

“H”

Applicant Response to Public Comments

MEMORANDUM

DATE: February 3, 2016
TO: Laura Anderson, Napa County Deputy County Counsel
FROM: Thomas Adams & Jeff Dodd, Dickenson, Peatman & Fogarty
RE: Response to comments on Frog's Leap Winery Project

This memorandum addresses recent comments provided by Shute Mihaly and Weinberger (SMW) on behalf of Charlotte Blank and Nancy Hammond dated December 23, 2015 regarding the Frog's Leap Winery Use Permit Modification (the "Project") at 8815 Conn Creek Road, Rutherford, California (the "Property"). After review of the letter, we recommend that the County revise the Initial Study to clarify the Project's existing environmental baseline used as the basis for determining the Project's environmental impacts. We also recommend utilizing CEQA Guidelines Section 15183 to increase the legal defensibility of the analysis. Section 15083 will allow the County to take advantage of the General Plan's CEQA analysis and findings addressing cumulative traffic impacts, as well as the County's Noise and Right to Farm Ordinances as an appropriate project condition for addressing possible noise impacts. These approaches, along with further clarifications in the document—such as those provided by the traffic consultant—will increase the legal defensibility of the CEQA document while providing decision makers with the information they need to evaluate the Project.

OVERVIEW

The SMW letter is based on a false presumption that cascades through its entire analysis. Most problematic is that SMW fails to recognize the existing conditions of the winery which, represent the CEQA baseline. The "Existing Winery characteristics" described in the Initial Study and the technical studies prepared for the Project use the existing winery operations as the environmental baseline; however, this is not clear when reading the Initial Study's discussion of potential impacts. As you know, CEQA allows a lead agency to use the existing environmental conditions as the baseline, even where existing conditions include unapproved or permitted development or activities. (See CEQA Guidelines § 15125(a); see also *Citizens for East Shore Parks v. State Lands Com.* (2011) 202 Cal.App.4th 549, 559 ["[h]ow present conditions come to exist... is irrelevant to CEQA baseline determinations—even if it means preexisting development did not receive environmental review under CEQA."].) This approach is not only consistent with CEQA but also the existing statements made in the Initial Study, and the technical reports referenced in the Initial Study. Accordingly, we recommend revising the Initial Study to clarify that the existing winery operations already include a significant percentage of the proposed visitation and some marketing activities. Upon review of the Initial Study's baseline assumptions, we discovered that while the Initial Study accurately described the existing numbers of visitors for the winery's tours and tastings, it actually overstated the number of existing marketing events. We have revised the Initial Study to accurately reflect the actual number of marketing events and we propose that the Initial Study be revised accordingly.

The County can strengthen the Initial Study's traffic (cumulative) and noise impact analysis and conclusions further by reference to the County's General Plan EIR and Findings pursuant to CEQA Guidelines section 15183. Section 15183(a) "mandates that projects which are consistent with the development density established by . . . general plan policies for which an EIR was certified shall not require additional environmental review, except . . . to examine . . . project-specific significant effects which are peculiar to the project." While this CEQA mandate requires analysis of site-specific issues, it applies to the Project's cumulative traffic impact analysis. As for site-specific issues relating to noise, the County can reference subsection (c), which allows the Initial Study to rely on uniformly applied development policies or standards that mitigate project impacts as a basis for finding the effect is not "peculiar" and thus, not requiring additional site specific analysis. In addition to clarifying the baseline and other language, the use of Section 15183 will provide a more legally defensible Initial Study by streamlining the analysis by utilizing the General Plan EIR as support for its' conclusions.

ANALYSIS

1. Clarify the CEQA Baseline.

The existing winery operations already include a significant percentage of the proposed visitation and some large marketing activities, which represents the baseline conditions for CEQA purposes. [CEQA Guidelines Section 15125(a); and *Citizens for East Shore Parks v. State Lands Com.* (2011) 202 Cal.App.4th 549.] SMW's analysis presumes that Frog's Leap is radically increasing its visitation activities. (SMW Letter, p. 1 ["Project would entail a substantial increase in visitor-serving commercial uses . . . increasing weekly tasting limits by more than threefold"].) This is the basis for most of SMW's comments on the Project.

The CEQA analysis for the Project established a baseline that recognized the applicant's current visitation and marketing activities. This is apparent in the Initial Study:

- *Project Initial Study - Background*: "The project as it exists is compliant with respect to all structures on the property. However, the visitation, marketing, and number of employees is in excess of the last Modification which permitted up to 50 visitors per day, 36 annual events, and four full time employees. The applicant submitted their Modification application voluntarily upon realizing that their activities were beyond the scope authorized in 2010." (IS, p. 2.)
- *Project Initial Study - Population & Housing*: "There is no increase in overall employment by the winery over existing conditions."

We suggest that the County clarify the Project's environmental setting and existing conditions as it relates to each of the impact discussions in the Initial Study. This requires describing the existing marketing activities as including 18 annual marketing events consists of one event per month at 25 persons; one event annually for 100 persons; one event per year for 150 persons; three events per year for 200 persons and one event annually for up to 450 persons. The latter has been conducted under a Temporary Events License. We have evaluated both the Traffic Study and Water Availability Analysis to determine if this change in the marketing event baseline would result in any change in the studies conclusions. Due to the fact that the Traffic

Study relied upon actual traffic counts conducted during the day (when no marketing events were occurring), we found no deficiencies in the analysis or conclusions. The Water Availability Analysis did include a line item for existing marketing events without catering that required minor reduction in the volume of existing water use. These changes are proposed in the Initial Study along with a footnote describing the change, which only amounted to an increase in water use from existing to proposed of 0.016 AF/YR (a relatively insignificant increase).

2. Utilize the Napa County General Plan's CEQA Analysis under Guidelines section 15183 to analyze cumulative traffic impacts and traffic-related noise impacts.

The Initial Study should utilize the ability to streamline the cumulative traffic impact discussion provided under the Napa County General Plan's EIR and CEQA. CEQA Guidelines section 15183(c) states that projects which are consistent with the development density established by existing zoning, community plan, or general plan policies for which an EIR was certified, do not require additional environmental review, except as might be necessary to examine whether there are project-specific significant effects which are peculiar to the project. (See Pub. Resources Code § 21083.3.) This streamlines the review of such projects and reduces the need to prepare repetitive environmental studies.

In this instance, the Project is consistent with the County's General Plan because the actual amount of winery and other development within the County is either at or below the General Plan growth projections. (Director Morrison acknowledged that the growth of wineries is consistent with General Plan predictions at the December 8, 2015 Board of Supervisor's meeting. See Napa County General Plan FEIR (Dec. 2007) (hereinafter "FEIR"), p. 2.0-9 [projecting winery development through the year 2030].)

a. Cumulative Traffic Impacts

The General Plan EIR analyzed cumulative traffic impacts related to all development within the County, including winery development. (See FEIR, p. 2.0-16; Napa County General Plan DEIR (Feb. 2007) (hereinafter "GP DEIR"), p. 4.4-31). Not only did the County GP DEIR study cumulative impacts related to traffic, the Board of Supervisors made a specific finding that, even with the implementation of feasible mitigation measures, there would be a significant cumulative impact on traffic that was and unavoidable. The Board found "that specific economic, legal, social, technological, and other benefits of the proposed 2008 General Plan Update outweigh[ed] this significant impact" and approved a Statement of Overriding Considerations. (Napa County Board of Supervisors Resolution 08-86 (Jun. 3, 2008) (hereinafter, "Napa County Resolution 08-86"), § 8, C.)

While CEQA Guidelines section 15183(c) does not require more analysis other than project-specific impacts, the Initial Study and Omni's traffic studies analyzed both project specific and cumulative traffic impacts—concluding that the impacts are less than significant based on existing county thresholds of significance for both project and cumulative impacts. While the County has recently engaged a consultant to provide guidance on interpreting the significance criteria under the General Plan's Circulation Policies, the Board of Supervisors has not reviewed nor approved the document as County policy. This is significant because the Board

recently expressed significant concern that staff was providing policy directives that the Board had not reviewed or approved. In this instance reliance on the existing County thresholds and General Plan analysis and findings pursuant to CEQA Guidelines Section 15183 is sufficient.

Pursuant to CEQA Guidelines, the lead agency is not required to perform additional analysis of cumulative traffic impacts because the Initial Study assesses a project that is consistent with General Plan development projections for which an EIR was prepared and that concluded that the impact was significant and unavoidable. Not only is it appropriate for the lead agency to do so, but CEQA mandates it. That said, to be conservative, the traffic study did analyze both direct and cumulative traffic impacts to provide the Planning Commission with information to evaluate the Project. To the extent that site specific or “peculiar” impacts are not covered by CEQA Guidelines section 15183(a), the traffic studies have adequately addressed those impacts.¹ While section 15183 provides that the lead agency make a finding that the “feasible mitigation measures will be undertaken,” cumulative traffic impacts were determined to be significant and unavoidable. (Napa County Resolution 08-86, § 8, C [“Even with the implementation of mitigation measures . . . this impact would remain significant, and there are no other feasible mitigation measure or alternatives that would reduce this impact to a less than significant level”].) Consequently, this finding requirement is not applicable since there is no feasible mitigation to reduce the impact to less than significant and the County adopted a Statement of Overriding Considerations. (See *supra*; see also FEIR, p. 2.0-16; DEIR, p. 7.0-5.)

b. *Traffic-Related Noise*

Similar to the analysis above for cumulative traffic impacts (see Guidelines § 15183(a)), the General Plan EIR analyzed the increase of traffic-related noise along County roadways with projected increases in traffic volumes. (DEIR, p. 4.7-28; FEIR, p. 2.0-22.) Similar to cumulative traffic impacts, the Board found that the increase of traffic-related noise was a significant and unavoidable impact. Based on the study of these noise impacts and the Project being consistent with the General Plan, CEQA Guidelines section 15183(c) does not require any additional analysis outside of project-specific noise impacts and these project impacts can rely on the County’s Noise and Right to Farm Ordinances as a basis for complying with CEQA (see discussion below).

2. Utilize the County’s Noise and Right to Farm Ordinances as an appropriate project condition to address potential noise impacts under CEQA Guidelines section 15083(f).

Unlike cumulative traffic and traffic-related noise impacts under 15183(c), noise impacts that are “peculiar to the parcel or to the project” could require additional study. However, CEQA Guidelines section 15183(f) provides that:

¹ See Omni-Means response to SMW letter dated January 13, 2016 attached. As provided in the letter, the traffic analysis provided in the Initial Study was more than sufficient under CEQA because it used the highest available traffic volume data, accounted for the project’s harvest data, and studied an area consistent with County practice and professional standards for evaluating traffic and marketing impacts. We recommend revising the Initial Study section on traffic to provide clarification on this point.

[A]n effect of a project on the environment *shall not be considered peculiar to the project or the parcel . . .* if uniformly applied development policies or standards have been previously adopted by the city or county with a finding that the development policies or standards will substantially mitigate that environmental effect when applied to future projects, unless substantial new information shows that the policies or standards will not substantially mitigate the environmental effect. (Emphasis added)

The DEIR analyzed new significant noise generated from the continued development associated with existing or new agricultural, industrial and commercial land uses. (See FEIR, p. 2.0-23; DEIR, p. 4.7-35.) Based on the analysis contained in the DEIR, FEIR and administrative record, the Board adopted a policy that “project generated non-transportation noise source impacts would be less than significant [due to the] continued implementation of the County’s Right to Farm Ordinance (for agricultural uses) and Noise Ordinance (for industrial, commercial, and winery uses).” Thus, new and existing agricultural development substantially mitigates noise impacts by complying with the County’s relevant noise standards. (Napa County Resolution 08-86, § 8, G; see DEIR, p. 4.7-35; FEIR, p. 2.0-23.)

The operation and development of the Project is covered under the County’s Right to Farm Ordinance. Specifically, Napa County Code (NCC) section 8.16.090 provides an exemption to noise regulations which are applicable to the project’s agricultural activities. While wineries are not included in this section, the Agricultural Processing Center, and arguably the construction thereof, fall under this section. This distinction is relevant as the existing environmental conditions already include a significant percentage of the proposed visitation and some marketing activities. (See baseline discussion above.)

The Project is also covered under Noise Ordinance. (NCC Chapter 8.16) Under General Plan Policy CC-38, “[s]tandards for maximum exterior noise levels . . . are established in the County’s Noise Ordinance. Additional standards are provided in the Noise Ordinance for construction activities (i.e. intermittent or temporary noise).” Section 8.16.070 regulates exterior noise levels within the unincorporated area of the county due to operational related noise:

**EXTERIOR NOISE LEVEL STANDARDS
(LEVELS NOT TO BE EXCEEDED MORE THAN 30 MINUTES IN ANY HOUR)**

Land Use Type	Time Period	Noise Level (dBA) by Noise Zone		
		Rural	Suburban	Urban
Single-Family homes and Duplexes	10 pm. to 7 am.	45	45	50
	7 am. to 10 pm.	50	55	60
Multiple residential 3 or More units Per Building (Triplex +)	10 pm. to 7 am.	45	50	55
	7 am. to 10 pm.	50	55	60
Office and Retail	10 pm. to 7 am.	60		
	7 am. to 10 pm.	65		
Industrial and Wineries	Anytime	75		

dBA = hourly A-weighted sound level in decibels

Section 8.16.080 regulates exterior noise levels due to construction in that the operation of any tools or equipment used in construction must not take place between 7 am to 7 pm. And, where feasible, construction activities shall be conducted so that the maximum noise levels at affected properties will not exceed those listed in the following schedule:

NOISE LIMITS FOR CONSTRUCTION ACTIVITIES

	Residential	Commercial	Industrial
Daily: 7 am. to 7 pm.	75 dBA	80 dBA	85 dBA
Daily: 7 pm. to 7 am.	60 dBA	65 dBA	70 dBA

dBA = hourly A-weighted sound level in decibels

In recognition of these standards (promulgated under the General Plan), the Initial Study provides that “[c]ontinuing enforcement of Napa County’s Noise Ordinance by the Division of Environmental Health and the Napa County Sheriff . . . would ensure that marketing events and other winery activities do not create a significant noise impact” and that all “construction activities will be conducted in compliance with the Napa County Noise Ordinance.” (IS, p. 21) While this is sufficient mitigation under subsection (f), the standard conditions of approval, such as prohibiting amplified music and “limiting development to daylight hours using properly muffled vehicles” should further minimize exterior and construction noise levels. (*Ibid.*)

The Board found that noise could be substantially mitigated by complying with the County’s Right to Farm and Noise Ordinances. While CEQA Guidelines section 15183(f) does not apply when “substantial new information shows that the policies or standards will not substantially mitigate the environmental effect,” the SMH letter has provided no evidence that compliance with the County’s noise standards and policies *would not* substantially mitigate noise impacts. Thus, the Initial Study needs to clarify that compliance with these noise standards will substantially mitigate the noise impacts from the Project while referencing subsection (f).

CONCLUSION

We recommend clarifying the Project’s CEQA baseline because the SMW letter improperly presumes that the applicant will be significantly increasing its visitation activities on the Property. This presumption is incorrect and significantly undermines any related SMW arguments as to the Initial Study’s failure to comply with CEQA. Additionally, we recommend utilizing CEQA Guidelines section 15083 as a means of relying on the County General Plan’s CEQA analysis for addressing cumulative traffic and traffic-related noise impacts and the County’s Noise and Right to Farm Ordinances as appropriate project conditions related to potential noise impacts.



January 13, 2016

Mr. Jonah Beer, Vice President/General Manager
Frog's Leap Winery
8815 Conn Creek Road
Rutherford, CA 94573

RE: Initial Outline Response Letter to Shute Mihaly & Weinberger Comment Letter (12-23-15); Frog's Leap Winery, Use Permit Major Modification #P14-00054

Dear Mr. Beer:

The following letter provides our initial responses and thoughts related to the recent comment letter provided by Shute Mihaly and Weinberger (SM&W) dated December 23, 2015 related to the proposed Frog's Leap Winery Use Permit Major Modification project (attached). Omni-Means provides the following initial responses to SM&W comments on the proposed project:

Page 3; B. The IS's Transportation Analysis is Inadequate, and There Is a Fair Argument that the Project May Have Significant Transportation Impacts.

Comment noted.

Page 4: Second paragraph; First, the IS does not establish a proper baseline to evaluate the Project's impacts during the highest volume traffic season. The applicant's traffic analysis did not evaluate existing traffic conditions near the Project site during the harvest and crush season...

As stated in the Focused Traffic Impact Analysis (TIA) for the Frog's Leap Winery, existing traffic volumes collected as part of the analysis were increased by 9% to account for the "peak month" of traffic flow along Conn Creek Road. This was based on the most recent Caltrans volume data available at the time the Notice of Preparation was published and represents the highest month of traffic volumes recorded on Conn Creek Road during the year, period. Caltrans does not identify the month (only the volume). However, whether traffic volume is recorded during the harvest/crush season or not, it represents the absolute highest volumes on Conn Creek Road and Rutherford Road. In addition, volume increases on SR-29 are comparatively less (based on Caltrans data) and no recent counts are available for Silverado Trail. Therefore, a very conservative increase of 9% is acceptable for project study roadways.

The County does not typically require traffic analysis of proposed project impacts during the crush/harvest season (established at six weeks over an August, September, or October period dependent on weather and harvest conditions). However, as stated above the traffic analysis used the highest volume representations in the project study area as established by Caltrans. In addition, the Focused TIA provided proposed project crush/harvest information related to

Page 5: Second paragraph; Third, the IS traffic analysis contains an improperly narrow study area, again rendering it incapable of evaluating all the Project's potential traffic impacts. The IS only considers potential impacts at three intersections on Conn Creek Road, Silverado Trail, the Frog's Leap Driveway, and Rutherford Road.

The Focused TIA was reviewed extensively by County Planning and Transportation for scope, content, and methodology during the draft application process. Specifically, after reviewing the traffic analysis on March 31, 2014, the County requested to expand the scope of the analysis to include all key intersections located east and west of the project site including Conn Creek Road/Rutherford Road and Conn Creek Road/Silverado Trail. After re-submitting a draft report that included these additional intersections and analyses, the County then requested further cumulative analysis on two projects that the County has not approved: the Caymus Vineyards project to the southwest and proposed Frank Family Vineyards project to the northeast (both located on Conn Creek Road). In addition, the intersection of Rutherford Road/SR-29 is located over 1.8 miles from the Frog's Leap Winery project driveway and County staff did not expand the scope to include this intersection deeming its location (appropriately) outside of the study area. The Focused TIA's study area is consistent with County practice and professional standards for evaluating traffic impacts.

Page 5: Fourth paragraph; Fourth, the IS and the Traffic report neglect to account for the traffic impacts from increased marketing events even though the applicant is proposing to host up to 500 people for a single event.

As previously noted, the Focused TIA included proposed project crush/harvest information related to production, employment, visitation, and trucks with resulting daily and peak period trip generation. The analysis also identified daily trip generation related to the largest marketing event that would accommodate 500 guests. Specifically, Table 2 (Peak Hour and Daily Trip Generation; Proposed Frog's Leap Winery Project) of the Focused TIA indicates a total trip generation of 403 daily trips. This daily trip total includes 500 guests, 20 event staff, and 3 catering trucks. These events are typically of sufficient duration in length that the inbound and outbound trips occur at separate hours, thus the number of trips on the street network at one time are half of the total volume. Additionally, these events are held outside of typical peak traffic periods (during the middle of the day or after 6:00 p.m.) and therefore generally do not impact peak hour operations and no other visitation or events would occur during the annual events. The same applies to events held for Auction Napa Valley; however those events would host significantly less than 500 people. Accordingly, the Focused TIA adequately evaluated the project's marketing events.

Page 6: First paragraph; Fifth, the IS acknowledges that traffic conditions near the Project Site are already poor. The intersection of Silverado Trail and Conn Creek Road currently operates at LOS E—the second worst traffic rating—and is projected to worsen to LOS F by 2030.

The intersection of Conn Creek Road/Silverado Trail is operating at LOS E during the weekday PM peak hour and LOS F during the weekend mid-day peak hour without proposed project traffic. Under cumulative year 2030 (no project) conditions, as evaluated in the County General Plan EIR, the intersection would be operating at LOS F during both the weekday PM and weekend mid-day peak hours. Napa County's General Plan volume projections for the year 2030 are quite conservative for Conn Creek Road/Silverado Trail intersection. Overall



weekday/weekend trips at the proposed project driveway and 2,438 daily trips on Conn Creek Road, a northbound left-turn lane would be warranted on Conn Creek Road.

Existing plus project and near-term plus project volumes were also compared with Caltrans guidelines for installing a left-turn lane on Conn Creek Road at the project driveway. Compared to Napa County standards, Caltrans guidelines for installation of a left-turn lane are based on peak hour volumes and include actual left-turn volumes. As identified under near-term plus project conditions (worst case), the winery would generate 30 peak hour trips on a typical Friday and 86 peak hour trips on a Saturday, while the peak hour volumes on Conn Creek Road are projected to be 144 vehicles on Friday and 286 vehicles on Saturday.

The peak hour traffic volumes at the winery access have been compared with left turn lane warrants outlined in a Caltrans intersection design guide.⁵ By comparing the advancing and opposing S.R. 128 (Conn Creek Road) volumes with the percentage of left turning vehicles into the access road, the volumes are **well below** the Caltrans minimum threshold at which a left turn lane would be warranted. In addition, vehicle queuing analysis conducted for the intersection indicates the northbound left-turn movement from Conn Creek Road into the Frog's Leap driveway would require approximately one vehicle length (95% queue @ 30 feet) during normal weekday PM peak hour or Saturday mid-day peak hour conditions (see vehicle queuing report sheet in the Focused TIA for the Frog's Leap Winery Appendix).⁶

The projected right turn volumes at the site driveway are well below minimum thresholds at which right turn lane would be required (right turn lane warrant graphs are included in the Focused TIA for the Frog's Leap Winery Appendix).⁷

The project applicant has requested an "exception to standards" related to the Napa County warrant being satisfied for the installation of a northbound left-turn lane at the project driveway on Conn Creek Road with proposed project traffic.⁸ Consistent with the Napa County Adopted Road and Street Standards (Item #3—Exception To Standards), the request provided all supporting materials, details of the exceptions and mitigating factor, and map with the proposed location and sighting of the exception.⁹ As stated in the exceptions section, "Standards that effect native trees or other geological features are prime examples of those circumstances where exceptions may be reviewed." Large native oak tree(s) are located off Conn Creek Road immediately adjacent to the proposed project driveway that would encroach on necessary ROW for installation of a left-turn lane. Subsequently, County Engineering staff has indicated that they will defer to

⁵ Caltrans, *Highway Design Manual*, 6th Edition, 2009.

⁶ Vehicle queuing analysis, *Frog's Leap Driveway/Conn Creek Road, Saturday mid-day peak hour, Near-term plus project conditions (worst case)*, Synchro-Simtraffic software (version 6.0).

⁷ Transportation Research Board, *National Cooperative Highway Research Program Report 279, "Intersection Channelization Design Guide"*, November, 1985.

⁸ Mr. Jonah Beer, General Manager, Frog's Leap Winery, *Exception Request Letter to Mr. Nate Galambos, Engineering Services, Napa County, Frog's Leap Winery Use Permit Modification #P14-00054, 8815 Conn Creek Road, Rutherford, August 13, 2014.*

⁹ Napa County California, *Adopted Road and Street Standards Napa County, Item #3—Exceptions To Standards, Revised August 31, 2004.*



driveway and the total daily vehicle trips on Conn Creek Road. The warrant is not directly related to the amount of vehicle traffic turning left (inbound) from Conn Creek Road into the project driveway or the amount/type of vehicle accidents that occur on Conn Creek Road. Therefore, the County left-turn lane warrant is not required to mitigate any safety issues and the proposed exception also not mitigation for either traffic impacts or safety concerns but rather simply required to comply with the County requirements.

As noted in the Focused TIA, overall peak period volumes on Conn Creek Road would be considered "light" for this major two-lane arterial street. This is evidenced by calculated operations of LOS A (less than 10 seconds vehicle delay) at the Frog's Leap Driveway/Conn Creek Road intersection under existing and near-term "with project" conditions.

Lastly, it is understood that the occurrence of DUI vehicular accidents in the Napa Valley is a concern given the nature of winery visitation/tasting. However, from an engineering standpoint there are little if any mitigation-related intersection or roadway improvements that can guard against DUI accidents.

Sincerely,

Omni-Means, Ltd.



Peter Galloway
Transportation Planner

Cc: Mr. Jeff Dodd & Mr. Thomas Adams (DP&F), Mr. Jeff Redding (Planning Consultant), George Nickelson, P.E. (Omni-Means)

Enc. Shute, Mihaly & Weinberger Comment Letter (12-23-15); Memorandum from Department of Public Works Re: Frog's Leap Winery (10-12-15).

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document therefore lacks the necessary evidence to support its conclusion that the Project will not have adverse transportation, public safety, noise, and water supply impacts.

In addition to these CEQA deficiencies, the Project likely violates the Winery Definition Ordinance (“WDO”) and is inconsistent with significant provisions of the Napa County General Plan designed to preserve the rural and agricultural character of Napa. Thus, approval of the Project would not just violate CEQA, but would also violate California Planning and Zoning Law, Gov’t Code § 65000 et seq.

As you know, the County has been processing and approving an exceptionally high number of use permits for new or expanded wineries throughout Napa Valley. Like this Project, a great number of these permits propose significant expansions of tourist-serving commercial uses. At the same time, many wineries have been hosting largescale tourism events in violation of their use permits. Such violations have gone largely unenforced by the County. The result has been a substantial increase in tourism across Napa that not only undermines the agriculture-centered land use goals embodied by the WDO, the General Plan, and Measure P, but also creates significant cumulative environmental impacts that the County must analyze and mitigate. Without further information and analysis of the Project’s likely impacts, the Commission cannot legally approve the Project. Consequently, the Commission should deny the application before it.

I. The Project Violates CEQA, and the Project’s Potentially Significant Impacts Prohibit the County from Approving the Project Without First Preparing an EIR.

A. Legal Standard

It is well settled that CEQA establishes a “low threshold” for initial preparation of an EIR, especially in the face of conflicting assertions concerning the possible effects of a proposed project. *Pocket Protectors v. City of Sacramento*, 124 Cal. App. 4th 903, 928 (2005). CEQA provides that a lead agency may issue a negative declaration and avoid preparing an EIR only if “[t]here is no substantial evidence, in light of the whole record before the lead agency, that the Project may have a significant effect on the environment.” CEQA § 21080(c)(1). A lead agency may adopt a negative declaration only when all potentially significant impacts of a project will be avoided or reduced to insignificance. Pub. Res. Code § 21080(c)(2); Guidelines § 15070(b).¹ A negative

¹ The CEQA Guidelines, 14 Cal. Code Regs. § 15000 et seq., are referred to as “Guidelines.”

Silverado Trail or SR 29. But despite observations of negative traffic conditions immediately surrounding the Project site, the IS relies on a legally inadequate transportation analysis to conclude that the substantial proposed expansion would not result in any traffic impacts.

First, the IS does not establish a proper baseline to evaluate the Project's impacts during the highest volume traffic season. The applicant's December 14, 2015 Focused Traffic Analysis ("Traffic Report"), on which the IS relies, did not evaluate existing traffic conditions near the Project site during the harvest and crush season, when traffic volumes in the County reach their highest. Traffic Report at 4. Instead, the applicant relied on seasonal Caltrans data for a single segment of SR 128 in front of the Project site to project that traffic volumes on SR 128 and Silverado Trail would increase by 9% during this season.

This attempt to extrapolate baseline conditions during harvest from limited data is flawed. The seasonal increase on SR 128 provides no information about how traffic volumes change on the more heavily-used Silverado Trail and SR 29 during harvest season. The IS and Traffic Report cannot simply assume that the percentage traffic increase on these main County thoroughfares will be the same as the increase in traffic for smaller arterials like SR 128. Moreover, a simple percentage increase does not account for the change in traffic character during harvest, when an increased number of large agricultural equipment and trucks hauling grapes are on the roadways. These slow-moving vehicles make frequent stops and can further exacerbate traffic conditions during the County's peak traffic season.

Without a study of traffic conditions during harvest season, the IS completely fails to evaluate Project impacts against the heaviest traffic periods in the County. This failure to establish a proper baseline is fatal to any purported analysis of transportation impacts. "Without a determination and description of the existing physical conditions . . . at the start of the environmental review process, [the IS] cannot provide a meaningful assessment of the environmental impacts of the proposed project." *Save Our Peninsula Committee v. Monterey County Board of Supervisors*, 87 Cal. App. 4th 99, 119 (2001).

Second, the IS does not establish proper thresholds of significance for determining whether traffic from the Project will result in significant impacts to the intersections it analyzes. The document merely recites the CEQA Appendix G checklist, which, among other things, requires the County to determine whether additional traffic is "substantial in relation to the existing traffic load or capacity of the street system." IS at 25. But the IS never offers a specific numerical threshold to determine whether the new traffic from the site will be "substantial." CEQA recognizes that "the significance of an activity may vary

Fifth, even with this faulty analysis, the IS acknowledges that traffic conditions near the Project site are already poor. The intersection of Silverado Trail and Conn Creek Road currently operates at LOS E—the second worst traffic rating—and is projected to worsen to LOS F by 2030. IS at 25-26. The Project's contribution to these substandard and worsening traffic conditions is likely a significant cumulative transportation impact that must be evaluated in an EIR and properly mitigated. *Kings County Farm Bureau v. City of Hanford*, 221 Cal. App. 3d 692, 721 (1990).

Finally, the County's own assessment of the Project's traffic impacts indicates that there will be a significant impact at the intersection of Conn Creek Road and the winery's main entrance. To mitigate that impact, the County's Road and Street Standards require the installation of a left-turn pocket on the northbound section of Conn Creek Road at this intersection. Memorandum from Paul Wilkinson to Shaveta Sharma, dated January 20, 2015. As alternative mitigation, the applicant has proposed to expand the shoulder across from the winery entrance. IS at 26. Yet even though Project traffic would violate the County's Road and Street Standards without a new left turn lane or other adequate mitigation, the IS fails to acknowledge this significant traffic impact.

Courts have found that this approach violates CEQA. An agency may not include mitigation measures as part of the project when determining whether it may have a significant effect on the environment. *Lotus v. Department of Transportation*, 223 Cal. App. 4th 645, 665 (2014). Instead, the agency must first determine whether the project will have a significant effect on the environment and then identify and adopt feasible mitigation measures that will reduce the impacts of the project below a level of significance. CEQA requires this approach for two reasons. First, acknowledging potentially significant impacts obligates an agency to adopt definite and enforceable mitigation through a mitigation monitoring and reporting program. Guidelines § 15097. Second, agencies must consider secondary impacts associated with adopted mitigation measures. *Id.* § 15126.4(a)(1)(D). This latter requirement is especially important here, since construction on the eastern shoulder of Conn Creek Road could impact large heritage oak trees that grow along the road.

But based on the record before the Commission, it is impossible to know what mitigation the County will require for this intersection. The IS does not commit to any particular mitigation, observing that the department of public works *may* grant an exception to the left turn lane requirement. IS at 26. Section 3(G) of the County's Road and Street Standards grants the Director of Public Works the discretion to approve the proposed exception, but staff has indicated that this determination will not be made until *after* the Commission's hearing on the Project. Thus, the public and the Commission are left in the dark about the mitigation that will be required for this impact. Without this

supported with substantial evidence. Substantial evidence consists of “facts, a reasonable presumption predicated on fact, or expert opinion supported by fact,” not “argument, speculation, unsubstantiated opinion or narrative.” Pub. Res. Code § 21080(e)(1)-(2). Once again, the IS fails on many levels.

First, the IS provides no information about the Project’s environmental setting, other than to state that the nearest residences are located about 600 feet away. IS at 21. This contravenes CEQA’s requirements for environmental documents, which “must include a description of the physical environmental conditions in the vicinity of the project.” Guidelines § 15125(a). Moreover, the significance of an impact may vary with the setting. While increased noise levels may not be significant in an urban area, they may be extraordinarily burdensome in a rural area. Here, without any information on the area’s acoustical setting, including existing ambient noise levels, the impact analysis in the IS quickly becomes meaningless.

Nor does the IS identify the standard or threshold of significance for determining a significant noise impact.⁴ Instead, it appears to assume that because the County’s Noise Ordinance regulates noise events between 10 p.m. and 7 a.m., there will be no significant impact. IS at 21. Thus, the IS entirely fails to consider that Project-related construction and event noise might impact nearby properties during other hours. The failure to establish an adequate noise threshold of significance is critical. Without a threshold, there is no means by which to determine whether impacts would or would not be significant. Since the requirement to provide mitigation is triggered by the identification of a significant impact, the IS’s failure to identify all of the Project’s significant impacts also results in a failure to mitigate these impacts.

Given the failure to describe the existing noise environment and to establish thresholds of significance, it comes as no surprise that the IS fails to identify the noise levels that would accompany construction of the Project. In fact, the document, never even attempts to predict noise levels during each phase of construction on nearby receivers. As the attached table shows, construction-related equipment and operations can be extraordinarily loud. A typical noise level for a jackhammer, for example, is upwards of 96 decibels, while loaders, backhoes and bulldozers can generate noise upwards of 85 decibels. *See* OSHA Construction-Related Noise levels, attached as Exhibit 1. The

⁴ The IS does refer to the Napa County Noise Ordinance, explaining that it sets a maximum permissible sound level for rural residences as 45 dB between the hours of 10 p.m. and 7 a.m. (at 21), but the IS fails to demonstrate that the Project will even meet these evening noise standards.

increase in water usage, or even the winery's existing water usage, is sustainable. This incomplete analysis further defeats CEQA's core informational requirements. *Laurel Heights Improvement Ass'n v. Regents of University of California* 6 Cal. 4th 1112, 1123 (1993).

II. The Project is Inconsistent with the Winery Definition Ordinance and the County General Plan.

A. The Project Is Inconsistent with the Winery Definition Ordinance.

The Winery Definition Ordinance ("WDO") contains several statements of legislative intent directly relevant to this Project. These include a declaration that the ordinance must be interpreted to achieve the goal of protecting agriculture and open space use as the primary land use in the Agricultural Preserve, and to "prohibit" the use of agricultural land for non-agricultural purposes "except to the extent expressly permitted" by the General Plan and County ordinances. *See* WDO, § 6.

Significantly, the WDO restricts the scope and maximum square footage of "accessory uses" such as "marketing of wine" and "tours and tastings." All such accessory uses, "in their totality[,] must remain clearly incidental, related and subordinate to the primary operation of the winery as a production facility." *See, e.g.,* Napa County Code ("NCC") § 18.08.370; 18.16.030(G)(5); 18.08.020. In addition, the WDO places an absolute numerical cap of the square footage of structures that may be "used for accessory uses." *See* NCC § 18.104.200 ("The maximum square footage of structures used for accessory uses that are related to a winery shall not exceed forty percent of the area of the production facility.").

The Project documents provide incomplete descriptions of the square footage that Frog's Leap will utilize for accessory uses if the Project is approved. The application asserts that with the Project, the square footage assigned to accessory uses will be roughly 30 percent of the square footage used for production (11,850 and 39,306 square feet, respectively). Application at 12. But neither the application nor the IS provides a detailed description of which areas of the site are currently used for accessory uses compared to commercial uses. For example, the applicant is proposing to add an 845 square foot porch to the Project site, which already has an "existing porch with the admin building [that] would remain available for tasting . . ." *Id.* at 6. Drawings of the site also show a small "orchard" located in the middle of the winery compound that contains interior paths and a fountain. All of these areas would be available for tasting and marketing uses, but it is impossible to determine whether they have been included in the

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land use, where uses incompatible with agriculture should be precluded” In short, the proposed vast expansion of marketing events and daily tasting are commercial uses, not agricultural ones. Accordingly, they are inconsistent with the General Plan and may not lawfully be approved.

III. Conclusion

For all of these reasons, the Commission should deny the proposed Project.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP



Ellison Folk

cc: Nancy Hammonds

Attachment

734923.3

	DECIBEL - dB(A)	EQUIPMENT
Double protection recommended above 105 dB(A)	112	Pile driver
	110	Air arcing gouging
	108	Impact wrench
	107	Bulldozer - no muffle
	102-104	Air grinder
	102	Crane - uninsulated cab
	101-103	Bulldozer - no cab
	97	Chipping concrete
	96	Circular saw and hammering
	96	Jack hammer
	96	Quick-cut saw
	95	Masonry saw
	94	Compactor - no cab
Hearing protection recommended above 85 dB(A)	90	Crane - insulated cab
	87	Loader/backhoe - insulated cab
	86	Grinder
	85-90	Welding machine
	85	Bulldozer - insulated cab
	60-70	Speaking voice

Table 1: Some typical noise levels found on construction sites

Jonah Beer
October 12, 2015
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Regards,

Rick Marshall
Deputy Director of Public Works
Road Commissioner & County Surveyor

C: PBES staff
Caltrans District 4