SUPERIOR COURT OF CALIFORNIA

COUNTY OF MARIN

SAN GERONIMO HERITAGE ALLIANCE, Petitioner and Plaintiff, v. COUNTY OF MARIN; BOARD OF SUPERVISORS OF COUNTY OF MARIN; and THE TRUST FOR PUBLIC LANDS, Respondents and Defendant, and SALMON PROTECTION AND WATERSHED NETWORK; and PRESTON BROWN, Real Parties in Interest.	Case No. CIV 2001569 **ORDER AFTER HEARING** **ANDREW E. SWEET**

Petitioner San Geronimo Heritage Alliance's ("SGHA") Petition for Writ of Mandate is DENIED. Petitioner failed to demonstrate exhaustion of administrative remedies.

PETITIONER'S MOTION IN LIMINE

Petitioner's Motion in Limine to Augment the Administrative Record is DENIED.

By this motion, Petitioner requests the Court to augment the administrative record to include SPAWN's engineer report on the grounds that it is relevant to the allegations stated in the Petition and has been improperly excluded from the administrative record.

Moving party has failed to lay a proper preliminary foundation supporting its assertion that the document has been improperly excluded from the administrative record. Moving party fails to make any showing that the document in question was submitted to the Board and the Board "improperly refused to entertain admissible evidence." (*Schoenen v. Bd. of Med. Examiners* (1966) 245 Cal.App.2d 909, 913–14.)

REQUESTS FOR JUDICIAL NOTICE

- SGHA's Requests for Judicial Notice A-D and I are GRANTED pursuant to Evidence Code section 452(b).
- SGHA's Requests for Judicial Notice E-G, J, and R, are GRANTED pursuant to Evidence Code section 452(d).
- SGHA's Request for Judicial Notice H and K are GRANTED pursuant to Evidence Code section 452(h).
- SGHA's Requests for Judicial Notice L-M, and O are GRANTED pursuant to Evidence Code section 452(c).
- SGHA's Request for Judicial Notice N is GRANTED pursuant to Evidence Code section 452(h), to the extent that the Court takes Judicial Notice of the documents themselves, but not Judicial Notice of factual matters stated therein.
- SGHA's Request for Judicial Notice P is GRANTED pursuant to Evidence Code section 454(a), to the extent that the Court takes Judicial Notice of the documents themselves, but not Judicial Notice of factual matters stated therein.
- SGHA's Request for Judicial Notice O and Q are GRANTED pursuant to Evidence Code section 451(e).
- SGHA's Request for Judicial Notice S is GRANTED pursuant to Evidence Code section 452(g).

BACKGROUND

SGHA is an unincorporated association comprised of ten local residents who are unhappy with the sale of the former San Geronimo Golf Course, a private property sold by its prior owner in 2017. The new private landowner, TPL, has elected not to continue the property's golf course operations and is contemplating future use of the property as community park space.

On July 6, 2020, SGHA filed its Verified Petition for Writ of Mandate, and Complaint for Declaratory and Injunctive Relief against Defendants County of Marin, Board of Supervisors of the County of Marin (collectively "County Respondents"), TPL, and Real Parties in Interest Salmon Protection and Watershed Network ("SPAWN") and Preston Brown. The Petition sought to stop the replacement and alteration of the San Geronimo Golf Course (the "Property") to open space and parkland.

Shortly after filing its petition, SGHA filed an ex parte application for a stay of the County's decision approving land use permits authorizing SPAWN to undertake development and construction in and around a creek running through the Property. SGHA argued that the work involved the decimation of fairways, green areas, and 58 "protected" and "heritage" trees in violation of County laws that designate the Property's primary use as a golf course. On July 30, 2020, the court denied the ex parte application, finding that under Code of Civil Procedure section 10904.5(G) a stay was against the public interest. The court ruled: "A stay would hamper resources and project that are in the public interest. The court further finds to perpetuate the conflict on this property in a case where success on the merits is low is against the public interest. The court does not find that the petitioner will suffer irreparable harm."

SGHA filed an Amended Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief ("FAP") on August 25, 2020. The First Cause of Action for Writ of Mandamus (based on Civil Code of Procedure Sections 1094.5 and 1085) alleged that the County's decision to approve the land-use permits to SPAWN was invalid because the permits authorize development and use of the Property that are inconsistent with the applicable provisions of the Development Code, the Marin Countywide Plan, the San Geronimo Valley Community Plan, and the County Code. The Second Cause of Action to abate a public nuisance alleged that the condition

of the Property is a public nuisance because it is in violation of the Marin County Code and has become a vacant and unsightly wasteland. In the Prayer for Relief, SGHA requested that the court issue a writ of mandate directing the County to vacate the land use permits to SPAWN, declare that TPL has violated the County Code and maintained a public nuisance, stay the land use permits, and issue an injunction enjoining TPL from any further action converting the Property from a golf course and compelling TPL to restore the Property for use as a golf course.

After TPL demurred to the FAP, SGHA filed the Second Amended Petition ("SAP") which maintained the first and second causes of action previously alleged in the FAP (however mandate was only requested under Code of Civil Procedure section 1094.5 in this iteration of the Petition), and also added TPL as a defendant to the first cause of action and included a third cause of action for negligence against TPL. Defendants filed their respective demurrers to the SAP.

The Court sustained TPL's demurrer to the second cause of action without leave to amend and struck the first and third causes of action against TPL, since Petitioner did not have leave of the Court to add additional causes of action against TPL. The Court overruled the Demurrer by real parties in interest SPAWN and the County Respondents.

The SAP for Writ of Mandate is now before the Court. The sole cause of action remaining to be determined is the First Cause of Action for Writ of Mandamus against the County Respondents and Real Parties in Interest.

DISCUSSION

Exhaustion of Administrative Remedies

The parties dispute whether this Writ of Mandate is properly brought under Code of Civil Procedure section 1085 or 1094.5. Regardless of the code section, the exhaustion doctrine applies. (*Cal. Water Impact Network v. Newhall County Water District* (2008) 161 Cal.App.4th 1464, 1485

citing *Eight Unnamed Physicians v. Medical Executive Committee* (2007) 150 Cal.App.4th 503, 511 [exhaustion requirement applies whether relief is sought by traditional or administrative mandamus].)"

The exhaustion of administrative remedies is a jurisdictional prerequisite, intended to limit the standing of persons who can bring lawsuits. *(Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 590-591.) The exhaustion doctrine "precludes judicial review of issues, legal and factual, which were not first presented at the administrative agency level." *(Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1197.)

Here, the First Cause of Action alleges that the County's decision to approve SPAWN's "land-use permits" was and remains invalid. (SAP ¶ 41.) The reference to "land-use permits" is not entirely clear, but prior paragraphs refer to "two discretionary land-use permits" and identify the "first permit" as the Design Review and Tree Removal Permit issued by the Community Development Agency on April 13, 2020 and the "second permit" as the Creek Permit issued by the Public Works Department on April 23, 2020. (SAP ¶¶ 36-37.)

A. Design Review and Tree Removal Permit

The Planning Division of the Marin Community Development Agency approved the Design Review and Tree Removal Permit for the restoration project on April 13, 2020. (AR 138.) As the decision document explains, the agency action accomplished two separate authorizations, 1) construction of a new steel truss bridge and 2) removal of 51 protected trees and 7 heritage trees. (AR 144.) The permit indicated that any administrative appeal had to be filed with the Planning Commission within eight business days (by April 23, 2020). (AR 145.) Because the Design Review and Tree Removal Permit was not timely appealed to the Planning Commission as required by law,

Petitioner failed to exhaust the administrative remedies available and as such, the Court lacks subject matter jurisdiction to review the Design Review and Tree Removal Permit decision.

B. Creek Permit

There is no dispute that the Creek Permit was timely appealed to the Board of Supervisors. However, SPAWN contends that the administrative appeal did not raise any issue concerning impeded passage of water in San Geronimo Creek – the only legitimate bases on which the permit could be challenged. Upon review of the relevant Code sections, the Court agrees that the issue of impeded passage is the only legitimate basis for the administrative appeal. (See Marin Municipal Code § 11.08.060 ["If the director finds and determines that the proposed construction will not, in any way, impede the passage of water within the creek, he **shall** approve the plans and issue a permit, subject to such conditions as he believes necessary to insure the continued flow of water"]. Emphasis added.) The Marin County Development Code sections Petitioner seeks to rely on do not apply to the Creek Permit under Title 11 of the Marin County Municipal Code. SPAWN asserts that Plaintiff's attempt to remedy this error by now adding allegations about creek flow to the amended Writ does not fix the issue, as the issues must be raised in the administrative appeals process. (*See Morgan v. Community Redevelopment Agency (Morgan*) (1991) 231 Cal.App.3d 243, 258. A challenger who has participated in the administrative process must also show that the issues raised in the judicial proceeding were raised during the administrative hearing process.)

Petitioner seeks to establish exhaustion or excuse therefrom by 1) asserting that SGHA members submitted written objections to prior to issuance of the Creek Permit on the grounds that the project would impede the passage of water in the creek, 2) that "technical problems with the zoom procedure at the time prevented SGHA members from telephonically submitting further objections [that the project would impede the passage of water in the creek] at the time of the [Creek Permit]

hearing", and 3) that after the issuance of the permits "an SGHA member filed appeals" but the "County failed to process the appeal of the permit issued on April 13, 2020 [Design Review and Tree Removal Permit]." (SAP ¶ 37.)

"Exhaustion of administrative remedies is 'a jurisdictional prerequisite to resort to the courts.' [Citation]." (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70.) " 'The essence of the exhaustion doctrine is the public agency's opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review.' " (*Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1138, quoting *Coalition for Student Action v. City of Fullerton, supra,* 153 Cal.App.3d at p. 1198.) "[I]solated and unelaborated comment[s]" do not satisfy the exhaustion requirement. (*Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 527.) Rather, " '[t]he "exact issue" must have been presented to the administrative agency....' " (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535.) Requiring anything less "would enable litigants to narrow, obscure, or even omit their arguments before the final administrative authority because they could possibly obtain a more favorable decision from a trial court." (*Tahoe Vista Concerned Citizens v. County of Placer, supra,* 81 Cal.App.4th at p. 594.) A challenger who has participated in the administrative process must also show that the issues raised in the judicial proceeding were raised at the administrative level. (*Morgan v. Community Redevelopment Agency, supra,* 231 Cal.App.3d at p. 258.)

With regards to the allegations 1 and 3 (that objections of "impeded passage" were made prior to the Creek Permit approval and that the Design and Tree Removal appeal was not processed by the County), the Court has previously found these arguments insufficient to establish exhaustion. First, with respect to the statements prior to Permit issuance, the objection needs to be made within the scope of the appeal and administrative hearing. (*See Tahoe Vista Concerned Citizens v. County*

of Placer, supra 81 Cal.App.4th p. 594 ["Requiring anything less "would enable litigants to narrow, obscure, or even omit their arguments before the **final administrative authority** because they could possibly obtain a more favorable decision from a trial court."] Emphasis added. See also Asimow, Strumwasser, Levy, & Tuleja, Cal. Practice Guide: Administrative Law (The Rutter Group 2021) ¶ 15:487, citing *Lopez v. Civil Service Comm'n of City & County of San Francisco* (1991) 232 Cal.App.3d 307, 312 [Issue exhaustion rule requires that the issue in question be raised at each level of the agency at which it can be considered (including the initial hearing and all administrative appeals) before it can be considered in court.].) The reviewing agency would not have known it needed to address objections made prior to Permit issuance and which were not raised after the Permit was issued, during the appeal process. It is this opportunity to address the issues prior to court review which is the essence of the exhaustion doctrine. (*Evans v. City of San Jose, supra,* 128 Cal.App.4th at p. 1138, quoting *Coalition for Student Action v. City of Fullerton, supra,* 153 Cal.App.3d at p. 1198.) For this reason, the first argument is insufficient to establish exhaustion. Second, with regards to the "failure to process" the Design and Tree Removal appeal allegations, Petitioner has provided no evidence which establishes the alleged appeal of the Design Review and Tree Removal Permit was timely and whether or not it was submitted to the correct agency. Without such evidence, the third argument is also insufficient to establish exhaustion.

As the Court noted in its July 6, Order on Demurrer to the SAP, the 2nd argument regarding the inability to raise additional objections due to zoom technical problems gives rise to a "factually driven inquiry" to determine whether or not this is sufficient to establish exhaustion or excuse therefrom. (Order, p. 9:11-14.)

In evidentiary support Petitioner has provided a "Verified Replication to Answer" to establish that the County's Zoom technical problems prevented additional efforts by Pettit and Page to object

at the hearing. The pleading in question states "Ms. Page attempted to be heard at the Zoom hearing of the appeal on June 2, 2020 by following the County's link for public comment, [link inserted], and, as instructed, by pressing *9. There was no response when she followed the County's instructions. Had Ms. Page's call been put through, she would have stated her objection to the proposed project... [and] her concerns how [the project] would affect the passage of water in the creel." (Replication to Answers p. 3:7-15.) There is similar language stating how Mr. Pettit would have done the same. (Id. p. 3:22-28- 4:1-14.) The "Verified" Replication to answers is signed by Mr. Snell, as attorney for SGHA. Although the pleading title states "Verified," there does not appear to be any verification of the document. There is no signature under an attestation that the following is true, etc. There is none of the language required when an attorney verifies a pleading for his/her clients. There is only the usual attorney signature found on an unverified pleading. An unverified Replication to Answer is merely a pleading, with little evidentiary value. (*In re Scott* (1928) 205 Cal. 525, 527.)

Further, even if the document had been properly verified, for it to be "used as evidence," the facts contained therein must be positive, direct and not based upon hearsay." (*Star Motor Imports, Inc. v. Superior Ct.* (1970) 88 Cal.App.3d 201, 204–05, citing *Gutierrez v. Superior Court* (1966) 243 Cal.App.2d 710, 725.) Here, the representations are as to what Ms. Page and Mr. Pettit did and would have done. Mr. Snell is the one that signed the pleading. There is no basis for how Mr. Snell knows what Ms. Page and Mr. Pettit did or would have done. Without such evidence before the Court, the "facts" are merely hearsay and could not be properly used as evidence even if the Replication to Answer had been properly verified.

Either way, Petitioner failed to meet its burden of proof show that exhaustion occurred or was prevented by technical issues. (*N. Coast Rivers All. v. Marin Mun. Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 624.)

The Court also notes that although the Petition clearly indicates that the letters of objection were submitted *prior* to the issuance of the Creek Permit (SAP ¶ 37), it appears from the review of the Administrative Record that some of them were submitted after the issuance of the Creek Permit and prior to the hearing on the Snell Appeal. These include a June 1, 2020 letter from Joshua Pettit (see AR 07), a June 1, 2020 email from Michael McLennan (AR 34), a May 31, 2020 email from Cia Donahue (AR 40), as well as a letter attached to Ms. Donahue's email, previously added to the AR by way of Motion to Augment by Order dated October 7, 2021 (AR 207-8). The Court notes that it is unclear whether the attached letter was ever presented at the appeal hearing, as it appears only the email referencing the attachment was included in the board package. (See Order p. 4:12-25.)

The question before the Court then is whether these three references to impeded flow (by Pettit, McLennan, and Donahue) immediately preceding the hearing are sufficient to constitute exhaustion vis a vis the Snell appeal. The Court finds that they are not.

"Under the "issue exhaustion" doctrine, an issue cannot be considered by a reviewing court unless it was raised at each level of the agency, **either by the challenger or by some other party to the administrative proceeding.**" (Asimow, Strumwasser, Levy, & Tuleja, Cal. Practice Guide: Administrative Law (The Rutter Group 2021) ¶15:485.) Here, Mr. Snell was the challenger. He provided a detailed briefing of his appeal via email on June 1, 2020, the day before the hearing on his appeal. He also indicated that he would appear to speak at the hearing. There is nothing in that briefing document that references impeded passage or flow issues. (See AR 30-33.) There is nothing in the transcript which demonstrates he challenged the Permit on impeded water passage grounds at the hearing. (See AR 183-190.) There is nothing in the written appeal itself which references impeded passage. (See AR 71-79 .) Instead, Snell focused exclusively on the fact that issuance of the permit was "illegal because the San Geronimo Valley Community Plan establishes the golf course

as the primary use of this property... and the Development Code prohibits issuance of permits for developments which do not conform in all aspects to the Community Plan." Moreover, he implicitly acknowledged compliance with the water passage condition of section 11.08.060 stating that compliance with the water passage condition of that section does not satisfy the primary use as a golf course requirement in the Community Plan. (AR 33.)

In fact, at the conclusion of the appeal hearing the Board found that the appeal lacked "sufficient merit to overturn DPW's decision to approve the permit because the Petition for Appeal fails to assert that the creek permit was issued in violation of Marin County Code 11.08.050 and fails to assert that the proposed construction will impede the passage of water within the creek." (AR 175.) The staff report prepared in advance of the hearing (AR 60-61) had also indicated that Mr. Snell's appeal only asserted violations of various Development Code provisions. (AR 60). At no time did Mr. Snell (either in his appeal, the brief in support, nor at the hearing) state that he was also challenging the Permit on impeded passage grounds.

Clearly Mr. Snell, the challenger, failed to raise the issue. Petitioner has provided no evidence that Pettit, McLennan, or Donahue were parties to the administrative proceeding. Notably all of their correspondence post-dates the date for the filing of a timely administrative appeal, the proper vehicle for raising any concerns about the "passage of water" within the creek. The Court notes that Petitioner's reliance on Government Code section 65009(b) is misplaced. Although that section contemplates public input at an appeal hearing or through written correspondence to the agency in connection with the hearing, that section does not apply here. It is part of state Planning and Zoning Law. (Government Code sections 65000 et seq.) The Planning and Zoning law only governs local land use planning and zoning agencies. (See *Topanga Assn. for a Scenic Cmty. v. Cty. of Los Angeles* (1974) 11 Cal.3d 506, 511.) The Department of Public Works is not a zoning or land

use agency however, and the Planning and Zoning Law does not apply to its exercise of local power over creek construction decisions pursuant to Title 11 of the Marin County Code. Unlike section 65009, nothing in the Marin County Code Title 11 suggests that issues not raised in a timely appeal may be exhausted via later-submitted written or oral comments by non-parties.

Ultimately, Petitioner bears the burden of proof to show that exhaustion occurred. (*North Coast Rivers Alliance v. Marin Mun. Water Dist. Bd. of Directors, supra,* 216 Cal.App.4th at p. 624.) It has not done so.

Failure to Make Required Findings, Insufficiency of Findings, and Unfairness of Appeal

The Court notes that Petitioner also argues in its Brief that the Board failed to make required findings regarding whether the proposed construction would not, in any way, impede the passage of water within the creek, and to the extent that it did, "Finding c" failed to meet the standard of legal sufficiency, and that the appeal was unfair because the hydraulic study was not produced at the hearing. None of these arguments are included in the Petition and as such are not properly before the Court. "[A] court may not grant relief that is not encompassed within the issues framed by the pleadings." (*County of Los Angeles v. Superior Court* (2015) 242 Cal.App.4th 475, 488) (applying rule to writ of mandate).) Accordingly, the Court does not consider these newly advanced challenges.

Failure to Comply with Development Code

Much of Petitioner's appeal and this writ focuses on how the Creek Permit allegedly violated Marin County Municipal Development Code sections. This argument demonstrates a fundamental misunderstanding of the differences between a permit issued under Title 11 of the Marin County Code and Title 22, et seq. (the Development Code). Development Code rules do not apply to the Creek Permit issued pursuant to Title 11. Perhaps recognition of this issue is why Petitioner

repeatedly attempts to lump the Tree Permit together with the Creek Permit. As the Court already explained above, the Tree Permit is not before it, SGHA having failed to file a timely appeal and exhaust their administrative remedies.

For these reasons the First Cause of Action for Writ of Mandamus against the County Respondents and Real Parties in Interest is DENIED.

DATED: February 16, 2022

ANDREW E. SWEET
Judge of the Superior Court

MARIN COUNTY SUPERIOR COURT
3501 Civic Center Drive
P.O. Box 4988
San Rafael, CA 94913-4988

SAN GERONIMO HERITAGE ALLIANCE vs. **COUNTY OF MARIN, ET AL.**	CASE NO. CIV 2001569 **PROOF OF SERVICE BY FIRST CLASS MAIL** ***Code of Civil Procedure Sections 1013a and 2015.5***

I am an employee of the Marin County Superior Court. I am over the age of 18 years and not a party to this action. My business address is 3501 Civic Center Drive, Hall of Justice, San Rafael, California.

On 2-17-2022, I served the following document(s): **ORDER AFTER HEARING** in said action to all interested parties, by placing the envelope for collection and mailing on the date shown thereon, so as to cause it to be mailed on that date following standard court practices. I am readily familiar with the court's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

PHILIP SNELL
205 LOS ANGELES BLVD.
SAN ANSELMO, CA 94960

BRIAN CASE
3501 CIVIC CENTER DRIVE
ROOM 275
SAN RAFAEL, CA 94903

PATRICK WOOLSEY
396 HAYES STREET
SAN FRANCISCO, CA 94102-4421

DEBORAH SIVAS
559 NATHAN ABBOTT WAY
STANFORD, CA 94305-8610

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Rafael, California

JAMES M. KIM
Court Executive Officer

S. HENDRYX

By: _____
DEPUTY