

Attachment 7

Chair's Good Cause Determination



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Board of Supervisors

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Alfredo Pedroza
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**

December 1, 2021

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

FROM: Chair Alfredo Pedroza

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.

I do recognize that 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. Nevertheless, while 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. Appellant's Good Cause Requests.

As the Chair of the Napa County Board of Supervisors, I have received and reviewed Appellant's Appeal Packet dated November 5, 2021, including the PowerPoint presentation entitled "Are We Losing Faster Than We're Gaining?" (hereafter "Stillwell Presentation") attached as Exhibit 3 of the appeal packet and the three articles attached to the appeal packet as References (hereafter "Reference Articles"). The Reference Articles are entitled "Tree planting is not a simple solution," by Karen D. Holl and Pedro H.S. Brancalion; "Long-term Growth and Persistence of Blue Oak (*Quercus Douglasii*) Seedlings in a California Oak Savanna," by Walter D. Koenig and Johannes M.H. Knops; and "Rate of tree carbon accumulation increases continuously with tree size," by N.L. Stephenson, *et al.* Since these documents were not provided to the Director and are not part of the documentary record of the Director's decision, they are considered "new evidence" subject to this Good Cause Determination.

I have also received and reviewed Appellant's November 29, 2021, request to augment the record on appeal, which includes additional documents that the Appellant wishes to include in the record. Such additional evidence includes the 1998 study from the U.S. Department of Energy entitled, "Method for Calculating Carbon Sequestration by Trees in Urban and Suburban Settings;" and several project documents from an unrelated ECP currently before the County called Atlas View II. Appellant requests that the Initial Study and several of the study's exhibits and figures be included in the record for this project, despite being published on November 22, 2021, nearly two months after the underlying decision in this matter.

I have considered the requests, including the arguments set forth in the November 29, 2021, letter, and make the following determinations which are addressed below.

C. New Evidence Attached to Appellant's Appeal Packet.

As described above, the Appeal Packet contained the Stillwell Presentation, attached as Exhibit 3, and the three Reference Articles.

1) The Stillwell Presentation in Exhibit 3 to the Appeal Packet.

Decision and Rationale: Granted. Although the full PowerPoint presentation was not included in any comments or records before the Director when the decision was made, much of the content of the presentation was referenced in comments submitted before the decision. The source material, therefore, is not really new evidence, but was included in the record on appeal either directly or by reference. This fact could be an argument for its exclusion: since the material was cited and referenced in comments to the decisionmaker, there does not appear to be a good reason that the material itself could not have been presented to the decisionmaker. However, since the substance of the presentation was included in comments on the record, there is minimal impact to including the whole presentation on the record.

2) The Reference Articles attached to the Appeal Packet.

Since the three reference articles attached to the Appeal Packet are all similarly situated, with the same basis put forward by the Appellant in the request to augment the record, I will treat them as one request. This also confirms that the decision regarding their inclusion in the record is not based on the content of these articles.

Decision and Rationale: Granted. 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. New Evidence Added in the Request to Augment the Record.

The Applicant's Request to Augment the Record, submitted on November 29, 2021, included two additional requests: (1) an article from the U.S. Department of Energy ("DOE Article"); and (2) the Initial Study and related exhibits and figures for the Atlas View II Vineyard ECPA project currently pending before the County (the "Atlas Project Documents").

1) The DOE Article attached to Request to Augment the Record.

Decision and Rationale: Granted. Appellant requests the inclusion of the DOE Article for reasons similar to the Reference Articles addressed above. The document supports the Appellant's arguments set forth in the Appeal Packet, which are partially in response to comments from the Applicant submitted without an opportunity for the public to respond. For the same reasons identified for the Reference Articles, above, the DOE Article should also be included in the record on appeal.

2) The Atlas Project Documents referenced in the Request to Augment the Record.

Decision and Rationale: Granted. Appellant requests the inclusion of certain project documents from the Atlas View II Vineyard ECPA, which were published on November 22, 2021. Appellant argues that these documents could not be presented to the decisionmaker in this matter because they were not available until after the decision was made. Therefore, they could not have been presented to the decisionmaker with the exercise of due diligence. However, Appellant has not articulated the relevance of these documents beyond drawing on inferences that can be made. The documents relate to a different project at a different site with different environmental resources and impacts. The impact of the fires on this site may only have marginal relevance to the analysis of the GHG mitigation at the project site. Nevertheless, because they may be relevant and could not have been presented to the decisionmaker, I find that good cause exists to allow these documents into the record on appeal.

E. Applicant's Good Cause Requests.

As the Chair of the Napa County Board of Supervisors, I have reviewed and considered Applicant's November 29, 2021, request to augment the record on appeal with various maps containing information regarding conservation and other mitigation measures applicable to the project ("Project Maps"). Applicant also submitted proposed revisions to the Mitigation Measure 6-1 that is the subject of this appeal. While this is not "new evidence," but rather a proposal to modify the decision, it is not subject to the good-cause

requirement. I will address that further, below. My decision on Applicant's November 29, 2021, good cause requests is as follows:

1) The Conservation Easement Maps.

Decision and Rationale. Granted. The Applicant submitted seven maps generated by PPI Engineering, which purport to show various conservation areas and resources on the project property, including the proposed easement areas. The Applicant states that the GIS mapping is the same information as the County relied upon in preparing the Final EIR and in approving the revised Mitigation Measure 6-1, which is the subject of the appeal. It appears that the proposed maps do not provide new evidence or information, but rather consist of a compilation of evidence already on the record. In particular, the maps show planned easement areas required by other mitigation measures, which are already depicted in maps contained in the Biological Resources Management Plan.

To the extent that the maps contain new information, such as newly proposed areas that can be preserved to meet the obligations of a new Mitigation Measure 6-1, that information is not "new evidence" in the sense that it could not be relied upon to meet the substantial evidence standard. The Board may consider proposals from the Applicant made in response to issues or concerns raised by the appeal, whether or not it was before the decisionmaker below.

2) Proposed Revisions to Mitigation Measure 6-1.

Decision and Rationale: Granted. As mentioned above, the proposed revision to Mitigation Measure 6-1 is not "new evidence" that requires consideration under the good-cause standard set forth in the Napa County Code. Instead, the Applicant proposes changes to address grounds of appeal or to respond to concerns raised by the appeal. While I express no opinion regarding the propriety of these revisions, since it is the Board's task to determine whether the mitigation is appropriate and supported by substantial evidence, I conclude that this proposal should be part of the record on appeal. It does not, however, constitute evidence so as to contribute to the substantial evidence standard.

F. 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 December 6, 2021, 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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