

1 Jeffrey M. Brax, Bar No. 218601
Jeffrey.Brax@countyofnapa.org
2 Laura J. Anderson, Bar No. 161372
Laura.Anderson@countyofnapa.org
3 Jason M. Dooley, Bar No. 258570
Jason.Dooley@countyofnapa.org
4 OFFICE OF NAPA COUNTY COUNSEL
1195 Third Street, Room 301
5 Napa, CA 94559-3001
Telephone: 707.253.4521
6 Facsimile: 707.259.8220
Attorneys for Respondents
7 COUNTY OF NAPA and
NAPA COUNTY BOARD OF SUPERVISORS

8
9 Brien F. McMahon, Bar No. 66809
BMcMahon@perkinscoie.com
Jacob E. Aronson, Bar No. 313353
10 JAronson@perkinscoie.com
Michelle W. Chan, Bar No. 281587
11 MWChan@perkinscoie.com
PERKINS COIE LLP
12 505 Howard Street, Suite 1000
San Francisco, CA 94105-3204
13 Telephone: 415.344.7000
Facsimile: 415.344.7050
14 Attorneys for Real Party in Interest
MOUNTAIN PEAK VINEYARDS, LLC and
15 Alleged Real Party in Interest HUA YUAN aka ERIC YUAN

16 SUPERIOR COURT OF THE STATE OF CALIFORNIA

17 COUNTY OF NAPA

18 SODA CANYON GROUP,

19 Petitioner,

20 v.

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

24 Respondents.

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

28 Real Parties in Interest.

Case No.: 17CV001063

**RESPONDENTS AND REAL PARTIES'
RESPONSE TO PETITIONER'S
OPENING BRIEF RE SCOPE OF ATLAS
FIRE EVIDENCE TO BE CONSIDERED
BY RESPONDENT ON REMAND**

[CEQA Matter]

Hearing Date: May 7, 2019
Hearing Time: 8:30 a.m.
Department: C
Judge: Hon. Cynthia P. Smith

Action Filed: September 20, 2017

1 **I. Introduction.**

2 Petitioner Soda Canyon Group’s conclusory one-page opening brief wholly fails to
3 address or demonstrate how any of its proffered post-approval Atlas Fire information constitutes
4 “new evidence of emergent fact” under the two-factor standard that the Court formulated and
5 ordered the parties to brief. As set forth in Respondents and Real Parties’ opening brief on this
6 matter, Petitioner’s proffered post-approval information fails to meet the limited exception for
7 admission of extra-record information under Code of Civil Procedure section 1094.5(e) for
8 relevant evidence that could not have been produced at the County’s hearing on the use permit for
9 the Project.

10 None of the proffered post-approval Atlas Fire information is relevant to challenge the
11 County’s approval of the Project on any basis. The County was only required to consider the
12 record before it when it made findings, adopted the Negative Declaration, and issued the use
13 permit for the Project. Judicial review of the County’s decision is similarly limited to whether the
14 County’s decision was supported by substantial evidence in the record, and should only be
15 overturned if there was no evidence in the record to support its findings. Second-guessing and
16 micromanaging the County’s decision-making contravenes the substantial evidence standard of
17 review and the fundamental principle that extra-record evidence is never relevant or admissible to
18 contradict or question the wisdom of an agency’s determination based on the record before it.

19 As articulated in the opening brief of the County and Mountain Peak, the proffered post-
20 approval extra-record Atlas Fire information does not add any materially different information to
21 what had been produced or could have been produced during the County’s proceedings. Several
22 declarants acknowledged the *absence* of any material difference between the Atlas Fire and
23 previous fires in the subject area—recalling that multiple similar fires have occurred near Soda
24 Canyon (a fact that was considered by the County Board of Supervisors) and that the Atlas Fire
25 was predictable. Declarants’ personal accounts of burning trees blocking the road (a potential
26 consequence of *any* wildfire) and other circumstances that made evacuation difficult, personal
27 feelings, property damage assessments, and hearsay accounts of firefighter opinions also offer no
28 information that is either relevant to the County’s decision or that evidences a characteristic of the

1 Atlas Fire that is materially different from previous fires. In short, none of the post-approval Atlas
2 Fire information is admissible under the Court’s standard.

3 Nor is interlocutory remand authorized under Code of Civil Procedure section 1094.5(e)
4 in this circumstance. Interlocutory remand is proper only where a court has evaluated the merits
5 of the agency’s decision and determined that the agency’s findings are ambiguous or are
6 unsupported by the weight of the evidence, and such deficiency can be corrected through
7 consideration of additional evidence. The Court has made no determination that the County’s
8 findings regarding fire safety issues are not supported by substantial evidence in the record.
9 Indeed, the court determined that the administrative record is “replete with evidence, analysis,
10 discussion, and conclusions relating to the history of fire, and the risk of future fire in the area.”
11 There is no valid basis for remand to reopen and reconsider the County’s Project approval on the
12 basis of the post-approval Atlas Fire information.

13 **II. Petitioner Failed to Demonstrate How Any of its Proffered Post-Approval Evidence**
14 **Meets the Court’s Standard for New Evidence of Emergent Fact.**

15 Petitioner failed to address the only issue on which the Court ordered supplemental
16 briefing: *which* of Petitioner’s proffered post-approval evidence (if any) shows a characteristic of
17 the Atlas Fire that is both (a) relevant to the County’s decision on Mountain Peak’s use permit
18 application, and (b) not exhibited by or materially different from characteristics exhibited by
19 previous fires in the area. Petitioner’s opening brief contained a single conclusory sentence
20 regarding the relevance of its proffered evidence. Petitioner’s opening brief did not offer *any*
21 argument how its proffered evidence satisfies the second factor of the Court’s standard. For that
22 reason alone, the Court should not order remand.

23 **III. Petitioner’s Post-Approval Evidence Does Not Meet the Court’s Standard for New**
24 **Evidence of Emergent Fact.**

25 **A. Post-Approval Information Is Not Relevant Because the Standard of Review**
26 **Is Limited to the Evidence in the Record Before the County at the Time of its**
27 **Decision.**

28 As discussed in the opening brief of the County and Mountain Peak, post-approval
information regarding the Atlas Fire is not relevant to the County’s decision on Mountain Peak’s
use permit application because the County’s (and the Court’s) review is limited to the evidence in

1 the record at the time of Project approval. The same substantial evidence standard applies to the
2 County's adoption of the Negative Declaration, the County's determination that the Project is
3 consistent with the General Plan, and the County's determination that the Project will not
4 adversely affect the public health, safety, or welfare. (*Compare* Pub. Res. Code § 21080(c)
5 ("substantial evidence, in light of the whole record before the lead agency") with Code Civ. Proc.
6 § 1094.5(c) ("substantial evidence in the light of the whole record"); see *Western States*
7 *Petroleum Ass'n v. Superior Court* (1995) 9 Cal. 4th 559, 574.) The limited exception for
8 consideration of extra-record evidence under Code of Civil Procedure section 1094.5(e) cannot be
9 applied in a manner that contravenes the substantial evidence standard of review. "Extra-record
10 evidence can never be admitted merely to contradict the evidence the administrative agency relied
11 on in making a quasi-legislative decision or to raise a question regarding the wisdom of that
12 decision." (*Western States Petroleum*, 9 Cal. 4th at 579.) The same underlying principles apply in
13 administrative mandamus actions. (*Cadiz Land Co., Inc. v. Rail Cycle, L.P.* (2000) 83 Cal. App.
14 4th 74, 120.)

15 Petitioner's proffered extra-record evidence was only submitted to second-guess the
16 wisdom of the County's decision on Mountain Peak's use permit application.¹ There is no
17 denying that the County considered fire safety and the likelihood of future fires in the area, and
18 still made findings necessary to approve the Project. Thus, the only purpose of the extra-record
19 Atlas Fire evidence would be to contradict the County's findings. Therefore, whether or not the
20 proffered evidence is admitted, the Court would be required to determine whether substantial
21 evidence exists in the record to support the findings. If such evidence exists, the Court cannot
22 overturn the County's decision because other evidence, whether in the record or not, might lead to
23 a different policy decision.

24
25
26 ¹ In its opening brief, Petitioner asserts only that its proffered post-approval Atlas Fire evidence is
27 relevant because it contradicts the County's findings regarding fire risk and the evidence in the
28 record on which the County relied. (Pet'r's Opening Br. at 2:1-3 ("all of this evidence is highly
relevant and must be presented to the County on remand because it directly refutes the County's
findings of fact and legitimizes SCG members' fire-related concerns").)

1 **B. The Post-Approval Evidence Does Not Demonstrate a Characteristic of the**
2 **Atlas Fire that Was Different from Previous Fires.**

3 There is no evidence that the Atlas Fire demonstrated a characteristic that was not
4 exhibited by or is materially different from previous fires. The County recognized and expressly
5 considered the risk of fire when it approved the Negative Declaration and use permit for the
6 Project. The Court’s February 22, 2019, Order expressly acknowledged that “[t]he Administrative
7 Record is replete with evidence, analysis, discussion, and conclusions relating to the history of
8 fire, and the risk of future fire in the area.” (Order at 9.) In fact, Petitioner’s own proffered extra-
9 record information demonstrates that fires have occurred in the vicinity of Soda Canyon over the
10 previous century and are likely to occur in the future. (*See, e.g.*, Arger Declaration, Ex. 5 (maps
11 of historic fires); Grupp Declaration ¶ 17 (“I wish I could say that the 2017 Atlas Fire was
12 unpredictable and that a similar fire will likely never happen again in the future. Unfortunately,
13 that is not the case. As I outlined for both the Napa County Planning Commission and the Napa
14 County Board of Supervisors [], Soda Canyon Road is located in a “very high fire hazard
15 severity” zone as designated by CalFire—the worst severity rating on the scale. The Soda Canyon
16 area has suffered numerous, largescale and devastating wildfires dating back to the 1860s . . .”);
17 Hallett Declaration ¶ 8 (“Living in the beautiful, but extremely high-fire danger area of Soda
18 Canyon Road compelled us to create two short lists of items of what to grab in the event of an
19 emergency.”); Schreuder Declaration ¶ 4 (“Our family’s home burned to the ground in the 1981
20 Atlas Peak Fire. We are keenly aware of the fire dangers that exist on Soda Canyon Road.”).)

21 Petitioner has not met its burden to demonstrate that *any* of its post-approval information
22 meets the Court’s standard for new evidence of emergent fact. Accordingly, none of the proffered
23 post-approval evidence should be considered by the County, and remand is unwarranted.

24 **IV. Interlocutory Remand for Reconsideration in Light of Post-Approval Extra-Record**
25 **Evidence Is Not Appropriate.**

26 An interlocutory remand in a case brought under Code of Civil Procedure section 1094.5
27 is not appropriate before the Court has considered the merits of the petition for writ of mandate
28 and determined that the agency’s findings or the evidence in the record supporting its findings are
lacking. An interlocutory remand is only appropriate after the Court has determined either that (1)

1 a finding made by the agency is ambiguous, and the agency may be able to clarify the finding on
2 remand (*Rapid Transit Advocates, Inc. v. S. Cal. Rapid Transit Dist.* (1986) 185 Cal. App. 3d
3 996, 1002–03), or (2) the agency’s decision is not sufficiently supported by evidence in the
4 record, and the agency should be allowed to consider additional evidence to fill the gap in the
5 evidence (*Voices of the Wetlands v. State Water Res. Control Bd.* (2011) 52 Cal. 4th 499, 526,
6 531–32).

7 The Court has not found that the County’s findings regarding fire safety are ambiguous or
8 are unsupported by substantial evidence in the record. On the contrary, the Court found that the
9 administrative record was “replete” with evidence, analysis, discussion, and conclusions
10 regarding fire safety and hazards. Interlocutory remand is therefore improper.

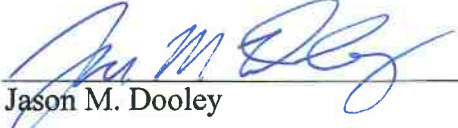
11 **V. Conclusion.**

12 Petitioner has failed to demonstrate that any of its proffered post-approval Atlas Fire
13 evidence satisfies the Court’s two- part standard for new evidence of emergent fact or the limited
14 exception under Code of Civil Procedure section 1094.5(e) for relevant extra-record evidence that
15 could not have been presented at the hearing. The post-approval information is not relevant under
16 the substantial evidence standard of review that applies to the County’s decision. None of
17 Petitioner’s proffered post-approval evidence shows any characteristic of the Atlas Fire that is
18 materially different from previous fires in the area or contains any information that could not have
19 been presented at the time of the County’s hearing on the Project. Interlocutory remand is not
20 appropriate and should be denied.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED: April 19, 2019

NAPA COUNTY COUNSEL

By: 
Jason M. Dooley

Attorneys for Respondents
COUNTY OF NAPA and
NAPA COUNTY BOARD OF
SUPERVISORS

DATED: April 19, 2019

PERKINS COIE LLP

By: 
Brien F. McMahon

Attorneys for Real Party in Interest
MOUNTAIN PEAK VINEYARD, LLC and
Alleged Real Parties in Interest
HUA YUAN aka ERIC YUAN

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

I, Cathy Kisler Caravantes, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action or proceeding. My business address is 1195 Third Street, Suite 301, Napa, California 94559. On the date indicated below, I served the within document(s);

**RESPONDENTS AND REAL PARTIES' RESPONSE TO PETITIONER'S
OPENING BRIEF RE SCOPE OF ATLAS FIRE EVIDENCE TO BE
CONSIDERED BY RESPONDENT ON REMAND**

- by placing, or causing to be placed, the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Napa County, California, addressed as set forth below.
- by placing, or causing to be placed, a true copy thereof enclosed in a sealed envelope, by **registered or certified mail, return receipt requested**, with postage thereon fully prepaid, in the United States mail at Napa County, California, addressed as set forth below.
- by transmitting via e-mail or electronic transmission to the person(s) at the e-mail address(es) set forth below on this date before 5:00 p.m.

Mark R. Wolfe
John H. Farrow
M. R. WOLFE & ASSOCIATES, P.C.
555 Sutter Street, Suite 405
San Francisco, CA 94102
mrw@mrwolfeassociates.com

Anthony G. Arger
ROBERTSON, JOHNSON, MILLER &
WILLIAMSON
50 West Liberty Street, Suite 600
Reno, NV 89501
anthony@nvlawyers.com
aargerlaw@gmail.com

Brien F. McMahon
PERKINS COIE LLP
505 Howard Street
San Francisco, CA 94105
BMcMahon@perkinscoie.com

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on April 19, 2019, at Napa, California.



Cathy Kisler Caravantes