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9 CONTEMPO MARIN HOMEOWNERS ASSOCIATION

10 CITY OF SAN RAFAEL
11 APPEAL TO THE CITY COUNCIL

12
13 IN RE: 2013, 2014, AND 2015 PETITIONS
14 BY EQUITY LIFESTYLE PROPERTIES,
15 INC. FOR RENT INCREASE FOR
16 CONTEMPO MARIN MOBILE HOME
17 PARK

**APPELLANT CONTEMPO MARIN
HOMEOWNERS ASSOCIATION'S APPEAL
OF ARBITRATOR'S DECISION OF AUGUST
2, 2016**

SRMC Section 20.12.090

1 **I. INTRODUCTION**

2 The Contempo Marin Homeowners Association (“CMHOA” or “the Homeowners”)
3 respectfully submits this brief in support of its appeal from the August 2, 2016 decision of
4 Arbitrator Lawrence A. Baskin (the “Decision”), granting in part and denying in part Equity
5 Lifestyle Properties’ (“ELS”) 2013, 2014, and 2015 petitions (collectively, the “Petitions”) to
6 “pass through” certain costs that ELS had incurred during the course of its operations to the
7 resident Homeowners.

8 This appeal involves a single issue: whether ELS’s failure to provide the Homeowners
9 with “all information reasonably available” regarding the items claimed in the Petitions, as
10 required by Section 20.12.040 of the San Rafael Municipal Code (the “Code”), should result in
11 the disqualification of the Petitions.

12 The answer to this question is “yes.” The requirement that ELS provide “all” information
13 regarding the claimed items to the City and the Homeowners is important and ELS’s willful
14 failure to comply is not a mere technicality. Section 20.12.040 was enacted to protect the
15 Homeowners from potential abuses of the pass-through mechanism by ELS, who, in most cases,
16 has exclusive access to all the evidence from which it can be determined whether or not a claimed
17 expenditure qualifies for reimbursement.

18 The evidence at Arbitration unequivocally demonstrated that ELS did not provide
19 anywhere near all of the information regarding the claimed items, and ELS’s disregard for the
20 requirements of the Ordinance prejudiced the Homeowners’ ability to test whether the claimed
21 items qualified for reimbursement, as discussed below. ELS should not be permitted to
22 strategically select what information to share and what information not to share in an effort to
23 obtain a better result in arbitration, as it has done for years.

24 As a result, the Homeowners request that this Council disqualify the deficient Petitions
25 and deny them in their entirety.

26 **II. BACKGROUND**

27 Contempo Marin is a mobilehome park located in San Rafael. The park is owned and
28 operated by ELS, a publicly traded REIT with a market cap of \$6.13 billion (NYSE: ELS). While

1 ELS owns the land and common areas at Contempo Marin, the residential mobilehomes
2 themselves are owned by the individuals who live in them.¹ This arrangement leaves the
3 residents of Contempo Marin, who are predominately low- and fixed-income individuals and
4 families, particularly vulnerable to rent increases.² Unlike other renters, if they cannot afford an
5 elevated rent, they may be compelled to not only relocate, but to sell their homes in forced and
6 potentially disadvantageous circumstances.

7 Title 20 of the Code (“the Ordinance”) sets out a rent control regime for mobilehome
8 parks to protect the resident Homeowners from rent increases that might force them to abandon
9 their homes. To encourage ELS to upkeep and improve the Park, the Ordinance allows ELS to
10 pass through certain costs associated with qualifying “capital improvements” and “capital
11 replacements” to residents. *See* SRMC § 20.04.020(B) and (C). In order to pass through these
12 costs, ELS must first file a Petition with the City identifying the work completed. SRMC §
13 20.12.050. If the Homeowners disagree that certain items qualify for reimbursement, they may
14 then invoke the arbitration process. These requirements ensure that ELS does not pass through its
15 ordinary maintenance and operation costs, thereby undermining the City’s rent control regime.

16 In each of 2013, 2014, and 2015, ELS filed Petitions seeking to raise the rent of the
17 Homeowners to reimburse ELS for alleged capital expenses, identifying 19 capital expenses in
18 total. (Ex. 1³ at 1-2, 17-18, 39-40.) The Petitions were accompanied by remarkably sparse
19 documentation, consisting primarily of copies of checks endorsed by ELS (*e.g.*, Ex. 1 at 3) and
20 invoices—some of which contain no details at all about the work that was completed (*e.g.*, Ex. 1
21 at 5).

22 The Homeowners contested all three Petitions on various grounds. (Ex. 1 at 15-16, 38,

23 _____
24 ¹ The term “mobilehome” is misleading, as moving a mobilehome is costly and can damage the
25 home, and as a result residents that wish to leave the park almost always have to sell their homes.
26 *See* SRMC, § 20.04.010(F).

27 ² *See* SRMC, § 20.04.010(C) (“A large number of persons living in mobilehomes are elderly,
28 some of whom live on small fixed incomes. These persons may expend a substantial portion of
their income on rent and may not be able to afford other housing within the city.”).

³ This Appeal refers to each exhibit by the number or letter assigned to that exhibit at the arbitral
hearing, with the exception of the Decision. The Decision, which was issued after the hearing, is
designated as Exhibit 7.

1 63-64.) This resulted in arbitration, and a hearing was held on July 19, 2016 (the “Hearing”). On
2 August 2, 2016, the Arbitrator issued a written Decision, attached here as Exhibit 7, granting
3 ELS’s Petitions as to 10 of the 19 items and denying the Petitions as to the remaining nine items,
4 six of which ELS decided not to contest over the course of the hearing.

5 The Arbitrator rejected the Homeowners’ Motion to deny all three Petitions on the
6 grounds that ELS failed to provide “all reasonably available information” under Section
7 20.12.040. The Arbitrator stated his view that, while ELS had failed to provide available
8 information, the meaning of the Ordinance’s term “all information reasonably available” was
9 unclear. (Decision at 4-5.)

10 **III. ARGUMENT**

11 ELS has petitioned the City to pass through certain costs to the Homeowners every year
12 since at least 2005. In these petitions, ELS has consistently sought to pass through costs that are
13 not eligible for capital treatment under the Ordinance, leading to at least three prior arbitrations
14 and two appeals to the City Council (in 2006 and 2011).

15 In the most recent Arbitration, ELS actually withdrew six of the 19 items in the Petitions
16 over the course of the Hearing, after the Homeowners identified glaring flaws in ELS’s claims in
17 their written pre-hearing submission, and the Arbitrator separately found another three items did
18 not qualify under the Ordinance. (Decision at 5-6, 8.) The fact that ELS misidentified *nearly*
19 *half* of the alleged capital expenses it claimed demonstrates the need for careful review of ELS’s
20 petitions.

21 But such a review requires clear information about each project. Anticipating this fact,
22 this Council set out a requirement that a petitioner supply reasonably available information soon
23 after submitting a petition. Section 20.12.040 reads:

24 Within thirty (30) days after the filing of a petition, the homeowners and the
25 owner/operator shall file with the city clerk **all information reasonably**
26 **available** in support of or opposition to any proposed increase of rent. Copies of
said supporting information shall be provided to the opposing party and the
arbitrator.

27 SRMC § 20.12.050 (emphasis added). This section makes clear that a petition must be
28 accompanied by “*all*” supporting information that is reasonably available to the petitioner. This

1 is the only discovery mechanism contemplated by the Ordinance. That is, absent Section
2 20.12.050, the Homeowners have no way of compelling ELS to provide any documentation
3 showing whether alleged capital expenses meet the Ordinance’s requirements.⁴

4 ELS conceded that its three Petitions had to comply with Section 20.12.040’s requirement.
5 (Hearing Transcript (“Tr.”) at 215:3-4 (“[Section 20.12.040] says that we have to file with the
6 city clerk all information reasonably available.”).) However, evidence on the record shows,
7 without question, that ELS withheld extensive and easily available information about each of the
8 projects at issue.

9 **The Major Expenditure Forms.**

10 Up until January 1, 2014, ELS required that its employees complete a Major Expense
11 Form (“MEF”) for any project over \$1,000. (Tr. at 150:6-14.) Ms. Jennifer Barret, a Senior
12 Regional Manager at ELS, testified that ELS was firm about following its capital expense
13 procedures (Tr. at 150:1-5), meaning that for each project in the 2013 Petition, ELS had a
14 corresponding MEF. And MEF numbers appear on some of the provided invoices. (*See, e.g.*, Ex.
15 1 at 11.) The MEF is a three-part form that details a proposed project, including vendor
16 information, and serves as an internal request for approval. (Tr. at 43:25-44:6.) Ms. Barret
17 testified that these forms were not disposed of, and are still kept at the respective offices of the
18 parks owned by ELS. (Tr. at 150:23-25; 151:19-23.) Given that the MEF forms in question were
19 kept in ELS’s own office at Contempo Marin, they were “reasonably available” to ELS. As such,
20 ELS’s failure to provide any of these documents to the Homeowners or the Arbitrator was in clear
21 violation of Section 20.12.040.

22 **The Cap X System.**

23 Starting January 1, 2014, ELS implemented a much more robust system for tracking
24 information connected to capital expenses. Under the new procedure, “[w]hen entering a project
25 into the cap X system, as much detail as possible should be provided, including but not limited to
26 project reason descriptions, invoice descriptions, comment boxes and backup documentation,

27 _____
28 ⁴ Moreover, absent this requirement, ELS is free to “cherry pick” only the documentation that
advances its claims, as it has done for years.

1 such as bids, insurance certificates, and photos.” (Tr. at 153:24-154:4; Ex. 2 at 3.) Ms. Barret
2 testified that that for each capital expense, the aforementioned documents are maintained in the
3 Cap X system. (Tr. at 154:10-13 (“Q. So that means that for each capital expenditure project, all
4 of these various forms of documentation are kept; is that also true? A. Yes, that is correct.”).)
5 Ms. Barret further testified that she personally ensured that these Cap X procedures were
6 followed (Tr. at 154:7-8) and that these procedures applied for each of the items in the 2014 and
7 2015 Petitions (Tr. at 153:7-10).

8 More specifically, Ms. Barret explained that for every item in the 2014 and 2015 Petitions,
9 a “project reason description” was drafted, and that those descriptions are still maintained on the
10 Cap X system. (Tr. at 157: 6-9 (“Q. So that means that somewhere on the cap X system
11 maintained by ELS every project at issue today has a project reason description? A. Yes.”).)
12 When asked if she could have retrieved these project reason descriptions and provided them to the
13 Homeowners, Ms. Barret eventually testified, “I could have, yes.” (Tr. at 157:25-158:3.) Ms.
14 Barret admitted the same was true of other documentation, including comments entered about
15 projects, bids received in connection with projects, and photos taken during projects. (Tr. at
16 159:19-160:25.) All of this detailed information about the purpose and nature of capital projects
17 was “reasonably available” to ELS as it was maintained on ELS’s own system, and yet none of it
18 was provided to the Homeowners or the Arbitrator, in violation of Section 20.12.040.

19 **The Contracts.**

20 Ms. Barret also testified that, for capital projects, a “lengthy” contract is executed with
21 each vendor. (Tr. at 162:11-20.) These contracts explain the jobs they pertain to, and Ms. Barret
22 admitted that they are kept by ELS. (Tr. at 163:2-14.) Yet, with the exception of a single two-
23 page excerpt, none of these contracts were provided to the Homeowners or the Arbitrator.

24 **These Facts Require Disqualification of the Petitions.**

25 These facts show, unequivocally, that ELS disregarded the requirement that it provide all
26 reasonably available information in connection with its Petitions. The Arbitrator agreed that ELS
27 did not provide available information: “[Ms. Barret] used files and paper records but did not print
28 and attach documents that may have been in the Company's computer records system as no-one

1 directed her to do so. More records could be made available for future petitions.” (Decision at
2 4.) But the Arbitrator denied the Homeowners’ motion to disqualify the Petitions for failure to
3 comply with Section 20.12.040, finding that “it is not clear” what “all information reasonably
4 available” means and that “there is no evidence ELS purposefully withheld information.”
5 (Decision at 5.)

6 ELS admitted to withholding documents kept in its own filing system and on its own
7 capital expense tracking system. (Tr. at 152:10-14 (“I didn't look for those [MEF] forms. When
8 preparing the packets we were required prepare [sic], I didn't -- even for this submission last year,
9 **I did not send in any forms, documentation from our back end, our office.**”) (emphasis
10 added).) ELS’s witness testified that all of this documentation was kept and *that she could have*
11 *provided it to the Homeowners*. There can be no doubt that the missing documentation was
12 reasonably available—in fact, it is hard to imagine how this documentation could have been any
13 more easily available. Whether ELS intended to withhold information, something nearly
14 impossible to prove in this context, is immaterial. Moreover, ELS’s counsel claimed that he runs
15 into this objection *every time* a petition is filed. (Tr. at 214:1-4.) Yet ELS did nothing to cure the
16 deficiency year after year.

17 ELS’s failure to provide this reasonably available information is not an academic issue.
18 Where the Homeowners had detailed accounts of the work completed, they often succeeded in
19 disqualifying items. For example, the Homeowners relied on the extensive narrative provided in
20 an invoice for repairs on a lagoon pump (Ex. 1 at 30-32) to argue that the work was maintenance
21 (a cost which cannot be passed through to the Homeowners) and not a capital replacement.
22 Because of the detailed information available to both parties, ELS was obliged to agree with the
23 Homeowners and withdrew the item. In contrast, the 2013 Petition includes invoices for work
24 done on “new ABS lift pumps,” but these invoices give *no further information* about the work.
25 (Ex. 1 at 5, 7.) Remarkably, ELS’s own witness could not explain why the work was needed or
26 even what ABS stood for. (Tr. at 25:22-26:18 (“**Q.** Is it your understanding that [ABS is] a type
27 of pipe, similar to [] PVC? **A.** I can't answer yes or no on that.”); Tr. at 31:7-20.) Despite this
28 incomplete record, the Arbitrator still passed through \$14,000 of expenses to the Homeowners in

1 connection with the two items, concluding they were capital expenses,⁵ making clear that ELS
2 has an incentive to selectively provide limited details about alleged capital expenses. (Decision at
3 5.) The sole check on ELS's power to do so is Section 20.12.040.

4 **IV. CONCLUSION**

5 Section 20.12.040 means what it says. ELS was obligated to provide "all information
6 reasonably available" regarding the items claimed in its Petitions. The evidence shows, beyond
7 any doubt, that ELS failed to comply with this requirement, and ELS's disregard for this
8 important safeguard prejudiced the Homeowners' ability to test the sufficiency of ELS's
9 Petitions. As a result, ELS's 2013, 2014, and 2015 Petitions are deficient and should be denied in
10 their entirety.

11 Dated: October 14, 2016

Respectfully submitted,

COOLEY LLP

14 By: 

Nathaniel Cooper

16 Attorneys for Appellant
17 CONTEMPO MARIN HOMEOWNERS
18 ASSOCIATION

19 137739596

25 ⁵ The Arbitrator noted that he relied on Ms. Barret's testimony that the "existing pump had ceased
26 being operational and required complete replacement." (Decision at 5.) But Ms. Barret also
27 testified that she was not involved with the property at the time. (Tr. at 18:13-15.) The
28 Homeowners objected to the admissibility of this testimony due to a lack of foundation that Ms.
Barret had personal knowledge. It was then established that Ms. Barret was testifying *based on
her reading of the invoices themselves*, rather than any additional information she could supply.
(Tr. at 22:14-23:13.)

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PROOF OF SERVICE

I am a citizen of the United States and a resident of the State of California. I am employed in San Francisco County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of 18 years, and not a party to the within action. My business address is Cooley LLP, 101 California Street, 5th Floor, San Francisco, California 94111-5800. My e-mail address is pmines@cooley.com. On October 14, 2016, I served the following documents on the parties listed below in the manner(s) indicated: **APPELLANT CONTEMPO MARIN HOMEOWNERS ASSOCIATION'S APPEAL OF ARBITRATOR'S DECISION OF AUGUST 2, 2016**

- (BY U.S. MAIL – CCP § 1013a(1)) I am personally and readily familiar with the business practice of Cooley LLP for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at San Francisco, California.
- (BY MESSENGER SERVICE – CCP § 1011) I consigned the document(s) to an authorized courier and/or process server for hand delivery on this date.
- (BY FACSIMILE – CCP § 1013(e)) I am personally and readily familiar with the business practice of Cooley LLP for collection and processing of document(s) to be transmitted by facsimile and I caused such document(s) on this date to be transmitted by facsimile to the offices of addressee(s) at the numbers listed below.
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- (BY ELECTRONIC MAIL – CCP § 1010.6(a)(6)) I caused such documents described herein to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

1 **Via Messenger-Hand Delivery**
2 Ms. Esther C. Beirne, City Clerk
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4 1400 Fifth Avenue
5 San Rafael, CA 94901
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16 Facsimile: (415) 485-3109
17 E-mail: Lisa.Goldfien@cityofsanrafael.org

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

15 Executed on October 14, 2016, at San Francisco, California.

17 
18 _____
19 Patricia Mines

19 137857346 v1

ARBITRATION OF PETITIONS FOR CAPITAL PASS THROUGHS FOR
2013, 2014 AND 2015 PURSUANT TO TITLE 20 OF CITY OF
SAN RAFAEL MUNICIPAL CODE

MHC FINANCING LIMITED PARTNERSHIP
and its AFFILIATE MHC OPERATING
LIMITED PARTNERSHIP,

Petitioner,

vs.

CONTEMPO MARIN HOMEOWNERS'
ASSOCIATION, et al.,

/

Respondents.

Reporter's Transcript of Proceedings
BEFORE ARBITRATOR LAWRENCE BASKIN, ESQ.

RESOLUTION REMEDIES
1000 Fourth Street, Eighth Floor
San Rafael, California

July 19, 2016
10:00 a.m.

REPORTED BY: JODY GIBNEY, CSR NO. 12308, RPR

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PROCEEDINGS - 7/19/16

<p>1 I N D E X 2 EXAMINATIONS 3 4 ISSUE - PUMP REPLACEMENT 5 WITNESS: JENNIFER BARRETT 6 Direct Examination By Mr. Moran 14 7 Cross-Examination By Mr. Cooper 25 8 WITNESS: KEITH MELONEY 9 Direct Examination By Mr. Cooper 38 10 Cross-Examination By Mr. Moran 41 11 12 ISSUE - LAWN MOWERS 13 WITNESS: JENNIFER BARRETT 14 Redirect Examination By Mr. Moran 42 15 Recross-Examination By Mr. Cooper 45 16 WITNESS: ROBERT ANDREWS 17 Direct Examination By Mr. Moran 52 18 Cross-Examination By Mr. Bernstein 56 19 WITNESS: ROBERT HEINE 20 Direct Examination By Mr. Bernstein 59 21 22 23 24 25</p>	<p>1 ISSUE - POOL FURNITURE 2 115 3 WITNESS: JENNIFER BARRETT 4 Direct Examination By Mr. Moran 5 Cross-Examination By Mr. Bernstein 122 6 Redirect Examination By Mr. Moran 126 7 Recross-Examination By Mr. Bernstein 127 8 ISSUE - FITNESS ROOM EQUIPMENT 9 WITNESS: ROBERT ANDREWS 10 Direct Examination By Mr. Cooper 128 11 WITNESS: JENNIFER BARRETT 12 Direct Examination By Mr. Moran 129 13 Cross-Examination By Mr. Cooper 133 14 ISSUE - LANDSCAPING/MOWERS 15 16 WITNESS: JORGE GONZALEZ 17 Direct Examination By Mr. Moran 136 18 Cross-Examination By Mr. Cooper 142 19 WITNESS: ROBERT ANDREWS 20 Recross-Examination By Mr. Cooper 144 21 WITNESS: JENNIFER BARRETT 22 Cross-Examination By Mr. Cooper 144 23 Direct Examination By Mr. Bernstein 146 24 Direct Examination By Mr. Jaccard 161 25 Redirect Examination By Mr. Bernstein 162</p>																												
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<p>1 ISSUE - DRAINAGE 2 WITNESS: JENNIFER BARRETT 3 Direct Examination By Mr. Moran 61 4 Cross-Examination By Mr. Cooper 63 5 Redirect Examination By Mr. Moran 66 6 Direct Examination By Mr. Jaccard 67 7 8 ISSUE - HVAC 9 70 10 WITNESS: JENNIFER BARRETT 11 Direct Examination By Mr. Moran 12 Cross-Examination By Mr. Cooper 75 13 Redirect Examination By Mr. Jaccard 77 14 ISSUE - ROOFING 15 81 16 WITNESS: JENNIFER BARRETT 17 Direct Examination By Mr. Moran 18 Cross-Examination By Mr. Cooper 86 19 Direct Examination By Mr. Moran 90 20 Cross-Examination By Mr. Cooper 96 21 ISSUE - ASPHALT REPLACEMENT 22 104 23 WITNESS: JENNIFER BARRETT 24 Direct Examination By Mr. Moran 25 Cross-Examination By Mr. Cooper 108 Redirect Examination By Mr. Moran 114</p>	<p>1 WITNESS: RICHARD HEINE 2 Direct Examination By Mr. Bernstein 166 3 Cross-Examination By Mr. Moran 170 4 5 ISSUE - POOL FURNITURE 6 WITNESS: ROBERT ANDREWS 7 Direct Examination By Mr. Moran 183 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <table border="1"> <thead> <tr> <th>No.</th> <th>Description</th> <th>Mrkd</th> <th>Rcvd</th> </tr> </thead> <tbody> <tr> <td>1</td> <td>Equity LifeStyle Properties' Petitions to City of San Rafael</td> <td>109</td> <td>109</td> </tr> <tr> <td>2</td> <td>Equity LifeStyle Properties, Inc. Capitalization Policy & Procedure</td> <td>122</td> <td>122</td> </tr> <tr> <td>3</td> <td>Copy of letter to Jennifer Barrett from Richard Heine</td> <td>169</td> <td>169</td> </tr> <tr> <td>4</td> <td>Resolution No. 12014</td> <td>188</td> <td>188</td> </tr> <tr> <td>5</td> <td>Exhibit 1 to Homeowners' brief</td> <td>188</td> <td>188</td> </tr> <tr> <td>6</td> <td>HOA exhibits to pre-arbitration statement</td> <td>191</td> <td>191</td> </tr> </tbody> </table>	No.	Description	Mrkd	Rcvd	1	Equity LifeStyle Properties' Petitions to City of San Rafael	109	109	2	Equity LifeStyle Properties, Inc. Capitalization Policy & Procedure	122	122	3	Copy of letter to Jennifer Barrett from Richard Heine	169	169	4	Resolution No. 12014	188	188	5	Exhibit 1 to Homeowners' brief	188	188	6	HOA exhibits to pre-arbitration statement	191	191
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2 (Pages 2 to 5)

PROCEEDINGS - 7/19/16

1 A. November 1st of 2012.
2 Q. The first item on the invoice says
3 October, \$1,650.
4 What is that for?
5 A. For the chemical adjustments.
6 Q. And is ELS seeking to pass through that
7 expense to the homeowners?
8 A. No, they are not.
9 Q. What are the two remaining items on that
10 invoice?
11 A. It's for additional parts and labor
12 needed to install, actually, lift station No. 15 at
13 the park, at Contempo Marin.
14 MR. COOPER: I'd like to interpose an
15 objection. The witness testified earlier that she
16 wasn't involved in this item, so I'm not sure what the
17 basis for her testimony is, so we object based on lack
18 of foundation.
19 THE ARBITRATOR: All right.
20 MR. MORAN: Q. Are these business records?
21 THE ARBITRATOR: Why don't you lay a
22 foundation.
23 MR. MORAN: Sure.
24 Q. Did you obtain business records --
25 A. Yeah.

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1 Q. -- from ELS?
2 A. Yes, I did.
3 Q. And are these kept in the regular course
4 of business?
5 A. Yes, they are.
6 Q. And do you typically rely on these
7 invoices in performing your duties at ELS?
8 A. Yes, I do.
9 Q. And is that true for all the properties
10 that you manage for ELS?
11 A. Yes, it is.
12 Q. Okay.
13 A. Thanks. That's all I have.
14 THE ARBITRATOR: Okay on Items 1, 2 and 3, on
15 that?
16 MR. MORAN: Right.
17 THE ARBITRATOR: Let me just ask you also.
18 Prior coming here today, did you make inquiries of
19 people who would know about these items in order to
20 have a basis for your testimony?
21 THE WITNESS: I spoke with the previous VP
22 for California, and more important, I've been with the
23 company for ten years, and I understand the operations
24 of each of the properties, which is why I understand
25 what these invoices are saying. I've been doing this

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1 for a long time.
2 THE ARBITRATOR: Okay, very good. Go ahead.
3 I'm satisfied; she can testify.
4 MR. MORAN: Okay. Let's move on to the
5 fourth item on the 2013 petition.
6 THE ARBITRATOR: Excuse me for one second.
7 MR. MORAN: Yes.
8 THE ARBITRATOR: So this might be a little
9 bit unorthodox in terms of how we would conduct
10 things, but one way that we might do this, if you're
11 interested, is we could have a series of mini trials,
12 if you will.
13 MR. MORAN: Oh, yeah.
14 THE ARBITRATOR: And deal with them item by
15 item or groups of items, and it will help my notes and
16 my decision-making process, and if it won't throw you
17 off -- I mean, these three items group together pretty
18 readily. There's a couple other places where there's
19 some groups of items. I mean, the good news is we
20 only have, what did we get this down to --
21 MR. COOPER: 17.
22 THE ARBITRATOR: -- 17. So, you know, I want
23 to move it along, but I want it to be a fair hearing
24 in terms of making sure that you have an opportunity
25 to present all the information as well as the owners.

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1 So do you want to respond, perhaps, to those?
2 MR. COOPER: Yeah, I think that makes sense,
3 with the caveat that there may be some additional
4 lines of questioning that doesn't necessarily fall
5 into one of these buckets, and we might like the
6 opportunity at the end of closing Counsel's
7 presentation to examine the witness on maybe some
8 summary topics.
9 THE ARBITRATOR: I don't have a problem with
10 that.
11 MR. MORAN: That's agreeable to us.
12 THE ARBITRATOR: Why don't we do that. Let's
13 take these Items 1, 2, and 3 of the '13 petition and
14 let's address them.
15 MR. COOPER: Sure.
16 CROSS-EXAMINATION BY MR. COOPER
17 MR. COOPER: Q. Ms. Barrett, I think you
18 testified to the effect that you're familiar with the
19 nature of these items because you deal with sewage
20 issues regularly and so understand what these invoices
21 are conveying?
22 A. Yes.
23 Q. So I want to look at the description in
24 the first two invoices. It's not entirely clear to me
25 what it's describing. It says: "New ABS lift station

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1 pump."
2 Can you explain to me in as much detail as
3 you can provide what that means, what that job
4 entails?
5 A. Sure. So in a lift station, you have a
6 pump that is at the bottom of the lift station. As
7 far as the depth, I'm not familiar exactly how deep it
8 is, and the lift station, actually, the pump pumps the
9 sewage through the system, to then pump it through to
10 the city. That is my understanding of the lift
11 station pumps.
12 Q. And just unpacking these words here.
13 What is ABS?
14 A. Oh, I do not remember right off the top
15 of my head.
16 Q. Is it your understanding that it's a type
17 of pipe, similar to the PVC?
18 A. I can't answer yes or no on that.
19 Q. And so when you see this line item here,
20 "New ABS lift station pump," your interpretation of
21 that is that a new pump was installed --
22 A. Yes.
23 Q. -- correct?
24 And it's not that there was a new pipe
25 installed?

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1 A. Correct.
2 Q. And is \$7,500 the unit cost for the pump
3 itself, or, for example, the cost for the pump and the
4 installation together?
5 A. Looking at this, it would be for both.
6 It would be for the installation and the labor.
7 Q. And --
8 A. Pardon me. The pump and the labor.
9 Q. Understood.
10 And I believe you testified previously that
11 you're not sure which pumps were replaced for Items 1
12 and 2; is that right?
13 A. Correct, until we look at the Item 3,
14 which says one of them was No. 15.
15 Q. And what's the reason why you believe
16 Item 3 tells us that one of them was at No. 15? I
17 mean, I can see what it says here, "Install new ABS in
18 lift station 15," but what about that leads you to
19 believe that these two other invoices relate to lift
20 station 15 as well?
21 A. Because we only installed two lift
22 station pumps. We didn't install three, and this
23 references 15.
24 Q. That's right. Do you see this item on 3,
25 it says: "Install new ABS in lift station No. 15,"

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1 correct?
2 A. Yes.
3 Q. Do you see the word "pump" in there
4 anywhere?
5 A. No, I do not.
6 Q. So what about this item leads you to
7 believe that this relates to the replacement of a
8 pump?
9 A. Because it was the same project.
10 Q. And what's the basis for your
11 understanding that it was the same project?
12 A. The time period in which all of this was
13 replaced.
14 Q. So I can see that these invoices are all
15 from the same vendor, SOS, and I can see the dates on
16 top, and the first one says September 1, 2012, and as
17 Mr. Moran pointed out, there's a line item on there
18 that says August, correct? I think you testified that
19 related to the pH balancing work that was done in
20 August?
21 A. Correct.
22 Q. And then the second item is dated
23 September 28th, the end of September, and there's
24 another pH balancing item that says September,
25 correct?

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1 A. Correct.
2 Q. And this third item says -- October 31st
3 is the date of the invoice, and there's a line item
4 that says October, and that's the pH balancing for
5 October, correct?
6 A. I think it says November 1st in here.
7 Q. Does yours say November 1st?
8 A. November 1st.
9 Q. I see November 1st at the top. I think
10 that's maybe a fax transmission stamp.
11 A. I see that, yes.
12 Q. In any case, these three invoices are
13 spread over the course of two months --
14 A. Correct.
15 Q. -- correct? And each one of them
16 reflects, at least the pH balancing maintenance
17 balancing work that was done in a separate month. So
18 I'm still trying to get at -- and you stated that it's
19 the timing of these invoices that leads you to believe
20 that they're part of the same project.
21 So I guess I'm just trying to get at what
22 about the timing of the invoices leads you to believe
23 that that's part of the same project?
24 A. I don't know.
25 Q. 'Cuz I see these, I see that they

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1 occurred in three separate months, and it's difficult
2 for me to draw that conclusion, so I'm trying to see
3 where you're taking that from.
4 Do you have any understanding about the
5 issues with -- the specific issues with the lift
6 station pump at Site 15?
7 A. I do not.
8 Q. And that's true as of the time period of
9 October 2012, correct?
10 A. Correct.
11 Q. And that's currently true as well?
12 A. Correct.
13 Q. I'm not sure if this question was asked,
14 and perhaps you're answered it, when did you begin
15 working for ELS?
16 A. In November of 2006.
17 Q. And when did you assume responsibility
18 for the Contempo Marin Mobile Home Park?
19 A. Not direct responsibility, but I became a
20 part of Contempo Marin, I think, in September of '14.
21 Q. So prior to September of '14, did you
22 have any involvement in the capital expenditure
23 decision-making process at Contempo Marin?
24 A. No, I did not.
25 Q. Did you have any involvement prior to

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1 September of '14 in the capital expenditure petition
2 process?
3 A. No, I did not.
4 Q. Do you have any understanding about
5 sewage leaks at Site 15?
6 A. No, I do not.
7 Q. Do you have any understanding that there
8 was -- there were complaints from the resident at that
9 site about leaking sewage in the 2012 time period?
10 A. No, I do not.
11 Q. Do you have an understanding that this
12 invoice reflects the repair work that was done in
13 response to those complaints at Site 15?
14 A. No, I do not.
15 Q. Did you have an understanding that the
16 pumps that were replaced took place at the other two
17 pump stations and not at the pump at Site No. 15?
18 A. I do not.
19 Q. Is it possible that is the case?
20 A. It is possible.
21 Q. Mr. Moran had previously -- well, I take
22 that back.
23 I have in front of me the brief that ELS
24 submitted in connection with this arbitration. And
25 I'm looking at the characterization of this -- of

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1 these three items here on Page 5 on Line 12.
2 Do you have the copy of the brief that ELS
3 gave to Mr. Baskin?
4 A. Yes.
5 Q. And I'm just focused here on the single
6 bullet point related to these items. It says:
7 "\$16,595.07 for replacement of two ABS lift station
8 pumps for the sewage system to the 396 home park;
9 7,500 per pump, plus \$1,595.07 installation."
10 Do you have any understanding as to why ELS
11 characterized in its brief this \$1,595 as an
12 installation cost for the pumps?
13 A. I do not.
14 MR. COOPER: I think that's all we have on
15 that item.
16 THE ARBITRATOR: Do you have any testimony
17 from the homeowners with regard to the items you asked
18 on cross-examination.
19 MR. COOPER: I did speak with the homeowner
20 about the issue. He's not able to be here today.
21 THE ARBITRATOR: Okay.
22 And, Neil, do you have anything else that's
23 going to talk about these items?
24 MR. MORAN: I'll talk to my clients at the
25 break and find out.

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1 THE ARBITRATOR: Anybody know what "ABS"
2 stands for?
3 MR. MORAN: It's the name of the manufacturer
4 of these pumps.
5 THE ARBITRATOR: Okay.
6 MR. MORAN: It also has another meaning in
7 plumbing, which is a type of sewer pipe, plastic sewer
8 pipe. Also polyvinyl chloride is used in some sewage
9 applications, as well as cast iron and --
10 THE ARBITRATOR: Well, I mean, the reference
11 I would be familiar with would be the abbreviation for
12 PVC, and I'm wondering if ABS is another -- an acronym
13 for another type of pipe.
14 MR. MORAN: It is, but there's a manufacturer
15 of sewage injection pumps called ABS, and that's what
16 this is.
17 THE ARBITRATOR: Okay. All right. That's it
18 on Item Nos. 1, 2 and 3.
19 Going to --
20 MR. COOPER: Before we proceed, just a quick
21 rebuttal on that.
22 It's ELS' burden to show that these expenses
23 qualify, and the fact that Mr. Moran has a
24 characterization or belief about this last item sounds
25 like it's relating to the ejector pump, but I think

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1 **A.** What I mean is the lift station is a
2 sealed entity, and so when the workers aren't working
3 on it, it's closed off, so I can't see inside of it.
4 That's what I meant by I can't physically see it
5 myself. I can only see that work was being done on
6 it, it was closed off. And there were blockades put
7 up for safety reasons.
8 **Q.** Thank you.
9 **THE ARBITRATOR:** Okay. Moving on to No. 4,
10 and I've left a spot in my notes for Mr. Gonzalez when
11 he appears.
12 **MR. MORAN:** So I'll go back to Jennifer
13 Barrett, our witness.
14 **ISSUE - MOWERS**
15 **JENNIFER BARRETT**
16 **REDIRECT EXAMINATION BY MR. MORAN**
17 **MR. MORAN:** Q. Jennifer, will you tell us
18 what Item 4 is?
19 **A.** Item 4 is a Buck's Saw mower, a Kawasaki
20 ride-on mower.
21 **Q.** For the record, what is a ride-on mower?
22 **A.** It is a lawn mower that you sit on and
23 drive versus a push mower.
24 **Q.** Okay. And this item is in the amount of
25 \$8,603.42?

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1 **A.** Yes.
2 **Q.** And is there a piece of paper attached to
3 our hearing brief at Exhibit A that deals with this?
4 **A.** Yes, there is.
5 **Q.** Seriously, what do you call -- is this a
6 screen shot? What is this? Is this an invoice?
7 **A.** This is a -- an invoice, yes.
8 **Q.** Okay. That's right.
9 Okay. And who is the vendor?
10 **A.** The vendor is Buck's Saw Service.
11 **Q.** Jennifer what -- there's some handwriting
12 at the top of that invoice. The date of the invoice,
13 I'll just say for the record, is November 26, 2012; is
14 that correct?
15 **A.** That is correct.
16 **Q.** And at the top right corner is some
17 handwriting that says: "MEF number," and then it
18 says: "604012," and it looks like "10."
19 Did I read that correctly?
20 **A.** Correct.
21 **Q.** What is -- if you know, what does MEF
22 mean in that context?
23 **A.** Major expenditure form.
24 **Q.** Tell us what that is in simple words.
25 **A.** So during this year, we -- when we had a

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1 major expenditure, this was a three-part form that we
2 would fill out with all the vendor information and the
3 request. This is the way that we tracked capital
4 projects in that year, and everybody would have to
5 sign off on it, and that was the reference to that
6 number.
7 Once we submitted the major expense form, the
8 accounting team would then give us an MEF number to
9 correlate with that expense.
10 **Q.** Thank you.
11 To what purpose at Contempo Marin was a
12 sitting mower put? What gets mowed, if anything?
13 **A.** I don't know what was being done at the
14 property during this time period to speak to exactly
15 what the lawn mower was used for.
16 **Q.** Is there grass? Are there lawns at the
17 park?
18 **A.** Yes. There's large grassy areas, both on
19 the front of the property, all around the lagoon
20 there's grassy areas, and the tennis courts there's
21 large glassy areas.
22 **Q.** And are those grassy areas that you just
23 described, are those maintained? Are there people who
24 cut the grass?
25 **A.** There is.

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1 **Q.** And at present, here we are in July 2016,
2 who performs the duties of cutting the grass?
3 **A.** We have outsourced it to a vendor, and
4 the vendor's name is Enviroscapes.
5 **Q.** Enviroscapes?
6 **A.** Yes.
7 **Q.** And is it correct that this Kawasaki
8 19 horsepower 44-inch -- what do you call it, ride-on?
9 **A.** Ride-on mower.
10 **Q.** -- ride-on mower is no longer in use at
11 Contempo Marin?
12 **A.** I have not seen it in use. I don't know
13 if it's being used to do our firebreaks every year --
14 **Q.** Okay.
15 **A.** -- but I have not seen it in use.
16 **Q.** I'll ask Mr. Gonzalez when he gets here.
17 Are there ride-on mowers that are used at
18 other ELS properties that are used there?
19 **A.** Yes, several.
20 **MR. MORAN:** Okay. That's all I have on this
21 item until Mr. Gonzalez gets here.
22 **THE ARBITRATOR:** Nate.
23 **RECROSS-EXAMINATION BY MR. COOPER**
24 **MR. COOPER:** Q. Jennifer, I believe you
25 testified previously that you weren't involved in the

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1 MR. BERNSTEIN: Q. And I think you told us
2 on direct examination, and this is a quote I wrote
3 down, and you can correct me, "Our company is pretty
4 firm when it comes to cap X decision-making."
5 A. Yes.
6 Q. Isn't that right?
7 So one of the policies of the company was to
8 fill out what's called an MEF form for each
9 expenditure exceeding a thousand dollars; isn't that
10 true?
11 A. That was true. That has changed since --
12 so in the -- I explained, in 2012 and 2013 -- it was
13 like in 2013 the MEF process went away, but a new
14 system came into play.
15 Q. Okay. So in the period before the most
16 recent procedures were implemented, an MEF form was
17 required for any expenditure over one thousand
18 dollars?
19 A. Correct.
20 Q. And just for the record, MEF stands for
21 major expense form; isn't that right?
22 A. Correct.
23 Q. And these forms, they don't get thrown
24 away, do they?
25 A. They should not be thrown away.

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1 Q. In fact, they're kept at the Contempo
2 Marin office in the office itself; isn't that true?
3 A. I don't know where they're kept.
4 MR. MORAN: Objection; overbroad as to time.
5 MR. BROWN: Q. These forms, to the best of
6 your knowledge, are not disposed of; isn't that true?
7 THE ARBITRATOR: You're talking about since
8 she came to Contempo Marin in 2014?
9 MR. BERNSTEIN: I believe the questioning has
10 changed slightly. Ms. Barrett explained that the MEF
11 forms were in place before the most recent policy. So
12 let me limit my questions, then, to 2012 until the
13 most recent procedures were implemented, which, I
14 believe, were in January of 2014.
15 THE ARBITRATOR: So then your question would
16 be at ELS facilities, were the MEF forms kept in the
17 respective offices 'cuz she couldn't speak
18 specifically to Contempo Marin.
19 MR. BERNSTEIN: Q. Okay, Ms. Barrett, so to
20 the best of your knowledge, these MEF forms from 2012
21 to 2014, they were maintained by ELS at their
22 respective offices; isn't that right.
23 A. They should be, yes.
24 Q. But to the best of your knowledge, none
25 of these MEF form in connection with any of the items

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1 at issue today were ever provided to the homeowners?
2 A. I don't know. I wasn't involved with
3 that property then.
4 Q. You don't have any of these MEF forms
5 from the 2012 to 2014 expenditures with you today, do
6 you?
7 A. No, I do not.
8 Q. So if don't have those forms, you would
9 agree that those forms were never provided to us?
10 A. I didn't look for those forms. When
11 preparing the packets we were required prepare, I
12 didn't -- even for this submission last year, I did
13 not send in any forms, documentation from our back
14 end, our office.
15 Q. So just to be clear, when preparing the
16 petitions that are at issue today, you did not look
17 for these MEF forms?
18 A. No, the MEF form is an internal document
19 that's used. It's not meant to distribute to any
20 residents. It's an internal document.
21 Q. Now I want to draw your attention to the
22 capitalization policy and procedure, which was
23 recently labeled Exhibit 2.
24 Do you have that document before you?
25 A. Yes.

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1 Q. Now, this is the policy that came into
2 place in January of 2014; isn't that right?
3 THE ARBITRATOR: Here, I'll share mine.
4 THE WITNESS: Yes.
5 MR. BERNSTEIN: Q. Yes, it is?
6 A. It's dated January of 2014.
7 Q. So this is the policy that would have
8 applied to each expenditure that took place in 2014
9 and in 2015; is that right?
10 A. Yes.
11 Q. I'd like to draw your attention to the
12 third page of that document. I'd like you to read
13 silently while I read aloud.
14 "A capital expenditure project request needs
15 to be completed for the entire project. When entering
16 a project into the cap X system, as much" --
17 THE ARBITRATOR: Wait, wait, wait, Max.
18 Where are you reading?
19 MR. BERNSTEIN: I apologize. It's the top of
20 Page 3, Paragraph 2.
21 THE ARBITRATOR: Oh, okay. I got it.
22 MR. BROWN: Read slowly so that the court
23 reporter can get it down.
24 MR. BERNSTEIN: Q. "When entering a project
25 into the cap X system, as much detail as possible

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1 should be provided, including but not limited to
2 project reason descriptions, invoice descriptions,
3 comment boxes and backup documentation, such as bids,
4 insurance certificates, and photos."
5 Did I read that correctly?
6 A. You did read that correctly.
7 Q. You told us before that you ensure that
8 these procedures are followed; is that right?
9 A. Yes.
10 Q. So that means that for each capital
11 expenditure project, all of these various forms of
12 documentation are kept; is that also true?
13 A. Yes, that is correct.
14 Q. These various forms of documents are kept
15 in what's referred to in this document cap X system;
16 is that right?
17 A. Correct.
18 Q. Are you familiar with the cap X system?
19 A. Yes.
20 Q. And do you have access to the cap X
21 system?
22 A. Yes.
23 Q. Would you agree that it's relatively --
24 or fairly easy for an ELS employee to take a document
25 off of the cap X system?

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1 A. No, I wouldn't agree with that.
2 Q. Would you agree that if properly
3 authorized, an ELS employee could get a document off
4 of the cap X system?
5 MR. MORAN: Objection; vague. Vague as to
6 time, what document, when.
7 THE ARBITRATOR: Go ahead.
8 THE WITNESS: That was my question. What
9 documents are you speaking of?
10 MR. BERNSTEIN: Q. Well, let's say that your
11 boss came to you and said, I want a document from the
12 cap X system. Would you be able to get that document?
13 A. It depends on the document.
14 Q. Tell us, which documents can you not
15 access?
16 A. I can't -- I would have -- so, for
17 example, if I wanted to go in there today for a
18 project that has not been started yet and look at
19 proposals, I can go do that. If the project has been
20 started, I would have to go -- and we've chosen a
21 vendor, I wouldn't be able to pull those proposals now
22 that it's been started.
23 Q. So once a project has been started
24 there's a freeze on accessing documents in the cap X
25 system?

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1 A. I wouldn't say there's a freeze on
2 accessing the documents.
3 Q. Well, let me get this clear, Ms. Barrett.
4 If your boss needed a document, say, because of a
5 litigation, are you telling us that you would not be
6 able to access that document?
7 A. I'm not saying that. I'm not -- wouldn't
8 be able to access it. We would be able to obtain that
9 document.
10 Q. You would be able to obtain any document
11 on the cap X system?
12 A. I don't know about "any document."
13 Q. Can you identify any document on the cap
14 X system that you would not be able to obtain if it
15 was necessary?
16 A. I would not be able to drill down and
17 answer that question without having a specific
18 question on which document you're asking for.
19 Q. Okay. Well, let's look at this. Every
20 single project requires a project reason description.
21 That's what the procedure says, right?
22 A. Yes.
23 Q. So that means for every project at issue
24 today that took place in 2014 and 2015, it was
25 required by these procedures that a project reason

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1 description be drafted; isn't that right?
2 A. Yes.
3 Q. And to the best of your understanding,
4 those procedures were followed?
5 A. Yes.
6 Q. So that means that somewhere on the cap X
7 system maintained by ELS every project at issue today
8 has a project reason description?
9 A. Yes.
10 Q. Would you be able to access the project
11 reason description associated with the petition items
12 at issue today?
13 A. Yes.
14 Q. And would you be able to take those
15 documents and print them out if needed and authorized
16 by ELS?
17 A. So the way the system is, it's not a
18 document in there for the description. It's a
19 step-by-step template that you complete. So it's not
20 a printable document.
21 Q. Well, certainly there's a way to take
22 information from the system and use it in paper form;
23 isn't that right?
24 A. Yes.
25 Q. So you could have gotten these project

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1 reason descriptions off of the system and provided
 2 them to the homeowners; isn't that right?
 3 A. I could have, yes.
 4 Q. But you did not?
 5 A. So these items for -- and I'm going to
 6 speak to my year -- were discussed with the
 7 homeowners. So it wasn't an option -- I didn't even
 8 think that there was a need to go into our internal
 9 system, print something off, and give it to the
 10 homeowners because they were involved with all of
 11 this.
 12 The one thing that I didn't do was I didn't
 13 write it down and follow up in email. But they were
 14 definitely involved. I couldn't speak for 2012, 2013,
 15 but I can speak for late '14 and '15, they were very
 16 involved with what we were doing on the property.
 17 Q. So, Ms. Barrett, just for clarity, you
 18 did not produce -- or rather you did not print project
 19 reason descriptions and provide them with the
 20 petitions issues to the City? That's a yes, you did
 21 not do that?
 22 A. I'm not going to say yes because there's
 23 a process in the capital expenditures that, for
 24 example, the moneys that we're going to spend in 2017,
 25 we're already planning those projects. So it's done

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1 prior to the new year, prior to the expenditures,
 2 unless it is an un-budgeted request, meaning it's an
 3 emergency situation. So those items have already been
 4 discussed with the homeowners before they even go into
 5 the system, so we plan a year in advance.
 6 Q. Ms. Barrett, I appreciate your answer.
 7 Let's put aside for a second the discussion with the
 8 homeowners.
 9 A. Sure.
 10 Q. This is a very straightforward question.
 11 The project reason descriptions that were in
 12 the cap X system, they were not printed out and
 13 provided to the City as part of 2013, 2014 and 2015
 14 petitions; isn't that right?
 15 A. So they wouldn't have been printed out
 16 for 2013 or 2014 'cuz the cap X system didn't exist at
 17 that time; it was just getting off the ground. And
 18 for 2015 they were not.
 19 Q. Looking at some of these other items,
 20 there's also comment boxes that are contained within
 21 the cap X system. Those were not printed out and
 22 provided with any petition to the City --
 23 A. No.
 24 Q. -- isn't that right?
 25 We have here backup documentation, such as

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1 bids. And those were also entered into the cap X
 2 system?
 3 A. Correct.
 4 Q. And I believe you described some of the
 5 bids. For example, you mentioned with the roof that
 6 proposals came in for 110- and \$150,000?
 7 A. Right.
 8 Q. And those bids were entered into the cap
 9 X system following the procedure outlined here?
 10 A. Correct.
 11 Q. But those bids were not provided in
 12 connection with any of the petitions at issue today?
 13 A. No.
 14 Q. In fact, no bids of any kind, other than
 15 those that were ultimately acted on, were provided to
 16 the homeowners or the City through a petition system?
 17 A. Correct.
 18 Q. Looking here, there's also photos of each
 19 project at issue today. And those photos -- is that
 20 correct?
 21 A. Yes.
 22 Q. And those photos were not provided to the
 23 homeowners or the City through the petitions at issue
 24 today?
 25 A. No.

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1 MR. BERNSTEIN: No further questions at this
 2 time.
 3 THE ARBITRATOR: Okay.
 4 DIRECT EXAMINATION BY MR. JACCARD
 5 MR. JACCARD: Q. Jennifer, I'd like to call
 6 your attention to the language that Max asked you to
 7 read at the very beginning.
 8 A. Yes.
 9 Q. And it says, "When entering a project
 10 into the cap X system, as much detail as possible
 11 should be provided."
 12 That doesn't say does that every one of these
 13 items necessarily is provided?
 14 A. Correct.
 15 Q. So for any particular project, some of
 16 these things may not be provided?
 17 A. Correct.
 18 Q. Based on whoever is making the input
 19 decision to input whatever is put in the system?
 20 A. Correct.
 21 Q. So Max's assumption that each one of
 22 these items exist for every project isn't true,
 23 correct?
 24 A. Correct.
 25 MR. JACCARD: Thank you.

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1 THE ARBITRATOR: Okay.
2 MR. BERNSTEIN: Mr. Baskin, may I ask one
3 more short line of questioning of Ms. Barrett?
4 THE ARBITRATOR: I don't know. It depends on
5 what it's about.
6 MR. BERNSTEIN: It's about a very related
7 issue. It's about the contracts at issue in this
8 case.
9 THE ARBITRATOR: Go ahead.
10 REDIRECT EXAMINATION BY MR. BERNSTEIN
11 MR. BERNSTEIN: Q. Ms. Barrett, you also
12 mentioned that the standard contracts with the vendor
13 is 30 pages long; isn't that right.
14 A. I might have been exaggerating a little
15 bit. I'm not sure exactly how many pages, but it's
16 pretty lengthy.
17 Q. There's a lengthy contract --
18 A. Yes.
19 Q. -- with each vendor?
20 A. Yes.
21 Q. And that's to protect ELS?
22 A. Yes.
23 Q. So you make sure that every transaction
24 of a big nature is going to have one of these
25 contracts, right?

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1 A. Correct.
2 Q. You would agree that in these contracts,
3 I believe this is actually a quote from your earlier
4 testimony, it reads what the job would be; isn't that
5 true?
6 A. Correct.
7 Q. That's written into the contract. But
8 other than the one or two-page excerpts that we've
9 already discussed, none of those contracts were
10 attached to the petitions provided to the City; isn't
11 that true?
12 A. Correct.
13 Q. But you did keep those contracts?
14 A. Yes.
15 MR. BERNSTEIN: No further questions.
16 RE-CROSS-EXAMINATION BY MR. JACCARD
17 MR. JACCARD: Q. Isn't it true that on our
18 standard form contract, the description of work is
19 actually not entered into the contract? It's actually
20 in Exhibit A, which is typically the vendor's
21 proposal, which in those cases is the documents here?
22 A. Yes, correct.
23 THE ARBITRATOR: Okay. Any other questions?
24 MR. JACCARD: No.
25 THE ARBITRATOR: Any more here?

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1 So we're waiting for Mr. Heine; is that
2 right?
3 MR. MORAN: Mr. Heine.
4 THE ARBITRATOR: We can go off the record.
5 (Discussion held off the record.)
6 THE ARBITRATOR: I'd like to entertain from
7 respective Counsel, Neil and Nate or whoever Nate
8 wants to designate --
9 MR. ANDREWS: Excuse me. May I -- can we
10 release Jorge?
11 (Discussion held off the record.)
12 THE ARBITRATOR: What I'd like to hear is
13 from the petitioners with regard to each of these
14 items that remain on the list whether or not they're
15 seeking the pass through as a capital replacement or a
16 capital improvement.
17 MR. MORAN: Yes.
18 THE ARBITRATOR: And then hear from you as to
19 whether or not you think it's a capital improvement,
20 capital replacement, or maybe you are going to argue
21 that it's maintenance and repair. And I'd like to
22 know where we're going with that. I'm required to
23 make specific findings on the issues, so I should know
24 what is being requested.
25 MR. MORAN: Excellent. Could we have a short

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1 break so I can talk to the client representatives
2 about that?
3 THE ARBITRATOR: Sure.
4 [Short recess.]
5 THE ARBITRATOR: You guys wanted to present
6 some testimony about homeowners' communications or
7 decision-making?
8 MR. COOPER: We did. I think that Neil had
9 wanted to call Robert on that issue, but we're happy
10 to --
11 THE ARBITRATOR: You want to call Robert and
12 then they're going to respond?
13 MR. MORAN: I'll let them put on their case,
14 and then I'll have Robert bat cleanup.
15 THE ARBITRATOR: Is that all right with you?
16 MR. COOPER: Yes, it is.
17 THE ARBITRATOR: Okay.
18 MR. BERNSTEIN: We'll go ahead and get
19 started by talking to Mr. Heine a little bit.
20 Q. Mr. Heine, you mentioned before that
21 you're currently the CM HOA president and a resident?
22 A. I should point out that even though I
23 talked earlier, I haven't been sworn.
24 Q. Oh, okay. Well, let's swear in Mr.
25 Heine.

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1 The City -- this has to do with the -- I run into this
2 every year or every time we have a petition or appeal
3 and I get the same argument that there's some
4 excruciating piece of detail we didn't supply. And
5 today we got the ultimate, which is that even though
6 under our cap X policies there is actually no
7 document -- may I see the declaration that's received
8 in evidence of -- 'cuz I --
9 Here it is. The cap X policy. It was --
10 it's going to absurd lengths that even though -- the
11 argument is that even though there's not a specific
12 document that would contain the excruciatingly
13 detailed information that we went through, the project
14 reason description -- so I'm at Page 3 at the top of
15 the capitalization policy and procedure.
16 Jennifer Barrett testified that actually the
17 project reason descriptions are not in a document;
18 they're in an electronic place, and there would be a
19 way to extract it, but it wouldn't be a document.
20 The invoice descriptions are actually not a
21 document. They're in some electronic form, so one
22 couldn't simply print a document that would have that.
23 But I tell you from having done this since
24 2006 that no matter what we provide, we're always
25 accused of not providing enough. So the statute, the

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1 ordinance at 20.120.040 doesn't say we have to supply
2 every excruciatingly detailed piece of information.
3 It says that we have to file with the city clerk all
4 information reasonably available. And we've done
5 that.
6 Now, there was some -- we did not have --
7 submit at the beginning the proposal dated
8 February 19th to Mr. Linscott's, the work that Mr. --
9 that Linscott did, and I'm sorry for that. It was
10 referred to -- we submitted the invoice, but the
11 invoice referred to a proposal. So I made the
12 independent decision that we should supply the
13 corresponding -- it was -- it's Item No. 5, Linscott
14 Engineering, \$12,708. It refers to a February 18th,
15 2014, proposal, so I belatedly produced the proposal
16 last Thursday, which is on the day that Jennifer
17 Barrett found it and gave it to me, and I got it over
18 to opposing counsel on the same day.
19 But other than that, I think we've met our
20 burden under the statute.
21 Thank you.
22 MR. BROWN: Just one follow-up on that. It
23 is true at that time on the ordinance doesn't use the
24 word excruciatingly. The ordinance has the language
25 that it has, but what I would say is that every city

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1 council in enacting every ordinance has to consider
2 the various competing interests that are presented
3 before it, and it makes certain decisions on how to
4 balance those interests, and then they also set out
5 certain requirements to be met, and oftentimes those
6 are based on principles of due process or fairness, in
7 the judgment of the city council.
8 We, in this room, some of us may disagree
9 with where the city council came down in wording an
10 ordinance in a particular way or the decisions they
11 made, but that's not our job today. Our job is to
12 follow the ordinance as it's written and the ordinance
13 simply says that "the petitioner shall file," not may
14 file or can file, but "shall file with the city clerk
15 all information reasonably available in support of any
16 proposed increase of rent."
17 It doesn't use the term document, it doesn't
18 say that you shall file information if it's contained
19 in the form of a paper document. It says "all
20 information." And we all know very well, those of us
21 in this room who have litigated, that if this
22 information on their cap X system had been requested
23 in discovery, it absolutely would be readily
24 available, very easily produced, whether in electronic
25 form or reduced to paper form. If they received a

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1 search warrant from the prosecutor and had to produce
2 the information, absolutely, it would be readily
3 available. I guarantee it.
4 And so the point is that the statute sets out
5 a number of requirements that have to be met before
6 the petitioner can get a pass through. It has to
7 comply with the definition of capital improvement, or
8 it has to comply with the definition and requirements
9 of a capital replacement, and as well, it also needs
10 to comply with this requirement to produce all
11 information reasonably available that supports the
12 proposed increase.
13 Here, the testimony is very, very clear that
14 there's all manner of information related to the
15 sought pass throughs that is available and hasn't been
16 provided, and so our very elemental point here is that
17 the requirement of the statute hasn't been met, and
18 therefore, the petitions must be denied because they
19 don't comply with the plain language in the ordinance.
20 THE ARBITRATOR: Okay, submitted?
21 MR. MORAN: Yes, thank you.
22 MR. COOPER: Submitted, yes.
23 THE ARBITRATOR: Thank you all for your help
24 in being here.
25 THE REPORTER: Who would like a copy of the

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1 transcript?
2 MR. COOPER: We'd like a copy. You can send
3 it to me.
4 MR. MORAN: Yes, Jody.
5 [Proceedings concluded at 4:06 p.m.]
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1 I, Jody Gibney, R.P.R., C.S.R. No. 12308, a
2 Certified Shorthand Reporter in and for the State of
3 California, do hereby certify:
4 That the foregoing proceedings and testimony
5 were taken before me at the time and place set forth
6 and was taken down by me in shorthand and thereafter
7 reduced to computerized transcription under my
8 direction and supervision, and I hereby certify the
9 foregoing testimony is a full, true and correct
10 transcript of my shorthand notes so taken.
11 I further certify that I am neither counsel
12 for nor related to any party to said action nor in any
13 way interested in the outcome thereof.
14 IN WITNESS WHEREOF, I have hereunto
15 subscribed my name this ___ day of _____, 2016.
16
17 _____
18 Jody Gibney
19 Certified Shorthand Reporter No. 12308, RPR
20
21
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23
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