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Planning, Building & Environmental Services

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David Morrison
Director

MEMORANDUM

To: Napa Planning Commission	From: David Morrison, PBES Director

Date: December 18, 2019

Re: CEQA Memorandum for Napa County Small Winery Protection and Use Permit Streamlining Ordinance and Text Amendment

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

The County is considering several updates to the Zoning Regulations in implementation of the 2008 Napa County General Plan and the Napa County Strategic Plan (2019-2022) in an effort to simplify and clarify the procedures for applying for and obtaining modifications to winery use permits. Specifically, the proposed ordinance would streamline the process for approving winery use permits for wineries operating under the former small winery exemption, would more clearly define minor modifications to winery use permits and provide for a simplified process for approval, and would identify alterations to winery structures and operations that would be approved administratively. The proposed action would implement the 2008 General Plan Agricultural Preservation and Land Use (AG/LU) Policy AG/LU-16 and Action Item AG/LU-16.1. In addition, the proposed ordinance is consistent with the Napa County Strategic Plan, including Strategic Actions 9.G and 9.H.

After careful review, the PBES Department has concluded that the Napa County's proposed amendments to the Zoning Ordinance are exempt from environmental review under the California Environmental Quality Act ("CEQA"; Pub. Res. Code §21000, *et seq.*) and the CEQA Guidelines (14 C.C.R. §15000, *et seq.*) Given that these updates consist, primarily, of changes to the procedures for obtaining discretionary modifications to permits that would be independently reviewed in compliance with CEQA, and that the action was considered and reviewed in connection with the 2008 General Plan, many of the proposed changes would not require further environmental review, pursuant to CEQA Guidelines §15183. While other proposed changes would result in converting discretionary actions into ministerial approvals, these changes fall within categorical exemptions under the CEQA Guidelines, as well as the general rule exempting activities where it can be seen with certainty the activities in question will not have a significant effect on the environment.

In particular, the ordinance updates relating to administrative approvals are exempt as falling within Class 1, Class 3, and Class 4 Exemptions, as codified in Title 14 of the California Code of Regulations, sections 15301, 15303, and 15304. Further, no exceptions to the exemptions would apply.

II. APPLICABLE EXEMPTIONS AND POTENTIAL EXCEPTIONS, GENERALLY.

Projects consistent with a Community Plan, General Plan, or Zoning. Section 15183 of the CEQA Guidelines (14 C.C.R. §15183) provides that no further environmental review is required for "projects which are consistent with the development density established by existing zoning, community plan, or general plan policies for which an EIR was certified…, except as might be necessary to examine whether there are project-specific significant effects which are peculiar to the project or its site." The purpose of this section is to allow municipalities to implement the broadly applicable development standards with streamlined environmental review.

Requirements of Class 1, Class 3, Class 4, and Common Sense Exemptions. The language of the pertinent exemptions are included below.

- **Class 1 Exemption.** This exemption covers "the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of existing or former use." (14 C.C.R. §15301.) A non-exclusive list includes interior or exterior alterations, modification to existing streets, sidewalks, and bicycle facilities, and additions to existing structures not to exceed 2,500 square feet. (*Id.*)

- **Class 3 Exemption.** This exemption covers "construction and location of limited numbers of new, small facilities or structures; installation of small new equipment and facilities in small structures; and the conversion of existing small structures from one use to another where only minor modifications are made in the exterior of the structure." (14 C.C.R. §15303.) Relevant examples include, without limitation, construction of a "store, motel, office, restaurant or similar structure" not exceeding 2,500 square feet, and construction of accessory structures. (*Id.*)

- **Class 4 Exemption.** This exemption covers "minor public or private alterations in the condition of land, water, and/or vegetation which do not involve removal of health, mature, scenic trees except for forestry and agricultural purposes." (14 C.C.R. §15304.) Relevant examples include, without limitation, grading on land with a slope of less than 10 percent, and new gardening or landscaping. (*Id.*)

- **Common Sense Exemption.** The CEQA Guidelines include an exemption based on "the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment." (14 CCR, § 15061(b)(3); *see Muzzy Ranch Co. v. Solano County Airport Land Use Comm'n* (2007) 41 Cal.4th 372.) Under this exemption, an

> agency can find a project is exempt from environmental review if "it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment." (14 CCR, § 15061(b)(3).)

The Class 1, Class 3, and Class 4 Exemptions are premised on a finding by the California Secretary for Natural Resources that the classes of projects covered by them do not have a significant effect on the environment. The exemptions, however, are not absolute. Although a project might otherwise be eligible for a categorical exemption, these exemptions must be denied if (1) significant cumulative impacts from projects of the same type will result; and (2) there is a reasonable possibility of a significant impact on the environment due to unusual circumstances. (14 CCR, § 15300.2(b)&(c).) In addition, these exemptions cannot apply if the activity in question falls within a particularly sensitive environment, meaning an environment where there exists an "environmental resource of hazardous or critical concern where designated, precisely mapped, and officially adopted pursuant to law by federal, state, or local agencies." (14 CCR, § 15300.2(a).)

Agency's finding that a particular proposed project falls within one of the exempt classes necessarily includes an implied finding that the project has no significant effect on the environment and that no exception to the exemption applies. (*Save the Plastic Bag Coal. v. City & Cty. of San Francisco* (2013) 222 Cal. App. 4th 863, 873–74; *Association for Protection of Envt'l Values v. City of Ukiah* (1991) 2 Cal.App.4th 720, 731.) However, where an agency does not make express findings, and relies on implied findings regarding the inapplicability of exceptions, and project opponents file a legal challenge, a court's ability to affirm the agency's decision is constrained with respect to the "unusual circumstances" exception. With implied determinations, a court cannot discern whether (1) the agency determined no unusual circumstances existed, or (2) whether the agency determined unusual circumstances existed, but there was no reasonable possibility of a significant impact due to those circumstances. (*Respect Life South San Francisco v. City of South San Francisco (Planned Parenthood Mar Monte, Inc., Real Party In Interest)* (2017) 15 Cal.App.5th 449.) This makes a difference because the determination of whether unusual circumstances exist is subject to the highly deferential "substantial evidence standard," under which a court will defer to the agency's decision if it is supported by substantial evidence, whereas the determination about whether there exists a reasonable possibility of a significant impact is subject to the non-deferential "fair argument" test, under which a court will find for project opponents if they show there is a fair argument of a reasonable possibility the activity will have a significant environmental impact. (*Id.*) In the absence of direction, a court must analyze the implied finding as if made on the narrowest possible grounds, and can uphold the categorical exemption against the unusual circumstances challenge only if (1) it finds the record contains no substantial evidence that could support a finding of unusual circumstances – a determination courts will likely be reluctant to make due to the broad discretion vested in the local agency to determine this "essentially factual" issue – *or* (2) it *assumes* the existence of unusual circumstances, but finds the record is devoid of substantial evidence supporting a fair argument of a reasonable possibility that any purported unusual circumstances identified by the challenger will have a significant environmental effect.

Simply, an agency's decision rejecting the existence of an exception to a categorical exemption is much more defensible if the agency makes explicit findings that no unusual circumstances exist and that, regardless, there exists no reasonable possibility the activity in question will have a significant impact. Accordingly, we have set forth below evidence the County can consider in finding the proposed ordinance updates have no significant effect on the environment, and are exempt from CEQA.

Findings are also of significant benefit when an agency seeks to apply the Common Sense Exemption to a project. In essence, the application of this exemption is to be decided based on whether record evidence supports the exemption, and the agency has the burden of demonstrating the exemption applies. (*Muzzy Ranch Co. v. Solano County Airport Land Use Comm'n* (2007) 41 Cal.4th 372, 386, 388.) The agency need not engage in detailed or extensive fact-finding to make this determination, but there must be substantial evidence in the record to support it. (*Id.* at 388, quoting *Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 369.) What must comprise this evidence may vary, and depends on a multitude of factors, including the nature of the project, the directness or indirectness of the contemplated impact, and the ability to forecast the actual effects the project will have on the physical environment. (*Id.*) To this end, we have included findings below that can assist the County in supporting use of the Common Sense Exemption.

III. EVIDENCE SUPPORTING APPLICABILITY OF EXEMPTIONS

Consistency of portions of ordinance updates with 2008 General Plan EIR. Among other things, the proposed ordinance establishes a streamlined discretionary process for small wineries operating in accordance with the small winery exemption to obtain a use permit. The proposed ordinance would establish a procedure for such small wineries to obtain a use permit after a hearing before the zoning administrator, rather than the planning commission. Each project would be subject to independent environmental review under CEQA, which would allow the County to examine project- and site-specific environmental impacts. Because this portion of the proposed ordinance simply shifts the locus of decision-making, without reducing or changing the level of environmental review, the proposed ordinance itself would not have any project-specific environmental impacts. Therefore, under 14 C.C.R. §15183, to the extent the proposed ordinance is consistent with the 2008 General Plan, further environmental review is not required.

The small winery exemption was enacted in 1981 to allow wineries that met the definition of a small winery to operate without a use permit. The County issued certificates of exemption upon confirming that the winery operations met the requirements of the exemption. The exemption was removed in 1986, but the Winery Definition Ordinance (WDO) recognized the many wineries operating in accordance with these certificates of exemption. However, to obtain a use permit that would allow a small winery to modify their operations, even just to add employees, wineries were required to go before the Planning Commission at great expense.

The Environmental Impact Report (EIR) prepared for the 2008 General Plan included an analysis of several alternatives, including Alternative C (Plan Update Alternative 2). This option included a proposal to no longer require a use permit for small wineries (less than 20,000 gallons), if they exclusively process grapes grown on site and conduct limited on-site marketing (Page 3.0-24). The County did not adopt this alternative.

Instead, the 2008 General Plan recognized that small wineries have limited impacts on the environment and charged the PBES Department to "consider affording small wineries a streamlined permitting process" (Policy AG/LU-16). The policy that was adopted did not exempt small wineries from the use permit process (as in Alternative C), but instead offered a streamlined process for obtaining a use permit. The draft ordinance fulfills this policy.

In 2019, the County adopted its Strategic Plan, which established the framework and priorities for County policy during the 2019-2022 fiscal years. The Strategic Plan contains five key pillars for success, supported by 14 goal, and 84 action items.

Pillar No. 3 in the Strategic Plan is "Livable Economy for All." There are three goals that define this pillar, including No. 9, which states: "Collaboratively design systems and structures that promote a diverse and stable economy, with livable wages." In turn, two actions implement Goal No. 9, as follows:

> Action No. 9.G: Provide a healthy and welcoming business environment by implementing the Process Improvement Plan for the Planning, Building, and Environmental Services (PBES) Department and expanding the process to other permitting functions.
>
> > The "Analysis of the Planning Review Process" prepared by Matrix Consulting Group was presented to and accepted by the Board of Supervisors on August 28, 2018. On Page 6, the study made the following recommendation:
> >
> > Implement an internal policy working group to identify current development trends and provide relevant information to decision makers. Subsequently develop code and ordinance changes if directed by decision makers.
> >
> > The development of a Use Permit Streamlining Ordinance was directed by the Board of Supervisors in a workshop held during the regularly scheduled meeting of May 21, 2019. The draft ordinance was developed by an internal staff policy working group in accordance with the Matrix analysis and the Strategic Plan.
>
> Action No. 9.H: Protect family-owned businesses, local wineries, and small farmers as a vital part of the economy, including preservation of the small vineyard exemption.

The proposed draft ordinance provides a streamlined process to allow small wineries to transition into use permit approval, and clarifies the circumstances when the Director may issue minor modifications and administrative permits for all wineries. These provisions will benefit family owned businesses (including non-wineries), assist small farmers who have wineries, and preserve the ability of small wineries to modify their operations to meet current business needs.

Qualification of ordinance updates for Class 1, Class 3, Class 4, and Common Sense Exemptions. Portions of the proposed ordinance do not fall within the scope of the General Plan and would involve conversion of discretionary acts into ministerial. Specifically, the proposed ordinance would provide for administrative approval of certain modifications to use permits that previously would have required approval by the Planning Commission or the Zoning Administrator. The proposed ordinance does not exempt any of these activities from the application of other regulations in the Napa County Code, however, so projects that would be subject to the Conservation Regulations, or Viewshed regulations, would still require discretionary approvals under those ordinances. Similarly, other state and local laws and regulations would require permits from other permitting agencies that provide appropriate limitations on these activities. Therefore, after careful review of each proposed administrative approval, the PBES Department has found the following exemptions are applicable, as described more fully below:

- **Class 1 Exemption.** The exemption for existing structures allows for minor alterations or changes within existing structures, but also allows for additions to existing structures, so long as they do not exceed fifty percent of the existing floor area, or 2500 square feet, whichever is less. The proposed ordinance addresses internal alterations or remodels that fit clearly within the exemption. The ordinance would also allow additions to structures in the form of shade structures to previously approved winery areas used for tastings or to existing crush pads. The proposed ordinance also allows the addition of bicycle facilities, changes to the alignment of internal roads and parking areas, and installation of water system improvements to connect to existing publicly-owned utilities. Each of these improvements are specifically listed as examples of exempt improvements.

- **Class 3 Exemption.** The exemption for new construction or conversion of small structures allows for the construction of small structures, including "store(s), motel(s), office(s), restaurant(s) or similar structure(s)." These structures cannot exceed 2,500 square feet in floor area. The proposed ordinance allows construction of small structures, appropriately limited in scale, including shade structures, enclosures for trash receptacles, and crush pad covers.

- **Class 4 Exemption.** This exemption covers minor alterations to the condition of land, water, and/or vegetation. The proposed ordinance would allow ministerial approval of new or modified landscaping, the installation of waste water improvements, and the

internal realignment of roads or driveways, which would all involve minor amounts of grading. Such work would be subject to grading permits, unless exempt under Appendix J of the California Building Code, but would generally be exempt as minor alterations of land.

- **Common Sense Exemption.** CEQA Guidelines allows a lead agency to find a project to be exempt from CEQA where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment. Some of the changes proposed in this ordinance will have no effect on the environment, compared to the baseline of existing regulations. The proposed ordinance allows the use of temporary trailers during construction on a property, which is currently allowed for construction, "watchman," farm labor, or office uses under Napa County Code section 18.126.060. The ordinance would allow changes to hours of operation between 9:00 am and 6:00 pm, which are typical working hours for businesses. It allows removal of existing conditions of approval relating to custom crush facilities, which generally does not involve changes to winery operations. As these changes are de minimus in nature, it can be seen that they will not have an environmental impact. The ordinance also allows extensions to the permit expiration time limits set forth elsewhere in the Napa County Code, which is currently a ministerial act. In addition, because many of the activities addressed in the proposed ordinance are subject to state and local regulation outside of the zoning context, many of the activities being addressed through the administrative approval are limited by those regulations. For example, waste water treatment facilities would require approval of a waste water permit under Title 13 of the Napa County Code and would be further regulated by the State Water Resources Control Board and the regional boards.

IV. NO EXCEPTIONS TO EXEMPTIONS WOULD APPLY

The ordinance updates would not have any significant, adverse effects on the environment, and none of the CEQA Guidelines' exceptions apply. The Class 1, Class 3, and Class 4 exemptions have exceptions, and do not apply, where (1) significant cumulative impacts from projects of the same type will result; or (2) there is a reasonable possibility of a significant impact on the environment due to unusual circumstances. (14 CCR, § 15300.2(b)&(c).) In addition, the exemptions cannot apply where the activity in question is ordinarily insignificant, but would be located in a particularly sensitive environment and thus have the potential for a significant impact. (14 CCR, § 15300.2(a).)

With respect to cumulative impacts, the ordinance updates are Countywide regulations that govern all unincorporated lands. There are no similar regulations being proposed in the County, including within its five incorporated municipalities, that would cumulate with the proposed project. With respect to possible significant environmental impacts due to unusual circumstances, substantial evidence exists to support a finding that no unusual circumstances exist, and such a finding would be given deference if challenged. Consider:

- ***Streamlined permit review is not an "unusual circumstance" and limitations on ministerial approvals will ensure any unusual circumstances are independently reviewed under CEQA.*** The main objectives of this proposed ordinance are to streamline the permit review for small wineries operating under the use permit exemption available in the 1990s and to streamline the process for obtaining modifications to existing use permits. These activities relate to administrative functions, which do not constitute unusual circumstances. The methods of review and approval of permits are already established by the Napa County Code and, therefore, are not new or different. With respect to the administrative approvals, the nature and extent of the modifications allowed by the proposed ordinance is consistent with numerous projects already existing in the unincorporated County. (*See San Francisco Beautiful v. City & County of San Francisco* (2014) 226 Cal.App.4th 1012, 1025; *Wollmer v. City of Berkeley* (2011) 183 Cal.App.4th 1329, 1351; *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School District* (2006) 139 Cal.App.4th 1356.) The heavily-regulated nature of some of the activity outside of the zoning context also indicates that such activity is not unusual, but pervasive.