LAW OFFICES OF
MICHAEL W. RUPPRECHT

East Bay Office
18 Crow Canyon Court, Suite 160
San Ramon, California 94583
(925) 837-0867
Fax: (925) 837-6104

Napa Valley Office
1001 Second Street, Suite 205
Napa, California 94559
(707) 257-6454

Of Counsel
Jeffrey G. Hansen
Paul B. Justi

Reply to:
East Bay Office

May 29, 2008

By Facsimile – (707) 253-4336 / Regular Mail

Chairman Terry Scott
Commissioner Bob Fiddaman
Commissioner Rich Jager
Commissioner Heather Phillips
Commissioner King
County of Napa Conservation, Development & Planning Dept.
1195 Third Street, Suite 210
Napa, California 94559

Re: *Pavitt Family Vineyards / Shane & Suzanne Pavitt Trust*
Variance & Use Permit Requests
Request Nos: P06-01427-VAR / P06-01426-UP

Dear Chairman Scott and Commissioners:

This office represents Robert and Sharon Freed regarding the above-referenced applications. This is an amplification of the legal argument that was presented at the hearing. As there has been no vote concerning the variance, I believe it prudent that the County Council and the Commission consider the facts and legal ramifications prior to the vote.

The applicants have attempted to persuade the Commission that because there is the availability of a variance and a use permit under the subject property's existing zoning, this elevates their application to an entitlement to a variance and a use permit. That is an incorrect statement of law. At the hearing, one of the commissioners asked if the crushing facility and winery cannot be located where the existing agricultural building is located, then where would it go? The answer to that is perhaps nowhere on the property, as there is no legal entitlement that the applicants have to a variance or use permit. The applicants do not have a property right to a variance to have a winery and crush facility at the agricultural building site or anywhere on the property. It must be remembered that

the applicants purchased the property, and constructed their own agricultural building with full knowledge of the zoning and county ordinances. The state law concerning a variance is clear and should not be ignored by the Planning Commission.

THE APPLICANTS' PROPERTY IS ZONED AW, AGRICULTURAL WATERSHED

Without a use permit, the property can be used for one dwelling unit, a second dwelling unit of 1200 sq. ft., a 1000 guest cottage with no kitchen, agricultural purposes, and for animals. Under that zoning, the applicants can also use the property (with a use permit) for the following purposes: Farm labor; small residential care facility; a family daycare; a kennel; public stables and a winery. Wine warehousing is also permitted with a use permit for wineries. County Ordinances 12232 and 12047.

IN 1990, A NEW SECTION WAS ADDED TO THE NAPA COUNTY CODE, SECTION 12420

The Board of Supervisors enacted the ordinance, which specifically requires a minimum setback for wineries on Silverado Trail or any arterial county road to be 600 feet. Clearly, the Board of Supervisors knew what Silverado Trail and its topography looked like. It should be noted that the ordinance also included language which requires a setback for a winery located on parcels contiguous to any other public or private road used by the public by 300 feet.

It cannot be assumed that the Board of Supervisors was cavalier in setting forth clear setback restrictions for wineries in Napa County. In this case, the applicants do not comply with the 600-ft. setback off Silverado Trail and they do not even comply with the 300-ft. setback off other public or private roads.

It should be noted that when the Board of Supervisors enacted the setback ordinance, it was voted on unanimously.

THE APPLICANTS' REASONS FOR A VARIANCE

The applicants' reasons for a variance can be summarized as follows:

1. The portion of the property located outside the 600-ft. setback from Silverado Trail is steep and would require grading.

2. The agricultural building that exists within the setback was constructed with the infrastructure to serve a winery and crush pad. The applicants contend that this was the fault of their consultant and misrepresentations from county staff. However, they did not produce any facts at the hearing to substantiate the hearsay. The applicants also go on to say that the grant of a variance would not be a grant of special privilege for their property.

THE PURPOSES OF ZONING ARE SELF-EVIDENT

The applicants' property is zoned agricultural watershed and Napa County has set forth the permitted uses in their ordinances. Those uses are intended to be relied upon by property owners and those who purchase property adjacent. A property owner in Napa County should be able to rely on the County zoning and the high standards required to obtain a variance from a setback requirement.

The California Supreme Court, in the case of *Miller v. Board of Public Works* (1925) 195 Cal.4th 77, stated, in part:

> Obviously, the purpose of comprehensive zoning is the attainment of unity in the construction and development of a city along the lines of reasonable regulations which tend to promote the health, safety, morals and general welfare of the community and it is equally obvious that to accomplish this purpose, there must be definitely in the minds of makers of comprehensive zoning, a plan, an outline at least, sufficiently extensive so that when embodied an enacted ordinance, a reviewer thereof may say with confidence that it will redound to the welfare of the city as a whole and that any part of the plan as reasonably related thereto.

The Supreme Court stated, in *Topanga Assn. for a Scenic Community v. County of Los Angeles*, 11 Cal.3rd 506, that

> A zoning scheme after all in similar in some respects to a contract: Each party forgoes rights to use the land as it wishes and returns for the assurance that the use of neighboring property will be similarly restricted, the rationale being that such mutual restriction can enhance the total community welfare.

The Supreme Court, in the *Topanga* case, hit upon exactly what Mr. Freed was entitled to when he purchased the property before the Pavitts built their house and their agricultural building. This is the same burden the Pavitts carried when they purchased their property, built their house, and built the barn. The Pavitts now want that obligation to run one way only. The intent of the Board of Supervisors in enacting the 300-ft. and 600-ft. setback off Silverado Trail was clear, deliberate and voted on unanimously. Silverado Trail extends approximately 17 miles. I would suggest that much of the property along the eastern slope of Silverado Trail is affected similarly to the applicants' property. As the 600-ft. setback requirement specifically affects wineries and related services, the Board of Supervisors must have intended a specific result in enacting the ordinance.

VARIANCES

A variance is a permit issued to a landowner to do an act that would not otherwise be permitted by a zoning ordinance regulation. For instance, variances sanction deviations from regulations applicable to such physical standards as lot sizes, floor area ratios for buildings and off-street parking requirements. The concept is that the basic zoning provisions are not being changed, but that the property owner is allowed to use his property in a manner basically consistent with the established regulations and with such minor variations as will place him in parity with other property owners in the same zone.

There is no requirement that every zoning ordinance provide for a variance procedure when the basic ordinance is reasonable in its effect. *Schroeder v. Municipal Court* (1977) 73 Cal.App.3rd 1841.

The zoning ordinance affects all of Napa County. The 600-ft. setback affects only properties along Silverado Trail.

STATUTORY STANDARDS FOR A VARIANCE

The state zoning law provides statutory zoning standards for granting of variances as follows:

> Variances shall be granted only when because of special circumstances applicable to the property, include size, shape, topography, location of surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity under identical zoning classification.

The 600-ft. setback requirement along Silverado Trail does not treat the applicants differently from any other property along Silverado Trail. The applicants' property is large, and the applicants decided where to site the buildings on the property. Clearly, since all of the other properties along Silverado Trail are similarly situated and similarly affected by the setback requirement, any variation granted to the applicants would amount to a grant of a special privilege inconsistent with the limitation on the properties in the vicinity and zone in which the property is situated. Govt. Code sec. 65906. The vicinity and zone in which the applicants' property is situated is unambiguous. The zoning is county-wide; however, the ordinance established by the Board of Supervisors created the 600-ft. setback along Silverado Trail only. Therefore, the vicinity that the ordinance affects is quite clear.

The language of Govt. Code sec. 65906 emphasizes disparities between properties, not the treatment of a particular property's characteristics in the abstract. It contemplates that only a small fraction of any one zone can qualify for a variance. *Topanga Assn. for a Scenic Community v. County of Los Angeles.* In other words, the plight of an applicant for a variance must be due to peculiar circumstances and/or conditions, and it must be special or unique in contrast with that of other property owners in the same district. *Zakessian v. City of Sausalito* (1972) 28 Cal.App.3rd 794, 799. The area being discussed was made specific by the Board of Supervisors as the 600-ft. setback affects only properties along Silverado Trail. There were no facts presented by the applicants at the hearing to show any peculiar circumstances. The property is no different than any other property along Silverado Trail when it comes to the topography that exists along that 17-mile stretch. Therefore, there can be no finding of any special or unique circumstances by the applicants' that is different than the other property owners affected along Silverado Trail.

ECONOMIC HARDSHIP

The applicants apparently persuaded a majority of the Commission that there was a hardship. As a general rule, hardship is solely financial or economic nature, making it more expensive to develop a proposed structure or not being able to construct one is improper to satisfy the "hardship" requirement of Govt. Code sec. 65906. *Broadway Laguna Etc. Assn. v. Board of Permit Appeals* (1967) 66 Cal.2nd 767.

It should be pointed out that the economic or financial hardship must apply to a "unique" condition of an applicant's property and must not pertain to the uniqueness of the plight of the owner. *Zakessian v. City of Sausalito.*

The *Zakessian* case is on point. The applicants cannot factually point to any unique condition of the property, but rather only to unique circumstances. If the Commission were to believe the applicants, the applicants built the so-called agricultural building to accommodate a winery and crush pad, and the applicants' plight is that they did so based on the apparent negligent advice of a consultant and misrepresentations from unnamed county staff members. Without any factual basis or evidence of the applicants' contentions, one could easily be led to question what really happened. The story could easily have been that the applicants and the consultant knew of the setback requirements, but proceeded anyway and believed it would be easier to ask for forgiveness. The Commission must be reminded that even assuming the applicants' story is true, ignorance of the law is not a "unique" condition of one's property to entitle one to a variance. If the Commission were to decide all variances based on the unique plight of a particular applicant, rather than the uniqueness of the condition of the property, there would be a long line of applicants for variances in the county with similar, unsubstantiated stories.

SELF-INDUCED HARDSHIP

It is an established legal rule that a self-induced hardship affords no grounds for a grant of a variance. *Town of Atherton v. Templeton* (1961) 198 Cal.App.2nd 146, 154. Clearly, it could be construed that the applicants intentionally or negligently induced the hardship there are now claiming.

NO SPECIAL PRIVILEGE

Any variance granted shall be subject to conditions that will assure that the adjustment thereby authorized shall not constitute a grant of a special privilege inconsistent with the limitations upon other properties in the vicinity and zone in which such property is situated. Govt. Code sec. 65906. It is not possible to create conditions that do not amount to a special favor by the county to the applicant. Although the Govt. Code authorizes variances for property deprived of privileges enjoyed by other properties in the vicinity, it is intended to bring such properties up to parity with such other properties and must not amount to a grant of special privileges over and above those enjoyed by such other properties in the vicinity and zone. The California Supreme Court has determined that where there had been no affirmative showing that the subject property differs substantially and in a relevant respect from other parcels in the zone, the variance amounts to the kind of "special privilege" explicitly prohibited by Govt. Code sec. 65906. Once again, the other properties in the zone are those along Silverado Trail and are similarly affected by the ordinance.

EFFECT OF SIMILAR VARIANCE GRANTS OR FORMER DENIALS

There was discussion by the applicants' representative that the Planning Commission should consider that there have been other similar variances granted. That position is incorrect as a matter of law. For instance, in *Hill v. City of Manhattan Beach* (1971) 6 Cal.3rd 297, the plaintiff sought a variance from a "lot split" ordinance prohibiting development of a substandard parcel. Plaintiff claimed discrimination because of the availability of prior variances to other owners of substandard parcels. In rejecting this contention and upholding the variance denial, the Supreme Court held that there was no merit to plaintiff's claim of discrimination and that each situation was unique and could be distinguished. This case cuts against the applicants' position. There is no evidence that anyone prohibited the applicants from doing their appropriate due diligence.

In conclusion, the applicants do not have a property right entitlement to a variance. Rather, to obtain a variance from a county ordinance, the bar is high and the County must comply with the statutory and case law requirements. The county staff's analysis on this initially was correct. As stated in the staff report, paragraph 1, the staff states, "The state law sets a fairly high bar for granting variances." The analysis of the staff report was correct and so was their recommendation. The applicants are asking the Commission to go under the bar, where my clients are requesting that the Commission go over the bar. My clients request that the staff recommendation of denial of the variance be the controlling vote of the Planning Commission.

Very truly yours,

Michael W. Rupprecht

MWR:pcl

cc: Clients (by fax)
County Counsel

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