

Attachment M

Chair's Good Cause
Determination



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Board of Supervisors

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Belia Ramos
Chair

**DETERMINATION OF GOOD CAUSE REQUEST TO
AUGMENT THE DOCUMENTARY RECORD
REGARDING THE DUCKHORN VINEYARDS WINERY
APPEAL HEARING**

September 20, 2023

TO: Amy C. Minter, Esq. on behalf of Appellant Preserve Lodi Lane
William McKinnon, Esq. on behalf of Appellant Water Audit California
Rob Anglin, Esq. on behalf of Applicant Duckhorn Wine Company

FROM: Chair Belia Ramos

RE: Duckhorn Vineyards Winery Appeal Hearing – Good Cause Determination

As the Chair of the Napa County Board of Supervisors, I have received and reviewed the following: Appellant Preserve Lodi Lane’s (Appellant PLL or PLL) August 17, 2023, request to augment the record with five additional documents and Appellant Water Audit California’s (Appellant WAC or WAC) August 18, 2023, request to augment the record with opinion testimony of four expert witnesses on existing issues related to the appeal grounds. I have also reviewed Applicant’s August 18, 2023 objections to such requests. The Chair’s determination to augment the record on appeal requires a finding of “good cause” meaning that the proposed evidence, in the exercise of reasonable diligence, could not have been produced to, or was improperly withheld or excluded from, the Planning Commission. My decision on the requests and objections is set forth below.

APPELLANT PLL’S GOOD CAUSE REQUESTS:

1) Appellant PLL requests to augment the record with a project description document from the Napa de Oro Winery. Appellant PLL requests that the record be augmented to allow new information in the form of a project description document for the Napa de Oro Winery. PLL asserts that good cause exists because the document was not made available on the County’s Current Projects Explorer website until after the Appeal Packet was filed on June 1, 2023, and there was no reasonable way to produce the document as part of the Appeal Packet.

Joelle Gallagher
District 1

Ryan Gregory
District 2

Anne Cottrell
District 3

Alfredo Pedroza
District 4

Belia Ramos
District 5

Decision and Rationale: Granted. The Napa de Oro Winery application and project description was first submitted to the Planning, Building and Environmental Services (PBES) Department on July 28, 2022. However, a revised May 10, 2023 resubmittal was not submitted until July 24, 2023, and therefore could not have with reasonable diligence been produced to the Planning Commission at or in advance of the hearing on May 3, 2023. Good cause exists to augment the record with the Napa de Oro Winery May 10, 2023 project description.

2) Appellant PLL requests to augment the record with a winery trip generation worksheet from the Napa de Oro Winery project (Trip Worksheet). Appellant PLL requests that the record be augmented to allow new information in the form of a winery trip generation worksheet for the Napa de Oro Winery project. PLL asserts that good cause exists because the document was not made available on the County's Current Projects Explorer website until after the Appeal Packet was filed and there was no reasonable way to produce the document as part of the Appeal Packet or to the Planning Commission.

Decision and Rationale: Granted. The Chair notes that although the Trip Worksheet is dated March 6, 2023, it was not submitted to the PBES Department until July 24, 2023 and therefore could not have, with reasonable diligence, been presented to the Planning Commission prior to the May 3, 2023 hearing. Good cause exists to augment the record with the Trip Worksheet dated March 6, 2023.

3) Appellant PLL requests to augment the record with the Inn at the Abbey Initial Study. Appellant PLL requests that the record be augmented to allow additional information in the form of the Inn at the Abbey Initial Study document. Appellant PLL asserts that good cause exists because PLL's Appeal Packet discussed the traffic study prepared for the proposed Inn at the Abbey project incorporating it into the record, and it should therefore already be included in the record for the Duckhorn Project.

Decision and Rationale: The Chair finds that the Inn at the Abbey Initial Study is already part of the record on appeal that will be provided to the Board. This document was referenced in Appellant PLL's Appeal Packet.

4) Appellant PLL requests to augment the record with the Inn at the Abbey Traffic Impact Study prepared by W-Trans dated August 16, 2019 (2019 Traffic Study). Appellant PLL requests that the record be augmented to allow additional information in the form of the 2019 Traffic Study. Appellant PLL asserts that good cause exists because the PLL's Appeal Packet discussed the traffic study prepared for the proposed Inn at the Abbey project incorporating it into the record, and it should therefore already be included in the record on appeal.

Decision and Rationale: The Chair finds that the Inn at the Abbey 2019 Traffic Study is already part of the record on appeal that will be provided to the Board. The contents of this document were referenced in the Traffic Impact Study for the Duckhorn Vineyards Use Permit Major Modification prepared by W-Trans dated June 10, 2021.

5) Appellant PLL requests to augment the record with the Inn at the Abbey Traffic Impact Study Addendum dated February 3, 2020 (the 2020 Traffic Addendum). Appellant PLL requests that the record be augmented to allow additional information in the form of the 2020 Traffic Addendum. Appellant PLL asserts that good cause exists because PLL’s Appeal Packet discussed the traffic study prepared for the proposed Inn at the Abbey project incorporating it into the record, and it should therefore already be included in the record for the Duckhorn project.

Decision and Rationale: Denied. The 2020 Traffic Addendum is dated February 3, 2020, and has been publicly available on the County’s Current Project Explorer website since July 23, 2020. PLL has failed to demonstrate why the 2020 Traffic Addendum could not have, with reasonable diligence, been presented to the Planning Commission prior to the May 3, 2023 hearing. Also, the 2020 Traffic Addendum is not referenced or incorporated in either the Traffic Impact Study or the Initial Study/Mitigated Negative Declaration that was prepared for the Duckhorn project. Good does not exist to augment the record with the Traffic Addendum.

APPELLANT WAC’S GOOD CAUSE REQUESTS:

6) Appellant WAC requests to augment the record with a legal opinion from Dr. Karrigan Börk entitled “The Public Trust Doctrine” dated August 18, 2023 (the Börk Analysis). Appellant WAC requests that the record be augmented to allow the Börk Analysis regarding the County’s legal duty to consider the public trust interest when making decisions impacting water that is imbued with the public trust.

Decision and Rationale: The Börk Analysis is legal opinion and analysis of the public trust doctrine and its interplay with the Sustainable Groundwater Act (SGMA). It is not evidence and therefore the Börk Analysis is not properly the subject of a good cause determination. Because the Börk Analysis is legal argument it will be treated as supplemental argument and counted towards Appellant WAC’s five-page limit established at the pre-hearing conference for submittal of additional written information or legal argument in support of WAC’s appeal.

7) Appellant WAC requests to augment the record with expert opinion and testimony from Dr. Peter Moyle entitled “The Napa River as Habitat for Native Fishes and Shrimp” dated August 18, 2023 (the Moyle Opinion). Appellant WAC requests that the record be augmented to allow the Moyle Opinion opining that native fishes and other aquatic organisms need a flow regime that contains features of natural flows to thrive in the Napa River. Appellant WAC asserts that good cause exists because Napa County erred in its public trust duties when it failed to review existing groundwater extractions, consider potential injury, and consider best efforts at mitigation.

Decision and Rationale: Denied as to the good cause request but allowed as a summary of WAC’s witness list and witness testimony.

The County agrees that it has a duty under the public trust doctrine to consider impacts to public trust resources. In fact, both the Planning Commission staff report (page 13) and the Mitigated Negative Declaration (MND)(page 21) acknowledged the County's duty and consideration of public trust resources. WAC's disagreement with the County involves how that duty is satisfied. The Chair finds that Appellant WAC has asserted this disagreement as its good cause justification. This disagreement is among the very grounds of appeal that will be heard and considered by the Board including, but not limited to, the County's public trust duty and consideration of public trust resources, the environmental impact of groundwater extraction utilized by the Duckhorn project and the Planning Commission's consideration of all the same.

Appellant WAC had ample notice and opportunity to provide the Moyle Opinion to the Planning Commission. On April 3, 2023, Notice of the Public Hearing and Intent to Adopt the MND was published in the Register some 30 days before the hearing on May 3rd. The Planning Commission staff report was posted to the County's website on April 27, 2023, almost a week prior to the hearing date. WAC was aware of the hearing as evidenced by counsel for WAC's testimony at the Planning Commission hearing regarding public trust. Counsel for WAC did not inform the Commission that WAC had retained Dr. Moyle to prepare an opinion on the flow regime needed for native fish and aquatic organisms to thrive in the Napa River. Nor did counsel request a continuance of the matter so as to provide the Commission with the Moyle Opinion. Furthermore, the Duckhorn application P19-00097-MOD is specifically identified and described in WAC's prior litigation with the County that was filed on June 2, 2021.

Appellant WAC has failed to identify why, in the exercise of reasonable diligence, the Moyle Opinion could not have been provided to the Planning Commission for consideration particularly when judicial records reveal that WAC has been aware of the Duckhorn application since at least June 2021. Nevertheless, the Chair further finds that because Dr. Moyle has been identified as one of Appellant WAC's witnesses and since the Moyle Opinion is related to WAC's appeal grounds, the Moyle Opinion will be treated as a summary of Dr. Moyle's expected testimony and credentials, and it will be included in the materials provided to the Board of Supervisors as part of the agenda item for the November 7, 2023 appeal hearing. Applicant will have the opportunity to argue how much weight and relevance the Moyle Opinion should be given by the Board at the appeal hearing.

8) Appellant WAC requests to augment the record in the form of witness testimony and an opinion from Dr. Graham Fogg entitled "Groundwater Pumping and Napa River Low Flows" dated August 18, 2023 (the Fogg Opinion). Appellant WAC requests that the record be augmented to allow the Fogg Opinion regarding the cause-effect relationship between river flows and groundwater pumping and that there is inadequate monitoring in Napa County to make a full assessment of potential public trust injuries. Appellant WAC asserts that good cause exists because Napa County erred in its public trust duties when it failed to review existing groundwater extractions, consider potential injury, and consider best efforts at mitigation.

Decision and Rationale: Denied as to the good cause request but allowed as a summary of WAC's witness list and witness testimony.

The Chair incorporates here by reference the same rationale as set forth above regarding the Moyle Opinion. The Chair finds that Dr. Fogg has been identified as one of Appellant WAC's witnesses and since the Fogg Opinion is related to WAC's appeal grounds, the Fogg Opinion will be treated as a summary of Dr. Fogg's expected testimony and credentials, and it will be included in the materials provided to the Board of Supervisors as part of the agenda item for the November 7, 2023 appeal hearing. Applicant will have the opportunity to argue how much weight and relevance the Fogg Opinion should be given by the Board at the appeal hearing.

9) Appellant WAC requests to augment the record in the form of witness testimony and an opinion from Dr. Tedd Grantham entitled "Flow Analysis for the Napa River Streamflow Gauge at St. Helena, California" dated August 18, 2023 (the Grantham Opinion).

Appellant WAC requests that the record be augmented to allow the Grantham Opinion regarding the decline in the minimum flows in the Napa River near St. Helena in the past 20 years. Appellant WAC asserts that good cause exists because Napa County erred in its public trust duties when it failed to review existing groundwater extractions, consider potential injury, and consider best efforts at mitigation.

Decision and Rationale: Denied as to the good cause request but allowed as a summary of WAC's witness list and witness testimony.

The Chair incorporates here by reference the same rationale as set forth above regarding the Moyle Opinion and Fogg Opinion. The Chair finds that Dr. Grantham has been identified as one of Appellant WAC's witnesses and since the Grantham Opinion is related to WAC's appeal grounds, the Grantham Opinion will be treated as a summary of Dr. Grantham's expected testimony and credentials, and it will be included in the materials provided to the Board of Supervisors as part of the agenda item for the November 7, 2023 appeal hearing. Applicant will have the opportunity to argue how much weight and relevance the Grantham Opinion should be given by the Board at the appeal hearing.

APPLICANT'S OBJECTION TO WAC'S APPEAL PACKET SUBMISSION AND REQUEST FOR CONFIRMATION.

10) Applicant Objects to Two Slides Depicted on Page 9 and Exhibit 1 of WAC's Appeal Packet. Applicant objects to two slides depicted on page 9 and the reports and agreement included in Exhibit 1 of WAC's Appeal Packet and requests that they be excluded from the record on appeal because Appellant WAC has failed to make a good cause request for them to be included. The two slides on page 9 are from a presentation to the Napa County Watershed Information and Conservation Council in 2015 and Exhibit 1 includes printouts of Consumer Confidence Reports from 2017 to 2022 and a recorded Water Agreement from 2000.

Decision and Rationale: Sustained. The Chair finds that the two slides and Exhibit 1 reports and agreement were not provided to the Planning Commission and therefore are not part of the record on appeal. The Chair further finds that Appellant WAC has not articulated why, in the

exercise of reasonable diligence, the two slides (which are from a presentation to the Napa County Watershed Information and Conservation Council in 2015) and the Exhibit 1 printouts of Consumer Confidence Reports from 2017 to 2022 and a recorded Water Agreement from 2000 could not have been provided to the Planning Commission for consideration. As detailed above, Chair further finds that as detailed above, WAC was expressly aware of the Duckhorn project in June 2021. These documents were available to WAC well before (and in one case decades before) the Planning Commission hearing. The Chair finds that good cause does not exist to augment the record with the two slides depicted on page 9 of WAC's Appeal Packet or the Exhibit 1 printouts of the Consumer Confidence Reports from 2017 to 2022 and the recorded Water Agreement from 2000.

11) Applicant requests confirmation that the record on appeal includes the Tier 2 and 3 Water Availability Analysis.

Response: Confirmed. Napa County Code Section 2.88.010 (K) defines the "record on appeal" as all written materials, staff reports, statements, testimony, information and evidence that were considered by the decision maker, either directly or indirectly, in arriving at the decision being appealed.

The Applicant's Tier 2 and 3 Water Availability Analysis is part of the record on appeal as defined by Napa County Code. Although County staff concluded that the Duckhorn project's reduction in water use did not necessitate the Tier 2 and 3 analysis, the report was referenced and cited in the Tier 1 analysis submitted to the Planning Commission. Staff and Applicant's consultant George Monteverdi also repeatedly referenced the Tier 2 and 3 analysis and its resulting findings at the Planning Commission hearing. Because the Tier 2 and 3 analysis was relied upon (both directly and indirectly) by the Planning Commission in making its decision, that analysis is part of the "record on appeal" as defined by Napa County Code.

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 September 26, 2023 for either Appellants or Applicant to inform County Counsel's office in writing of their request that the whole Board overrule the Chair's determinations set forth herein. Upon receipt of such request, the parties shall each be given three minutes to verbally address the Board at the appeal hearing on their request to overrule the Chair. No written arguments are allowed.