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**Summers Winery Request for Variance  
Memorandum**



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## MEMORANDUM

To: David Morrison, PBES Director	From: Laura J. Anderson, Commission Counsel Chris R.Y. Apallas, Deputy
Date: January 20, 2016	Re: Summers Winery Request for Variance

The purpose of this memo is to address whether the request by Summers Winery (Summers) for a variance from the County’s 600 foot road setback satisfies the legal requirements for approving a variance. Based on staff’s review of the materials to date, the variance does not meet the legal requirements necessary to approve the request.

### **A. Purpose of Variances.**

A variance is a constitutional safety valve to prevent a property from becoming unusable if the zoning code were strictly applied. It protects against an unconstitutional taking by allowing the owner to seek a deviation from the applicable zoning so as to enjoy the benefits afforded to other properties in the applicable zone. One typical use of a variance is to provide relief from design or development standards—such as height, density, setback, floor area ratio, parking, or other requirements—if those standards would prevent a property owner from using the property at issue.<sup>1</sup>

Courts view variances as an exception rather than the rule. “The requirements for variances under California law are very strict. As a result, variance approvals are often overturned in litigation due to insufficient findings or a lack of relevant evidence to support the findings.”<sup>2</sup> The landmark case of *Topanga Assn. for a Scenic Community v. County of Los Angeles* specifically acknowledged judicial concerns about an agency’s approvals of unjustified variances and stated that “many zoning boards employ adjudicatory procedures that may be characterized as casual.”<sup>3</sup> Under *Topanga* and a long line of variance cases since then, the courts have reiterated that the local agency must make findings to “bridge the analytic gap between the raw evidence and the ultimate decision or order.” Variance findings should be as detailed as possible, and provide specific facts to support each of the three-prongs.<sup>4</sup>

### **B. The Legal Requirements for Granting a Variance.**

Variances must satisfy the criteria in Government Code section 65906<sup>5</sup> and County Code section 18.128.060. Generally, the findings for a variance must meet each prong of a three-prong test to satisfy the statutory

<sup>1</sup> Repking and Paradise, *Zone Defense*, (2009) Los Angeles Lawyer, Vol. 32, No. 5.< <http://www.lacba.org/showpage.cfm?pageid=10959>>[as of August 7, 2015].

<sup>2</sup> Repking and Paradise, *supra*.

<sup>3</sup> *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 518.

<sup>4</sup> *Levi Family Partnership, LP v. City of Los Angeles* (2015) 241 Cal.App.4<sup>th</sup> 123.

<sup>5</sup> Variances from the terms of the zoning ordinances shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification.  
Gov. Code, § 65906.

requirements together with additional local findings contained in the County Code.<sup>6</sup> An applicant must demonstrate that: 1) he or she will suffer practical difficulties and unnecessary hardships in the absence of the variance, 2) these hardships result from special circumstances relating to the property that are not shared by other properties in the area, and 3) the variance is necessary to bring the applicant into parity with other property owners in the same zone and vicinity.

Each of the three factors are further explained and demonstrated as follows:

1. Hardship. Hardship is generally evaluated based on economics and “effective use.” “If the property can be put to effective use, consistent with its existing zoning, without the deviation sought, it is not significant that the variance sought would make the applicant's property more valuable, or that it would enable him to recover a greater income, nor that it would relieve him from undesired costs in compliance with the existing restrictions.”<sup>7</sup> Profit motive, benefit to community, practical difficulty, superior building standards and attractive architectural features all may have value and be desirable from a planning perspective, but unfortunately these factors are legally irrelevant when the County considers a variance application. Hardship must be demonstrated based on substantial evidence in the record. An unnecessary hardship occurs where the natural condition or topography of the land places the landowner at a disadvantage vis-à-vis other landowners in the area, such as peculiarities of the size, shape or grade of the parcel. The hardship must arise due to features inherent to the property, such as due to physical features mentioned above. A clear illustration of ‘unnecessary hardship’ occurs when the natural condition or topography of one's land places him at a disadvantage vis-à-vis other landowners in the zoning district.<sup>8</sup> The hardship must relate to a unique condition of the property and not be self-induced or pertain to the plight of the owner. By way of example, courts have found that irregularly shaped lots, lots with steep or eroding slopes, and narrow lots with setbacks which limit the amount of overall developable area are all valid examples of hardship.

2. Special Circumstances. An applicant must show special circumstances applicable to his/her property as compared to other properties in the vicinity and with the same zoning. The *Topanga* court addressed what an applicant must show to satisfy the special circumstances prong. Specifically, “[t]he data contained in the planning commission's report focused almost exclusively on the qualities of the property for which the variance was sought. In the absence of comparative information about surrounding properties, these data lack legal significance. Thus knowledge that the property has rugged features tells us nothing about whether the original real party in interest faced difficulties different from those confronted on neighboring land.”<sup>9</sup>

Special circumstances can be documented through the use of GIS mapping to show the conditions of properties in the vicinity *compared* to the conditions of an applicant's property. Without such a comparison or other evidence in the record showing the conditions of surrounding properties, the County is unable to determine whether the condition complained of is in fact a “special circumstance.” Courts have found special circumstances exist where steep slopes above the ocean prevented a home from being constructed outside the street setbacks. In another case, special circumstances were found where the majority of a property was substantially below the grade of the roadway and the city code prevented construction of a fence close enough to the roadway to prevent pedestrians from falling. The court found that this physical feature together with concerns for safety warranted a variance to the fence height limitation.

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<sup>6</sup> The County's required Variance findings contain the statutory three-prong test described here together with additional findings stating that “[g]rant of the variance is necessary for the preservation and enjoyment of substantial property rights” and that grant of the variance will not adversely impact the groundwater basin.” (See County Code sections 18.128.060 (A)(4), (5) and (6).

<sup>7</sup> *Hamilton v. Board of Sup'rs of Santa Barbara County* (1969) 269 Cal.App.2d 64, 67

<sup>8</sup> *Zakessian v. City of Sausalito* (1972) 28 Cal.App.3d 794, 800

<sup>9</sup> *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 520

3. Parity. Variances shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which such property is situated.<sup>10</sup> Stated another way, variances are intended to bring the property 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. There must be an affirmative showing that the subject property differs substantially and in relevant aspects from other parcels in the zone, otherwise the granting of a variance amounts to the kind of ‘special privilege’ explicitly prohibited by Government Code section 65906. An applicant must provide sufficient information to ensure that granting the variance does not result in a special privilege to the applicant and a method of doing that is through comparison to other properties within the vicinity under the same zoning designation.

### **C. Application of the Three-Prong Test to Summers Winery.**

Based on our review of the materials, Summers thus far does not appear to have adequately demonstrated that their property could not be put to effective use without the variance, that their property has special circumstances different from other properties in the vicinity, and that the variance is necessary to bring their property to parity with those other properties.

1. Hardship. The Summers property is currently being put to effective use in that there is an existing operational 50,000 gallon per year winery on the parcel. Denying the variance would not be a deprivation of substantial property rights because the existing winery would remain. Likewise grant of the variance is not necessary for preservation and enjoyment of substantial property rights. Courts have clearly held that profit motive (such as expanding wine production), a benefit to the community, practical difficulty, and attractive architectural features are legally irrelevant when evaluating a variance application. All of the arguments made by Summers and his representative to the Commission and staff thus far appear to fall into this category. The variance has been requested in order to have the tank farm closer to the winery to increase operational efficiency. The stated need for the tank farm is to “develop additional winemaking capacity”, presumably to become more profitable. Other hardships raised by Summers in their application as well as during the public hearing include processing inefficiencies, increased hardscape coverage, removal of some vines, and added costs of construction. Applicant’s representative also commented that there could be additional glare and visual impacts “sticking out like a sore thumb” if the tanks were located outside the setback. While these practical considerations may be desirable and have value, they fail to demonstrate the kind of substantial hardship required by law. Furthermore, the November 18, 2015 staff report identifies an area where the tank farm can be located adjoining the winery, within the setback, thus removing the inefficiencies and vine removal hardship arguments and need for a variance.

2. Special Circumstances. There do not appear to be any special circumstances existing on the property. The staff report indicates that the parcel is a flat rectangle 25 acre parcel located on the valley floor with no environmentally sensitive areas. Thus far staff and Summers have been unable to document any special circumstances existing on the property, such as size, shape, topography, etc., that would prevent the tank farm from being located outside the required setback. Summers asserts that the preexisting winery buildings located within the setback equate to special circumstances, however the location of existing buildings are not in any way a barrier to the new tank farm complying with setback requirements. There is no relationship between the location of the existing buildings and the ability to comply with the setbacks. Further, there is no comparison of the circumstances of Summers’ property to other properties in the vicinity and within the same zoning designation. Summers has only provided information about its property with no discussion or comparison of surrounding properties so it is not possible for staff (or the Commission) to determine if in fact the location of winery buildings within a setback is truly a special circumstance.

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<sup>10</sup> Government Code section 65090

3. Parity. Summers has not demonstrated that the property has characteristics different from similarly situated properties and that the variance is needed to bring the Summers property up to parity with such other properties. There is nothing in the record thus far to indicate that the flat, valley floor parcel is any different from other properties within the immediate vicinity. Again, Summers focuses exclusively on conditions of their property and claims that the proposed location within the setback makes common sense, however this is not the legal standard by which courts review variance approvals.

**D. Conclusion.**

Based on the evidence to date, the Summers variance request does not satisfy the existing legal test for the granting of a variance. While several points were raised about the common sense siting of the tank farm at the public hearing, these arguments do not carry legal relevance per cases cited herein. Convenience, superior design, and added costs are not the factors by which the worthiness of a variance request can be judged. While staff is not deaf to Summers' position and acknowledges the practical considerations of locating the tank farm within the setback, we must adhere to the underlying purposes of a variance; to act as a safety valve to prevent a property from becoming unusable and to protect against an unconstitutional taking. Neither purpose would be served by granting the variance in this case. Finally, it is important to note that in supporting the APAC's and Planning Commission's recommendations, the Board of Supervisors has confirmed that the use of variances should be avoided as a principle tool for achieving compliance with land use regulations. Variances may be used only when there is specific evidence supporting all necessary findings.