

Attachment 10
Chair's Good Cause Determination



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Board of Supervisors

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Chair

**DETERMINATION REGARDING GOOD CAUSE REQUESTS BY APPELLANT
AND APPLICANT TO AUGMENT THE DOCUMENTARY RECORD ON APPEAL
WITH NEW EVIDENCE REGARDING THE WALT RANCH MITIGATION
APPEAL HEARING**

April 1, 2022

TO: Ross Middlemiss, Esq., on behalf of Appellant
Whit Manley, Esq., on behalf of Applicant

FROM: Chair Ryan Gregory

RE: Walt Ranch Mitigation Appeal Hearing – Record on Appeal

A. Background.

Napa County Code Chapter 2.88 governs the conduct of appeals heard by the Board of Supervisors. The rules and policies established by the Board outline the procedure for the designation of the record on appeal, the scope of additional evidence, deadlines for submittal of materials and other matters. These rules and procedures ensure that the parties and the public understand the expectations of the Board regarding the appeals process and prohibit late materials by the parties.

County Code Section 2.88.090 (B) provides that if the appeal pertains to a decision for which a record on appeal exists, the Board, in hearing the appeal, shall base its consideration of the appeal on the record on appeal and any extrinsic evidence allowed by the Chair for “good cause” shown. In this case, the Walt Ranch Mitigation appeal will be based on the record of the decision by the Director of the Department of Planning, Building and Environmental services and the extrinsic evidence allowed below by the Chair for “good cause” shown.

In accordance with the prehearing procedures and timelines established at the Prehearing Conference held on March 17, 2022, the parties submitted requests to include additional information or evidence, based on good cause. The specific requests are discussed below. It should be noted that a determination to include additional information or evidence into the record on appeal does not reflect any consideration of the weight or value of that information or evidence with respect to the Board’s decision on the merits of the appeal.

This particular project had a different procedural context than many projects that reach the Board on appeal. There was no public hearing to allow oral comments. Instead, the County opened a public comment

period after notifying the public of the intended decision and making the environmental document publicly available. The County did receive numerous comments during this period, but the timeframe was limited, as was appropriate for such a limited issue. Additionally, after the appeal was filed, the Applicant submitted a revised proposal that addresses many of the grounds raised in the appeal, but was not previously reviewed by the Appellant. Nevertheless, while the Napa County Code provides that this decision must be based on the record, I am committed to ensuring that the parties get a full and fair opportunity to make their cases before the Board.

B. Applicant's Good Cause Requests.

On March 8, 2022, the Applicant submitted a revised proposal for Mitigation Measure 6-1 to mitigate the Greenhouse Gas Emissions impacts of the Project. The revision proposes reverting back to the approved mitigation, but specifically identifying the woodland habitat that is suitable for mitigation according to the conditions identified by the Court of Appeal. The proposal included a map showing the areas suitable for conservation as well as a table identifying the acreage of such habitat on each parcel within the project property.

On March 29, 2022, the Applicant submitted additional information, including a revision to the Figures and Table previously submitted with the March 8, 2022, letter. The Applicant also requested the inclusion of excerpts from the transcript of the December 14, 2022, hearing, as well as excerpts from the Appellant's appeal packet.

As the Chair of the Napa County Board of Supervisors, I have reviewed and considered the Applicant's March 29, 2022, request that the following materials be included in the record on appeal: the March 8, 2022, revised proposal; the revised Figures and Table reflecting the conservation easement; the excerpts from the December 14, 2021, hearing; and the excerpts from the Appellant's appeal packet. My determinations are as follows.

1) March 8, 2022, Revised Proposal.

Decision and Rationale: Granted. The revised proposal was not before the PBES Director at the time the Director made the decision on appeal. The proposal includes maps with specific areas of land identified as woodland habitat that the Applicant contends meets the requirements identified by the Court of Appeal. It also includes a table showing the amount of woodland habitat available for conservation on each parcel within the Project Property. While some of this information was already included in the record, as part of the certified EIR (i.e., the tree survey and GIS mapping of the Property,) the specific identification of qualifying woodland habitat was not previously on the record. Good cause does exist to include this information in the record, as the revised proposal responds directly to the requirements of the Court of Appeal, as well as claims set forth in the appeal. Denying the request to modify a project proposal in response to an appeal based on an evidentiary rule would discourage applicants from making good faith project revisions to address concerns from appellants.

2) Revised Figures and Table.

Decision and Rationale: Granted. The revised Figures and Table identified in the Applicant's March 29, 2022, request modify and refine the revised proposal from March 8, 2022. For the same reasons set

forth in connection with that request, discussed above, good cause exists to include this information in the record.

3) Excerpts from December 14, 2021, Hearing.

Decision and Rationale: Granted. While the December 14, 2021, hearing addressed the proposal as approved by the PBES Director, and did not reflect the revised proposal submitted on March 8, 2022, the statements excerpted from the transcript are relevant to the consideration of the revised proposal. Good cause exists to include this evidence in the record on appeal. The decision to include these excerpts does not reflect any consideration of their weight or value with respect to the merits of the appeal.

4) Excerpts from November 5, 2021, Appeal Packet.

Decision and Rationale: Granted. Generally, the appeal packet is considered part of the record on appeal, in the sense that the Board must consider the arguments set forth in the appeal packet. Any evidence attached or referenced in the appeal packet would be subject to the good cause procedures in the Appeals Ordinance in the Napa County Code, but the argument set forth by the Appellant is not. Since it appears the excerpts identified by the Applicant contain the Appellant's argument with citation to information already in the record, no determination of good cause is necessary.

C. Appellant's Good Cause Requests.

The Appellant submitted a request to include a letter, dated March 29, 2022, setting forth the Appellant's response to the Applicant's revised proposal, discussed above. The Appellant also requested the inclusion of the following documents, referenced in the March 29, 2022, letter, and identified by the primary author of the study: (1) Damschen et al. 2019; (2) Delaney et al 2021 IPCC 2022; (3) de Paula et al. 2011; (4) IPCC 2022; (5) Ma et al. 2017; (6) Sobral et al. 2017; (7) Watson et al. 2018; (8) Wakesa et al. 2016; and (9) Yap et al. 2021. Appellant claims that good cause exists for inclusion of the letter and the referenced studies because the letter is the only opportunity for the Appellant to comment on the revised proposal from the Applicant.

In addition, the Appellant requested that two studies identified and referenced in the Appeal Packet be included in the record on appeal. These include: (1) Stephenson et al. 2014; and (2) U.S. Department of Energy (1998). The Appellant claims that these materials were referenced, discussed and linked in public comments submitted to the PBES Director before the decision on the original proposal in October 2021.

As the Chair of the Napa County Board of Supervisors, I have reviewed and considered the requests from the Appellant. My decision on Appellant's March 29, 2022, good cause requests is as follows:

1) March 29, 2022, Letter.

Decision and Rationale. Granted. The Appellant's letter is responding to a revised proposal submitted by the Applicant well after the decision was made by the PBES Director. Because of that, the Appellant's argument, in the exercise of reasonable diligence, could not have been produced to the decision maker prior to the decision. Therefore, good cause exists to include the letter here.

2) **Studies Referenced in March 29, 2022, Letter.**

Decision and Rationale. Granted. Like the Appellant's letter, the referenced articles and studies respond to the revised proposal for Mitigation Measure 6-1. The good cause grounds are less clear, however. Many of the articles predated the decision at issue on appeal, some by several years, and the articles relate equally to the previously-proposed 124-acre conservation easement as to the revised 248-acre proposal. Nevertheless, the Appellant should have an opportunity to respond to the revised proposal and these articles are integral to that response. In the interest of ensuring the Appellant has a full opportunity to be heard, I find that good cause exists to allow these references into the record on appeal.

3) **Studies Referenced in Appeal Packet.**

Decision and Rationale. Granted. The Appellant requested that two articles cited in pre-decision comments be included in the record on appeal. The tentative decision by the Director indicated that the final decision would be made by close of business on October 1, 2021. However, due to the volume of comments received by the public, much of which was received on that day, the Director did not make the decision until October 5, 2021. Prior to making the decision, but after October 1, 2021, the Director received additional comment, including a letter from the Applicant dated October 4, 2021, responding to previously submitted comments. While the County does not have an obligation to allow the public and the Applicant to respond indefinitely, the circumstances of this decision suggest that these articles, which are proffered to support arguments by the Appellant, should be allowed. The fact that the Applicant can respond to the arguments at the appeal hearing reduces any prejudice that may result from their inclusion in the record on appeal.

D. **Right to Request an Overrule.**

Pursuant to County Code Section 2.88.090 (B), at the beginning of the appeal hearing, prior to opening the public hearing, the chair shall announce any decision regarding the introduction of extrinsic evidence to the record and the whole Board, by majority vote, may overrule any such decision upon request by an appellant or the permittee. The Chair set a deadline of April 5, 2022, for either Appellant or Applicant to inform County Counsel's office in writing of their request that the whole Board overrule the Chair's prior determination regarding the extrinsic evidence. Upon receipt of such request, the parties shall each be given three minutes to orally address the Board at the appeal hearing on their request to overrule the Chair. No written arguments are allowed.

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