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7  
8 SUPERIOR COURT OF CALIFORNIA  
9 COUNTY OF NAPA

10 NAPA COUNTY,

11 Plaintiff,

12 v.

13 CARLICE, LLC, FRANK C. ALTAMURA,  
14 KAREN L. ALTAMURA and DOES 1 through  
10, inclusive,

15 Defendants.

CASE NO.: 26-61207

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO DISSOLVE PRELIMINARY  
INJUNCTION [C.C.P. §533]

Date: March 14, 2014

Time: 8:30 a.m.

Dept.: ~~NA~~

Honorable ~~Michael Byrne~~ TBA

Unlimited Civil

21  
22 BY FAX

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24  
25  
26 LAW OFFICES OF  
GEARY,  
SHEA,  
O'DONNELL  
27 GRATTAN &  
MITCHELL  
28 P.C.

Memorandum of Points and Authorities in Support of Motion to Dissolve  
Preliminary Injunction

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I.

INTRODUCTION

Plaintiff Napa County (hereinafter "County") has sued the Altamura family, asserting four causes of action related to Defendants' use and occupancy of a winery and adjacent wine cave on their property located in Wooden Valley. The County alleges that the Altamuras were and are operating their winery and Cave in violation of certain County codes and, therefore, the building and Cave are unsafe for any use. In April 2013, this Court issued a Preliminary Injunction, which was later modified by the parties, that prohibits Defendants from using or occupying the winery building ("Winery Building") and attached wine cave ("Cave") until Defendants bring the premises up to code, the premises passes all required County inspections and the County issues Certificates of Occupancy.<sup>1</sup> By this Motion, Defendants request that this Court dissolve the Preliminary Injunction pursuant to California Code of Civil Procedure §533 on the grounds that (1) there has been a significant and material change in the facts upon which the Preliminary Injunction was premised; and (2) the ends of justice would be served.

Since the Preliminary Injunction issued, the Altamuras have completed all necessary work on the Winery Building and Cave such that both are now code compliant. Defendants have complied with all of the County's demands and both the Winery Building and Cave are safe for full use and occupancy. Thus, the premise for the issuance of the Preliminary Injunction (i.e. the County's interest in protecting employees, residents and visitors from any hazards) is no longer at issue. Defendants offer evidence in support of this Motion that the County now admits that the Winery Building and Cave no longer pose a safety threat as they have passed all inspections. The County must now take the final *ministerial* step of issuing the Certificates of Occupancy, yet it refuses to do so—relying upon a newly concocted requirement that the Altamuras must first complete all construction work for the separate, upstairs residential portion of the structure before it will issue the Certificate of Occupancy on the Winery Building. The County has offered no explanation for why it has not issued the Certificate of Occupancy on the Cave.

<sup>1</sup> The structure on the premises consists of the downstairs Winery Building and upstairs residence. The Winery Building and residence are entirely separate and the Winery Building has passed all County inspections and is fit for occupancy.

1 Despite working closely with the Altamuras and their counsel over the past many years, and  
2 more particularly in the 10 months since filing the present litigation, at no time has anybody at the  
3 County raised this issue until now. In fact, the County's Chief Building Official, Darrell Mayes,  
4 previously testified under oath that so long as the "minor" issues were resolved, a final Certificate  
5 of Occupancy would issue. After the Altamuras expended significant time and resources (i.e.,  
6 \$350-400,000) to obtain Certificates of Occupancy for both the Cave and Winery Building, the  
7 County cannot now be permitted to "move the goal posts" so late in the game. To allow the  
8 Preliminary Injunction to remain in place simply because the County is now unreasonably refusing  
9 to issue the Certificates of Occupancy would not only be an injustice but contrary law.<sup>2</sup> This Court  
10 has the authority to dissolve the Preliminary Injunction to serve the ends of justice.

11 Given the change in material facts and hollow position it now takes, the County can no  
12 longer establish that it is "reasonably probable" that it will prevail on the merits at trial, and, thus,  
13 this Court must dissolve the Preliminary Injunction pursuant to C.C.P. § 533. Moreover, in  
14 balancing the "probability of success" versus the "gravity of harm" to the Altamuras, the scales of  
15 justice have tipped in favor of the Altamuras given that they have expended significant effort and  
16 resources complying with the County's demands and will suffer significant and ongoing monetary  
17 losses if they are prevented from operating their business. At this point, the County has little to no  
18 chance of success on the merits given that any public safety issues that might have existed have  
19 been addressed.

20 Defendants, thus, ask this Court to immediately dissolve the Preliminary Injunction.

## 21 II.

### 22 STATEMENT OF FACTS

#### 23 A. Procedural History.

24 On or about March 21, 2013, the County of Napa, without warning, filed its *Ex Parte*

25  
26 <sup>2</sup> Defendants recognize that given the posture of this case, this Court is not empowered at this time to compel the  
27 County to issue the Certificates of Occupancy and Defendants are not making such a request here. Defendants have  
28 filed the appropriate appeal of the County's decision, which is scheduled for hearing before the Board of Supervisors  
on March 18, 2014. Rather, Defendants seek to dissolve the Preliminary Injunction as a first and necessary step toward  
operating at the subject premises.

1 Application for Temporary Restraining Order and Order to Show Cause Regarding Preliminary  
2 Injunction along with a Complaint for Preliminary and Permanent Injunction to Abate a Public  
3 Nuisance and for Civil Penalties and Attorneys' Fees. (Declaration of Frank Altamura (hereinafter  
4 "Altamura Decl."), ¶ 3.) The County was apparently concerned with there being no Certificate of  
5 Occupancy for either the Cave or the Winery Building, despite the fact that Defendants had  
6 operated with the County's approval and intimate involvement in all phases of construction since  
7 1997. (*Ibid.*)

8 Following a hearing on that date, the Court issued a Temporary Restraining Order that  
9 temporarily restricted Defendants, in part, from conducting wine tasting in the Cave and required  
10 them to "cease all use and occupancy of the Cave on the Property for any and all Winery related  
11 purposes." (*Ibid.* ¶ 5.) The Court also issued an Order to Show Cause as to why the County's  
12 motion for a preliminary injunction prohibiting use of the Winery Building and wine Cave should  
13 not be granted. (*Ibid.*)

14 An initial hearing on the preliminary injunction occurred on April 9, 2013 but was  
15 continued to April 15, 2013. (*Ibid.* ¶ 6.) On April 15, 2013, the parties reached an agreement that  
16 the Court would issue a Preliminary Injunction restraining the Altamuras from conducting wine  
17 tasting on the Property or otherwise using or occupying the Winery Building until a temporary  
18 certificate of occupancy ("TCO") could issue, which Defendants agreed to obtain by April 29,  
19 2013. (*Ibid.*)

20 On May 9, 2013, this court entered the Stipulation to Modify Preliminary Injunction and  
21 Order to allow the Altamuras to access the Cave in order to service and maintain the stored wine  
22 through May 6, 2013 and further reflect that a 90-day TCO had been issued to allow use of the  
23 Winery Building for production purposes only. (*Ibid.* ¶ 7.)

24 Another hearing occurred on May 20, 2013 with regard to the County's request for a  
25 Preliminary Injunction to prevent further use of the Cave. On May 23, 2013, the Court granted the  
26 County's request for a Preliminary Injunction with respect to the Cave and on June 11, 2013, this  
27 Court entered an Order Modifying the Preliminary Injunction pursuant to the parties' stipulation,  
28 ordering that all Defendants refrain from any further use or occupancy of the Cave until a

1 Certificate of Occupancy issued. (*Ibid.* ¶ 8.)

2 On June 4, 2013 after further discussions with the County, a stipulation was entered into by  
3 the parties to modify the Preliminary Injunction as follows:

4 'a The Defendants shall immediately and no later than Thursday, June 20, 2013,  
5 apply to the County for a Use Permit Modification so the Cave can be recognized as part of  
6 the Use Permit for Altamura Winery.

7 b. The Defendants shall immediately, and no later than Thursday, June 20,  
8 2013, apply for a building permit for the plumbing, electrical and mechanical within the  
9 Cave...

10 c. Once the County issues the building permit and the Use Permit Modification  
11 is approved, Defendants shall apply for a Temporary Certificate of Occupancy so the wine  
12 barrels can remain in the Cave and Defendants' employees can service the wine.

13 d. Once a Use Permit Modification is obtained and the Building Permit is  
14 finalized, the County Building Official shall issue a Certificate of Occupancy for the Cave.

15 e. Until such time that a Temporary Certificate of Occupancy of Certificate of  
16 Occupancy is issued by the Building Official for the Cave, no person shall enter the Cave,  
17 unless specifically stated above."

18 (*Ibid.* ¶ 9.)

19 The Preliminary Injunction, as modified by the parties, remains in place as of the filing of  
20 this Motion. (*Ibid.*)

21 **B. Wine Cave.**

22 There was substantial testimony by John McDowell, Deputy Planning Director for Napa  
23 County, regarding the wine Cave and why, from the County's perspective, it was not in  
24 "compliance," to wit: (1) the Cave was not included in the original use permit issued in 1995; and  
25 (2) there was no record any building permit for the mechanical, electrical and plumbing facilities  
26 within the Cave, and, thus no Certificate of Occupancy of record. *See*, Reporter's Transcript of  
27 Proceedings on April 9, 2013 at p. 25, lines 17-20; p. 42, lines 8-12; and p. 51, lines 14-16 attached  
28 as Exhibit B to the Declaration of Michael T. Carlson ("Carlson Decl."). This was confirmed by

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1 Darrell Mayes, Chief Building Official ("CBO") for Napa County. *See*, Reporter's Transcript of  
2 Proceedings on April 9, 2013 at p. 64, lines 13-22; and p. 65, lines 4-15, Carlson Decl. Exhibit B.

3 Despite disagreements on both the factual and legal issues regarding the Cave and the  
4 County's demands to "modify" the original use permit to include the Cave as part of the winery, the  
5 Altamuras nevertheless applied for a Use Permit Modification to include the Cave as part of the use  
6 permit issued back in 1995 (*Ibid.* ¶ 10.) After much time, work and expense, the County ultimately  
7 issued its letter of approval for "Very Minor Use Modification" on September 20, 2013. (*Ibid.*)  
8 Moreover, on June 20, 2013 Defendants applied for a building permit in order to complete any and  
9 all inspections of the plumbing, electrical and mechanical within the Cave and since that time have  
10 completed all of the work necessary for issuance of the Certificate of Occupancy. (*Ibid.*) There  
11 have been no fewer than three inspections of the Cave since June 12, 2013 and the Altamuras have  
12 addressed each and every one of the County's concerns and issues, including the installation of a  
13 new and improved ventilation system. (*Ibid.*)

14 The testimony of Darrell Mayes removes any question about whether or not the County  
15 should issue a final Certificate of Occupancy for the Cave:

16 "Q: If the Altamuras do obtain these permit modifications and all work is inspected and  
17 signed off on and finalized, would you be able to issue a Certificate of Occupancy?

18 A: With approval of all the division's requirements being met, yes.

19 Q: Once a Certificate of Occupancy is issued for the cave, what would that allow?

20 A: It would allow for full occupancy of the cave for what the application was for. If it  
21 was for tasting, it would allow tasting."

22 *See*, Reporter's Transcript of Proceedings on April 9, 2013 at pp. 67, lines 24-25 and 68, lines 1-9,  
23 Carlson Decl. Exhibit B.

24 More recently, on Friday, January 10, 2014, Frank Altamura spoke with David Guidice at  
25 the County regarding the Certificate of Occupancy for the Cave. (*Ibid.* ¶ 11.) Mr. Altamura was  
26 informed by Mr. Guidice that a follow-up inspection would be conducted the following week to  
27 address a few miscellaneous items on the Correction Notice previously issued by the County on  
28 December 18, 2013 (*Ibid.*) The final inspection took place and the County agreed the Cave was



1 complete. (*Ibid.*) Mr. Altamura has called Mr. Guidice 2-3 times since that inspection, and he has  
2 not returned the calls, and the County has yet to issue the Certificate for the Cave. (*Ibid.*)

3 **C. Winery Building.**

4 On April 29, 2013, the County issued a TCO for the Winery Building for production  
5 purposes only. (*Ibid.* ¶ 15.) The TCO was approved for ninety (90) days. (*Ibid.*)

6 On August 8, 2013, County Counsel requested that the Altamuras submit another written  
7 request to the Darrell Mayes (CBO), if they were intending to continue their use of the Winery  
8 Building for production purposes. (*Ibid.*) Thus, on August 22, 2013, the Altamuras submitted such  
9 a request to Mr. Mayes to extend the TCO in order to gain additional time to complete the punch-  
10 list items necessary to receive a final Certificate of Occupancy for the Winery Building.

11 Defendants' request expressly stated: "*We wish to extend our TCO which was granted on April*  
12 *29, 2013 in order to complete the work necessary for our Certificate of Occupancy Final.* This  
13 TCO is for parcel # 033-070-045 and building permit #B98-00096." (*Ibid.*) The Altamuras never  
14 received a response from the County regarding this issue, but nevertheless diligently proceeded to  
15 complete the necessary work mandated by the County. (*Ibid.*)

16 On November 13, 2013, the Altamuras received a letter from Mr. Mayes stating that it was  
17 his understanding that an "oral extension" was granted for an additional ninety (90) day extension  
18 of the TCO, from the date of its expiration but that: (1) the TCO (as extended) had expired on  
19 October 26, 2013; (2) under Napa County Code section 15.08.070(B), temporary occupancy of a  
20 structure is only permitted for one hundred eighty (180) days; (3) such time had passed; (4) no  
21 further extensions of the TCO could be granted; and (5) all use of the Winery Building must  
22 immediately cease. (*Ibid.* ¶ 16.)

23 That the County is now effectively prohibiting the Altamuras from operating their business  
24 cannot be reconciled with the position the County asserted at the prior hearings before this court.  
25 All of the issues with the Winery Building have been addressed and received final sign off from the  
26 County. Yet, the County has refused to issue a Certificate of Occupancy.

27 The sworn testimony of Mr. Mayes is telling:

28 "Witness: I believe the permit was issued for a winery building with a residence up top.

1 Q: Have you issued a certificate of occupancy for that building?  
2 A: No.  
3 Q: What still needs to be completed in order for you to be able to issue a  
4 certificate of occupancy?  
5 A: *There are minor issues in the building itself and, also, all of the other*  
6 *divisions need to have their requirement (sic) met and they need to approve*  
7 *it. And then after that, they will issue a certificate of occupancy."*

7 See, Reporter's Transcript of Proceedings on April 9, 2013 at p. 56, lines 7-18, Carlson Decl.  
8 Exhibit B.

9 Since the issuance of Preliminary Injunction to the most recent inspection on November 19,  
10 2013, the County inspected the Winery Building on five separate occasions including:

11 April 29, 2013 – fire.

12 April 29, 2013 – special inspection re: bolting and seismically securing tanks.

13 July 30, 2013 – rough electrical, rough mechanical and rough structural framing.

14 August 13, 2013 – ceiling installation inspection and underfloor insulation inspection.

15 September 17, 2013 and November 19, 2013 - wallboard inspections.

16 (*Ibid.* ¶ 18.) During that most recent inspection, Marcus Johnson (Building Inspector II for the  
17 County) indicated that all of the work had been completed on the Winery Building and that he  
18 would submit the matter to Mr. Mayes for issuance of the final Certificate of Occupancy. (*Ibid.* ¶  
19 19.) Since that same date, the Altamuras have made several inquiries to the County to obtain the  
20 final Certificate of Occupancy to no avail. The County has simply refused to issue the Certificate  
21 of Occupancy, claiming that the upstairs, detached residence must be completed in order to obtain a  
22 final Certificate of Occupancy for the Winery Building. (*Ibid.* ¶ 20.)

23 On January 6, 2014, Mr. Mayes issued a letter confirming the County's position that it will  
24 not issue a Certificate of Occupancy for the Winery Building unless and until the "other" work is  
25 completed on *the residence*. (*Ibid.*) Simply put, this position is irreconcilable with the prior sworn  
26 testimony of Mr. Mayes:

27 "Q: Once you issue the Certificate of Occupancy for the winery, what will that allow?  
28

1 A: Full use of the winery, full occupancy.

2 Q: What are your concerns today with allowing tours and tasting in the winery building  
3 prior to issuing that Certificate of Occupancy?

4 A: I am concerned with the safety of any occupants in that building prior to issuing a  
5 certificate.

6 Q: **Is the building close to being finalized?**

7 A: **I think it's – I think it's hard to put a number on it, but I think it's getting  
8 close, the winery building itself, yes."**

9 *See, Reporter's Transcript of Proceedings on April 9, 2013 at p.70, lines 6-21, Carlson Decl.*  
10 Exhibit B.

11 For the County to now take the position that the 2<sup>nd</sup> floor residence must be completed,  
12 while perhaps not a surprise given its conduct to date, illustrates the personal and vindictive nature  
13 of these proceedings.

14 **III.**

15 **LEGAL STANDARD**

16 California Code of Civil Procedure § 533 provides as follows:

17 "In any action, the court may on notice modify or dissolve an  
18 injunction or temporary restraining order upon a showing that there  
19 has been *a material change in the facts* upon which the injunction or  
20 temporary restraining order was granted, that the law upon which the  
injunction or temporary restraining order was granted has changed, or  
that *the ends of justice would be served* by the modification or  
dissolution of the injunction or temporary restraining order."

21 (Emphasis added.)

22 When evaluating whether to grant a preliminary injunction, and, thus, by necessity, when  
23 evaluating whether to modify or dissolve a preliminary injunction, a court must balance the equities  
24 between the parties as follows:

25 "A Superior Court must evaluate two interrelated factors when ruling  
26 on a request for a preliminary injunction; (1) the likelihood that the  
27 plaintiff will prevail on the merits at trial, and (2) the interim harm  
28 that plaintiff would be likely to sustain if the injunction were denied  
as compared to the harm the defendant would be likely to suffer if the  
preliminary injunction were issued."

1 *Smith v. Adventist Health System West* (2010) 182 Cal.App.4th 729, 749.

2 IV.

3 **LEGAL ARGUMENT**

4 **A. The County can no longer establish that it is likely to succeed on the merits**  
5 **given the change in material facts.**

6 There has undoubtedly been a significant change in material facts such that the County can  
7 no longer establish a likelihood that it will prevail on the merits. By its Complaint, the County  
8 seeks to abate an alleged public nuisance. (See, Complaint ¶¶47, 48, 57, 58, 66, 67, 73, 76 and 77.)  
9 The nuisance, it claims, is Defendants' "illegal" operation of a non-code compliant Winery  
10 Building and Cave that, according to the County, poses an "immediate threat to the health and  
11 safety" of winery employees, Napa County residents and Napa County visitors, despite the fact that  
12 the Altamuras had been safely operating for almost two decades. (*Ibid.*; See also County's *Ex*  
13 *Parte* Application for TRO and OSC, 9:27-10:2, 12:10-17.) Furthermore, the Napa County Chief  
14 Building Official, Darrell Mayes, in sworn testimony before this court testified that the Preliminary  
15 Injunction was necessary to protect the "safety of the occupants." See, Reporter's Transcript of  
16 Proceedings on April 9, 2013 at p.70, lines 6-21, Carlson Decl. Exhibit B. The County's likelihood  
17 of success was based entirely on the abatement of dangerous public nuisance.

18 Since the Preliminary Injunction issued, Defendants have undertaken great efforts to meet  
19 all of the County's demands and ensure that the Winery Building and Cave are fully code compliant  
20 at the cost of nearly \$400,000. The evidence offered in support of this Motion establishes that, by  
21 the County's own admission, the Winery Building and Cave have passed all County inspections and  
22 are now "safe" for use and occupancy and no longer pose a threat to public safety. Accordingly,  
23 the County no longer has a safety interest to protect the public and cannot establish a probability of  
24 success on the merits. And, thus, the County simply has no discretion to withhold the Certificate of  
25 Occupancy for either the Winery Building or the Cave. The facts have fundamentally changed  
26 since the issuance of the Preliminary Injunction such that it is not warranted and the County will no  
27 longer prevail on the merits.

28 Furthermore, serving the ends of justice should compel this Court to dissolve the

1 Preliminary Injunction. Since the fall of 2012, the County has been hounding Defendants over code  
2 violations pertaining to the Winery Building and Cave which Defendants had been operating for  
3 more than a decade previously. Defendants have expended hundreds of thousands of dollars and  
4 countless man hours addressing each of the issues raised by the County. Now, after all work is  
5 complete and the County has done the final inspections on both the Winery Building and Cave, the  
6 County has changed its position and raised a new, previously unidentified issue. This is a  
7 manifestly unjust basis to continue the Preliminary Injunction. The County has had countless  
8 opportunities in face to face meetings, correspondence, court pleadings and sworn testimony to  
9 raise this issue, but it never did. The interest of justice require that this court dissolve the  
10 Preliminary Injunction.

11 The County's position that the upstairs residence must now be completed in order for a  
12 Certificate of Occupancy for the Winery Building to issue is wholly baseless. This new requirement  
13 being imposed by the County does not seek to protect or promote the safety of employees and  
14 visitors. Rather, it is an unfounded, hyper-technical demand that appears purely based in the  
15 County's unreasonable desire to prevent the Altamuras from operating their winery. The County  
16 cannot prevail at trial as Defendants will establish that they have met all County demands and that  
17 the County has no discretion but to take the final ministerial step of issuing Certificates of  
18 Occupancy for the Cave and Winery Building.

19 **B. Defendants have and will continue to sustain grave and irreparable damages if**  
20 **the preliminary injunction remains in place.**

21 In determining whether to dissolve the Preliminary Injunction, the Court must balance the  
22 County's diminished or non-existent likelihood of success on the merits against the injury suffered  
23 by the Altamuras should the Injunction remain in place. Defendants have and will continue to  
24 suffer grave injury as result of the County's actions and the Preliminary Injunction. First, since the  
25 Preliminary Injunction issued, Defendants have incurred expenses totaling \$350,000-400,000 in  
26 meeting the County's demands for both the Cave and Winery Building. Now apparently, this work  
27 was all for naught because the County has "moved the goal posts" and now refuses to issue the  
28 Certificate of Occupancy. It is unjust and unfair, if Defendants are forced to bear this significant

1 expense and still be precluded from using and occupying the Winery building and Cave. On this  
2 basis, the harm to Defendants outweighs the County's interest in seeing that "all work" under the  
3 permit be completed before issuing a Certificate of Occupancy.

4 Second, in addition to the compliance expenses, Defendants will incur ongoing business  
5 losses from being unable to operate at the Winery Building or access the wines stored in the Cave.  
6 Defendants have approximately \$15,000,000-\$20,000,000 worth of wine at the winery. (Altamura  
7 Decl. ¶22.) If Defendants are unable to operate the winery and they lose the current inventory or it  
8 is damaged, the loss will be catastrophic and would likely force Defendants out of business. (*Ibid.*)

9 Third, Defendants' brand name reputation has taken a significant hit as a result of the  
10 County's actions. (*Ibid.*) Sales are down approximately 20%. (*Ibid.*) Customers and distributors  
11 alike think the winery is closed because of the negative, one-sided media attention that the County's  
12 baseless actions have garnered. (*Ibid.*) These customers may never return.

13 In sum, when the County's now negligible likelihood of success on the merits is balanced  
14 against the significant past, ongoing and future damages sustained by Defendants, the scale has  
15 very clearly tipped in favor of Defendants and against the continued existence of the Preliminary  
16 Injunction.

17 **C. The County's grounds for withholding the Certificates of Occupancy is**  
18 **baseless.**

19 While Defendants recognize that the Court is not yet in a position to compel the County to  
20 issue the Certificates of Occupancy, it is important for the Court to recognize that the County's  
21 position is without merit and is simply the latest of a series of roadblocks designed to prevent  
22 Defendants from operating their business. Quite simply, no authority exists that would prevent the  
23 County from issuing a Certificate of Occupancy on a completed portion of a structure (i.e., the  
24 Winery Building and/or the Cave). And in fact, the California Building Code Section 111.2, which  
25 governs the issuance of certificates of occupancy, specifically contemplates it as follows:

26 "Certificate issued. After the building official inspects the building or  
27 structure and finds no violations of the provisions of this code or  
28 other laws that are enforced by the department of building safety, the  
building official shall issue a certificate of occupancy that contains  
the following:

- 1 1. The building permit number.
- 2 2. The address of the structure.
- 3 3. The name and address of the owner.
- 4 4. *A description of that portion of the structure* for which the
- 5 certificate is issued.
- 6 5. A statement that the described portion of the structure has
- 7 been inspected for compliance with the requirements of this
- 8 code for the occupancy and division of occupancy and the
- 9 use for which the proposed occupancy is classified.
- 10 6. The name of the building official.
- 11 7. The edition of the code under which the permit was issued.
- 12 8. The use and occupancy, in accordance with the provisions
- 13 of Chapter 3.
- 14 9. The type of construction as defined in Chapter 6.
- 15 10. The design occupant load.
- 16 11. If an automatic sprinkler system is provided, whether the
- 17 sprinkler system is required.
- 18 12. Any special stipulations and conditions of the building
- 19 permit."

20 (Emphasis added.)

21 Further, Defendants have complied with Napa County Building Code Section 15.08.070,

22 which reads:

23 Final inspection requirements.

24 A. No new building shall be occupied and no permanent

25 electrical service connection to a new structure shall be

26 provided until:

- 27 1. The building is completed as approved;
- 28 2. All conditions of any applicable development permit are
- satisfied;
3. All applicable zoning, planning, environmental, public
- works and fire official requirements have been met; and
4. The final building inspection of the building permit is
- approved.

1 B. Notwithstanding subsection (A) of this section, temporary  
2 occupancy of a structure shall be permitted, upon securing the  
3 approval of the building official in writing, for a maximum of  
4 one hundred and eighty days. The building official shall grant  
such an approval only if he or she determines that operable  
electrical, water, toilet and sewer facilities serve the building.

5 Moreover, the State Fire Marshall – Code Enforcement Division even contemplates  
6 issuance of certificate of occupancies on portions of buildings as set forth in their published  
7 Certificate of Occupancy Guidelines:

8 **“Occupiable in part** – These are buildings or structures with  
9 complete life safety systems that have a portion of their area  
10 completed and are in compliance with all applicable codes and  
11 ordinances. Site and off-site requirements must be constructed  
installed, and accepted for the portion being granted a Certificate of  
Occupancy. This would include but not be limited to fire department  
access, parking, and accessibility to the proposed use.”

12 (Carlson Decl., Exhibit A.)

13 Finally, *Thompson v. City of Lake Elsinore* (1993) 18 Cal.App.4<sup>th</sup> 49 is instructive here. In  
14 *Thompson*, plaintiff “complied with all the appropriate building codes, regulations and requirements  
15 in completing her renovation” and Lake Elsinore issued a “Final Inspection Okay” on the project.  
16 *Id.* At 53. Lake Elsinore, just as here, withheld the issuance of a certificate of occupancy for the  
17 building for reasons unrelated to the safety and compliance of the structure at issue. *Id.* The court  
18 explained that because the City of Lake Elsinore had already exercised its discretion during the  
19 building permit process, it had no discretion to refuse to perform the purely ministerial duty of  
20 issuing the occupancy permit. *Id.* at 53, 58. The court noted that “[o]nce a building permit has  
21 been issued, it cannot be de facto revoked by the simple expedient of never issuing the certificate of  
22 occupancy.” *Id.* at 58.

23 The same rationale is applicable here. Defendants have complied with all of the County’s  
24 requirements to bring the Winery Building and Cave up to code at the cost of \$350,000-400,000.  
25 The Winery Building has passed all County inspections and has, in effect, been finalized. But now,  
26 the County has added a new requirement – this is not permitted under *Thompson*. The County  
27 exercised its discretion in placing the requirements on the Altamuras and approving their  
28 compliance with those requirements. Thus, the County no longer has the discretion to deny issuing

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GRATTAN &  
MITCHELL  
P.C.



1 the Certificate of Occupancy.

2 V.

3 CONCLUSION

4 If there ever was a case to exercise the authority granted to this court by C.C.P§ 533, this is  
5 it. The County sought and obtained a Preliminary Injunction preventing Defendants from using and  
6 occupying the Winery Building and Cave on the grounds that both were "unsafe and posed a threat  
7 to the safety of employees and visitors." Now, after great effort and expense, the Altamuras have  
8 worked diligently to meet all of the County's demands. The result: a Winery Building and Cave  
9 that are fully code complaint and safe for occupancy but cannot be used due to the County's  
10 insistence that the upstairs residence now be completed. Given the change in facts, the County no  
11 longer has a reasonable probability of success on the merits of its complaint as any concern over the  
12 safety of employees or members of the public has been fully addressed. Instead, the County has  
13 twisted the laws and facts in order to withhold the Certificates of Occupancy. That the Winery  
14 Building cannot be "finaled" until the residence has been completed is not only inconsistent with  
15 the prior sworn testimony of Mr. Mayes, but is, as a matter of law, not within the County's  
16 discretion at this point in time, per *Thompson*.

17 Defendants therefore request that the Preliminary Injunction be immediately dissolved in its  
18 entirety.

19  
20 DATED: February 10, 2014

GEARY, SHEA, O'DONNELL, GRATTAN &  
MITCHELL, P.C.

21  
22  
23 By: 

MICHAEL T. CARLSON  
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CARLICE, LLC, FRANK C. ALTAMURA  
and KAREN L. ALTAMURA

24  
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27 GRATTAN &  
MITCHELL  
28 P.C.

**PROOF OF SERVICE**

I am employed in the County of Sonoma, State of California. I am over the age of 18 years and not a party to the within action. My business address is Geary, Shea, O'Donnell, Grattan & Mitchell, 37 Old Courthouse Square, Fourth Floor, Santa Rosa, CA 95404.

On February 11, 2014, I served the attached:

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISSOLVE PRELIMINARY INJUNCTION**

on the parties to this action by placing a true copy thereof in a sealed envelope, addressed as follows:

Office of County Counsel  
Minh C. Tran, County Counsel  
Carrie R. Gallagher, Deputy  
1195 Third Street, Suite 301  
Napa, CA 94559

Telephone: (707) 253-4521  
Attorneys for Plaintiff Napa County

/X/ (BY MAIL) I placed a copy of the above-described document in sealed envelope, with postage thereon fully prepared for First-Class Mail, addressed to the parties as set forth above, for collection and mailing at Santa Rosa, California, following ordinary business practices. I am readily familiar with the practice of Geary, Shea, O'Donnell, Grattan & Mitchell for processing of correspondence, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for processing.

/ (BY E-MAIL) I caused an electronic copy of the above-described document to be transmitted by e-mail to the address(es) known by or represented to me to be the receiving e-mail(s) of the parties noted above.

/ (BY OVERNIGHT DELIVERY, PURSUANT TO CCP '1013(c)) I placed such sealed envelope for collection and mailing by overnight delivery at Santa Rosa, California, within the ordinary business practices of Geary, Shea, O'Donnell, Grattan & Mitchell. I am readily familiar with the practices of Geary, Shea, O'Donnell, Grattan & Mitchell for processing overnight correspondence, said practice being that in the ordinary course of business, correspondence is either picked up by or delivered to the delivery company the same day as it is placed for processing.

/ (BY FACSIMILE) I caused the above-described document to be transmitted, pursuant to Rule 2008, by facsimile machine (which complies with Rule 2003(3)) to the parties at the number(s) indicated after the address(es) noted above. The transmission was reported as complete and without error.

/ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the parties at the address(es) noted above.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed at Santa Rosa, California, on February 11, 2014.

*Molly Meroney*  
Molly Meroney

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