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Supreme Court Copy

No. \_\_\_\_\_

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

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DANA POINT BEACH COLLECTIVE,  
a California non-profit Mutual Benefit corporation,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF  
CALIFORNIA, FOR THE COUNTY OF ORANGE

Respondent

CITY OF DANA POINT,

Real Party in Interest

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PETITION FOR REVIEW

Re: Decision of the Court of Appeal, Fourth Appellate District, Division  
Three, filed February 19, 2010 (Court of Appeal No. G042889) -  
Orange County Case No. 30-2009-00298206

STAY REQUESTED OF BRIEFING SCHEDULE IN COURT OF  
APPEAL CASE NUMBER G042889

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SUPREME COURT  
FILED

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## **PETITION FOR REVIEW**

To the Honorable Chief Justice of the California Supreme Court, and the Associate Justices of the Supreme Court of California:

Petitioner Dana Point Beach Collective, Defendant and Appellant, respectfully petitions for review of the Order of the Court of Appeal, G042889, Fourth Appellate District, Division Three by Justices Rylaarsdam, Moore, and Aronson filed February 19, 2010.

### **STAY REQUESTED:**

The Court is requested to stay further proceedings in the Court of Appeal pending its decision on this petition for review.

### **I. ISSUES PRESENTED FOR REVIEW**

1) Whether an order compelling compliance with a legislative subpoena issued pursuant to California Government Code §37104 *et seq.* is appealable as a final judgment in a special proceeding.<sup>1</sup>

Review is requested to resolve inconsistent opinions by the First, Second, Third, Fourth and Sixth District Courts of Appeal

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<sup>1</sup> Government Code §37104 provides as follows:

The legislative body may issue subpoenas requiring attendance of witnesses or production of books or other documents for evidence or testimony in any action or proceeding pending before it.

regarding appealability of the underlying Superior Court order compelling compliance with a legislative subpoena.

2) Whether the Court of Appeal properly denied consolidation of cases where the Superior Court had consolidated the cases.

## **II. NATURE OF THE CASE**

### **A. Introduction**

This Petition seeks review of an important unsettled issue whether an order compelling compliance with a legislative subpoena issued pursuant to California Government Code §37104 *et seq.* is appealable as a final judgment in a special proceeding or whether it may only be reviewed by a petition for extraordinary writ.

The Courts of Appeal and the Superior Courts in this state must choose among conflicting authority on the appealability of Superior Court orders enforcing administrative and analogous legislative subpoenas.

Some courts have held such orders are non-appealable and may only be reviewed by writ. (*See Bishop v. Merging Capital, Inc.*, (1996). 49 Cal.App.4th 1803, 1806-09, 57 Cal.Rptr.2d 556.) Other courts, however, have found that the a better view is that such orders

are appealable as final judgments in special proceedings. (*Millan v. Restaurant Enterprises Group, Inc.* (4<sup>th</sup> Dist. 1993) 14 Cal.App.4th 477, 484-85, 18 Cal.Rptr.2d 198.)

Therefore, the question of whether an order compelling compliance with a legislative subpoena issued pursuant to California Government Code §37104 *et seq.* is appealable as a final judgment in a special proceeding, will be a recurring one for California's courts.

This Court should grant review to give guidance to the lower courts in California on this important issue.

The second issue, while of perhaps less general importance is whether, after separate appeals are filed from a court order in a consolidated case, the court of appeal errs when it denies appellants' motions to consolidate the cases for review.

B. Procedural History

The Petitioner, Dana Point Beach Collective, (hereinafter "Dana Point Beach Collective") is a California non-profit Mutual Benefit corporation duly organized under the laws of the State of California. Dana Point Beach Collective was created pursuant to the guidelines set forth by the California Attorney General as a collective

for the cultivation and distribution of marijuana solely for medical purposes.

On or about June 29, 2009 the Real Party in Interest, caused to be issued a subpoena for the production of Business Records pursuant to California Government Code § 37104. Said subpoena contained a total of forty-four (44) production requests. The aforementioned subpoena was served upon the Petitioner on or about July 15, 2009 with a production deadline of July 27, 2009.

On August 31, 2009, the Real Party in Interest filed a Petition seeking an Order to Show Cause Re Contempt for Non-Compliance of a legislative subpoena pursuant to California Government Code §37104 et seq. In support of the Order to Show Cause, the Real Party in Interest submitted the "Mayor's Report," which set forth the basis for the issuance of the Subpoena.

On or about October 13, 2009, Petitioner responded to the subpoena and requested a Protective Order from the court to restrict the disclosure of patient information and member's names. Pending



the court's decision on the protective order, Petitioner withheld the documents referenced in its response to the subpoena.<sup>2</sup>

One of the demands in the subpoena, to which the Petitioner objected, and which was subject to extensive briefing at the trial court level, was the disclosure of private personal information of third parties and of the members of the collective. The Real Party in interest alleged that these records were sought to determine that the Petitioner was in compliance with the Attorney General Guidelines. The Petitioner argued that these were private and privileged records of third party individuals and of patients. Further, these private documents had no bearing on the issue at hand.

Notwithstanding the Petitioner's arguments, on November 2, 2009, the trial Court ordered that the Petitioner's custodian of records, Kevin Sperry, produce all documents (including the names and physician information of patient members as well as private information of third parties) and records responsive to the City Subpoena to the City of Dana Point, no later than 5:00 p.m. on

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<sup>2</sup> The City and Superior Court have not differentiated in their response or enforcement of the subpoena among the other defendant/appellant/petitioners.

December 7, 2009. A copy of the order is attached hereto and incorporated herein by reference as Exhibit "A".

On November 13, 2009, the Petitioner timely filed its Notice of Appeal of the Superior Court's order. On November 17, 2009 the Court consolidated the Dana Point Enforcement cases for all purposes. On December 3, 2009, the Superior Court at the request of all Defendants including Petitioner, found the order to be appealable and stayed its enforcement pending the appeal.

On January 26, 2010, Dana Point Beach Collective, and appellants in the related cases, filed motions to consolidate the cases G042889, G042883, G04878, G043880, and G042893 on appeal.

On January 29, 2010, the Court of Appeal for the Fourth District, Division Three found that the appeal in this case was not from an appealable order and deemed that the Notice of Appeal filed by the Petitioner on November 13, 2009, to be a petition for extraordinary writ and further ordered that the Petitioner had fifteen (15) days from the date of the order to file a petition for extraordinary writ. The Court also denied the motion to consolidate. A copy of the January 29<sup>th</sup> order as listed on the Court's docket is attached hereto and incorporated herein by reference as Exhibit "B". Petitioner did

not receive written notice of the January 29<sup>th</sup> order from the Court, as explained in the Declaration of Wendy Stevens, attached hereto as Exhibit “D”.

On February 11, 2010, the Petitioner filed its Motion to Reconsider the Order Determining the Order Below to be Non-Appealable, and to Reconsider the Order Denying Consolidation, in the Court of Appeal. On February 19, 2010, the Court of Appeal denied the Petitioner’s motion, but allowed an extension up to and including March 12, 2010, for the Petitioner to file its extraordinary writ. A copy of the Court of Appeal docket listing the order dated February 19, 2010 is attached hereto and incorporated herein by reference as Exhibit “C”. Petitioner did not receive written notice of the February 19<sup>th</sup> order from the Court, as explained in the Declaration of Wendy Stevens, attached hereto as Exhibit “D”.

The Petitioner now seeks review of the Court of Appeal’s ruling of February 19, 2010.

### **III. WHY REVIEW SHOULD BE GRANTED**

The California Rules of Court provide for review in this Court “when necessary to secure uniformity of decision or to settle an important question of law.” (Cal. Rules of Court, Rule 8.500 (b)(1).)

This case presents an important question of law that will arise frequently in California's lower courts. Current decisions lack uniformity. Despite the ruling in *Millan v. Restaurant Enterprises Group, Inc., supra*, which held that orders enforcing legislative subpoenas *are appealable* as final judgments in special proceedings, the Court of Appeal in *this* case has found that the appeal is *not* from an appealable order.

Petitioner and the other appellants have been denied their statutory right to appeal the Order of November 2, 2009. This right to appeal is critical, because of the potential disclosure of private information that could affect the way these third party individuals are treated. This petition raises a clear ambiguity in the law as it relates to the appealability of legislative subpoenas. This ambiguity will have a significant impact on a large number of cases.

In the absence of a definitive ruling from this Court, there will be no uniformity of decision as it relates to legislative subpoenas.

Further, by denying consolidation, the Court of Appeal will unnecessarily consume resources, judicial, attorney, and environmental, as well as risk non-uniform decisions as the cases are currently assigned to different panels of the Court of Appeal.

#### IV. LEGAL DISCUSSION

A. Review is necessary to decide the important question of appealability of legislative subpoena and to secure a uniformity of decision.

Since the question of appealability goes to the jurisdiction of a court, the court has the authority to consider its own jurisdiction and the issue of appealability. *Olson v. Cory* (1983) 35 Cal.3d 390. However, that authority is not unbounded and must yield to a determination by this Court that an order is, or is not, appealable. (*Auto Equity Sales v. County of Santa Clara* (1962) 57 Cal. 2d 450, 455.)

There is a split of authority on the appealability of Superior Court orders enforcing legislative subpoenas issued pursuant to California Government Code §37104 *et seq.* as well as of administrative subpoenas by government agencies. Some courts have held such orders are non-appealable and may only be reviewed by writ. (*See, Bishop v. Merging Capital, Inc.(supra)*, 49 Cal.App.4th 1803, 1806-09, 57 Cal.Rptr.2d 556 .)

The Fourth District, where Petitioner and the related cases are being heard, has, however, previously found that the better view is

that such orders are appealable as final judgments in special proceedings. *Millan v. Restaurant Enterprises Group, Inc.*, (4<sup>th</sup> Dist. 1993). 14 Cal.App.4th 477, 484-85, 18 Cal.Rptr.2d 198:

Moreover, the better view is that Aorders requiring compliance with the subpoenas are appealable as final judgments in special proceedings. . . Numerous cases, including cases from our Supreme Court, have decided appeals taken from similar orders on the merits without discussion of the appealability issue. Inasmuch as the Supreme Court is among those courts which have assumed the appealability of such orders, we conclude such an order is appealable . . . The issue on this appeal, whether the subpoena meets constitutional standards for enforcement, is a matter of law and is reviewed *de novo*. *Millan, supra* [internal citations omitted].

B. Applicable Principles of Law as to the Appealability of Legislative Subpoenas

The Sixth Appellate District has expressly found that an order to compel compliance with a legislative subpoena pursuant to Government Code §37104 is appealable as a final judgment. (*City of Santa Cruz v. Patel*, (6<sup>th</sup> Dist. 2007)155 Cal.App.4th 234, 240-43, 65 Cal.Rptr.3d 824.) The Sixth District extensively cited *Millan* with approval extensively in *Patel* while also discussing and rejecting a contrary line of cases from the Second District Court of Appeal in favor of this better view.

Further the more recent decision by the Third District in *State ex rel. Dept. of Pesticide Regulation v. Pet Food Express Ltd.* (2008) 165 Cal.App.4th 841 [81 Cal.Rptr.3d 486] offers strong support for the appealability of a legislative subpoena:

Confusion exists regarding appealability of orders enforcing administrative subpoenas." (*Id.*, at p. 849; compare e.g., *Millan v. Rest. Enters. Group, Inc.* (1993) 14 Cal.App.4th 477, [18 Cal.Rptr.2d 198] (*Millan*) [holding that "the better view is that 'orders requiring compliance with the subpoenas are appealable as final judgments in special proceedings . . . ' "], with *Bishop v. Merging Capital, Inc.* (1996) 49 Cal.App.4th 1803, 1809 [57 Cal.Rptr.2d 556] (*Bishop*) [concluding that orders compelling compliance with administrative subpoenas are not appealable].) (*Id.*)

Following *Millan* and thus rejecting *Bishop*, the court in *State ex rel. Dept. of Pesticide Regulation* concluded that an order compelling compliance with an administrative subpoena is appealable as a final judgment:

"[A] judgment is the 'final determination of the rights of the parties in an action or proceeding.' The statutory scheme provides for an original proceeding in the superior court, which results in an order directing the respondent to comply with the administrative subpoena. The court order enforcing the administrative subpoena is tantamount to a superior court judgment in mandamus which, with limited exceptions, is appealable under Code of Civil Procedure ' 904.1. Whether the matter is properly characterized as an 'action' or a 'special proceeding', it is a final determination of the parties'

rights. It is final because it leaves nothing for further judicial determination between the parties except the fact of compliance or noncompliance with its terms.

The fact that an intransigent respondent may be subject to a contempt order does not mean the court order is not final, because the same possibility exists with injunctions and final judgments which form the basis for contempt citations. The purpose of any judicial order which commands or prohibits specific conduct is to make the sanction of contempt available for disobedience. This fact does not render such an order 'nonfinal.' Indeed, the contempt judgment is not appealable but must be reviewed, if at all, by writ, and therefore review of the underlying order can reliably be had only if that order is appealable. [Citation.]" (*State ex rel. Dept. of Pesticide Regulation, supra*, 165 Cal.App.4th at p. 851.).

Thus, *State ex rel. Dept. of Pesticide Regulation* rejected the argument that an order compelling compliance with an administrative subpoena is akin to a nonappealable discovery order:

"We . . . reject the Department's . . . argument that we should analogize to discovery orders in civil litigation, which are not considered final, appealable orders. Such discovery orders, however, are made in connection with pending lawsuits which have yet to be resolved. A discovery order does not determine all of the parties' rights and liabilities at issue in the litigation. The Department argues the same applies here, because even with the documents, the Department cannot impose administrative penalties unless an administrative hearing is held if such a hearing is requested. However, it is possible an administrative hearing may not be requested and, even if it is requested, it will not necessarily end up in court. [Fn. omitted.] In contrast to this case, pending



civil litigation in which a discovery order occurs already involves the court and will continue to do so." (*State ex rel. Dept. of Pesticide Regulation, supra*, 165 Cal.App.4th at p. 852.).

*State ex rel. Dept. of Pesticide Regulation, supra*, was cited and followed in the more recent case of *The People ex rel. Preston DuFauchard v. U.S. Financial Management*, (2009) 169 Cal.App.4th 1502:

We agree with the court's analysis in *State ex rel. Dept. of Pesticide Regulation*. In this case, the trial court's order compelling compliance with the Commissioner's administrative subpoena constituted a final determination of the parties' rights, notwithstanding the possibility that further proceedings might be required to gain U.S. Financial Management's compliance with that order. (See *State ex rel. Dept. of Pesticide Regulation, supra*, 165 Cal.App.4th at p. 852.) As such, the order constitutes an appealable final judgment pursuant to Code of Civil Procedure ' 904.1, subdivision (a)(1). (See *State ex rel. Dept. of Pesticide Regulation, supra*, 165 Cal.App.4th at p. 849.)."

Accordingly, in following the historical rulings from *Bishop* through the present, there has been a clear shift in the treatment of legislative subpoenas. The recent decisions have clearly rejected *Bishop* and are more in line with *Millan*, in concluding that an order

compelling compliance with an administrative subpoena is appealable as a final judgment.

It is unclear why this court decided the order was not appealable. Although the order references *Olson v. Cory* (1983) 35 Cal. 3d 390, it appears to do so only in aid of its decision to treat the appeal as a petition for extraordinary writ. That is because in *Olson* the Supreme Court explained that the order in question was not appealable, inter alia, *because it was not a final order*. Here, however, the order was a final order on the only controversy presented to the Superior Court: did the City of Dana Point properly issue and serve a legislative subpoena on Respondents that the Superior Court properly enforced. No further proceedings on this issue could even occur until such time as the Appellate Court completed its review. In *H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal. App. 4th 1357, the Court similarly afforded the “relief” or grace it affords appellants here, that is treating the appeal from a non-appealable order as a petition for a writ. However, that case as well gives no hint or clue why this Court believes the order is not appealable.

The question of the appealability of a Government Code § 37104 order was previously decided by the Court of Appeal in *City of*

*Santa Cruz v. Patel* (2007) 155 Cal. App. 4th 134. The procedural posture of that case is nearly on all fours with this one. The City of Santa Cruz issued a legislative subpoena and when Patel failed to comply, the City instituted enforcement. Patel failed to comply with the subpoena. The Superior Court ordered Patel to comply and Patel appealed. Appellant could not provide a better analysis than that of the *Patel* court:

Before proceeding to the substance of the dispute we must decide whether the superior court's orders are appealable. We conclude that they are. Government Code section 37104 authorizes the legislative body of a city to issue subpoenas "requiring attendance of witnesses or production of books or other documents for evidence or testimony in any action or proceeding pending before it." In the event a witness refuses to comply with the subpoena, the mayor may report that fact to the judge of the superior court. (Gov. Code, § 37106.) "The judge shall issue an attachment directed to the sheriff of the county where the witness was required to appear, commanding him to attach the person, and forthwith bring him before the judge." (Id., §37107.) "On return of the attachment and production of the witness, the judge has jurisdiction." (Id., § 37108.) Refusal to comply with a subpoena could subject the witness to contempt proceedings. In that event, the witness has the same rights he or she would have in a civil trial "to purge himself [or herself] of the contempt." (Id., § 37109.) City issued the subpoenas and obtained enforcement orders according to the foregoing statutory scheme. Appellants claim that the compliance orders are appealable. City does not dispute that claim. There is no case directly holding that these compliance orders are appealable.

Because there is a split of authority on the point as it relates to orders compelling compliance with administrative subpoenas (Gov. Code, § 11180 et seq.), we consider the issue in some detail.

B. Analysis There is no constitutional right to an appeal; the right to appeal is wholly statutory. (*Trede v. Superior Court* (1943) 21 Cal.2d 630, 634 [134 P.2d 745].) Code of Civil Procedure section 904.1 lists the types of rulings that are appealable in this state. A “judgment,” other than an interlocutory judgment, is appealable. (Code Civ. Proc., § 904, subd. (a)(1).) Other specified orders are also appealable. An order compelling compliance with subpoenas issued under Government Code section 37104 et seq. is not one of them. Nor are we aware of any case specifically considering the appealability of such orders. *City of Vacaville v. Pitamber* (2004) 124 Cal.App.4th 739, 748 [21 Cal.Rptr.3d 396] (*Vacaville*) was an appeal from such an order, but *Vacaville* did not consider appealability, apparently assuming the order was appealable. The cases differ on the question of whether an analogous order compelling compliance with an administrative subpoena (Gov. Code, § 11180 et seq.) is appealable.

In *Millan v. Restaurant Enterprises Group, Inc.* (1993) 14 Cal.App.4th 477, 484-485 [18 Cal.Rptr.2d 198] (*Millan*), the Fourth District Court of Appeal held that an order compelling compliance with an administrative subpoena issued pursuant to Government Code section 11181 is appealable as a final judgment in a special proceeding. In so holding, *Millan* primarily relied upon the fact that many cases, including cases from the Supreme Court, had considered appeals from such orders without addressing the appealability issue. (*Millan*, at pp. 484-485, citing *Younger v. Jensen* (1980) 26 Cal.3d 397 [161 Cal.Rptr. 905, 605 P.2d 813]; *Board of Medical Quality Assurance v. Gherardini* (1979) 93 Cal.App.3d 669 [156 Cal.Rptr. 55]; *Fielder v. Berkeley Properties Co.* (1972) 23 Cal.App.3d 30 [99 Cal.Rptr. 791]. See also

Arnett v. Dal Cielo (1996) 14 Cal.4th 4, 18 [56 Cal.Rptr.2d 706, 923 P.2d 1].) Of course, a case is not authority for an issue it has not considered. (People v. Toro (1989) 47 Cal.3d 966, 978, fn. 7 [254 Cal.Rptr. 811, 766 P.2d 577].)

Millan also cited as a basis for its holding Wood v. Superior Court (1985) 166 Cal.App.3d 1138, 1140 [212 Cal.Rptr. 811]. (Millan, *supra*, 14 Cal.App.4th at p. 485.) Wood provides no independent analysis but simply relies upon the observation in Franchise Tax Board v. Barnhart (1980) 105 Cal.App.3d 274, 277 [164 Cal.Rptr. 331], that “[a]n order made under the authority of [Government Code] sections 11186-11188 . . . can be viewed as a final judgment in a special proceeding, appealable unless the statute creating the special proceeding prohibits such appeal.”

A line of cases from the Second District Court of Appeal holds that compliance orders made under Government Code sections 11186 through 11188 are not appealable. (Barnes v. Molino (1980) 103 Cal.App.3d 46, 51 [162 Cal.Rptr. 786] [order is not a final determination of parties’ rights and does not fit description of appealable orders listed in Code Civ. Proc., § 904.1]; People ex rel. Franchise Tax Bd. v. Superior Court (1985) 164 Cal.App.3d 526, 535 [210 Cal.Rptr. 695] [following Barnes]; Bishop v. Merging Capital, Inc. (1996) 49 Cal.App.4th 1803, 1808-1809 [57 Cal.Rptr.2d 556] (Bishop).) Bishop was of the view that, when a witness is ordered to comply with an administrative subpoena issued under Government Code section 11180 et seq., the witness is not aggrieved until he or she has disobeyed the order and been found in contempt. Prior to that, any ruling the appellate court could make would be purely advisory. “That is to say, if we were to rule in favor of the [respondent], we would simply be advising the appellants that, if the [respondent] pursues contempt proceedings, and the trial court finds [appellants] in contempt, we will uphold that ruling on appeal.

Similarly, our decision in favor of appellants would amount to no more than our advice to the [respondent] that contempt proceedings will ultimately prove fruitless.” (Bishop, *supra*, 49 Cal.App.4th at p. 1808.) The appellate court did not consider the order to be a judgment because, under its analysis, the order was not final.

The orders before us compel compliance with legislative subpoenas issued pursuant to Government Code section 37104 et seq. As to these, we believe the better view is that the orders are appealable as final judgments. A judgment is the “final determination of the rights of the parties in an action or proceeding.” (Code Civ. Proc., § 577.) The statutory scheme at hand provides for an original proceeding in the superior court, initiated by the mayor’s report to the judge, which results in an order directing the respondent to comply with a city’s subpoena. Indeed, the compliance order is tantamount to a superior court judgment in mandamus, which, with limited statutory exceptions, is appealable. (*Id.*, § 904.1, subd. (a); *Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc.* (1987) 43 Cal.3d 696, 702 [238 Cal.Rptr. 780, 739 P.2d 140].) Whether the matter is properly characterized as an “action” (Code Civ. Proc., § 22) or a “special proceeding” (*id.*, § 23), it is a final determination of the rights of the parties. It is final because it leaves nothing for further determination between the parties except the fact of compliance or noncompliance with its terms. (*Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc.*, *supra*, 43 Cal.3d at p. 703.) (*Id.*)

Concerning the question of the finality of the order (see also *Collins v. Corie* (1936) 8 Cal. 2d 120), *Patel* concluded that the fact that an intransigent witness may be subject to a contempt order does not mean that the order compelling compliance is not final and that

the normal rule is that “injunctions and final judgments which form the basis for contempt sanctions are appealable. . . and that if there is a contempt finding, *that* finding would not be appealable. (Id.)

Therefore, review of the underlying order can reliably be had only if that order is appealable. The superior court’s order determined all of the parties’ rights and liabilities at issue in the proceedings; the only determination left was the question of future compliance, which is present in every judgment. (*Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc.* (1985) 192 Cal.App.3d 1530, 1537 [243 Cal.Rptr. 505].) We conclude that the orders herein must be deemed final judgments and are, therefore, appealable pursuant to Code of Civil Procedure section 904.1, subdivision (a)(1). (*Patel, supra* at 240-244, emphasis added.)

As *Patel* recognizes, appeals are historically more likely to result in full opinions than writs, which are susceptible to postcard denial. Since this case presents issues of critical importance as cities attempt to deal with increasingly complex zoning and land use issues as well as the conflict between state and federal law on medical marijuana, the public interest as well as that of the litigants would be best served by the kind of full review and opinion provided by appeal. It should also be noted that the Superior Court had ruled in a contested hearing that the order was appealable and thereupon issued a stay.

C. REVIEW SHOULD BE GRANTED TO REDRESS DANA POINT BEACH COLLECTIVE'S DENIAL OF DUE PROCESS

The court's order was in apparent response to appellants' motion to consolidate the cases G042883, G04878, G043880, G042889, and G042893.

Notice and opportunity to be heard, even at the appellate level, and even on motions, is the cornerstone of due process of law. Appellants/Petitioners note that in *Olson v. Cary*, supra, the Supreme Court considered the issue of appealability on its own motion as a jurisdictional question. Here, however Petitioner was not afforded proper notice that the appellate court was considering this ruling and the court did not consider Appellant's letter brief.

On December 22, 2009, the court filed an order inviting the parties to file letter briefs regarding appellate jurisdiction, including whether Petitioner's appeal was from an appealable order. However, Petitioner never received notice of the December 22, 2009 court order and was not aware of the related filing deadline. Thereafter, Petitioner filed a request for extension of time with the court on January 12, 2010. Said request was granted, unbeknownst to



Appellant, on January 13, 2010.

Upon filing Petitioner's first request for extension of time, a paralegal for Petitioner's counsel of record spoke with a clerk at the appellate court to confirm the court's procedure for filing a request for extension of time. The paralegal specifically asked the appellate clerk whether Petitioner would receive notice of the court's decision. The appellate clerk said that Petitioner could fax file the request. However, the clerk did not inform Petitioner's office that Petitioner would not receive written notice of the court's order without submitting a copy of the request and a self-addressed stamped envelope to the court. Due to the miscommunication and/or misunderstanding, Petitioner did not receive notice that its request had been granted. Petitioner's counsel checked the court docket to learn that the request had been granted but only after the extension period had passed.

The court then declined to accept Petitioner's late filed letter brief and ruled on the issue of appealability without consideration of said brief.

Without review of the court's denial to reconsider its order determining the order below to be non-appealable, Petitioner will not

have an opportunity to explain its position with regard to this court's jurisdiction to hear this appeal. Specifically, Petitioner will not have an opportunity to address the issue of whether Appellant hereby appeals from an "appealable order." The appellate court's jurisdiction is a threshold issue and will decide whether the court will hear the merits of Petitioner's appeal.

In the interest of justice, Petitioner respectfully requests review of the court's denial to reconsider its order determining the order below to be non-appealable. Accordingly, due process of law necessitates appellate review of this order.

#### **V. THE COURT SHOULD ALSO REVIEW THE ORDER DENYING CONSOLIDATION**

These cases were consolidated for hearing and decision. This consolidation will facilitate decision of this matter because all of the challenges to the enforcement of the legislative subpoenas were heard jointly, all of appellants' counsel cooperated on all briefing in the superior court and if the cases are separately heard this will require duplication of briefing and result in a waste of judicial resources. All "Petitioners" wish to file a joint brief and by separately filed motions join in this request. Moreover, this court necessarily consolidated the

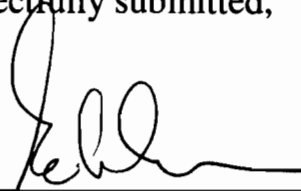
cases if it relied on the rejected letter brief submitted by Beach Cities. Further, the cases concern common issues of law and fact both matters involve common issues of law and fact. (See *Primo Team, Inc. v. Blake Construction Co.* (1992) 3 Cal.App.4th 801, 803, fn. 1. [4 Cal.Rptr.2d 701] and *Sharick v. Galloway* (1936) 12 Cal.App.2d 733, 738 [55 P.2d 1196].). By denying consolidation, the Court of Appeal also risks, indeed virtually assures, piecemeal litigation. (*Saxana v. Gaffney* (2008) 159 Cal.App.4th 316, 321.)

## VI. CONCLUSION

For the reasons stated above, this Court should grant review to determine the whether an order compelling compliance with a legislative subpoena issued pursuant to California Government Code §37104 *et seq.* is appealable as a final judgment in a special proceeding. It should also review and reverse the order denying consolidation.

DATED: March 3, 2010

Respectfully submitted,



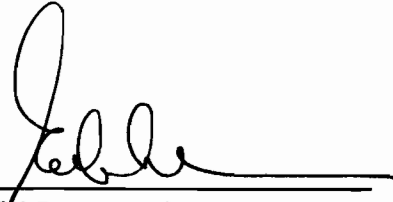
\_\_\_\_\_  
GARFIELD LANGMUIR-LOGAN,  
Attorneys for Petitioner

**VII. CERTIFICATE OF COMPLIANCE WITH CALIFORNIA  
RULES OF COURT, RULE 8.204**

The foregoing brief is proportionately spaced, using 14-point Time New Roman. The Word count of 4,963 is based on information provided by Microsoft Word processing program and therefore does not exceed the limits provided by Rule 8.204, California Rules of Court.

I certify that the foregoing is true and correct.

Executed this 3 day of March 2010, at San Juan Capistrano,  
California.



\_\_\_\_\_  
Garfield Langmuir-Logan  
(SBN: 101858)

## PROOF OF SERVICE

I, Christine Merida, am employed in the County of Orange, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 31351 Rancho Viejo Road, Suite 202, San Juan Capistrano, CA 92675.

This brief has been submitted to this court and to the court of appeal by priority mail pursuant to rule of court rule 8.25(b)(3)(A).

On March 2, 2010, I served the foregoing PETITION FOR REVIEW by placing a true copy thereof enclosed in a sealed envelope, as follows:

Court of Appeal  
601 W. Santa Ana Blvd.  
Santa Ana, CA 92701

Clerk of the Superior Court  
700 Civic Center Drive West  
Santa Ana, CA 92701

Rutan & Tucker  
A. Patrick Munoz  
Noam I. Duzman  
Jennifer J. Farrell  
611 Anton Blvd.,  
14<sup>th</sup> Floor  
Costa Mesa, CA 92626

I caused such envelopes to be deposited in the mail at San Juan Capistrano, California or placed for collection and mailing on the date and at the place shown above following our ordinary business practices. I am "readily familiar" with the firm's practice of collection

and processing correspondence for mailing. It is deposited with the United States postal service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing affidavit. The envelopes were mailed with postage thereon fully prepaid.

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

Executed this 4 day of March, 2010, at San Juan Capistrano, California.

  
Christine Merida

# EXHIBIT “A”

1 RUTAN & TUCKER, LLP  
A. Patrick Muñoz (State Bar No. 143901)  
2 City Attorney  
Noam I. Duzman (State Bar No. 213689)  
3 Deputy City Attorney  
Jennifer J. Farrell (State Bar No. 251307)  
4 Deputy City Attorney  
611 Anton Boulevard, Fourteenth Floor  
5 Costa Mesa, California 92626-1931  
Telephone: (714) 641-5100  
6 Facsimile: (714) 546-9035

**FILED**  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ORANGE  
CENTRAL JUSTICE CENTER  
NOV 02 2009  
CARLSON, Clerk of the Court  
in Sanders

7 Attorneys for CITY OF DANA POINT

8

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

11

12 In Re:  
13 ENFORCEMENT AGAINST DANA POINT  
14 BEACH COLLECTIVE OF CITY OF DANA  
POINT CITY COUNCIL SUBPOENA

Case No. 30-2009-00298206  
~~REDACTED~~ ORDER  
Date: October 22, 2009  
Time: 10:00 a.m.  
Dept: C-17  
Judge: Hon. Glenda Sanders

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17

18 The hearing on the City of Dana Point's ("City") application for an order compelling  
19 Respondent Dana Point Beach Collective ("Respondent") to respond to the City Subpoena came  
20 on regularly for hearing on October 22, 2009, at 10:00 a.m. in Department C-17 of the above-  
21 entitled Court, the Honorable Glenda Sanders, Judge Presiding.

22 Upon consideration of the pleadings and papers filed in support of and in opposition to the  
23 City application, and after considering the arguments of counsel, and good cause appearing,

24 IT IS ORDERED, ADJUDGED AND DECREED THAT:

25 Respondent's custodian of records, Kevin Sperry, shall produce all documents and records  
26 responsive to the City Subpoena to the City of Dana Point at the office of Rutan & Tucker, 611  
27 Anton Boulevard, Suite 1400, Attention: Patrick Muñoz, Costa Mesa, California 92626, no later  
28 than 5:00 p.m. on December 7, 2009.



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IT IS SO ORDERED.

Dated: 11-2-09

GLENDASANDERS  
Honorable Glenda Sanders  
Judge of the Superior Court

**FILED**  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ORANGE  
CENTRAL JUSTICE CENTER

NOV 02 2009

CARLSON, Clerk of the Court  
*Dea Sanabria*

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ORANGE - CENTRAL JUSTICE CENTER**

In re: Enforcement Against the Point Alternative Care of City of Dana Point City Council's Subpoena.	30-2009-00298187  FINAL RULING Dept. C17
---	---

**City of Dana Point v. Point Alternative Care;  
Holistic Health; Safe Harbor Collective; Beach Collective and Beach Cities Collective.**

The Mayor of the City of Dana Point in her report to this Court pursuant to Government Code 37106 notifies the Court that:

1. The City has learned that the Respondents are likely operating as marijuana dispensaries within the City's borders;
2. These Respondent Dispensaries have not obtained any authorization from the City to do so;
3. The City has received several complaints from residents and business owners concerning some of these dispensaries;
4. The Respondent Dispensaries are operating beyond the scope of their Occupancy Permits;

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5. The Dana Point Municipal Code states that any proposed land use not expressly allowed in a given district is prohibited;

6. Medical marijuana dispensaries are not listed as permitted uses in the City;

7. Based on this information, and against the background of State and Federal Law as well as the AG Guidelines, the City Council authorized her to issue subpoenas pursuant to GC 37104 "for the purpose of gathering information that could assist the City in its investigation as to whether medical marijuana dispensaries located in the City are operating in compliance with applicable law."

GC 37104 provides that a legislative body may issue subpoenas requiring the attendance of witnesses or production of books or other documents for evidence or testimony in any action or proceeding pending before it. The issuance of the subpoena is valid if:

- 1. It is authorized by ordinance or similar enactment;
- 2. It serves a valid legislative purpose;
- 3. The witnesses or materials subpoenaed are pertinent to the subject matter of the investigation.

**Re 1: Authorized by Ordinance or Similar Enactment**

The first requirement is clearly met. Just as the City of Lodi's city council was specifically authorized to issue subpoenas pursuant to GC 37104 so too is the City of Dana Point. This is the "ordinance" or "other enactment" to which the Courts in *Connecticut Indemnity* at 813, and *Wilkerson v. United States* 365 U.S. 339, 408-409 are referring. The facts in *Wilkerson* were very different from the facts here. In *Wilkerson* the entity that issued the subpoena was the House Committee on Un-American Activities. The respondent challenged that committee's power to issue a legislative subpoena. The Supreme Court determined that the Committee derived its power to issue legislative subpoenas from 2 U.S.C Section 192 which empowered the House of Representatives and its Standing

1 Committees (including the subject committee) to issue them. Here we are dealing with an  
2 entity which is specifically authorized to issue legislative subpoenas pursuant to GC  
3 37104.

4 The Respondents also appear to suggest that the City of Dana Point cannot issue the  
5 subpoenas absent an ordinance similar to the *Vacaville* city ordinance imposing a duty  
6 on hotel owners to collect and remit an occupancy tax to the City of Vacaville. This is not  
7 correct. There is no authority for the proposition that a legislative entity is only  
8 empowered to issue a subpoena in connection with an *existing* ordinance as opposed to  
9 an ordinance it might enact after conducting its legislative enquiry. (See *Connecticut*  
10 *Indemnity* at B14 citing *Barenblatt v. U.S.* "The scope of the power of inquiry ... is as  
11 penetrating and far reaching as the potential power to enact and appropriate...")

12  
13 **Re 2: Serves a Valid Legislative Purpose**

14 A legislative body may conduct an investigation in order to assist its decision making  
15 regarding legislative matters. *Connecticut Indemnity Company v. Lodi* 23 Cal. 4<sup>th</sup> 807.  
16 The investigation cannot be an end in and of itself. *Watkins*, 354 US 178. The  
17 investigation must be for a legislative purpose. Respondents argue that the City, in  
18 declaring it was issuing the subpoenas "to investigate whether medical marijuana  
19 dispensaries are operating in compliance with applicable law" essentially admits that the  
20 subpoenas were issued, not for any legislative purpose, but rather for the improper  
21 purpose of determining whether to prosecute them for non compliance with applicable  
22 law.

23  
24 The Court rejects this argument. It is clear from a reading of the Mayor's entire report that  
25 the City authorized the issuance of the subpoenas to investigate whether the  
26 dispensaries are complying with the law in order to determine how to respond to  
27 residents' concerns about the manner in which the dispensaries are conducting  
28

1 business, whether under existing zoning laws they should be permitted to conduct such  
2 businesses, whether the zoning laws need to be amended to accommodate the  
3 dispensaries, and if so what amendments are necessary. Mayor's Report Para.s 1-2.  
4 The Mayor and the other Council members were elected to legislate on precisely such  
5 matters.

6  
7 In *Vacaville* the court held that the subpoena was properly issued for the purpose of  
8 enabling the city to investigate whether a business was violating a tax ordinance. The  
9 court ruled that the City Council was considering the valid legislative concern of carrying  
10 out the audit of an uncooperative taxpayer to determine compliance with the City's taxing  
11 ordinance. The court held that matters relating to the investigation and enforcement of tax  
12 measures are proper legislative concerns. The Vacaville City Council met to consider the  
13 tax administrator's effort to obtain cooperation with the tax audit. The City Council  
14 authorized the mayor to issue the subpoena and to apply to the superior court for  
15 enforcement of the subpoena as authorized by GC section 37104. Thus the tax audit and  
16 the reluctant taxpayer's refusal to comply with the subpoena were considered by the  
17 court in *Vacaville* to be proper subjects of legislative enquiry by the City Council.

18  
19 Likewise here the City's concern that the dispensaries may be operating beyond the  
20 scope of their occupancy permits is a proper subject of legislative enquiry. The essential  
21 facts in the case at bar are indistinguishable from the facts in *Vacaville* and those in  
22 *Connecticut Indemnity*. The City, in furtherance of its legislative powers, is entitled to  
23 investigate whether dispensaries are operating under the law to determine if they should  
24 be allowed to continue operating as dispensaries in city limits, and if so under what  
25 conditions.

26 Because the City's issuance of the subpoenas was, in itself, a proper exercise of  
27 legislative power, the potential that the City might also use information gained by the

28

1 subpoenas in future litigation against the dispensaries does not render them invalid.  
2 *Connecticut Indemnity Company* at 816 ("When a city's issuance of a subpoena is, in  
3 itself, a proper exercise of legislative power, the potential that the city also may use the  
4 information gained by that subpoena in future litigation does not render the subpoena  
5 invalid".) In *Connecticut Indemnity* the Supreme Court of California went on to state  
6 "...it is well established that courts generally do not engage in such second-guessing of  
7 legislative motive....". *Id. at 816.*

8  
9 **Re 3: The witnesses or materials subpoenaed are pertinent to the subject matter of**  
10 **the legislative investigation.**

11 Respondents claim that the demands are overly broad but they fail to indicate with  
12 specificity which documents are not reasonably related to the legislative purpose  
13 described above. A challenge to a subpoena for lack of specificity must fail unless the  
14 challenging party can demonstrate that the demands in the subpoenas are not pertinent  
15 to the subject matter of the investigation. *Connecticut Indemnity at 816-817.*

16 The City is entitled to information to determine if the entities are acting within current  
17 state and local laws to determine whether it should allow the entities to continue to  
18 operate and, if so, to decide what additional local regulation may be required. The City  
19 has provided the uncontroverted expert opinion of Mr. Goodrich as to the relevance of  
20 the documents sought to a proper forensic evaluation of the question whether the  
21 respondent entities are maintaining financial and other records necessary for compliance  
22 with the enabling legislation and the AG Guidelines. Even absent such an opinion the  
23 Court considers that the subpoenas seek pertinent documents and records. The court  
24 lists below the specific demands and primary relevance each demand has to the  
25 purposes stated above:

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**Demands 1-11, 34, 37, 40, 41, 42, 43, and 44** relate to the general business operation of the entities, including compliance with the tax laws. The enabling legislation prescribes the structure of entities entitled to provide medical marijuana.

**Demands 13-23, 36, 37, and 39** seek information regarding compliance with specific aspects of H&S § 11362.7. The documents requested relate to each Respondent's status as a primary caregiver, clinic, residential care facility, residential care facility for elderly, hospice, home health agency, cooperative, or collective. The demands also include demands for documents showing verification of member qualifications and verification of caregiver status.

**Demands 12 and 24-33** seek information regarding the supply of marijuana to Respondents. The documents sought relate to the source of the marijuana, its cost, methods of exchange, amount cultivated, amount stored, transportation, distribution and security measures.

**Demands 36, 38 and 39** seek information necessary to determine the qualifications of persons to be members of the entities under both H&S 11362.7 and the Attorney General guidelines. The documents sought include names of members, names of persons designated as primary caregivers, and documents supporting the designation of an entity or person as a primary caregiver.

The City has specifically not sought copies of marijuana recommendations, patient medical files, and information related to the medical condition for which the marijuana was recommended. See City's Reply to Safe Harbor's Opposition, Page 7, lines 19-23 and footnote 3. (A similar statement is made by the City in its Reply to each of the Respondents' Oppositions).

**The 5<sup>th</sup> Amendment, Brown Act, Equal Protection, Separation of Powers, 4<sup>th</sup> Amendment and Privacy Objections:**

1 Having considered the arguments made by Petitioner and each Respondent concerning  
2 these issues or objections, the Court is persuaded by the City's arguments and  
3 accordingly concludes these objections have no merit. Each of these objections is  
4 overruled.

5  
6 The Court has, however, signed the Protective Order proposed by the City to ensure that  
7 the names of members are treated as "Confidential Information" to be made available  
8 only to those designated as "Qualified Persons" within the meaning of the Protective  
9 Order. As such, the names of members will be made available only to that very limited  
10 group of persons who have a justifiable need to know such information in order to assist  
11 the City in the performance of its legislative purpose.

12  
13 **The Court's Orders.**

14 The Court finds that the City's subpoenas were properly served in furtherance of a proper  
15 legislative purpose. While at least one of the Respondents has produced some  
16 documents responsive to the City's subpoena, none of the Respondents has produced all  
17 the documents and records sought by the subpoena.

18 The Court has accordingly signed orders requiring the individual served with the  
19 subpoena (on behalf of the Respondent for which he was authorized to accept service of  
20 the subpoena at Court on October 2, 2009) to produce all documents and records  
21 responsive to the subpoena on December 7, 2009 no later than 5PM at the offices of  
22 Rutan & Tucker, 611 Anton Boulevard, Suite 1400, Costa Mesa, CA. Thus the Court has  
23 signed orders requiring: (1) Stephen Hase, (2) Garrison Williams, (3) David Niedhardt, (4)  
24 Kevin Sperry and (5) David Lambert for and on behalf of The Point Alternative Care,  
25 Holistic Health, Safe Harbor Collective, Beach Collective and Beach Cities Collective  
26 respectively, to produce all documents and records responsive to the City's Subpoena at  
27 the time and place mentioned above.

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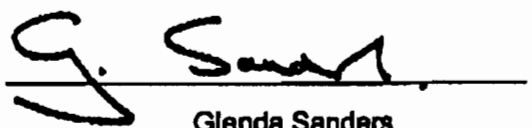


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Any records containing "Confidential Information" as defined in the Protective Order signed by the Court shall be produced and handled in accordance with the provisions of that Protective Order.

The Court has signed the Protective Order to protect the confidentiality interests of Respondents' medical marijuana members. Any willful breaches of the Protective Order will result in the issuance of an Order to Show Cause why sanctions for contempt of Court should not be issued against the person breaching the Protective Order.

November 2, 2009



Glenda Sanders

Judge, Superior Court of California.

1 RUTAN & TUCKER, LLP  
A. Patrick Muñoz (State Bar No. 143901)  
2 City Attorney  
Noam I. Duzman (State Bar No. 213689)  
3 Deputy City Attorney  
Jennifer J. Farrell (State Bar No. 251307)  
4 Deputy City Attorney  
611 Anton Boulevard, Fourteenth Floor  
5 Costa Mesa, California 92626-1931  
Telephone: (714) 641-5100  
6 Facsimile: (714) 546-9035

7 Attorneys for Petitioner  
CITY OF DANA POINT  
8

**FILED**  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ORANGE  
CENTRAL JUSTICE CENTER

NOV 02 2009

CARLSON, Clerk of the Court  
*Carlson*

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF ORANGE, CENTRAL JUSTICE CENTER  
11

12 In Re:

Case No. 30-2009-00298206

13 ENFORCEMENT AGAINST DANA POINT  
14 BEACH COLLECTIVE OF CITY OF DANA  
POINT CITY COUNCIL SUBPOENA

**[REDACTED] PROTECTIVE ORDER**

Date: November 2, 2009  
Time: 3:00 p.m.  
Dept: C-17  
Judge: Hon. Glenda Sanders

17  
18 This protective order (the "Protective Order") is issued for the purpose of governing the  
19 handling and use of certain information and documents ordered to be produced by Respondent  
20 DANA POINT BEACH COLLECTIVE ("Respondent") to Petitioner CITY OF DANA POINT  
21 ("Petitioner" or "City") pursuant to the City's Subpoena and this Court's order dated November  
22 2, 2009, as follows:

23 1. Under this Protective Order, the term "Confidential Information" shall mean the  
24 names of those individuals who: (i) are members of Respondent's organization, and (ii) are  
25 identified in documents produced pursuant to the City's Subpoena and the Court's order dated  
26 November 2, 2009.  
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**EXHIBIT A**

DECLARATION OF \_\_\_\_\_

I, \_\_\_\_\_, hereby certify and declare as follows:

1. My present address is \_\_\_\_\_

My present employer is \_\_\_\_\_,

and the address of my present employment is \_\_\_\_\_.

My present occupation is \_\_\_\_\_.

2. I have received a copy of the Protective Order in this action. I have carefully read and understand its provisions. I will comply with all the provisions of the Protective Order. I hereby submit to the jurisdiction of the Court in this action for the purpose of enforcement of the Protective Order.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was made on \_\_\_\_\_, at \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
(Declarant)

# EXHIBIT “B”

	extension of time	due 1/8/10
01/13/2010	Granted - extension of time.	1st ext- lbf due 1/19/10
01/21/2010	Note:	No letter brief filed by: Dana Point Beach Collective, Defendant and Appellant Garfield Langmuir-Logan, Retained counsel
01/22/2010	Record on appeal filed.	1 CT and 1 RT
01/26/2010	Filed joinder of:	Aplt's joinder to aplt's mtn filed in G042883 to consolidate G042883 w/G042878, G042880, G042889 & G042893
01/26/2010	To court.	Aplt's joinder to aplt's mtn filed in G042883 to consolidate G042883 w/G042878, G042880, G042889 & G042893
01/28/2010	Motion filed.	By aplt, for leave of court to file late letter brief. (Letter brief attached to mtn, letter brief "RECEIVED" stamped only)
01/28/2010	To court.	Aplt's mtn for leave of court to file late letter brief. (Letter brief attached to mtn, letter brief "RECEIVED" stamped only)
01/29/2010	Order filed.	THE COURT:* After inviting the parties to file letter briefs on the issue, the court finds the appeal in this case is not from an appealable order and deems the notice of appeal filed on November 13, 2009, to be a petition for extraordinary writ. (Olson v. Cory (1983) 35 Cal.3d 390; H.D. Arnaiz, Ltd. v. County of San Joaquin (2002) 96 Cal.App.4th 1357, 1366-1367.) Petitioner, Dana Point Beach Collective, has 15 days from the date of this order to file a petition for extraordinary writ. Any informal response shall be filed within 5 days thereafter. No extensions of time will be granted absent a showing of extraordinary good cause. On the court's own motion and for good cause, the previous briefing schedule on appeal is hereby VACATED and any request for an extension of time to file a brief is MOOT. Petitioner's request to consolidate this case with G042878, G042880, G042883, and G042893 is DENIED. Rylaarsdam, Moore, Aronson
02/11/2010	Motion filed.	Aplt's request for reconsideration of order denying consolidation of appeals and determining the order below to be non-appealable.
02/11/2010	To court.	Aplt's mtn to reconsider consolidating appeals and determining order non-appealable.
02/16/2010	Request filed to:	by aplt. to file a writ petition
02/18/2010	Opposition filed.	By resp to aplt's motion to vacate order and reinstate appeal
02/18/2010	To court.	Resp. opposition
02/19/2010	Order filed.	COURT:* Petitioner's request for reconsideration of the court's order filed January 29, 2010, is DENIED. Based on petitioner's

# EXHIBIT “C”

	extension of time	due 1/8/10
01/13/2010	Granted - extension of time.	1st ext- lbf due 1/19/10
01/21/2010	Note:	No letter brief filed by: Dana Point Beach Collective, Defendant and Appellant Garfield Langmuir-Logan, Retained counsel
01/22/2010	Record on appeal filed.	1 CT and 1 RT
01/26/2010	Filed joinder of:	Aplt's joinder to aplt's mtn filed in G042883 to consolidate G042883 w/G042878, G042880, G042889 & G042893
01/26/2010	To court.	Aplt's joinder to aplt's mtn filed in G042883 to consolidate G042883 w/G042878, G042880, G042889 & G042893
01/28/2010	Motion filed.	By aplt, for leave of court to file late letter brief. (Letter brief attached to mtn, letter brief "RECEIVED" stamped only)
01/28/2010	To court.	Aplt's mtn for leave of court to file late letter brief. (Letter brief attached to mtn, letter brief "RECEIVED" stamped only)
01/29/2010	Order filed.	THE COURT:* After inviting the parties to file letter briefs on the issue, the court finds the appeal in this case is not from an appealable order and deems the notice of appeal filed on November 13, 2009, to be a petition for extraordinary writ. (Olson v. Cory (1983) 35 Cal.3d 390; H.D. Arnaiz, Ltd. v. County of San Joaquin (2002) 96 Cal.App.4th 1357, 1366-1367.) Petitioner, Dana Point Beach Collective, has 15 days from the date of this order to file a petition for extraordinary writ. Any informal response shall be filed within 5 days thereafter. No extensions of time will be granted absent a showing of extraordinary good cause. On the court's own motion and for good cause, the previous briefing schedule on appeal is hereby VACATED and any request for an extension of time to file a brief is MOOT. Petitioner's request to consolidate this case with G042878, G042880, G042883, and G042893 is DENIED. Rylaarsdam, Moore, Aronson
02/11/2010	Motion filed.	Aplt's request for reconsideration of order denying consolidation of appeals and determining the order below to be non-appealable.
02/11/2010	To court.	Aplt's mtn to reconsider consolidating appeals and determining order non-appealable.
02/16/2010	Request filed to:	by aplt. to file a writ petition
02/18/2010	Opposition filed.	By resp to aplt's motion to vacate order and reinstate appeal
02/18/2010	To court.	Resp. opposition
02/19/2010	Order filed.	COURT:* Petitioner's request for reconsideration of the court's order filed January 29, 2010, is DENIED. Based on petitioner's



	<p>representation that this case involves complex issues which require extensive briefing, the court finds good cause to GRANT petitioner's application for an extension of time to file a petition for extraordinary writ. Petitioner may file a petition for extraordinary writ no later than March 12, 2010. No extensions of time beyond March 12, 2010, will be granted absent a showing of extraordinary good cause. Any informal response shall be filed no later than March 22, 2010.</p>
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# EXHIBIT “D”

## **DECLARATION OF WENDY STEVENS**

1. I, Wendy Stevens, declare as follows:

2. I am employed by Logan Retoske, LLP as a legal assistant for Garfield Langmuir-Logan, attorney of record for Petitioner Dana Point Beach Collective, and I make this declaration in support of the Petition for Review regarding the February 19, 2010 decision of the California Court of Appeal for the Fourth Appellate District, Division Three.

3. All of the matters stated herein are personally known to me and if sworn as a witness I would and could competently testify thereto.

4. On or about January 11, 2010, I spoke with the clerk for the California Court of Appeal, Fourth District, Division Three, and informed her that our office did not receive notice of the Court's December 22, 2009 order inviting the parties to file letter briefs regarding appellate jurisdiction. The clerk acknowledged that we should have received notice and thereafter confirmed that the Court had the correct mailing address and contact information for Logan Retoske, LLP.

5. On or about January 29, 2010, I reviewed the appellate court online docket for Appellate Case No. G042889 and discovered that the Court filed an order dated January 29, 2010, deciding that the appeal in this case is not from an appealable order and denying petitioner's request to consolidate related cases on appeal.

6. The office of Logan Retoske, LLP has not received written notice from the Court of Appeal, Fourth District, Division Three regarding the Court's January 29<sup>th</sup> order.

7. On or about February 19, 2010, I reviewed the appellate court online docket for Appellate Case No. G042889 and discovered that the Court filed an order dated February 19, 2010, denying Petitioner's request for reconsideration of the court's order dated January 29, 2010 and granting Petitioner's application for an extension of time to file a petition for extraordinary writ.

8. The office of Logan Retoske, LLP has not received written notice from the Court of Appeal, Fourth District, Division Three regarding the Court's February 19<sup>th</sup> order

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

Executed this 3<sup>rd</sup> day of March 2010, at San Juan Capistrano, California.

  
WENDY STEVENS, Declarant

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT

DIVISION THREE

COURT OF APPEAL-4TH DIST DIV 3  
FILED

JAN 29 2010

Deputy Clerk

DANA POINT BEACH COLLECTIVE,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE  
COUNTY,

Respondent;

CITY OF DANA POINT,

Real Party in Interest.

G042889

(Super. Ct. No. 30-2009-00298206)

ORDER

THE COURT:\*

After inviting the parties to file letter briefs on the issue, the court finds the appeal in this case is not from an appealable order and deems the notice of appeal filed on November 13, 2009, to be a petition for extraordinary writ. (*Olson v. Cory* (1983) 35 Cal.3d 390; *H.D. Arnatz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1366-1367.) Petitioner, Dana Point Beach Collective, has 15 days from the date of this order to file a petition for extraordinary writ. Any informal response shall be filed within 5 days thereafter. No extensions of time will be granted absent a showing of extraordinary good cause.

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On the court's own motion and for good cause, the previous briefing schedule on appeal is hereby VACATED and any request for an extension of time to file a brief is MOOT.

Petitioner's request to consolidate this case with G042878, G042880, G042883, and G042893 is DENIED.

**RYLAARSDAM, J.**

RYLAARSDAM, ACTING P. J.

\* Before Rylaarsdam, Acting P. J., Moore, J., and Aronson, J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT

DIVISION THREE

COURT OF APPEAL 4TH DIST DIV 3  
FILED

FEB 19 2010

Deputy Clerk \_\_\_\_\_

DANA POINT BEACH COLLECTIVE,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE  
COUNTY,

Respondent;

CITY OF DANA POINT,

Real Party in Interest.

G042889

(Super. Ct. No. 30-2009-00298206)

ORDER

THE COURT:\*

Petitioner's request for reconsideration of the court's order filed January 29, 2010,  
is DENIED.

Based on petitioner's representation that this case involves complex issues which  
require extensive briefing, the court finds good cause to GRANT petitioner's application  
for an extension of time to file a petition for extraordinary writ. Petitioner may file a  
petition for extraordinary writ no later than March 12, 2010. No extensions of time

beyond March 12, 2010, will be granted absent a showing of extraordinary good cause.

Any informal response shall be filed no later than March 22, 2010.

**RYLAARSDAM, J.**

RYLAARSDAM, ACTING P. J.

\* Before Rylaarsdam, Acting P. J., Moore, J., and Aronson, J.