SUPERIOR COURT IN AND FOR THE STATE OF CALIFORNIA,
COUNTY OF NAPA

SODA CANYON GROUP,

Petitioner,

vs.

COUNTY OF NAPA; NAPA COUNTY BOARD OF SUPERVISORS; and DOES 1 through 10, inclusive,

Respondents.

MOUNTAIN PEAK VINEYARDS, LLC; ERIC YUAN; HUA YUAN; and DOES 11 through 20, inclusive,

Real Parties in Interest.

Case No.: 17CV001063

ORDER:

(1) GRANTING RESPONDENT AND REAL PARTIES IN INTEREST'S MOTION TO STRIKE PORTIONS OF PETITIONER'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO AUGMENT THE ADMINISTRATIVE RECORD; and

(2) GRANTING IN PART AND DENYING IN PART PETITIONER'S MOTION TO AUGMENT THE ADMINISTRATIVE RECORD

Petitioner Soda Canyon Group's Motion to Augment the Administrative Record ("Motion to Augment") and Respondents' and Real Parties in Interest's Motion to Strike Portions of Petitioner's Reply in Support of it Motion to Augment the Administrative Record and Declaration of Anthony G. Arger in its Entirety ("Motion to Strike") came on for hearing on

February 1, 2019. Having read and considered the papers submitted in support of and in opposition to the Motion to Augment and the Motion to Strike and having heard oral argument, the Court took the matter under submission and now rules as follows:

A. MOTION TO STRIKE PORTIONS OF PETITIONER'S REPLY IN SUPPORT OF ITS MOTION TO AUMENT THE ADMINISTRATIVE RECORD AND THE DECLARATION OF ANTHONY G. ARGER IN ITS ENTIRETY.

The Motion to Strike is GRANTED.

It is generally improper for a party to submit new evidence with a reply brief. (*Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 241.) The decision whether to admit such evidence is within the trial court's discretion. (*Id.*)

The Court finds that the evidence and legal argument sections of Petitioner's reply brief to the Motion to Augment are new, and improperly submitted. For this reason, the Court orders the following stricken from the record:

A) Section II of the Reply Brief (p. 1:17 – 4:24) including footnotes 1 through 3;

B) Footnote 5 at p. 10 of the Reply Brief;

C) All references in the Reply Brief to either the Arger Declaration or to any exhibits attached to the Arger Declaration;

D) The Arger Declaration submitted in support of the Reply Brief including all exhibits thereto.

B. MOTION TO AUGMENT THE ADMINISTRATIVE RECORD

The Motion to Augment is made in an action for writ of mandate made pursuant to the California Environmental Quality Act ("CEQA"). The procedural history relevant to the present motion is as follows. The underlying Petition is brought by an unincorporated association of Napa County residents and property owners and seeks a writ of mandate pursuant to CEQA

relating to Respondent Napa County's approval of an application by Real Party in Interest Mountain Peak Vineyards, LLC and related individuals for a use permit and related entitlements for development of a winery on Soda Canyon Road in unincorporated Napa County (the "Project"). The Napa County Planning Commission began its hearing on the matter on July 20, 2016. Thereafter, the hearing was continued multiple times by the parties. The Planning Commission ultimately approved the Project at a public hearing on January 4, 2017. Petitioners appealed the Planning Commission decision to the Napa County Board of Supervisors (the "Board"). The Board held a public hearing on the appeal on May 23, 2017, and adopted resolutions containing its finding of facts and approving the project on August 22, 2017.

The materials that are the subject of the present motion can be grouped in two categories. The first (the "Supplemental Reports") includes materials that were submitted to the County after the Planning Commission Hearing but before the Board of Supervisor's decision, in particular: the Rector Reservoir Water Yield Study, dated May 2013; Rector Creek Watershed Sanitary Study, dated July 2009; and Geotechnical Road Impact Review & Reconnaissance study dated May 8, 2017. The second (the "Atlas Fire Evidence") involves evidence relating to the October 2017 Atlas Fire.

The Court addresses the Supplemental Reports and Atlas Fire Evidence separately below.

1. The Supplemental Reports.

Public Resources Code § 21167.6 provides the background requirements for assembling the record of proceedings ("AR") in CEQA cases. Section 21167.6, subdivision (e) specifically enumerates eleven categories of materials that shall be included. Courts have noted the clear intent of inclusivity found in the provision. The breadth of the categories is expansive, and non-exclusive. (*Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48,

63-64.) In an oft-repeated quote, "Section 21167.6 'contemplates that the administrative record will include pretty much everything that ever came near a proposed development or to the agency's compliance with CEQA in responding to that development.'" (*Citizens for Ceres. v. Super. Ct.* (2013) 217 Cal.App.4th 889, 909-910.)

Among these categories is "all written evidence or correspondence submitted to, or transferred from, the respondent public agency with respect to compliance with [CEQA] or with respect to the project." (Public Resources Code § 21167.6, subd. (e)(7).)

Petitioners argue that the AR should be augmented to include the Supplemental Reports because these were written evidence submitted to the responding public agency prior to the Board's August 2017 final decision. There appears to be no disagreement that the Supplemental Reports were so submitted to the County.

Respondents counter that courts are generally limited to reviewing the evidence that was before the local agency *when the agency made the challenged decision.* (Code Civ. Proc. § 1094.5, subd. (b) and (e).) They argue that the Supplemental Reports were not before the Planning Commission when it rendered its decision on the matter in January 2017. Respondent argues that the Board had appellate jurisdiction over the matter, and properly followed the relevant provision of the Napa County Code which provides, "[u]pon a showing of good cause, the chair of the board may authorize . . . the presentation of additional evidence which could not have been presented at the time of the decision appealed from." (Napa County Code § 2.88.090, subd. (B).) It appears undisputed that the chair of the Board considered Petitioner's request for presentation of the Supplemental Reports, determined that they could have been presented prior to the Planning Commission's January 4, 2017 hearing, and on that ground declined to authorize presentation of the materials to the Board for purposes of hearing the appeal.

The central question before the Court then is whether the "challenged decision" in this matter was made by the Planning Commission on January 4, 2017, or by the County Board of Supervisors in August of that same year. This question is linked with the standard of review actually exercised by the Board in the present matter. If the Board was, in effect, making an independent decision relating to the proposed project, the County "made the challenged decision" in August 2017 and therefore, the Supplemental Reports should be part of the AR under Public Resources Code §§ 21167.6, subdivisions (e)(7) and (10). If the Board simply reviewed the Planning Commission's decision for error, or according to a similar standard of review, then the relevant date was January 4, 2017 and therefore, the Board properly denied Petitioner's request to consider the Supplemental Reports.

Respondents argue that because the Board declined to conduct a de novo review under Napa County Code section 2.88.090, subsection (B), its review of the Planning Commission decision was a true appeal and therefore, the Supplemental Reports should not be part of the AR. Instead, the Board reviewed the matter under Napa County Code § 2.88.090, subdivision (A). That section provides in pertinent part "[i]n hearing the appeal, the board shall exercise its independent judgment in determining whether the decision appealed was correct." It further provides that, "[f]ollowing close of the hearing on appeal the board may affirm, reverse, or modify the decision being appealed . . .." (*Id.* at subs. (C).)

At oral argument, the Court inquired into whether the Board's exercise of "independent judgment," particularly, where, as here, Napa County Code section 2.88.090(C) permitted the Board to "affirm, reverse or modify the decision being appealed" was in effect a de novo review. As a starting point, the exercise of "independent judgment" is not the same as trial de novo. Rather, independent judgment is limited to a review of the administrative record plus any

additional evidence admitted under CCP section 1094.5. See, e.g. *Fairfield v. Superior Court of Solano County* (1975) 14 Cal. 3d 768, 776.

The Court has compared the Planning Commission's Conditions of Approval (AR00001-00002) with the Board's Conditions of Approval (AR 00056-00071). The substantive differences between the two Conditions of Approval are (1) Planning Commission allowed 80 visitors each day and the Board approved 60, (2) Planning Commission approved 78 marketing events and the Board approve three and (3) the Board added a new condition that 75 percent of the wine produced at the winery be "estate grown." All of these substantive modifications were volunteered by the Real Parties in Interest, not unilaterally imposed by the Board. See AR 00899, 00946.

Hence the Court finds that the Board did not conduct a de novo review of the issues before the Planning Commission and properly declined to receive the Supplemental Reports. Therefore, Petitioner's Motion to Augment the Administrative Record as to the Supplemental Reports is DENIED.

Atlas Fire Evidence

As discussed above, Respondents correctly assert that courts are generally limited to reviewing the evidence that was before the local agency when the agency made the challenged decision. (Code Civ. Proc. § 1094.5, subd. (b) and (e).) However, "[w]here the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced . . . at the hearing before respondent, it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in the light of that evidence." (*Id.* at subd. (e).)

As an initial matter we address Respondent's suggestion that the holding in *Western States Petroleum Assn. v. Super. Ct.* (1995) 9 Cal.4th 559, limiting the applicability of

subdivision (e) in traditional mandamus actions should be extended to the present administrative mandamus action. This suggestion was specifically considered and rejected in *Fort Mojave Indian Tribe v. Dept. of Health Services* (1995), 38 Cal.App.4th 1574, at 1594. "[H]ad the [*Western* States] court also intended to construe and qualify Code of Civil Procedure section 1094, subdivision (e)--a construction that would have been obiter dictum--it presumably would have been conscious that its interpretation conflicted with a substantial line of Court of Appeal decisions approving the use, under that subdivision, of evidence that did not exist when the administrative decision was rendered. (citations omitted.)" (*Ibid.*)

Respondents argued that the *Fort Mojave* holding should be limited to non-CEQA cases. When asked by the Court, Respondents were unable to provide authority in support of this position. (Respondents countered that neither is there authority holding that *Fort Mojave* should be applied to CEQA cases.) *Fort Mojave* announces the rule to be applied in administrative mandamus actions. In the absence of authority excepting CEQA cases from the holding in *Fort Mojave*, that rule governs the Court's decision here. Therefore, based on the holding in *Fort Mojave,* the Court declines to extend the holding of *Western States* to the present action and finds that Code Civ. Proc. § 1094.5, subd. (e) controls its analysis.

Pursuant to the "substantial line of Court of Appeal decisions" referenced in *Fort Mojave*, "[w]hen the Legislature granted the superior court the discretion to receive 'relevant evidence which, in the exercise of reasonable diligence, could not have been produced at the administrative hearing,' it reasonably may be inferred that it meant to authorize the receipt of evidence of events which took place after the administrative hearing." (*Windigo Mills v. Unemployment Ins. Appeals Bd.* (1979) 92 Cal.App.3d 586, 596-597.)

Several of the cases cited in *Fort Mojave* stand squarely for the proposition that in administrative mandamus actions such as the present one, where a party presents evidence, relevant to the issues raised, of events that had not occurred at the time of the hearing before the administrative agency, then, pursuant to section 1094.5, subdivision (e), the Court should remand to the administrative agency for reconsideration in light of the new evidence. (*Elizabeth D. v. Zolin* (1993) 21 Cal. App. 4th 347, 356-57; *Curtis v. Board of Retirement* (1986) 177 Cal. App. 3d 293, 298-299; *Windigo Mills v. Unemployment Ins. Appeals Bd., supra,* 92 Cal. App. 3d at 594-597.) "In keeping with the principle that the administrative agency should have the first opportunity to decide the case on the basis of all of the evidence, the better practice might be to remand the action for agency redetermination in the light of the new evidence, particularly where the evidence would have been crucial to the administrative decision.")

While the court in *Fort Mojave* confirmed that the foregoing remains the general rule, it specifically limited its application to "truly new evidence, of emergent facts." (*Fort Mojave Indian Tribe v. Dept. of Health Services, supra,* 38 Cal.App.4th at 1595.) Thus, on the facts before it, the *Fort Mojave* court reversed the trial court's remand of a report that "did not truly constitute 'evidence of events which took place after the administrative [decision]'" but rather "was a restatement and elaboration of its authors' opinions about possible features of the [project] which they had previously discussed." (*Id.* at 1596.)

It is undisputed that the Atlas Fire began on or about October 8, 2017, some two months after the Board denied Petitioner's appeal and upheld the decision of the Planning Commission. Therefore, evidence of the Atlas Fire could not have been produced prior to the final decisions of the Planning Commission or the Board.

The evidence is certainly relevant. The Administrative Record is replete with evidence, analysis, discussion, and conclusions relating to the history of fire, and the risk of future fire in the area. (See e.g. AR 2186-2200, 2362-64, 2486-2500, 3480-3484, 3573-74, and 3600.) Respondent's Statement of Facts in support of its decision specifically references fire danger. (AR 00017-18.)

The question before the Court is whether evidence of the Atlas Fire is "truly new evidence of emergent facts."

After careful deliberation, the Court concludes that it is. The Court finds that this deliberation ultimately turns on the question of whether the Atlas Fire event is itself an emergent fact, or simply an additional example of a well-known and fully presented condition. While significant evidence was received by Respondent on the issue of the fire danger in the subject area - the catastrophic nature of the Atlas Fire, and, in particular the mass evacuations, many by helicopter, that resulted from the fire constitute truly new evidence of emergent facts that were not presented to the Board. While evidence regarding the state of Soda Canyon Road and residents' concerns that the winery would increase congestion and accidents along the road were expressed below, the Court is unaware of evidence presented to the Board of Supervisors regarding the complete inaccessibility of Soda Canyon Road during a fire and resulting helicopter evacuations of stranded individuals. In fact, the Board's decision on appeal found that "In the event of a fire that results in mass evacuations from [the project] area, the road has sufficient capacity and roadway width to accommodate all outgoing traffic while allowing incoming fire response units."

For the foregoing reasons, Petitioner's motion to augment the administrative record with the Atlas Fire Evidence is GRANTED. The Court will be remanding the case to the Napa County Board of Supervisors for reconsideration in light of the Atlas Fire Evidence.

Prior to reconsideration by the Board of Supervisors, however, the parties are ordered to meet and confer in an effort to identify the scope of the Atlas Fire Evidence (Exhibit C to Petitioner's Motion to Augment the Administrative Record) that constitutes new evidence of emergent fact for purposes of remand to the Board of Supervisors. Proffered Atlas Fire materials meet this requirement where they evidence a characteristic of the Atlas Fire that is both (a) relevant to Respondent's decision in this matter, and (b) not exhibited by or is materially different from those exhibited by previous fires in the subject area.[1]

If the parties are unable to agree on the scope of the materials to be considered by the Board of Supervisors, they shall appear in Department C at 8:30 am on March 7 to set a briefing schedule for the Court's decision on the issue.

The Writ of Mandate hearing previously set for March 7, 2019 is vacated. The Court's December 19, 2018 order to include hyperlinks in the parties' briefs is stayed. A review hearing is set for May 2, 2019 at 8:30 am in Department C.

Dated: 2/21/19

Cynthia P. Smith, Judge

[1] To be clear, the Court finds that evidence relating to the issue of mass evacuations is sufficient to demonstrate that the Atlas Fire is an emergent fact rather than a subsequent example of a previously presented fact. The Court does not hold that this is the exclusive issue on which the evidence of the Atlas Fire presents emergent fact. For example, in its Findings of Fact, the Board declared that, "most of Foss Valley in the vicinity of the Project site is now planted in vineyard, which significantly reduces the extent of wildland fire than can occur in the vicinity." (AR 00017-18.) Among the evidence submitted in the present motion to augment are photographs that may constitute truly new evidence of emergent fact relating to this issue.

Superior Court of California

County of Napa
825 Brown Street
Napa. CA 94559

Case #: 17CV001063 **Soda Canyon Group vs County of Napa et al**

Mark Raymond Wolfe	1 Sutter St Ste 300 San Francisco, CA 94104
Jeffrey Michael Brax	1195 Third Street STE 301 Napa, CA 94559
Brien Francis McMahon	505 Howard ST STE 1000 San Francisco, CA 94105

Certificate of Mailing/Service

I hereby certify that I am not a party to this cause and that a copy of the foregoing ***Order*** was:

- ☒ **mailed** (first class postage pre-paid) in a sealed envelope
- ☐ **certified copy faxed** to Napa Sheriff's Department at (707) 253-4193
- ☐ **personal service** – personally delivered to the party listed above
- ☐ **placed in attorney/agency folders** in the ☐ Criminal Courthouse ☐ Historic Courthouse

at Napa, California on this date and that this certificate is executed at Napa, California this Date. I am readily familiar with the Court's standard practice for collection and processing of correspondence for mailing within the United States Postal Service and, in the ordinary course of business, the correspondence would be deposited with the United States Postal Service on the day on which it is collected at the Courthouse.

Date: 2/22/2019

Robert E. Fleshman, Court Executive Officer

Mirasol Aguilar-Marron, Deputy Court Executive Officer