

ATTACHMENT 1

Legal Standard of Review.

Since a mitigated negative declaration was adopted in 2006 connection with the original use permit for the Suscol Creek Winery (Use Permit No. P05-0434-UP), the standard of review that is applied by the Commission is different than the standard applied when the Commission reviews a new project. The fair argument test is the usual standard of review that is applied when the Commission adopts a negative declaration. Under the fair argument test, if the record as whole contains substantial evidence that the proposed project may have a significant environmental effect, the lead agency must prepare an EIR even though there may be evidence to the contrary that the project will have no significant effects. (14 CCR § 15063 (b).) The fair argument standard creates a low threshold for the preparation of an EIR.

The fair argument test applies *before* the lead agency makes its initial determination on whether to adopt a negative declaration or an EIR for a project. However, once an EIR or negative declaration has been prepared, the fair argument standard no longer applies and under Section 15162 of the State CEQA Guidelines an EIR will *not* be required unless substantial evidence exists in light of the record as a whole that: (1) subsequent changes are proposed which will require important revisions of the previous EIR or negative declaration due to the involvement of new significant environmental impacts not considered in the previous EIR or negative declaration; (2) substantial changes occur with respect to the circumstances under which the project is undertaken which will require important revisions of the previous EIR or negative declaration due to the involvement of new significant environmental impacts not covered in the previous EIR or negative declaration; or (3) new information of substantial importance to the project becomes available. (14 CCR § 15162 (a).)

The substantial evidence test under Section 15162 was applied in *Benton v. Board of Supervisors of Napa County* (1991) 226 CA3d 1467. There, a negative declaration was prepared in connection with approval of a winery project. Subsequent to the approval, the applicant desired to change the location of the winery which triggered modification of the previously approved use permit to allow relocation of the winery. The County prepared a second negative declaration which analyzed the potential impacts associated with relocating the winery. The Bentons argued that the fair argument standard applied and that since the record contained expert evidence that the relocated winery would result in more noise, it could be fairly argued that the project might have a significant effect and therefore an EIR was required. The Court disagreed and held that the substantial evidence test and not the fair argument standard applies when a court (or the Board) evaluates whether a lead agency properly issued a subsequent negative declaration or EIR on a project pursuant to CEQA Guideline § 15162. In upholding the Board's decision to adopt a subsequent negative declaration, the Court found that relocation of the winery was not so substantial as to require major modification of the previously prepared mitigated negative declaration or the preparation of an EIR under Section 15162 and that substantial evidence supported the County's determination that the relocation would not cause significant environmental impacts sufficient to require preparation of an EIR. (*Benton*, pg. 1482-1484.)

The Court's rationale for relying on the substantial evidence standard is because an in-depth review of the project has already occurred, the time for challenging the original CEQA document has expired and the question is whether circumstances have changed enough to warrant repeating a substantial portion of the process. The Benton Court noted that these principles are particularly apt when a negative declaration has been prepared for a project when it stated "if a limited review of a modified project is proper when the initial environmental document was an EIR, it stands to reason that no greater review should be required of a project that initially raised so few environmental questions that an EIR was not required, but a negative declaration was found to satisfy the environmental review requirements of CEQA." (Benton, pg. 1480)

The original use permit for the Suscol Creek Winery was previously evaluated under an adopted mitigated negative declaration. Since this project involves modification of an approved use permit and adoption of a subsequent negative declaration, the fair argument standard does not apply. Furthermore, the preparation of an EIR is not required unless substantial evidence exists in light of the record as a whole that the proposed modifications to the Suscol Creek Winery are such a substantial change in the original winery project as to require major modification of the previously approved negative declaration under Section 15162. No Such substantial evidence exists.