Planning Commission Mtg.
July 15 2020
Agenda Item # 7B

From: Water Audit California <general@waterauditca.org>
Sent: Tuesday, July 14, 2020 3:40 PM
To: JoelleGPC@gmail.com; PC; Morrison, David; Bordona, Brian; Barrella, Donald; Garrett.Allen@wildlife.ca.gov; StephenPuccini@wildlifeca.gov; Karen.Weiss@wildlife.ca.gov; Anderson, Laura; Jeffery.Brax@countyofnapa.org; DBGilbreth@gmail.com; mike hackett; Kathy@kathylynnfelch.com; William McKinnon
Subject: Water Audit reply re: Bremer Con Regs Exception PC hearing 07.15.2020
Attachments: 20200714 Water Audit Reply to staff response to Bremer comment letter.pdf

[External Email - Use Caution]

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WATER AUDIT CALIFORNIA

A PUBLIC BENEFIT CORPORATION

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July 14, 2020

BY EMAIL

Joelle Gallagher
Chair
Napa County Planning Commission JoellePC@gmail.com

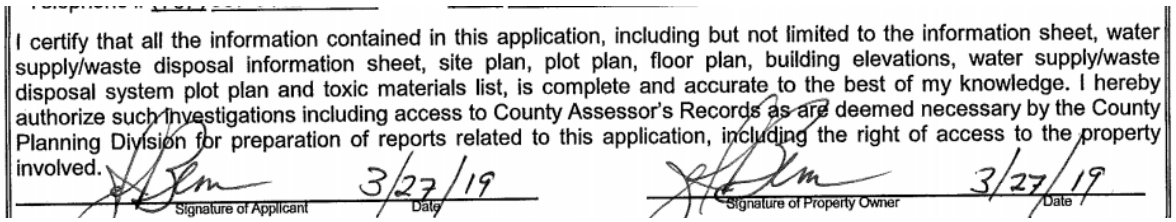
Dear Ms. Gallagher

RE: Planning Commission Meeting July 15, 2020
BREMER GROUP LLC. / BREMER FAMILY WINERY / USE PERMIT EXCEPTION TO THE CONSERVATION REGULATIONS FOR EXISTING SITE IMPROVEMENTS – APPLICATION P20-00143

1. **This proceeding must be conducted in accord with due process.**

A Planning Commission hearing is a **"quasi-judicial hearing,"** a proceeding that hears evidence and makes findings of fact. It is subject to the requirement for due process and fairness.

By stipulated judgment dated February 8, 2019, the county gave the Applicants sixty days to make an application for an exception to the conservation regulations. On March 29, 2019, John Bremer personally attested to the evidence submitted in support of Application P19-00153. By his signature he certified that the Application was "complete and accurate."



I certify that all the information contained in this application, including but not limited to the information sheet, water supply/waste disposal information sheet, site plan, plot plan, floor plan, building elevations, water supply/waste disposal system plot plan and toxic materials list, is complete and accurate to the best of my knowledge. I hereby authorize such investigations including access to County Assessor's Records as are deemed necessary by the County Planning Division for preparation of reports related to this application, including the right of access to the property involved.

Signature of Applicant 3/27/19 Date

Signature of Property Owner 3/27/19 Date

It was neither. Although a mandatory component of the Application, no site plan submitted for 146 days, and even then, the requirement that the drawing show the property boundaries were ignored, and pertinent building location information was omitted. Subsequently the Applicant has supplemented, shuffled and deleted the evidence until the record is virtually unintelligible. See attached Matrix.

As we understand it, a new proceeding identified as P20-00143 has been created to complete the P19-00153 proceeding on remand. There is no statutory authority for such an unconventional process.[1] In the normal course the appellate record is returned to the lower authority under the same case number for further proceedings, but due to this ad hoc process the record that is before the Commission is not the same record considered on the Appeal. There is no Application on file for P20-00143, therefore no verification of the evidence being considered in the subject hearing. Staff has responded in bold underline that this is not a "judicial proceeding."

Due process is guaranteed under Article I § 7 of the California Constitution whenever an individual is subject to governmental action. On all occasions all persons have a due process interest both fair and unprejudiced decision-making and in being treated with respect and dignity. The principle that procedural due process protection is applicable to all adjudicatory actions was affirmed in *Saleeby v. State Bar of California*, 39 Cal.3d 547, 563-64 (1985).

It is well-established that a quasi-judicial decision must be founded on "admissible evidence." For example, when a declaration submitted in a regulatory hearing did not include a statement that it was made under penalty of perjury, the declaration was deemed inadmissible. *Burk-Soorani v. Simon* B251686 (Cal. Ct. App. Mar. 13, 2015) In the absence of *admissible* evidence, the *substantial* evidence burden cannot be discharged.

"[T]o the extent citizens generally are entitled to due process in the form of a fair trial before a fair tribunal, the provisions of the [Administrative Procedures Act provisions of the Government Code] are helpful as indicating what the Legislature believes are the elements of a fair and carefully thought out system of procedure for use in administrative hearings." *Nightlife Partners, Ltd. v. City of Beverly Hill*s 08 Cal.App.4 at 92. *Government Code* §11513 provides the following standards:

> (a) Oral evidence shall be taken only on oath or affirmation.
>
> (b) Each party shall have these rights: to call and examine witnesses, to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him or her to testify;

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[1] Napa Ordinance 2.88.090: "Following close of the hearing on appeal the board may affirm, reverse, or modify the decision being appealed*, or may remand the matter to the approving authority for further consideratio*n, additional findings, advisory report to the board within forty days of the remand, or other appropriate action consistent with the decision of the board."

and to rebut the evidence against him or her. If respondent does not testify in his or her own behalf he or she may be called and examined as if under cross-examination.

(c) The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

(d) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.

(e) The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing.

(f) The presiding officer has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.

A trial court may issue a writ of administrative mandate where an agency has deprived the petitioner of a fair hearing. Code of Civ. Proc., § 1094.5, subd.(b). "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence. *(Pub. Resources Code, § 21168.5*)" *Western States Petroleum Assn. v. Superior Court* 9 Cal.4th 559, 568 (Cal. 1995)

Code of Civil Procedure 1094.5 creates a statutory right to a fair hearing. *Cal. Pub. Res. Code § 21168* states:

> Any action or proceeding to attack, review, set aside, void or annul a determination, finding, or decision of a public agency, made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency, on the grounds of noncompliance with the provisions of this division shall be in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure.
>
> In any such action, the court shall not exercise its independent judgment on the evidence but shall only determine whether the act or decision is supported by substantial evidence in the light of the whole record.

Napa Ordinance 18.124.040 states:

> **All witnesses presenting testimony at the hearing shall be sworn. Witnesses shall be subject to direct and cross-examination.** However, formal rules of evidence applicable to the trial of civil proceedings in the trial courts of California shall not be applicable to the hearing but **relevant evidence may be admitted and given probative effect only if it is the kind of evidence which reasonable**

> **persons are accustomed to rely upon in the conduct of serious affairs. The burden of establishing that a use permit should be granted shall be borne by the applicant.** (Emphasis added.)

2. **Staff report re June 30, 2020, meeting with CDWF**

Objection: Hearsay

CDFW is available and apparently willing to appear at the hearing of this matter, but Water Audit has been informed that they have not been invited. Note carefully what staff is reporting: CDFW does not have a position on this matter for two reasons. First, FGC 1602 is prospective, not retrospective. Second, the issue of stream setbacks is primarily a matter of Napa ordinance, not state law.

This is contrary to the previous testimony of Messrs. Blake and Monk who avowed that after inspection and consideration DFW representative Garrett Allan stated that it would better to leave the rock walls in place. (For example, see transcript of PC hearing 10.16.19 p23-24 and p27--28). The decision to allow the rock walls and bridges to remain was based in large part on this misrepresentation.

In an unusual act the DFW wrote to the County repudiating the testimony. Rather than appropriate outrage at this miscarriage of justice, staff has failed to post DFW's communications and attempted to plaster the matter over with bland half-truths.

Further, Mr. Monk's earlier fictitious testimony become one of the foundations on which Ms. King of Dawn2Dawn Investigations has built her edifice of conclusions. This situation clearly illustrates the need for considering only admissible evidence and permitting cross-examination.

Objection: unqualified expert opinion, or alternatively, misstates the evidence

The CDFW representatives mentioned in the staff report are not attorneys, and their comments about the limits of remedial action pertain only to the enforcement scope of the agency. Water Audit is not so constrained in its view and does not agree that referral to the District Attorney is the sole remedial mechanism.

In our opinion, the first, best and most obvious solution is for the Planning Commission to apply the facts to the law. The law says that no building shall be built in the stream set back. Buildings were built there, and the facts disclose no qualifying exception or exemption. Ordinance 18.144.40 provides for mandatory abatement.

3. **Investigative Report by Dawn2Dawn Investigations.**

Objection: Relevance

Water Audit submits that this hearing concerns *only* APN 021-400-002; staff now argue that it also includes APN 021-420-027. The evidence establishes that both APNs have the postal address of 975 Deer Park Road.

References to other properties in the King report (APN: 024-300-051-000 and APN: 021-400-005-000) are irrelevant in this proceeding and must be wholly excluded from consideration.

Objection: Unqualified expert opinion

Ms. King's opinions exceed her competence.

Her recital of experience does not reflect any training or experience in environmental law, planning or development law, or CEQA law. She is not an attorney and cannot offer legal advice or opinion. Her unrelated experience with organized crime investigation endows her with no more expertise about the subjects of this hearing than the average person in the street.

The reason for Ms. King's appearance at this time is obvious. The Applicants wish to intimidate both the protesting citizens and the County by dark inferences of "investigation" by a former FBI agent. This follows upon a most unseemly public personal attack on appellant Michael Hackett and his counsel by Applicants' counsel.

Hidden behind this bluster is the Applicants' ultimate problem: they do not have the evidence carry their burden of proof to qualify for any of the three available exceptions.

The first exception, § 18.108.050, is factually inapplicable. The application did not concern land clearing, fire safety, or any other of the designated exceptions set forth in that provision. In fact, this Application intends to do no work whatsoever. The proposal does not contain the necessary precondition of maintaining legal setbacks from the stream bank. The Commission is without authority to grant an exemption if the applicant does not meet that fundamental requirement. This minimum protection of environmental interests is mandatory. Closing the final third door, there is no state or federal permit which would allow the Applicants to qualify under § 18.108.025

The argument of counsel is not and never can be evidence. The testimony of Mr. Blake and Mr. Monk about the stream channel is both technically absent from proceeding P20-0143, and in any event completely irrelevant to the structures. The unqualified testimony of Ms. King is inadequate to carry the burden. She does not and cannot attest that the Application qualifies for exception. There is **no evidence** that supports such a conclusion.

There is an aphorism that in legal conflict, if one is favored by the law, argue the law. If one is favored by the facts, argue the facts. If neither the facts or law favor your position, pound on the table and call your opponent a rogue. It's a "tell." Once an attorney starts to call names, you know that they know they have nothing legitimate to work with.

4. In conclusion

At the outset of our original comment letter Water Audit expressed two reasons for our participation.

First, buildings have been built where the law says that they should not be built. We enumerated the grounds on which an exception could be made and opined that the Applicants did not qualify on any ground. There is nothing in the County's reply that provides a persuasive argument to the contrary. The matter is now before you for adjudication.

The second component to our concern is that the County's patterns and practices fail to protect the public trust. The Settlement Agreement paragraph I0 provides: "Within sixty (60) calendar days after entry of Judgment [February 8, 2019] pursuant to this Settlement Agreement, **Defendants shall submit a complete application** for an exception to the Conservation Regulations, as provided in Napa County Code section 18.108.040, to allow the walls and bridge structures within the creek setback. … County staff shall reasonably recommend approval of the exception if it is consistent with the Napa County Code and will not result in any significant adverse environmental impact." As perhaps yet another mistaken understanding of instruction from the Board of Supervisors, staff has abandoned its duty to consider the public interest and merged its interests and advocacy with those of the Applicants, determined to secure approval at all costs.

Howitt v. Superior Court, 3 Cal. App. 4th 1575 (1992) and *Nightlife Partners* (supra) held that there is a violation of due process when a single lawyer acts both in a prosecutorial capacity (as an advocate) and as the adviser to the decision maker/adjudicator in the same matter. This prohibition brings into immediate question the propriety of this matter, and in a larger sense it challenges the conflict of interest inherent in the dual roles of planning staff (and their supporting County Counsel) acting as a project's advocate, while simultaneously formulating and advising the decision making body in these eccentric quasi-judicial proceedings.

Evidence of the effect of the conflict of interest can be seen throughout this proceeding. Two immediate facts prove the point. First, a response to our comment letter was written by staff, not by the Applicant. The legal points, for example on the admissibility of evidence, on the advice of County Counsel were written by the planning department as an advocate seeking to rebut Water Audit's contentions. Less than a week later the very same attorneys will counsel the Commission in its deliberations. Representation of the public trust has been abandoned.

The second telling piece of evidence is the saga of the Encroachment Plan. Originally indicated as authored by RSA+, (whoever that might be) it was first submitted by the Applicants in June 2019 in support of P19-00153. It has reappeared in some form in each of the earlier proceedings. From the beginning to the last iteration the Encroachment Drawing has failed to disclose the property lines, or the existence of the restroom sitting directly on the stream bank. More or less the same drawing is now submitted in support of P20-00143, but now displaying the title-block of the Napa Planning Department, with no indication of the original authorship or providence. It remains inadequate, but now its inadequacy is certified and ratified by the planning department.

We note one additional procedural irregularity. As discussed before, the Board of Supervisors directed the remand of P19-00153, but that matter is not before you. What is before you now is P20-00143.

Napa law provides that an application is made when all mandatory components are submitted. A complete application for P19-00143 was not made until, at the earliest, June 26, 2019, some 146 days following entry of judgment. It is unknown why the planning department acquiesced in this tardiness. In any event, the record shows that no documents were filed in support of P20-00143 before May 2020, and therefore this proceeding is unquestionably time barred.

For any or all of the foregoing reasons we urge you to fairly apply the facts to the law and deny application P20-00143.

Respectfully,

Grant Reynolds
Director

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