TENTATIVE RULINGS

FOR: February 1, 2019

The Court may exercise its discretion to **disregard** a late filed paper in law and motion matters. (Cal. Rules of Court, rule 3.1300(d).)

Unlawful Detainer Cases – Pursuant to the restrictions in Code of Civil Procedure section 1161.2, no tentative rulings are posted for unlawful detainer cases and appearances are required.

Court Reporting Services – The Court does not provide official court reporters in proceedings for which such services are not legally mandated. Parties are responsible for either making the appropriate request in advance or arranging for their own private court reporter. Go to http://napacountybar.org/court-reporting-services/ for information about local private court reporters. Attorneys or parties must confer with each other to avoid having more than one court reporter present for the same hearing.

PROBATE CALENDAR – Hon. Victoria Wood, Dept. A (Historic Courthouse) at 8:30 a.m.

Estate of Jeannette Rose Scicchitano **18PR000272**

PETITION FOR LETTERS OF ADMINISTRATION AND AUTHORIZATION TO ADMINISTER UNDER THE INDEPENDENT ADMINISTRATION OF ESTATES ACT

TENTATIVE RULING: There is no proof of publication on file. If a proper proof of publication is filed prior to the hearing, the petition will be GRANTED. Petitioner also needs to file the proposed order (Judicial Council form DE-140) and letters (DE-150) conforming to the petition. If the proof of publication is not filed before or at the hearing, the petition will be DENIED without prejudice.

Conservatorship of Preston Domingos **18PR000281**

AMENDED PETITION FOR APPOINTMENT OF PROBATE CONSERVATOR OF THE PERSON – LIMITED CONSERVATORSHIP

APPEARANCE REQUIRED. The proposed co-conservator, Paula Gragg, shall appear. She did not sign the amended petition. The proposed co-conservators shall file the proposed order and letters conforming to the amended petition.

Conservatorship of Stanley L. Price **26-65972**

THIRD AND FINAL ACCOUNT AND REPORT OF CONSERVATOR, AND PETITION FOR ALLOWANCE OF COMPENSATION FOR CONSERVATOR'S SERVICES AND FOR ATTORNEY'S FEES, DISCHARGE OF CONSERVATOR OF THE ESTATE AND DELIVERY OF ASSETS

TENTATIVE RULING: The matter is continued to February 22, 2019, at 8:30 a.m. in Dept. A. The proof of service is deficient as it references the second accounting. Further, there is no attorney or conservator declaration supporting the fees requested. The petition, with the supporting declarations, need to be reserved. The conservator shall file the declarations and a proper proof of service.

CIVIL LAW & MOTION CALENDAR – Hon. Victoria Wood, Dept. A (Historic Courthouse) at 8:30 a.m.

NCC Venture I, LLC v. Northern California Carpenters Regional Council and its Affiliated Unions, et. al. **18CV001415**

(1) PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

TENTATIVE RULING: The matter is continued to February 21, 2019, at 8:30 a.m. in Dept. A. Plaintiff has not complied with Local Rule 3.3. Plaintiff is directed to provide courtesy copies of e-filed documents not later than February 8, 2019.

(2) DEFENDANT'S MOTION TO COMPEL ARBITRATION, APPOINTMENT OF ARBITRATOR AND PETITION FOR STAY

TENTATIVE RULING: The matter is continued to February 21, 2019, at 8:30 a.m. in Dept. A. Plaintiff has not complied with Local Rule 3.3. Plaintiff is directed to provide courtesy copies of e-filed documents not later than February 8, 2019.

CIVIL LAW & MOTION CALENDAR – Hon. Cynthia Smith, Dept. C (Historic Courthouse) at 8:30 a.m.

Soda Canyon Group vs. County of Napa, et al. **17CV001063**

(1) 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.

TENTATIVE RULING: Respondent's and Real Parties in Interest's motion to strike portions of Petitioner's reply in support of its motion to augment the administrative record and the declaration of Anthony G. Arger in its entirety 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 subject to the present motion 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.

(2) MOTION TO AUGMENT THE ADMINISTRATIVE RECORD

TENTATIVE RULING: APPEARANCE REQUIRED in part and GRANTED in part.

The motion 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 the California Environmental Quality Act (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 (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 (Supplemental Reports) includes materials that were submitted to the County after the Planning Commission Hearing but before the Board of Supervisor's decision: 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 (New Evidence) involves evidence relating to the October 2017 Atlas Fire.

<u>The Supplemental Reports.</u>

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).) It argues 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. However, it is unclear to the Court what standard of review the Board exercised in reviewing 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).) That the board "shall exercise its independent judgment" and "may modify the decision being appealed" suggests to the Court that pursuant to Napa County Code, every appeal effectively involves what is thought of in the judiciary as a "de novo review."

For the foregoing reasons, the Court orders counsel to appear at the hearing prepared to address this issue.

New 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*.) Based on this holding in *Fort Mojave,* the Court declines to extend the holding of *Western States* to the present action.

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 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.)

The Court finds that the New Evidence contains truly new evidence of events that took place after the administrative agency's decision.[1]

Furthermore, the Court finds that this evidence is relevant. In making its decision on appeal, the Board made the following findings: "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. In addition, 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). Significant portions of the evidence in the New Evidence is directly relevant to these two findings.

For the foregoing reasons, Petitioner's motion to augment the administrative record is GRANTED WITH RESPECT TO THE NEW EVIDENCE and the matter is remanded to Respondent Napa County with direction to conduct a supplemental hearing on the matter in light of the New Evidence. The Court will determine whether this supplemental hearing shall include the Supplemental Reports, or any of them, at or following hearing on February 1, 2019.

The Court sets an OSC: Re Dismissal of the present action for Thursday, March, 14, 2019, at 8:30 a.m. in Dept. C.

[1] The Court notes the possibility that portions of the New Evidence may be the type of statement or restatement of opinion at issued in *Fort Mojave*, rather than true evidence. Counsel should be prepared to address this issue at oral argument.