

Attachment F

Appellants' Supplemental Information

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VIA E-MAIL Diane.Dillon@countyofnapa.org

Honorable Chair Diane Dillon and
Members of the Napa County Board of Supervisors
County Administration Building
1195 Third Street
Napa, CA 94559

**Re: Appellants' Supplemental Information
Hard Six Winery Use Permit; February 11, 2020 Appeal Hearing**

Dear Chair Dillon and Members of the Board of Supervisors:

The appellants, Martin S. Checov and Timothy J. Bause own and reside at the property located at 2031 Diamond Mountain Road in Calistoga (the "Checov/Bause Property"), which is developed with a single-family, 1907 log-cabin home located at the end of the narrow and steep South Fork of Diamond Mountain Road; it lies immediately south of 1755 Diamond Mountain Road, which is also developed as a single family residence (the "Project Site"). This is a heavily wooded, rural, residential area, approximately 2.2 miles from the intersection of Diamond Mountain Road and State Route 29. The Project Site is a remote one in terms of both its distance and elevation from the Valley floor and its access constraints.

As approved by the Planning Commission on October 16, 2019, the proposed Hard Six Winery project contemplates a 20,000-gallon per year winery with a 7,135 foot wine cave, and a marketing program that will result in approximately 4,435 visitors per year through daily tours and tastings and three large marketing events per year for up to 75 people (two events) and 125 people (one event) utilizing shuttle services (the "Project"). The entire output of the vineyards owned by Hard Six across Napa and Sonoma County is approximately 2,480 gallons, including an estate plot at the Project Site of four acres that would produce less than 500 gallons. Accordingly, the Project plan is that 97.5% of the grapes will be trucked in from off-site vineyards, with 17,520 gallons of wine to be produced presumably on a custom-crush contract basis.

The Project requires multiple exceptions to County road and conservation standards designed to ensure life safety and environmental compatibility. In addition to the winery use permit, the Project requires approval of the following: (1) exceptions to the Napa County Road and Street Standards for driveway improvements that include (a) a sub-standard driveway apron where the driveway meets Diamond Mountain Road, (b) a sub-standard driveway width of 10-12 feet where a width of 22 feet is required, and (c) sub-standard grading for a segment of roadway ("RSS Exceptions");

and (2) a Use Permit for an Exception to Conservation Regulations to encroach into the required 55-foot stream setback to allow re-grading of the existing access driveway to accommodate fire truck access to proposed new winery (the "Use Permit Exception"). A significant portion of this

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sub-standard road approved by the Planning Commission will burden the Checov/Bause Property pursuant to a driveway easement.

We submit this supplemental letter to provide further elaboration of the issues raised in the Appellants' statement of appeal dated November 13, 2019 ("Statement of Appeal"): (1) the Planning Commission finding that the proposed Project will not adversely affect the public health, safety or welfare of the County is not supported by the evidence; (2) the proposed Project does not conform to the Winery Definition Ordinance and its Interpretive Guidelines; (3) the proposed Project is inconsistent with the Napa County General Plan; and (4) the Initial Study and Mitigated Negative Declaration prepared for the Project do not satisfy the requirements of the California Environmental Quality Act, Public Resources Code Sections 21000, *et seq.* ("CEQA").

1. The Planning Commission finding of no adverse effect on the public health, safety, or welfare of the County is not supported by the evidence.

Under the Napa County Code, the Planning Commission is required to make certain findings, including that "[t]he grant of the use permit, as conditions will not adversely affect the public health, safety or welfare of the county." (NCC 18.124.070(C); Statement of Appeal p. 3, Sec. B.) Findings made in support of an agency's decision must be based on evidence contained in the administrative record, which comprises the entire body of evidence presented for consideration in connection with the project and provides the basis to judge whether sufficient evidence supports the findings and decision of the agency. (*Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 515). A governmental entity "must render findings sufficient both to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing body the basis of the decision." (*Id.* at p. 514.) Substantial evidence must support an administrative agency's findings and the findings must "bridge the analytical gap" between the evidence and the decision. (*Id.* at p. 521.)

Here, the facts, testimony and other evidence presented prior to, and at hearing fail to support the finding that the Project will not be adverse to the public health, safety, or welfare of the county. Ample evidence in the record shows that the proposed Project will have adverse effects in terms of traffic congestion and the associated increase in the risk of hazards, as well as a greater need for emergency response services for a commercial winery on a rural residential site, and noise impacts from construction activities and from visitors to and events held at the winery.

These are the very concerns that County-wide policy discussions on remote wineries have sought to address (and that Planning Commission Chair Gallagher alluded to in deliberating on the Project) by considering winery compatibility measures that would require developments to be proportionate to the constraints of a site and supporting infrastructure so as to benefit natural resources and ensure the quality of life for rural communities. It is generally recognized that there are unique safety concerns posed by the placement of potentially large numbers of out-of-county visitors through tasting or marketing events in areas with a high risk of fire. While formal standards have not been adopted, the County is still required to make a finding regarding the effect of the proposed Project on the public health, safety, and welfare and in doing so, must take into account the record evidence, which demonstrates that the proposed Project gives rise to all of the concerns associated with remote wineries such that a finding of no adverse effect cannot be made.

2. The proposed Project does not conform to the Winery Definition Ordinance.

The Winery Definition Ordinance, as construed under the Interpretive Guidelines (the “WDO”) is intended to ensure that wineries and their marketing programs are appropriately scaled to the location and amount of wine to be produced. (Statement of Appeal, p. 4, Sec. C.) Under the WDO, the County must consider the remoteness of the location and the amount of wine to be produced at a facility when reviewing use permit proposals, and it must endeavor to ensure a direct relationship between access constraints and on-site marketing and visitation programs. (County Res. No. 2010-48, adopted May 11, 2010. Sec. III.) The proposed marketing program fails to account for the remoteness of the location and access constraints and, as approved by the Planning Commission, is not appropriate in terms of its intensity. The Project exceeds average and median calculations for daily, weekly, and annual visitors among wineries permitted for production of 20,000 gallons per year. (Napa County Winery Comparison Chart (Oct. 2019).)

As compared to wineries that are similar in terms of location and access, the Project far exceeds the permitted production capacity and intensity of the Marketing Program. Diamond Mountain Winery, for example, is at as great a distance from the Valley floor as the Project Site, and has a permitted production capacity of 10,000 gallons per year and has 25 visitors per week or 1,300 visitors per year, and 16 marketing events per year with 222 marketing event visitors, for a total of 1,522 visitors per year. Similarly, long-established Diamond Creek Winery at 1500 Diamond Mountain Road (much lower down than the Project Site), has a permitted production capacity of 10,000 gallons per year and a total of 1,020 visitors per year. Storybook Mountain, which is located on the other side of Diamond Mountain with direct access from SR 128, has a permitted capacity of 15,000 gallons per year, with 240 visitors per year.

At the Planning Commission hearing, the Project applicant erroneously stated that the Project would not involve the highest number of visitors to wineries on Diamond Mountain Road, identifying as comparable wineries, Joseph Cellars, with a total of 525 visitors per week or 75 per day, 1520 Acquisition, with 100 visitors per week or 15 per day, and Checkerboard, with 75 visitors per week or 10 per day. But these wineries are not comparable to the Project. They are located near SR 29 and are accessible either from the highway or from the lower, wider segment of Diamond Mountain Road before it becomes a steep incline. Any plausible and direct comparison demonstrates that the Project would be much larger in scale than other, similarly sited wineries.

3. The Project is inconsistent with the Napa County General Plan.

Section 18.124.070 of the Napa County Code requires a finding that the proposed use complies with the applicable provisions of the County Code and is consistent with the policies and standards of the general plan and any applicable specific plan. (Statement of Appeal, p. 6, Sec. D.) The Project is inconsistent with numerous safety goals and policies of the General Plan, as well as basic land use compatibility goals that ensure compatibility among neighboring uses, and conservation and circulation policies and goals. In addition to the specific General Plan policies identified in the Statement of Appeal, Conservation Policy CON-6 imposes conditions on discretionary projects to “limit development in environmentally sensitive areas such as those adjacent to rivers or streamside areas and physically hazardous areas such as floodplains, steep slopes, high fire risk areas and geologically hazardous areas.” Here, the Project requires exceptions to County safety standards in order to facilitate development near both environmentally sensitive and physically hazardous areas.

In terms of code compliance, the Project, which provides four parking spaces, does not satisfy County parking requirements. Based on the County’s trip generation information, 13 parking

spaces are required for daily activities. The Project also fails to include an off-street parking plan as required by NCC Section 18.104.130, for the proposed shuttles that will service visitors.

The Project's ability to satisfy the 75% grape source requirement established in Napa County Code section 18.104.250, for a production capacity of 20,000 gallons is also not supported by the evidence. The Project Statement, dated July 20, 2017, provides that the Project applicant "envisions" being able to comply with the County's 75 Percent Grape Source Agreement, and that the maximum production level of 20,000 gallons per year will be achieved utilizing fruit from on-site vineyards and some off-site vineyards. However, there are only four acres of vineyards on-site and the ability to source enough grapes from off-site vineyards to produce over 90% of the permitted capacity is entirely speculative. Even assuming such grapes can be sourced, Hard Six admits that the facilities will be operated primarily as a custom crush facility which, while not expressly restricted under the Code, is recognized as being inappropriate within an agricultural zoning district. To the extent that the Project Statement indicates an additional two acres of vineyards can be added such that all six acres are "envisioned" as producing by the time the winery is built, the IS/MND does not include such plantings as part of the Project.

Finally, in applying for the Use Permit Exception and RSS Exception, the Project applicant improperly circumvented County requirements to obtain property owner consent. Section 3.A of the Napa County Road & Street Standards, adopted April 27, 1991, and revised as of April 23, 2019, authorizes a "property owner or leaseholder of a site" seeking an exception to an applicable provision of the Standards to make a written request for such exception. Section 18.108.040 of the Conservation Regulations similarly states that an exception may be granted "[u]pon application by the landowner or leaseholder of a site." The Appellants, as the owners of a significant portion of the property underlying the driveway subject to the requested exceptions, did not (for fear of potential liability as well as their right to insist on the easement being limited to "reasonable" purposes under California law—which would naturally exclude the burden of vastly increased traffic across a sub-standard commercial roadway) consent to the Fingermans' applications for the required exceptions, placing the Project in violation of the regulations.

4. The IS/MND does not satisfy the requirements of CEQA.

The IS/MND is inadequate because there is substantial evidence in the record that the Project may result in a significant adverse change in the environment, and under the low threshold "fair argument" standard, the County must prepare an environmental impact report (*See Friends of "B" St. v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002; 14 Cal. Code Regs., §15064(f)(1); Statement of Appeal, pp. 5-6, Sec. E.) The "fair argument" standard creates a presumption in favor of requiring preparation of an EIR. (*Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768, 785.) A project "may" have a significant effect on the environment if there is a "reasonable probability" that it will result in a significant impact. (*No Oil, Inc. v City of Los Angeles* (1974) 13 Cal.3d 68, 83.) A negative declaration is to be prepared only if the lead agency finds no substantial evidence in the record that the project may have a significant effect on the environment. (Pub. Resources Code §21080(c); 14 Cal. Code Regs., §§15063(b)(2), 15064(f)(3).)

The "substantial evidence" required to support a fair argument includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (14 Cal. Code Regs., §15384(b).) Statements by members of the public based on relevant personal observations constitute substantial evidence supporting a fair argument that a project may have a significant effect on the environment. (*See Protect Niles v. City of Fremont* (2018) 25 Cal.App.5th 1129 [fair argument standard satisfied by substantial evidence of significant traffic and aesthetic impacts comprised of the opinions and observations of neighboring citizens]; see *Keep Our Mountains Quiet*

v. County of Santa Clara (2015) 236 Cal.App.4th 714, 730, 735 [substantial evidence comprised of neighbors' testimony about noise impacts based on past events and personal knowledge of road conditions].) Where there are credible conflicting opinions regarding the significance of an impact, the lead agency must treat the impact as significant and prepare an EIR. (*Stanislaus Audubon Society v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151.) In other words, if substantial evidence in the record supports a fair argument that the project may have a significant environmental effect, the lead agency must prepare an EIR even if other substantial evidence before it indicates the project will have no significant effect.

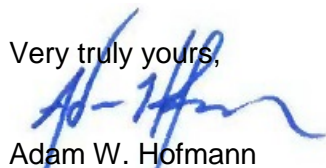
Here, detailed comments on the IS/MND and testimony provided at the hearing support a finding of substantial evidence for a fair argument that there is a reasonable possibility the project, as conditioned, will result in significant environmental impacts in several areas including Biological Resources, Water Quality, Public Services, Transportation, Tribal Cultural Resources, and Wildfire. Therefore, any approval of the Project requires preparation of an environmental impact report.

At a minimum, the addition of new mitigation measures required recirculation of the IS/MND. Once a negative declaration has been circulated, it must be recirculated for another round of review and comment if it is "substantially revised." (14 Cal Code Regs §15073.5.) New mitigation measures added in response to comments on environmental impacts that were not already identified in the negative declaration requires recirculation. (*Id.*; *Gentry v City of Murrieta* (1995) 36 Cal.App.4th 1359, 1392.) For example, here, the letter from the Department of Fish and Wildlife dated October 10, 2019 identifies potential impacts that were not identified in the IS/MND and concludes "[t]he draft MND does not include a discussion on the Project's potential impacts to [Northern Spotted Owl] and no mitigation measures or pre-construction surveys are proposed" and that "[o]verall the draft MND does not include any discussion on or mitigation measures for avoiding impacts to bats." (CDFW Letter, p. 3.) The addition of new mitigation measures (different from those recommended by CDFW and that improperly defer mitigation) prior to adoption of the IS/MND at the Planning Commission hearing required recirculation under CEQA.

Finally, other deficiencies in the environmental review process for the Project include (1) lack of an accurate, stable and finite project description; (2) potential piecemealing relating to the additional vineyard plantings of approximately two acres; (3) inadequate mitigation relying on proposed compliance with County standards, including noise standards; and (4) inadequate identification and evaluation of cumulative impacts of the Project, taking into account the effects of past projects, the effects of other current projects, and the effects of probable future projects.

Based on the Statement of Appeal, the foregoing discussion, and information to be presented at the hearing, we respectfully urge the Board to require further environmental review of the Project, and a reduction in its scale.

Very truly yours,



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