Case No. A158076
Related Petition: Case No. A156816
Related Petition: Case No. A158071

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT – DIVISION THREE

COUNTY OF NAPA and NAPA COUNTY BOARD OF SUPERVISORS,
Petitioners (Respondents in Trial Court),

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF NAPA,
Respondent,

SODA CANYON GROUP,
Real Party in Interest (Petitioner in Trial Court)

MOUNTAIN PEAK VINEYARDS, LLC AND HUA "ERIC" YUAN,
Real Parties in Interest (Real Parties in Interest in Trial Court).

From the Superior Court of Napa County
Case No. 17CV001063
Hon. Cynthia P. Smith, Judge
(707) 299-1170

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS COUNTY OF NAPA and NAPA COUNTY BOARD OF SUPERVISORS; PROPOSED BRIEF OF CALIFORNIA STATE ASSOCIATION OF COUNTIES

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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or persons that must be listed in this certificate under Rule 8.208 of the California Rules of Court.

DATED: 8/28/19

THOMAS E. MONTGOMERY,
County Counsel, County of San Diego

By: s/*T. Brooke Miller*
T. BROOKE MILLER, Senior Deputy
Attorneys for Amicus Curiae,
California State Association of Counties

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

STATUTES

OTHER

<u>State</u>

<u>Federal</u>

APPLICATION OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

On Appeal From the Judgment of the
Superior Court of the State of California,
Napa County, Honorable Cynthia P. Smith, Judge

TO: THE HONORABLE PRESIDING JUSTICE:

Proposed Amicus Curiae California State Association of Counties hereby makes this application to file the accompanying brief in this case pursuant to California Rules of Court, Rule 8.200, subd. (c).[1]

The California State Association of Counties ("CSAC") is a non-profit corporation. Its membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The Court's decision in this matter will significantly impact CSAC's interests, and the interests of counties generally, because the trial court's order remanding a land use decision to Napa

[1] Note that California Rules of Court Rule 8.487(e) now governs amicus briefs in writ cases after an OSC is issued. However, courts have discretion to grant amicus applications "before the court has determined whether to issue an alternative writ or order to show cause." (Cal. Rule of Court, rule 8.487, Advisory Committee Comment to subds. (d) and (e).)

County for consideration of new evidence creates an unwarranted and unworkable process by which a petitioner seeking to challenge a land use approval could delay resolution of the challenge on its merits, potentially indefinitely, by introducing new, post-hearing "evidence of emergent facts" which the trial court could then remand to the agency without ever making the determination mandated by State law; that is, whether the agency's initial decision on the project was supported by substantial evidence in the record. This outcome is inconsistent with the standard of review established by Code of Civil Procedure, section 1094.5,[2] and with the stated and implicit purposes of the procedures for judicial review of decisions under the Planning and Zoning Law (Government Code section 65000, *et seq*.) and the California Environmental Quality Act ("CEQA") (Public Resources Code section 21000, *et seq*.), which promote swift resolution of challenges to land use decisions. The order stands to jeopardize both the process of review of projects by counties and other land use agencies throughout the State and the finality of any number of land use decisions, including for development of housing, transportation, infrastructure and many other crucial projects.

As CSAC represents all counties throughout the state, it is uniquely situated to offer context for the Court and to provide insight into the practical ramifications of the trial court's reasoning.

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[2] (All section references hereafter are to the Code of Civil Procedure, unless otherwise stated.)

Because CSAC will be affected by this Court's decision and may assist the Court through its unique perspective, CSAC respectfully requests the permission of the Honorable Presiding Justice to file this brief.

DATED: 8/28/19

Respectfully submitted,

THOMAS E. MONTGOMERY,
County Counsel, County of San Diego

By: s/*T. Brooke Miller*
T. BROOKE MILLER, Senior Deputy
Attorneys for Amicus Curiae,
California State Association of Counties

[PROPOSED] ORDER

The application of California State Association of Counties for permission to file a brief as Amicus Curiae having been read and filed, and good cause appearing therefor,

IT IS HEREBY ORDERED that California State Association of Counties be, and hereby is, permitted to file the proposed brief attached to this application as Amicus Curiae herein; and

PERMISSION IS HEREBY GRANTED to any party to this appeal to serve and file an answering brief within ____ [*number*] days thereafter.

Dated: _____

_____
Presiding Justice

BRIEF OF CALIFORNIA STATE ASSOCIATION OF COUNTIES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS COUNTY OF NAPA and NAPA COUNTY BOARD OF SUPERVISORS

I. INTRODUCTION

The California State Association of Counties ("CSAC") supports Napa County's ("County") petition for review of the Superior Court's June 17, 2019 order.

The order improperly declined to assess the record evidence and rule on the merits of the underlying petition for writ of mandamus. Instead, it remanded the approval of a land use permit and related CEQA determination to the County to consider non-record evidence, based on events that occurred nearly two months after the County's decision on the project became final.

Review of an order remanding a matter to an administrative body is appropriate where the order effectuates a final determination which would otherwise evade review. Here, the trial court's misapplication of the standard for admission of new evidence to order remand of the matter to the County has the effect of a final order by forcing the County to reconsider its decision on the project. Moreover, it creates an unwarranted and unworkable process by which a petitioner seeking to challenge a land use approval could delay resolution of the challenge on its merits, potentially indefinitely, by introducing new, post-hearing "evidence of emergent facts" which the trial court could then remand to the lead agency without ever making the determination mandated by State law; that is, whether the

agency's decision on the project was supported by substantial evidence in the record. This outcome is inconsistent with both the letter and spirit of the procedures established by State law for judicial review of land use decisions and determinations under CEQA. The order stands to jeopardize both the process of review of land use decisions by agencies throughout the State and the finality of any number of approvals, including for development of housing, transportation, infrastructure and many other crucial projects.

Absent review of the trial court's order through this writ of mandate, the County may have no other opportunity to dispute the effect of the order. The pathway to perpetual delay in resolution of land use matters would be established. Writ review is warranted here.

Moreover, there is no legal basis for remand of a decision for review of new evidence in cases subject to the substantial evidence standard of review before the trial court has made a determination whether the agency's decision was supported by substantial evidence in the record before it; that is, before the trial court has ruled on the merits of the petition.

Amicus respectfully urges this Court to grant Napa County's petition for review, to vacate the trial court's order, and require the matter to proceed to consideration of its merits before the trial court.

II. ARGUMENT

A. Immediate Review of the Trial Court's Remand Order is Both Appropriate and Necessary.

1. The Order is final and warrants immediate review.

The trial court's order of June 17, 2019, was issued following multiple hearings before that court relating to the admissibility of so-called "Atlas Fire Evidence" – that is, approximately 175 pages of information relating to the Atlas Fire, which began in Napa County on October 8, 2017, nearly two months after final approval of the project (a use permit to construct a 100,000 gallon-per-year winery on a 41.57-acre parcel) and related CEQA determination (Negative Declaration) on August 22, 2017, and after filing of the underlying writ petition on September 20, 2017. After explaining its reasoning, the order states:

> *The Court concludes that it would be most efficient to remand the matter to the County prior to the administrative mandamus hearing. If the County affirms its decision, the matter will return to the trial court for hearing. If not, the matter will proceed accordingly.*

Thus, the order indicates the petition will be back for hearing, after remand, only if the County reaffirms its initial decision to approve the project.

Review of an order remanding a matter to an administrative body is appropriate where the nature of the particular remand order at issue renders it a final and appealable judgment and where, as a practical matter, review is necessary to

consider the trial court's interpretation of a matter governing the remand which may otherwise effectively evade review. (*Dhillon v. John Muir Health* (2017) 2 Cal.5th 1109, 1116.) Here, the order itself indicates the petition may not be back for further consideration, if in light of the additional evidence (or, perhaps more likely, due to other factors), the County declines to reaffirm its original approval. The order has at least the potential to end the instant litigation, and thus has the effect of a final order.

More importantly, the order remanding the decision to the County to consider new evidence is itself the aberration, and the basis for review, irrespective of the ultimate outcome of the underlying case. Whereas a lead agency expects that a land use decision is subject to challenge on the grounds set forth in the law (that is, whether the findings are "supported by substantial evidence in the light of the whole record"[3]), the idea that a decision could be challenged *and then its resolution delayed indefinitely* because a trial court is empowered to remand the entire matter to the local agency to consider newly generated, extra-record evidence, without first considering whether, in fact, the decision is supported by substantial evidence in the record, is

[3] Code Civ. Proc., § 1094.5(c); see also, *Krater v. City of Los Angeles* (1982) 130 Cal.App.3d 839, 843-844 [*Krater*] ["the issues before this court are whether there exists substantial evidence to support the Council's finding and whether that finding supports its decision."]; Pub. Resources Code, § 21168 ["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."]

antithetical to the interests in timely resolution of challenges to land use approvals and CEQA determinations, as expressed in State law.

2. The Legislature favors prompt and conclusive land use decisions, and provides for only limited, "substantial evidence" review.

Decisions of a local agency relating to land use and CEQA— and petitions for judicial review of those decisions— are governed by a specialized regulatory regime. Several of these rules express a specific legislative interest in the efficient resolution of disputes. Among them, Government Code section 65009(c)(1)(E) requires that an action to challenge land use decisions, including a use permit, be both *commenced and served* on the legislative body within 90 days of its decision. Section 65009(a)(2) and (3) express the statute's purpose and the legislative findings in support thereof:

> *(2) The Legislature further finds and declares that a legal action or proceeding challenging a decision of a city, county, or city and county* ***has a chilling effect*** *on the confidence with which property owners and local governments can proceed with projects. Legal actions . . . can* ***prevent the completion of needed developments*** *even though the projects have received required governmental approvals.*
>
> *(3) The purpose of this section* ***is to provide certainty*** *for property owners and local governments regarding decisions made pursuant to this division.*

Ibid., emphasis added.

For its part, CEQA, at Public Resources Code, section

21167, establishes statutes of limitation for challenges under CEQA as short as 30 days and not exceeding 180 days, compared to 2 years for personal injury (Code Civ. Proc., § 335), 3 years for injury to personal property (Code Civ. Proc., § 338) and four years for actions on contracts (Code Civ. Proc., § 337).[4] Public Resources Code section 21167.1 also provides that actions challenging a decision under CEQA shall be given "preference over all other civil actions, in the matter of setting the action or proceeding for hearing or trial, and in hearing or trying the action or proceeding, so that the action or proceeding shall be *quickly heard and determined*." (Emphasis added.)

Like Government Code section 65009, the purpose of these provisions is to ensure that legal challenges under CEQA are resolved expeditiously, so as not to cause undue delay, uncertainty and hardship. As the courts have put it, "Patently, there is legislative concern that CEQA challenges, with their obvious potential for financial prejudice and disruption, *must not be permitted to drag on to the potential serious injury of the real party in interest*." (*Nacimiento Reg'l Water Mgmt. Advisory Com. v. Monterey County Water Resources Agency* (2004) 122 Cal.App.4th 961, 96, emphasis added.)

Consistent with this patent intention that challenges to land use and CEQA decisions be resolved expeditiously, State law

[4] See generally, *Friends of Shingle Springs Interchange, Inc. v. County of El Dorado* (2011) 200 Cal.App.4th 1470, acknowledging "short limitations periods in the California Environmental Quality Act, Pub. Res. Code §§ 21000 et seq., and the Planning and Zoning Law, Gov. C §§ 65000 et seq."

further supports expeditious resolution by providing for limited judicial review of land use and CEQA decisions – such decisions are to be upheld whenever they are "supported by substantial evidence in the light of the whole record." (Code Civ. Proc., § 1094.5(c); *see also*, *Krater*, *supra*, 130 Cal.App.3d at pp. 843-844 ["the issues before this court are whether there exists substantial evidence to support the Council's finding and whether that finding supports its decision."]; *City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1017 ["issues before this court are whether there is substantial evidence to support the county's findings and whether the findings support the decision."].)

The substantial evidence standard of review promotes the efficient resolution of legal challenges by reducing the scope of the court's inquiry to a determination as to whether the evidence before the decision-maker provides adequate support for the decision made: "In making these determinations, our inquiry, as was the trial court's, is limited to the record made before the Council." (*Krater*, *supra*, 130 Cal.App.3d at p. 844.) Moreover, in applying this standard, "All conflicts must be resolved in favor of the prevailing party below and that party must be given the benefit of every reasonable inference." (*City of Walnut Creek v. County of Contra Costa, supra,* 101 Cal.App.3d at p. 1017.) If the court determines this standard is met, the inquiry is concluded; no further process is required.

Similarly, Public Resources Code section 21168 provides that, in an action for administrative mandamus under Code of

Civil Procedure section 1094.5 alleging noncompliance with the requirements of CEQA, "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." (Emphasis added.) As the courts of appeal have acknowledged, "our limited function is consistent with the principle that the purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind." (*River Valley Pres. Project v. Metro. Transit Dev. Bd.* (1995) 37 Cal.App.4th 154, 178, internal punctuation omitted.)

Accordingly, where the record demonstrates that the lead agency has taken environmental consequences into account in making its decision, no further inquiry is warranted. The role of the trial court is not to evaluate whether the lead agency's decision was the *correct* one. (*Fund for Envtl. Def. v. County of Orange* (1988) 204 Cal.App.3d 1538, 1545) ("We do not judge the wisdom of the agency's action in approving the Project or pass upon the correctness of the EIR's environmental conclusions"). Rather, the standard of review requires a much more modest approach – assessing "whether the agency followed proper procedures and whether there is substantial evidence supporting the agency's determination." (*River Valley Pres. Project v. Metro. Transit Dev. Bd.*, *supra*, 37 Cal.App.4th at p. 168). In other words, the role of the trial court in land use and CEQA challenges is limited to determining whether substantial evidence in the record supports the decision made. Until this

determination is made, the law does not authorize further inquiry.

3. Consideration of non-record evidence undermines the need for finality, and will leave investors and developers in a perpetual state of uncertainty.

As such, the law does not require an agency to consider all evidence ever generated as to the potential effects of the project. If it did, no decision could ever be final; new evidence could always be discovered, or (as in this case) come into existence *ex post facto*. Instead, decision-makers must consider all evidence before them *at the time they make their decision*, and the court, upon review, must consider whether that evidence provides sufficient support for the decision made. As the appellate courts have admonished, "information appearing after an approval does not require reopening of that approval." (*Fort Mojave Indian Tribe v. Department of Health Services* (1995) 38 Cal.App.4th 1574, 1597 [*Fort Mojave*]).) Where a trial court has held that substantial evidence does support the decision, consideration of additional evidence is not appropriate, and exceeds the proper scope of judicial review.

Here, the trial court's order expresses concern that "if the Court finds substantial evidence sufficient to support the agency's decision, neither the Court (nor presumably the County/ Board of Supervisors on remand) could consider 'truly new evidence of emergent facts.'" (Order, p. 2.) But this is precisely what the law requires, and is no harsher than other features of civil and criminal procedure that militate in favor of finality and

repose. Statutes of limitation bar consideration of even the most meritorious lawsuits; convicted prisoners face heavy restrictions on introduction of new evidence[5]; and courts of appeal routinely disregard evidence that lies outside the record. (*See Protect Our Water v. Merced County* (2003) 110 Cal. App. 4th 362, 364 ("[I]f it is not in the record, it did not happen.").)

Moreover, limited judicial review is necessary to allow for any measure of finality in land use decisions and related CEQA determinations. Although it may be tempting to revisit decisions upon presentation of new facts, the Legislature barred the trial courts from doing so. The express statutory role of the trial court is to consider whether the evidence that was before the agency was adequate to support its decision— not whether, in the court's judgment, the decision was the right one. The law charges decision-makers not with making perfect decisions but with weighing the evidence presented to them in the first instance, and making a decision supported by that evidence. Once it is demonstrated they have done so, the court's inquiry into the propriety of that decision is complete.

The ability of land use agencies to proceed with the efficient review of proposed projects, of property owners to proceed with use and development of their land, and the overall function of development throughout the State depends on the enforcement of

[5] (*See, e.g.,* Fed. R. Crim. Proc. 33 ("A motion for new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilty.").) There is no exception for fairness, delayed discovery, or the "interests of justice."

this very standard. Specifically, development decisions and investments are made based on municipal land use decisions, and parties make these decisions based on the understanding that such decisions are final. Private parties are well aware that the future is always uncertain, and structure their transactions accordingly – just as land in a high fire-risk area will thus command a lower price than low-risk land or properties with significant slopes or unstable soils require additional construction contingencies. It would be manifestly unfair to disrupt the reasonable expectations of the parties to such transactions. The Legislature has recognized as much in acknowledging the need for efficient resolution of land use disputes. The trial court's order remanding the case to the County directly contradicts these interests and should be vacated.

B. The Trial Court Was Not Authorized to Exercise Independent Judgment, and Thus Had No Authority to Remand the Decision to the County to Consider Extra-Record Evidence.

The cases cited in the trial court's order do not support its conclusion that a trial court may remand a land use decision to the lead agency without first considering whether the agency's determination was supported by substantial evidence. Rather, the cases cited establish a narrow pathway for admission of new evidence, under limited circumstances, by the trial court where it exercises *independent judgment* in its review of a decision.

In support of its remand order, the trial court cited the cases of *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499 [*Voices of the Wetlands*]; *Windigo Mills*

v. Unemployment Ins. Appeals Bd. (1979) 92 Cal.App.3d 586 [*Windigo Mills*]; *Elizabeth D. v. Zolin* (1993) 21 Cal.App.4th 347 [*Elizabeth D.*]; *Curtis v. Board of Retirement of Los Angeles County Employees Retirement Association* (1986) 177 Cal.App.3d 293 [*Curtis*]; and *Fort Mojave, supra*, 38 Cal.App.4th 1574. None of these cases supports the trial court's decision to remand the project to the County for consideration of new evidence prior to considering the writ petition on its merits.

In *Voices of the Wetlands*, the trial court remanded a decision to issue a discharge permit for operation of a power plant for consideration of new evidence only *after* considering whether the Regional Water Quality Control Board's finding, required for issuance of the permit, was supported by the original record.[6] After finding it was not, the trial court tentatively issued a writ compelling the permit to be vacated— but deferred its final judgment in order to avoid shutting down the operation of the plant. Instead, the trial court exercised its discretion, *having first found the findings required for issuance of the permit were not*

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[6] Holding: "the trial court did not err when, *after concluding that the original record before the Regional Water Board did not support the board's finding* on a single issue crucial to issuance of the cooling water intake permit, the court deferred a final judgment, ordered an interlocutory remand to the board for further 'comprehensive' examination of that issue, then denied mandamus after determining that the additional evidence and analysis considered by the board on remand supported the board's reaffirmed finding." (*Voices of the Wetlands*, *supra*, 52 Cal.4th at p. 507, emphasis added.)

supported by evidence in the original record, to remand the decision to the Board for consideration of additional evidence.

Voices of the Wetlands thus presents the exact *opposite* fact pattern as that presently at bar: a trial court had already concluded that the original record was insufficient and therefore remanded the decision to the administrative board to consider additional evidence before issuing final judgment, in order to avoid interruption of approved operations. Here, the trial court made no determination as to the sufficiency of the original record upon which the County relied in approving the project. Indeed, rather than avoiding interruption of permitted activity, the court instead placed that activity into potentially perpetual jeopardy.

Whereas the trial court in *Voices of the Wetlands* acted to preserve continuity of a permitted use pending consideration of new evidence, where it first found that insufficient evidence supported the initial approval, here the order functions only to avoid the trial court's statutory duty to determine the adequacy of the record upon which the administrative agency made its decision. As a consequence, any administrative decision is subject to remand for further process, no matter how comprehensive the original record. Nothing in the law (nor in the interest of public policy) compels a reading of this case to support remanding a decision to an administrative agency for consideration of new evidence *before the trial court even determines whether the agency's decision was supported by substantial evidence in the record*.

Windigo Mills is not on point, as it did not involve a remand of an administrative decision to the administrative board, together with supplemental evidence, prior to consideration of the original decision on the merits. Rather, it involved an appeal from a writ issued by a trial court after the trial court admitted supplemental evidence (declarations) pursuant to Code of Civil Procedure section 1094.5(e). (*Windigo Mills*, *supra*, 92 Cal.App.3d at 594-95.) In *Windigo Mills*, the appellate court *itself* considered whether supplemental evidence was properly admitted by the trial court *to issue its ruling on the merits* (*not* whether that supplemental evidence was required to be submitted to the administrative agency for reconsideration), and concluded that the admission of some such evidence was not erroneous. (*Id*. at 593.)

This is consistent with the language of section 1094.5(e), which states, in relevant part, "*in cases in which the court is authorized by law to exercise its independent judgment* on the evidence, the court *may admit the evidence* at the hearing on the writ without remanding the case." (Code Civ. Proc., § 1094.5, subd. (e), emphasis added.) As the court noted in *Windigo Mills*, "Appellant concedes that the standard for judicial review of decisions of the Unemployment Insurance Appeals Board *is the independent judgment standard rather than the substantial evidence test* [. . . .]"; thus, the appellate court concluded, "the trial court properly weighed the evidence at the administrative hearing" pursuant to section 1094.5(e). (*Windigo Mills*, *supra*, 92 Cal.App.3d at p. 599, emphasis added.)

Here, as explained *supra*, the correct question for the trial court is whether the County's decision was supported by substantial evidence in the record. As Code of Civil Procedure Section 1094.5(e) and (f) provide, in cases where the court does not exercise independent judgment, *if the court orders the decision to be set aside*, it may enter a judgment remanding the case to be reconsidered in light of the court's order, including a finding that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the original hearing. This is precisely what occurred in *Voices of the Wetlands*, and was upheld by the Supreme Court. The same rule should apply here.

Nor do the "progeny" of *Windigo Mills* cited in the order support its conclusions. *Elizabeth D.* involved an appeal from the decision of the trial court granting a writ to the DMV to set aside suspension of the plaintiff's driving privileges on the ground that the trial court "was not provided with either the administrative record or a sufficient portion of that record to review." In that case only some of the documents presented to the administrative body were presented to the trial court, and the law specifically required the trial court to exercise its independent judgment in reviewing the administrative decision. The appellate court concluded that the trial court erred because it did not "review the administrative record, or a sufficient portion of that record, to properly exercise its required independent judgment." (*Elizabeth D., supra,* 21 Cal.App.4th at 353, emphasis added.) This case is inapplicable to the facts at bar, since here the whole record before

the administrative agency was presented to the trial court (only new evidence produced after the decision is proposed to be added), the trial court is not authorized to review the Board's decision in its independent judgment, but only for substantial evidence, and, of course, the trial court never issued a writ setting aside the County's decision.

Curtis involved an appeal from the trial court's decision to uphold a retirement hearing board's decision that the petitioner was ineligible for disability retirement. Even though the trial court "expressly determined that the applicable standard of review is the court's independent judgment," the trial court declined to consider evidence produced after the hearing (but before trial) to support petitioner's claim. (*Curtis, supra,* 177 Cal.App.3d at p. 296.) The appellate court remanded directly to the hearing board to consider the new evidence. *Curtis* is fundamentally inapplicable because the decision there at issue was subject to the independent judgment standard of review, which, pursuant to section 1094.5(e), would allow the trial court to admit new evidence (within the limitations set forth therein). In that context, it would make sense for the trial court to receive new evidence, as the trial court's role in that context is not simply to determine whether the hearing officer's determination had adequate support. That the appellate court remanded the new evidence to the hearing officer, rather than the trial court, does not create any binding precedent on a trial court charged with considering whether the decision of a lead agency was supported

by substantial evidence in the record. The case is thus inapplicable.

On the other hand, *Fort Mojave*, cited parenthetically in the order, actually supports the County's position in this case. *Fort Mojave* (unlike the other cases relied on in the order) involved a petition under CEQA challenging certification of an EIR and the grant of a license for a radioactive waste facility in the Mojave Desert. In that case, the trial court denied the petition, but nevertheless remanded the decision to the lead agency to reconsider the matter in light of a scientific report issued after approval of the project. The court of appeal upheld the trial court's decision to deny the petition, and reversed its remand to the lead agency to reconsider the project in light of new evidence generated after the approval, in part because "it arrived too late" to be considered. (*Fort Mojave, supra,* 38 Cal.App.4th at p. 1597.)

As the appellate court in *Fort Mojave* explained, "Once such an approval has been given, CEQA's role in it is completed. If qualified new information thereafter develops, a supplemental or subsequent EIR must be prepared in connection with the next discretionary approval, if any. But *information appearing after an approval does not require reopening of that approval*." (*Ibid.*, citing 14 Cal. Code Regs. § 15162, subd. (c); Kosta & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 1995) § 19.28, pp. 732-733; emphasis added.)

While the court carefully stopped short of applying the Supreme Court's decision in *Western States Petroleum Assn. v.*

Superior Court (1995) 9 Cal.4th 559 [*Western States*] (barring post-decision evidence in traditional mandamus cases under Code of Civil Procedure section 1085), it nevertheless drew parallels, finding that "the concerns that underlay" that decision "also bear on the proper application of [Section 1094.5(e)], in administrative mandamus cases. In such cases too, the writ is also made available to 'inquir[e] into the validity of [a] final administrative decision,' rendered on the basis of 'evidence taken' (Code Civ. Proc., § 1094.5, subd. (a)), *that is, evidence in the administrative record*." Thus, even without extending *Western States* to apply to actions in administrative mandamus, *Fort Mojave* holds that remand for consideration of new evidence is not appropriate where the trial court finds substantial evidence in the record to support a lead agency's CEQA determination.

Similarly, here, the Court need not abrogate decisions finding that Code of Civil Procedure section 1094.5(e) allows new evidence to be admitted by a trial court, where none of those decisions holds that a trial court may remand a decision subject to review under the "substantial evidence" test to the lead agency without first determining that substantial evidence in the record does not support the decision. The trial court's order should be vacated, as it misinterprets case law and misapplies precedent established therein, and the underlying petition should be considered, on its merits, under the substantial evidence test

before the court may determine whether any further evidence need be considered by the lead agency.

CONCLUSION

For the foregoing reasons, Amicus Curiae CSAC urges this Court to vacate the trial court's order remanding this matter. The order establishes a procedure that is unwarranted by the letter and spirit of State law, and would create unnecessary uncertainty and confusion, and unduly chill development throughout the State. Ultimately, such a process could imperil virtually every land use approval, even reapprovals, in the State and preclude finality in every instance. The law demands no such outcome.

Whether the County adequately complied with the law is a matter for consideration by the trial court, at the hearing on the merits of the petition, and this Court should compel the trial court to proceed to that hearing expeditiously.

DATED: 8/28/19

THOMAS E. MONTGOMERY,
County Counsel, County of San Diego

By: s/*T. Brooke Miller*
T. BROOKE MILLER, Senior Deputy
Attorneys for Amicus Curiae,
California State Association of Counties

CERTIFICATE OF COMPLIANCE

(California Rules of Court 8.204(c)(1))

I hereby certify, pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed brief of Amicus Curiae California State Association of Counties contains 4,671 words, not including tables of contents and authorities, the signature block, and this certificate, as counted by Microsoft Word, the computer program used to prepare this brief.

DATED: 8/28/19

THOMAS E. MONTGOMERY,
County Counsel, County of San Diego

By: s/*T. Brooke Miller*
T. BROOKE MILLER, Senior Deputy
Attorneys for Amicus Curiae,
California State Association of Counties

DECLARATION OF SERVICE
C.C.P. §§ 1005; 1013(a); 1010.6

I, TAMMY MONTELLO, declare:

That I am over the age of eighteen years and not a party to the case; I am employed in, or am a resident of, the County of San Diego, California where the service occurred; and my business address is: 1600 Pacific Highway, Room 355, San Diego, California.

On August 28, 2019, I served the following documents: **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS COUNTY OF NAPA and NAPA COUNTY BOARD OF SUPERVISORS; PROPOSED BRIEF OF CALIFORNIA STATE ASSOCIATION OF COUNTIES** in the following manner:

☒ By electronic filing, I served each of the above-referenced documents by E-filing, in accordance with the rules governing the electronic filing of documents with in the Court of Appeal for the State of California, Fourth Appellate District, Division One, with *TrueFiling, LLC* as to the following parties:

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County of Napa and Napa County Board of Supervisors v. Superior Court of the State of California for the County of Napa [Soda Canyon Group] [Mountain Peak Vineyards, LLC and Hua "Eric" Yuan; Court of Appeal, First Appellate District-Division Three Case No. A158076; Related Petition: Case No. A156816; Related Petition: Case No. A158071

	Clerk Supreme Court of California 350 McAllister Street San Francisco, California 94102 (electronic service) [service effected per Cal. Rules of Court, rule 8.212(c)(2)]

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 28, 2019, at San Diego, California.

s/ *TammyMontello*
TAMMY MONTELLO