



A Tradition of Stewardship
A Commitment to Service

Agenda Date: 3/17/2020
Agenda Placement: 9A
Set Time: 9:30 AM PUBLIC HEARING
Estimated Report Time: 2.5 Hours

NAPA COUNTY BOARD OF SUPERVISORS Board Agenda Letter

TO: Board of Supervisors
FROM: David Morrison - Director
Planning, Building and Environmental Services
REPORT BY: Donald Barrella, Planner III - 707-299-1338
SUBJECT: Bremer Group LLC/Bremer Family Winery Conservation Regulation Exception Appeal

RECOMMENDATION

Consideration and possible action regarding an appeal filed by Michael Hackett to a decision by the Napa County Planning Commission on October 16, 2019 to approve a request from Bremer Group LLC/Bremer Family Winery for an exception to the Napa County Conservation Regulations in the form of a Use Permit (No. P19-00153-UP) to maintain, in their current configuration, the following existing physical site improvements, or portions thereof, that encroach into the minimum required stream setbacks: (1) an approximate 2,200 square foot agricultural storage building and associated water tank; (2) an approximate 800 square foot pad and associated walls attached to the winery; (3) an approximate 150 square foot ground floor/story addition and second floor/story deck to the farmhouse/office building; (4) an approximate 100 square foot freestanding restroom; (5) approximately 1,210 lineal feet of rock walls; and (6) two pedestrian bridges over a blue-line stream.

The project is located on an approximately 47.1-acre holding (Assessor's Parcel Nos. 021-400-002 and 021-420-027) at 975 Deer Park Road, St. Helena, California. **(CONTINUED FROM FEBRUARY 4, 2020)**

ENVIRONMENTAL DETERMINATION: Consideration and possible adoption of Categorical Exemptions Class 1, 2, 3, and 4. It has been determined that this type of project does not have a significant effect on the environment and is exempt from the California Environmental Quality Act (CEQA). [See Section 15301, Class 1 Minor Alterations to Existing Facilities; Section 15302, Class 2 Replacement or Reconstruction; Section 15303 Class 3 New Construction or Conversion of Small Structures; Section 15304, and Class 4 Minor Alterations to Land, which may be found in the guidelines for the implementation of the CEQA at 14 CCR Sections 15301, 15302, and 15304. This project has also been determined to be exempt pursuant to CCR Section 15061 in that the recognition, retention, and maintenance of existing site improvements has no possibility of causing a significant effect. This project is not on any lists of hazardous waste sites enumerated under Government Code Section 65962.5.

EXECUTIVE SUMMARY

The matter before the Board involves an appeal of the Planning Commission's decision on October 16, 2019 to approve (3:2- AYES: Whitmer, Mazotti and Hansen; NO: Gallagher and Cottrell) an application submitted by Bremer Group LLC/Bremer Family Winery (Applicant, Winery or Bremer Winery) for an exception in the form of a use permit to allow and approve certain existing structures located within required stream setbacks (the Application) on an approximately 47.1-acre holding (Assessor's Parcel Nos. 021-400-002 and 021-420-027) at 975 Deer Park Road, St. Helena, California.

PROCEDURAL REQUIREMENTS

1. Chair introduces item and invites disclosures from Board members and then the Staff Report presentation.
2. Chair opens the public hearing and invites testimony from Appellant and their witnesses.
3. Chair invites any other interested members of the public to testify regarding the appeal.
4. Upon hearing all testimony from interested members of the public, Chair invites the Applicant and their witnesses as previously disclosed on their witness list attached as Attachment D to testify.
5. Chair then invites Appellant to have final rebuttal.
6. Chair closes the public hearing.
7. A motion of intent is made and seconded to deny, uphold, and/or remand the appeal.
8. Chair refers the matter to County Counsel's office for preparation of a Resolution of Findings and Decision on Appeal. Because of the number of pending appeals, good cause exists for County Counsel's office to have up to ninety days to prepare the Resolution of Findings and Decision on Appeal. Consequently, Staff recommends that the Board direct County Counsel's office to return to the Board on May 5, 2020 at 9:30 a.m. with the proposed Resolution for the Board's consideration and adoption.

FISCAL & STRATEGIC PLAN IMPACT

Is there a Fiscal Impact? No

County Strategic Plan pillar addressed:

ENVIRONMENTAL IMPACT

Consideration and possible adoption of Categorical Exemptions Class 1, 2, 3, and 4. It has been determined that this type of project does not have a significant effect on the environment and is exempt from the CEQA. [See Section 15301, Class 1 Minor Alterations to Existing Facilities; Section 15302, Class 2 Replacement or Reconstruction; Section 15303 Class 3 New Construction or Conversion of Small Structures; Section 15304, and Class 4 Minor Alterations to Land, which may be found in the guidelines for the implementation of the CEQA at 14 CCR Sections 15301, 15302, and 15304. This project has also been determined to be exempt pursuant to CCR Section 15061 in that the recognition, retention, and maintenance of existing site improvements has no possibility of causing a significant effect. This project is not on any lists of hazardous waste sites enumerated under Government Code Section 65962.5.

BACKGROUND AND DISCUSSION

All documents associated with the Bremer Winery, including but not limited to the application materials, Planning Commission Staff Reports, CEQA memorandum, comments and correspondence, the transcripts of the Planning

Commission meetings, and the appeal can be accessed at: <https://pbcs.cloud/index.php/s/xwmDYP66WtMekYL>

The matter involves an appeal of the Planning Commission's approval of Bremer Winery's request for an exception to the Conservation Regulations in the form of Use Permit No. P19-00153-UP to maintain existing physical site improvements, or portions thereof, that encroach into the minimum required stream setbacks by recognition and approval of the following: (1) an approximate 2,200 square foot agricultural storage building and associated water tank; (2) an approximate 800 square foot pad and associated walls attached to the winery; (3) an approximate 150 square foot ground floor/story addition and second floor/story deck to the farmhouse/office building; (4) an approximate 100 square foot freestanding restroom; (5) approximately 1,210 lineal feet of rock walls; and (6) two pedestrian bridges over a blue-line stream. The encroachments range from 45 feet to 65 feet from the top of bank of an unnamed blue-line stream that traverses the property. A map of the improvements approved by the Planning Commission is provided at **Attachment B**.

As the result of a code compliance investigation, the County pursued litigation alleging that the Bremers were operating the winery in excess of their use permit, notably with regard to unpermitted visitation levels, days and hours of operation, and the location of winery operations. The parties reached a settlement agreement and Judge Cynthia Smith entered a judgment in February 2019 imposing restrictions on winery visitation and operations, as well as partial cost recovery to the County by the Bremers. The Planning Commission received comments that this Application for a use permit should be denied to further "penalize" the Applicant. Use permits regulate land rather than individuals, however, and conditions of approval that relate to specific applicants are invalid. (*Sounheim v. City of San Dimas* (1996) 47 Cal.App.4th 1181, 1187; *Anza Parking Corp. v. City of Burlingame* (1987) 195 Cal.App.3d 855, 858; Government Code Section 65909.)

Code Compliance:

The Application was submitted in compliance with the County's Code Compliance Program (Resolution No. 2018-164). That resolution established procedures and policies regarding the processing of land use applications for properties that are the subject of County Code violations. The resolution established a deadline of March 29, 2019 for landowners to apply for permits to voluntarily remedy their violations; those that did not meet the deadline are now required to operate within their existing legal entitlements for at least one year from the date of the initial Notice of Violation before an application to modify their use permit may be submitted.

The settlement agreement required the Applicant to submit a complete application for an Exception to the Conservation Regulations in the form of a use permit to legalize two of the six items in this application, the walls and bridge structures (items 5 and 6). The Applicant has done so. The settlement agreement explicitly provides that "The County does not and cannot make any representation or promise that any applications for use permit modifications submitted pursuant to the Judgment entered pursuant to this Settlement Agreement will be approved in whole or in part." The settlement agreement has no bearing at all on the other four improvements the Applicant seeks to legalize as part of the use permit application. The settlement agreement does not address and has no relevance to the (1) approximate 2,200 square foot agricultural storage building and associated water tank; (2) approximate 800 square foot pad and associated walls attached to the winery; (3) approximate 150 square foot ground floor/story addition and second floor/story deck to the farmhouse/office building; or (4) approximate 100 square foot freestanding restroom.

Public Process:

The Bremer Winery Use Permit Application No. P19-00153 was submitted on March 29, 2019. Staff responded with a comment letter on May 14, 2019, describing additional project information and plan details that were needed to process the Application. A resubmittal application with the additional requested information was provided on June 28, 2019. The Application was determined to be complete on July 28, 2019.

On May 24, 2019, a New Project Submittal Courtesy Notice (dated May 24, 2019) was mailed to all property owners within 1,000 feet of the subject property and emailed to those persons on the general CEQA document notification list.

On September 5, 2019, the Public Notice for the Planning Commission hearing and Notice of Intent to adopt Categorical Exemptions was mailed to all property owners within 1,000 feet of the subject property as well as any other persons who had requested notice. (It should be noted that the County's requirements to notice all property owners within 1,000 feet far exceeds the State mandate of noticing all owners within 300 feet). Notice was also provided to those persons on the general CEQA document notification list. The Notice was published in the Napa Valley Register on September 6, 2019.

The Commission held two public hearings (September 18, 2019 and October 16, 2019) on the Application. Topics considered by the Planning Commission during the public hearings included the property's compliance history, the Conservation Regulations as they relate to stream setbacks and the improvements subject to the requested exceptions, the CEQA environmental baseline conditions, and the County's Code Compliance Program (Resolution No. 2018-164).

At the time the September 18, 2019 Staff Report was posted, six written comments had been received. At the time the October 16, 2019 Staff Report was posted, six more written comments had been received. The written comments primarily focused on the County's litigation against the Bremers and associated settlement agreement; other past violations and stream setback encroachments; the adequacy of biological resource documentation; the adequacy of public notification; the status of the Regional Water Quality Control Board's Cleanup and Abatement Order on the adjoining vineyard property (not a part of this request); and the character of the Bremers.

On January 22, 2020, public notice of this appeal hearing was mailed and provided to all parties who received notice of the Planning Commission hearing on September 18, 2019. The notice ran in the Napa Valley Register on January 24, 2020. The appeal hearing was opened on February 4 and continued without public testimony to March 17, 2020.

The public comment period on this appeal will have run for 53 days by the time the hearing is held on March 17, 2020.

Appeal:

On October 28, 2019, a timely Notice of Intent to Appeal was submitted by Michael Hackett (Appellant). On November 12, 2019, Appellant timely filed an appeal packet to the Planning Commission's decision to approve an exception to the Conservation Regulations in the form of a Use Permit No. P19-00153-UP (Please see **Attachment A**). Pursuant to the County's appeals ordinance (Napa County Code Chapter 2.88), a public hearing on the appeal must be scheduled not less than fifteen days nor more than ninety calendar days from submittal of an appeal. To comply with the appeals ordinance, Staff and the Applicant requested that the appeal hearing be opened and continued on February 4th without public testimony to March 17, 2020 at 9:30 a.m. Appellant's counsel was contacted but refused to participate in discussions about scheduling the hearing date.

Pre-Hearing Conference:

To clarify the County's procedural requirements and expectations regarding land use appeals, over the last five years the County Counsel's office has implemented a program of holding pre-hearing conferences with the parties and the Chair of the Board to discuss the conduct of the appeal hearing along with estimates on presentation lengths, the scope of evidence, testimony to be presented, and witness lists. Any witness not appearing on a witness list at the pre-hearing conference is treated as an ordinary member of the public and allotted the usual three minutes of speaking time.

On December 20, 2019, notice was given to Appellant's counsel and Applicant's counsel of a pre-hearing conference scheduled in this matter for January 27, 2020. On January 17, 2020, the pre-hearing conference agenda, including the conduct of the appeal and pre-hearing deadlines, was emailed to Appellant's counsel and Applicant's counsel. The pre-hearing conference was held on January 27, 2020 with Applicant's counsel, Chair Dillon and a Deputy County Counsel. Appellant's counsel declined to participate in the conference.

At the conference, the Chair reiterated the protocol outlined in the agenda including various deadlines for submittal of information, and the parties' respective witness lists. The Chair also allocated a maximum of 45 minutes for Appellants' presentation including rebuttal (allocated at Appellant's discretion) and 45 minutes for Applicant's presentation. On January 29, 2020, the minutes of the pre-hearing conference including the Chair's various deadlines and protocol for the hearing were emailed to Appellant's counsel and Applicant's counsel, and are attached as **Attachment C**. Appellant has not complied with the Chair's deadlines or with the protocol. Applicant's counsel provided a summary of the witness information by name, subject matter of testimony and time estimates, attached as **Attachment D**. No witness information was submitted by Appellant's counsel.

At the pre-hearing conference, the Chair also set February 7, 2020 as the deadline for either party to submit a "good cause" request to either supplement the record with new information and/or to have the appeal heard de novo (e.g., a hearing where new information could be considered). No such requests were made by either party. The Chair further established February 25, 2020 as the deadline for Appellant and Applicant to provide any supplemental information. No supplemental information was provided by Appellant or Applicant.

On February 18, 2020, the Director of Planning, Building, and Environmental Services (PBES) Department contacted the Appellant requesting a meeting. The two parties met on February 19, 2020, to discuss the appeal. The PBES Director asked the Appellant if Appellant would agree to a second pre-hearing conference, to obtain the agreement of all parties as to the protocol for the hearing. The Appellant said that Appellant would discuss with counsel. On February 21, 2020, Appellant's counsel emailed County Counsel indicating that the Appellant declined to participate. Appellant's counsel also indicated that they were awaiting the County's response to Kathy Felch's letter of February 10, 2020 on behalf of the Advocates for the Public Trust, as the Board of Supervisors' qualification to hear the appeal is determinative of the Appellant's participation in any further proceedings adjudicated by the Board.

On February 24, 2020, County Counsel responded to the letter of February 10, 2020, from Advocates of the Public Trust. The response indicated that the Board of Supervisors does not have a disqualifying conflict of interest, the Appellant has been afforded full due process in this matter, and there is no alternative adjudicative body that can or should consider the appeal. The letter added that participation in the pre-hearing conference and/or the Board hearing does not subject the Appellant to the Board's jurisdiction, nor does it waive the Appellant's objection to any alleged conflict of interest. Correspondence between Appellant's counsel and County Counsel's office is attached as **Attachment E**.

No correspondence was received by the Board as of March 4, 2020.

GROUND OF APPEAL:

This appeal differs from other land use appeals in that the grounds of appeal raised by Appellant are wholly unrelated to the underlying project or its consistency with the Conservation Regulations, the use permit findings, or any environmental impacts. They are solely related to alleged violations of procedural due process and the public trust doctrine and an alleged conflict of interest that disqualifies the Board from hearing and deciding the appeal. County Code Section 2.88.050(A)(4) requires that the appeal packet identify the specific legal or factual determination which is being appealed, and the basis for such appeal. Any issue not raised by the Appellant in the appeal packet shall be deemed waived. Here, because the appeal did not raise any issues related to the merits (or lack thereof) of the Application or the CEQA determination, they are deemed waived per the Napa County Code.

This report responds to the arguments raised in the appeal.

The following outlines the basis of the appeal as contained in Appellant's appeal dated November 12, 2019 (See **Attachment A**). For convenience, Staff has provided a summary below, but recommends the Board review the actual appeal for details.

Appeal Ground No. 1:

Appellant asserts that the Board of Supervisors cannot hear the appeal due to a common law conflict of interest that has and will deprive the public and Appellant the right to procedural due process. Appellant alleges that prior to the Planning Commission action which is the subject of this appeal, the Board of Supervisors entered into a private settlement agreement in a lawsuit brought by the County against the Applicant in which an application for the use permit ultimately granted by the Planning Commission was required. Appellant alleges the Planning Commission limited its consideration of Applicant's Application due to direction by the Board of Supervisors and misapplication of the settlement agreement. Appellant further asserts that the Board should recuse itself as the appellate body.

Staff Response:

No procedural due process violation occurred and there is no evidence that any member of the Board of Supervisors has a common law conflict of interest that warrants disqualification. The Planning Commission did not limit its consideration of Applicant's project, as evidenced by two Commissioners voting to deny the request. The settlement agreement merely required the Applicant to submit an application. It did not require that the Commission approve that application.

A. Procedural Due Process

The constitutional principle of procedural due process requires reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest. (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612.) Because Appellant has not asserted that it has a significant property interest or a significant deprivation of its property interest, there is no basis upon which Appellant could assert or a court could find a viable procedural due process claim. Staff pointed out this issue in a letter to Appellant's counsel dated January 24, 2020. Neither Appellant nor his counsel have provided any response.

B. Common Law Conflict of Interest

A common law conflict of interest exists only in limited circumstances that do not exist here. (See *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1233 ["We continue to be cautious in finding common law conflicts of interest. ... We reject the application of the doctrine in this case, assuming, arguendo, it exists".]) A common law conflict of interest requires proof of "an unacceptable probability of actual bias" on the part of the Board. (Id. at p. 1236.) "A mere suggestion of bias is not sufficient to overcome the presumption of integrity and bias." (Id.) Bias is never implied, and Appellant's "unilateral perception of an appearance of bias cannot be a ground for disqualification." (Id. at p. 1237.) No evidence of a common law conflict of interest exists here. No Board member has demonstrated any actual bias against the Appellant, Applicant or any other party. No Board member has made any statements regarding the Application, and any such statements would not violate due process in any event. (*Fairfield v. Superior Court of Solano County* (1975) 14 Cal.3d 768, 772, 780-781.)

Appellant incorrectly alleges that the settlement agreement required approval of the Application. In fact, the settlement agreement has no relevance at all to four of the six improvements in this Application, and explicitly does not require approval of the other two. The settlement agreement does not mandate any outcome or require the Planning Commission or the Board to take any particular action on the Application. The agreement merely

requires the Applicant to submit a complete application regarding walls and bridge structures, which the Applicant has done.

No authority suggests that entry of a settlement agreement can constitute a common law conflict of interest or violation of procedural due process, and Appellant has cited to none. Staff pointed out these arguments in a letter to Appellant's counsel dated January 24, 2020, but neither Appellant nor his counsel have provided any authority to the contrary.

C. Planning Commission's Discretion

Contrary to Appellant's allegations, the Planning Commission thoughtfully considered the Application, the health of the watercourse, and whether the existing structures in the setback should be removed. The Commission was fully apprised of its discretion to either grant, deny or modify the Application and the record is replete with evidence of that fact, including but not limited to the Staff Reports, comments from Staff, and even testimony from Applicant's counsel. Furthermore, nothing in the settlement agreement itself limited or mandated the Commission's discretion. Section 10 of the settlement agreement simply states: "... 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." Section 6 explicitly provides that "The County does not and cannot make any representation or promise that any applications for use permit modifications submitted pursuant to the Judgment entered pursuant to this Settlement Agreement will be approved in whole or in part."

The September 18, 2019 Staff Report provided an eight-page analysis of the Application and explicitly identified the options before the Planning Commission, including to deny the requested use permit or redesign it "to identify what site improvements should be removed and the underlying areas restored." (Planning Commission Meeting Staff Report September 18, 2019, pages 7-8.) The Staff Report belies any claim that the Planning Commission was directed to approve the Application.

The Planning Commission clearly understood it had the ability to approve, redesign, or deny the Application. Commissioner Hansen said that under the settlement agreement, the Planning Commission's options included "approve, redesign, or deny, or continue." (Certified Planning Commission Hearing Transcript, September 18, 2019, page 11:25.) The Project Planner confirmed that the Planning Commission could authorize the improvements to be retained, "or should you choose to have them remove some, we could look at that." (Certified Planning Commission Hearing Transcript, September 18, 2019, page 12:20-24.)

Deputy County Counsel reiterated the Commission's options, noting that "... the Planning Commission in its discretion reviews the project, reviews the findings and whether or not they can be made, and then we'll take action." (Certified Planning Commission Hearing Transcript, September 18, 2019, pages 26:25-28; 27:1-3.) Applicant's counsel even acknowledged the Commission's discretion: "You have to use your own judgment on this. If you believe there's damage to the watercourse, you shouldn't approve it." (Certified Planning Commission Hearing Transcript, September 18, 2019, page 34:20-21.)

As Commissioner Hansen openly explained, "This is within our discretion." (Certified Planning Commission Hearing Transcript, September 18, 2019, page 46:16.) The Planning Commission then exercised its discretion to not approve the Application, but rather continue the matter for additional information and testimony.

The October 16th Staff Report again explained that the Planning Commission had multiple decision-making options, including denying the requested use permit or redesigning the project to identify which site improvements should be removed and underlying areas to be restored. (Planning Commission Meeting Staff Report, October 16, 2019, pages 5-6.) The Staff Report clearly states that although staff recommended approval, "that recommendation is not binding on the Commission. The Planning Commission retains its discretion on this

project." (Planning Commission Meeting Staff Report, October 16, 2019, page 5 [emphasis added].)

The Planning Commission then exercised its discretion to approve the project — with two Commissioners voting No. Appellant disproportionately relies on comments from those two Commissioners, but their No votes prove beyond any doubt that the Planning Commission was not limited or directed to approve the Application. Commissioner Cottrell voted No because "there's too many details hanging over our review of this application for me to support it at this time," while Chair Gallagher voted No after explicitly stating that "we do have power over the decision we make." (Certified Planning Commission Hearing Transcript, October 16, 2019, page 46:4-5, 19-20.)

Appellant's argument to the contrary ignores all of this record evidence and relies on a few selective comments that Appellant recites incorrectly or out of context. Appellant ignores the discussion surrounding these comments, which includes testimony that denial of the Application could result in non-compliant structures, a potential code compliance enforcement action, a likely appeal to the Board, the encroachments possibly being left in place for environmental reasons or possible removal and restoration. (Certified Planning Commission Hearing Transcript October 16, 2019, pages 41:4-28; 42:1-28.)

The Board did not direct the Planning Commission to limit its review or exercise its discretion in any particular way. No evidence exists to the contrary, and Appellant has pointed to none. Instead, multiple Commissioners asked if the Commission had authority to deny the Application, and what would happen if the Commission did so. Staff advised the Planning Commission that it had full authority to approve, deny, or condition the requested use permit. Staff explained that denial would result in non-compliant structures that would be subject to code enforcement and potential removal of the structures. As Chair Gallagher recognized at the hearing, "we do not have power over [the settlement agreement], but we do have power over the decision we make." (Certified Planning Commission Hearing Transcript, October 16, 2019, page 46:19-20.)

Counties have the fundamental power to control their own land use decisions, which derives from their inherent police power rather than any delegation of authority by the state. (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151.) The County Code requires the Board to hear and decide on this appeal, and identifies no alternative source of decision. As a result, the Board's participation is legally required.

Appeal Ground No. 2:

Appellant asserts that the Planning Commission failed to consider the public trust as required by applicable law in granting the Application.

Staff Response:

It is unclear on what basis the Planning Commission is alleged to have failed to consider the public trust. Appellant's appeal contains this assertion but did not articulate how the public trust has been violated. The Planning Commission meeting transcripts are equally uninformative. Appellant testified, "I am here representing the public trust, not the Bremers." (Certified Planning Commission Hearing Transcript, October 16, 2019, page 20:25.) Appellant further stated, "There is no statute of limitations on the public trust. Every day, the public is going to be allowed on this property, but I cannot see it. They are using public trust space to sell wine." (Certified Planning Commission Hearing Transcript, October 16, 2019, page 22:5-8.)

The public trust doctrine dates back to ancient Roman and English common law, and has been part of California law since the State's admission to the Union in 1850. (*Environmental Law Foundation v. State Water Resources Control Board* (2018) 26 Cal.App.5th 844, 856; *World Business Academy v. California State Lands Commission* (2018) 24 Cal.App.5th 476, 508.) The public trust doctrine is borne out of the concept "that the public rights of commerce, navigation, fishery and recreation are so intrinsically important and vital to free citizens that their unfettered availability to all is essential in a democratic society." (*Zack's Inc. v. City of Sausalito* (2008) 165

Cal.App.4th 1163, 1175.) The doctrine is an affirmation of state power to use public property for public purposes, and the state's duty to protect the people's common heritage of streams, lakes, marshlands and tidelands. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 441.)

The doctrine requires the state and its legal subdivisions to "consider," give "due regard," and "take the public trust into account" when considering actions that may adversely impact a navigable waterway. (*Environmental Law Foundation v. State Water Resources Control Bd.* (2018) 26 Cal.App.5th 844, 861, 868; *San Francisco Baykeeper, Inc. v. State Lands Com.* (2018) 29 Cal.App.5th 562, 569.) There is no "procedural matrix" governing how an agency should consider public trust uses. (*Citizens for East Shore Parks v. State Lands Com.* (2011) 202 Cal.App.4th 549, 576.) Rather, the level of analysis "begins and ends with whether the challenged activity harms a navigable waterway and thereby violates the public trust." (*Environmental Law Foundation*, 26 Cal.App.5th at p. 403.)

The courts have refused to impose factual evaluation requirements or procedural constraints on agencies considering the public trust. (*Citizens for East Shore Parks*, 202 Cal.App.4th at p. 577; *World Business Academy*, 24 Cal.App.5th at p. 509.) Evaluating project impacts within a regulatory scheme like CEQA is sufficient "consideration" for public trust purposes. (*Citizens for East Shore Parks*, 202 Cal.App.4th at pp. 576-577.)

The courts have upheld agency decisions when staff discussed public trust uses as part of the project evaluation. In *San Francisco Baykeeper*, for example, the court upheld leases to dredge sand in the San Francisco Bay where agency staff opined the dredging would not impair the public right to use the parcels for commerce, navigation, fishing, recreation, or other public trust uses. (29 Cal.App.5th at p. 573.) Likewise, the court in *World Business Academy* upheld a replacement lease for the Diablo Canyon nuclear power plant where the staff report "explicitly analyzed the public trust doctrine" and the commission considered the facts before it. (25 Cal.App.5th at p. 509.) In *Citizens for East Shore Parks*, the agency properly considered the public trust by engaging in the CEQA review process, which encompasses potential impacts to recreational and other public trust uses. (202 Cal.App.5th at p. 578.)

Here, too, the record contains substantial evidence that allowing the built improvements to remain in place would not adversely impact an unnamed blue-line stream which traverses the project site. The stream is not mapped as an environmentally sensitive resource for biotic vegetation groups, critical habitat, wetlands or vernal pools, or other resources. (Planning Commission Staff Report, September 18, 2019, page 6.) The record also contains professional biological evaluations that determined the stream would not be adversely impacted and that there are no anticipated threats to water quality as a result of the continued maintenance of the site improvements.

The stream and its ecological functions were evaluated by two biologists and a certified professional erosion and sediment control (CPESC) consultant. All three professionals opined that the stream is functioning normally and that the native vegetation present is typical for this part of the County. The CPESC consultant's report noted that "overall stream health and riparian function in the upper reach by the winery are in good condition." (Planning Commission Staff Report, September 18, 2019, Attachment E.) The Biological Report from FirstCarbon Solution found that, "The creek meanders through the property, uninterrupted, largely in its natural state and appears to be functioning as such. ... It is our biological professional opinion that the walls and improvements built within the creek corridor have not significantly changed the natural state of the ephemeral creek and there is no impairment of the vital ecological function of the creek." (Planning Commission Staff Report, September 18, 2019, Attachment D.) These opinions were echoed in biologist Geoff Monk's testimony: "the channel is functioning very well, fine. All the flows are well below any structure that has been constructed. There's no constriction, there's no sedimentation issues. It's a very stable stream channel the way it is now." (Certified Planning Commission Hearing Transcript, October 16, 2019, page 17:21-24.)

Based on this substantial record evidence, the Planning Commission appropriately found that the Application would not impact a public trust resource. The record is clear that leaving the improvements in place would not

harm the stream, but it further reveals concern that “doing any kinds of modifications to that, pulling back, removing things, would probably create greater instability, and certainly a sediment source that hasn’t existed on the site for some time.” (Certified Planning Commission Hearing Transcript, September 18, 2019, page 24:20-24.) For all the reasons stated herein, the Planning Commission properly considered the Application’s impact on the stream and appropriately found no credible evidence that approval of the permit would harm the stream or a navigable waterway.

This substantial evidence and the limited nature of the project differentiate the Application from those circumstances in which courts have expressed public trust concerns. Those cases involve groundwater pumping that was partly responsible for decreased surface flows in a navigable waterway that allegedly injured local fish (*Environmental Law Foundation, supra*, 26 Cal.App.5th 844); an 1884 case in which a mining company impaired navigation by dumping sand and gravel into a non-navigable stream that flowed into the Sacramento River (*People v. Gold Run D. & M. Co.* (1884) 66 Cal. 138); and the City of Los Angeles’ practice of diverting water from non-navigable streams flowing into Mono Lake resulting in lake levels dropping and the surface area diminishing by one-third (*National Audubon Society, supra*, 33 Cal.3d 419.) None of those situations are remotely similar to this Application. Unlike those cases, here the analysis begins and ends with multiple qualified professional opinions finding that allowing the improvements to remain in the stream setback would not harm the blue-line stream.

Here, the County complied with CEQA and prepared a five page memorandum documenting how the various existing improvements built within the stream setback were categorically exempt. To support the exemptions, the County relied on opinions by environmental professionals that the improvements have not significantly changed the natural state of the stream or impaired its ecological functions. No grading has or would occur in the bed of the stream. Because the Application would approve existing improvements and have no change in the use of the stream, the public trust doctrine does not require the County to conduct any additional analysis or consideration. The County and Planning Commission fulfilled their obligations under the public trust doctrine.

Appeal Ground No. 3:

Appellant asserts that the Planning Commission acted against the public interest by failing to conduct a fair and impartial hearing, thereby depriving the public, including Appellant, of the right to procedural due process. Specifically, Appellant asserts that the Planning Commission acted at the direction of the Board of Supervisors to comply with the terms of a private settlement agreement without notice to or hearing on that direction or those terms at a public meeting as required by applicable law, including but not limited to the Ralph M. Brown Act, Government Code Section 54954, et seq.

Staff Response:

Appellant has also not alleged that it has a significant property interest subject to procedural due process. Please see Staff Response to Appeal Ground No. 1 incorporated here by reference.

The Planning Commission hearings on the Application were fair, impartial and afforded the public and the Appellant due process. Notice of the public hearing was mailed to all property owners within 1,000 feet of the subject property and published in the newspaper more than eleven days prior to the hearing. The Planning Commission meeting agendas were made available and posted to the County’s website one week prior to the hearing dates. Appellant and the public had an opportunity to be heard on the Application as demonstrated by Appellant’s and others’ written and verbal testimony at the hearings. Because proper notice was given, Appellant and the public had ample opportunity to comment on the project and no due process violation occurred.

Furthermore, the Planning Commission did not act at the direction of the Board, and no direction was given by the Board to the Planning Commission regarding the settlement agreement or the Application. The only meetings that occurred were properly noticed before the Planning Commission in full compliance with the Brown Act’s open and

public meeting requirements.

Appeal Ground No. 4:

Appellant asserts that the Planning Commission acted at the direction of the Board to comply with the terms of the private settlement agreement, which was itself arrived at on the basis of a draft tentative ruling by the Napa County Superior Court, which was provided to the parties to the lawsuit but withheld from the public.

Staff Response:

The Planning Commission did not act at the direction of the Board. The Board did not direct the Planning Commission to limit its review or exercise its discretion in any particular way. No evidence exists to the contrary, and Appellant has pointed to none. Please see Staff Response to Appeal Ground No. 1 incorporated here by reference.

The superior court did not issue a “draft tentative ruling.” Appellant appears to refer to a “case analysis” prepared by an early judge in the code enforcement litigation. (Appeal Packet, Exh. B, page 6:12.) That case analysis was preliminary and prepared by a judge who recused themselves from the case on October 9, 2018. The settlement agreement was executed approximately four months later, before an entirely different superior court judge. The “case analysis” was irrelevant, and remains irrelevant to this Appeal.

Appeal Ground No. 5:

Appellant asserts that the Planning Commission acted against the public interest by failing to conduct a fair and impartial hearing, thereby depriving the public, including Appellant, of the right to procedural due process. Specifically, Appellant asserts that the Planning Commission limited action on Applicant’s Application to the terms of the private settlement agreement.

Staff Response:

Please see Staff Response to Appeal Ground Nos. 1 through 3 incorporated here by reference.

Appeal Ground No. 6:

Appellant asserts that the Planning Commission failed to provide documents regarding the Application in a timely manner in accordance with the Brown Act so that the public could participate in a meaningful manner in the public hearing on the Application.

Staff Response:

Neither the Appellant nor any member of the public were deprived of participating in a meaningful manner at the public hearings before the Planning Commission. All documents related to the Commission’s action on the use permit were made available to the public, including the Appellant, well in advance of the September 18th and October 16th Commission meetings.

The Brown Act requires that the meeting agenda be available to the public 72-hours in advance of a regular meeting and that the meeting agenda include “a brief general description of each item of business to be transacted or discussed at the meeting.” (Government Code Sections 54954.2(a)(1) and 54954.2(b).) The Act further prohibits an appointed body such as a planning commission from taking action on matters that are not listed on the posted agenda.

On September 11, 2019, the Planning Commission Meeting Agenda and materials related to the hearing on the Bremer Winery Application were posted on the County's website. Consistent with the Brown Act, the Planning Commission Meeting Agendas for September 18th and October 16th both identified the item of business to be transacted or discussed at the meeting as "Approval of a request for an exception to the Napa County Conservation Regulations, Napa County Code (NCC) Chapter 18.108, in the form of a Use Permit, in order to maintain" various existing site improvements located within stream setbacks. In addition to the Staff Report, the publicly available agenda materials included recommended findings, conditions of approval, the Application and submittal documents, the CEQA determination memorandum, site plans, a biological report, the prior use permit on the property, and supporting graphics. All of these materials were posted on the County's website and available for the public and the Appellant to review on September 11, 2019, six days in advance of the September 18th meeting, and well beyond the 72-hours mandated by the Brown Act.

Appellant has not identified what specific documents were not made available to the public in a timely manner. To the extent that Appellant is asserting that the unrelated settlement agreement should have been provided to the Commission and the public, it was. The action item before the Commission related only to the Use Permit Exception request and the CEQA determination, not the settlement agreement. Nevertheless, the agreement was provided for informational and background purposes on September 17, 2019. After taking public comment and in response to a request for continuance, the Planning Commission continued the hearing to October 18, 2019, giving the public and the Appellant more than one month of additional time to review all documents related to the Application and the unrelated settlement agreement.

The settlement agreement required the Applicant to apply for the use permit exception to allow the walls and bridge structures within the creek setback. Per the County Code, applications for an exception to the Conservation Regulations in the form of a use permit are heard and considered by the Planning Commission (County Code Section 18.108.040). As further discussed in Staff Response to Appeal Ground Nos. 1 through 3, the Commission retained and exercised its independent judgment. Neither the settlement agreement nor the Board usurped the Commission of its discretion.

Staff Recommendation and Options:

Staff recommends that the Board deny the appeal in its entirety and uphold the Planning Commission's approval of the exception to the Conservation Regulations in the form of Use Permit No. P19-00153-UP for the Bremer Family Winery. The following options are provided for the Board's consideration regarding possible action on the appeal:

1. Follow the Staff recommendation to deny the appeal in its entirety and uphold the Planning Commission's approval of the Use Permit;
2. Uphold one or more grounds of the appeal and reverse the Planning Commission's decision thereby denying the Bremer Family Winery Use Permit;
3. Remand the matter to the Planning Commission with direction;
4. Upon a showing of good cause by a Board member, Appellant or Applicant, the Chair may authorize a de novo hearing. This decision by the Chair may be overruled by a majority of the remaining Board members. Here, neither the Applicant nor the Appellant has requested de novo review, but the Board could find that good cause exists because of the nature of the project and the limited nature of the appeal. As set forth above, the project proposes to legalize multiple buildings, walls and other improvements constructed within the required stream setback and without a use permit as required by the Napa County Conservation Regulations. The Board could find that the amount, size, and unpermitted nature of these improvements warrant full Board review, yet the present appeal does not address the merits of the project, use permit findings, or environmental impacts. The Board could find that good cause exists because, absent de novo review, the Board would be denied its legal opportunity to review and opine on the whole of the project. This is true regardless of whether the Board ultimately approves, denies, or takes another action on the appeal.

The de novo hearing could be held immediately, or the hearing could be continued to allow the parties to provide additional evidence. Staff will be prepared to proceed on March 17th if there is good cause for a de novo hearing.

SUPPORTING DOCUMENTS

- A . Attachment A - Appeal Packet
- B . Attachment B - Map of Improvements
- C . Attachment C - Pre-Hearing Conference Protocol
- D . Attachment D - Applicant's Witness List
- E . Attachment E - Correspondence Between Appellant's Counsel and County Counsel

CEO Recommendation: Approve

Reviewed By: Helene Franchi