M. CHRISTINE DAVI, SBN 178389
City Attorney
CITY OF MONTEREY
City Hall
Monterey, California 93940
Telephone: (831) 646-3915
Facsimile: (831) 373-1634
Email: davi@ci.monterey.ca.us

SABRINA V. TELLER, SBN 215759
REMY MOOSE MANLEY, LLP
555 Capitol Mall, Suite 800
Sacramento, CA 95814
Telephone: (916) 443-2745
Facsimile: (916) 443-9017
E-mail: steller@rmmenvirolaw.com

Attorneys for Respondents
CITY OF MONTEREY

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MONTEREY

TURN DOWN THE LIGHTS,

Petitioner,

v.

CITY OF MONTEREY,

Respondent.

CASE NO. M116731

REPLY TO PETITIONER'S OPPOSITION TO MOTION TO STRIKE EXTRA-RECORD DOCUMENTS

Hearing Date: May 11, 2016
Time: 2:00 p.m.
Dept.: 1, Salinas

Filing Date of Action:
March 22, 2012

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I. INTRODUCTION

The City of Monterey filed a Motion to Strike disputed documents that Petitioner Turn Down the Lights added to the administrative record of proceedings ("AR" or record) certified by the City (AR 584 to AR 1005) ("Augment Documents") for the Street and Tunnel Lighting Replacement Project (the project). The Augment Documents are inadmissible to challenge the determination that the project was exempt from the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000 et seq.). The Augment Documents were not "before" the City when it took the challenged actions, and considering them in evaluating the merits of Petitioner's arguments would thus directly contradict the California Supreme Court's holding in *Western States Petroleum Association v. Superior Court* (1995) 9 Cal.4th 559 ("*WSPA*") prohibiting extra-record documents in writ proceedings.

Petitioner argues the City provided inadequate notice and no public hearing, and that therefore the augmented record evidence is admissible. Petitioner urges the Court to ignore the plain language of CEQA and directly relevant Supreme Court case law regarding the scope of the record and exhaustion requirements. Petitioner's arguments are wrong. The City provided proper notice and a public hearing, and the Augment Documents are inadmissible. The Court must therefore grant the Motion to Strike and refuse to consider the Augment Documents in relation to the arguments on the merits of the petition.

II. STATEMENT OF FACTS and PROCEDURAL HISTORY

The City fully incorporates herein the Statement of Facts and Procedural History from its Motion to Strike. The City reiterates that in the Court's previous order granting Petitioner's Motion to Augment the Record, the Court expressly allowed the City to submit a Motion to Strike the Augment Documents at trial. The City's Motion is submitted pursuant to that directive.

III. ARGUMENT

Petitioner claims that whether or not the record should contain the Augment Documents turns on two factors: (1) public notice of the City Council's proposed action to approve the light replacement contract on November 1, 2011, and (2) the City's filing of the Notice of Exemption ("NOE") in February 2012. (Petitioner's Opposition to Respondent's Motion to Strike ["Opp."], p. 7.) As to the first factor, the City did provide regular notice of its proposed action on November 1, 2011. As to the second

factor, the scope of the record for exempt projects and related exhaustion requirements do not turn on the filing of an NOE. Rather, the record may only be augmented and exhaustion requirements excused where there was *no* notice or public hearing or other opportunity to be heard prior to project approval.

There are no mandatory procedures the City failed to follow in determining the project was exempt; in fact, the City went beyond CEQA's requirements in providing any notice and a public hearing on the matter. Despite having an opportunity to present questions or comments to the Council regarding any alleged impacts of the light replacement project prior to the contract approval, Petitioner failed to do so, complaining only after the lights were installed. Having failed to exhaust available administrative remedies, Petitioner may not now rely on irrelevant and post-approval documents to argue that the project is not exempt from CEQA. There is nothing unusual or inadequate about the 583-page certified record that would warrant supplementing it with additional documents. The scope of documents is inclusive, containing all evidence relevant to the City's approval of the project that was before the staff and decision makers (including the several public hearings on the proposed lighting replacement over a couple of years leading up to the final contract approval decision [see, e.g., AR 255-256, 259, 271, 292, 296]) and their determination that the project is exempt from CEQA. (Pub. Resources Code, § 21167.6, subd. (e); AR 300-323.)

A. The City provided adequate public notice and a public hearing.

In order to fulfill CEQA's robust exhaustion requirement, a contested issue must have been presented to the public agency "during the public comment period provided by [CEQA] or prior to the close of the public hearing on the project before the issuance of the notice of determination." (Pub. Resources Code, § 21177, subd. (a); Opp., p. 8.) Petitioner alleges there was *no* notice or opportunity for public comment here prior to the City's approval of the categorical exemption for the project. (Opp., p. 8.) That is a false statement. There was both notice and an opportunity to be heard at the City Council's hearing for the project. Although not required to do so under CEQA, the City approved the project at a public hearing and provided notice of its exemption determination prior to that meeting. (AR 7, 24, 38-41, 44; *Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 290 (*Tomlinson*).) Petitioner's reliance on the Augment Documents is a transparent attempt to get around its complete failure to exhaust

available remedies, which it could have easily accomplished by providing the disputed documents to the City before project approval. (*Tomlinson*, *supra*, 54 Cal.4th at p. 290; *WSPA*, *supra*, 9 Cal.4th at p. 578.)

1. The City provided adequate notice.

Petitioner alternatively alleges the City provided no notice and did not provide "meaningful" public notice ahead of its exemption determination regarding the grounds for its determination, and thus there was no opportunity for public comment. (Opp., pp. 8, 9, 12.) In fact, the City *did* give notice of the ground for its exemption determination in the agenda report for the proposed action. (AR 39.) CEQA does not require any particular form of notice for an exemption determination, yet the City provided an adequate explanation for its reasoning in finding the project exempt, in a document that was publicly and readily available to any interested party prior to the hearing. (See Pub. Resources Code, § 21177, subd. (a); AR 39.) Petitioner does not explain *how* the City's notice was inadequate, or what alternative notice was either required by law or would have been deemed adequate, in its view.

Petitioner states that "the exemption was not adopted until after the streetlights had already been approved and installed," implying that the City did not make an exemption determination until after project installation. (Opp., p. 11.) This is also not true. The City provided notice that it believed the project was exempt prior to its November 1, 2011 meeting. (AR 39.) The *NOE* was not filed until February 2012. But the filing of the NOE was not the pertinent date for notice of the determination prior to the City Council hearing. (Guidelines, § 15062, subd. (a); *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1385 (*San Lorenzo*) ["A notice of exemption has no significance other than to trigger the running of the limitations period"].) The NOE was not the final decision; it was simply optional documentation of that earlier decision.[1] The exemption determination was proposed by the City staff before the project was approved, as required. (*San Lorenzo*, *supra*, 139 Cal.App.4th at p. 1385.) The City provided notice that the project was considered exempt prior to November 1, 2011 in the meeting's agenda report. (AR 39.)

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[1]/ In fact, NOEs *must* be filed *after* project approval, not before. (*Coalition for Clean Air v. City of Visalia* (2012) 209 Cal.App.4th 408, 423.) Therefore, they do not serve as notice of impending decisions as Petitioner appears to suggest they must in order to trigger the duty to exhaust under Public Resources Code section 21177.

Critically, Petitioner cannot point to any notice requirements with which the City failed to comply. The City made the agenda packet available to the public pursuant to the Brown Act. (Gov. Code, § 54950 et seq.) And even though it was not required to do so under CEQA, the City *did* provide notice that its staff had determined the project was exempt in the council agenda report. (AR 39; Guidelines, § 15062, subd. (a); see *Robinson v. City and County of San Francisco* (2012) 208 Cal.App.4th 950, 961 (*Robinson*).) The City therefore did more than required by law. Importantly, this report was sufficient to put the public on notice that City staff had determined the project was exempt from CEQA and that the Council might agree with that determination and approve the project at its public hearing on November 1, 2011. (*Tomlinson, supra,* 54 Cal.4th at p. 290.)

Petitioner cites *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689 for the proposition that it need not have exhausted administrative remedies before challenging the project, but that case is distinguishable. (Opp., p. 11.) There, the city gave no notice of an addendum *before* taking action on it at a public hearing. (114 Cal.App.4th at p. 702.) The city's decision was therefore predetermined, with no meaningful opportunity for public input. (*Ibid.* ["by the time the public received notice of the [project] in connection with the October city council meeting, environmental review was effectively complete…there was no clearly defined administrative procedure for petitioners to resolve their concerns about the project as it was finally configured"].) Here, in contrast, the City had not yet adopted the exemption before the City Council's meeting; both the Council and the public had the opportunity at the hearing to discuss and refute that potential decision. No one objected.

As to the adequacy of *how* the City provided notice, the recent decision in *Citizens for a Green San Mateo v. San Mateo Community College District* (2014) 226 Cal.App.4th 1572 is instructive. That case held that notice of a project was adequately provided through a board report that was part of an agenda packet. (*Id.* at pp. 1595-1596.) Details about the project activity were not required to be put in the agenda item itself. The fact that *Citizens for a Green San Mateo* involved the statute of limitations rather than exhaustion is of no import; if such notice was sufficient for triggering the statute of limitations, it should also be sufficient for triggering exhaustion requirements, given that CEQA does not define "notice." (See Guidelines, §§ 15372-15375.) As explained in its Opposition to Petitioner's

opening brief, the City respectfully disagrees with the First District Court of Appeal's novel interpretation of CEQA's exhaustion statute in *Defend Our Waterfront v. California State Lands Commission* (2015) 240 Cal.App.4th 570. Nothing in Public Resources Code section 21177, subdivision (e) suggests that exhaustion is only triggered by public notice via the text *in* an agenda item. Rather, as explained above, prior cases have expressly held that agencies are not required to include exemption determinations in meeting agendas in order to trigger the duty to exhaust. (See *San Joaquin Raptor Rescue Center v. County of Merced* (2013) 216 Cal.App.4th 1167, 1178, fn. 17 [exemption need not be included on an agenda]; see also *Robinson*, *supra*, 208 Cal.App.4th at p. 955; *City of Pasadena v. State of Cal.* (1993) 14 Cal.App.4th 810, 820.)

2. The City provided a public hearing, or an opportunity for public input.

Petitioner notes that CEQA excuses exhaustion where "there was no public hearing or other opportunity for members of the public to raise those objections orally or in writing." (Opp., p. 10, citing Pub. Resources Code, § 21177, subd. (e).) But, as Petitioner admits, CEQA does not define "public hearings." (Opp., p. 9.) "Public hearing" is not a term of art under CEQA—it simply means an agency meeting that is open to the public. The November 1, 2011 Council meeting was public, and in fact, public participation was encouraged. (AR 7, 12, 44-46.) In other words, it was a "public hearing." Petitioner points to no authority holding that the City's hearing was not a "public hearing" as referenced in Public Resources Code section 21177. Petitioner circularly argues that the Council meeting was not a public hearing because members of the public did not object. (Opp., p. 10.) But it is the *opportunity* for public comment which makes a public hearing, not whether the public actually makes any comments. (*Tomlinson*, *supra*, 54 Cal.4th at pp. 290-291; *Mani Bros. Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1395 ["the exhaustion requirement nonetheless applies because the public meetings held constituted an '*other opportunity* for members of the public to raise … objections orally or in writing prior to the approval of the project'"], citing § 21177, subd. (e), italics original.)

The November 1, 2011, meeting provided a public opportunity to raise any objections orally or in writing, and thus the issue exhaustion requirement is not excused. *Tomlinson* is exactly on point. The *Tomlinson* court stated that even where no notice of determination is filed, "the challenging party is still

required to exhaust its administrative remedies by presenting its objections to the project to the pertinent public agency, so long as it is given the opportunity to do so at a public hearing held before the project is approved. When, as in this case, a party is given such an opportunity, and it fails to raise a particular objection to the project, it may not raise that objection in court, because it has not satisfied the exhaustion requirement of section 21177's subdivision (a)." (54 Cal.4th at p. 290.)

Petitioner attempts to distinguish *Tomlinson*, but critically misstates the facts of that case. Petitioner wrongly claims the CEQA document at issue in *Tomlinson* was an addendum. (Opp., pp. 10-11.) As here, *Tomlinson* involved a categorical exemption; there was never an addendum at issue. Petitioner also incorrectly claims that in *Tomlinson*, a public hearing was held on the "defined issue" of an exemption. (Opp., p. 11.) The hearings in *Tomlinson* were required because of the project itself (for the Planning Commission hearing) and the fact that the petitioners appealed the initial approval of the subdivision project on grounds of inconsistency with applicable plans as well as CEQA compliance. (54 Cal.4th at pp. 287-288.) It is well established that there is no requirement for a public hearing on either a CEQA exemption or an addendum. (Guidelines, §§ 15164 [addendum], 15060 [preliminary review], 15061 [review for exemption]; *CalBeach Advocates v. City of Solana Beach* (2002) 103 Cal.App.4th 529, 538–541 [findings not required for statutory exemption]; see also *Magan v. County of Kings* (2002) 105 Cal.App.4th 468, 477 [even where exemption is contested, agency need not provide hearing on the record for such contest].) Nonetheless, the City here provided notice of the fact that staff considered it exempt, staff explained at a public meeting what the lights would look like (including the color of the light they would emit), engaged in a dialogue with the Council members, and the Council provided an opportunity for the public to present objections to the project and the City's CEQA determination prior to the lighting contract being approved. (AR 7, 12, 44-46.) No one objected. Petitioner's claim that the City provided "no public hearing or other opportunity" to object pursuant to Public Resources Code section 21177, subdivision (e) is completely false.

B. The Augmented Record evidence is inadmissible.

1. Judicial review under CEQA is limited to evidence in the administrative record.

Judicial review in CEQA cases is limited to review of the evidence that was before the agency

when it made its challenged decision. (*WSPA*, *supra*, 9 Cal.4th 559; see also Evid. Code, § 350 [only relevant evidence admissible in court].) All other evidence is considered "extra-record" evidence and, subject to very limited exceptions not applicable here, is inadmissible in traditional mandamus actions challenging an agency's quasi-legislative decision.[2] (*Id.* at p. 576.) This evidentiary bar ensures courts do not "engage in independent fact finding rather than engaging in a review of the agency's discretionary decision." (*Friends of the Old Trees v. Cal. Dept. of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1391 (*Friends of the Old Trees*).) Numerous courts have applied *WSPA*'s rule prohibiting extra-record evidence to CEQA cases. (See, e.g., *Eureka Citizens for Responsible Gov. v. City of Eureka* (2007) 147 Cal.App.4th 357, 367; *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1032, fn. 13; *City of Carmel-by-the-Sea v. Bd. of Supervisors* (1986) 183 Cal.App.3d 229, 249, fn. 11.)

There are limited exceptions to the extra-record prohibition, but none apply here. Moreover, the *WSPA* court made clear that, even when extra-record evidence is admissible under an exception, it "can never be admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision." (*WSPA, supra,* 9 Cal.4th at p. 579.) Petitioner relies on the Augment Documents for that prohibited purpose.

2. The project approval was not a ministerial or informal agency action, and the general rule prohibiting extra-record evidence applies here.

This case presents a typical CEQA challenge to an agency's discretionary determination that a project is exempt from CEQA. As such, it fits squarely within the "unbroken line of cases hold[ing] that, in traditional mandamus actions challenging quasi-legislative administrative decisions, evidence outside the administrative record 'extra-record evidence' is not admissible." (*Carrancho v. Cal. Air Resources Bd.* (2003) 111 Cal.App.4th 1255, 1269 (*Carrancho*).) Petitioner wrongly contends the rule prohibiting extra-record evidence should not apply here because the City's determination was allegedly "informal." (Opp., p. 14.) Its argument is based on *WSPA*'s general statement that courts "will continue to allow

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[2]/ Although *WSPA* involved a traditional mandamus action under CCP § 1085 challenging a quasi-legislative decision, the rule also applies to administrative mandamus against quasi-judicial decisions brought under CCP §1094.5. (*Cadiz Land Co. v. Rail Cycle LP* (2002) 83 Cal.App.4th 74, 120.)

admission of extra-record evidence in traditional mandamus actions challenging ministerial or informal administrative actions … because there is often little or no administrative record in such cases." (9 Cal.4th at pp. 575-576.) In contrast, "the administrative record developed during the quasi-legislative process is usually adequate to allow the courts to review the decision without recourse to such evidence." (*Id.* at p. 575.)

The City's action here was discretionary, not ministerial. "A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out." (Guidelines, § 15369.) Quasi-legislative actions, in contrast, involve "the exercise of discretion governed by considerations of public welfare." (*Wilson v. Hidden Valley Municipal Water Dist.* (1968) 256 Cal.App.2d 271, 280.) They are also generally self-generated by public agencies, as the City's action was here.[3] (See Guidelines, § 15357.) The City Council exercised its judgment on November 1, 2011, determined the project was exempt from CEQA, and approved the project based on the evidence in its record at that time. (AR 7, 12-25, 26-36, 38-41.)

Nor was the City's action "informal." An agency action is not informal where the agency allows the opportunity for public comment, even where a hearing was not required. (See, e.g., *Carrancho*, *supra*, 111 Cal.App.4th at pp. 1269-1270 [no hearing, but the agency provided opportunity for public input]; *Friends of the Old Trees*, *supra*, 52 Cal.App.4th at p. 1392 [same].) The City provided such an opportunity. (AR 2, 7, 24.)

3. The Friendly Plaza Lighting Project documents are irrelevant and inadmissible.

The two sets of Augment Documents in Exhibit A (pages 584 to 675) should be stricken from the record and Petitioner's arguments relying on them disregarded by the Court because they were not "before" the City when it decided to approve the challenged project, and are irrelevant to that decision. While the documents relating to the Friendly Plaza Lighting Project (AR 584-634) and the City's

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[3]/ The fact that the Council invited public comment indicates the decision was not ministerial; the existence of any public objections or requests for modification would be irrelevant to the determination of whether the project meets "fixed standards or objective measurements." (Guidelines, § 15369.)

website related to the National Historic Landmark District Survey (AR 635-675) were in the City's files prior to the Council's approval of the project, not every document that was in the City's files at the time it approved a project belongs in a record for that particular project. Judicial review in CEQA cases is limited to review of the evidence that was *before*—i.e., considered by—the agency when it made its challenged decision. (*WSPA, supra,* 9 Cal.4th 559; Pub. Resources Code, § 21167.6, subd. (e).)

The Friendly Plaza Lighting Project, an unrelated project, was not timely challenged and is not being challenged now. (AR 584-634.) Similarly, the National Historic Landmark District Survey was a separate project and is irrelevant to this case; that survey does not once refer to lighting. (AR 635-675.) In *Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, the court held a prior EIR was inadmissible extra-record evidence when the city adopted an MND because there was no evidence the EIR was utilized or consulted in preparing the MND. (*Id.* at p. 895.) The EIR was not referenced during the public hearing or considered by the city council prior to the MND's adoption. (*Id.* at p. 894.) Here too, there is no evidence indicating the City consulted or otherwise relied upon any of the Augment Documents in AR pages 584 to 675. Anyone could have offered the documents into the record *prior* to project approval, but no one did. Those documents are therefore inadmissible. (*Id.* at pp. 894-895; *WSPA*, *supra*, 9 Cal.4th at p. 574.)

Public Resources Code, section 21167.6, subdivision (e) does not support an expansive view of the record that would justify inclusion of these pages. That provision, which lists the types of documents that must be included in the record, clearly refers to documents pertaining to the *particular project under review*. It does not contemplate the inclusion of every document in an agency's files. Even if a document fits within one of the categories in subdivision (e), it is still subject to *WSPA*'s ban on extra-record evidence if those documents were not before the agency when it made its challenged decision. There is simply no authority that supports adding or relying on pages 584 to 675. The Court must therefore strike these pages from the record and disregard Petitioner's arguments that rely on them.

4. The Augment Documents submitted after project approval are irrelevant and inadmissible.

The Augment Documents Petitioner submitted as Exhibits B and C (pages 676 to 1005) also should not be included in the record or relied upon by this Court. The documents were submitted long

after the City approved the project on November 1, 2011, many not even *created* until after the project was *implemented.* Administrative records close upon an agency's final decision. Documents that did not yet exist or were not submitted to the City by that date could not have been "before the City" when it made its decision. (*WSPA*, *supra*, 9 Cal.4th at p. 573, fn. 4.) Project challengers cannot wait until after a project is approved and implemented, complain about the project, and then rely on their own complaints as substantial evidence to challenge the project approval.

Exhibit B consists of emails and an historic area survey created *after* project approval and implementation. (AR 676-717, 718-856.) The historic area survey does not once mention the nature of lighting or light fixtures in historic Monterey. Exhibit C contains post-project-implementation emails, studies and newspaper articles. (AR 857-921, 922-1005.) Project opponents cannot satisfy their evidentiary burdens under CEQA by pointing to general studies without showing specifically how those studies apply to the project. (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 175.) Petitioner's "studies" and opinion pieces have even less scientific rigor than those rejected in *Save the Plastic Bag*. (AR 718-856, 922-1005.) Furthermore, those documents cannot overcome the *WSPA* bar. (*WSPA*, *supra*, 9 Cal.4th at pp. 576-577 [court cannot admit additional evidence simply to show the agency did not consider all relevant factors in making its decision].) Those studies and articles therefore do not belong in the record.

IV. CONCLUSION

Petitioner's reliance on the Augment Documents for the majority of their arguments in support of their petition contravenes the plain rule established by the Supreme Court in *Western States Petroleum Association*. The Augment Documents were not before the City at the time it approved the project. In fact, many of the documents did not even exist yet. There is no exception in the process followed here that would allow admission of these documents. The City gave adequate notice of its exemption determination and provided a public opportunity to object to that determination and the project itself before approving it. Petitioner was therefore required to exhaust its contested issues at the administrative level, and it failed to do so. The Court must strike all of the Augment Documents and disregard Petitioner's arguments that rely exclusively on this inadmissible evidence.

Dated: April 29, 2016

Respectfully,

REMY MOOSE MANLEY, LLP

By: Sabrina V. Teller

SABRINA V. TELLER
Attorneys for Respondent
CITY OF MONTEREY

Turn Down the Lights v. City of Monterey
County of Monterey, Case No. M116731

PROOF OF SERVICE

I, Rachel N. Jackson, am a citizen of the United States, employed in the City and County of Sacramento. My business address is 555 Capitol Mall, Suite 800, Sacramento, California 95814. My email address is rjackson@rmmenvirolaw.com. I am over the age of 18 years and not a party to the above-entitled action.

I am familiar with Remy Moose Manley, LLP's practice whereby the mail is sealed, given the appropriate postage and placed in a designated mail collection area. Each day's mail is collected and deposited in a U.S. mailbox after the close of each day's business.

On April 29, 2016, around 3:50 p.m. I served the following:

REPLY TO PETITIONER'S OPPOSITION TO MOTION TO STRIKE EXTRA-RECORD DOCUMENTS

☐ On the parties in this action by causing a true copy thereof to be placed in a sealed envelope with postage thereon fully prepaid in the designated area for outgoing mail addressed as follows; or

☐ On the parties in this action by causing a true copy thereof to be delivered via Federal Express to the following person(s) or their representative at the address(es) listed below; or

☐ On the parties in this action by causing a true copy thereof to be delivered by facsimile machine number (916) 443-9017 to the following person(s) or their representative at the address(es) and facsimile number(s) listed below; or

☑ On the parties in this action by causing a true copy thereof to be electronically delivered via the internet to the following person(s) or representative at the address(es) listed below:

I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 29th day of April, 2016, at Sacramento, California.

_____
Rachel N. Jackson

Turn Down the Lights v. City of Monterey
County of Monterey, Case No. M116731

SERVICE LIST

Michael W. Stamp Molly E. Erickson STAMP | ERICKSON 479 Pacific Street, Suite One Monterey, California 93940 Telephone: (831) 373-1214 Facsimile: (831) 373-0242 E-mail: erickson@stamplaw.us	Attorney for Petitioner TURN DOWN THE LIGHTS **VIA EMAIL**
Susan Brandt-Hawley Brandt–Hawley Law Group P.O. Box 1659 Glen Ellen, California 95442 Telephone: (707) 938-3900 Facsimile: (707) 938-3200 E-mail: susanbh@preservationlawyers.com	Attorney for Petitioner TURN DOWN THE LIGHTS **VIA EMAIL**
Rachel Mansfield-Howlett Provencher and Flatt LLP 823 Sonoma Ave. Santa Rosa, CA 95404 Telephone: (707) 284-2380 Facsimile: (707) 284-2387 E-mail: rhowlettlaw@gmail.com	Attorney for Petitioner TURN DOWN THE LIGHTS **VIA EMAIL**