

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF NAPA  
The Honorable J. MICHAEL BYRNE, Judge Pro Temp  
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RECEIVED  
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COUNTY OF NAPA  
CLERK OF THE BOARD

NAPA COUNTY,  
Plaintiff,  
vs.  
CARLICE, LLC, et al.,  
Defendant.

No. 26-61207

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REPORTER'S TRANSCRIPT OF PROCEEDINGS  
HAD AT TIME OF HEARING

--oOo--

Napa, California  
Tuesday, April 9, 2013  
3:00 o'clock p.m.

--oOo--

Transcribed by:

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I N D E X

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5 APPEARANCES

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6 PROCEEDINGS

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10 PLAINTIFF'S WITNESSES:

11 JOHN MCDOWELL

12 Direct Examination by Ms. Gallagher  
13 Cross-Examination by Ms. Cunningham  
14 Redirect Examination by Ms. Gallagher

19  
35  
48

15 DARRELL MAYES

16 Direct Examination by Ms. Gallagher  
17 Cross-Examination by Ms. Cunningham

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EXHIBITS

20

FOR IDEN. IN EVID.

21 FOR THE PLAINTIFF:

22 1 -- Approval letter dated 3/1/95 43

23 2 -- Letter to M. Mackenzie  
dated 4/1/97 43

24 3 -- Temporary Certificate of  
Occupancy letter dated  
25 11/26/12 58

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I N D E X (CONTINUED)

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EXHIBITS

6

FOR IDEN. IN EVID.

7 FOR THE DEFENDANT:

8 A -- Napa County - Invoice dated 44  
9 6/17/1998

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11 --oOo--

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13 REPORTER'S CERTIFICATE 90

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2 A P P E A R A N C E S  
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5 For the Plaintiff: NAPA COUNTY COUNSEL  
6 County of Napa  
7 1195 Third Street, Room 301  
8 Napa, California 94559

By: CARRIE GALLAGHER, ESQ.  
Deputy County Counsel

9

For the Defendant: GAW, VAN MALE  
Attorneys at Law

10

1000 Main Street  
Napa, California 94559

11

BY: TERESA CUNNINGHAM, ESQ.

12

- and -

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ROBYN CHRISTO, ESQ.  
Attorneys at Law

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1 TUESDAY, APRIL 9, 2013

3:00 O'CLOCK P.M.

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The above-entitled matter came on regularly  
this day for hearing before the Honorable J. MICHAEL BYRNE,  
Judge Pro Temp.

6

NAPA COUNTY COUNSEL, County of Napa, 1195  
Third Street, Room 301, Napa, California 94559,  
represented by CARRIE GALLAGHER, Deputy County Counsel,  
appeared as counsel on behalf of the Plaintiff.

10

GAW, VAN MALE, Attorneys at Law, 1000 Main  
Street, Napa, California 94559, represented by TERESA  
CUNNINGHAM and ROBYN CHRISTO, Attorneys at Law, appeared as  
counsel on behalf of the Defendant.

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14 The Honorable J. MICHAEL BYRNE, Judge Pro  
15 Temp, Presiding.

16 SUSAN L. STRAUB, CSR No. 7608, Certified  
17 Shorthand Reporter for the County of Napa was duly present  
18 and acting.

19 The following proceedings were then and  
20 there had and taken, to wit:

21 P R O C E E D I N G S

22 THE COURT: Okay.

23 Napa versus Carllice.

24 Can get everybody's opinion -- I am sure I  
25 will get everybody's opinion, but can we have appearances.

5

1 MS. GALLAGHER: Good afternoon, your Honor.  
2 Carrie Gallagher, Deputy County Counsel on  
3 behalf of the department and Dave Giudice, Supervising Code  
4 Enforcement Officer.

5 THE COURT: All right.

6 Ms. Cunningham, go ahead.

7 MS. CUNNINGHAM: Good afternoon, your Honor.

8 Teresa Cunningham and Robyn Christo

9 appearing on behalf of the defendants.

10 THE COURT: Mr. Mackenzie, are you appearing  
11 or are you here as an observer.

12 MR. MACKENZIE: I am here as an observer and  
13 possibly, I believe, as a witness.

14 THE COURT: All right.

15 The matter is here for hearing on a  
16 preliminary injunction.

17 I did get a chance to see the papers an  
18 reply. It did look like there was a work in progress going  
19 on, or hopefully.  
20 what is the status going on right now.  
21 MS. GALLAGHER: Regarding the Temporary  
22 Certificate of Occupancy, your Honor?  
23 THE COURT: I know there are all kinds of  
24 issues regarding this. I was wondering where you were  
25 right now.

6

1 MS. GALLAGHER: The County did allow for an  
2 inspection, pursuant to the Temporary Certificate of  
3 Occupancy. There is a limited purpose of production; and  
4 they were not able to issue it as of yet.

5 I believe, that there is a remaining issue  
6 regarding the fermentation tanks and a very minor issue  
7 regarding electrical that needs to be capped.

8 So the Temporary Certificate of Occupancy  
9 has not yet been issued.

10 THE COURT: Ms. Cunningham, what is going on  
11 from your prospective?

12 MS. CUNNINGHAM: There were two inspections.  
13 The first inspection was March 28th regarding the driveway  
14 and It's our understanding that the driveway has been  
15 cleared for Temporary Certificate of Occupancy with regard  
16 to production.

17 And as Ms. Gallagher noted, there was a  
18 second inspection on April 2nd with regards to the winery  
19 proper. That had addressed all issues of the notice of  
20 correction from November 2012, save for the tank issue and

21 the -- I think as she said, the electrical, Z-box issue,  
22 which is fairly minor.

23                   It is our position that the tank issue is a  
24 legal issue and should not prevent the county from issuing  
25 the Temporary Certificate of Occupancy.

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1                   THE COURT: All right. So we really still  
2 have that issue and that is the tank that exists in the  
3 cave, not --

4                   MS. GALLAGHER: No.

5                   MS. CUNNINGHAM: No.

6                   MS. GALLAGHER: In the winery, your Honor.

7                   THE COURT: What's going on with the cave?  
8 I am short-cutting, maybe.

9                   MS. CUNNINGHAM: No. That's okay.

10                  THE COURT: Or at least the caves are what  
11 concerned me because the seismic earthquake issue and the  
12 public being in there and there were pictures of tanks on  
13 top of tanks.

14                  MS. CUNNINGHAM: Those were barrels, I  
15 believe.

16                  The tank issue is separate. The tanks are  
17 the stainless steel fermentation tanks that are in the  
18 winery area proper. It's our understanding that the county  
19 is remiss to issue the Temporary Certificate of Occupancy  
20 based on, as Miss Gallagher and I both note, the  
21 fermentation issue, one minor issue as to the electrical  
22 and there is a separate issue as to the caves and it's our  
23 position that the county is being unreasonable with regard

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24 to the caves. And that, again, is a legal issue not a  
25 factual issue.

8

1 THE COURT: I thought the caves -- that's  
2 why I asked. Is the cave still at issue or not?

3 MS. GALLAGHER: Definitely, your Honor.  
4 I would say the whole entire property, I would say, is  
5 still at issue.

6 THE COURT: Okay. All right.  
7 All right. Is the county ready to proceed.

8 MS. GALLAGHER: I am. I do have a clerical  
9 item that I would like to bring to your attention.

10 It appears in my ex-parte application and  
11 also my reply brief, I wrote Building Code 115 for the  
12 unsafe building section, and that is a clerical error, it  
13 should be 116. I just wanted to raise that to your  
14 attention, the correct code is Building Code 116 as it  
15 pertains to the unsafe building.

16 And I do have quite a few evidentiary  
17 objections to the declaration submitted by defendants. I  
18 don't know if you would like me to go through those at this  
19 time.

20 THE COURT: All right. Go ahead.  
21 whose declarations are you referring to?

22 MS. GALLAGHER: Let's start what Frank  
23 Altamura's declaration.

24 On page two --

25 THE COURT: Let me find it.

9



1 MS. GALLAGHER: Okay.

2 On page two, paragraph four, Mr. Altamura  
3 declares that use permit allowed for an operation of an  
4 11,800 square-foot winery. And this paragraph he relies on  
5 Exhibit A to support this statement. And I would like to  
6 request the Court strike the statement as it misstates the  
7 evidence and misleads the Court.

8 The evidence clearly shows in that exhibit  
9 the use permit was limited to a winery within a two-story  
10 7,600 square-foot building with a 4,200 square-foot outdoor  
11 crushing and work area and that is the direct language from  
12 the exhibit. It is not an 11,800 square-foot winery.

13 THE COURT: Ms. Cunningham, do you want to  
14 be heard on that?

15 MS. CUNNINGHAM: I'm sorry, I didn't hear  
16 you.

17 THE COURT: Do you want to be heard on that?

18 MS. CUNNINGHAM: Yes, your Honor.

19 First of all, with regard to the evidentiary  
20 objections, Ms. Gallagher and the county had an opportunity  
21 to file the reply brief and they did, in fact, file a reply  
22 brief, and it was file endorsed April 2. She had  
23 objections of evidentiary issues as to the declaration,  
24 which she had already seen. She should have filed it at  
25 the time.

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1 So with regard to these objections, I  
2 believe they have been waived. If the Court believes that

3 they are still considered timely with regard to the  
4 substantive issue, Mr. Altamura is prepared to testify that  
5 there was a verbal modification by the county and that is  
6 an admission against interest by the county that will be  
7 testified to in evidence.

8 THE COURT: well, at this time I -- it just  
9 refers to a particular document. That document will  
10 control and that's what the document says. It's referring  
11 to a document.

12 MS. CUNNINGHAM: Okay.

13 THE COURT: In there is any other evidence  
14 you want to proceed, let's hear the other evidence. You do  
15 make a good point as to whether the objection should have  
16 been made though.

17 MS. CUNNINGHAM: Thank you your Honor.

18 THE COURT: Obviously, it refers to a  
19 document, so the document controls.

20 MS. GALLAGHER: I do apologize for my  
21 lateness in these objections. I did file a reply brief and  
22 I was quite ill last week And so I did work on the day I  
23 filed the brief but I did it rather quickly and was out the  
24 remainder of the week and so I do apologize.

25 THE COURT: All right. All right.

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1 But it is fair to give Ms. Cunningham and  
2 her clients notice, but I do understand you were sick.

3 MS. GALLAGHER: I do understand that, your  
4 Honor.

5 On page two, paragraph six.

6 THE COURT: Go ahead.

7 MS. GALLAGHER: Mr. Altamura declared that  
8 the county did not issue permits for the construction or  
9 use of wine caves at the time of the construction of cave.  
10 To support this assertion, he attaches newspaper articles  
11 as Exhibit C. I think we all know that these newspaper  
12 articles are considered hearsay.

13 He also attached a letter from the director  
14 of planning as Exhibit D. And, although that letter is  
15 admissible as a business record, nowhere in the record does  
16 it state that the county did not issue permits for the  
17 construction or use of wine caves, so I would like to  
18 request that the Court strike the entire paragraph six for  
19 lacking foundation, being unsupported by the evidence  
20 and misstating the evidence in addition to hearsay.

21 THE COURT: Ms. Cunningham?

22 MS. CUNNINGHAM: The Court can take judicial  
23 notice of additional cites, including newspaper articles on  
24 matter at issue, so I would ask that the Court consider  
25 that. I believe she also indicated that it lacked

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1 foundation. She has an opportunity to cross-examine Mr.  
2 Altamura with regard to the foundation and his substance as  
3 to that paragraph. And I, frankly, didn't get the third  
4 objection as to the --

5 THE COURT: I am the trier of fact and I am  
6 not going to give a lot of credit to a newspaper article  
7 anyway. Documents control and any testimony your client  
8 wants to fill in on what took place, obviously, that would  
9 have much more impact than how it comes out in a newspaper

11 Go ahead.

12 MS. GALLAGHER: Page two, paragraph seven.

13 Mr. Altamura asserts that when he began excavating the  
14 cave, the county's only regulatory requirement was to  
15 obtain final inspection of the electrical and plumbing  
16 work, and he claims he did that.

17 To support this assertion, he again refers  
18 to the newspaper articles and he also refers to the letter  
19 attachment from the director of planning. But nowhere in  
20 that letter does it state that the county's only regulatory  
21 requirement was to obtain a final inspection of the  
22 electrical and plumbing and nowhere in that letter does it  
23 state that he did that.

24 I would like to request that the Court  
25 strike the entire paragraph seven as lacking foundation and

13

1 misstating the evidence, it's unsupported by the evidence;  
2 and, in addition, it's hearsay.

3 THE COURT: Don't we have documents to  
4 indicate what the county did anyway?

5 MS. GALLAGHER: For the use permit?

6 THE COURT: Right.

7 MS. GALLAGHER: And for the cave, the  
8 plumbing work?

9 THE COURT: Yeah.

10 MS. GALLAGHER: No. There is no evidence in  
11 front of the Court.

12 THE COURT: How did the county communicate  
13 what would be required of Mr. Altamura or his employees?

14 MS. GALLAGHER: For the cave?

15 THE COURT: Yes.

16 MS. GALLAGHER: We are indicating that he  
17 never applied for a building permit.

18 THE COURT: It is going to come down to a  
19 question of fact; isn't it?

20 MS. GALLAGHER: Well, he is asserting that  
21 he did it and there is no evidence in front of the Court  
22 that he did.

23 THE COURT: You can argue that.

24 This type of thing will come out better in a  
25 hearing after, I am sure, somebody is going to call some

14

1 witnesses.

2 MS. CUNNINGHAM: That issue will be  
3 specifically addressed by witnesses and documents during  
4 the course of the hearing, your Honor.

5 THE COURT: I think I would rather cut to  
6 the chase and go to the hearing and see what evidence there  
7 is there and weigh the evidence.

8 MS. GALLAGHER: Okay. Because I object to  
9 almost every single one.

10 THE COURT: I got that. It seems like we  
11 ought to just cut to the chase and go to the evidence and  
12 see what actual documents we've got, what records the city  
13 has -- or the county has, and what was said and let's  
14 proceed with that. It is going to have much more affect on  
15 me.

16 MS. GALLAGHER: No, I understand your Honor.

17 THE COURT: I mean, on both sides.

18 MS. GALLAGHER: I am just trying to make a  
19 record.

20 THE COURT: Okay.

21 So the problem is that it's being raised at  
22 this stage and I think it should have been raised in  
23 advance of today's hearing. It's coming in, could have  
24 filed some comments on it. I could have run through it a  
25 lot more quickly, efficiently and still get to resolving

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1 the underlying issues, which I think has a lot of  
2 significance to the county because I think what they are  
3 doing is important and I think it -- obviously, it has a  
4 lot of significance to the operation of the winery.

5 So I would like to cut to the chase.

6 MS. GALLAGHER: Okay.

7 THE COURT: If you have something that  
8 really -- I am assuming we are going to have evidence on  
9 this any way.

10 MS. GALLAGHER: I do find Exhibit H to be  
11 rather shocking.

12 THE COURT: Well, let me follow up on that.  
13 I forgot which one H is.

14 MS. GALLAGHER: It is relied on in paragraph  
15 three and four -- I'm sorry, page three and four, paragraph  
16 17.

17 THE COURT: All right. I will let you  
18 definitely tell me what is shocking.

19 MS. GALLAGHER: On that one, Mr. Altamura is  
20 asserting that the county provided the summary of

21 information for the plan-check process, and that the  
22 preliminary plans clearly showed the existing cave  
23 structure, and to support that he uses Exhibit H.

24 Exhibit H is a letter dated February 26th,  
25 1998 on county letterhead, it appears. However, the letter

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1 is incomplete. There is no signature page. It drops off  
2 after page two. I have asked for the signature page and  
3 remaining portion of the letter and I have not received  
4 that.

5 I don't know who wrote this letter over at  
6 the county, and we don't have a copy of it in the county  
7 file because we don't keep preliminary views.

8 And, in addition, I don't think that this  
9 can be admitted under the business exception to the hearsay  
10 rule, given that there is no authentication for this.  
11 There is no foundation for this letter.

12 If you look at it, there is a fax on the top  
13 heading on two pages, but on the plans he claims is  
14 attached, there is no fax on that document. So we have  
15 page one, page two. We don't know where the remaining  
16 document pages are and then we have these plans. And I  
17 think this document should be stricken from the record.

18 THE COURT: All right.

19 Ms. Cunningham?

20 MS. CUNNINGHAM: Ms. Gallagher did raise  
21 that issue with me specifically as to Exhibit H. Prior to  
22 today. We've made good faith efforts to find the  
23 document. The document in our possession, care, custody

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24 and control is exactly as we provided to Ms. Gallagher and  
25 the Court in Exhibit H.

17

1 I have the original that Mr. Altamura had,  
2 it is a fax version. It does have two pages of writing and  
3 then there is an attachment of three pages of schematics.  
4 It follows a course of other correspondence. And when Ms.  
5 Gallagher noted to me that she couldn't find this document  
6 in her file, I was somewhat taken a back by the inference  
7 that Ms. Gallagher was concerned that there was an  
8 authentication issue with regard to this.

9 we clearly did not make this document up.  
10 It came from the county. It's a business record. And for  
11 them to now raise that issue or call my client or my  
12 submission of this document suspect is really insulting at  
13 best.

14 I have the document should she want to see  
15 it. It will be introduced into evidence, as well as other  
16 correspondence from her very own file.

17 THE COURT: Well, I think you would need a  
18 little more of a foundation to authenticate it and to  
19 establish that it was a business record. If you can do  
20 that, we will talk about it.

21 MS. CUNNINGHAM: Sure.

22 THE COURT: But I think that should be done  
23 as part of the hearing.

24 All right. Ready to proceed.

25 MS. GALLAGHER: Yes, your Honor.

18



1 I would like to call Mr. McDowell to the  
2 stand.

3 THE BAILIFF: Stand right here, face the  
4 clerk and raise your right hand.

5 whereupon,

6 JOHN MCDOWELL

7 who, being first duly sworn to tell the truth, the whole  
8 truth, and nothing but the truth, was examined and  
9 testified as follows:

10 THE WITNESS: I do.

11 THE BAILIFF: Come right around here, all  
12 the way around the bench.

13 THE WITNESS: Thank you.

14 THE BAILIFF: You're welcome.

15 As soon as you're comfortable in the chair,  
16 state your full name and spell it for the record.

17 Thank you.

18 THE WITNESS: My name is John McDowell.  
19 J-o-h-n, M-c capital d-o-w-e-l-l.

20 MS. GALLAGHER: Thank you, your Honor.

21 DIRECT EXAMINATION

22 BY MS. GALLAGHER:

23 Q. Mr. McDowell, what is your current occupation?

24 A. I am a land-use planner for the county of Napa.

25 Q. How long have you been employed with the county of

1 Napa?

2 A. Approximately 11-and-a-half years.

3 Q. Where were you employed previously?

4 A. I was employed for the city of Vacaville for  
5 13-and-a-half years and I did a brief stint with the city  
6 of Mountain View, both in the capacity as a land-use  
7 planner.

8 Q. What is your current job title for Napa County?

9 A. I am the Deputy Planning Director.

10 Q. How long have you been the Deputy Planning Director?

11 A. I believe since 2006.

12 Q. Can you describe your job duties as a Deputy  
13 Planning Director?

14 A. Yes. I manage the current planning division, or  
15 what we call the planning division. I oversee eight  
16 land-use planners. Our primary responsibility is to review  
17 all private development applications for zoning, general  
18 plan and environmental consistency.

19 In that capacity, I act as the county's  
20 zoning administrator as designated by the county planning  
21 director. Which means, I am the staff level decision-maker  
22 for projects that do not require planning commission or  
23 Board of Supervisor review.

24 As it relates to this particular case, I am  
25 the decision-maker on use permit modification requests on

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1 whether or not the proposed change to a winery rises to a  
2 level that can either be handled at -- within the scope of  
3 the current entitlement or whether it requires a  
4 staff-level review or whether it's a commission-level  
5 review.

6 Q. So you are familiar with Altamuras' winery?

7 A. Yes.

8 Q. Does the planning commission keep a file Altamura's  
9 winery?

10 A. Yes, we do.

11 Q. Where is that physical file kept?

12 A. Second floor, County Administration Building, across  
13 the street. 1195 Third street, Suite 201.

14 Q. Is there an electronic file also?

15 A. I would say there are electronic records.

16 Q. Where are those kept?

17 A. They are accessible via the county's computer  
18 system. So second floor, County Administration Building.

19 Q. What type of documents and records are in your  
20 planning division file?

21 A. Well, on the electronic side, there is our operating  
22 system or building and planning permit tracking programs  
23 called Excella. In Excella, it lists all of the various  
24 types of permits that have been issued on property with  
25 detail -- with some rudimentary details about the project,

21

1 like where it's when it was submitted, when it was  
2 approved, what the status of the permit is, the status of  
3 inspections.

4 The hard copy file, it's a folder, what we  
5 call the "planning jacket" for the use permit would contain  
6 such things as an approval letter with all of the project's  
7 conditions of approval. A staff report containing the  
8 staff's analysis that was presented to the planning  
9 commission when the item went to hearing.

11 agencies, neighbor correspondence, notification packet,  
12 environmental document analyzing the environmental affects  
13 of the project and the applicant's submittal material,  
14 including detailed plans of site plans, building  
15 elevations, floor plans, just -- a narrative on the  
16 operation, capacity of facility, number of employees, the  
17 amount of traffic, that sort of the information.

18 Q. Now are you familiar with how that sort of  
19 information in record enters into the file in your office?

20 A. Yes, I am.

21 Q. Are these records kept in the normal course of  
22 county business?

23 A. Yes.

24 Q. Are these records made as part of the normal county  
25 business?

22

9

1 A. Yes.

2 Q. Do you regularly review these files in the course of  
3 your job duties for the planning division?

4 A. Yes.

5 Q. And have you had an opportunity to review the entire  
6 Altamura use-permit file?

7 A. Yes.

8 Q. Are you familiar with Altamuras' use permit, which  
9 is 93433?

10 A. Yes, I am.

11 Q. Can you describe what this use permit established?

12 A. As I recall, it was for 50,000 gallon per year  
13 winery, and the winery was to be conducted within a

14 two-story, 7,600 square-foot winery structure with an  
15 outdoor work area and crush area of approximately 2,400  
16 square feet.

17 Q. Did the use permit have conditions associated with  
18 it.

19 A. Yes, it did.

20 MS. CUNNINGHAM: Objection, best evidence.

21 The document speaks for itself.

22 THE COURT: I think it would.

23 MS. GALLAGHER: Okay.

24 THE COURT: I will sustain it.

25 ///

23

1 BY MS. GALLAGHER:

2 Q. Do you know if the Altamuras were required to follow  
3 all of the county Building Codes, zoning standards, other  
4 division standards as part of that use permit.

5 MS. CUNNINGHAM: Objection, vague, compound,  
6 calls for expert testimony, lacks foundation.

7 THE COURT: He has got the background to  
8 give an expert opinion and why they would be there and what  
9 it would mean and it might be a little. Maybe you could  
10 tie it down a little bit.

11 MS. GALLAGHER: If I could show him the  
12 documents, your Honor.

13 THE COURT: That might be the best way to do  
14 it.

15 BY MS. GALLAGHER:

16 Q. Mr. McDowell, I'm going to hand you Defendant's

18 Can you tell me what that document is?

19 A. Yes. This is an approval letter for a winery use  
20 permit.

21 Q. And what is the second page of that document?

22 A. It's the first page of the project's conditions of  
23 approval.

24 Q. And how many conditions are listed in that document?

25 A. There are 14 conditions.

24

1 Q. And is one of the conditions for the Altamuras to  
2 comply with all of the Building Codes and zoning codes?

3 A. Yes, it's the second condition of approval.

4 Q. Okay.

5 In your knowledge and review of the file,  
6 have all of those conditions listed in the use permit been  
7 met?

8 A. No, I don't believe so.

9 MS. CUNNINGHAM: Objection, lacks  
10 foundation.

11 THE COURT: I will overrule it.

12 MS. GALLAGHER: Your answer again, I  
13 apologize.

14 THE WITNESS: No, I do not believe the  
15 conditions have been met.

16 BY MS. GALLAGHER:

17 Q. Does the use permit that you have in front of you,  
18 include the use of the cave on the property for  
19 winery-related purposes?

20 A. No, it does not.

21 Q. Did the Altamuras, at any time indicate that they  
22 wanted too use the cave for winery related purposes?

23 MS. CUNNINGHAM: Objection, lacks  
24 foundation, calls for --

25 THE COURT: It's vague.

25

9

1 what do you mean, to him personally or  
2 anything in the documents?

3 MS. GALLAGHER: I will be more specific.

4 THE COURT: Tie that down a little.

5 BY MS. GALLAGHER:

6 Q. In your use-permit file, do you have any  
7 documentation that the Altamuras formally requested a  
8 use-permit modification for the cave to be used as part of  
9 this project?

10 A. There is no formal application for modification;  
11 however, there is a letter, I believe from March 1997, the  
12 date might be March 14th, 1997, from Mr. Malcolm McKenzie  
13 and that letter indicates the permittees intent to convert  
14 the second story of the winery structure to a residence and  
15 move that portion of the winery entitlement to the  
16 adjoining cave structure.

17 Q. Did the county respond to this March 14th, 1997  
18 letter from Mr. McKenzie?

19 A. Yes.

20 Q. And what was the county's response regarding the  
21 issue of the cave?

22 A. There is an April 1st, I believe, letter, 1997 from  
23 then director Jeff Reading stating -- let me back up a

25 The letter was primarily -- the letter

26

1 exchange between Mr. McKenzie and Mr. Reading was regarding  
2 whether the winery use permit had been exercised or  
3 activated. Sometimes the word "use" or "vested" is often  
4 associated with that. County use permits have an  
5 expiration date unless you takes steps to activate the  
6 permit.

7 So Mr. Mackenzie letter --

8 MS. CUNNINGHAM: Objection, the document  
9 speaks for itself. The letter says what the letter says.

10 THE COURT: It's beyond the scope of the  
11 question anyway, so we can have the next question.

12 MS. GALLAGHER: I don't think he answered my  
13 first question.

14 THE COURT: I don't think we got the answer.  
15 Do you want to get us back? I think we want to talk about  
16 the letter from Mr. Reading.

17 BY MS. GALLAGHER:

18 Q. Mr. Reading's letter response letter.

19 A. So Mr. Reading's letter states that caves were not a  
20 part of the use-permit entitlement.

21 MS. CUNNINGHAM: Your, Honor, I am going to  
22 make a belated objection, again. The document speaks for  
23 itself. It's critical that these documents be introduced  
24 as exhibits, that's fine, but for the witness to opine as  
25 to the intent of the author or the county at the time, but

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1 there has been no foundation laid this official was even  
2 employed with the county is questionable.

3 MS. GALLAGHER: Mr. Reading was the director  
4 of planning, which is a business record of the county.

5 THE COURT: The record can come in, but  
6 having somebody else read -- the record will speak for  
7 itself.

8 MS. GALLAGHER: And Mr. McDowell realize on  
9 those completely in his assessment.

10 THE COURT: You want to get the record and  
11 then have his opinion as an expert opinion, I will allow  
12 that. But we are getting a little confused as to him  
13 interpreting the letter. I think his expert opinion is to  
14 the status and how it applies and I have found that he has  
15 an expertise, but I think I should just go through the  
16 letter and they say what they say does create some  
17 problems.

18 How long has Mr. Reading been the director  
19 of planning -- was it planning?

20 MS. GALLAGHER: The whole entire department.

21 THE COURT: Planning for the county of Napa.  
22 Do you know that offhand?

23 THE WITNESS: I can give you approximate  
24 dates.

25 THE COURT: That's all right. I thought it

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1 would help with foundation.

2 MS. GALLAGHER: May I approach the witness,

4 THE COURT: Yes.

5 MS. GALLAGHER: Mr. McDowell, I am going to  
6 show you Exhibit D, the April 1st, 1997 letter.

7 Do you recognize that letter?

8 A. Yes, I do.

9 THE COURT: What is the date, I'm sorry?

10 MS. GALLAGHER: April 1st, 1997.

11 BY MS. GALLAGHER:

12 Q. That's on county letterhead?

13 A. Yes, it is.

14 Q. Who signed that letter?

15 A. That letter is signed by the director Jeffrey  
16 Reading.

17 Q. Did you review that letter?

18 A. Yes, I reviewed this letter.

19 Q. Did you utilize this letter in making a  
20 determination on whether or not a use-permit modification  
21 is required in this case?

22 A. Yes, I did.

23 Q. How did you rely on this letter?

24 A. On the second page of this letter, the third  
25 paragraph, there is a statement -- or the paragraph

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1 pertaining to the vesting of the permit. And the final  
2 sentence of this letter states that, I quote, from Mr.  
3 Reading.

4 "I would note that no caves were approved  
5 for winery use and, therefore, any costs attributable to  
6 the caves, cannot be used to reach conclusions relative to

7 vesting."

8 Q. So, in your opinion, does that indicate that the  
9 cave was not part of the use permit?

10 A. Yes.

11 Q. What is the county's process that the Altamuras  
12 would need to follow in order to use the cave under the use  
13 permit?

14 MS. CUNNINGHAM: Objection, vague and  
15 ambiguous as to time. Today? Or --

16 THE COURT: Sustained. Sustained.

17 MS. CUNNINGHAM: - or when the application  
18 was issued?

19 THE COURT: Sustained.

20 MS. GALLAGHER: Okay.

21 THE COURT: Do you want to set a time? Are  
22 you referring to this time or now?

23 MS. GALLAGHER: I was going to get to that.

24 THE COURT: Go ahead.

25 ///

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1 BY MS. GALLAGHER:

2 Q. In 1997, what -- do you know what the process would  
3 be to obtain a use-permit modification?

4 A. Yes, I believe I do.

5 Q. Okay. And what was that process in 1997?

6 A. It was to receive some form of use-permit  
7 modification, whether that be a staff level use-permit  
8 modification or --

9 Q. What's the difference between the two?

10 A. A staff level modification would be, for one, it

11 does not change the overall character of the winery

12 project. I believe the operative words in the code are

13 change in intensity, density or environmental affect

14 thereof.

15 Q. And the other one you indicated would go to the

16 planning commission?

17 A. So if you expand the side of the winery, for

18 example, that increase in intensity would be automatic

19 commission of a review.

20 Q. Is that the same standard today?

21 A. Yes.

22 Q. Did you discuss this process with Mr. Massey?

23 A. Yes, I did.

24 Q. And when did you discuss this process?

25 A. A meeting occurred, I believe, early December, may

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1 have been December 12th, 2012. And at that meeting, I

2 expressed to Mr. Massey that I believe the use of the

3 winery required -- excuse me, use of the cave required a

4 use-permit modification.

5 Q. Does the use permit state that any changes in the

6 use or changes in construction would be subject to county

7 approval?

8 A. Can you repeat the question.

9 Q. The use permit which you have in front of you, does

10 it state that any changes to the use or construction of the

11 project would need county approval?

12 A. Yes, I believe it does.

13 Q. Was it common practice in 1996 to dig a cave first

14 and then obtain a use permit after the cave was dug?

15 A. That is my understanding, yes.

16 Q. And what do you base that understanding on?

17 A. That was the practice when I started to work for  
18 Napa County in 2001. That practice continued onto -- until  
19 on about late 2007, early 2008, and then it's quite evident  
20 when you review older use permit files, that the cave was  
21 existing at the time or the cave was under construction of  
22 the time that a winery use-permit request would come in.

23 Q. So did -- would an applicant need permission to  
24 actually dig a cave in the county -- in 1996.

25 MS. CUNNINGHAM: Objection, vague --

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1 MS. GALLAGHER: -- in 1996?

2 THE COURT: I think she corrected that.

3 MS. CUNNINGHAM: Go ahead.

4 MS. GALLAGHER: Go ahead.

5 THE WITNESS: It's okay for me to answer?

6 THE COURT: Yes. Go ahead.

7 THE WITNESS: So when I started to work for  
8 the county, the practice was to -- in digging a cave  
9 was to essentially go and get approval from, I believe it  
10 was the state's division of mines and geology. I might not  
11 have the department name exactly correct, to start  
12 excavation, to what was effectively mine, and then the  
13 occupancy would follow at a later date, and depend on  
14 whether the occupancy of the structure was, say, for a  
15 residential purchase, it would be an allowed use under  
16 zoning; or if it was, say, for a winery use it would be

17 something that would be incorporated into the winery use

18 permit.

19 Q. So in 1996, was it required that you were going to  
20 use a cave for winery-related purposes, would that need to  
21 be under a use permit?

22 A. Yes.

23 Q. Is that any different today?

24 A. No.

25 Q. Can you define for us the definition of pre-existing

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1 legal non-conforming use?

2 A. Yes.

3 Q. What is that definition?

4 A. Legal non-conformity -- pre-existing legal  
5 non-conformity is a use that was legally established prior  
6 to a change in zoning regulations that would outlaw the  
7 use. So the use is allowed to continue until such time  
8 that it's voluntary abandoned or the property owner seeks  
9 some other use of the property, at which time the future  
10 use or the new use would need to come in into conformity  
11 with current zoning regulations.

12 Q. Does the cave on Mr. Altamura's property fall under  
13 that definition?

14 A. No.

15 Q. And why is a use permit needed to utilize that cave  
16 for winery-related purposes on this particular property?

17 A. There is a section of the zoning code, I believe  
18 it's section 1812040(b), which states that zoning and the  
19 regulations associated with zoning apply to all structures  
20 and to all uses of land.

21                   So under -- in this particular case, the  
22 subject property has an agricultural watershed zoning  
23 designation and that allows wineries, upon grant of the use  
24 permit. And to grant the use permit, there is a section of  
25 the County Code 181024, which states the mandatory findings

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1 of that grant the use permit.

2                   And then there is another section of County  
3 Code, I think it's 18104, which states the various  
4 requirements they need to meet in order to have a winery.  
5 Here in Napa County, we have regular particular  
6 requirements on the winery, how it is designed, related to  
7 how much space can be used for non-production activities,  
8 such as wine tasting, visitation space versus production  
9 space where the wine is actually made.

10                   So all of the various aspects of a winery  
11 operation wind up being folded into the winery use permit.

12 Q.       And that would include then a wine cave?

13 A.       Yes.

14                   MS. GALLAGHER: No further questions, your  
15 Honor.

16                   THE COURT: All right.

17                   Cross?

18                   MS. CUNNINGHAM: Yes, your Honor.

19                   CROSS-EXAMINATION

20 BY MS. CUNNINGHAM:

21 Q.       Mr. McDowell, you said you started in Napa County in  
22 2001; correct?

23 A.       That's correct.

24 Q. When was the first time you became familiar with

25 Altamura winery and the use-permit file?

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1 A. Recently here, 2012.

2 Q. And what month in 2012?

3 A. I would estimate sometime over the summer. July,  
4 maybe.

5 Q. Okay.

6 And in part your familiarization with the  
7 origination of the use permit file for the Altamura winery,  
8 did you have an opportunity to talk with anybody in county  
9 counsel's office with regard to the use-permit issue?

10 A. I talked to Ms. Gallagher on several occasions.

11 Q. Okay.

12 What was the first issue that you had with  
13 regard to the Altamura winery when you first became  
14 familiar with the project?

15 A. It's difficult to say. I think probably the most  
16 evident thing for me was that wine was being produced at  
17 the facility and visitors -- it was alleged that visitors  
18 were at the facility and there was no evidence of an  
19 occupancy permit being granted.

20 Q. How did that information come to you?

21 A. I believe through the code enforcement supervisor,  
22 Mr. Giudice.

23 Q. And then what efforts -- strike that.

24 Did you then, with that information from Mr.  
25 Giudice, make an effort to review your department file?

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1 A. It was at about that time, yes, when I started to  
2 review my files.

3 Q. And then at some point in time you had a meeting  
4 with county counsel, code enforcement, Mr. Altamura and Mr.  
5 Altamura's legal representatives in December 2012; correct?

6 A. Yes.

7 Q. And I think you said, you thought it was December  
8 12th --

9 A. It was the 12th.

10 Q. -- 21st, something like that.

11 Okay.

12 So between July and December, what hands-on  
13 review did you do of that file, if any, other than hearing  
14 from code enforcement officers and meeting in December?

15 A. You know, I can't recall the specifics on that.

16 Q. Okay.

17 Did you talk to anybody in the department,  
18 whether they were a current employee or former employee,  
19 with regard to historical information about the Altamura  
20 project?

21 A. I conversed with several staff members, who are not  
22 present in the courtroom right now, but no former staff.

23 I did not speak with --

24 Q. Jeff Reading?

25 A. -- Jeff Reading. I see Jeff Reading on a regular

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1 basis but I did not see or speak to him about this project.

2 Q. Okay.

3 Just briefly tell me what staff members you

4 spoke to about the Altamura project between July and  
5 December 2012.

6 A. I recall speaking with Mr. Giudice, Mr. Mayes, the  
7 building official, with members of the building division  
8 staff. Greg Baxter would be one of the inspectors. And  
9 then a member of my staff, Susie Gambel.

10 Q. And do you recall the topics of those discussions?

11 A. Not specifically, no.

12 Q. Do you have a general recollection of the topics of  
13 those discussions?

14 A. Yes. It was along the lines of what would be  
15 necessary in order to get this project completed and open  
16 for business.

17 Q. Other than the meeting in December of 2012 with the  
18 Altamuras and counsel, did you have any direct  
19 communication with Mr. Altamura?

20 A. No, I did not.

21 Q. Did you have any direct communication with his  
22 contractor, Pat Abernathy.

23 A. No.

24 Q. Did you make any efforts to communicate with them  
25 that were not resulted in a positive discussion?

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1 A. I made no efforts to speak with him.

2 Q. Okay.

3 You indicated that the department maintains  
4 a file. Does the file contain, obviously, paper documents  
5 that you testified to; correct?

6 A. Yes.

7 Q. Does the file folder or file jacket also contain  
8 notes or handwritten notations on the actual file folder,  
9 material folder.

10 A. I have it here, but I don't believe there are any  
11 except for a few hand-scratched notes of the assessor's  
12 parcel number.

13 Q. To your knowledge, were there any handwritten notes  
14 in the file, other than documentation on official county  
15 letterhead?

16 A. There are a couple of little side notes that you see  
17 on -- like the formal staff report, but there was not any  
18 historic notes from any of the previous staff members who  
19 had worked on the project.

20 Q. Okay.

21 When you were at that meeting in December of  
22 2012, do you remember making a comment to those in  
23 attendance that the county regulations pertaining to caves  
24 were much different, or words to that affect, in 1995 when  
25 the cave was initially constructed and began its use

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1 thereafter, then currently?

2 A. Yes.

3 Q. Okay.

4 In the course of your duties and  
5 responsibilities as land-use planner for the county, do you  
6 often meet with private developers to talk about ongoing  
7 issues with their projects? Is that part of your job  
8 duties or responsibilities?

9 A. If I understand the question, on a daily basis I

10 meet with property owners and representatives of property  
11 owners wishing to do projects on their property.

12 Q. Is there any reason that you did not do that in the  
13 case of the Altamuras once you became aware of the various  
14 issues raised in the July or December meeting?

15 A. In this particular case, Mr. Giudice has been the  
16 project manager on it.

17 Q. Okay.

18 Did you have any recollection of within the  
19 department file, on any notes or memorandum with regard to  
20 any involvement by -- excuse me -- Phil Crundell,  
21 C-r-u-n-d-e-l-l, and Sylvia Toth, T-o-t-h?

22 A. There is some correspondence from the Altamuras to  
23 Phil Crundell, who at the time was one of our senior  
24 planners, but I did not see any personal notes in the file  
25 from either Sylvia Toth or Mr. Crundell.

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1 Q. And you made no efforts to reach out to them with  
2 regard to historical information once you became involved  
3 in this matter?

4 A. No, I have not spoken to either.

5 Q. Okay.

6 What is the basis for your statement on  
7 direct by Ms. Gallagher, that in 1996, the cave would have  
8 been required to be -- have a separate use permit? Is that  
9 what you were saying?

10 A. I believe it needs a use-permit modification.

11 Q. Okay.

12 A. And the basis is -- that was the practice that I was  
13 taught when I started working for the county in 2001. But

14 it's also quite evident, when you do file research on older  
15 files, that that was occurring.

16 So if I could give an example.

17 I was recently going through the Jarvis  
18 winery file, and that project was originally approved in  
19 the mid 19 -- I think it was '92, when it was approved.  
20 And at that time the winery cave was under construction  
21 when the project came in for planning commission approval;  
22 and then subsequent to the planning commission approval,  
23 changes occurred to that winery's design that resulted in a  
24 code enforcement case.

25 And there is a letter in that file from 1992

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1 stating that a use-permit modification was necessary and  
2 that plumbing and mechanical permits were also necessary.

3 Q. Do you have any information that the caves as  
4 constructed on the Altamura property were not constructed  
5 with mining and geology standards at the time?

6 A. I am not familiar with the mining and geology  
7 standards.

8 Q. Do you have any information that, at the time the  
9 caves were constructed, that the plumbing and the  
10 electrical were not approved by the county?

11 A. I have found no record of a plumbing or mechanical  
12 or electrical permit for the cave.

13 Q. I would like to show you a document.

14 MS. CUNNINGHAM: Your Honor, can we mark  
15 this as Defendant's 1?

16 Did Ms. Gallagher have an exhibit that she

18 MS. GALLAGHER: I just utilized your  
19 exhibits.

20 MS. CUNNINGHAM: Okay.

21 I will just mark this as Defendant's 1.

22 THE COURT: The only one I have got so far  
23 is an A, which was one of your -- I guess we referred to  
24 them. We probably should mark them, so they are clear.

25 MS. GALLAGHER: He has two. I had him refer

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1 to two exhibits.

2 THE COURT: I don't think you mentioned any  
3 other exhibits. I don't believe we had any of them marked.

4 MS. GALLAGHER: I don't think we did either.  
5 Maybe we should Plaintiff Exhibit 1 and 2.

6 THE COURT: Let's call those 1 and 2.

7 MS. CUNNINGHAM: And I will do alpha.

8 THE COURT: Why don't you do that.

9 MS. CUNNINGHAM: Okay. That's fine.

10 Do you want to mark those now, Ms.

11 Gallagher.

12 THE COURT: So we have a 1 and a 2 and A.

13 Exhibit 1 will be the approval letter.

14 (Approval letter was marked as  
15 Plaintiff's Exhibit No. 1 for  
identification.)

16 THE COURT: And what was 2?

17 MS. GALLAGHER: April 1st, 1997 letter.

18 THE COURT: Okay, I saw that. That will be  
19 2.

20 (Letter was marked as Plaintiff's Exhibit

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22 THE COURT: And Exhibit A that's coming in,  
23 what is it?

24 MS. CUNNINGHAM: It's going to be the Napa  
25 County Conservation Development and Planning Department

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1 Invoice No. 89826, dated June 17, 1996, Altamura Winery,  
2 with an address.

3 And I have one for you.

4 Do you want an extra copy, your Honor?

5 THE COURT: No, I don't need one.

6 (Invoice was marked as Defendant's  
7 Exhibit A for identification.)

8 BY MS. CUNNINGHAM:

9 Q. I have handed you a document that has been marked  
10 Defendant's A. I have previously identified it.

11 Have you seen that document before?

12 A. I don't recall. I don't believe I have seen this  
13 document.

14 Q. Okay.

15 You indicated that -- you have been talking  
16 about Jarvis.

17 Isn't the Jarvis project entirely within the cave  
18 itself?

19 A. Yes.

20 Q. There is no separate stand-alone building structure;  
21 is that correct?

22 A. That is my understanding.

23 Q. And isn't it true with regard to the Altamura Winery

24 project, your information is limited to what you have seen  
25 in the documents, as opposed to you weren't involved in it

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1 since the permit was issued, the use permit was issued;  
2 correct?

3 A. That's correct.

4 Q. And what information, if any, do you have that  
5 Altamura Wine project, the winery or the owners, did not  
6 obtain the appropriate certificates for electrical or  
7 plumbing at the time the caves were completed?

8 A. Prior to this hearing, I reviewed our electronic  
9 Excella file records, as well as our planning folder or  
10 planning jacket and the building jacket, and I did not see  
11 a record in any of those documents for issuance of a permit  
12 for those improvements.

13 Q. Have you ever encountered in the course of your  
14 employment with Napa, that documents are on occasion  
15 misplaced or omitted from a particular file?

16 A. Yes.

17 Q. So would it be possible that documents are not in  
18 the Altamura file, for example, Exhibit A?

19 A. Yes, it's possible.

20 Q. Okay.

21 A. That copies of permits would not be in our files.

22 Q. And do you know when Napa County started to put  
23 documents in an electronic fashion in Excella?

24 A. Well, Excella, there was a system prior to Excella  
25 that was called Permits Plus.

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1 Q. Okay.

2 A. And Permits Plus, I believe, started in early 1994,  
3 possibly late 1993.

4 Q. And did you make an effort to obtain information  
5 from Permit Plus with regard to this project?

6 A. Yes. The Permits Plus data was downloaded, it was  
7 transferred into the Excella program.

8 Q. So that was part of the course and conduct of the  
9 business or the agency to transfer the electronic data from  
10 one system to another?

11 A. Yes.

12 Q. Okay.

13 Just one minute.

14 THE COURT: Of course.

15 BY MS. CUNNINGHAM:

16 Q. Is it your recollection when you reviewed the file,  
17 that the owners dug the cave first and then got the use  
18 permit?

19 A. It appeared that way from the file history.

20 Q. And what facts in the file gave you that belief?

21 A. I think the most telling fact is the 1998 -- late  
22 1997, early 1998 building permit plan submittal for the  
23 winery and residence. Those plans indicate entrances to  
24 the cave and there is one plan sheet there that has a  
25 bracketed E in front of the statement of "cave." So a

1 bracketed E stands for "Existing."

2 Q. And you believe that -- what was the date, I'm

4 A. I believe those plans were submitted in early 1998.

5 It could have been in late 1997.

6 Q. Did you remember seeing any plans submitted on or  
7 about February 28th, 1997 where plans were submitted for  
8 the cave portal and the retaining wall?

9 A. Yes.

10 Q. Okay.

11 THE COURT: Besides the cave portal, what  
12 did you say?

13 MS. CUNNINGHAM: Retaining wall.

14 BY MS. CUNNINGHAM:

15 Q. Do you recall when the building permit for the  
16 project issued?

17 A. I believe the retaining wall permit was issued in  
18 late 1997, August of 1997.

19 Q. Would it be possible that you are confusing the  
20 building permit being issued with the use permit being  
21 issued in terms of the sequence of when the caves were dug?

22 A. No, I think I have it straight.

23 Q. And you have your file here with you?

24 A. I have the use permit file. I did not bring the --

25 Q. I would like you to look at that file and show me

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1 what document that you have that you are relying on that  
2 the caves were dug in the sequence that you testified to.

3 A. I don't know if I have the building jacket file  
4 information.

5 As I recall, the use permit was originally  
6 issued in March of 1995. He got an extension in, I

7 believe, February, March of 1996 --

8 Q. That's consistent --

9 A. -- for the use permit.

10 Q. And then in early 1997, the building permit for the  
11 cave and retaining wall was submitted. And then the  
12 building permit for the residence and winery was submitted  
13 in the latter part of 1997 or early part of '98. It may  
14 have been February 1998 when that building permit was  
15 submitted.

16 MS. CUNNINGHAM: Okay.

17 No further questions at this time.

18 Thank you, your Honor.

19 Thank you, Mr. McDowell.

20 THE COURT: Ms. Gallagher, redirect.

21 MS. GALLAGHER: Yes, thank you, your Honor.

22 REDIRECT EXAMINATION

23 BY MS. GALLAGHER:

24 Q. On cross-examination, you indicated that you did  
25 state in your December 12th meeting that with the

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1 regulation of caves I think it was, I am paraphrasing, it  
2 was much different in 1995 and you replied "yes." You did  
3 state that at that meeting?

4 A. Yes.

5 Q. How -- give me the context of how that statement was  
6 made at that meeting?

7 A. My Impression of that meeting was that it was an  
8 attempt with Mr. Massey and the county to see what items  
9 remained and how we could move forward to resolve this code

11 MS. CUNNINGHAM: Your Honor, I will object  
12 on the basis that both counsel were present and I believe  
13 that was an effort for settlement conference to resolve the  
14 issue and dispute and so those would be privileged  
15 communication.

16 MS. GALLAGHER: She opened the door, your  
17 Honor, by asking if he made that statement and I would like  
18 to clarify what he meant by that statement.

19 THE COURT: I will admit it for that limited  
20 purpose.

21 MS. GALLAGHER: Thank you.

22 THE COURT: But I think the door is not open  
23 for everything that was said in negotiations since.

24 So if you want to go to that statement, I  
25 will, obviously, let you go into it.

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1 MS. GALLAGHER: Thank you.

2 BY MS. GALLAGHER:

3 Q. What did you mean by that statement?

4 A. Our process is different now than it was back then  
5 in that we require folks who are getting a winery use  
6 permit to complete the winery use-permit process and to get  
7 a grading permit and a building permit prior to commencing  
8 construction of the cave.

9 And I was simply recognizing that my  
10 understanding of the practice throughout the 1990's and to  
11 and about 2007, early 2008, was that folks would be able to  
12 dig caves under a mining excavation activity and then come  
13 in at a later date for use permit and building permit

14 entitlement.

15 Q. And did you make that statement at that meeting?

16 A. Yes, I did.

17 Q. Do Phil Crundell and Sylvia Toth still work for the  
18 county?

19 A. No.

20 Q. When a permit is finalized, is there some way that  
21 it's recognized in the county's system?

22 A. Yes.

23 Q. And how is that recognized in the county's system?

24 MS. CUNNINGHAM: Objection, your Honor.

25 It's vague and Ambiguous as to time.

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1 THE COURT: Sustained.

2 BY MS. GALLAGHER:

3 Q. Right now a permit is finalized. How is that  
4 recognized in the system?

5 A. It's recorded in the computer under "inspection" and  
6 there is a paper copy issued and placed in the file and  
7 provided to interested parties stating that a permit has  
8 been finalized.

9 In this case, a finalized permit would be a  
10 certificate of occupancy.

11 Q. And did you find a certificate of occupancy for the  
12 winery in the Altamura file?

13 A. No.

14 Q. Did you find a certificate of occupancy for the cave  
15 in the Altamuras' file?

16 A. No.

17 Q. In the later '90's, pre-Excella, how would the file  
18 recognize that a permit was final.

19 MS. CUNNINGHAM: Objection, lacks  
20 foundation, calls for speculation, calls for hearsay.

21 THE COURT: I would like to know if he does  
22 know that, if there are procedures and practices that exist  
23 in the county that have to deal with that, but I haven't  
24 heard her say that he has to know that to do his job. I  
25 would imagine he does, but I think he ought to say it so we

51

1 have a record of it.

2 BY MS. GALLAGHER:

3 Q. In early 2001 when you began at the county, what  
4 system was in place for entering the permit information?

5 A. It was the Permits Plus system.

6 Q. How long had the county had that Permits Plus  
7 system?

8 A. For approximately ten years; a little less than ten  
9 years.

10 Q. So when it was Permits Plus, how was it entered into  
11 the system?

12 A. In a similar fashion to the Excella program where  
13 the computer entry would list the permit has being  
14 finalized or certificate of occupancy granted. Likewise,  
15 there would be a certificate of occupancy document placed  
16 in the file.

17 Q. Based on your knowledge of the current system, would  
18 the practice have been any different now than in 1997/1998.

19 MS. GALLAGHER: No further questions.

20 THE COURT: Any recross?

21 MS. CUNNINGHAM: No, your Honor.  
22 THE COURT: Next witness.  
23 (Pause in the proceedings.)  
24 THE BAILIFF: Stand right here and raise  
25 your right hand.

52

1 whereupon,

2 DARRELL MAYES

3 who, being first duly sworn to tell the truth, the whole  
4 truth, and nothing but the truth, was examined and  
5 testified as follows:

6 THE BAILIFF: Come around here and around  
7 the banister and as soon as you are comfortable, state your  
8 name and spell it for the record, please.

9 THE WITNESS: My name is Darrell Mayes.  
10 D-a-r-r-e-l-l M-a-y-e-s.

11 DIRECT EXAMINATION

12 BY MS. GALLAGHER:

13 Q. Mr. Mayes, what is your current occupation?

14 A. I am the chief building official for the County of  
15 Napa.

16 Q. How long have you been employed with Napa County?

17 A. Just over seven years.

18 Q. How long have you been the chief building official  
19 for Napa County?

20 A. Just over seven years.

21 Q. Where were you employed prior to Napa County?

22 A. I was chief building official for the city of  
23 Caldwell in Caldwell, Idaho for the past 12 years prior to

25 Q. Are you familiar with Altamura winery?

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1 A. Yes.

2 Q. Does the building Division have a file on the  
3 Altamura winery?

4 A. Yes.

5 Q. Where is that physical file kept?

6 A. We keep those files in the parcel jacket in the file  
7 back in our office over at 1195 Third Street.

8 Q. Is there an electronic file?

9 A. Yes, through our permitting process, we  
10 electronically enter all of those permits into what is  
11 called, right now, Excella.

12 Q. What type of documents and records are in that file?

13 A. All correspondence. It can be the actual building  
14 permit. It can be all permits, the issuance of the  
15 certificate of occupancy when you are done. There are also  
16 letters of plan review. They are letters of conditions  
17 that they have to comply with in order to get a certificate  
18 of occupancy.

19 Q. Are you familiar with how those records and files  
20 are entered into the building division files?

21 A. Yes, I am.

22 Q. And are the records that are put into that file kept  
23 in the normal course of county business?

24 A. Yes.

25 Q. Are the records made as part of the normal county

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1 business?

2 A. Yes.

3 Q. Do you regularly review files in your job duties as  
4 the chief building official?

5 A. Yes, I do.

6 Q. Have you had the opportunity to review the entire  
7 Altamura building division files?

8 A. Yes.

9 Q. Are you familiar with Altamuras' building permit?  
10 It's a '98 permit, 00096?

11 A. Yes.

12 Q. Do you know when the last time that building permit  
13 was reactivated?

14 A. I would have to refer to my notes.

15 THE COURT: Do you have them with you?

16 THE WITNESS: I do.

17 THE COURT: You can refer to them.

18 (Witness reviewing documents.)

19 THE WITNESS: Question, please.

20 BY MS. GALLAGHER:

21 Q. Do you know when the last time that permit was  
22 reactivated?

23 A. 2012.

24 Q. Is that permit currently valid?

25 A. I believe so.

55

1 Q. Can you describe what that permit was issued for?

2 MS. CUNNINGHAM: Objection, BEST evidence.

3 THE COURT: I will allow it. It would

4 probably be a summary and be a little clearer if I can get  
5 it from him. You can always question him on cross but it  
6 would be best if I get it from Mr. Mayes.

7 THE WITNESS: I believe that permit was  
8 issued for a winery building with a residence on top.

9 BY MS. GALLAGHER:

10 Q. Have you issued a certificate of occupancy for that  
11 building?

12 A. No.

13 Q. What still needs to be completed in order for you to  
14 be able to issue a certificate of occupancy?

15 A. There are minor issues in the building itself and,  
16 also, all of the other divisions need to have their  
17 requirement met and they need to approve it. And then  
18 after that, they will issue a certificate of occupancy.

19 Q. Did you inform Mr. Altamura that he could not use or  
20 occupy that winery building until you issued a certificate  
21 of occupancy?

22 A. Yes.

23 Q. And when did you notify Mr. Altamura of that?

24 A. I believe it was February of 2008.

25 MS. CUNNINGHAM: I'm sorry?

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1 THE COURT: February of when?

2 THE WITNESS: 2008.

3 BY MS. GALLAGHER:

4 Q. I'm going to backtrack because I don't believe you  
5 were working for the county in 1998.

6 A. 2008.

7 Q. 2008? That is what you said?

8 A. Yes.

9 Q. Did you meet with Mr. Altamura on August 2nd, 2011?

10 A. August 2nd, 2011? I believe so.

11 Q. Did you inform Mr. Altamura of the process for  
12 applying for a Temporary Certificate of Occupancy?

13 A. Yes, I did.

14 Q. And was that at that meeting on August 2nd, 2011?

15 A. I don't have that exact date in my mind. I do  
16 believe he submitted for a TCO request in August --  
17 September 26th, 2011.

18 Q. Okay.

19 So Mr. Altamura submitted his request for A  
20 TCO, and when WE say "TCO" that means Temporary Certificate  
21 of Occupancy?

22 A. Yes.

23 Q. In September 2011, did that request expire?

24 A. Yes. It was never followed through on.

25 Q. Did you inform Mr. Massey that that request expired?

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1 A. Yes.

2 Q. Do you recall when you informed Mr.  
3 Massey of that?

4 A. I believe it was September 18th, 2012.

5 Q. Do you know if Mr. Massey submitted a TCO request on  
6 behalf of Mr. Altamura?

7 A. Yes, he did, I believe, the next day, I think.

8 Q. Is that TCO request still active?

9 A. Yes.

10 Q. Have you actually issued the TCO for the building --  
11 for the winery building?

12 A. No.

13 MS. GALLAGHER: May I, approach your Honor.

14 THE COURT: Yes.

15 MS. GALLAGHER: If I could mark this as  
16 Plaintiff's Exhibit 3.

17 THE COURT: Exhibit 3.

18 (Letter was marked as Plaintiff's Exhibit  
No. 3 for identification.)

19 BY MS. GALLAGHER:

20 Q. Do you recognize that letter?

21 A. This is a result of our TCO inspection on Wednesday  
22 2012 -- Wednesday the 21st.

23 Q. And that letter is written on county letterhead?

24 A. Yes.

25 Q. Who signed that letter?

58

1 A. I did.

2 MR. CUNNINGHAM: Your Honor, just for the  
3 record, I didn't get a copy of it and I don't know what  
4 document she handed the witness.

5 MS. GALLAGHER: I'm sorry. This is  
6 Defendant's Exhibit N.

7 THE COURT: We need to put the sticker on.

8 BY MS. GALLAGHER:

9 Q. Did you prepare this document?

10 A. It was prepared for me by a staff member.

11 Q. Did you sign this document?

12 A. Yes, I did.

13 Q. And what was the purpose of this document?

14 A. This was an inspections to issue a Temporary  
15 Certificate of Occupancy. So prior to doing that, we had  
16 to go out there and make sure that all of the requirements  
17 were met and we did that and the requirements were not met  
18 so we didn't issue that.

19 Q. Does this document list what needed to be done in  
20 order to issue the TCO?

21 A. Yes.

22 Q. How many issues needed to be dealt with prior to  
23 issuing the TCO?

24 A. About eight items on this list.

25 Q. How many items on that list are still needing to be

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1 addressed?

2 A. Give me a minute.

3 (Witness reviewing documents.)

4 THE WITNESS: Right now, item four, which  
5 are the fermentation tanks not being seismically anchored.  
6 That is one of the items.

7 At this time, exiting signs were not  
8 illuminated or not positioned properly throughout the  
9 building.

10 THE COURT: Which number is that?

11 THE WITNESS: That number is five.

12 MS. GALLAGHER: Mr. Mayes, I just want to be  
13 clear, I am talking about today.

14 BY MS. GALLAGHER:

15 Q. Off that list what still needs to be addressed?

16 A. Fermentation tanks.

17 Q. Okay.

18 A. I believe there is also some electrical outlet boxes  
19 that are not complete, that are uncapped. That needs to be  
20 done today.

21 Q. This letter also references the cave. Does that  
22 issue need to be dealt with -- in your letter, you  
23 indicated that that needs to be dealt with.

24 Does that issue need to be dealt with in  
25 order for you to issue a TCO?

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1 A. I'm sorry, can you repeat that question.

2 Q. I believe number two on your letter references a  
3 cave; is that correct?

4 A. Yes, it does. It suggests to the applicant that he  
5 needed to talk to the planning division to have that use  
6 approved, and that is in item two.

7 Q. Do you have to have the cave use approved prior to  
8 you issuing a TCO for the winery?

9 A. Do I need to have that?

10 Q. Yes.

11 A. Yes.

12 Q. For a Temporary Certificate of Occupancy?

13 A. Yes.

14 Q. Could you issue a TCO for a small portion of the  
15 winery and allow the Applicant to deal with the cave issue  
16 at a later date?

17 A. Yes.

18 Q. You can?

19 A. Yes.

20 Q. Would you be willing to issue a TCO under that

21 circumstance?

22 A. Yes.

23 Q. What would you specifically require for that TCO --

24 I'm sorry, that's vague. I will withdraw that.

25 TCO's are for a specific area in a winery;

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1 is that correct?

2 A. Typically -- TCO's typically for wine production  
3 only. And, usually, when we ask -- when an Applicant asks  
4 us for a TCO, we ask them to show us on a floor plan the  
5 area that they are asking for a TCO. And, typically, on a  
6 TCO, all we can do is issue that for production purposes  
7 only.

8 Q. So the TCO would not have anything to do with the  
9 cave?

10 A. No.

11 Q. AS for the fermentation tanks, what do you still  
12 need in order to sign off on the Temporary Certificate of  
13 occupancy?

14 A. I need one of two things. I need to have them  
15 provide me a design by a registered design professional,  
16 how to anchor that down, or I need a manufacturer's  
17 specification details, how it's supposed to be anchored  
18 down; or if it's not to be anchored down, the  
19 manufacturer's specification and installation instructions  
20 would indicate that. So I need one or the other.

21 Q. Have you received that documentation?

22 A. No.

23 THE COURT: This was normal practice with

25 we have a lot of wineries in this county, as you know as

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1 much as I do. Is this common practice on all of the  
2 wineries to require this information?

3 A. Yes.

4 BY MS. GALLAGHER:

5 Q. And is it common practice to actually issue  
6 Temporary Certificates of Occupancy before the entire  
7 winery is completed?

8 A. No.

9 Q. Do Temporary Certificates of Occupancy allow wine  
10 tasting and tours?

11 A. No.

12 Q. And why not?

13 A. We issue the TCO for production purposes only. We  
14 don't feel that allowing the public to come in to a  
15 building that is not finished, we don't feel that is safe.  
16 So we require that the building be complete with all of  
17 it's life-safety issues taken care of prior to the  
18 Permanent Certificate of Occupancy for the safety of the  
19 public.

20 Q. Did you review Mr. Altamura's declaration?

21 A. I don't recall.

22 Q. Did you conduct a diligent search of your building  
23 division file to see if a permit for electrical, plumbing  
24 and mechanical was applied for by Mr. Altamura for the  
25 case?

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1 A. I did look through them.

2 Q. What was the result of that search?

3 A. I couldn't find any permits or anything associated  
4 with them for that cave.

5 Q. Did you conduct a search to see if the county ever  
6 went out and inspected the cave for the electrical,  
7 plumbing and mechanical?

8 A. I reviewed the electrical volts out there and there  
9 was nothing to do with the cave.

10 Q. Are you familiar with the county requirement for  
11 permits needed for caves back in 1996?

12 A. Yes.

13 Q. What did the county require in order for a cave to  
14 be used back in 1996?

15 A. Well, they have to get a use permit approval.  
16 Right? And then they had to get approval from all of the  
17 other divisions.

18 Q. What type of permits would they need in order to  
19 have the public inside a cave?

20 A. They would also have to get a use permit and also  
21 building, plumbing and electrical permits for all of the  
22 things that go into a cave.

23 Q. What does the county require now for cave -- from  
24 the building division's point of view for a cave to be  
25 utilized for winery-related purposes?

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1 A. They would have to get all of the approvals for  
2 permits from all of the divisions first prior to -- can you

4 Q. I am asking what permits are necessary now to --

5 A. All the building and plumbing and electrical  
6 permits, approvals from the zoning department.

7 Q. For the building division, are the same permits  
8 required in 1996 that are required today?

9 A. Are you talking for caves?

10 Q. Yes, for the caves; the building, electrical, I  
11 think you said --

12 A. Building, plumbing, mechanical, electrical permits  
13 were required for caves back in 1996.

14 Q. And are they still required today?

15 A. Yes.

16 Q. Have the Altamuras applied for and obtained the  
17 necessary building permits for the cave?

18 A. No.

19 Q. When did you personally become aware, in your  
20 position as chief building official, that the cave was  
21 being used for winery storage and tasting.

22 A. Please state that question again.

23 Q. When did you become aware that the cave was being  
24 used for winery storage and tasting?

25 A. I believe when I went out there for an inspection of

1 the winery building itself was the first time I seen the  
2 cave.

3 Q. And what was the date of that?

4 A. I can't recall the exact date.

5 Q. What year was it in?

6 A. 2012.

- 7 Q. And why did you go out to the property in 2012?
- 8 A. It was a request for a TCO for the winery building.
- 9 Q. Did you see the cave being used when you went out
- 10 there in 2012?
- 11 A. It was occupied, yes. It had barrel storage and it
- 12 had remnants of wine glasses and things like that, yes.
- 13 Q. Did you discuss the existence of this cave with Mr.
- 14 Massey?
- 15 A. Yes.
- 16 Q. Do you recall when you had those discussions?
- 17 A. I believe that was September 18th, 2012; and, again,
- 18 December 2012.
- 19 Q. If the cave is going to be used for wine storage and
- 20 tasting, will you need to issue a Certificate of Occupancy
- 21 for that cave?
- 22 A. Yes.
- 23 Q. And in order to obtain that Certificate of Occupancy
- 24 for the cave, what did the Altamuras need to do?
- 25 A. well, first they have to apply for a permit and get

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- 1 the use permit approved and then apply for all of the
- 2 building, plumbing, electrical, mechanical purposes and get
- 3 those inspected and approved and then we can issue a
- 4 Certificate of occupancy.
- 5 Q. Do they still need to apply if the work has already
- 6 been done?
- 7 A. Oh, yes.
- 8 Q. Do you still need to inspect that work?
- 9 A. Certainly do.

10 Q. Are you able to issue a Certificate of Occupancy  
11 without inspecting that work?  
12 A. No.  
13 Q. Is it your understanding that use-permit  
14 modification is necessary prior to you issuing a  
15 Certificate of Occupancy?  
16 A. I'm sorry, can you repeat that.  
17 Q. Is it your understanding that a use-permit  
18 modification needs to occur prior to you issuing a  
19 Certificate --  
20 A. Oh, sure. Oh, yes.  
21 Q. And, in your opinion, is the use and occupancy of  
22 that cave today a violation of Napa County codes?  
23 A. Yes.  
24 Q. If the Altamuras do obtain these permit  
25 modifications and all the work is inspected and signed off

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1 on and finalized, would you be able to issue a Certificate of  
2 Occupancy?  
3 A. With approval of all of the division's requirements  
4 being met, yes.  
5 Q. Once a Certificate of Occupancy is issued for the  
6 cave, what would that allow?  
7 A. It would allow for full occupancy of the cave for  
8 what the application was for. If it was for tasting, it  
9 would allow tasting.  
10 Q. What type of cave do you currently consider the  
11 Altamuras' cave?  
12 A. Well, that is kind of hard to answer. I think it's  
13 being used for a type three cave, allowing tasting.

- 14 Q. And what -- how do you define a type three cave?
- 15 A. You have type one, type two and type three caves.
- 16 Type one caves are only for employees only. Type two
- 17 caves, you can actually invite the public in for a tour,
- 18 but no tasting or anything like that. Type three caves are
- 19 for activities that occur in any assembly-type building.
- 20 Q. Are there specific Building Code requirements for
- 21 type three caves?
- 22 A. Certainly.
- 23 Q. And would you need to inspect to make sure those
- 24 requirements are met prior to issuing a Certificate of
- 25 Occupancy?

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- 1 A. Yes.
- 2 Q. What are your concerns with allowing tours and
- 3 tastings inside the cave prior to you issuing a Certificate
- 4 of Occupancy?
- 5 A. Well, my general concern is for the safety of the
- 6 public.
- 7 Q. Is it your understanding today that the winery is
- 8 being used and occupied?
- 9 A. Yes.
- 10 Q. Is that current use and occupancy of the winery in
- 11 violation of the Napa County code?
- 12 A. Yes.
- 13 Q. There is a current active building permit for the
- 14 the winery; correct?
- 15 A. Yes.
- 16 Q. What would it take for you to issue a Certificate of

17 Occupancy for the winery?

18 A. Again, all of the requirements from all of the  
19 committing agencies would need to be met and we would do a  
20 final inspection to make sure they were all met and then we  
21 could do a Certificate of occupancy.

22 Q. whose duty is it to call for those inspections?

23 A. The applicant.

24 Q. So the county or you or your staff, do they contact  
25 the applicant and follow-up on progress throughout this

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1 process?

2 A. No. Typically it's left up to the applicant to get  
3 the sign-off and approvals from all of the other  
4 departments. I do know that staff does try to move it  
5 along to hurry the process up.

6 Q. Once you issue the Certificate of Occupancy for the  
7 winery, what will that allow?

8 A. Full use of the winery, full occupancy.

9 Q. what are your concerns today with allowing tours and  
10 tasting in the winery building prior to issuing that  
11 Certificate of occupancy?

12 A. Please repeat the question.

13 Q. what are your concerns today with allowing tasting  
14 and tours to occur in the winery building prior to you  
15 issuing the occupancy?

16 A. I am concerned for the safety of any occupants in  
17 that building prior to issuing a certificate.

18 Q. Is the building close to being finalized?

19 A. I think it's -- I think it's hard to put a number on  
20 it, but I think it's getting close, the winery building

21 itself, yes.

22 Q. Is the second floor complete yet?

23 A. No.

24 Q. What is missing for the second floor?

25 A. I have not been up there but I do know it's not

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1 complete. I am not even sure if they have called for a  
2 final yet.

3 Q. Have you received any calls for a final inspection  
4 on the winery?

5 A. Typically, the inspection request go to our  
6 inspection line and then staff takes those and schedules  
7 the inspectors out there, so I don't always have the  
8 knowledge for when they call for an inspection.

9 Q. But to your knowledge, you have issued a Certificate  
10 of Occupancy for that winery?

11 A. Correct, I have not.

12 Q. And you are the only person in the county that will  
13 issue that Certificate of Occupancy?

14 A. Yes.

15 MS. GALLAGHER: No further questions.

16 THE COURT: Cross?

17 MS. CUNNINGHAM: Yes, your Honor.

18 CROSS-EXAMINATION

19 BY MS. CUNNINGHAM:

20 Q. When was the last time you reviewed the building  
21 division file on this project?

22 A. Today.

23 Q. When was the first time you ever reviewed the file

25 A. Probably back when they first requested a TCO.

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1 Q. which year?

2 A. I believe that was in -- I don't have the exact date  
3 in my mind.

4 Q. Did you bring your file with you?

5 A. No, I did not.

6 Q. why not?

7 A. I wasn't asked to.

8 Q. Did you make any -- you said that you referred to  
9 notes that you made. Do you have those notes in front of  
10 you?

11 A. I do.

12 MS. CUNNINGHAM: Have we marked those notes,  
13 Ms. Gallagher?

14 MS. GALLAGHER: No.

15 MS. CUNNINGHAM: I would like those marked  
16 has Defendant's next in order.

17 THE COURT: what are they?

18 MS. CUNNINGHAM: They are his notes that he  
19 has relied and used for his testimony on direct.

20 THE COURT: Are they his file notes or his  
21 personal notes.

22 MS. CUNNINGHAM: They are his personal notes  
23 that he prepared to assist him today.

24 MS. GALLAGHER: I would object to those  
25 being entered into evidence.

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1 MS. CUNNINGHAM: I would like to see them,  
2 at least, and make a determination. He has used them to  
3 refresh his recollection about the facts. He used them to  
4 testify as to factual information, and I think that it's  
5 appropriate to mark it. Whether the Court gives it weight,  
6 that is up to the Court to decide.

7 THE COURT: Unless there is further  
8 foundation, because they are just notes to prepare for  
9 trial and I don't see how they become relevant. So if you  
10 want to pursue it.

11 BY MS. CUNNINGHAM:

12 Q. When were the notes made, sir?

13 A. Today.

14 Q. And did you use the building division file to make  
15 the notes, meaning you had it contemporaneously reviewing  
16 those building file, you made notes?

17 A. Looked at the file, partially my memory.

18 Q. And what was the purpose for making those notes?

19 A. Well, it's been such a long time and there were a  
20 lot of dates, specifics, so I was trying to get date  
21 specifics, that's all.

22 Q. Would it be fair to do say that one of the purposes  
23 was to assist you in recalling some highlighted dates in  
24 the project for you to recall at the time of testimony if  
25 you were asked?

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1 A. Yes.

2 Q. And would it be fair to say that the purpose of the

3 notes also served to refresh your recollection as to the  
4 content of the file since you were not going to be bringing  
5 the contents of the file with you?

6 A. No.

7 Q. Were the notes prepared as part of your review of  
8 the file at the same time; correct?

9 A. Yeah.

10 Q. Do they serve any other purpose other than to assist  
11 you in your testimony today?

12 A. No.

13 MS. CUNNINGHAM: I still think it's  
14 appropriate to have them marked, you don't have to agree  
15 that they can be used or entered into evidence later, but I  
16 think that they can be marked for identification purposes.  
17 The witness has used the notes to rely on substantive acts.

18 THE COURT: Ms. Gallagher, do you want to be  
19 heard?

20 MS. GALLAGHER: You know, your Honor, he met  
21 with me, he took some notes afterwards and I do think that  
22 that was part of our conversation together. And, so, in  
23 addition, I don't think -- I mean, the dates were to help  
24 him refresh his recollection. I don't know why they need  
25 to be entered into evidence. The dates are on every dock

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1 document that the Court has in front of him.

2 MS. CUNNINGHAM: Since I didn't see the  
3 notes, I wasn't given a copy, I don't know what else is on  
4 that other than what Ms. Gallagher has indicated.

5 MS. GALLAGHER: In addition, they are not  
6 made in the normal course of business.

7 THE COURT: No, they wouldn't be admissible.

8 MS. GALLAGHER: And they will not be going  
9 into the file.

10 THE WITNESS: No, they will not.

11 THE COURT: I don't see the relevance. I --

12 MS. CUNNINGHAM: That's fine, your Honor, I  
13 will move on.

14 THE COURT: I will sustain the objection.  
15 They are not a work product, so I don't think they qualify  
16 as a work product.

17 MS. CUNNINGHAM: Thank you, your Honor.

18 BY MS. CUNNINGHAM:

19 Q. You prepared a declaration for purposes of the  
20 ex-parte application for temporary restraining order and  
21 order to show cause regarding preliminary injunction filed  
22 by Ms. Gallagher on behalf of the county; correct?

23 A. Yes.

24 Q. And in the process of preparing that declaration,  
25 did you have an opportunity to read that declaration and

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1 review it before you signed it?

2 A. Yes.

3 Q. And you did sign that declaration on or about March  
4 18th, 2013; correct.

5 A. I believe so.

6 Q. And you signed it under penalty of perjury under the  
7 laws of the state of California that the information in  
8 that declaration was true and correct at the date you  
9 signed it; correct.

10 A. To the best of my knowledge, yes.

11 Q. I want to go through some of the information in that  
12 declaration.

13 You indicated in part in paragraph five or  
14 thereabouts, that the caves were, in your words, "newly  
15 discovered," end quote.

16 Did you believe that caves were discovered  
17 in 2012?

18 A. I believe that was -- I was referring to myself,  
19 newly Discovered by me.

20 Q. Okay.

21 So would it be fair to say that it's not the  
22 agency's position that it wasn't until 2012 that they knew  
23 about the caves?

24 A. Can you repeat that.

25 Q. Sure. Let me withdraw it and ask it a different

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1 way.

2 The building department had information, in  
3 either documents or staff, that; the caves existed on the  
4 property, prior to your September 18, 2012 meeting?

5 A. Yes.

6 Q. What basis or what Building Code provision do you  
7 rely on with regard to opining that the caves are a type  
8 three cave?

9 A. I rely on the California Building Code.

10 Q. What section?

11 A. I couldn't give you an exact section, but it's in  
12 Chapter IV.

13 Q. What addition?

14 A. Are you talking about the addition that it was built  
15 under or are you talking about today?

16 Q. What I am asking is, how did you come to opine that  
17 the cave on the Altamura property was a type three cave?

18 A. Back in, I think it was, if my memory serves me  
19 correct, the State Fire Marshall's office are the ones that  
20 designate the types of caves: Type one, type two and type  
21 three and I believe that was done, I'm going to guess, two  
22 code circles ago, I believe. And so let me think, 2010.

23 And those were given by the State Fire  
24 Marshall's office, those cave Designations.

25 Q. Were the classifications, type one, type two, type

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1 three in existence in any statutory regulations at the time  
2 the caves were completed, to your knowledge?

3 A. I am sure when they were completed. So, no.

4 Q. Let's me ask you that.

5 Do you have any information as the chief  
6 building official for Napa County for the last seven years  
7 as to when those caves were completed?

8 A. No.

9 Q. Did you endeavor to find that information, either in  
10 your building division file or elsewhere prior to your  
11 testimony today?

12 A. I couldn't find any information about a cave in our  
13 file.

14 Q. Did you ask any other agencies about the cave, the  
15 existence of the cave or the completion --

16 A. I didn't.

17 Q. why not? Didn't you think it was important?

18 A. why don't you rephrase that question.

19 Q. Did you make any efforts to talk to any other  
20 agency, prior to your testimony today, with regard to  
21 confirming when those caves were done?

22 A. No.

23 Q. Did you make any effort to talk to any other  
24 agencies with regards to whether or not they inspected  
25 those caves with regard to the building, electrical,

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1 mechanical or other issues that you have raised, as part of  
2 the factors of not issuing a Temporary Certificate of  
3 Occupancy as of yet.

4 MS. GALLAGHER: I will object as to vague.  
5 I am not sure what agencies she is referring to.

6 THE COURT: Sustained.

7 BY MS. CUNNINGHAM:

8 Q. Did you talk to anybody within your department with  
9 regard to confirming that there were inspections for  
10 electrical, mechanical or --

11 A. No, I didn't speak to anybody. I looked at the  
12 records.

13 Q. Okay.

14 Did you see anything in the records that  
15 Dave Delong or -- and D. Sylvestry inspected the cave  
16 plumbing, building and mechanical in 2001?

17 A. No.

18 Q. Did you see anything in the file that those two  
19 gentlemen were out on the property to inspect the retaining  
20 wall in 2001 and, also, did inspect the retaining wall?

21 A. Can you will repeat those names, please.

22 Q. Sure.

23 Dave DeLong, D-e-l-o-n-g; and Dave -- or D.

24 Sylvestry, excuse me.

25 A. Okay. That's a woman.

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1 And, no, I did not see that.

2 Q. I think we got a little far afield for a minute. We  
3 were talking about cave designations.

4 what basis, if any, do you have that the  
5 cave as it's presently existing on the Altamura property is  
6 not a type two cave?

7 A. The presence of glasses and wine bottles situated in  
8 a manner that looked like somebody was tasting.

9 Q. I think you said you were out at the property on one  
10 occasion; correct?

11 A. Yes.

12 Q. And was there any actual tasting going on while you  
13 were present?

14 A. No.

15 Q. And you saw a table with glasses on it?

16 A. Yeah.

17 Q. And there might have been a table cloth?

18 A. I can't recall.

19 Q. Okay.

20 were there any other facts that you have  
21 that would ascribe to whether or not that cave was type  
22 three or type two, in your mind, based on what you saw?

23 A. No.

24 Q. Now you said that based on the November 26th, 2012

25 letter that you authored, that there were certain

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1 corrections that needed to be done; correct?

2 A. Yes.

3 Q. And I believe your testimony on direct was that they  
4 were minor; correct?

5 A. I am not sure how to put -- I am not sure what your  
6 definition of minor is, but these -- these are items that  
7 can actually be -- let's say, hazardous to people that  
8 enter that cave.

9 I think anchoring down a tank is a minor  
10 installation; however, it has major consequences if it's  
11 not done.

12 Q. Okay.

13 You recall on direct examination, you used  
14 the word "minor."

15 A. I may have.

16 Q. I am just asking you.

17 As of right now -- other than -- I think you  
18 said the electrical issue, I think it's a J-box issue,  
19 covering the J-box, the tank issue and the cave issue, is  
20 it your understanding that all other corrective items in  
21 your November 26th, 2012 letter have been addressed to your  
22 department's satisfaction?

23 A. Can you repeat that question.

24 Q. Sure.

25 Other than covering the J-box outlets, the

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1 cave issue and whether or not the information has been  
2 given to you about the tanks, those three issues aside,  
3 every other item in your November 26th, 2012 letter have  
4 been addressed to your department's satisfy?

5 A. There is -- there are some other items in there. I  
6 mean, look at that letter. I pointed out that fermentation  
7 tanks aren't presently anchored --

8 Q. Right.

9 And other than the tank issues --

10 A. There were also some exit signs.

11 Q. Okay.

12 As of right now, is it your position that  
13 there is a need to remedy the exit signs?

14 A. I haven't been out there to do a re-inspection.

15 Q. Okay.

16 Did anybody else do a re-inspection on April  
17 2 --

18 A. Oh, yeah.

19 Q. Do you know who was there from your department?

20 A. I would have to refer to the records. I believe it  
21 was Marcus Johnson and I believe, David.

22 Q. Okay.

23 And I'll tell you, I was there.

24 So Mr. Altamura, myself, Mr. Giudice --

25 MS. GALLAGHER: Objection, counsel is

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1 testifying.

2 MS. CUNNINGHAM: I am asking a question.

3 BY MS. CUNNINGHAM:

4 Q. Were you advised on or about after the morning of

5 April 2 that the electrical signs were still an issue?

6 A. I believe not.

7 Q. You believe not; correct?

8 A. Yes.

9 Q. So other than the tanks, other than the cave and

10 other than the Z-box issue, is there anything else on your

11 November 26th, 2012 letter that remains outstanding from

12 your department's prospective?

13 A. Not that I believe. Not that I can see.

14 THE COURT: What has to be done with the

15 electrical box? Is that just like the Lap that goes over

16 them and seals them over --

17 THE WITNESS: Yes. And they have a cap that

18 covers the exposed wire and you are just supposed to see a

19 switch or a light fixture.

20 THE COURT: You can get those at the

21 hardware store, can't you?

22 THE WITNESS: Yes.

23 THE COURT: Okay.

24 BY MS. CUNNINGHAM:

25 Q. Going back to the cave classification, did you

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1 review any outside resources or additional resources with

2 regard to your determination that the cave on the Altamura

3 property was a type three cave in your opinion?

4 A. Could you please repeat that.

5 Q. Did you refer to any statutes or regulations in

6 coming --

7 A. Yes.

8 Q. -- to the conclusion --

9 A. Yes.

10 Q. Which one did you refer to?

11 A. Chapter IV, California Building Code.

12 Q. Building Code Section 436.3 --

13 A. Yes.

14 Q. -- defines, and I will read it for you.

15                   Type three wine caves are, quote, "Natural  
16 or manmade caves used for the storage and/or processing of  
17 wine at a winery facility. Type three winery caves are  
18 acceptable to the public on guided tours or by hosted  
19 events." Citing section 436.3.

20                   Type two wine caves are, quote, "Natural or  
21 manmade caves used for the storage and/or processing of  
22 wine at a winery facility and are accessible to the public  
23 on guided tours only."

24                   Citing the same statute, 436.3.

25                   Type one wine caves are, quote, Natural or

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1 manmade caves used solely for the storage and/or processing  
2 of wine at a winery facility and are not accessible to the  
3 public," end quote.

4 A. Accessible to the public.

5 Q. Are not accessible to the public?

6                   Does that sound --

7 A. It sounds familiar?

8 BY MS. CUNNINGHAM:

9 Q. Do you have any facts or information that the

10 Altamuras do anything more than guided tours in the cave?

11 A. I have not witnessed it, no.

12 Q. You have no information one way or another; isn't  
13 that true?

14 A. Only what I saw with my own eyes as far as having  
15 wine glasses in there with remnants of wine in it.

16 Q. But you made no efforts to confirm, personally, how  
17 the winery utilizes the cave for purposes of tours or  
18 tastings; correct?

19 A. No.

20 Q. Thank you.

21 Your declaration said, in part, in paragraph  
22 nine, "The cave is not safe for occupancy due to the  
23 inadequate means of egress."

24 Isn't it true that there are two exits in  
25 that cave?

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1 A. I did not witness two exits.

2 Q. Do you have any facts as you sit here now, that  
3 there are not two exits in that cave?

4 A. I believe on that last inspection, David Giudice and  
5 Mark Johnson went up there and I think they came back and  
6 told me, yes, indeed there was; however, those exits were  
7 blocked and that is inadequate exiting when you have your  
8 exits blocked by storage barrels or anything like that.

9 Q. Okay.

10 And you recall that was inspection was April  
11 2 after the temporary restraining order was issued  
12 preventing the owners from utilizing the cave?

13 A. I am not sure of that date, but I was only out there

14 once, whatever that day was.

15 Q. Okay.

16 Do you recall when you were in the cave  
17 last, what the position of or -- of the barrels were in the  
18 cave that you witnessed? Do you recall?

19 A. I would say that they were stacked somewhat, not  
20 organized. Some, I think, were stacked four and five  
21 barrels high. There were some barrels stacked in front of  
22 the exit way, things like that.

23 Q. Do you have any information as -- from the last  
24 inspection as to what the condition of the barrels were in  
25 terms of stacking or physical layout within the cave?

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1 MS. GALLAGHER: Objection, assumes facts not  
2 in evidence.

3 THE COURT: Are we going to have one of  
4 those witnesses?

5 MS. CUNNINGHAM: Yes. We will.

6 THE COURT: Okay.

7 MS. CUNNINGHAM: I didn't know what  
8 information had been transmitted, and if that was a basis  
9 for another opinion that the TCO did not issue.

10 MS. GALLAGHER: But they didn't go into the  
11 caves on April 2nd, and she is asking questions about April  
12 2nd.

13 THE COURT: Time out for a minute.

14 How much longer do you think you have? I am  
15 not cutting you out.

16 MS. CUNNINGHAM: I have these exhibits to go

18 THE COURT: We are not going to get done in  
19 the next five minutes?

20 MS. CUNNINGHAM: No, we're not going to get  
21 done.

22 THE COURT: It's about ten to 5:00. We will  
23 have to figure out a time when we can finish.

24 MS. CUNNINGHAM: Okay.

25 THE COURT: I had thought --

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1 MS. CUNNINGHAM: We originally asked, your  
2 Honor --

3 MS. GALLAGHER: I thought it was a day.

4 MS. CUNNINGHAM: We asked for a day and then  
5 there was some discussion that maybe we could do it in half  
6 a day if we could get some of the issues narrowed prior to  
7 this hearing.

8 When it was reset, the Court simply told us  
9 that they reserved two hours of your time today and we were  
10 both surprised because we didn't think we could finish it  
11 in two hours.

12 THE COURT: Well, can you -- I don't think  
13 --

14 You can step down, sir.

15 Okay. We have got to figure out when we can  
16 do it.

17 I have got a problem tomorrow and I am in  
18 Sonoma on Friday. I have family law in Sonoma and tomorrow  
19 I have a family obligation and wasn't planning on working  
20 tomorrow.

21 Let's go off the record.  
22 (Off the record discussion.)  
23 THE COURT: All right.  
24 Back on the record.  
25 We have continued this to Monday, April 15th

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1 at 9:30 in Department C.

2 MS. CUNNINGHAM: Thank you, your Honor.

3 MS. GALLAGHER: Thank you, your Honor.

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6 (Whereupon, the proceedings were concluded.)

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1 STATE OF CALIFORNIA     )  
2 COUNTY OF NAPA         )     ss.

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4 CERTIFICATE OF SHORTHAND REPORTER

5 I, SUSAN L. STRAUB, CSR No. 7608, a duly  
6 qualified and acting Official Shorthand Reporter of the  
7 Superior Court of the State of California, in and for the  
8 County of Napa, do hereby certify:

9 That I acted as the Certified Shorthand  
10 Reporter in the Matter of NAPA COUNTY vs. CARLICE, LLC, NSC  
11 NO. 26-61207.

12 That I took down in shorthand writing the  
13 testimony and proceedings had therein.

14 That thereafter I transcribed the same into  
15 typewriting.

16 That the foregoing pages comprise a full, true  
17 and correct transcript of proceedings had.

18 Dated this 31st day of January, 2014.

19

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21

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23

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\_\_\_\_\_  
SUSAN L. STRAUB, CSR No. 7608  
Official Shorthand Reporter  
County of Napa,  
State of California

--oOo--

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