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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CITY OF SELMA,

Plaintiff and Appellant,

v.

FRESNO COUNTY LOCAL AGENCY FORMATION COMMISSION,

Defendant and Respondent;

CITY OF KINGSBURG,

Real Party in Interest and Respondent.

F072712

(Super. Ct. No. 13CECG02651)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Jeffrey Y. Hamilton, Jr., Judge.

Costanzo & Associates and Neal E. Costanzo for Plaintiff and Appellant.

Kahn, Soares & Conway, Rissa A. Stuart, Courtney E. Griffin, and Michael J. Noland for Defendant and Respondent and for Real Party in Interest and Respondent.

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INTRODUCTION

After prevailing on the merits, City of Kingsburg (Kingsburg) recovered costs incurred for preparing the administrative record in this case under Public Resources Code section 21167.6.[1] City of Selma (Selma) contends Kingsburg was not entitled to recover costs because it was the real party in interest, not the lead agency, and Selma did not consent to Kingsburg's involvement in the preparation of the record. (See *Hayward Area Planning Assn. v. City of Hayward* (2005) 128 Cal.App.4th 176, 183-185 (*Hayward*).)

While we agree the parties, including a petitioner under the California Environmental Quality Act (CEQA), must "agree to an alternative method of preparation of the record of proceedings" (§ 21167.6, subd. (b)(2)) before a real party in interest may prepare the record, we conclude substantial evidence supports the conclusion that Selma *did* agree to that procedure here. Consequently, we affirm the trial court's denial of Selma's motion to strike the cost memorandum.

We also reject the bulk of Selma's claims as to the unreasonableness of the record preparation costs. However, we agree Kingsburg unreasonably sought $1,000 for preparing the *index* of the record because that task is simple and the work appears to be reflected in other line items. We also agree Selma has shown that Kingsburg failed to credit one of two $1,500 payments Selma made during the litigation for record preparation costs. As a result, we reverse the trial court's denial of Selma's alternative motion to tax costs and direct the trial court to order costs taxed in the total amount of $2,500.

FACTS

"In 2012, … Kingsburg … studied a proposal to annex approximately 430 acres of land in Fresno County." (*City of Selma v. Fresno County Local Agency Formation Com.* (2016) 1 Cal.App.5th 573, 576 (*Selma I*).) Kingsburg approved the annexation and repealed a portion of the North Kingsburg Specific Plan (NKSP). Selma challenged

[1] All statutory references are to the Public Resources Code unless otherwise noted.

those actions in separate[2] lawsuits, which we will refer to as the Annexation action and NKSP action, respectively.

Kingsburg sought the Fresno County Local Agency Formation Commission's (LAFCo) approval for the annexation. (See Gov. Code, § 56375.) Eventually, LAFCo approved the annexation, subject to several conditions. (*Selma I*, *supra*, 1 Cal.App.5th at p. 580.)

On August 23, 2013, Selma filed a writ of mandate challenging LAFCo's approval of the annexation. (See Code Civ. Proc., § 860.) We will refer to that case, from which the present appeal arises, as the LAFCo action.

Pursuant to an agreement, Kingsburg indemnified LAFCo from all claims in the LAFCo action. Attorney Rissa Stuart of Kahn, Soares & Conway represented both LAFCo and Kingsburg in the LAFCo action.[3]

Along with the writ petition, Selma filed a "Request for Preparation of Record of Proceedings." In that filing, Selma requested LAFCo prepare a record of proceedings that included "all documents within the scope of Public Resources Code § 21167.6(e)."

On October 7, 2013, the parties filed a stipulation. The stipulation contained several recitals, including one stating: "WHEREAS, [Selma]'s counsel has advised it wants LAFCO and [Kingsburg] to prepare the subject Administrative Records herein." After the recitals, the stipulation read as follows:

> "IT IS HEREBY STIPULATED AND AGREED AS FOLLOWS:
>
> "1. The parties hereto agree to a continuance of the deadlines imposed under Fresno County Local Rule 2.11.2 with respect to preparation of the preliminary cost notification for preparation of the Administrative Record. Thus, LAFCO and [Kingsburg] will serve said notice to [Selma]

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[2]The Annexation and NKSP actions were consolidated for purposes of oral argument and trial only. (*City of Selma v. City of Kingsburg* (July 14, 2016, F071156) [nonpub. opn.].) There is no indication in the record that either of those actions was consolidated with the LAFCo action.

[3]LAFCo was also represented by cocounsel.

by facsimile and mail on or before the close of business on October 9, 2013;

"2. Further, the parties agree that [Selma], notwithstanding the requisite notification and rights under Local Rule 2.11.2, has requested that LAFCO and [Kingsburg] prepare the Administrative Record for these proceedings."

The administrative record was lodged on October 29, 2013.

Record Preparation Cost Notices

Rissa Stuart sent Selma's counsel a record preparation cost notice dated October 9, 2013, containing several line items totaling $13,375.[4]

In a letter to Selma's counsel dated October 30, 2013, and captioned "First Amended Administrative Record Preparation Cost Notice," Rissa Stuart provided line items pertaining to the cost of preparing the administrative record.

The first line item reads, "The total page count is: 1360 × 3 (court, plus 2 copies) [¶] Total cost ($ .25 p/p)." The amount for this line item was $1,020.

There were also line items for "duplication of audio recordings" of commission hearings for $25; "Staff time indexing, copying, and reviewing records" for a total of $8,000;[5] "Kahn, Soares & Conway time—organization and preparation of Index of record—4 hours at $250/hr." for $1,000; "Cost for electronic copy of record for parties (2); and (2) court (@$25.00 per cd)" for $100; "Staff time at KS&C for scan/bate stamp, OCR (make PDF searchable and print) copying and binding (15 hours @$100/hr" for $1,500; and "Cost for Spiral binding the records (1360 pages / 6 volumes)" for $14.78.

The total listed on the amended cost notice was $11,659.78.

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[4]Selma takes issues with several line items in this original record preparation cost notice. But an amended notice was created thereafter and it is the amended notice on which the cost memorandum is based.

[5]This amount was not totaled, but instead broken down as follows: "8 hours @ $125/hour" for $1,000, "10 hours @ $250/hour" for $2,500, and "25 hours @ $180/hour" for $4,500.

On October 31, 2013, a document entitled "Notice of Filing and Certification of Administrative Record" was served[6] on Selma. The document provided notice that "[LAFCO] and [KINGSBURG] certified and filed its [*sic*] Administrative Record as related to the above-captioned matter, with the above-referenced court on October 29, 2013." The document was signed by attorney Rissa A. Stuart of Kahn, Soares & Conway, LLP as counsel for both Kingsburg and LAFCO.

On May 7, 2015, the trial court issued an order denying Selma's writ petition. We affirmed the trial court's denial of Selma's writ petition in *Selma I, supra*, 1 Cal.App.5th 573.

Kahn, Soares & Conway filed a memorandum of costs listing only Kingsburg. The memorandum had a single line item titled "Preparation of Administrative Record Pub. Res. Section 21167.6(b)" in the amount of $10,159.78. The memorandum had a notation reading, "See amended notice and payment letter attached hereto and incorporated herein by this reference as Exhibits 'A' and 'B.'" The First Amended Administrative Record Preparation Cost Notice dated October 30, 2013, was attached as exhibit A. A December 16, 2013, letter from Selma's counsel to Rissa Stuart enclosing an "additional" $1,500 check for record preparation was attached as exhibit B.

Selma filed a motion to strike costs or, alternatively, to tax costs on June 30, 2015. Selma claimed LAFCo did not have authority to delegate preparation of the administrative record to Kingsburg because Selma did not consent. Selma also asserted that the costs requested were excessive, that Kingsburg failed to credit one of two $1,500 payments Selma had already made, that the costs requested included amounts related to documents that were not "properly part of the administrative record," and that there was insufficient information supplied to segregate the "time properly spent in actual

[6] A register of actions appearing in the Appellant's Appendix indicates the notice was *filed* on November 4, 2013.

preparation of the record of the actual proceedings, from time spent by Kingsburg in pursuit of its own interests in this litigation."

The trial court rejected Selma's argument that LAFCo improperly delegated the role of preparing the administrative record.[7] The court observed that the October 7, 2013, stipulation provided that Selma agreed to LAFCo and Kingsburg preparing the administrative record. The court also noted Selma submitted no evidence showing the absence of such an agreement.

Selma appealed.

DISCUSSION

I. The Trial Court Did Not Abuse Its Discretion in Effectively Finding that Selma Consented to LAFCo and Kingsburg Jointly Preparing the Administrative Record

A. Law

1. Preparation of a CEQA Record

In all CEQA cases, a record of administrative proceedings is prepared. (See § 21167.6.) The administrative record includes the project application, environmental review documents and written comments thereon, and documentation of the final public agency decision, among other documents. (§ 21167.6, subd. (e).)

"Section 21167.6 authorizes only three ways to prepare a CEQA record …. The three alternatives are (1) that the public agency prepare and certify the record; (2) that the petitioner prepare the record, subject to certification by the public agency; or (3) that the parties agree to an alternative method of preparing the record, subject to certification by the public agency." (*Hayward, supra,* 128 Cal.App.4th at p. 183; see § 21167.6, subd. (b).)

[7]The trial court prepared a written tentative ruling, which it later adopted as its order.

2. Recovering Costs of Preparing Administrative Record

CEQA provides that "[t]he parties shall pay any reasonable costs or fees imposed for the preparation of the record of proceedings in conformance with any law or rule of court." (§ 21167.6, subd. (b)(1).) This statutory text "leads us to the general rules applicable to the award of costs, which are set forth in Code of Civil Procedure sections 1032, 1033 and 1033.5." (*Wagner Farms, Inc. v. Modesto Irrigation Dist.* (2006) 145 Cal.App.4th 765, 773.) "[E]xcept as otherwise expressly provided by statute, the party who prevails in any action or proceeding 'is entitled as a matter of right to recover costs.' (Code. Civ. Proc., § 1032, subd. (b).)" (*Ibid*.)

A party's request for costs can be challenged by a motion to strike or tax costs. (See *Guevara v. Brand* (1992) 8 Cal.App.4th 995, 998.) "'The trial court's exercise of discretion in granting or denying a motion to tax costs will not be disturbed if substantial evidence supports its decision.' [Citation.]" (*Chaaban v. Wet Seal, Inc.* (2012) 203 Cal.App.4th 49, 52.)

B. Analysis

As noted above, "[s]ection 21167.6 authorizes only three ways to prepare a CEQA record …. The three alternatives are (1) that the public agency prepare and certify the record; (2) that the petitioner prepare the record, subject to certification by the public agency; or (3) that the parties agree to an alternative method of preparing the record, subject to certification by the public agency." (*Hayward*, *supra*, 128 Cal.App.4th at p. 183; see § 21167.6, subd. (b).) Kingsburg contends the third scenario applies here because Selma consented to joint preparation of the record by Kingsburg and LAFCo.[8] Selma contends it did not consent.

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[8]Kingsburg offers other arguments as well. First, it contends Selma was "aware" that Kingsburg's counsel also represented LAFCo and "did not object" to Kahn, Soares & Conway preparing the administrative record. Selma responds that the only letter referring to Kahn, Soares & Conway acting as cocounsel for LAFCo postdates the filing of the administrative record. Selma also asserts it did effectively object by observing in a November 7, 2013, letter that "absent an agreement to the contrary, costs incurred by the real party in interest, which Kingsburg is in the case against LAFCO, in preparing the record for the respondent agency,

The trial court did not abuse its discretion when it relied on evidence of the October 7, 2013, stipulation as proof that Selma agreed that LAFCo *and* Kingsburg would prepare the record. The stipulation clearly states: "the parties agree that Petitioner [i.e., Selma], notwithstanding the requisite notification and rights under Local Rule 2.11.2, has requested that LAFCO *and the City* [i.e., Kingsburg] prepare the Administrative Record for these proceedings." (Italics added.) Moreover, defense counsel submitted a declaration stating the stipulation "specifically provided that LAFCO and Kingsburg would prepare the ROP, as Petitioner requested." Based on the plain text of the stipulation and defense counsel's declaration as to how she understood the agreement between the parties, it was reasonable for the trial court to conclude there was sufficient evidence the parties agreed that both LAFCo and Kingsburg could jointly prepare the administrative record.[9]

Selma argues the stipulation "simply and only extends a deadline under local rules." But the trial court concluded otherwise, and that determination was reasonable.

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which is LAFCO, are not recoverable." Selma insists it did not concede the issue in a subsequent letter.

Our issue with Kingsburg's contention is more fundamental. We doubt that even a knowing failure to object to preparation of the record by a real party in interest would suffice in lieu of an express agreement between the parties. That is, Selma's purported failure to object is not equivalent to Selma "agree[ing] to an alternative method of preparation." (§ 21167.6, subd. (b)(2).) However, because we conclude below that substantial evidence supports the conclusion Selma *expressly* agreed to LAFCo and Kingsburg jointly preparing the record, we need not definitively resolve this issue.

Kingsburg also submits that it prepared the record of proceedings "in its capacity as LAFCO's co-counsel." Since Kingsburg, an entity, cannot act as counsel, we understand this argument to be that Kahn, Soares & Conway's costs in preparing the record are recoverable because that firm is counsel of record for LAFCo. This contention might be persuasive if LAFCo had been the party seeking costs. But the cost memorandum only lists City of Kingsburg in the caption. For *Kingsburg* to recover costs of record preparation, the parties must have "agree[d]" to that arrangement. (§ 21167.6, subd. (b)(2).)

[9] As a result, this case is different than *Hayward*, where the "[p]laintiffs were never informed of [the d]efendant's arrangement [for counsel for the real party in interest to prepare the record] … and they never agreed to it." (*Hayward*, *supra*, 128 Cal.App.4th at p. 179.)

The stipulation clearly has two numbered, operative paragraphs. The first paragraph does extend a deadline under the local rules. But Selma's reading effectively ignores the second paragraph, which states, "*Further*, the parties *agree* that [*Selma*], notwithstanding the requisite notification and rights under Local Rule 2.11.2, *has requested* that LAFCO *and* [*Kingsburg*] prepare the Administrative Record for these proceedings." (Italics added.)

Selma offers a different interpretation of the stipulation, relying on a recital from the stipulation providing: "WHEREAS, [Selma]'s counsel has advised it wants LAFCO and [Kingsburg] to prepare the subject Administrative Records herein." Selma emphasizes the pluralization of "Records" and asserts that the correct interpretation of the stipulation was that "LAFCO and Kingsburg were to prepare the respective [records of proceedings] applicable to their respective proceedings [e.g., the Annexation, NKSP and LAFCo actions] in accordance with the request for preparation of the [record of proceedings]. The stipulation has nothing to do with who is to prepare an [record of proceeding] for a particular proceeding."[10] But the actual, operative stipulation of the parties was that Selma had requested "that LAFCO and [Kingsburg] prepare the Administrative Record [singular] for *these proceedings*." (Italics added.) The stipulation was filed in case No. 13CECG02651 and there is no indication the case was consolidated with the NKSP or Annexation actions. Because there is substantial evidence supporting the inference in favor of the trial court's order (i.e., that Selma agreed LAFCo and Kingsburg would jointly prepare the administrative record in the LAFCo action specifically), the fact the stipulation might also be read differently does not warrant reversal.

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[10] Selma also points to a stipulation filed in the Annexation action indicating that if LAFCo approved Kingsburg's application, Selma "will likely file an action against LAFCo and seek to consolidate the two actions into the single case herein." However, the record does not indicate any such consolidation with the LAFCo action was actually sought or granted.

Selma also points to a November 7, 2013, letter in which it noted that "absent an agreement to the contrary," costs incurred by Kingsburg in preparing the record for LAFCo are not recoverable. But that letter postdates the lodging—and, necessarily, the preparation—of the administrative record in this case. Any attempt by Selma to revoke or change a prior agreement as to how the record would be prepared was ineffective at that point. Moreover, even if the November 7, 2013, letter is considered probative as to whether there was *ever* an agreement to permit LAFCo and Kingsburg to jointly prepare the record, it does not warrant reversal on substantial evidence review. The fact that some evidence """"'might also be reasonably reconciled with a contrary finding does not warrant a reversal …. [Citation.]'""" (*In re George T.* (2004) 33 Cal.4th 620, 631.)

Surprisingly, Selma also contends "*the stipulation does not even speak to the preparation of an ROP* which is an activity that according to Rule 2.11.2 is to occur after the service of the preliminary cost notification referred to in the stipulation and after the party on whom it has been served has been given the opportunity either to elect to prepare the ROP itself, or to inspect the documents proposed to be included by the party that actually prepares the ROP." (Italics added, underscore in original.)[11] But the stipulation does clearly speak to the preparation of the administrative record when it says "the parties agree that [Selma], notwithstanding the requisite notification and rights under Local Rule

[11]Selma's briefing is interspersed with several comments asserting Kingsburg failed to adhere to local rules of court concerning the preliminary cost notification and index of the administrative record. To the extent Selma is trying to claim these purported local rule violations warrant reversal of the cost award, we decline to consider that contention because it is not set out as a separate argument. (*Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187, 201; *T.P. v. T.W.* (2011) 191 Cal.App.4th 1428, 1440, fn. 12; *Tilbury Constructors, Inc. v. State Comp. Ins. Fund* (2006) 137 Cal.App.4th 466, 482; *Heavenly Valley v. El Dorado County Bd. of Equalization* (2000) 84 Cal.App.4th 1323, 1345–1346 & fn. 17; *Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, fn. 4; *Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1291; see Cal. Rules of Court, rule 8.204(a)(1)(B).) Moreover, Selma does not cite authority establishing a violation of local rules warrants the granting of a motion to strike or tax costs.

2.11.2, has requested that LAFCO and [Kingsburg] *prepare* the Administrative Record for these proceedings." (Italics added.)

II. Reasonableness of Costs

Selma argues the various amounts requested in the cost memorandum are unreasonable. We largely reject these contentions, but do order costs taxed $2,500 for the reasons explained below.

A. Selma Has Failed to Show Respondents Improperly Included Certain Documents in the Administrative Record

Selma argues that some of the documents in the administrative record were duplicative of documents in the administrative record in the Annexation and NKSP actions.[12] But the LAFCo case was not consolidated with the Annexation action or the NKSP action, so overlap in the administrative records was not improper.[13]

B. Selma Has Failed to Show the Trial Court Abused Its Discretion in Awarding Costs for Staff Time Indexing, Copying and Reviewing Records

Selma also challenges the line item for "Staff time indexing, copying, and reviewing records," which totaled 43 hours of time and $8,000.[14] Selma relies on cases like *Coalition for Adequate Review v. City and County of San Francisco* (2014) 229

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[12]Selma says some included documents were "irrelevant or duplicative." While Selma does explain why it believed some documents were "duplicative," it does not expand on which documents it contends were "irrelevant" and why.

[13]Indeed, in the Annexation and NKSP actions, "Selma argued the records of the proceedings in the NKSP and LAFCo actions were *required* to be included in the Annexation action's record of proceedings because they were written materials relevant to CEQA compliance issues or the merits of the project. (See § 21167.6, subd. (e)(10).)" (*City of Selma v. City of Kingsburg*, *supra*, F071156, italics added.)

[14]Attorney Stuart's declaration notes that "as set forth …, LAFCO staff and counsel also spent significant time gathering, organizing, and putting together the ROP." The line item for "Staff time indexing, copying, and reviewing" is separate from the line items relating to counsel's staff. Therefore, the line item for "Staff time indexing, copying, and reviewing" records would appear to reference LAFCo staff, not counsel's staff. Respondents' brief also indicates this line item refers to LAFCo staff.

Cal.App.4th 1043 (*Coalition for Adequate Review*) in arguing that the request is improper.[15]

In *Coalition for Adequate Review*, *supra*, 229 Cal.App.4th 1043, the *petitioner* prepared the record and the agency believed the petitioner had improperly omitted documents from the record. The agency filed a motion to supplement the record and later sought costs it incurred in having a paralegal "review … the record petitioners prepared 'for completeness.'" (*Id.* at p. 1060.) The appellate court noted that it was not aware of any authority "indicating labor costs to review a *petitioner-prepared* record of proceedings 'for completeness' … are recoverable record *preparation* costs." (*Id.* at p. 1059, italics added.) The court noted that costs for locating, copying, indexing, and assembling documents are recoverable, but held that costs of reviewing a record prepared by the opposing party for completeness are not. (*Coalition for Adequate Review, supra*, at pp. 1059-1060.)

The obvious distinction between the present case and *Coalition for Adequate Review* is that the petitioner (i.e., Selma) did not prepare the record in this case. In the present case, *respondents* prepared the record and requested costs for, among other things, "Staff time indexing, copying, and reviewing" documents. It is unclear how Selma believes respondents were supposed to prepare the record without initially reviewing documents to determine whether they should be in the administrative record. As *Coalition for Adequate Review* makes clear, staff time spent "locating" documents is recoverable. (229 Cal.App.4th at pp. 1059-1060.) Part of "locating" documents for inclusion in an administrative record necessarily involves looking at the contents of the documents (i.e., "reviewing" documents) to ensure they relate to the appropriate

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[15]Selma also cites *Wagner Farms, Inc. v. Modesto Irrigation Dist.*, *supra*, 145 Cal.App.4th 765 in which this court rightly recognized a distinction between "time necessary for preparation of the ROP and … time … that went beyond … preparing the ROP." (*Id.* at p. 779.) But, as elaborated below, time spent by staff initially looking at a document to determine whether it should be included in the ROP is "time necessary for preparation of the ROP" and therefore permissible under cases like *Wagner Farms*.

proceedings and are otherwise proper for inclusion in the record. This is in contrast to the situation in *Coalition for Adequate Review* where a paralegal "reviewed" a record prepared *by an opposing party* to determine whether it was properly compiled, and the agency then filed a motion to supplement the record. That type of "review" is susceptible to "blurring" into litigation strategy and should not be recoverable. (*Coalition for Adequate Review*, *supra*, at p. 1059 ["record review 'for completeness' can easily blur into review for strategy, implicating the kind of attorney fee award neither authorized nor sought here"].)

C. Costs Must Be Taxed $1,000 for Excessive Time Claimed to Prepare Record Index

The cost memorandum also sought reimbursement for four hours at $250 per hour for "Kahn, Soares & Conway time" spent organizing and preparing the *index* of the administrative record. The index is essentially a table of contents for the administrative record. It lists each document and provides the volume number and bates stamp number range for the document. Considering there are separate line items for "Staff time *indexing*, copying, and reviewing records" (italics added) (43 hours) and for "Staff time at KS&C for scan/bate stamp, OCR (make PDF searchable and print) copying and binding," (15 hours at $100 per hour), we conclude it is not reasonable to seek any additional time for preparation of an index. Consequently, the cost award should be taxed $1,000.

D. Costs Must Be Taxed $1,500 to Reflect a Prior Payment by Selma that is Apparently Not Reflected in the Cost Memorandum

Selma also claims the $10,159.78 sought by respondents failed to credit one of two $1,500 payments Selma made earlier in the litigation for record preparation. The first amended cost notice identified costs totaling $11,659.78, yet the cost memorandum only sought $10,159.78. That is a difference of $1,500. But Selma points to evidence in the record that it made *two* payments of $1,500. A letter dated December 16, 2013, from Selma's counsel to respondents' counsel reads, in part, "Enclosed herewith is the

additional $1,500 payment we agreed to." (Italics added.) A copy of a check with the same date appears in the record. In support of the motion to strike or tax costs, Selma's counsel filed a declaration in which he stated the December 16, 2013, check was "*the second* $1,500 payment I made to Rissa Stuart for preparation of the Administrative Record." (Italics added.)

We note respondents do not reply to this contention at all in their brief. The trial court's ruling does not discuss this argument either. Because Selma has adduced evidence it was entitled to a credit of $3,000 rather than $1,500, and respondents cite to no contrary evidence, we will order the cost award reduced another $1,500.

DISPOSITION

The trial court's denial of Selma's motion to strike the memorandum of costs is affirmed. The trial court's denial of Selma's alternative motion to tax costs is reversed. The trial court is directed to enter a new order taxing costs in the amount of $2,500, resulting in a total award of costs of $7,659.78. Each party shall bear its own appellate costs.

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PEÑA, J.

WE CONCUR:

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LEVY, Acting P.J.

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GOMES, J.