

Case No. _____
Related Petition: Case No. A156816

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT – DIVISION THREE**

COUNTY OF NAPA; NAPA COUNTY BOARD OF SUPERVISORS,
Petitioners (Respondents in Trial Court),

v.

SUPERIOR COURT OF NAPA COUNTY,
Respondent,

SODA CANYON GROUP,
Real Party in Interest (Petitioner in Trial Court)

MOUNTAIN PEAK VINEYARDS, LLC; HUA “ERIC” YUAN,
Real Parties in Interest (Real Parties in Interest in Trial Court),

From the Superior Court of Napa County
Trial Court Case No. 17CV001063
Hon. Cynthia P. Smith, Judge
(707) 299-1170

**PETITION FOR WRIT OF MANDATE, WRIT OF PROHIBITION,
AND/OR OTHER APPROPRIATE RELIEF;
MEMORANDUM OF POINTS AND AUTHORITIES**

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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or persons that must be listed in this certificate under Rule 8.208 of the California Rules of Court.

DATED: August 16, 2019

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INTRODUCTION

The Court of Appeal should set aside an improper evidentiary order by the trial court in an administrative mandamus action challenging the approval of a conditional use permit by Petitioner, Napa County. The trial court's June 17, 2019, Order remanding the underlying case to the Petitioner for reconsideration constitutes prejudicial error on multiple grounds. The trial court exceeded its jurisdiction by determining that the post-decision, extra-record evidence is relevant to the matter without consideration of the appropriate standard of review. The trial court also erred in determining that remand was an appropriate procedure prior to any determination of the merits of the case.

The trial court failed to apply the appropriate standard of review in the context of a motion to augment the record, thus failing to give the required deference due to local agencies in administrative mandamus cases. The trial court acted in excess of its jurisdiction, resulting in an erroneous order remanding the case to Petitioner to reconsider its findings without first determining that the Petitioner committed any error. It is a key function of the Court of Appeal to ensure that the trial court acts within its authority and the Court should intervene to ensure that justice be done. Petitioner hereby requests that this Court reverse the trial court's erroneous order and re-establish the appropriate separation of powers in administrative mandamus actions under the substantial evidence standard of review.

Under the substantial evidence standard, courts review the agency's decision to determine whether its findings are supported by substantial evidence in light of the record as a whole. This standard is a question of law for the reviewing court, similar to an appellate court's review of factual

determinations by the trial court. This standard necessarily limits the scope of evidence that is subject to review to the evidence that is, or should have been, in the record that was before the inferior tribunal at the time it made the decision. Evidence that came into existence after the decision and is merely offered to contradict the evidence relied on by the agency cannot be relevant under that standard of review. By definition, the agency cannot be said to have acted without the support of substantial evidence based on contradictory evidence that did not exist at the time of the challenged decision.

In addition, the trial court must hold the hearing on the merits before determining if extra-record evidence is relevant under the standard of review. Code of Civil Procedure §1094.5(e) provides for the consideration of extra-record evidence and allows for entry of judgment remanding the case to the agency for reconsideration. The Supreme Court has held that interlocutory remand may be appropriate where the reviewing court, after a hearing on the merits, has determined that the record is lacking in evidentiary support for the agency's findings. The hearing on the merits is crucial because the reviewing court cannot determine that the proposed extra-record evidence is relevant without examining the record as a whole in the context of the merits of the writ. To do so would improperly inject independent judgment, implicitly second-guessing the wisdom of the decision of the agency.

The trial court's errors are substantial and highly prejudicial. The remand will require Petitioner to expend substantial resources to review the Project again, without any finding that it erred the first time. The reconsideration could provide an opportunity for members of the public to

insert even more post-decision evidence into the record. In addition, the remand will, at best, only delay the hearing on the merits, which is fully ripe for consideration by the trial court. In the meantime, nothing prevents the trial court from identifying still more post-decision, extra-record evidence and remanding the case to Petitioner again. There is no logical basis to conclude that this repeated cycle of remand and reconsideration will end.

On a broader scale, the trial court's ruling undermines the certainty and finality of land use decisions, and exposes local agencies to endless cycles of litigation. Every car accident, natural disaster, or discovery of a biological resource would be a basis for re-opening final decisions by local agencies. No decision by a state or local agency is safe from this carousel of irrelevant evidence.

For the reasons set forth in this Petition, Petitioner respectfully requests that the Court set aside the trial court's June 17, 2019, Order, and direct the trial court to deny the Motion to Augment the Record.

WRIT PETITION

I. PARTIES

1. Petitioner County of Napa and its Board of Supervisors (the "Board") are respondents in the underlying case in Napa County Superior Court, *Soda Canyon Group v. County of Napa, et al.*, Case No. 17CV001063. Petitioner is a political subdivision of the State of California and the Board is the legislative body of the County.

2. Project applicant Mountain Peak (the "Applicant") is real party in interest in the underlying case. Hua "Eric" Yuan is an alleged real party in interest in the underlying case, and the managing member of

Applicant. Applicant separately filed a Petition for Writ of Mandate, Writ of Prohibition, and/or Other Appropriate Relief (“Mountain Peak Petition”.)

3. Respondent is the Superior Court of Napa County (“trial court”).

4. Real Party in Interest Soda Canyon Group is petitioner in the underlying case in the Superior Court (“Real Party”).

II. EXHIBITS

5. All exhibits in the Appendix accompanying this Petition are true and correct copies of original documents.

6. As noted in Paragraph 7 of the Mountain Peak Petition, Applicant intends to lodge the entire administrative record with the Court.

7. All exhibits in the Appendix and the entire Administrative Record lodged by Applicant are incorporated herein by reference.

III. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Project Review, Approval and Appeal

8. The Mountain Peak project (the “Project”) was reviewed by Petitioner’s staff and, after several continued public hearings, was approved by the Napa County Planning Commission on January 4, 2017. Following the approval, members of Real Party filed four appeals, with identical grounds of appeal, challenging the decision. The Board heard the appeal on May 23, 2017, and found the evidence supported denial of all 42 appeal grounds presented by members of Real Party.

9. During the course of staff review and the numerous public hearings, Petitioner considered the potential risk of wildfires in the vicinity of the Project. Petitioner took evidence from experts on fire safety and on the capacity and safety of public roads near the Project, as well as

testimony from members of the public who had experienced such fires. At the conclusion of the hearings before the Board, Petitioner determined that substantial evidence supported specific findings related to wildfires and public safety, including evacuation from the vicinity of the Project site.

10. On August 22, 2017, the Board adopted four identical Resolutions of Findings of Fact, in which the Board set forth the factual and evidentiary support for each finding.

B. Writ Petition

11. Real Party filed the underlying writ petition on September 20, 2017, within the appropriate statutes of limitation. The writ petition set forth three causes of action, claiming (1) violation of the California Environmental Quality Act (“CEQA”), (2) violation of California’s Planning and Zoning Law based on inconsistency with Petitioner’s general plan, and (3) violation of California’s Planning and Zoning Law based on use permit findings not being supported by substantial evidence. In all three claims for relief, Real Party alleges that Petitioner’s decision was not supported by substantial evidence.

C. Atlas Fire

12. On or around October 9, 2017, a significant wildfire began to burn areas near the Project site and surrounding the homes of many members of Real Party. The Atlas Fire, as it was designated, burned for several days and residents living on Atlas Peak were forced to evacuate. Due to the pending litigation, Applicant had not begun any work on the Project. The Project site was not burned in the fire.

D. Real Party’s Motion to Augment the Record and Trial Court’s Initial Ruling

13. On October 15, 2018, pursuant to the parties’ Stipulation regarding Briefing Schedule, Real Party filed its opening brief in support of the writ petition.

14. Concurrently therewith, Real Party filed a Motion to Augment the Administrative Record (the “Motion”), which sought, *inter alia*, to introduce approximately 175 pages of declarations and exhibits addressing the Atlas Peak Fire.

15. On November 19, 2018, Petitioner and Petitioner Mountain Peak filed a joint brief in opposition to the underlying writ petition, along with an opposition to the Motion.

16. The trial court, at Real Party’s request, scheduled the Motion for hearing on February 1, 2019. After several hours of oral argument, the trial court took the matter under submission, issuing a written order on February 22, 2019 (the “Initial Order”).

17. As it relates to this Petition, the Initial Order granted part of Real Party’s Motion, ruling that some unidentified Atlas Fire evidence was admissible under Code of Civil Procedure, section 1094.5(e). The trial court ruled that some unidentified portion of the proffered evidence was “relevant evidence” and constituted “truly new and emergent facts.” The Initial Order required the parties to meet and confer on which portions of the proffered evidence met that standard and, failing any agreement on that issue, to submit briefs to the trial court for its decision. The parties submitted supplemental briefs and trial court scheduled a further hearing.

E. Prior Writ Petition

18. After receiving the Initial Order, Petitioner and Petitioner Mountain Peak filed a joint Petition for Writ of Mandate, Prohibition, or Other Appropriate Relief, seeking to set aside the Initial Order. The Prior Petition was assigned to Division Three of the First District Court of Appeal and assigned Case No. A156816.

19. Real Party filed a preliminary opposition on April 5, 2019, arguing, *inter alia*, that the writ petition was premature since the trial court had not ruled what evidence would be subject to remand.

20. The Court of Appeal summarily denied the writ petition on April 11, 2019.

F. Second Hearing and Remand Order

21. On May 7, 2019, the parties appeared at a hearing to address the issue of what proffered evidence of the Atlas Peak Fire constituted “truly new and emergent facts.” At the hearing, the trial court announced its tentative ruling, which asked the parties to address (1) the timing of a remand, and (2) the specific evidence that meets the trial court’s test for “truly new evidence of emergent facts.”

22. On June 17, 2019, the trial court issued an order remanding the case to Petitioner for reconsideration of the Project in light of the new, post-decision evidence (the “Remand Order”). The Remand Order concluded that the trial court had the authority to remand the matter at any time on an interlocutory basis. The Remand Order further identified specific subsets of the proffered new evidence relating to the Atlas Peak Fire that the trial court found to be (1) relevant, (2) unable to have been produced at the hearing below, and (3) truly new evidence of emergent facts.

23. The Remand Order required the following: “[Real Party] shall provide the above-referenced documents to County Counsel on or before June 26, 2019, and County Counsel shall provide it to [Petitioner] and/or the Board of Supervisors immediately upon receipt....” The Remand Order did not contain any further instruction or requirement regarding the procedure or scope of the remand.

24. The Remand Order and the Initial Order, combined, constitute the trial court’s ruling on the Real Party’s Motion. The Remand Order addressed the specific evidence that Real Party sought to include in the administrative evidence and remanded the case to Petitioner to reconsider its findings.

IV. TIMELINESS OF PETITION

25. This Petition seeks review of the trial court’s June 17, 2019, Order remanding the underlying case back to Petitioner for further review. The Order was mailed the same day. Petitioner filed the Petition within sixty days of the date trial court filed the Order.

V. BASIS FOR RELIEF

26. This Court has authority to issue a writ of mandate and writ of prohibition. (*See* Code Civ. Proc, §§1087, 1103.) Petitioner asks this Court to “arrest the proceedings” of the trial court due to its actions in excess of its jurisdiction in the underlying action and to order the trial court to enter such orders as the law requires to re-establish the proper relationship between local agencies and the courts. (*See* Code Civ. Proc., §§1085, 1102.)

27. In administrative mandamus matters not involving fundamental vested rights, such as the underlying case, the reviewing court

applies the substantial evidence test, to determine whether in light of the whole record substantial evidence exists to support the agency's decision, determination, or finding. The reviewing court is limited to reviewing the administrative record; relevant extra-record evidence can be admitted only if relevant and only in very narrow circumstances.

28. The trial court exceeded its jurisdiction and committed prejudicial error by failing to apply the appropriate standard of review and granting Real Party's Motion, ordering a remand for the Petitioner to reconsider its findings in light of the post-decision, extra-record evidence. The trial court erroneously applied reasoning and analysis applicable to the independent judgment standard, rather than the substantial evidence standard. The trial court incorrectly interpreted Code of Civil Procedure, section 1094.5(e)'s narrow exception to the inadmissibility of extra-record evidence in administrative mandamus proceedings, and failed to recognize the California Supreme Court's admonition that such evidence must exist before the administrative decision to qualify as relevant and admissible, a requirement consistently applied by appellate courts for 24 years. The trial court also failed to follow the Supreme Court's guidance on when pre-judgment remand is appropriate.

29. The issues presented are of substantial statewide importance, as they greatly, and negatively, impact every state and local agency's review of land use decisions. The interest in finality of land use decisions would be disregarded and any decision would be subject to reconsideration based on any subsequent event that is relevant, in the court's eyes, to the issues before the agency. This approach undermines the exception to the

general inadmissibility of administrative records that is embodied in Code of Civil Procedure, section 1094.5.

30. Issuance of a writ of mandate, writ of prohibition, and/or other appropriate relief is necessary to correct the trial court's erroneous orders.

VI. ABSENCE OF OTHER REMEDIES

31. Petitioner has no other plain, speed, or adequate legal remedy other than writ relief.

32. If the Court does not grant the writ, Petitioner will be required to conduct at least one additional review of a matter that was approved more than two and a half years ago, without any showing by the trial court that the original decision was legally deficient in any way. If Petitioner upholds its approval, the matter would still not be final, as the case would still be subject to other extra-record evidence and remands before ever reaching the merits. Depending on the result of the trial court's review, this issue may never be ripe for appeal. If Petitioner denies the Project on remand, the matter will be dismissed and any appeal of the trial court's Remand Order would be moot. Because of the significant statewide interests in the subject matter of this writ, adjudication of the issue is important.

PRAYER FOR RELIEF

Petitioner prays that this Court:

1. Issue a peremptory writ of mandate, writ of prohibition, or other appropriate relief in the first instance, directing the trial court to vacate its Remand Order and enter a new order denying Soda Canyon Group's Motion;

2. In the alternative, issue a peremptory writ of mandate, writ of prohibition, or other appropriate relief in the first instance, directing the trial court to act as specified in Paragraph 1 of this Prayer for Relief, or to show cause why it should not be ordered to do so, and upon return of the alternative writ, issue a peremptory writ as set forth in Paragraph 1 of this Prayer for relief or issue such other extraordinary relief as is warranted;

3. Award costs under California Rule of Court 8.493; and

4. Grant such other relief as may be just and proper.

DATED: August 16, 2019

Respectfully submitted,

NAPA COUNTY COUNSEL

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MEMORANDUM OF POINTS AND AUTHORITIES

The trial court in this matter failed to give due deference to Petitioner in reviewing a land use approval. By failing to apply the appropriate standard of review in an administrative mandamus case, the trial court improperly admitted post-decision, extra-record evidence in excess of its authority. This violation of the separation of powers between administrative agencies and the courts was further compounded by the trial court's improper order to remand the matter to the Petitioner without first determining that the record was insufficient to support the Petitioner's decision.

Section A of this brief will address the admissibility of extra-record evidence in administrative mandamus cases involving the substantial evidence standard of review. Under the substantial evidence standard, the reviewing court's sole concern is whether the agency's decision is supported by substantial evidence in light of the whole record. If the decision is so supported, the court must uphold it, even if the court would have decided differently, or even if the weight of the evidence supports other conclusions. Here, the trial court exceeded the bounds of this review by implicitly applying the independent judgment review, in which the court is allowed to weigh the evidence. This misapplication of the standard of review resulted in the erroneous introduction of post-decision evidence that was not before the Petitioner at the time of the decision.

Section B of this brief will address the trial court's improper injection of its judgment into the Petitioner's decision-making by ordering that the matter be remanded for reconsideration, even though the trial court has not reviewed the matter on the merits. This action exceeds the trial court's authority under the substantial evidence standard of review.

Section C of this brief will address the reasons for immediate review by this Court. The nature of the trial court's order requires writ relief since the consequences of the improper remand procedure would cause this issue to evade review. Since this matter involves issues of statewide importance, review is not only valuable, but imperative.

A. STANDARD OF REVIEW LIMITS ADMISSIBILITY OF EXTRA-RECORD EVIDENCE.

Procedures for administrative mandamus actions under Code of Civil Procedure, section 1094.5 apply to the review of quasi-judicial actions by state and local agencies. Courts review decisions by agencies that involve the exercise of discretion in the application of rules or laws to specific facts. (Code Civ. Proc., §1094.5(a).) These include such broad matters as employee disciplinary hearings, license revocation hearings, and land use permit hearings. Subsection (c), therefore, sets forth the different standards of review in cases challenging the evidentiary support of a decision:

Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(Code Civ. Proc., §1094.5(c).)

Independent judgment review is generally reserved for cases involving the adjudication of fundamental vested rights, such as rights to continued employment, licensure, or continued operation of a business.

(Malibu Mountains Recreation, Inc. v. County of Los Angeles (1998) 67

Cal.App.4th 359, 367; *International Brotherhood of Electrical Workers v. Aubry* (1996) 42 Cal.App.4th 861, 868.) In most land use cases, including both those under the California Environmental Quality Act (“CEQA”) and those not involving CEQA, courts apply the substantial evidence standard. (*Malibu, supra.*)

In an administrative mandamus action applying the substantial evidence standard, generally, courts may only consider evidence contained in the administrative record. (*Pomona Valley Hospital Medical Center v. Superior Court* (1997) 55 Cal.App.4th 93, 101.) Courts have identified very limited exceptions to this general rule, stemming from the language of Code of Civil Procedure, section 1094.5, subsection (e). (*Id.*) That section states:

Where the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or was improperly excluded at the hearing...it may enter judgment as provided in subdivision (f) remanding the case to be considered in the light of that evidence....

(Code Civ. Proc., §1094.5(e).)

However, this exception must be narrowly applied based on the nature of substantial evidence review. (*Western States Petroleum Association v. Superior Court* (1995) 9 Cal.4th 559, 578 (“WSPA”).) The standard of review requires the Court to review the whole of the administrative record that was before the agency at the time of its decision, and does not allow the Court to weigh the evidence or make an independent judgment of the wisdom of the agency’s decision. (*Id.* at 571 [WSPA analyzed the standard under traditional mandamus, but described the substantial evidence standard that is equally applicable under administrative mandamus].) This limitation on extra-record evidence avoids “repeated

rounds of litigation and uncertain, attenuated finality” that may result from consideration of matters that were not before the agency at the time of its decision. (*Fort Mojave Indian Tribe v. Department of Health Services* (1995) 38 Cal.App.4th 1574, 1595.)

In deciding the Real Party’s Motion to Augment the Record, the trial court faced the question of whether post-decision extra-record evidence should be admitted to the administrative record, and if so, what procedure should be followed to review the evidence. The Supreme Court has addressed these issues in two cases applicable here: *WSPA* and *Voices of the Wetlands v. State Water Resources Control Board* (2011) 52 Cal.4th 499 (“*Voices*”). The latter discusses the procedures for review of extra-record evidence, and will be discussed in Section B, below. A primary question addressed by the Supreme Court in *WSPA* is whether post-decision evidence can be admitted to augment the administrative record in mandamus review where the court is required to apply the substantial evidence standard. (*WSPA* at 578.) The Supreme Court held extra-record evidence must have existed at the time of the decision and established standards for admission of such evidence to ensure that the exceptions to the general rule of inadmissibility are narrowly construed in light of the deferential standard of review. (*Id.*)

1. Extra-Record Evidence Must Be Relevant in Light of the Substantial Evidence Standard Review, Which Is a Question of Law, Not a Factual Determination.

The *WSPA* decision is a bedrock case for review of land use decisions and CEQA litigation. Here, the trial court dismissed the reasoning of the Supreme Court in *WSPA* simply because the case involved a traditional mandamus action, in which the Court reviewed a quasi-

legislative decision. This distinction was too simplistic; the Supreme Court analyzed the court's role in applying the substantial evidence standard and the Court's reasoning is equally applicable to administrative mandamus cases:

In *Western States*, the court also added the requirement that, for extra-record evidence to be considered, it must have been in existence at the time of the administrative hearing. 9 Cal.4th at 578....The limitation in *Western States* has since been extended to administrative mandamus proceedings. *Saraswati v. County of San Diego* (2011) 202 Cal.App.4th 917, 930; *Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th 74, 118.

(California Administrative Mandamus (Third), CEB, §4.2 (May 2019).)

Indeed, the Supreme Court specifically considered the admissibility of extra-record evidence under Code of Civil Procedure, section 1094.5, subsection (e), applied that same rule to traditional mandamus actions with the same standard of review. The *WSPA* Court's analysis is more than just instructive in administrative mandamus actions, it is controlling.

In *WSPA*, the Supreme Court held that any extra-record evidence must be relevant to the writ action before it can be considered for inclusion in the record. (*WSPA* at 570.) This relevance determination can only be made in the context of the standard of review in the trial court; the question is not whether the evidence is generally relevant to the project, but only whether it is relevant to the court's determination of the issues on the writ. (*Id.*) In both *WSPA* and the present case, the substantial evidence standard applied. Thus, the Court stated, "[t]he admissibility of extra-record evidence turns on whether the existence of substantial evidence is a question of fact that may be disputed by contradictory evidence or whether it is instead purely a question of law." (*Id.*)

The Court concluded that substantial evidence review is in fact purely a question of law, not one in which the reviewing court weighs the evidence. (*Id.* at 573.) Because the legislature used the legally defined term “substantial evidence,” the Court held that the legislature intended the review to be deferential and limited, based on the following expression of that standard:

In reviewing the evidence...all conflicts must be resolved in favor of the [prevailing party], and all legitimate and reasonable inferences indulged in to uphold the [finding] if possible. It is an elementary, but often overlooked principle of law, that when a [finding] is attacked as being unsupported, the power of the...court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the [finding]. When two or more inferences can be reasonably deduced from the facts, **the reviewing court is without power to substitute its deductions for those of the agency.**

(*Id.* at 571 [emphasis added, internal quotations removed].) The Court also cited cases addressing CEQA, which had incorporated the same standard of review in the statutory language. (*Id.* at 573.) “A court’s task is not to weigh conflicting evidence and determine who has the better argument....” (*Id.* at 574, citing *Laurel Heights Improvement Association v. Regents of University of California* (1988) 47 Cal.3d 376.)

The Supreme Court’s discussion in *WSPA* also relates specifically to subsection (e) of Code of Civil Procedure, section 1094.5, which provides an exception to the general inadmissibility of extra-record evidence. (*Id.* at 578.) Subsection (e) allows extra-record evidence only if it is relevant. (Code Civ. Proc., §1094.5(e).) Since relevance is defined in the context of the standard of review, a court cannot admit the evidence simply because it bears a relationship to an issue that was before the agency whose decision

is under attack. A court must make the relevance determination in the context of the issues before the court, namely whether there is substantial evidence on the record supporting the decision under review. The evidence can therefore only be admitted if it tends to prove that a finding of fact is either supported by substantial evidence or not. It cannot be introduced for the improper purpose of contradicting the findings of the reviewing agency, as this would lead to weighing the evidence or second-guessing the agency's decision. (*WSPA* at 579.)

In the present case, the trial court erroneously ignored the reasoning and guidance of the Supreme Court in *WSPA*. (See Appendix, Exhibit 7.) Instead of following the decision, the trial court created an ad hoc rule to determine whether the proffered evidence constituted “truly new and emergent facts,” which the trial court believed was admissible. (*Ibid.*) The trial court incorrectly focused on whether the evidence was “relevant to [the Board of Supervisor's] decision in this matter.” (*Ibid.*) As the Supreme Court showed in *WSPA*, the correct formulation of this rule should be whether the evidence is relevant to the reviewing court's determination in this matter. (*WSPA* at 570.) The trial court cannot independently weigh the evidence or second-guess the wisdom of the agency's decision. (*Id.* at 571.) By ruling on the relevance of the extra-record evidence to the Petitioner's decision, the trial court is implicitly giving weight to the extra-record evidence and determining that such evidence should be a factor in the Petitioner's review of the project, despite the fact that it did not exist at the time of the Petitioner's decision. This cannot be the basis for determining whether the Petitioner abused its discretion in approving the project. (*Id.* at 578.)

Because the trial court applied an erroneous standard to determine the relevance of the proffered new evidence, the trial court committed prejudicial error in issuing the June 17, 2019, Order remanding the matter to the Petitioner. The trial court improperly injected its judgment into the case and converted a question of law to one of fact. For this reason, Petitioner requests this Court to intervene and order the trial court to follow well-established law in ruling on the Motion to Augment the Record.

2. *Extra-Record Evidence Must Have Existed at the Time of the Agency's Decision to Be Relevant.*

The proffered evidence in the present matter relates to events that occurred after the Petitioner's decision on the Project. Over Petitioners' objections, the trial court ruled that the post-decision evidence was admissible because it was relevant and could not have been presented to the Petitioner at the time of the hearing. This ruling ignored the purpose of the statute and once again disregarded the rule established in *WSPA* and applied to administrative mandamus actions in the *Cadiz* and *Saraswati* cases. As a result, the trial court has opened this case to the potential for endless rounds of revolving litigation and unnecessary and unreasonable costs and delays for Petitioners.

The Supreme Court in *WSPA* addressed the question of whether post-decision evidence was admissible in traditional mandamus. In this context, the Court analyzed subsection (e) of the Code of Civil Procedure, section 1094.5, as it relates to cases involving the substantial evidence standard. The Court held, "[e]xtra-record evidence is admissible in administrative mandamus proceedings under such circumstances (Code Civ. Proc., §1094.5, subd. (e)) and we see no reason to apply a different rule in traditional mandamus proceedings." (*WSPA* at 578.) The Court then

proceeded to elucidate the limitations on this exception, holding that a broad reading of this subsection “would seriously undermine the finality of quasi-legislative administrative decisions.” (*Id.*)

The limitation bears on the standard of review and the concept of relevance in administrative mandamus as well. The Supreme Court held

Extra-record evidence is admissible under this exception only in those rare instances in which (1) the evidence in question existed *before* the agency made its decision, and (2) it was not possible in the exercise of reasonable diligence to present this evidence to the agency *before* the decision was made so that it could be considered and included in the administrative record.

(*Id.*) The Court thus established a threshold question for a reviewing court to consider before even entertaining the admission of extra-record evidence. This threshold question goes directly to the standard of review. If the evidence existed before the agency made its decision, the reviewing court could conclude that the evidence may have altered the agency’s decision, had the evidence been properly before it. Post-decision evidence, however, could not possibly have altered the agency’s decision because there was no possibility of the evidence being before the agency. Opening the door to post-decision evidence would invite the reviewing courts to decide, in their own judgment, whether the evidence is important enough to set aside a decision that may have been supported by substantial evidence. This is not the reviewing court’s role and cannot be the basis for finding a lack of substantial evidence. (*Rapp v. Napa County Planning Commission* (1962) 204 Cal.App.2d 695, 698.)

In the present case, the trial court relied on several cases identified in a Court of Appeal decision, *Fort Mojave Indian Tribe v. Department of*

Health Services (1995) 38 Cal.App.4th 1574. The cited cases involve administrative mandamus matters in which post-decision evidence was admitted. The Court of Appeal in *Fort Mojave* distinguished *WSPA*, as the trial court does here, by claiming that this line of cases allows post-record evidence in all administrative mandamus cases. However, the *Fort Mojave* court, like the trial court here, fails to properly relate the holding in *WSPA* to the appropriate standard of review.¹

In each of the cases cited by the Court of Appeal in *Fort Mojave*, the court is applying the independent judgment standard. (*Elizabeth D v. Zolin* (1993) 21 Cal.App.4th 347 [applying independent judgment standard in review of a driver’s license suspension], *Toyota of Visalia, Inc. v. New Motor Vehicle Board* (1987) 188 Cal.App.3d 872 [applying independent judgment standard in review of penalty for licensed car dealer], *Curtis v. Board of Retirement* (1986) 177 Cal.App.3d 293 [applying independent judgment standard in review of denial of disability retirement benefits], *Windigo Mills v. Unemployment Insurance Appeals Board* (1979) 92 Cal.App.3d 586 [applying independent judgment standard in review of denial of eligibility for unemployment benefits].) Under that standard of review, the reviewing court is required to weigh the evidence to determine whether the agency’s decision was correct. (*International Brotherhood of Electrical Workers*, 42 Cal.App.4th at 868.) The standard of review is a factual determination, not a matter of law, and therefore “relevance” relates to the issues before the agency, as the reviewing court is engaging in a limited de novo review of those actions. (*Id.*) This different standard

¹ The *Fort Mojave* court’s efforts to distinguish *WSPA* also constitute dicta, as the court did not admit the extra-record evidence. (*Fort Mojave, supra*, at 1598.)

relaxes the limitations on extra-record evidence, because the interest is in getting the decision substantively right, not in ensuring the decision is procedurally correct and justifiable on any legal grounds, as is the case with the substantial evidence review. (*Windigo Mills*, 92 Cal.App.3d at 596.)

Rather than disregarding *WSPA*, the trial court should have followed its reasoning and the cases applying its reasoning to administrative mandamus actions, and determined that post-decision evidence is not relevant under the substantial evidence standard of review. By not doing so, the trial court improperly engaged in weighing the evidence and independently reviewing the case. For that reason, we respectfully request the Court to set aside the Order and require the trial court to review the post-decision evidence in light of the substantial evidence standard of review.

B. THE STANDARD OF REVIEW ALSO LIMITS THE USE OF REMAND.

Once the reviewing court has properly determined that an exception to the admissibility of extra-record evidence, in accordance with the discussion above, it must then decide when an order remanding the case is appropriate. At the May 7, 2019, hearing the trial court asked the parties to argue whether the trial court must hear the underlying petition on the merits before remanding the case to the Petitioner. In deciding that it had authority to order interlocutory remand without hearing the merits of the matter, the trial court committed reversible error. By ordering remand to the Petitioner to consider evidence that is not relevant to the trial court's review of the merits, the trial court exceeded its authority and disregarded the standard of review applicable to the case.

1. The Standard of Review Requires the Court to View the Whole of the Record Before Considering Extra-Record Evidence.

The standard of review applicable to the trial court's consideration of the petition for a writ of mandate is essential to the consideration of whether evidence outside the administrative record is admissible. "[I]n a proceeding to obtain a writ of mandate for the purpose of inquiring into the validity of any final administrative order or decision, the court's sole function is to determine from a review of the record whether there is sufficient evidence to sustain the ruling of the administrative body." (*Rapp*, 204 Cal.App.2d at 697-698.) The reviewing court "may not reweigh [the evidence on the record] but may only consider whether there is substantial competent and material evidence to sustain the findings of the board." (*Id.* at 698.) The court must disregard evidence that is contrary to the evidence in support of the board's findings, if such supportive evidence is substantial. (*Id.*)

The standard of review is intended to place the trial court in the proper relationship with the administrative agency. (*WSPA, supra*, at 572.) The court must not act as a sixth board member by substituting its judgment for the agency's. As the Supreme Court put it, "[w]hen two or more inferences can be reasonably deduced from the facts, **the reviewing court is without power to substitute its deductions for those of the agency.**" (*Id.* at 571 [emphasis added].)

In the present matter, it is vital that the court must disregard contrary evidence if it finds substantial evidence in support of the findings. The trial court reviewed Real Party's Motion in a vacuum rather than in light of the whole record. The trial court did have access to the record, but did not make any determination about whether the Petitioner's findings were

supported by substantial evidence in the record. Had the trial court held the hearing on the merits, the trial court would have been able to decide if the proposed new evidence merely contradicted otherwise substantial evidence, thus requiring the court to disregard it in any event.

As a result of the trial court's failure to examine the proffered evidence in light of the whole record, the trial court's decision admitted evidence that was not relevant to the trial court's ultimate review of the Petitioner's decision. A review of the merits of the case would have revealed whether such evidence could possibly be relevant to the court's review of the case. For this reason, the order to remand the case was premature.

2. Interlocutory Remand in a Substantial Evidence Case is Only Appropriate in the Proper Circumstances Where the Trial Court Finds a Gap in the Evidence After a Hearing on the Merits.

A court does have inherent authority to enter orders necessary to carry out its jurisdiction. (Code Civ. Proc., §187.) However, this power is not without limits in the context of a petition for an administrative writ under Code of Civil Procedure, section 1094.5. The Supreme Court's decision in *Voices of the Wetlands v. State Water Resources Control Board* (2011) 52 Cal.4th 499, is instructive. The trial court in that case held the hearing on the merits of the petition, but before entering judgment, but after finding a gap in the evidence, issued an interlocutory order remanding the matter to the State Water Board to reconsider a single, limited finding. (*Voices* at 507.) The court had prepared a final decision, but deferred the judgment to allow the agency to reconsider the finding. (*Id.*) Once the agency did so, the court found the record sufficient on that finding and entered judgment denying the writ. (*Id.* at 514.)

On review, the Supreme Court analyzed subsections (e) and (f) of Code of Civil Procedure, section 1094.5, and found that they “impose no absolute bar on the use or prejudgment limited remand procedures....” (*Id.* at 525.) The Court based its ruling on Code of Civil Procedure, section 187, which authorizes courts to employ all means necessary to carry its jurisdiction into effect, allowing “any suitable process or mode of proceeding...which may appear most conformable to the spirit of [the Code of Civil Procedure.]” (*Id.* at 526)

The Supreme Court describes the “appropriate circumstances” in the *Voices* case. The trial court in *Voices* held a full hearing on the merits of the writ petition and concluded that only a single finding lacked evidentiary and analytic support. (*Id.* at 529.) The court then determined that resources would be wasted if it entered judgment granting the writ, thus requiring the entire, complex permit process to be redone. (*Id.* at 528.) It would have also required a new mandamus proceeding, should a party decide to challenge the reissued permit. (*Id.*) Instead, the court decided that a more directed, interlocutory remand, with the court retaining jurisdiction, would be more practical and efficient. (*Id.*)

These circumstances are in stark contrast to the present case. Here, the trial court decided to hear the Real Party’s Motion to Augment the Record separately from the hearing on the merits of the underlying writ petition. This obscured the only question before the trial court in this action, which is whether the evidence is relevant to the trial court’s determination of whether the Petitioner abused its discretion in approving the Project. To make such a relevance determination, the trial court must first review the

writ on the merits to see whether the Petitioner’s decision was supported by substantial evidence.

In this case, the trial court has not determined that the record is lacking in any way, nor that the Petitioner’s findings were unsupported by evidence. Instead, the trial court has essentially decided that the post-decision Atlas Peak fire evidence was important enough that the Petitioner should have considered it.² The trial court is implicitly, and improperly, weighing the value of the project in light of the new evidence, without having considered its relevance and admissibility under proper standards and in light of the sufficiency of the evidence in the actual administrative record.

The Supreme Court in *Voices* pointed to a key limiting factor in determining the proper circumstances for an interlocutory remand. The Court identified numerous cases that “expressed the unremarkable principle that, when an agency determination is set aside for *insufficiency of the evidence* in the administrative record, the proper course is to remand to the agency for further appropriate proceedings....” (*Id.* at 531 [emphasis in original].) Based on this, the Court held that the trial court may remand the matter for consideration by the agency “upon finding that the administrative record *lacks* evidence sufficient to support the agency’s decision.” (*Id.* at 532 [emphasis in original].)

² *WSPA* addresses and disapproves of this approach, stating that “This would change the issue on review from “prejudicial abuse of discretion” to “whether the [agency’s] decision was wise or scientifically sound in light of the extra-record evidence.” p. 576-577. This is not the standard set forth in Code of Civil Procedure, section 1094.5 and thus, exceeds the trial court’s authority. See Section A, above.

The Supreme Court held “subdivision (e) simply prevents a mandamus petitioner from challenging an agency decision that *is* supported by the administrative record on the basis of evidence presented to the court, which could have been, but was not, presented to the administrative body.” (*Id.* [emphasis in original].) Both formulations of the rule require the trial court to have made a determination of the sufficiency of the administrative record before deciding whether the extra-record evidence is relevant and admissible.

Because the trial court did not examine the merits of the petition in light of the whole record, nor determine the evidence in the record related to fire safety issues was insufficient to support the Petitioner’s decision under the applicable substantial evidence standard, the proper circumstances do not exist for the interlocutory remand allowed by Code of Civil Procedure, section 187 and *Voices*.

In making its ruling, the trial court relied on the opinions in *Windigo Mills, supra*, and cases citing it. These cases are inapposite as they involve the adjudication of fundamental vested rights, requiring an independent judgment review. The independent judgment standard has been applied in many cases to allow the reviewing court to weigh the evidence, including post-decision evidence. (*Windigo Mills, supra*, at 598.) The *Windigo Mills* court addressed this in the footnote cited by the trial court in the June 17, 2019, Order. The *Windigo Mills* court noted that a trial court may admit extra-record evidence where the independent judgment test is applied, but:

This does not mean that the trial court should admit such evidence in all cases. In keeping with the principle that the administrative agency should have the first opportunity to decide the case on the basis of all the evidence, the better practice might be to remand the action for agency

redetermination in light of the new evidence, *particularly where the evidence would have been crucial to the administrative decision.*

(*Id.* at 599, fn 4. [emphasis added].) The trial court, in a substantial evidence review, however, cannot weigh the evidence to decide whether the evidence “would have been crucial to the administrative decision.” The trial court must decide as a matter of law whether the evidence in the administrative record supports Petitioner’s decision.

The trial court failed to acknowledge or heed the legal limits that apply to administrative mandamus actions in which the reviewing court applies the substantial evidence test. Therefore, the trial court court’s exercise of its inherent authority to adopt suitable process to aid in its jurisdiction was erroneous and prejudicial and should be reversed.

C. THE RESPONDENT’S ERROR IS PREJUDICIAL AND THE ISSUES PRESENTED IN THIS PETITION WARRANT IMMEDIATE REVIEW AND CORRECTION

The writ process is necessary in this matter to prevent the unnecessary and costly process of reconsidering Petitioner’s decision on the Project. There is no other available remedy to correct the trial court’s errors before they become irredeemable.

The Remand Order would effectively foreclose any review of the trial court’s decision through the ordinary legal remedy of an appeal if it is determined not to be a final judgment.³ In such an event, without a writ setting aside the trial court’s erroneous ruling, such a final judgment would not occur, necessarily, until after the Petitioner has followed the ruling and opened the administrative record to the irrelevant, post-decision evidence.

³ Petitioner acknowledges that Applicant has filed a Notice of Appeal to preserve its rights should the Court determine that the Remand Order is in fact a final judgment.

Regardless of the outcome before the Petitioner on reconsideration, the harm of the trial court's error would be irredeemable through an appeal.

In addition, the June 17, 2019 Order does not appear to consider the process that is required for Petitioner to reconsider the decision. The Order simply requires Real Party to provide the limited new evidence to County Counsel and County Counsel to provide it to Petitioner. The Order does not contemplate the process that Petitioner would be required to undertake to conduct the reconsideration that the trial court ordered. Such a process will be costly, both in staff time for Petitioner, and money for the Applicant. The process must also comply with applicable state laws governing public meetings, which could result in additional testimony and documents from members of the public. It is unclear from the trial court's order whether such additional testimony or documents would be admitted into the administrative record under the trial court's erroneous test, but if so, the parties can expect additional rounds of remand and reconsideration in the future.

Lastly, should Petitioner reconsider the evidence and approve the Project, the parties still have to address the other issues raised by the underlying petition. Despite Petitioner's confidence in its decision, the trial court may find that some of the Petitioner's findings lack substantial evidence and may remand the matter again for further review.⁴ Even worse, the cycle of litigation was precisely why the Supreme Court limited the admission of extra-record evidence in substantial evidence cases in *WSPA*.

Petitioner respectfully requests that the Court intervene in this process to correct a clear and palpable error by the trial court. Without

⁴ Economy of resources is further reason for the trial court to have held the hearing on the merits before remanding to Petitioner.

intervention through this writ, the issue will evade review by being lost in the complexities of the cycle of remands.

CONCLUSION

For the reasons set forth herein, Petitioner respectfully requests that the Court issue a writ of mandate setting aside the June 17, 2019, Order and requiring the trial court to issue a new order denying the Real Party's Motion to Augment the Record.

DATED: August 16, 2019

Respectfully submitted,

NAPA COUNTY COUNSEL

By: /s/ Jason M. Dooley
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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1))

The text of the Memorandum of Points and Authorities, including footnotes, consists of 5,220 words as counted by the Microsoft Word processing program used to prepare this brief. Including the Petition, the total word count is 7,910 words. The brief is also printed in typeface of 13 points.

DATED: August 16, 2019

Respectfully submitted,

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PROOF OF SERVICE

I, Erin Cossen, declare:

I am a citizen of the United States and employed in Napa County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 1195 Third Street, Suite 301, Napa, California 94559. I am readily familiar with this office’s practice for collection and processing of correspondence for mailing with the United States Postal Service.

On August 16, 2019, I electronically filed via my electronic service address (erin.cossen@countyofnapa.org) the following documents:

Petition for Writ of Mandate, Writ of Prohibition, and/or Other Appropriate Relief; Memorandum of Points and Authorities

Exhibits to Petition for Writ of Mandate, Writ of Prohibition, and/or Other Appropriate Relief (4 Volumes)

with the Clerk of the Court using the Electronic Filing System operated by ImageSoft TrueFiling, which will then send a notification of such filing to the following:

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And I hereby do certify that on August 16, 2019, I personally delivered by hand true and correct copies to the following address:

Clerk of the Superior Court of Napa County
825 Brown Street
Napa, CA 94559
Respondent

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

Executed on August 16, 2019, at Napa, California.

/s/ Erin L. Cossen
Erin L. Cossen

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