

No. 23-15857

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MENDOCINO RAILWAY,

Plaintiff-Appellant,

v.

JACK AINSWORTH, ET AL.

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
No. 22-cv-04597-JST
Hon. Jon S. Tigar

**MOTION FOR JUDICIAL NOTICE IN SUPPORT OF
APPELLANT'S OPENING BRIEF; DECLARATION OF PAUL BEARD II
IN SUPPORT THEREOF**

Paul J. Beard II
FISHERBROYLES LLP
453 S. Spring St., Suite 400-1458
Los Angeles, CA 90013
Telephone No.: 818-216-3988
Email: paul.beard@fisherbroyles.com

Attorney for Appellant MENDOCINO RAILWAY

Pursuant to Federal Rules of Evidence, Rule 201, Appellant Mendocino Railway requests that the Court take judicial notice of the following documents in support of its Opening Brief. True and correct copies of the exhibits are attached to the Declaration of Paul Beard II (“Beard Decl.”), which follows this request.

EXHIBIT 1: Current docket of Mendocino County Superior Court for *City of Fort Bragg vs Mendocino Railway* (Case No. 21CV00850).

EXHIBIT 2: Letter from California Coastal Commission to Mendocino Railway’s counsel, Paul Beard II, dated December 3, 2019.

ARGUMENT

Exhibit 1 is a true and correct copy of the current docket of Mendocino County Superior Court for *City of Fort Bragg vs Mendocino Railway* (Case No. 21CV00850). The docket is offered to demonstrate the progress of the case to date, for purposes of the balancing of factors under *Colorado River*.

Exhibit 1 is judicially noticeable under Federal Rule of Evidence 201(b), because it “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” This Court has judicially noticed the dockets of other cases. *Headwaters Inc. v. United States Forest Serv.*, 399 F.3d 1047, 1051 n.3 (9th Cir. 2005) (“The record in this case is silent on what happened next, but we may take judicial notice of the American Lands docket.”). A copy of the docket up through June 21, 2023, was before the District Court. ER-95.

Exhibit 2 is a true and correct copy of a letter from the Commission to

Mendocino Railway’s counsel, Mr. Beard. The letter is offered, not for the truth contained in the letter, but to establish the fact that the Commission has asserted its “review authority under the CZMA” (the Coastal Zone Management Act) with respect to “development activities” proposed and/or undertaken by the Railway. The letter is relevant to the Railway’s argument that this Federal Action seeks relief, not just from the Commission’s purported permitting authority under the Coastal Act and the City’s Local Coastal Program, but from its purported pre-clearance authority under the CZMA, as well.

Exhibit 2 is judicially noticeable. Federal Rule of Evidence 201 permits a court to judicially notice facts that “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). A court may also take judicial notice of government documents obtained from reliable sources. *See U.S. ex rel. Modglin v. DJO Glob. Inc.*, 48 F. Supp. 3d 1362, 1381 (C.D. Cal. 2014), *aff’d sub nom. United States v. DJO Glob., Inc.*, 678 F. App’x 594 (9th Cir. 2017). This Court has judicially noticed official letters and correspondence from the government. *See Smith v. L.A. Unified Sch. Dist.*, 830 F.3d 843, 851 n.10 (9th Cir. 2016) (taking judicial notice of letters sent by Appellee Los Angeles Unified School District to Appellants).

The Court should grant this motion and notice Exhibits 1 and 2.

Date: September 6, 2023

Respectfully submitted,

s/ Paul Beard II

Attorney for Appellant
MENDOCINO RAIWAY

DECLARATION

I, Paul Beard II, declare as follows:

1. I am counsel of record for Appellant Mendocino Railway. I have personal knowledge of the facts stated herein. If called upon to testify, I could and would testify competently thereto.

2. Exhibit 1 is the current docket of Mendocino County Superior Court for *City of Fort Bragg vs Mendocino Railway* (Case No. 21CV00850). I retrieved this docket from the Superior Court's official website on September 6, 2023.

3. Exhibit 2 is a true and correct copy of a letter dated December 3, 2019, which I received from the California Coastal Commission.

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

DATED: September 6, 2023



Paul Beard II

EXHIBIT 1

Case Information

21CV00850 | City of Fort Bragg vs Mendocino Railway

Case Number
21CV00850
File Date
10/28/2021

Court
Civil
Case Type
42:Unlim Other Complaint(Not Spec)

Judicial Officer
Brennan, Clayton
Case Status
Opened

Party

Plaintiff
City of Fort Bragg

Active Attorneys ▼
Lead Attorney
HILDERBRAND, RUSSELL A
Retained

Defendant
Mendocino Railway

Active Attorneys ▼
Lead Attorney
BEARD, PAUL J. II
Retained

Events and Hearings

10/28/2021 First Paper Filed ▼

Complaint Verified for Declaratory and Injunctive Relief

Comment
Complaint for Declaratory and Injunctive Relief

10/28/2021 Summons Issued / Filed ▼

Summons
Comment
Summons Issued/Filed

10/28/2021 Civil Cover Sheet Filed ▼

Civil Case Cover Sheet

Comment
Civil Cover Sheet Filed

10/28/2021 Notice ▼

MCV-101 Notice of Case Management Conference

Comment
Notice of Case Management Conference

12/08/2021 Proof of Service ▼

Proof of Service on Mike Heart

Comment
Proof of Service of Summons and Complaint on Mike Heart

12/08/2021 Proof of Service ▼

Proof of Service on Robert Pinole

Comment
Proof of Service of Summons and Complaint on Robert Pinole

01/07/2022 Declaration ▼

Declaration 30 day extension

Comment
Declaration of Demurring Party ISO Automatic Extension

01/14/2022 Motion - \$60 Fee ▼

Notice of Demurrer and Demurrer

Comment
Notice of Demurrer and Demurrer

01/14/2022 Memorandum of Points & Authorities ▼

Points and Authority Demurrer

Comment
Memo of Ps and As re Demurrer

01/14/2022 Request ▼

Request for Judicial Notice.pdf

Comment
Request for Judicial Notice

01/14/2022 Declaration ▼

Declaration of Paul Beard

Comment
Declaration of Paul Beard

01/14/2022 Declaration ▼

Declaration of Mike Hart

Comment
Declaration of Mike Hart

01/14/2022 Motion - \$60 Fee ▼

Motion to Strike Filed by Defendants

Comment
Motion to Strike

01/19/2022 Notice ▼

Notice of New Hearing Date

Comment
Of New Hearing date for Defendants Demurrer and Motion to Strike Filed by Atty Paul Beard II for Defendants Mendocino Railway

01/20/2022 Minute Order ▼

Minute Order re: Vacating/ Resetting Hearing

PSN-100 Proof of Service

Comment
Re: Vacating / Setting of Hearing

02/09/2022 Opposition - No Fee ▼

Plaintiffs Opposition to Motion to Strike Complaint

Comment
City of Fort Bragg's Opposition to Motion to Strike Complaint for Declaratory and Injunctive Relief

02/09/2022 Opposition - No Fee ▼

Plaintiffs Opposition to Demurrer

Comment
City's Opposition to Demurrer to Verified Complaint for Declaratory and Injunctive Relief

02/09/2022 Objection - No Fee ▼

Plaintiffs Objection to Request for Judicial Notice

Comment
City's Objection to Request for Judicial Notice ; Evidentiary Objections

02/09/2022 Notice ▼

Notice of Lodging Authority Cites

Comment
Notice of Lodging of Federal Agency Opinions Cited In Support Of Opposition to Demurrer

02/16/2022 Brief Filed ▼

Reply Brief In Support of Defendant Demurrer

Comment
Reply Brief in Support of Demurrer

02/16/2022 Brief Filed ▼

Reply Brief in Support of Def's Mtn to Strike

Comment
Reply Brief in Support of Motion to Strike

02/16/2022 Brief Filed ▼

Reply In Support of Def's Req for Judicial Ntc

Comment
Reply Brief in Support of Request for Judicial Notice

02/22/2022 Notice ▼

NOT - Lodging Authority Cites 2 - Final.pdf

Comment

Notice of Lodging of Federal Agency Opinions Cited In Support Of Opposition to Demurrer

02/22/2022 Brief Filed ▼

Amicus Curiae Application & Brief

Comment

Amicus Curiae Application & Brief

02/22/2022 Request ▼

Request for Judicial Notice

Comment

Request for Judicial Notice

02/22/2022 Proof of Service ▼

Proof of Service

Comment

Proof of Service

02/22/2022 Notice ▼

Notice of Remote Appearance

Comment

Notice of Remote Appearance

02/24/2022 *Demurrer / Motion to Strike ▼

Original Type

*Demurrer / Motion to Strike

MINUTES 02/24/2022

Judicial Officer

Brennan, Clayton

Hearing Time

2:00 PM

Result

Held

Comment

both Demurrer and a Motion to Strike

Parties Present ▲

Defendant

Attorney: BEARD, PAUL J. II

02/24/2022 *Case Taken Under Submission

03/23/2022 Case Management / Status Conference Statement ▼

Case Management Statement

Comment

Case Management / Status Conference Statement

03/24/2022 Case Management / Status Conference Statement ▼

Amended Case Management Statement

Comment

AMENDED Case Management / Status Conference Statement

04/06/2022 Notice ▼

4.6.22 Notice Remote Appearance

Comment

Notice of Remote Appearance

04/07/2022 *Case Management Conference ▼

Original Type

*Case Management Conference

04/07/2022 MINUTES

Judicial Officer

Brennan, Clayton

Hearing Time

2:00 PM

Result

Held

Parties Present ▲

Defendant

Attorney: BEARD, PAUL J. II

04/07/2022 Remote Appearance Made by:

04/11/2022 Minute Order ▼

Minute Order Re: Setting Further Case Managment Confrence

PSN-100 Proof of Service

Comment

Re: Further Case Management Conference

04/13/2022 Request ▼

Defendants Supplemental Request for Judicial Notice

Comment

Supplemental RJN in Support of Demurrer/Motion to Strike

04/28/2022 Ruling ▼

Ruling on Demurrer to the Complaint

PSN-100 Proof of Service

Comment

On Demurrer to the Complaint

04/28/2022 Ruling ▼

Ruling On Motion to Strike

PSN-100 Proof of Service

Comment

On Motion to Strike

04/28/2022 *Case Returned from Under Submission

05/04/2022 Case Management / Status Conference Statement ▼

Case Management Statement for Defendants

Comment

Case Management / Status Conference Statement

05/04/2022 Proof of Service ▼

Proof of Service of Case Management Statement

Comment

Proof of Service Of: Case Management Conference statement To; Atty. Krista MacNevin Jee for Plaintiff By: Electronic Transmission On: 05/04/2022

05/04/2022 APPEAL - Document: ▼

Appeal Document WRIT DECISION

Comment

WRIT DECISION

05/09/2022 Minute Order ▼

Minute Order Re: Vacating Case Management Conference

PSN-100 Proof of Service

Comment

Minute Order Re: Vacating Case Management Conference

05/09/2022 APPEAL - Document: ▼

Appeal Document LETTER STAYING PROCEEDINGS PENDING DECISION ON WRIT OF MANDATE.

Comment

LETTER STAYING PROCEEDINGS PENDING DECISION ON WRIT OF MANDATE.

05/19/2022 *Case Management Conference ▼

Judicial Officer

Brennan, Clayton

Hearing Time

2:00 PM

Cancel Reason

Vacated

06/10/2022 APPEAL - Document: ▼

Appeal Document ORDER DENYING PETITION FILED 06/09/22

Comment

ORDER DENYING PETITION FILED 06/09/22

06/13/2022 Minute Order ▼

Minute Order

PSN-100 Proof of Service

06/23/2022 *Case Management Conference ▼

Judicial Officer

Brennan, Clayton

Hearing Time

2:00 PM

Cancel Reason

Vacated - Set in Error

06/24/2022 Answer / Response / Denial - Unlimited ▼

Verified Answer Filed by Mendocino Railway

Comment

Answer / Response / Denial - Unlimited

06/27/2022 Opposition - No Fee ▼

Opp to Notice of Related Case

Comment

Opposition of City of Fort Bragg To Notice of Related Case

06/29/2022 Minute Order ▼

Minute Order Re: Setting of Case Mangement Conference

Proof of Service of Minute Order Re: Setting of Case Mangement Conferenc

Comment

re: Setting of Case Management Conference

08/18/2022 Case Management / Status Conference Statement ▼

Amended Case Management Statement filed by Defendant Mendocino Railway

Comment

Amended Case Management / Status Conference Statement

08/18/2022 Proof of Service ▼

Proof of Service of CMC statement 8-18-22

Comment

Proof of Service Of: Defendant's Case Mangement Conference Statement To: Atty. Krista MacNevin Jee for Plaintiff By: Mail On: 08/18/2022

08/25/2022 Case Management / Status Conference Statement ▼

Case Mangement Statement filed by Plaintiff City of Ft. Bragg

Comment

Case Management / Status Conference Statement

09/01/2022 *Case Management Conference ▼

Original Type

*Case Management Conference

09/01/2022 MINUTES

Judicial Officer

Brennan, Clayton

Hearing Time

2:00 PM

Result

Held

Parties Present ▲

Plaintiff: City of Fort Bragg

Defendant: Mendocino Railway

09/01/2022 Remote Appearance Made by:

09/06/2022 Minute Order ▼

MCV-163 Minute Order Setting Trial-Proceedings Court Trial

PSN-100 Proof of Service

Comment

Setting Trial and Other Proceedings

09/08/2022 Motion - \$60 Fee ▼

Notice of Motion

Comment

NOTICE OF MOTION AND MOTION FOR LEAVE OF COURT TO INTERVENE

09/13/2022 Objection - No Fee ▼

Comment

TO JUDGE PRESIDING OVER TRIAL AND ALL OTHER PROCEEDINGS CONCERNING THIS ACTION FILED BY ATTY BEARD FOR DEF MENDOCINO RAILWAY

09/14/2022 Answer / Response / Denial - Unlimited ▼

Answer of Judge Clayton L. Brennan to Mendocino Railway's Statement of Disqualification

PSN-100 Proof of Service

Comment

Answer of Judge Clayton L. Brennan to Mendocino Railway's Statement of Disqualification

09/16/2022 Opposition - No Fee ▼

Opposition of California Coastal Commission to Mendocino Railway's Notice of Related Cases

Comment

Opposition to Notice of Related Case

09/22/2022 Brief Filed ▼

Defendant Mendocino Railway's Reply in Support of Its Notice of Related Cases

Comment

Brief Filed

09/22/2022 Opposition - No Fee ▼

Opposition Defendant Mendocino Railway's Opposition to CCC Motion to Intervene

Comment

Defendant Mendocino Railways Opposition to the California Coastal Commission's Motion to Intervene Filed by Atty Paul J. Beard for Mendocino Railway

09/26/2022 Non-opposition ▼

City's Non-Opp Motion to Intervene

Comment

City's Non-opposition to California Coastal Commission's Motion to Intervene

09/27/2022 Objection - No Fee ▼

Plaintiff's Opposition to Request for Judicial Disqualification

Comment

Objection to Request for Judicial Disqualification

09/27/2022 Minute Order ▼

Minute Order

PSN-100 Proof of Service

09/29/2022 Order ▼

Order ON MOTION TO DISQUALIFY JUDGE BRENNAN

Comment

ON MOTION TO DISQUALIFY JUDGE BRENNAN

09/30/2022 Minute Order ▼

Minute Order Setting of Hearing Date

PSN-100 Proof of Service

Comment

Minute Order Re: Setting of Hearing

10/06/2022 *Motion ▼

Judicial Officer

Brennan, Clayton

Hearing Time

2:00 PM

Cancel Reason

Vacated

Comment

California Coast Commissions Notice of Motion and Motion for Leave of Court to Intervene

10/12/2022 Notice ▼

Notice of Remote Appearance

Comment

Notice of Remote Appearance

10/13/2022 Reply Filed ▼

California Coastal Commission Reply In Support of its Motion to Intervene

Comment

California Coastal Commission's Reply in Support of its Motion to Intervene Filed by Deputy Attorney General Patrick Tuck

10/20/2022 *Motion ▼

Original Type

*Motion

10/20/2022 MINUTES

Judicial Officer

Brennan, Clayton

Hearing Time

2:00 PM

Result

Held

Comment

Intervene

Parties Present ▲

Plaintiff

Attorney: HILDERBRAND, RUSSELL A

Defendant

Attorney: BEARD, PAUL J. II

10/20/2022 Minute Order ▼

Proof of Service of Minute Order granting Motion

Minute Order Granting Coastal Commission's Motion for Leave of the Court to Interene

Comment

Granting California Coastal Commission's Motion for Leave of the Court to Intervene

10/20/2022 Remote Appearance Made by:

10/20/2022 Notice ▼

Notice to State Court

Comment

Notice of Removal

10/27/2022 Notice ▼

Notice of Entry of Order

Comment

Notice of Entry of Order

10/27/2022 Motion - \$60 Fee ▼

Complaint In Intervention

Comment

Complaint in Intervention

04/26/2023 Minute Order ▼

Minute Order re: Vacating Trial Date, Other Proceedings

Proof of Service of Minute Order re: Vacating Trial Date, Other Proceedings

Comment

Re: Vacating Trial Date, Other Proceedings

04/27/2023 Internal Review ▼

Judicial Officer

Brennan, Clayton

Hearing Time

2:00 PM

Cancel Reason

Vacated

Comment

Disposition

05/10/2023 *Settlement Conference ▼

Judicial Officer

Nadel, Jeanine

Hearing Time

1:30 PM

Cancel Reason

Vacated

Comment

Ghidelli Official

06/06/2023 Document Entry ▼

Comment
Certified Copy of the Docket Entries U.S. District Court California Northern District (Oakland)

06/06/2023 Order ▼

Order Granting Motions to Remand

Comment
Granting Motions to Remand Submitted by U.S. District Court Northern District of California

06/06/2023 Notice of Acknowledgment of Receipt ▼

Notice of Acknowledgment of Receipt

06/06/2023 Document Entry ▼

Certified Letter from U.S. District Court

Comment
Certified Letter from United States District Court Northern District of California

06/09/2023 Minute Order ▼

Minute Order re: Case Management Conference

Proof of Service of Minute Order re: CAsE Management Conference

Comment
Re: Case Management Conference

06/15/2023 *Pretrial Conference ▼

Judicial Officer
Brennan, Clayton

Hearing Time
2:00 PM

Cancel Reason
Vacated

06/21/2023 *Trial: Court ▼

Judicial Officer
Brennan, Clayton

Hearing Time
9:00 AM

Cancel Reason
Vacated

Comment
3 day Est

07/25/2023 Case Management / Status Conference Statement ▼

Case Management / Status Conference Statement

Comment
Case Management / Status Conference Statement

07/25/2023 Answer / Response / Denial - Unlimited ▼

Signed Verified Answer to California Coastal Commission Complaint

Comment
Verified Answer of Defendant Mendocino Railway to Complaint in Intervention of California Coastal Commission.

07/26/2023 Change of Address ▼

Change of Address

Comment

Change of Address Attorney for Defendant

07/26/2023 Proof of Service ▼

Proof of Service: Change of Address

Comment

POS of Defendant's Notice of Change of Address by Electronic Transmisson-One Legal on 7/26/23.

07/26/2023 Case Management / Status Conference Statement ▼

Case Management Statement: Plaintiff

Comment

Plaintiff: City of Fort Bragg. POS attached

07/26/2023 Case Management / Status Conference Statement ▼

CASE MANAGEMENT STATEMENT: DEFENDANT

Comment

Defendant: Mendocino Railway

07/26/2023 Proof of Service ▼

Proof of Service of CMC Statement

Comment

Proof of Service of Case Management Statement. By electronic transmission 7/26/2023

08/02/2023 Amended Answer/Response - No Fee ▼

Verified First Amended Answer to Coastal Commision Complaint

Comment

Amended Answer/Response - No Fee

08/09/2023 Notice ▼

Notice of Remote Appearance

Comment

Notice of Remote Appearance for Patrick Tuck Proceeding: CMC 08/10/23 at 2:00 p.m. Filed by Atty. Patrick Tuck Intervenor California Coastal Commission

08/10/2023 *Case Management Conference ▼

Original Type

*Case Management Conference

08/10/2023 MINUTES

Judicial Officer

Brennan, Clayton

Hearing Time

2:00 PM

Result

Held

Parties Present▲

Defendant

Attorney: BEARD, PAUL J. II

09/05/2023 Motion - \$60 Fee ▼

Notice of Motion and Motion for Stay

Comment
Motion for Stay

09/05/2023 Request ▼

Request for Judicial Notice
Comment
Request for Judicial Notice

09/05/2023 Proof of Service ▼

Proof of Service
Comment
Proof of Service

09/07/2023 Internal Review ▼

Judicial Officer
Brennan, Clayton
Hearing Time
2:00 PM
Cancel Reason
Vacated
Comment
District Court ruling on removal request follow up

10/05/2023 *Case Management Conference ▼

Judicial Officer
Brennan, Clayton
Hearing Time
2:00 PM

10/19/2023 *Motion ▼

Judicial Officer
Brennan, Clayton
Hearing Time
2:00 PM
Comment
Motion and Motion for Stay

EXHIBIT 2

CALIFORNIA COASTAL COMMISSION

45 FREMONT STREET, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE (415) 904-5200
FAX (415) 904-5400
TDD (415) 597-5885



December 3, 2019

Paul Beard II
FisherBroyles LLP
5670 Wilshire Blvd, Ste 1800
Los Angeles, CA 90036-5653

Re: Georgia-Pacific Mill Site/ Mendocino Railway

Dear Mr. Beard:

In light of the upcoming meeting with you and California Coastal Commission (Commission) staff set for December 19, 2019, I hope that we can discuss the following issues related to the Mendocino Railway's development plans for the former the Georgia-Pacific Mill site (site). As a starting point I would like to note that we have not received a response to the June 11, 2019 letter from the Commission's Senior Legal Counsel Ann Cheddar to Mr. LaRocca, counsel for Mendocino Railway (Railway), with regard to the questions of jurisdiction, or any additional information that would alter the conclusions set forth in that letter. Thus, without additional evidence to the contrary, we remain unable to conclude that the Railway engages in intrastate rail transportation as part of the interstate rail network within the meaning of the ICCTA. As a result, we also cannot conclude that the ICCTA exempts the Railway's activities from review under applicable provisions of Coastal Act, and in any event, the ICCTA does not preempt the Commission's jurisdiction pursuant to the Coastal Zone Management Act (CZMA). We renew the requests made in the June letter, including the request for any letters or determinations from the STB regarding the Railway's proposed development, any additional evidence regarding ICCTA preemption, and information regarding any development activities that might trigger Coastal Act permitting requirements and/or Commission review authority under the CZMA.

To our knowledge the Railway has recorded a Grant Deed purporting to effect a lot line adjustment but without a certificate of compliance or any other form of local government review or approval, and without the requisite Coastal Act authorization; and it has conducted vegetation clearing and other work in and around Dry Shed # 4 without first seeking a coastal development permit or permit exemption from the City. Is this correct? Is this the extent of the work done by the Railway on the Mill Site?

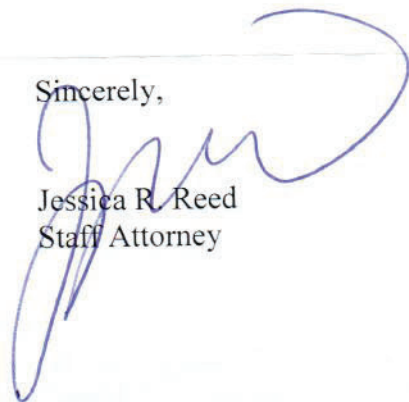
Further, it is our understanding that the Railway has many additional plans to develop the Mill Site, including a master plan for development of the site (referring to the Concept Master Plan provided to the City); leasing all, or a portion, of Dry Shed #4 to North Coast Brewing company for storage/brewery activities; potential work funded by a federal BUILD grant, were the City to receive the grant; and tourist rail expansion. These activities may also trigger the need for a coastal development permit and/or federal consistency review. Therefore, before conducting any

Paul Beard II
12/3/19
Page 2 of 2

further development in the coastal zone, the Railway should coordinate with Commission staff, in addition to the City, to determine whether the particular action may require either a coastal development permit or CZMA review. To that end, we look forward to our meeting with you later this month.

Please let me know if you have any questions about this letter, and I thank you in advance for your response.

Sincerely,



Jessica R. Reed
Staff Attorney

cc: Tabatha Miller, City Manager, City of Fort Bragg