TENTATIVE RULINGS

FOR: November 2, 2018

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.

CIVIL LAW & MOTION CALENDAR – Hon. Rodney Stone, Dept. H (Criminal Courts Bldg.-1111 Third St.) at 1:30 p.m.

Margaret Jake O'Kelly v. Mariah Bryant, et al. **17CV000345**

MOTION TO TAX COSTS

TENTATIVE RULING: Defendant Mariah Bryant moves to tax costs in the amount of $38,577.66 by reducing deposition costs (item 4), witness fees (item 8), models, enlargements, and exhibits (item 12), fees for electronic filing or service (item 14), and fees for hotels, mileage, and gas and groceries (item 16). At the outset, plaintiff Margaret Jake O'Kelly withdraws $6.45 for unwarranted travel costs for Erin Bigler, Ph.D, and $550 for Richard Olcese, Psy.D. A tax of costs is warranted in the amount of $556.45.

A. Deposition Costs (Item 4)

Bryant argues the $5,426.45 in depositions costs are unrecoverable. Bryant challenges the $120 fee charged for an employee from plaintiff's attorney's firm to use a video camera during Bryant's deposition, and the $4,580 costs for taking the depositions of Elaine Serina, Ph.D., Bruce Adornato, M.D., Jerome Barakos, M.D., Joanna Berg, Ph.D, and Michael Diliberto.[1] The costs associated with taking and video recording the deposition is recoverable. (Code Civ. Proc.,§ 1033.5, subd. (a)(3).) Even if not permitted, the costs were reasonably necessary to the conduct of the litigation. (*Id.*, § 1033.5, subd. (c)(2).) Each expert was deposed, and the taking of necessary depositions is recoverable. (*Id.*, § 1033.5, subd. (a)(3).) The costs appear reasonable. Bryant otherwise has not shown the costs were not reasonable or necessary.

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[1] Bryant no longer challenges the $90 paid for copies of records from Kaiser Permanente – Radiology and $450. (Reply at p. 1:25-28.)

(See *Ladas v. Cal. State Auto. Ass'n* (1993) 19 Cal.App.4th 761, 774.) A tax of costs is not warranted.

B. Witness Fees (Item 8)

Bryant contends fees for experts who did not testify are unrecoverable, there is no explanation to support expert witness costs, there is no invoice to prove Bigler's fee of $3,300, post-trial testimony work by Richard Latchaw, M.D., is not recoverable, and the expert fees charged are excessive. The contentions fail. Expert fees are recoverable due to the section 998 offer. (See *Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1264 [the determination of whether a section 998 offer was reasonable and made in good faith is within the Court's discretion]; *Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 700 ["Where, as here, the offeror obtains a judgment more favorable than its offer, the judgment constitutes prima facie evidence showing the offer was reasonable and the offeror is eligible for costs as specified in section 998."]; *Jones, supra*, 63 Cal.App.4th at p. 1264 ["We are not obliged to ignore the reality that respondent prevailed at trial. In fact, the trial result itself constitutes prima facie evidence that the offer was reasonable, and the burden of proving an abuse of discretion is on appellants, as offerees, to prove otherwise."].) Costs are recoverable for Hayes & Associates and Principia Engineering. Case law provides that section 998 "covers the cost of experts who aid in the preparation of the case for trial, even if they do not actually testify." (*Santantonio v. Westinghouse Broad. Co., Inc.* (1994) 25 Cal.App.4th 102, 124.) Plaintiff submitted Bigler's retainer fee agreement. The Court will not reduce the fees as they appear reasonable and necessary.

C. Models, Enlargements, and Exhibits (Item 12)

Bryant avers the costs for models, enlargements, and exhibits are excessive. The materials are permissible under the code. (See Code Civ. Proc., § 1033.5, subd. (a)(13) [permitting costs for blow-ups if they were reasonably helpful to aid the trier of fact].) The materials allowed the jury, as the trier of fact, to understand the case. The Court will not tax these costs as excessive as they appear reasonable and necessary. (Code Civ. Proc., § 1033.5, subd. (c)(4).) A tax of costs is not warranted.

D. Fees for Electronic Filing or Service (Item 14)

Bryant maintains plaintiff is not entitled to recover $933.50 for using a delivery service to file court documents under Code of Civil Procedure section 1033.5. No specific pin citation is identified, and the argument is not fully developed. The Court is not required to make arguments for a party. (*Paterno v. State of Cal.* (1999) 74 Cal.App.4th 68, 106.) The Court can deem an argument waived if it is not supported by analysis or argument. (*Employers Mut. Cas. Co. v. Philadelphia Indem. Ins. Co.* (2008) 169 Cal.App.4th 340, 349-50.)

E. Fees for Hotels, Mileage, Gas, and Groceries (Item 16)

Bryant argues $12,595.52 for hotel costs for attorneys, experts, and witnesses were not reasonably necessary plus $310.90 for transportation costs. Staying in Napa allowed counsel and

witnesses to prepare for trial instead of commuting and sitting in traffic. The costs are reasonable and necessary. (Code Civ. Proc., § 1033.5, subd. (c)(4).) A tax of costs is not warranted.

F. Conclusion

Bryant's motion to tax costs is GRANTED IN PART AND DENIED IN PART. The motion is granted in the amount of $556.45. The motion otherwise is denied.

PROBATE CALENDAR – Hon. Diane Price, Dept. I (Criminal Courts Bldg.-1111 Third St.) at 2:00 p.m.

Conservatorship of Maria Elena Garcia **26-63808**

PETITION FOR MEDICAL TREATMENT OF CONSERVATEE

APPEARANCE REQUIRED

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

SECOND ACCOUNT AND REPORT OF CONSERVATOR, AND PETITION FOR ALLOWANCE OF COMPENSATION FOR CONSERVATOR'S SERVICES AND FOR ATTORNEY'S FEES

TENTATIVE RULING: GRANT petition, including fees as prayed. The conservatee passed away on March 24, 2018. The matter is set for a final accounting and termination of the conservatorship on February 1, 2019, at 2:00 p.m. in Dept. I. If the conservator is not able to move forward with a final accounting at that date (due to the sale of the Texas property, etc.), he shall file a status update and request a continuance. The clerk is directed to send notice to the parties.

CIVIL LAW & MOTION CALENDAR – Hon. Diane Price, Dept. I (Criminal Courts Bldg.-1111 Third St.) at 2:00 p.m.

RR Health Inc. v. BaseHealth, Inc. **18CV000435**

MOTION FOR SANCTIONS AGAINST PLAINTIFF RR HEALTH INC. AND SMITH DOLLAR PC PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 128.7

TENTATIVE RULING: Defendant BaseHealth, Inc's motion for sanctions against plaintiff RR Health Inc., attorney Diane Aqui, and Smith Dollar PC pursuant to Code of Civil Procedure section 128.7 on the ground certain allegations in the complaint are devoid of evidentiary support as "proven" by the "undisputed evidence" provided to plaintiff's attorneys is

DENIED as not code-compliant. According to the proof of service, the motion was personally served on October 11, 2018. There is no evidence defendant complied with the safe harbor provision prior to filing the motion on October 11, 2018. (Code Civ. Proc., § 128.7, subd. (c)(1).)

In addition, defendant did not support its request for monetary sanctions to allow the Court to apply the lodestar. Defendant attempted to remedy the deficiency by filing the supplemental Sakaguchi declaration on October 26, 2018. Indeed, the supplemental declaration *still* does not allow a proper determination of the lodestar. In any event, not only does this late filing violate the "safe harbor" provision, but the supplemental declaration is improper new evidence. The Court sua sponte strikes the supplemental declaration as the evidence should have been filed with the original papers. (*Id*., § 436.)

The Court has not reached the merits of the motion, but it appears there is support for the challenged provisions in the complaint. Although plaintiff incurred attorney's fees opposing this motion, the Court elects, at this time, not to impose monetary sanctions against defendant's counsel for filing a procedurally deficient motion. (*Id*., § 128.7, subd. (h).) The Court disfavors such motions – especially when they attack opposing counsel – unless there is a filing that clearly is frivolous.

CIVIL LAW & MOTION CALENDAR – Hon. Victoria Wood, Dept. JAR (Historic Courthouse)

At 10:00 a.m.

Citizens for Responsible Winery Growth in St. Helena
v. City of St. Helena, et al. **17CV000953**

(1) PETITIONER'S MOTION TO AUGMENT THE RECORD OR, IN THE ALTERNATIVE, REQUEST FOR JUDICIAL NOTICE

TENTATIVE RULING: Petitioner Citizens for Responsible Winery Growth's request to augment the administrative record with an October 2016 application packet for a use permit modification for the project at issue (Exhibit A) and the City of St. Helena's 1995 production assessment for the Beringer production facility showing production was at 3,100 tons prior to June 25, 1979 (Exhibit B), is DENIED. "[E]vidence outside the administrative record generally is inadmissible to show that the agency has not proceeded in the manner required by law. [Citation.] However, extra-record evidence is admissible if the proponent shows that the evidence existed before the agency made its decision, but that it was impossible in the exercise of reasonable diligence to present it to the agency before the decision was made. [Citation.] Also, arguably, extra-record evidence may be admissible to show 'agency misconduct.'" (*Cadiz Land Co, v. Rail Cycle* (2000) 83 Cal.App.4th 74, 118, italics omitted.)

Petitioner contends the evidence is necessary because: (1) the documents were improperly omitted when the City provided documents for the administrative record to

petitioner; (2) the City and real party in interest are taking a new position contrary to the position they took throughout the administrative process; and (3) the administrative record should include "pretty much everything that ever came near a proposed development," citing *Cnty. of Orange v. Super. Ct.* (2003) 113 Cal.App.4th 1, 8. Petitioner has not shown any exception applies. Thus, Exhibits A and B constitute extra-record evidence, which is not admissible to challenge the substantiality of the evidence.

Petitioner's reliance on *Cnty. of Orange, surpa,* 113 Cal.App.4th 1 is misplaced. In *Cnty of Orange,* the agency correctly included the EIR for a previous iteration of a project, even though the agency had not certified the original EIR and the project subsequently evolved. (113 Cal.App.4th at pp. 9-10.) However, *Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 890, held that a general plan EIR was not part of the record for a later development project when there was no evidence the EIR had been referenced during the agency's project review by the agency, the developer, or project opponents. Here, the proffered exhibits are not EIR drafts, but a withdrawn application and a purported assessment from 1979 that, similar to what occurred in *Porterville*, never were submitted to or considered by the City or decisionmakers.

Petitioner's alternative request for judicial notice of the documents is DENIED. Petitioner asserts the two exhibits are judicially noticeable under Evidence Code section, 452, subdivision (c), as official records of the City. Not so. The materials are not "official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States." (Evid. Code, § 452, subd. (c).) Nor are the facts contained within the documents the proper subject of judicial notice.

(2) PETITION FOR WRIT OF MANDATE

TENTATIVE RULING: Petitioner Citizens for Responsible Winery Growth's writ of mandate is DENIED. The Beringer Icon III Project applicant and recipient of the project approval is real party in interest Treasury Wine Estates Americas Company (Real Party). The project will replace eight large format wine fermentation tanks with 130 smaller format wine fermentation tanks with the purpose of encouraging a higher level of quality. Respondent the City and City Council of St. Helena (collectively, the City) approved the project based on a claimed class 1 categorical exemption to the requirements of the California Environmental Quality Act (CEQA) to conduct environmental review. Petitioner objects to the City's approval of the project.

There are three types of projects that are exempt from CEQA. The categorical exemption is at issue here. The Court applies a two-step process in its review of the application of a categorical exemption. First, the Court reviews whether the agency's decision that the project is categorically exempt under class 1 is supported by substantial evidence. Second, the Court reviews whether an exception to the categorical exemption applies; namely, the cumulative impacts exception or the unusual circumstances exception that petitioner alleges apply in this case.

A. Class 1 Categorical Exemption

1. Substantial Evidence Supports the City's Decision

The CEQA Guidelines currently list 33 classes of projects that generally do not have any significant effect on the environment and that are exempt from CEQA review. (Pub. Resources Code, § 21084; Guidelines, §§ 15300-15333.) Agencies consider whether a proposed project may fit into one of the categorical exemption classes. (Guidelines, § 15300.4.) The classes are restricted to the reasonable scope of their prescribed language. "'In keeping with general principles of statutory construction, exemptions are construed narrowly and will not be unreasonably expanded beyond their terms. [Citations.] Strict construction allows CEQA to be interpreted in a manner affording the fullest possible environmental protections within the reasonable scope of statutory language. [Citations.] It also comports with the statutory directive that exemptions may be provided only for projects which have been determined not to have a significant environmental effect. [Citations.]'" (C*nty. of Amador v. El Dorado Cnty. Water Agency* (1999) 76 Cal.App.4th 931, 966.)

In the case at bar, the City took the position that the project was exempt under class 1 of the Guidelines' categorical exemptions for "existing facilities." (Guidelines, § 15301.) "Class 1 consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination." (*Id*.) The types of "existing facilities" are itemized within section 15301 and include projects which might fall within class 1. (*Id*.) The items listed "are not intended to be all-inclusive . . . ." (*Id*.) "The key consideration is whether the project involves negligible or no expansion of an existing use." (*Id*.)

Petitioner asserts the City improperly relied on the class 1 categorical exemption in approving the project because the project does not fit within that categorical exemption. The parties offer diametrically opposite standards of review. The City advances a review based on substantial evidence while petitioner believes review is de novo because interpreting the language of a categorical exemption is a question of law. Petitioner is correct that when only the language of the exemption is at issue (i.e. the meaning of the exemption), the issue is a question of law, subject to de novo review. (*Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1251; see *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1192 ["The issue is one of law because it turns on the interpretation of the Guidelines."].)

However, because the record contains evidence on the question of whether the project qualifies for the exemption, the Court must determine whether the record contains substantial evidence. (See *San Francisco Beautiful v. City & Cnty. of San Francisco* (2014) 226 Cal.App.4th 1012, 1021 ["The City concluded that the project fell within the terms of Class 3 of the categorical exemptions. To the extent this contention 'turns only on an interpretation of the language of the Guidelines or the scope of a particular CEQA exemption, this presents "a question of law subject to de novo review by this court."' [Citation.] However, '[w]here the record contains evidence bearing on the question whether the project qualifies for the exemption,

such as reports or other information submitted in connection with the project, and the agency makes factual determinations as to whether the project fits within an exemption category, we determine whether the record contains substantial evidence to support the agency's decision.' [Citation.]"].) Petitioner is confusing its proffered standard of review with what occurred here: the agency's subsequent *application* of the categorical exemption, which is reviewed for substantial evidence.

The Court, therefore, applies "the substantial evidence test to an agency's factual determination that a project comes within the scope of a categorical exemption."[2] (*N. Coast Rivers Alliance v. Westlands Water Dist.* (2014) 227 Cal.App.4th 832, 852, citing *Committee to Save the Hollywoodland Specific Plan v. City of Los Angeles* (2008) 161 Cal.App.4th 1168, 1187, and *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1251.) "Substantial evidence" is "fact, reasonable assumptions predicated upon fact, or expert opinion supported by fact." (Pub. Resources Code, § 21080, subd. (e)(1).) Argument, speculation, inaccurate information, unsubstantiated opinion, and social or economic impacts unrelated to environmental impacts are not substantial evidence. (*Id.*, § 21080, subd. (e)(2).) The Guidelines repeat the statutory language, adding that substantial evidence includes "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Guidelines, § 15384.)

Substantial evidence supports the City's determination the project was exempt under the class 1 categorical exemption for existing facilities. The City determined the project was exempt because it involved no, or negligible, expansion of an existing use. (AR 3:12, 9:201, 9:203-04, 15:350, 15:361). There is evidence the project will actually reduce the Beringer facility's wine production capacity. (AR 24:409-411, 9.5:224, 18:377.) Wine production capacity will be reduced by almost 40,000 gallons (4.316 million gallons to 4.276 million gallons). (AR 5:99, 9:201, 9:203-204, 9.5:224.) The overall footprint of the small tanks is larger. The project will increase the size of the tank area by approximately 58,000 square feet, consisting of one new concrete slab of 42,000 square feet and a second slab of 16,000 square feet. (AR 9.4:222.) But City staff analysis stated the "proposed project activities would be confined to previously disturbed areas of the site and serve to improve site circulation and functionality and thereby enhance the viability of the agricultural use." (AR 5:127.) The replacement of the large-format tanks improves traffic flow and simplifies operations with a new forklift/ramp, the relocation and redesign of other existing wine production facilities (a receiving station and a press pit), and redesign of an existing weigh station and central scale house. (AR 9.201.)

Moreover, the City concluded, based on the City's staff analysis and testimony from Real Party, that water use probably would be reduced or ameliorated by washing the tanks less and using decommissioned tanks to capture 800,000 gallons of rainwater that otherwise would have passed into the wastewater treatment system (AR 5:99, 9:201, 9:203-04. 12:294-297, 12:325-26, 24:411), and noise and traffic would not increase (AR 9:203, 12:294-295, 15:350-52, 15:361).

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[2] To the extent petitioner's position is based only on the interpretation of the language of Guidelines section 15301 or the scope of the categorical exemption, after independently reviewing the language of section 15301, the Court is satisfied the meaning of the exemption encompasses the wine fermentation tanks and the project in general. Wine fermentation tanks are "mechanical equipment" under section 15301 and the project itself falls within the "existing facilities" exemption as many aspects go to the "operation" of the existing facilities. (AR 1, 75.) The list of exempt items is not intended to be all-inclusive. (Guidelines, § 15301.)

To the extent petitioner challenges the City's reliance, or lack thereof, on other evidence – comments from neighbors, including Anthony Micheli, or the submission of the Tom Rinaldi letter – the Court cannot weigh the conflicting evidence. (*Laurel Heights Improvement Ass'n v. Regents of Univ. of Calif.* (1988) 47 Cal.3d 376, 392-93.)

2. Exemptions

Categorical exemptions are not absolute. When a project fits into a categorical exemption class, the agency must consider whether a codified exception applies. (Guidelines, § 15300.2.) Petitioner avers the cumulative impacts exception and the unusual circumstances exception apply. The Court disagrees.

a. Cumulative Impacts of Similar Projects

Categorical exemptions do not apply when the cumulative impact of successive projects of the same type and same place over time may be significant. (Guidelines, § 15300.2, subd. (b).) "'Cumulative impacts' refer to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts. [¶] (a) The individual effects may be changes resulting from a single project or a number of separate projects. [¶] (b) The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." (*Id*., § 15355.)

Petitioner argues the City has approved several projects in recent years located near the intersection of Highway 29 and Pratt Avenue, such as winery operations, alterations, and expansions, resulting in an inadequate level of service at this intersection, as well has hazardous conditions for vehicles and pedestrians. As a result, according to petitioner, the project would have adverse cumulative impacts on traffic congestion and safety as well as on water usage in the City.

The standard of judicial review applicable to the cumulative impact exception is not well settled. (*Aptos Residents Ass'n v. Cnty. of Santa Cruz* (2018) 20 Cal.App.5th 1039, 1048, citing *Hines v. California Coastal Comm'n* (2010) 186 Cal.App.4th 830, 855-56.) Because the exception is predicated on a factual issue about traffic and water use, the Court applies a traditional substantial evidence standard of judicial review to those factual issues. (*Id*. at p. 1049; see *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1114 ["Whether a particular project presents circumstances that are unusual for projects in an exempt class is an essentially factual inquiry . . . ."].)

Substantial evidence supports the City's decision the project will have no impact, or a de minimis impact, on traffic and safety. (AR 4:38, 5:73-74, 12:294-295, 15:308, 15:350-352.) Eric Gilliland, General Manager of Winery Operations at Beringer Vineyards, explained the project would not change the traffic at the facility, switching from larger tanks to smaller tanks would not change traffic resulting from grape deliveries, and deliveries would be timed to

improve traffic. Petitioner raises other portions of the record to support its position, such as speculation about traffic from local residents and the skeptical comments from Planning Commissioner Bobbi Monnette. Not only is speculation and unsubstantiated opinion not substantial evidence, but the Court cannot weigh conflicting evidence in any event. (*Laurel Heights Improvement Ass'n, supra*, 47 Cal.3d at pp. 392-93; see Pub. Resources Code, § 21080, subd. (e)(2)].)

Substantial evidence supports the City's decision the project will have no impact on water use. The project primarily is sourced from on-site wells, although the Beringer production facility is connected to the municipal water system to provide water for fire protection purposes and back up for domestic water. (AR 12:128.) The City heard evidence from Gilliland that Real Party's decommissioned tanks will provide for 800,000 gallons of rainwater collection, which will decrease Real Party's overall water use. (AR 12:294.) In addition, the City heard evidence the smaller tanks being installed just for fermentation would require five times less water to rinse and clean than the large tanks used for fermentation and storage. (*Id*.) The City also relied on its staff analysis concluding no increase in water use was anticipated as a component of the project. (AR 5:128.) Petitioner raises evidence from Tom Rinaldi who believes the smaller tanks will use more water to rinse and clean. Again, the Court cannot weigh the conflicting evidence. (*Laurel Heights Improvement Ass'n, supra*, 47 Cal.3d at pp. 392-93.)

Petitioner otherwise has not adequately shown any "successive projects," such as a hotel or a previously completed winery, are of the "same type" in the "same place" to negate the categorical exemption. (Guidelines, § 15300.2, subd. (b); see *Robinson v. City & Cnty. of San Francisco* (2012) 208 Cal.App.4th 950, 959-60 ["[S]peculation that potential future projects similar to the one under consideration *could* cause a cumulative adverse impact is not sufficient to negate a categorical exemption."].)

b. Unusual Circumstances

If there is a reasonable possibility a project will have a significant environmental effect due to unusual circumstances, it is not categorically exempt even if in a defined exemption class. (Guidelines, § 15300.2, subd. (c); see *Friends of Mammoth v. Bd. of Supervisors* (1972) 8 Cal.3d 247, 272.) Petitioner maintains the missing 1974 conditional use permit is an unusual circumstance giving rise to a reasonable possibility the activity will have a significant effect on the environment, and the City's findings to the contrary lack substantial evidence. (AR 2:2-11.)

The Supreme Court addressed the unusual circumstances exception in *Berkeley Hillside Preservation, supra*, 60 Cal.4th at pp. 1096-1117, and a split court adopted a two-step process for applying the exception. First, an agency decides whether a project reflects "unusual circumstances" compared to others in its categorical exemption class. A court reviews this first step under the traditional substantial evidence test. "[E]vidence that a project will have a significant effect *does* tend to prove that some circumstance of the project is unusual." (*Id*. at p. 1105.) Alternatively, a project may have "some feature that distinguishes it from others in the exempt class, such as its size or location." (*Id*.) Agencies have discretion to consider conditions in the vicinity when determining whether effects are unusual. If there are unusual circumstances, the agency applies the second step, considering whether those circumstances may give rise to a

reasonable possibility that the activity will have significant effect on the environment. The agency's determination under this second step is reviewed by a court under the fair argument standard. (*Id*. at p. 1114.)

The Court turns to the first question whether the project for which a categorical exemption is being claimed involves an unusual circumstance. "Unusual circumstances" is not defined in the Guidelines. (*Voices for Rural Living v. El Dorado Irrigation Dist.* (2012) 209 Cal.App.4th 1096, 1109.) "As explicated in case law, an unusual circumstance refers to 'some feature of the project that distinguishes it' from others in the exempt class. [Citation.] In other words, 'whether a circumstance is "*unusual*" is judged relative to the *typical* circumstances related to an otherwise typically exempt project.' [Citation.]" (*San Lorenzo Valley Cmty. Advocates for Responsible Ed. v. San Lorenzo Valley Unified Sch. Dist.* (2006) 139 Cal.App.4th 1356, 1381.)

The absence of a conditional use permit is not an unusual circumstance of the project. As the City proffers, the purported lack of a conditional use permit from 1974 does not relate to any physical or operational feature of the facility or the project under class 1. That is, the specific "unusual circumstance" petitioner relies on (the lack of a permit from 1974) is not the kind of unusual circumstance required for the application of the exception, because whether a circumstance is "unusual" is judged relative to the *typical* circumstances related to an otherwise typically exempt project. The lack of a permit – call it a circumstance – without more, is not the type of "unusual circumstance" which requires CEQA review. (See *Protect Telegraph Hill v. City & Cnty. of San Francisco* (2017) 16 Cal.App.5th 261 [exemption upheld for condominium project adjacent to public park]; *Berkeley Hillside Preservation, supra*, 241 Cal.App.4th 943 [exemption upheld for 10,000 square-foot single family home, on remand from the Supreme Court]; *Citizens for Environmental Responsibility v. State Ex. Rel. 14th Dist. Agricultural Ass'n* (2015) 242 Cal.App.4th 55 [exemption upheld for Santa Cruz rodeo].) There is nothing about the project that sets it apart from any other winery facility that is so unusual as to constitute the *type* of unusual circumstance required to support application of the exception.

Assuming the lack of the 1974 permit constituted an "unusual circumstance," the second step requires the Court to consider whether the lack of a permit gives rise to a reasonable possibility that the project will have a significant effect on the environment under the fair argument standard. It does not because the lack of a permit does not have any environmental effect. Moreover, as previously noted, substantial evidence supports the City's conclusion that the project's water use, noise level, traffic congestion and safety impact will not increase.

B. Requests for Judicial Notice

The City's request for judicial notice of City of St. Helena Ordinances 79-7 (Exhibit G), 80-1 (Exhibit H), 580 (Exhibit A), and 586 (Exhibit B), approved minutes of the St. Helena Planning Commission meeting held on February 5, 1974 (Exhibit C), approved minutes of the St. Helena City Council meetings from February 12, 1974 (Exhibit D) and August 13, 1974 (Exhibit F), a complaint and stipulation from Napa County Superior Court, Case No. 32112, *C. Mondavi and Sons v. City of St. Helena* (Exhibit E), approved use permits from November 25, 1980, as amended on September 27, 1983 (Exhibit I), and September 25, 1986 (Exhibit J) for Preferred

Vineyard Property Inc., and resolution PC2016-038 approved by the St. Helena Planning Commission on September 20, 2016, is DENIED. Generally, the exhibits are the proper subjects of judicial notice, but not for the truth of the matters asserted therein. The exhibits, however, constitute extra-record evidence not before the agency at the time it made its decision, which is not admissible unless an exception applies. The City has not shown any exception applies. (*Cadiz Land Co, v. Rail Cycle* (2000) 83 Cal.App.4th 74, 118.) The documents also are not relevant to the Court's inquiry as to the substantiality of the evidence.

Petitioner's request for judicial notice of St. Helena Municipal Code sections 13.04.221, 13.10.010, and 13.12.010 (Exhibits A-C) is GRANTED.

At 2:00 p.m.

Angelica De Vere, et al. v. Sullivan Vineyards Corporation, et al. **26-67976**

PLAINTIFFS' MOTION FOR LEAVE TO FILE FOURTH AMENDED COMPLAINT

TENTATIVE RULING: The Notice of Motion does not provide notice of the Court's tentative ruling system as required by Local Rule 2.9. Plaintiffs' counsel is directed to contact Defendants' counsel forthwith and advise Defendants' counsel of Local Rule 2.9 and the Court's tentative ruling procedure. If Plaintiffs' counsel is unable to contact Defendants' counsel prior to the hearing, Plaintiffs' counsel shall be available at the hearing, in person or by telephone, in the event Defendants' counsel appears without following the procedures set forth in Local Rule 2.9.

The Motion is DENIED. Rules of Court, Rule 3.1324, subsection (b), requires that the declaration supporting a motion for leave to amend specify, *inter alia*, "(3) When the facts giving rise to the amended allegations were discovered; and (4) The reason why the request for amendment was not made earlier." The declaration supporting the instant motion fails in this regard. It appears to the court that the proposed amendments certainly could have been made much sooner in the exercise of due diligence. That having not been done, the Court exercises its discretion to deny the motion as untimely. The Court does not believe that the recent retention of new counsel opens the door to restructure the case by adding claims that could have been asserted much sooner.