Case No. A158071
Related Writ Petition: Case No. A158076
Related Writ Petition: Case No. A156816 (Denied 4/11/2019)
Related Appeal: Case No. A158130

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

MOUNTAIN PEAK VINEYARDS, LLC
Petitioner (Real Party in Interest in Superior Court);

HUA "ERIC" YUAN,
Petitioner (Real Party in Interest in Superior Court);
v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF NAPA,
Respondent;

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

COUNTY OF NAPA; NAPA COUNTY BOARD OF SUPERVISORS,
Real Parties in Interest (Respondents in Superior Court)

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

PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE, PROHIBITION, ETC.

MARK R. WOLFE (SBN 176753)*
M. R. WOLFE & ASSOCIATES, P.C.
555 Sutter Street, Suite 405
San Francisco, CA 94102
Tel: (415) 369-9400
mrw@mrwolfeassociates.com

ANTHONY G. ARGER (SBN 304483)
ROBERTSON, JOHNSON, MILLER & WILLIAMSON
50 West Liberty Street, Suite 600
Reno, NV 89501
Tel: (775) 329-5600
anthony@nvlawyers.com

Attorneys for Real Party In Interest SODA CANYON GROUP

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 23, 2019

M. R. WOLFE & ASSOCIATES, P.C.

By: _____

Mark R. Wolfe
Attorney for Real Party In Interest
Soda Canyon Group

REAL PARTY IN INTEREST SODA CANYON GROUP'S PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE, PROHIBITION, ETC.

Pursuant to California Rules of Court Rule 8.487(a), Real Party In Interest Soda Canyon Group (SCG), the petitioner below, submits its preliminary opposition to the County of Napa and Napa County Board of Supervisors (County)'s and Mountain Peak Vineyards, LLC, et al. (Mountain Peak)'s (collectively "Petitioners"), separate Petitions for Writ of Mandate, Prohibition or Other Appropriate Relief (Petition), filed August 16, 2019.[1]

INTRODUCTORY STATEMENT

As the court is aware, in March, 2019 Petitioners filed a joint Petition for Writ of Mandate, etc., challenging the trial court's February 22 order granting SCG's motion to augment the administrative record with evidence relating to the evacuation efforts, property destruction, and loss of life along Soda Canyon Road from the 2017 Atlas Fire in Napa County, and remanding the underlying matter to the County's Board of Supervisors to reconsider its approval of MPV's winery project (Project) on Soda Canyon Road in light of this evidence. The earlier Petition raised nearly identical arguments to those in this new iteration. This court summarily denied the Petition on April 11, 2019. Petitioners now present essentially the same Petition under different packaging.

[1] SCG has filed the same Preliminary Opposition in the related Petition filed by the County of Napa and its Board of Supervisors (No. A158076).

Petitioners claim much has changed since this court's April, 2019 summary dismissal, and that the case now occupies a "materially different procedural posture" than it did before. In fact, virtually nothing has changed with respect to the case since April. Although the trial court's February 22 remand order directed the parties to submit additional briefs addressing the scope of the evidence that the Board would need to consider, and set a later hearing on that issue, the substance and reasoning of its remand order was final and conclusive, as the March, 2019 Petition challenging it acknowledged.

Following a hearing on the scope of evidence on remand, during which the County and MPV exhaustively re-argued their claims that remand was improperly, the trial court on June 17 issued the order that Petitioners now challenge. Although it went somewhat further than its predecessor in discussing case authority supporting its action, that order did not extend, modify, or alter in any substantive fashion the remand directive or its underlying reasoning. In other words, the only difference in the case's "procedural posture" today as opposed to April, 2019, is that the trial court has narrowed the scope of evidence to be remanded so as to include only "new evidence of emergent fact" that is both relevant and not duplicative of other evidence already in the record.

I. The case is in precisely the same "procedural posture" as when this court summarily denied the previous Petition, and there are no new materially facts or arguments raised in the current Petition that warrant a different result.

As discussed below, there is simply nothing "materially different," procedurally or legally, between the trial court's February, 2019 remand order and the current order narrowing the scope of that remand. There is likewise nothing materially different between the arguments Petitioners raised in their March, 2019 Petition and those they proffer now. This court should summarily dismiss both the County's and MPV's current Petitions just as it did previously. SCG begins with a restatement of the relevant facts and procedural history.

During the County's administrative review of Mountain Peak's winery (Project) application, several parties testified that the Project's remote location in a dry, wooded, fire-prone hillside area, accessible only via Soda Canyon Road, a narrow, winding, highly deteriorated dead-end thoroughfare with a long history of traffic accidents, would make evacuating the area extremely difficult in the event of a fire, thus creating an undue fire safety risk. The Board of Supervisors disregarded this testimony and approved the Project based in part on the following finding of fact:

> In the event of a fire that results in mass evacuations from this area, [Soda Canyon Road] has sufficient capacity and roadway width to accommodate all outgoing traffic while allowing incoming fire response units.

See Exhibits to County's Petition ("Exhibits"), Vol 1, p. 000017-000018.

Two months later, the Atlas Fire occurred. It was one of the worst fires in the Napa County history. It completely destroyed 118 of the 163 homes on Soda Canyon Road, substantially damaged 16 others, and even burned a portion of the Project site. *See* Exhibits, Vol. 2, p. 000364.[2] The fire also killed two people who lived in one of the homes before they could evacuate. *Id.* As the fire spread, Soda Canyon Road soon became blocked by burning trees and debris, rending it completely impassable by automobile. *Id.* Approximately 20 people were trapped in their cars behind a downed, burning tree as the fire closed in around them. *Id.* As a result, they and others totaling 45 individuals living towards to the end of the dead-end road – including the area immediately adjacent to the Mountain Peak project site – were forced to evacuate by helicopter. *See* Exhibits, Vol. 2, p. 000365. Needless to say, the Atlas Fire showed that the County's factual finding regarding the capacity of Soda Canyon Road was uncontrovertibly false.

[2] Although MPV suggests (MPV Pet. at p. 21), and the County outright states (County Pet. at p. 11), that the Project site did not burn in the fire, photographic evidence admitted by the trial court plainly shows a portion of the site near its entrance off Soda Canyon Road did in fact burn. *See* Photos, Exhibits, Vol. 3, pp. 000668-000671.

Meanwhile, SCG had filed its petition for writ of administrative mandate under C.C.P. § 1094.5 challenging the County's approval. The petition included claims under the California Environmental Quality Act (CEQA) that the County had unlawfully failed to prepare and environmental impact report before approving Mountain Peak's project. The petition also included separate claims that the project was inconsistent with the County's General Plan, and that the County's findings of fact in approving the project – including the fire safety finding quoted above – were not supported by substantial evidence. *See* Exhibits, Vol. 2, p. 000352-000353.

SCG later filed its Motion to Augment the Administrative Record with evidence of the Atlas Fire, the resulting impassibility of Soda Canyon Road, and the subsequent need to evacuate the Project area by helicopter. The trial court granted the motion in part, and ordered the matter remanded to the County to consider "new evidence of emergent facts" relating to the fire, relying on C.C.P. § 1094.5(e), *Ft. Mojave Indian Tribe v. Dept. of Health Svcs.* (1995) 38 Cal.App.4th 1574, 1593-1595, and *Windigo Mills v. Unemployment Ins. Appeals Bd.* (1979) 92 Cal.App.3d 586, 596-597 ("[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"). *See* Order, Exhibits, Vol. 3, p. 000870. The trial court noted, however, that not all the evidence in SCG's motion would necessarily constitute "new evidence of emergent facts." It ordered the parties to submit briefs addressing the scope of the evidence the County must consider on remand, and set a further hearing.

In the briefing that followed, and again at the hearing, both the County and MPV repeated the same arguments raised in their opposition to SCG's motion to augment the record, namely that remand to consider the Atlas Fire evidence was improper. Exhibits, Vol. 4, pp. 000877-000884. After hearing these arguments again, the trial court issued its June 17 order. Exhibits, Vol. 4, p. 001004 *ff.* Although the order went somewhat further than its February 22 predecessor in addressing the question of the timing of the remand (i.e., whether the court was required to hear the merits of SCG's writ petition before remanding the new evidence to the Board), it did not modify or amend its primary reasoning or ultimate holding in any material way. *Id.,* p. 001005.

To the contrary, the June 17 order cited and relied on the same case authority as its predecessor, namely *Voices of the Wetlands v. State Water Resources Control Board* (2011) 52 Cal.4th 499 (interlocutory remand prior to final merits judgment within trial court's discretion); *Windigo Mills v. Unemployment Ins. Appeals Bd.* (1979) 92 Cal.App.3d 586 (trial court may consider new, post-

decision evidence in administrative mandamus case under CCP § 1094.5(e)); and *Fort Mojave Indian Tribe v. Dept. of Health Services* (1995) 38 Cal.App.4th 1574 (no categorical bar to admitting newly produced, extra-record evidence in administrative mandamus cases). Exhibits, Vol. 4, p. 001005-001007.

In other words, the trial court twice rejected, in thorough, well-reasoned orders, Petitioners' arguments that remand to the County to consider the Atlas Fire evidence was impermissible under C.C.P section 1094.5(e). This court has already done so once. Petitioners are seeking a fourth bite at the same apple, consuming judicial resources unnecessarily in the process.

II. The Trial Court acted well within its discretion, and Petitioners have shown no prejudicial error.

Petitioners characterize *Western States Petroleum Ass'n v. Superior Court* (1995) 9 Cal.4th 559 and cases following it as establishing a bright-line rule that post-decision evidence may never be admitted and considered in administrative mandamus cases that do not involve "fundamental rights" or are otherwise judicially reviewed under the substantial evidence standard. Although the circumstances where admitting such evidence may well be narrow, clearly no such bright-line rule exists. To the contrary, the cases all envision limited circumstances under which it is not only permissible but appropriate to remand cases to administrative agencies to consider post-decision information that is

"truly new evidence of emergent facts." *Fort Mojave, supra,* 38 Cal.App.4th at 1595. Indeed, the Supreme Court in *Western States* expressly stated: "we do not foreclose the possibility that extra-record evidence may be admissible in traditional mandamus actions challenging quasi-legislative administrative decisions under unusual circumstances or for very limited purposes not presented in the case now before us." 9 Cal.4th at p. 578; *see Fort Mojave, supra,* 38 Cal.App.4th at p. 1595 (extending this reasoning to administrative mandamus actions challenging quasi-adjudicative decisions).

In *Cadiz Land Company v. Rail Cycle, LP* (2000) 83 Cal.App.4th 74, the court affirmed the reasoning of *Fort Mojave*, explaining:

> The *Fort Mojave* court noted that subdivision (e) of Code of Civil Procedure section 1094.5 opens a narrow, discretionary window for additional evidence, newly discovered after the [administrative] hearing (or improperly excluded at it) .... [¶] Remand under Code of Civil Procedure section 1094.5, subdivision (e) for consideration of postdecision evidence generally has been limited to truly new evidence, of emergent facts. The leading case [(*Windigo Mills v. Unemployment Ins. Appeals Bd.* (1979) 92 Cal.App.3d 586, 596-597)] endorsing the use of newly created evidence under the statute adverted to mandamus's traditional function of achieving justice, and then concluded that by 'the enactment of subdivision (e),' ... it reasonably may be inferred that [the Legislature] meant to authorize the receipt of evidence of events which took place after the administrative hearing.' [Citations.]
> [¶]
> The *Fort Mojave* court further explained that the reason for narrowly limiting exceptions to the general rule of excluding evidence outside the administrative record is <u>because routine allowance of conflicting scientific opinions created after an administrative decision would pose a threat of repeated rounds of litigation, and uncertain, attenuated finality</u>. [Citations.]
> [¶]

> While we recognize *Western States* and the instant case differ because Western States involved a traditional mandamus quasi-legislative action and the instant case is an administrative mandamus quasi-judicial action, this is a distinction without a difference. [Citations.] Regardless of whether common law principles under *Western States* apply or the action is subject to Code of Civil Procedure section 1094.5, subdivision (e), the underlying principles in determining whether extra-record evidence is admissible are essentially the same.

Cadiz Land Co. Inc. v. Rail Cycle, LP (2000), 83 Cal.App.4th 74, 120, underline added.

Thus, *Western States, Fort Mojave,* and *Cadiz* all stand for the proposition that while trial courts should not blindly admit post-decision evidence in administrative mandamus cases, particularly post hoc expert opinions or reports, there may be circumstances that open "a narrow discretionary window" for admitting "truly new, emergent facts."

And if ever there were a case opening such a narrow window, this is that case. The crux of the current dispute is the Board of Supervisors' factual finding that Soda Canyon Road "has sufficient capacity and roadway width to accommodate all outgoing traffic while allowing incoming fire response units" in the event of a fire that requires mass evacuations. The Board approved the Project based in material part on this very finding, which was predicated not on facts but on the blithe opinions of County staff and MPV's consultants. The Atlas Fire proved those opinions and this finding to be absolutely, categorically, irrefutably false in the gravest sense. Two lives were lost, dozens of homes were destroyed,

and a portion of the Project site itself burned. For the County to argue now that the trial court abused its discretion by admitting information so utterly contradicting a finding affecting human life and property is as disingenuous as it is callous. It is also simply wrong as a matter of law under the cases cited above.

III. The trial court's interlocutory remand order was proper.

Contrary to Petitioners' arguments, the trial court's order does not impermissibly "reopen" the entire approval proceeding or otherwise undermine principles of "finality." The order constitutes a plainly authorized interlocutory remand to the County for the limited purpose of considering new, emergent facts about the Atlas Fire that directly contradict the County's unsupported findings regarding fire-safety. The County's approvals are by no means "final" in any legally operative sense, as they have been timely challenged as unlawful in litigation that is actively pending. The trial court's order is analogous to the interlocutory remand order upheld by the Supreme Court in *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499 ("when a court has properly remanded for agency reconsideration on grounds that all, or part, of the original administrative decision has insufficient support in the record developed before the agency, [section 1094.5(e)] does not preclude the agency from accepting and considering additional evidence to fill the gap the court has identified"); *see also Ft. Mojave, supra,* 38 Cal.App.4th at pp. 1593-1595.

IV. Urgent, extraordinary relief is neither necessary nor appropriate.

Finally, it is possible that the Board of Supervisors' final decision after considering the new evidence on remand will favor Mountain Peak. The Board may re-approve the project unchanged despite the new evidence; re-approve the project after adding new conditions or mitigation measures to address fire safety; or deny it. The record of the Board's future action will necessarily return to the trial court for briefing and argument, and any decision by the trial court may then be properly brought before the Court of Appeal. It is therefore premature and unnecessary for the Court of Appeal to intervene in the matter now, given the incompleteness of the record and the uncertainty of the final outcomes at both the administrative and trial court levels.

CONCLUSION

For the foregoing reasons, SCG respectfully requests the Court of Appeal to SUMMARILY DENY the current Petition.

Dated: August 23, 2019

Respectfully submitted,

M. R. WOLFE & ASSOCIATES, P.C.

Mark R. Wolfe
Attorney for Petitioner/Real Party In Interest SODA CANYON GROUP

CERTIFICATION OF WORD COUNT

I, Mark R. Wolfe, declare:

In accordance with Rule 8.204(c)(1) of the California Rules of Court, I hereby certify that the length of this brief, excluding tables, as calculated by the word processing software with which it was produced, is **2,448** words.

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

Dated: August 23, 2019 By: _____

Mark R. Wolfe