIES TO DIVISION 1.
5 NEXT.
6 NORMALLY, THE STATUTE OF LIMITATIONS THAT ARE
7 APPLIED, AS THE COURT RECOGNIZED IN THE TENTATIVE THROUGH
8 WRIT OF MANDAMUS IS DERIVED FROM 1094.6. 1094.6 HAS NOT
9 BEEN VIOLATED IN THIS CASE. I THINK EVERYONE CONCEDES IT
10 HAS BEEN FILED IN A TIMELY FASHION. IT IS THE SERVICE
11 THAT IS THE ISSUE AND THAT IS WHERE WE HAVE A
12 DISAGREEMENT.
13 NOW, WHAT IS OF SIGNIFICANCE -- AND I'M NOT
14 SURE I UNDERSTAND THE TENTATIVE'S APPLICATION HERE -- IS
15 THE CITY IN ITS MUNICIPAL CODE SAYS ANY APPEAL FROM A
16 DECISION WITH REGARD TO THE VIEW ORDINANCE IS MADE
17 PURSUANT TO CCP, NOT THE GOVERNMENT CODE. AND OUR
18 INTERPRETATION OF THAT IS THAT IT WOULD BE SUBJECT TO THE
19 STATUTE OF LIMITATIONS OF 1094.6. I THINK THAT IS THE
20 ONLY REASONABLE INTERPRETATION.
21 NOW, THE QUESTION HERE, IF WE GET BACK TO THE
22 FUNDAMENTAL ISSUE, IS --
23 ACTUALLY, GO TO THE NEXT SLIDE.
24 -- THEIR REFERENCE TO --
25 I'M SORRY IF I'M JUMPING AROUND A LITTLE BIT.
26 65009 IS THE GENERAL STATUTE THAT PERTAINS TO
27 WHAT MATTERS ARE SUBJECT TO THE STATUTE OF LIMITATION. IT
28 IDENTIFIES FIVE DIFFERENT CLASSES, SPECIFICALLY IDENTIFIES

FIVE DIFFERENT CLASSES OF DECISIONS.

(C)(1), NO ACTION OR PROCEEDING SHALL BE MAINTAINED IN ANY OF THE FOLLOWING CASES, VERY SPECIFIC, BY ANY PERSON UNLESS THE ACTION OR PROCEEDING IS COMMENCED AND SERVICE IS MADE ON THE LEGISLATIVE BODY WITHIN 90 DAYS.

(A), IS ATTACK ON A GENERAL OR SPECIFIC PLAN. GENERAL OR SPECIFIC PLAN, EVERYONE KNOWS WHAT IS THAT IS. IT IS GOVERNED BY SEVERAL SECTIONS OF THE CODE.

(B) IS THE ADOPTION AMENDMENT OF A ZONE ORDINANCE. AGAIN, EVERYONE KNOWS WHAT ZONING ORDINANCES ARE. THEY ARE ORDINANCES THAT PERTAIN TO WHAT CAN BE DONE ON VARIOUS PARTS OF THE CITY.

(C) IS TO ADOPT OR AMEND ANY REGULATION ATTACHED TO A SPECIFIC PLAN. A SPECIFIC PLAN IS WHAT WOULD BE CREATED IF A DEVELOPER WANTED TO GENERATE A DEVELOPMENT ON A PARTICULAR AREA. THAT PLAN ON THIS AREA WOULD BE A SPECIFIC PLAN.

(D) IS TO MODIFY, AMEND OR ADOPT DEVELOPMENT AGREEMENTS. AGAIN, VERY SPECIFIC TERM OF ART. EVERYONE KNOWS WHAT DEVELOPMENT IS. THESE ARE FOUR VERY SPECIFIC LAND USE ZONING COMMENTS.

(E) THEN REFERS TO 65901 AND 65903. (E) SAYS, TO ATTACK, REVIEW, OR SET ASIDE, VOID, OR ANNUL ANY DECISION ON THE MATTERS LISTED IN SECTIONS 65901 AND 65903. THAT IS CRITICAL.

IF YOU GO TO 65901 AND READ THAT YOU, WILL SEE THERE ARE ONLY THREE MATTERS SPECIFICALLY LISTED. (E)

STATES, TO ATTACK, REVIEW, SET ASIDE, VOID OR ANNUL ANY DECISIONS ON THE MATTERS LISTED IN SECTIONS 65901 AND 65903.

65901 STATES, THE BOARD OF ZONING ADJUSTMENT OR ZONING ADMINISTRATOR SHALL HEAR AND DECIDE: ONE, APPLICATIONS FOR CONDITIONAL USES; TWO, OTHER PERMITS WHERE THE ZONING ORDINANCE PROVIDES THEREFOR; AND, THREE -- AND THEN THE ZONING ORDINANCE PROVIDES CRITERIA -- AND, THREE, VARIANCES. AGAIN, VERY SPECIFIC ENUMERATED ITEMS.

IT GOES ON TO SAY, THE BOARD OF ZONING ADJUSTMENT -- AND WE DON'T DISAGREE THE PLANNING COMMISSION IS THE BOARD OF ZONING ADJUSTMENTS -- OR THE ZONING ADMINISTRATOR MAY ALSO EXERCISE ANY OTHER POWERS GRANTED BY THE ORDINANCE. THEIR INTERPRETATION OF THAT IS THAT ANY MATTER THAT COMES BEFORE THE PLANNING COMMISSION OR THE CITY -- THE CITY SITTING IN REVIEW IS SITTING AS THE ADMINISTRATOR -- ANY ORDINANCE THAT COMES BEFORE THEM IS SUBJECT TO 65009'S 90-DAY STATUTE.

THAT WOULD BE -- I LOOKED THROUGH THE DEL MAR MUNICIPAL CODE OUT OF CURIOSITY TO SEE HOW MANY OF THE ORDINANCES WOULD FALL UNDER THAT. I COULDN'T FIND ANY THAT WOULDN'T. THERE IS AN ORDINANCE ON LIVESTOCK. THERE IS AN ORDINANCE ON DOGS. THERE IS AN ORDINANCE ON PETS AT THE BEACH. THERE IS AN ORDINANCE ON BUSINESS LICENSES. THERE IS ALL OF THESE ORDINANCES. EVERY ONE OF THEM INVOLVES HOW PEOPLE CAN USE THEIR LAND. THAT IS THE DEFINITION OF LAND USE THAT THE DEFENDANTS HAVE GIVEN IN

1 THIS CASE. NOT ONLY IS THAT OVERBROAD AND NOT IN FACT AN
2 APPROPRIATE DEFINITION OF LAND USE, BUT EVEN IF IT WERE
3 THAT WOULD BE IRRELEVANT, BECAUSE 65009 ON ITS FACE AND
4 65901 ON THEIR FACE ONLY APPLY TO A VERY SMALL SUBSET OF
5 DECISIONS.
6 IT IS EASY TO VERIFY THAT IS THE PROPER
7 INTERPRETATION. THIS LAW HAS BEEN IN EFFECT SINCE 1984.
8 SO WE'RE TALKING ABOUT 30 YEARS PLUS. THERE ARE NO CASES,
9 NOT ONE. LATHAM WITH THEIR VAST RESOURCES HAS NOT
10 PRODUCED ANY. I CERTAINLY HAVE NOT BEEN ABLE TO FIND ANY.
11 AS FAR AS I KNOW, NONE EXIST. NO OTHER CASE IN 30 PLUS
12 YEARS THAT HAS FOUND 65009 APPLIES TO SOMETHING OTHER THAN
13 ONE OF THE ITEMS THAT WAS SPECIFICALLY ENUMERATED IN 65009
14 AND 65901. THERE IS NOT ONE. IF THE LAW WERE AS THE
15 DEFENDANT SUGGESTS, THERE WOULD BE HUNDREDS, JUST AS THERE
16 ARE HUNDREDS OF CASES THAT DEAL WITH THE STATUTE OF
17 LIMITATIONS OF 1094.6, BUT THERE AREN'T -- THERE ARE A
18 FEW. EVERY SINGLE ONE OF THE CASES THAT IS REFERRED TO BY
19 THE DEFENSE IN THEIR BRIEFING, EVERY SINGLE ONE OF THEM
20 HAS ONE OF THESE ITEMS, SPECIFIC ITEMS LISTED AS WAS BEING
21 CHALLENGED.
22 65901(A), WE'VE TALKED ABOUT THAT. 65901(A)
23 AGAIN LISTS THOSE THREE ITEMS.
24 ONE THING I DIDN'T MENTION. IF YOU LOOK AT
25 THAT SECOND SENTENCE OF 65901(A), THE BOARD OF ZONING
26 ADJUSTMENT OR ZONING ADMINISTRATOR MAY DO TWO THINGS:
27 ONE, EXERCISE ANY OTHER POWERS GRANTED BY LOCAL ORDINANCE.
28 THAT IS NOT JUST ANY OLD ORDINANCE. IT HAS TO BE A ZONING

ORDINANCE. IT DOESN'T HAVE TO BE A ZONING, BUT THAT IS THE CONTEXT, THE CHAPTER, THIS DIVISION. IF IT IS NOT ZONING, IT IS NOT GOING TO BE SUBJECT TO THIS DIVISION.

THE SECOND THING IT SAYS IS, AND MAY ADAPT ALL RULES AND PROCEDURES NECESSARY OR CONVENIENT FOR CONDUCTING THE BOARD'S BUSINESS. AGAIN, IF THEIR INTERPRETATION IS CORRECT, THERE WOULD BE NO DISTINCTION BETWEEN THAT. BOTH ACTING OUT OF ORDINANCE AND ANY RULES FOR YOUR CONVENIENCE AS A BOARD, BOTH OF THOSE, WOULD NOW FALL WITHIN DIVISION 1 AND NOT IN THE STATUTE OF LIMITATIONS. THERE IS NO CASES THAT HOLD UP. THEY HAVE NOT CITED ANY AUTHORITY FOR THAT PROPOSITION AND I DON'T THINK ANY EXISTS.

ONE CASE I THINK -- AS LONG AS I'M HERE, I WILL GO BACK TO THAT. IN THE REPLY -- INCIDENTALLY, I WANT TO VERIFY ONE THING. THE FIRST SEVERAL PAGES OF THE REPLY BRIEF SUGGESTS THAT THE ONLY DEFENSE THAT WE HAVE TO THIS MOTION IS THE ARGUMENT THAT THIS LAW ONLY APPLIES TO NEW HOUSING PROJECTS. WHAT WE SAID IN OUR BRIEF WAS, INITIALLY APPLIED TO NEW HOUSING PROJECTS. WE THEN REFER TO IT APPLYING TO ANY NEW DEVELOPMENTS. I CITE CASES THAT INVOLVE ADDITIONAL USE GRANTS AND OTHER ITEMS THAT AREN'T COMMERCIAL PROPERTIES; FOR EXAMPLE, THE OKASAKI CASE, WHICH IS A FALLBACK. WE ARE NOT ARGUING THAT. I KNOW THE COURT PRESUMED THAT WAS THE CASE IN THE TENTATIVE THAT THAT WAS OUR ARGUMENT. THAT IS NOT OUR ARGUMENT. THAT IS IMPORTANT, BECAUSE THAT SAME PURPOSE CONTINUED ON WITH THE AMENDMENT. ALL THE AMENDMENT DID WAS REMOVE THE WORD

1 HOUSING IN FRONT OF DEVELOPMENT AND IN FRONT OF PROJECT.
2 IT DIDN'T CHANGE THE FACT THAT IT IS DEALING WITH FUTURE
3 PROJECTS, FUTURE DEVELOPMENTS OR RULES OR DECISIONS THAT
4 WOULD AFFECT HOW QUICKLY THESE PROJECTS COULD BE BUILT --
5 DEVELOPED, NOT JUST BETWEEN TWO INDIVIDUALS, BUT
6 DEVELOPMENT. SO, AGAIN, THAT IS NOT OUR ARGUMENT. IT
7 NEVER WAS OUR ARGUMENT. THAT IS IMPORTANT FOR PERSPECTIVE
8 OF KNOWING WHAT THE POLICIES ARE THERE FOR AND WHY IT IS
9 THAT TO APPLY 65009, GIVEN THE POLICIES AND PURPOSE TO A
10 DISPUTE BETWEEN NEIGHBORS REGARDING WHETHER TREES NEED TO
11 BE TRIMMED TO SAY THAT OUTLAWS THE POLICY. I DON'T CARE
12 WHETHER YOU ARE TALKING ABOUT HOUSING PROJECTS OR ANY
13 OTHER KIND OF PROJECT. IT DOESN'T FALL WITHIN THE
14 PURVIEW. IT WAS NEVER INTENDED AND NOBODY HAS EVER
15 APPLIED IT, AS FAR AS I CAN TELL.
16 AGAIN, GOING BACK TO (C)(1) -- 65009(C)(1)(E).
17 (A), (B), (C) AND (D) SPECIFIC ACTIVITIES, DECISIONS THAT
18 HAVE TO DEAL WITH ZONING. (E), IS THE ONE THAT WE'RE
19 TALKING ABOUT THAT GETS YOU TO 65901. (E) SAYS, THE
20 PROCESS OF SERVICE MUST BE WITHIN 90 DAYS. IF YOU ARE
21 ATTACKING, REVIEWING, SETTING ASIDE, VOIDING OR ANNULLING
22 ANY DECISION ON ANY OF THE MATTERS LISTED IN SECTIONS
23 65901 AND 65903, OR TO DETERMINE THE REASONABLENESS,
24 LEGALITY, OR VALIDITY OF ANY CONDITION ATTACHED TO A
25 VARIANCE, CONDITIONAL USE PERMIT, OR OTHER PERMIT.
26 IT IS REALLY IMPORTANT HERE. SOME OF THE CASES
27 THAT THEY TALK ABOUT THERE MAY HAVE BEEN A PERMIT
28 INVOLVED, BUT THE ATTACK IS NOT ON THE PERMIT. THE ATTACK

IS ON THE CONDITION. IF, FOR EXAMPLE, I WAS TO PULL A BUILDING PERMIT AND I WANT TO BUILD SOMETHING THAT IS TWO STORIES HIGHER THAN IT IS SUPPOSED TO BE, I GET A VARIANCE. IT IS THE VARIANCE THAT IS BEING ATTACKED, NOT THE PERMIT. THE PERMIT IS NOT SUBJECT TO THE ATTACK. IT IS THE CONDITION ATTACHED TO ANY PERMITS.

HERE, THERE IS NO CONDITIONS. WE ARE NOT ATTACKING ANY CONDITION. WE ARE NOT ATTACKING -- IF THERE WAS A DECISION THAT PERTAINS TO LAND USE, IT WAS WHEN THE ORDINANCE WAS ADOPTED AND NOBODY HAS EVER ARGUED THAT IN ANY CASE. THIS DECISION, IF YOU PUT IT IN CONTEXT, IS -- AS REFERENCED IN THE CHAPTER 23 OF THE DEL MAR MUNICIPAL CODE, THIS DECISION WAS AN EFFORT TO ARBITRATE A DISPUTE. THEY REFERRED TO IT IN THE CODE -- DEL MAR MUNICIPAL CODE, DISPUTE RESOLUTION PROCESS. THERE IS NO LAND USE DECISION IN THE SENSE OF DIVISION 1, WHICH IS ZONING. THERE IS NO EVEN -- NOTHING EVEN SIMILAR TO ZONING IN THIS. TWO PEOPLE WHO ALREADY HAD HOUSES OR PROPERTIES ARGUED ABOUT HOW TALL THE HEDGES OR TREES CAN GET. THAT IS NOT A ZONING DECISION UNDER ANY SENSE. IT HAS TO BE A DECISION UNDER THIS CHAPTER. SO BASICALLY THAT IS WHAT IT COMES DOWN TO.

OUR ARGUMENT IS, VERY SIMPLY, 65009(E) SPECIFICALLY SAYS YOU HAVE TO HAVE ENUMERATED ITEMS. 65009 CLEARLY SAYS TWICE THAT ONLY DECISIONS SUBJECT TO DIVISION 1, ZONING, ARE GOVERNED BY THE 90-DAY SERVICE LIMITATION. AND THE ONLY WAY THEY ARE TRYING TO BOOTSTRAP THEIR ARGUMENT IN A WAY THAT NOBODY EVER HAS, NOT A SINGLE

1 CASE, THEY COULD NOT FIND ONE, THEY HAVE NOT CITED ONE,
2 NONE EXISTS, IS THEY ARE TRYING TO SAY THE SENTENCE THAT
3 SAYS THEY CAN EXERCISE OTHER POWERS. THEY CAN EXERCISE
4 OTHER POWERS, BUT IT IS NOT GOING TO HAVE ANY IMPACT ON
5 THE SERVICE REQUIREMENT, UNLESS THOSE OTHER POWERS THAT
6 THEY ARE EXERCISING ARE ZONING DECISIONS WITHIN THE
7 MEANING OF DIVISION 1, WITHIN THE MEANING OF
8 SECTION 65009. THAT IS OUR ARGUMENT, VERY SIMPLE. IT IS
9 NOT WHETHER THIS ONLY APPLIES TO THE HOUSING THEORY. IT
10 CLEARLY APPLIES TO OTHER MATTERS. AND THE VALIDITY OF OUR
11 INTERPRETATION IS CLEARLY BORNE OUT BY THE FACT THAT IN A
12 CASE IN WHICH THE CITY AND STATE WHICH HAS A LOT OF
13 LITIGATION OVER THINGS LIKE THIS. THERE HAS NEVER BEEN A
14 REPORTED DECISION ONE WAY OR THE OTHER. NOBODY ELSE HAS
15 EVEN BEEN CREATIVE ENOUGH TO COME UP WITH IT. I APPLAUD
16 THEIR CREATIVITY, BUT IT DOESN'T MAKE IT THE LAW. IF THIS
17 IS THE LAW AS THEY ASSERT, EVERY SINGLE ITEM ALMOST IN THE
18 MUNICIPAL CODE WOULD BE SUBJECT TO 65009. WE HAVE LOTS OF
19 65009 CASES AND THERE AREN'T.
20 THANK YOU, YOUR HONOR.
21 THE COURT: THANK YOU.
22 COUNSEL.
23 MS. RIIS: THANK YOU, YOUR HONOR.
24 I AM JUST GOING TO ADDRESS A FEW POINTS AND NOT
25 GO THROUGH THE WHOLE LAW FOR YOU.
26 AS THE COURT'S AWARE, SECTION 65009 IS
27 EXPANSIVE LANGUAGE BOTH WITHIN THE STATUTE ITSELF AS WELL
28 AS CASE LAW THAT INDICATES THAT THE STATUTE APPLIES TO

LAND USE DECISIONS. 65009(C)(1)(E) INCLUDES CHALLENGES TO ANY DECISION IN MATTERS IN SECTION 65901. IT IS NOT LIMITED TO SOME PORTIONS OF 65901 OR THE FIRST SENTENCE OF 65901 AS PETITIONER IS ALLEGING.

65901 IS A DECISION MADE BY A ZONING ADMINISTRATOR, WHICH IN THE CITY OF DEL MAR IS THE PLANNING COMMISSION. IT EXERCISES ITS POWERS BY LOCAL ORDINANCE. THE PLANNING COMMISSION WAS ESTABLISHED BY ORDINANCE TO CARRY OUT THE FUNCTIONS OF STATE DEVELOPMENT LAW.

AS PART OF THOSE DUTIES, ORDINANCE 23.51.040 GRANTED THE PLANNING COMMISSION THE POWER TO DECIDE VIEW RESTORATION APPLICATIONS, LIKE MS. WEISS. THAT APPLICATION WAS HANDLED JUST LIKE ANY OTHER LAND USE MATTER IN THE CITY. MS. WEISS FILED AN APPLICATION, NOTICE WAS GIVEN TO LANDOWNERS WITHIN 300 FEET, AND A HEARING WAS HELD BEFORE THE PLANNING COMMISSION. IN RULING AGAINST MS. WEISS, THE PLANNING COMMISSION WAS EXERCISING ITS LAND USE POWERS GRANTED UNDER THE DEL MAR MUNICIPAL CODE.

IT APPEARS PETITIONER IS ALLEGING THAT BECAUSE VIEW RESTORATION IS NOT SPECIFICALLY LISTED IN 95009 OR -- EXCUSE ME -- 65901 IT IS NOT INCLUDED; HOWEVER, EVERY POSSIBLE LAND USE DECISION DOES NOT NEED TO BE SPECIFICALLY LISTED BY NAME. THE LIST IS EXPANSIVE AND INCLUDES DECISIONS MADE BY THE ZONING ADMINISTRATOR AKA THE PLANNING COMMISSION PURSUANT TO THE POWERS GRANTED UNDER TITLE OR ORDINANCE.

IN ADDITION, PETITIONER IS TRYING TO ASSERT SOME SLIPPERY SLOPE ARGUMENT THAT SUDDENLY ANY DECISION MADE BY THE CITY WOULD THEN BE SUBJECT TO THE SERVICE REQUIREMENTS OF 65009. HOWEVER, THAT ARGUMENT BLURS THE FACT THAT THESE ARE LAND USE DECISIONS THAT ARE DECIDED BY THE LOCAL PLANNING ZONING ADMINISTRATOR.

ALSO, PETITIONER IS COMPARING APPLES TO ORANGES. VIEW RESTORATION IS CLEARLY A LAND USE ISSUE. IT'S SIMPLY NOT COMPARABLE TO WALKING A DOG ON A LEASH OR A NO SMOKING ORDINANCE THROUGHOUT THE CITY.

PETITIONER ALSO STATES THAT BECAUSE THE RESTORATION ORDINANCE IS NOT PART OF THE ZONING CHAPTER OF THE DEL MAR MUNICIPAL CODE THAT IT IS OUTSIDE THE SUBJECT MATTER OF 65009. HOWEVER, THIS IGNORES AGAIN THE FACT THAT 65009 APPLIES TO LAND USE DECISIONS, NOT JUST ZONING.

THE VIEW RESTORATION ORDINANCE IS CONTAINED IN THE BUILDING CONSTRUCTION CHAPTER, INCLUDING ENCROACHMENT PERMITS, BUILDING AND GRADING PERMITS, LAND CONSERVATION PERMITS, AND COMMUNITY RESTORATION, ALL LAND USE MATTERS.

ALSO, I JUST WANT TO MENTION IF PETITIONER DOES ASK FOR LEAVE TO AMEND, THAT THAT REQUEST BE DENIED. CHANGING THE WORDING OF ANY AMENDED PETITION WOULDN'T CHANGE THE NATURE OF THE CASE AND WOULD STILL BE A CHALLENGE TO A ZONING ADMINISTRATOR'S DECISION ABOUT LAND USE MATTERS.

THANK YOU, YOUR HONOR.

THE COURT: THANK YOU VERY MUCH.

COUNSEL.

MR. GARRETT: YOUR HONOR, CHRIS GARRETT.

I JUST HAVE A FEW BRIEF COMMENTS. UNLESS THE COURT HAS ANY QUESTIONS OR CONCERNS, WE WILL BE WILLING TO SUBMIT ON THE COURT'S TENTATIVE. THEN I WILL JUST BE VERY BRIEF.

THE PETITIONER, I GUESS, HAS HAD A CHANCE TO REFINE THE ARGUMENT FROM THE OPPOSITION PAPERS WHERE THEY SEEM TO APPLY THAT THE CODE SECTION WAS LIMITED TO HOUSING PROJECTS. BUT, AS WE STATE IN THE REPLY, THE STATUTE -- THE TWO STATUTES THAT MR. MAZZARELLA SHOWED YOU, 65009 SAYS THAT IT APPLIES TO ANY CASE, WHICH IS TO ATTACK, SET ASIDE, OR ANNUL ANY DECISION IN THE MATTERS LISTED IN SECTION 65901. 65901 SAYS THAT THE BOARD OF ZONING ADJUSTMENT, WHICH EVERYONE AGREES THAT IS THE PLANNING COMMISSION, HAS SUCH POWERS OR PERMITS AS MAY BE GRANTED BY LOCAL ORDINANCE. THAT IS CLEARLY A MATTER WHICH IS LISTED IN SECTION 65901.

SO, YES, IT'S POSSIBLE THAT IF THE CITY OF DEL MAR CHOOSES TO GIVE THE PLANNING COMMISSION AUTHORITY OVER A NUMBER OF LAND USE DECISIONS; FOR EXAMPLE, IF THEY SET UP A SYSTEM WHERE A NEIGHBOR CAN HAVE ADJUDICATION AND REQUIRE PEOPLE TO GET PERMITS TO SMOKE IN THEIR YARD, THEN THAT WOULD BE A MATTER WHICH WAS GIVEN TO THE PLANNING COMMISSION UNDER 65901 AND THERE WOULD BE A LIMIT IN THE TIME PERIOD IN WHICH YOU HAD TO SERVE LAWSUITS CHALLENGING THAT DECISION.

THERE ARE THREE CASES, WHICH THE COURT'S TENTATIVE CITES THROUGHOUT THERE IN THE LAST PARAGRAPH,

1 THE OKASAKI CASE, THE HONIG CASE, AND THE GONZALEZ CASE.
2 OKASAKI WAS OVER NEIGHBORS' DISPUTES OVER THE SIZE OF A
3 SWIMMING POOL. HONIG WAS OVER A BALCONY AND A BAY WINDOW
4 AND DISPUTES BETWEEN NEIGHBORS ON THAT. AND GONZALEZ WAS
5 OVER A CONDITIONAL USE PERMIT AND OTHER NEIGHBOR DISPUTES
6 INVOLVING A SWAP MEET APPROVAL. IN EACH OF THOSE CASES,
7 THOSE WERE DECISIONS OF THE PLANNING COMMISSION. THE
8 COURT SAID THAT DESPITE -- PETITIONER I GUESS DISCARDED
9 THIS ARGUMENT AT THIS POINT THAT 1094.6 GAVE HIM EXEMPTION
10 FROM THE STATUTE.
11 EACH OF THOSE THREE CASES, WELL-KNOWN LAND USE
12 CASES, SAY THAT YOU HAVE TO SERVE WITHIN 90 DAYS. AND
13 THAT IS IMPORTANT. AND NONE OF THOSE CASES INVOLVED THE
14 CREATION OF NEW HOUSING UNITS. THEY ALL INVOLVE MATTERS
15 THAT WERE GIVEN TO THE ZONING ADMINISTRATOR TO DECIDE.
16 I THINK, AS COUNSEL FOR PETITIONER NOTED, THE
17 HONIG CASE WENT EVEN FURTHER AND SAID THAT IN THAT CASE
18 THE STATUTE WAS EXPANSIVE AND SINCE THE BASIS FOR THE
19 DISPUTE INVOLVED A DECISION BY THE BOARD OF ZONING
20 ADJUSTMENT APPLIED TO THE BUILDING PERMIT AS WELL.
21 THE LAST THING, I GUESS I WOULD REJECT THE
22 CHARACTERIZATION. THIS ISN'T A DISPUTE BETWEEN TWO
23 NEIGHBORS. THAT WOULD BE A CIVIL ACTION. WHAT WE HAVE
24 HERE IS A CHALLENGE TO AN ACTION BY THE BOARD OF ZONING
25 ADJUSTMENT. AND THE LEGISLATURE VERY CLEARLY UNDER THE
26 STATUTE SAID THAT THEY WANTED THOSE CASES TO MOVE ALONG
27 NOT ONLY TO COMPLY WITH THE RULE OF COURT TO SERVE WITHIN
28 60 DAYS, IF YOU DON'T SERVE WITHIN 90 DAYS THE CASE IS

SUBJECT TO DISMISSAL.

THE COURT: THANK YOU.

MR. MAZZARELLA: YOUR HONOR, ONCE AGAIN, WHAT WE'VE HEARD STATED AS FACT IS THAT 65901 APPLIES TO ALL LAND USE DECISIONS. WE KEEP HEARING THAT. THEY HAVEN'T CITED A SINGLE CASE THAT SAYS THAT. THE CASES SAY THEY APPLY TO ZONING AND PLANNING. THEY DON'T SAY THEY APPLY TO ALL LAND USE AND THEY CLEARLY DON'T. THEY DON'T EVEN APPLY TO DIVISION 2 OF TITLE 1 -- TITLE 7 RATHER.

AS TO THE REFERENCES TO THE THREE CASES THAT THEY JUST REFERRED TO, THEY ARE INSTRUCTIVE. IN FACT, THEY ARE VERY INSTRUCTIVE. EACH OF THOSE CASES INVOLVES AN ITEM THAT WAS SPECIFICALLY LISTED IN 65009 OR 65901.

IN GONZALEZ, THE PROCEEDING WAS WITH REJECTIONS TO THE ISSUANCE OF A CONDITIONAL USE PERMIT. THAT IS ONE OF THE THREE ITEMS SPECIFICALLY LISTED IN 65901, USE PERMITS. CLEARLY, THAT WOULD FALL WITHIN DIVISION 1, WHICH IT GETS US SOMEHOW -- THAT SUPPORTS THE CONCEPT THAT YOU CAN HAVE ANY OLD LAND USE, ANYTHING THAT INVOLVES YOUR LAND, WHETHER YOU CAN RAISE DOGS, WHETHER YOU CAN RAISE TREES OR WATER YOUR LAWN ON SUNDAYS. THERE IS NO SUPPORT FOR IT. THEY DON'T CITE A SINGLE CASE. THEY JUST KEEP SAYING IT OVER AND OVER AGAIN AS IF IT IS FACT. I HAVEN'T HEARD A SINGLE SUPPORT FOR THAT FACT.

THEY TALK ABOUT HONIG. IN HONIG, THAT IS THE ONE THAT INVOLVES THE ISSUANCE OF A VARIOUS, AND BASED ON THE VARIANCE, ISSUANCE OF A PERMIT. THE COURT SPECIFICALLY SAID, THE GRAVAMEN OF THE PETITION IS THE

1 VARIANCE WAS IMPROPERLY GRANTED. THAT IS A QUOTE FROM THE
2 DECISION. BECAUSE IT WAS A VARIANCE -- NOBODY IS ARGUING
3 ABOUT THE GRANTING OF THE BUILDING PERMIT. NOBODY
4 DISPUTED THAT. THE ISSUE IS IF YOU GET A VARIANCE FROM
5 THE ZONING IN ORDER TO BUILD THE BUILDING. ONCE YOU GET
6 THE VARIANCE, THE BUILDING IS GOING TO GO UP. THERE IS NO
7 PROBLEM. IT IS THE DECISION ON THE VARIANCE WHICH IS WHAT
8 BROUGHT THAT WITHIN 65009. THAT IS SPECIFICALLY WHAT THE
9 HONIG CASE SAYS. THAT WAS THE HOLDING.
10 GOVERNMENT CODE 65009 APPLIES TO A REPETITION
11 CHALLENGING ISSUES OF BUILDING PERMITS ISSUED IN
12 CONJUNCTION WITH THE ZONING VARIANCE. IF THE GRAVAMEN OF
13 THE PETITION IS THAT THE VARIANCE WAS IMPROPERLY GRANTED
14 BECAUSE THE APPELLANT FAILED TO COMPLY WITH 65009, THE
15 PETITION WAS UNTIMELY BECAUSE THE VARIANCE. THAT IS WHAT
16 HOOKED IT IN. IT WAS VERY CLEAR ON THAT.
17 FINALLY, THE LAST CASE IS THE OKASAKI CASE.
18 THAT WAS A PETITION CHALLENGING A VARIANCE. THE OKASAKIS
19 WANTED TO BUILD A POOL AND SPA WITHIN THE SETBACK
20 BORDERING THE OKASAKI'S PROPERTY. THEY GOT A VARIANCE.
21 AGAIN, THE VARIANCE IS WITHIN THOSE ITEMS SPECIFICALLY
22 LISTED.
23 EVEN TODAY, AFTER ALL THE BRIEFINGS, AFTER ALL
24 THE ARGUMENTS WE'VE MADE, THE DEFENDANTS HAVE STILL NOT
25 BEEN ABLE TO FIND A SINGLE CASE THAT SUPPORTS THEIR
26 ARGUMENT. THEY REFER TO THREE CASES, WHICH EACH ONE OF
27 THEM SPECIFICALLY IDENTIFIES ITEMS LISTED IN 65009 OR
28 65901.

1 ANY SUGGESTION WE HAVE RETOOLED AND CHANGED OUR
2 POSITION, AGAIN, JUST ISN'T TRUE. WHAT WE STATED IN OUR
3 OPPOSITION WAS WITH REGARD TO THE HOUSING. IN CONTRAST,
4 THE 90-DAY STATUTE OF LIMITATIONS AND THE ZONING AND
5 PLANNING CODE ON FILING SERVICE WAS ADOPTED FOR A SINGULAR
6 VERY LIMITED PURPOSE AS STATED BY THE LEGISLATURE AND
7 GOVERNMENT CODE SECTION 65009(A)(1). THE LEGISLATURE
8 FINDS AND DECLARES THAT THERE IS CURRENTLY A HOUSING
9 CRISIS IN CALIFORNIA AND IT IS ESSENTIAL TO REDUCE DELAYS
10 AND EXPEDITIOUSLY COMPLETE HOUSING PROJECTS. THAT WAS
11 WHAT THE CASE WAS, WHAT WE ALWAYS SAID WAS INITIALLY
12 ADOPTED. SERVICE WAS ADOPTED FOR A SINGULAR PURPOSE.
13 THAT IS WHAT WE SAID.
14 WE DID GO ON TO SAY, I AM REFERRING TO
15 IMPROVING NEW PROJECTS, FIVE LINE DOWN ON THE NEXT PAGE,
16 WE REFER TO EXCEPTIONS FOR NEW PROJECTS. WE DON'T -- WE
17 ARE NOT CHANGING OUR VIEWS. EVERYTHING I SAID TODAY WE
18 ARE ASSERTING IN OUR OPPOSITION. THOSE WERE OUR
19 ARGUMENTS. THEY WOULD TRY TO SUGGEST ALL WE ARE DOING IS
20 ATTACKING HOUSING. IF THAT IS ALL WE WERE DOING, WE WOULD
21 BE ON PRETTY THIN ICE.
22 WHAT IS SIGNIFICANT ABOUT THESE AMENDMENTS,
23 THEY DIDN'T AMEND TO SAY THAT 65009 APPLIED TO SOMETHING
24 OTHER THAN DECISIONS LISTED IN 65009. THEY DIDN'T AMEND
25 TO SAY IT DOESN'T APPLY TO DECISIONS OUTSIDE OF
26 DIVISION 1. ALL THEY DID IS TAKE THE WORD HOUSING OUT
27 FROM IN FRONT OF ONE LOCATION TO THE WORD PROJECT AND THE
28 OTHER LOCATION TO THE WORD DEVELOPMENT. AND WHATEVER YOU

1 CALL TRIMMING HEDGES IS NOT GOING TO FALL WITHIN ANY
2 DEFINITION IN ANY CODE OF PROJECT DEVELOPMENT.
3 SO, AGAIN, AFTER ALL THIS TIME THEY STILL CAN'T
4 SUPPORT THEIR ARGUMENT, BUT THEY STILL SAY IT. OBVIOUSLY,
5 THE COURT WAS PERSUADED, BECAUSE THE TENTATIVE ADOPTS IT,
6 ADOPTS THE ARGUMENT THIS WAS A LAND USE DECISION. I DON'T
7 THINK IT IS A LAND USE DECISION. BUT EVEN IF IT IS, THAT
8 DOESN'T MATTER. THERE IS A LOT OF LAND USE OUT THERE,
9 BESIDES THE VERY SMALL, SMALL AMOUNT THAT IS WITHIN
10 DIVISION 1 OF TITLE 7. THAT STATUTE WAS ADOPTED FOR A
11 VERY SPECIFIC REASON, TO PREVENT DELAYS IN CONSTRUCTION OF
12 NEW HOUSING AND NEW PROJECTS, NEW DEVELOPMENTS, PERIOD.
13 IT HAD NOTHING TO DO WITH TRIMMING A HEDGE.
14 THERE WAS A TENTATIVE AND THE LANGUAGE WOULD
15 SUPPORT AND SUGGESTS THAT BECAUSE OF THE LANGUAGE IN
16 659001 IT TALKS ABOUT THE ZONING AGENCY AUTHORITY HAVING
17 THE POWER TO DO ANYTHING ELSE THAT THE CITY TELLS IT TO
18 DO. IT DOESN'T MATTER WHAT ELSE THEY DO. IF IT'S NOT
19 SOMETHING PERTAINING TO THE ZONING DISCUSSED IN
20 DIVISION 1, IT'S NOT GOING TO BE SOMETHING THAT TRIGGERS A
21 90-DAY STATUTE OF LIMITATIONS. THERE IS A REASON THERE IS
22 NO CASES OUT THERE, BECAUSE THE LAW IS NOT AS THEY KEEP
23 SAYING IT IS.
24 INCIDENTALLY, I THINK WE CAN -- IF THE COURT IS
25 NOT INCLINED TO OVERRULE THE -- DENY THE MOTION, I THINK
26 WE CAN ALLEGE THAT THIS IS NOT A ZONING ORDINANCE IF WE
27 ARE GIVEN THE OPPORTUNITY. THAT IS A FACTUAL QUESTION.
28 THE COURT: ANYTHING FURTHER, MS. RIIS?

1 MS. RIIS: TWO BRIEF POINTS, YOUR HONOR.
2 I MAY HAVE MISUNDERSTOOD MR. MAZZARELLA. I
3 BELIEVE HE STATED THAT WE CAN'T CITE TO ANY AUTHORITY THAT
4 THE STATUTE APPLIES TO OUR LOCAL LAND USE ORDINANCES. IN
5 THEIR OWN CASE FROM THEIR OPPOSITION, ARCADIA DEVELOPMENT
6 VERSUS CITY OF MORGAN HILL, PAGE 261, IT SAYS, QUOTE,
7 SECTION 65009 IMPOSES A RELATIVELY SHORT STATUTE OF
8 LIMITATIONS ON LEGAL CHALLENGES TO LOCAL LAND USE
9 DECISIONS, UNQUOTE.
10 I WOULD ALSO NOTE THAT ON THE NOTICE FOR THIS
11 APPLICATION TO THE PROPER OWNERS OF 200 FEET. IT WAS A
12 NOTICE OF DEVELOPMENT PERMIT CITING 65009.
13 THE COURT: ANYTHING FURTHER?
14 MR. GARRETT: NO, YOUR HONOR.
15 THE COURT: I AM LOOKING AT A CASE HERE, TRAVIS
16 VERSUS COUNTY OF SANTA CRUZ 2004 33 CAL 4TH 757 AT 765,
17 GOVERNMENT CODE SECTION 65009 WAS INTENDED TO PROVIDE
18 CERTAINTY FOR PROPERTY OWNERS AND LOCAL GOVERNMENTS
19 REGARDING DECISIONS MADE PURSUANT TO THIS DIVISION, 65009
20 SUBDIVISION (A)(3), AND THUS TO ALLEVIATE THE CHILLING
21 EFFECT ON THE CONFIDENCE WITH WHICH PROPERTY OWNERS AND
22 LOCAL GOVERNMENTS CAN PROCEED WITH PROJECTS CREATED BY
23 POTENTIAL LEGAL CHALLENGES TO LOCAL PLANNING AND ZONING
24 DECISIONS.
25 AT ANY RATE, IS THERE ANYTHING ELSE?
26 MR. MAZZARELLA: WELL, YES, YOUR HONOR.
27 WITH REGARD TO THE TRAVIS CASE SPECIFICALLY
28 THAT IS QUOTED IN SUPREME COURT DECISION, THE TRAVIS CASE

1 IS QUOTED IN THE REPLY BRIEF, AND I THINK IT'S
2 INSTRUCTIVE. THIS IS ON PAGE 8 AND 9 OF THE REPLY BRIEF.
3 IT SAYS, THE SUPREME COURT EXPLAINED THAT ONE OF THE
4 INTENDED PURPOSES OF SECTION 65009 IS, AS THE COURT JUST
5 EXPLAINED, TO ALLEVIATE THE CHILLING EFFECT ON THE
6 CONFIDENCE WITH WHICH PROPERTY OWNERS AND LOCAL
7 GOVERNMENTS CAN PROCEED WITH PROJECTS CREATED BY POTENTIAL
8 LEGAL CHALLENGES TO LOCAL PLANNING AND ZONING DECISIONS.
9 TO THIS END, SECTION 65009 ESTABLISHES A SHORT STATUTE OF
10 LIMITATIONS, 90 DAYS, APPLICABLE TO ACTIONS CHALLENGING
11 CIVIL TYPES OF LOCAL PLANNING AND ZONING DISPUTES. IT
12 DOESN'T SAY ALL TYPES, JUST THE ONES THAT ARE ENUMERATED
13 THERE, CIVIL TYPES. AND THEN THERE IS A COLON. AND IT
14 DOESN'T SAY INCLUDING BUT NOT LIMITED TO. AND IT LISTS
15 WHAT THOSE ARE. THE ONLY ONES THAT ARE LISTED IS 65009 OR
16 65901. THE ADOPTION OR GENERAL OR SPECIFIC PLAN: THAT IS
17 65009(1)(C)(A); THE ADOPTION OF A ZONING ORDINANCE, THAT
18 IS (B); REGULATION ATTACHED TO A SPECIFIC PLAN; THAT IS C;
19 AND DEVELOPMENT AGREEMENT, THAT IS D; AND THEN IT
20 CONTINUES ON, SEMICOLON.
21 NOW WE ARE INTO 65901, AND GRANT, DENIAL, OR
22 OPPOSITION OF CONDITIONS ON A VARIANCE OR PERMIT. THAT IS
23 WHAT IS DESCRIBED IN 65 -- SPECIFICALLY LISTED. IT
24 DOESN'T SAY OR ANY OTHER ORDINANCE, BECAUSE THAT IS NOT
25 THE LAW.
26 SO THAT SUPREME COURT CASE IS ACTUALLY VERY
27 CLEAR ON WHAT THE LIMITATIONS ARE, YOUR HONOR. THEY HAVE
28 NOT FOUND ANY CASE THAT DISTINGUISHES THAT, ANY CASE THAT

1 HOLDS ON -- MAKES A DIFFERENT HOLDING. IT CAN'T. IT IS
2 THE ONLY SUPREME COURT CASE THAT SAYS VERY EXPRESSLY THAT
3 THE STATUTE IS AS WE SAY IT IS.
4 MR. GARRETT: YOUR HONOR, IF I MIGHT BRIEFLY
5 RESPOND.
6 THE COURT: YES.
7 MR. GARRETT: AT THE BOTTOM OF THE COURT'S TENTATIVE
8 ON THE FIRST PAGE AND THE TOP OF THE SECOND PAGE THE COURT
9 CITES TRAVIS. YOU WILL NOTE IN THE SECOND LINE FROM THE
10 BOTTOM THE COURT SAYS -- THE QUOTE IN TRAVIS SAYS,
11 SUBSECTION (E) INCLUDES THE SERVICE REQUIREMENT ON THE
12 MATTERS LISTED, ATTACKS, SETS ASIDE, ANNULS ANY DECISION
13 ON THE MATTERS LISTED IN SECTION 65901. WHEN COUNSEL --
14 PETITIONER'S COUNSEL HAS BEEN SPEAKING, HE HAS
15 OCCASIONALLY MISSPOKE AND INSERTED THE WORDS "SPECIFICALLY
16 LISTED", MATTERS "SPECIFICALLY LISTED" IN 65901. I THINK
17 THE TRAVIS QUOTE IS ACCURATE.
18 IF THE COURT LOOKS AT 65901, THE TRAVIS QUOTE
19 CONTINUES AND IT SAYS THAT IT APPLIES TO MATTERS TO
20 DETERMINE THE REASONABLENESS, LEGALITY --
21 THE COURT: I'M SORRY. SLOW DOWN.
22 MR. GARRETT: I'M SORRY.
23 THIS IS THE LAST LINE OF THE COURT'S TENTATIVE
24 ON THE FIRST PAGE. THE COURT AGAIN IS QUOTING, REFERRING
25 TO THE TRAVIS, AND SAYS, THAT IT APPLIES TO MATTERS TO
26 DETERMINE THE REASONABLENESS, LEGALITY, OR VALIDITY OF ANY
27 CONDITION ATTACHED TO A VARIANCE, CONDITIONAL USE PERMIT,
28 OR ANY OTHER PERMIT. SO, AGAIN, THERE IS THIS OPEN-ENDED

1 OTHER PERMIT.

2 I THINK WHAT PETITIONER IS TRYING TO ARGUE IS
3 THAT IF YOU GO OVER TO 65901, THE STATUTE THAT TRAVIS IS
4 REFERRING TO AND THE STATUTE REFERS TO, THAT REALLY ONLY
5 THE MATTERS THAT ARE SPECIFIC -- QUOTE, SPECIFICALLY
6 LISTED IN 65901 ARE MATTERS THAT CAN BE SUBJECT TO
7 CHALLENGE AND SINCE PERMITS AND ORDERS INVOLVING TRIMMING
8 OF HEDGES IS NOT SPECIFICALLY LIMITED AND THEREFORE LISTED
9 AND THEREFORE THE STATUTE DOESN'T APPLY.

10 THE FLAW IN THE ARGUMENT, AND I REALLY THINK
11 THE ONLY SECTION THE COURT REALLY NEEDS TO LOOK AT IS IN
12 65901. IT SAYS, AND WE QUOTED THIS IN THE REPLY PAPERS,
13 THE BOARD OF ZONING ADJUSTMENT OR ZONING ADMINISTRATOR
14 SHALL HEAR AND DECIDE APPLICATIONS FOR CONDITIONAL USES OR
15 OTHER PERMITS, USING THAT OTHER PERMITS LANGUAGE FROM
16 TRAVIS. WE WOULD SUBMIT THIS IS AN OTHER PERMIT. WHEN
17 THE ZONING ORDINANCE PROVIDES THEREFOR AND ESTABLISHES
18 CRITERIA FOR DETERMINING THOSE MATTERS, AND APPLICATIONS
19 FOR VARIANCES FROM THE TERMS OF THE ZONING ORDINANCE. THE
20 SECOND SENTENCE SAYS, THE BOARD OF ZONING ADJUSTMENT OR
21 THE ZONING ADMINISTRATOR MAY ALSO EXERCISE ANY OTHER
22 POWERS GRANTED BY LOCAL ORDINANCE. THE LOCAL ORDINANCE
23 ESTABLISHES THE REGULATORY SCHEME FOR PERMITS AND
24 APPROVALS INVOLVING TRIMMING AND HEIGHTS OF TREES ASSIGNED
25 TO THE PLANNING COMMISSION.

26 WE WOULD SUBMIT THE LOCAL ORDINANCE THAT IS
27 ESTABLISHED UNDER 65901, THEY CAN HEAR IT. THIS IS A
28 MATTER LISTED IN 65901. AND IF YOU GO BACK TO THE

1 LANGUAGE FROM TRAVIS AND THE STATUTE 65 -- 65009 IT TALKS
2 ABOUT THE MATTERS LISTED, NOT SPECIFICALLY LISTED. ONE OF
3 THE MATTERS LISTED ARE THE THINGS WHICH ARE ASSIGNED TO
4 THE PLANNING COMMISSION BY A LOCAL ORDINANCE. IN THIS
5 CASE, THE CITY OF DEL MAR HAS CHOSEN TO ADOPT A LOCAL
6 ORDINANCE AND ASSIGNED IT TO THE PLANNING COMMISSION, NOT
7 TO THE POLICE DEPARTMENT OR SOMEONE ELSE, THE JOB OF
8 ISSUING PERMITS AND MAKING DECISIONS REGARDING THE
9 TRIMMING OF TREES.
10 THANK YOU.
11 MR. MAZZARELLA: YOUR HONOR, IF I MAY VERY BRIEFLY.
12 FIRST, IT HAS TO BE RECOGNIZED THROUGHOUT THE
13 TITLE 7, THE CODE -- THE STATE MADE VERY CLEAR THAT LOCAL
14 AGENCIES CAN REFINE THEIR DECISIONS, THEIR GUIDANCE, BUT
15 THEY CAN'T SAY ANYTHING INCONSISTENT. THE INTERPRETATION
16 THAT MR. GARRETT JUST GAVE TO 65901 WOULD ALLOW A LOCAL
17 AGENCY TO OPEN THE DOOR AND LET VIRTUALLY ANY ORDINANCE
18 COME IN. THAT WOULD BE BLATANTLY CONTRARY TO THE PURPOSE
19 OF 65009 AND THE LANGUAGE OF 65009. THAT WOULD NOT BE
20 ALLOWED. THEY CANNOT EXPAND 65009, DIVISION ONE.
21 THE COURT: SAYS, OR ANY OTHER PERMIT.
22 MR. MAZZARELLA: OR ANY OTHER PERMIT.
23 AGAIN, THAT IS IMPORTANT TO NOTICE THE
24 LANGUAGE. THE LANGUAGE IS IMPORTANT HERE. WHAT IT SAYS
25 IS, LEGALITY OR VALIDITY OF ANY CONDITION ATTACHED TO A
26 VARIANCE CONDITION USE PERMIT OR PERMIT. THAT MEANS, AND
27 THERE IS NOT ANY CASE OUT THERE THAT SAYS ANYTHING
28 DIFFERENT, ANY CONDITION THAT IS ATTACHED TO A VARIANCE,

1 ANY CONDITION THAT IS ATTACHED TO A CONDITIONAL USE
2 PERMIT, OR ANY CONDITION ATTACHED TO ANY OTHER PERMIT.
3 YOU ARE ATTACKING THE CONDITION. THAT IS THE POINT THAT
4 WAS MADE IN THE CASE I REFERENCED EARLIER.
5 THE COURT: IT DIDN'T SAY CONDITION ATTACHED TO ANY
6 OTHER PERMIT. IT JUST SAYS, OR ANY OTHER PERMIT.
7 MR. MAZZARELLA: WELL, I AM READING FROM 65903. IN
8 (E) IT SAYS --
9 THE COURT: REASONABLENESS, LEGALITY, OR VALIDITY OF
10 ANY CONDITION ATTACHED TO A VARIANCE, CONDITIONAL USE
11 PERMIT, OR ANY OTHER PERMIT.
12 MR. MAZZARELLA: SO I UNDERSTAND THERE ARE TWO WAYS
13 YOU CAN READ THAT. ONE IS THE CONDITION ATTACHED TO A
14 VARIANCE, THAT IS IT, OR CONDITION OR -- A CONDITION
15 REGARDLESS IF IT IS ATTACHED TO IT, A CONDITIONAL USE
16 PERMIT OR ANY OTHER PERMIT. THAT IS NOT WHAT THE CASES
17 TALK ABOUT. JUST AS THE CASES WITH THE VARIANCES BEING
18 ATTACHED TO A BUILDING PERMIT. IT IS THE ATTACHMENT. AND
19 THAT IS WHY THIS HAS GOT TO BE READ, THE VALIDITY OF ANY
20 CONDITION ATTACHED TO ANY ONE OF THESE THREE THINGS. THAT
21 IS WHAT IT SAYS. THAT IS WHAT THE CASES SAY. IT IS NOT
22 READ SEPARATE, ANY PERMIT THAT APPLIES. CERTAINLY, IF
23 THAT WERE THE INTERPRETATION, THIS STATUTE WOULD BE
24 CONSTITUTIONALLY VAGUE AND IN VIOLATION OF THE PROPERTY
25 OWNERS' RIGHTS TO HAVE IT CLEARLY UNDERSTOOD.
26 THIS DOES NOT INVOLVE ANY CONDITION ATTACHED TO
27 A VARIANCE, DOESN'T INVOLVE ANY CONDITION ATTACHED TO A
28 CONDITIONAL USE PERMIT, OR ATTACHED TO ANYTHING ELSE.

1 THERE IS NO CONDITION INVOLVED IN THIS CASE. IT IS
2 CLEARLY -- THE STATUTE JUST SIMPLY DOESN'T APPLY.
3 AGAIN, IF EVERY TIME THERE WAS A CONDITION
4 ATTACHED TO A PERMIT OR SOMETHING ELSE, EVERY TIME THAT
5 SWEPT INTO THE 90-DAY STATUTE OF LIMITATIONS, WE WOULD SEE
6 A LOT OF CASES UP THERE.
7 THE COURT: 65901 SAYS, THE BOARD OF ZONING
8 ADJUSTMENT OR OTHER ORDINANCE, THE ZONING ADMINISTRATOR
9 MAY ALSO EXERCISE ANY OTHER POWERS GRANTED BY LOCAL
10 ORDINANCE AND MAY ADOPT ALL THE RULES AND PROCEDURES
11 NECESSARY AND CONVENIENT FOR THE CONDUCT OF THE BOARD'S OR
12 ADMINISTRATIVE'S BUSINESS.
13 MR. MAZZARELLA: YOUR HONOR, I UNDERSTAND THAT
14 LANGUAGE. IT DOESN'T MEAN WHAT COUNSEL HAS ARGUED.
15 IF YOU LOOK AT THE CITIZENS -- STOCKTON
16 CITIZENS CASE, THAT WAS A CASE IN WHICH THAT WAS AN ISSUE.
17 THERE WERE TWO THINGS AT ISSUE. ONE WAS THE PLAINTIFF WAS
18 CHALLENGING THE APPLICATION OF 65009 BECAUSE THE TRIGGERING
19 EVENT WAS THE APPROVAL OF A -- I THINK A MULTI-USE PROJECT
20 BY MR. SPANOS, IN FACT. THAT WAS DONE BY THE HEAD OF THE
21 PLANNING COMMISSION -- NOT PLANNING COMMISSION -- I'M
22 SORRY -- THE COMMUNITY DEVELOPMENT DEPARTMENT, NOT BY AN
23 AGENCY. THAT WAS THE FIRST ISSUE.
24 THE SECOND ISSUE WAS THEY APPROVED -- HE
25 APPROVED -- HE TWEAKED THE DEVELOPMENT AGREEMENT. HE
26 APPROVED SOME MINOR CHANGES TO THE DEVELOPMENT AGREEMENT.
27 THE QUESTION WAS COULD HE DO THAT. THE ANSWER WAS YES.
28 THAT IS WHAT THEY ARE TALKING ABOUT. THEY ARE TALKING

1 ABOUT OTHER ORDINANCES PERTAINING TO ZONING. THEY OPEN THE
2 DOOR AND SAY -- THERE IS NO CASE THAT SAYS THIS BROADENS IT
3 BEYOND THE SCOPE OF 65009. THE CASES THAT DO ADDRESS IT
4 SAY JUST THE OPPOSITE. THEY ALL COME BACK AND SAY --
5 WHATEVER THE ACTIVITY IS, IF THEY APPLY 65009 IN EVERY CASE
6 THEY EXPLAIN WHY THAT IS ATTACHED TO, ONE, TO BE
7 SPECIFICALLY IDENTIFIED -- THE CODE SPECIFICALLY IDENTIFIED
8 OR JUST IDENTIFIED OR LISTED ONE OF THE ITEMS LISTED. IF
9 YOU INTERPRET THIS LANGUAGE AS OPEN THE DOOR TO ANYTHING,
10 WHAT IN THE WORLD IS THE PURPOSE OF THE LEGISLATOR SAYING
11 THIS APPLIES TO ONLY DIVISION ONE? SO IT HAS ALL THE
12 ZONING RULES THAT ARE AT ISSUE AND THEN A LOCAL AGENCY BY
13 LOCAL ORDINANCE IS ALLOWED TO DESTROY THAT LIMITATION,
14 BECAUSE NOW THEY WILL PUT ANYTHING IN THERE.
15 THE COURT: OKAY. ANYTHING FURTHER?
16 MS. RIIS: NOTHING FURTHER.
17 MR. GARRETT: NOTHING FURTHER, YOUR HONOR.
18 MR. MAZZARELLA: THANK YOU, YOUR HONOR. THANK YOU
19 FOR YOUR PATIENCE.
20 THE COURT: I WILL TAKE IT UNDER SUBMISSION.
21 I WILL GET A COPY OF THE TRANSCRIPT.
22 MR. GARRETT: WE'LL MAKE SURE THAT IT IS SUBMITTED
23 TO THE COURT, THE TRANSCRIPT.
24 THE COURT: THANK YOU.
25 (WHEREUPON THE COURT WAS IN RECESS IN THIS MATTER.)
26 ---000---
27
28

I, CARRIE LEE BOLDING, OFFICIAL REPORTER PRO TEMPORE FOR THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN DIEGO, DO HEREBY CERTIFY:

THAT AS SUCH REPORTER, I REPORTED IN MACHINE SHORTHAND THE PROCEEDINGS HELD IN THE FOREGOING CASE;

THAT MY NOTES WERE TRANSCRIBED INTO TYPEWRITING UNDER MY DIRECTION AND THE PROCEEDINGS HELD ON APRIL 20, 2018, CONTAINED WITHIN PAGES 1 THROUGH 28, ARE A TRUE AND CORRECT TRANSCRIPTION.

DATED THIS 25TH DAY OF APRIL 2018.

Carrie Lee Bolding

CARRIE LEE BOLDING, CSR NO. 7795

FILED
Clerk of the Superior Court
JUN 15 2018
By: V. Rodriguez, Deputy

Weiss v. City of Del Mar, et al.
San Diego Superior Court Case No. 37-2017-00034936-CU-Wm-CTL

PROOF OF SERVICE

I am employed in the county of San Diego, State of California. I am over the age of eighteen (18) years and am not a party to the within action; my business address is Mazzarella & Mazzarella, LLP, 2550 Fifth Avenue, 9th Floor, San Diego, California 92103.

On **June 15, 2018**, I served the following document:

NOTICE OF DESIGNATING RECORD ON APPEAL; NOTICE OF DESIGNATING ORAL PROCEEDINGS (with Certified Transcript copy attached)

on the parties in this action by placing a true copy thereof enclosed in a sealed envelope address as follows:

LATHAM & WATKINS, LLP
Christopher W. Garrett, Esq., Jennifer K. Roy, Esq., Samantha K. Seikkula, Esq.
12670 High Bluff Drive
San Diego, CA 92130
Attorneys for Real Party In-Interest Torrey Pacific Corporation

DEVANEY PATE MORRIS & CAMERON LLP
William C. Pate, Esq., Lesley A. Riis, Esq., Barry J. Schultz, Esq.
402 W. Broadway, Suite 1300
San Diego, CA 92101
Attorneys for Respondent City of Del Mar

Carrie L. Bolding, CSR NO. 7795
SDCRC
444 W. C Street, Suite 380
San Diego, CA 92101

__XX__ **By United States Mail.** I enclosed the document in a sealed envelope or package addressed to the persons at the addresses on the attached Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this Firm's business practice for collection 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.

_____ **By personal service.** I caused to be delivered such envelope by hand to the offices of the addressee(s) shown above.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **June 15, 2018**, at San Diego, California.

Alice M. Starr

SUPERIOR COURT OF CALIFORNIA

County of SAN DIEGO

Register of Actions Notice

Case Number:	37-2017-00034936-CU-WM-CTL	Filing Date:	09/19/2017
Case Title:	Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust vs City of Del Mar [IMAGED]	Case Age:	253 days
Case Status:	Post Judgment	Location:	Central
Case Category:	Civil - Unlimited	Judicial Officer:	Randa Trapp
Case Type:	Writ of Mandate	Department:	C-70

Future Events

Date	Time	Department	Event
No future events			

Participants

Name	Role	Representation
City of Del Mar	Respondent, Respondent on Appeal	Pate, William C; Self-Represented
Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust	Petitioner, Appellant	Mazzarella, Mark C
Torrey Pacific Corporation	Respondent on Appeal	Self-Represented

Representation

Name	Address	Phone Number
CITY OF DEL MAR	Not Available	
MAZZARELLA, MARK C	MAZZARELLA & MAZZARELLA LLP 2550 Fifth Avenue 9th Fl San Diego CA 92103	(619) 238-4900
PATE, WILLIAM C	DEVANEY PATE MORRIS & CAMERON LLP 402 West Broadway 1300 San Diego CA 92101	(619) 354-5030, (619) 354-5035
TORREY PACIFIC CORPORATION	Not Available	

ROA#	Entry Date	Short/Long Entry	Filed By
1	09/19/2017	Petition for Writ of Mandate filed by Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust. Refers to: City of Del Mar; Torrey Pacific Corporation	Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust (Petitioner)
2	09/19/2017	Civil Case Cover Sheet filed by Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust. Refers to: City of Del Mar; Torrey Pacific Corporation	Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust (Petitioner)
3	09/19/2017	Case assigned to Judicial Officer Trapp, Randa.	
4	09/20/2017	Case initiation form printed.	
5	09/19/2017	Original Summons filed by Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust. Refers to: City of Del Mar; Torrey Pacific Corporation	Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust (Petitioner)
6	09/20/2017	Summons issued.	
7	12/20/2017	Notice and Acknowledgment of Receipt (City of Del Mar) filed by Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust. Refers to: City of Del Mar	Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust (Petitioner)
8	12/20/2017	Notice and Acknowledgment of Receipt (Torre Pacific Corporation) filed by Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust. Refers to: Torrey Pacific Corporation	Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust (Petitioner)
9	01/22/2018	Motion Hearing (Civil) scheduled for 04/13/2018 at 11:00:00 AM at Central in C-70 Randa Trapp.	
10	01/18/2018	Answer filed by City of Del Mar.	City of Del Mar (Respondent)
11	01/23/2018	Motion to Dismiss filed by Torrey Pacific Corporation.	Torrey Pacific Corporation (Real Party In Interest (Rpii))

12	01/23/2018	Declaration - Other (Declaration of Christopher W Garrett) filed by Torrey Pacific Corporation.	Torrey Pacific Corporation (Real Party In Interest (Rpii))
13	01/23/2018	Declaration - Other (Declaration of Brian Staver) filed by Torrey Pacific Corporation.	Torrey Pacific Corporation (Real Party In Interest (Rpii))
14	01/23/2018	Proposed Order (Re: Motion to Dismiss) submitted by Torrey Pacific Corporation received but not filed on 01/23/2018.	Torrey Pacific Corporation (Real Party In Interest (Rpii))
15	01/23/2018	Proof of Service filed by Torrey Pacific Corporation.	Torrey Pacific Corporation (Real Party In Interest (Rpii))
16	01/30/2018	Answer filed by Torrey Pacific Corporation.	Torrey Pacific Corporation (Real Party In Interest (Rpii))
17	03/29/2018	Opposition - Other (Opposition to Joint Motion to Dismiss Petition for Writ of Mandate) filed by Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust.	Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust (Petitioner)
18	03/29/2018	Opposition - Other (Objection to Declaration of Brian Staver) filed by Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust.	Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust (Petitioner)
19	03/29/2018	Proof of Service filed by Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust.	Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust (Petitioner)
20	04/02/2018	Opposition - Other (Amended Opposition to Joint Motion to Dismiss Petition for Writ of Mandamus) filed by Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust.	Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust (Petitioner)
21	04/02/2018	Proof of Service filed by Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust.	Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust (Petitioner)
22	04/06/2018	Reply to Opposition of Noticed Motion and Supporting Declarations filed by Torrey Pacific Corporation.	Torrey Pacific Corporation (Real Party In Interest (Rpii))
23	04/06/2018	Declaration - Other filed by Torrey Pacific Corporation.	Torrey Pacific Corporation (Real Party In Interest (Rpii))
24	04/06/2018	Request for Judicial Notice filed by Torrey Pacific Corporation.	Torrey Pacific Corporation (Real Party In Interest (Rpii))
25	04/06/2018	Objections filed by Torrey Pacific Corporation.	Torrey Pacific Corporation (Real Party In Interest (Rpii))
26	04/12/2018	Tentative Ruling for Motion Hearing (Civil) published.	
27	04/17/2018	The Motion Hearing (Civil) was rescheduled to 04/20/2018 at 11:00:00 AM in C-70 before Randa Trapp at Central.	
28	04/17/2018	Motion Hearing (Civil) scheduled for 04/20/2018 at 11:00:00 AM at Central in C-70 Randa Trapp.	
29	04/18/2018	Tentative Ruling for Motion Hearing (Civil) published.	
30	04/19/2018	Objections (Petitioner Shirli Fabbri Weiss' obejctions and sur-reply to respondents' presentation of new issues, arguments and evidence not raised in the moving papers or petitioner's opposition brief) filed by Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust.	Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust (Petitioner)
31	04/20/2018	Matter taken under submission.	
32	04/20/2018	Minutes finalized for Motion Hearing (Civil) heard 04/20/2018 11:00:00 AM.	
33	04/20/2018	Appointment of Official Reporter Pro Tempore (Carrie Bolding, CSR#7795) filed by The Superior Court of San Diego.	
34	04/30/2018	Notice of Lodgment filed by Torrey Pacific Corporation.	Torrey Pacific Corporation (Real Party In Interest (Rpii))
35	05/10/2018	Matter decided.	
36	05/10/2018	Miscellaneous Minute Order Finalized.	
37	05/10/2018	Clerk's Certificate of Service By Mail (Minutes Only) SD generated.	

38	05/25/2018	Judgment was entered as follows: Judgment entered for City of Del Mar;Torrey Pacific Corporation and against Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust for $ 0.00, punitive damages: $ 0.00, attorney fees: $ 0.00, interest: $ 0.00, prejudgment costs: $ 0.00, other costs: $ 0.00, amount payable to court: $ .00, for a grand total of $ 0.00.	
39	05/29/2018	Judgment of Dismissal filed by City of Del Mar; Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust; Torrey Pacific Corporation.	City of Del Mar (Respondent); Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust (Petitioner); Torrey Pacific Corporation (Real Party In Interest (Rpii))
40	06/07/2018	Notice of Entry of Judgment filed by City of Del Mar.	City of Del Mar (Respondent)
41	06/07/2018	[Another document for ROA# 41]	
41	06/07/2018	Notice of Appeal filed by Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust. Refers to: City of Del Mar; Torrey Pacific Corporation	Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust (Appellant)
42	06/15/2018	[Another document for ROA# 42]	
42	06/15/2018	Notice of Designation of Record on Appeal and Election to Proceed by Appendix and Reporter's Transcript filed by Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust. Refers to: City of Del Mar; Torrey Pacific Corporation	Shirli Fabbri Weiss Trustee on behalf of the Shirli Fabbri Weiss Trust (Appellant)
43	08/15/2018	Receipt for Record on Appeal filed by The Superior Court of San Diego.	
44	08/15/2018	Notice of Completion of the Record on Appeal filed by The Superior Court of San Diego.	