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September 1, 2020

Emily.Hedge@countyofnapa.org

Emily Hedge
County of Napa Planning Division
1195 Third Street, 2nd Floor
Napa, CA 94559

Re: Balloons Above the Valley

Dear Miss Hedge:

As you know, our law firm represents Balloons Above the Valley, which is going to the Planning Commission tomorrow morning for a Use Permit Application Hearing. This letter responds directly to a threat of litigation letter provided to you on August 31, 2020 by Andrew Rauch, APC on behalf of Neighbors Against Privacy Abuse coalition.

First and foremost, Mr. Rauch's letter strains credibility with its insinuation about California Civil Code section 1708.8 (and its 2015 amendment, which is known as the "paparazzi law". (Pg. 13 of Rauch letter.) The full text of the statute is attached to this letter for your review should you wish. Under absolutely no circumstances does Balloons Above the Valley encourage or allow its customers to "capture a visual image of an individual engaging in a private personal or familiar activity." The customers of Balloons Above the Valley are not paparazzi or scofflaws.

Flying over a lovely Napa Valley vineyard and taking a photograph of it from a hot air balloon is encouraged though.

Secondly, it is important to understand that only the Federal Aviation Authority (FAA) has authority over airborne aircraft of any kind (airplanes, helicopters, gliders or balloons). Mr. Rauch's contention that state law prohibits the flying of balloons below 1,000 feet is simply wrong. Where state law is silent on a subject does not mean state law prohibits that subject. Prohibitions must be specific. For specificity, see the WDO.

Mr. Rauch spends a great deal of time arguing public policy, the United States Constitution and private property rights. The Planning Commission and county staff are not the appropriate arbiters of such things, unless of course the Board of Supervisors gives the Planning Commission a public policy role. That is not the case at this time with regards to balloon launching from or above the Ag Preserve and so the commission and staff are left to work within the existing County regulatory framework. And of course private property issues are best left to the various private property rights holders.

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Contrary to Mr. Rauch's claims on page 14 of his letter, Balloons Above the Valley did comply with the County's Covid related health regulations and submitted its safety plan to the County in June of this year.

The CEQA Negative Declaration and initial study, supported by the applicant's thorough noise study, refute Mr. Rauch's shallow CEQA concerns and Mr. Rauch's concerns are not supported by any expert data refuting the Negative Declaration. Notwithstanding the lengthy recitation of when an EIR is warranted, the simple fact here is that the County's CEQA documents clearly show there is not a single significant impact on the environment as a result of this project. In fact, there are very few impacts that even rise to the level of a "less than significant impact" and those criteria are air quality, greenhouse gas emissions, noise and traffic.

Put simply, there isn't an aspect of this application that requires even a mitigation measure.

Furthermore, Mr. Rauch's arguments are speculation, argument or unsubstantiated opinion or narrative...not substantial evidence. Substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact. Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative." (Pub. Resources Code, §§ 21080(e)(1)-(2) [emphasis added].) And accordingly, Mr. Rauch's CEQA related arguments fail to state a fair argument that substantial evidence exists that would warrant an EIR or even a mitigated negative declaration. Substantial evidence supporting a fair argument must be of ponderable legal significance, reasonable in nature, credible, and of solid value.

The mere existence of some controversy, which Mr. Rauch creates with his letter, does not satisfy the fair argument standard under Public Resources Code § 21151, and as such the County is warranted in concluding no significant impacts exist and a negative declaration is appropriate for adoption.(Public Resources Code § 21080(c)(1). (See Jensen v. Santa Rosa, 2018 Cal.App.Lexis 480.)

For instance, Mr. Rauch's comments regarding noise impacts are ineffective. (Pg. 13, Rauch letter) The applicant's noise study was comprehensive and has been augmented as of August 31, 2020 by further information. Mr. Rauch fails to provide any analysis from an acoustic expert to prove his point. His comment regarding launches prior to 7 AM misses the point in that there won't be any launches of balloons before 7 AM under this permit as the staff report and the conditions of approval make clear. Moreover the sound study was done at the best time it could be done during the application process, while dealing with good old fashioned customer demand, and the weather. For instance, a day where four balloons can safely launch, the noise engineer is available to perform the field work, and there are enough customers for four balloons may actually not happen in a given year and if the applicant waited around for such a perfect event, we may never get the noise study done.

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Similarly, Mr. Rauch's comments regarding aesthetics fail. Concerns about the height or scope of balloons are ineffective as they were considered by the County. The Initial Study correctly notes that the balloons are already operating at the location, in their present scope, pursuant to a valid use permit. The Initial Study also notes that there are no physical improvements to the property, which is in the Agricultural Preserve, that not only the balloons, but the vehicles are not permanent.

Mr. Rauch's arguments about Measure D are inapplicable, regardless of his contention otherwise. Had the drafters of Measure D wanted to preclude balloon launching use permits within the County, those drafters would have been as explicit as they otherwise were.

Mr. Rauch's comments regarding Agricultural and Forest Resources seem to misunderstand the nature of this portion of CEQA analysis. There is no conflict with the zoning, as this proposed use is already in place pursuant to a use permit and allowed by the County's ordinance for agriculturally zoned property. And the Initial Study appropriately and carefully notes the scope of the use on the property and that the launch location is undeveloped grass. That the balloons, unless there is a significant problem, will land in locations both in the County and in the City of Napa at which they have approval to land. The current scope of the County use permit process does not extend to those landing locations, but there is nothing in the Napa County Ordinance Code that states that a private property owner needs to seek a use permit to allow a balloon land a balloon on his or her private property. Nor is it within the County's jurisdiction if the City of Napa allows the landing of balloons in a City park. Wanting the County's use permit process to be something more than it is does rise to a legitimate CEQA argument.

Mr. Rauch's arguments regarding air quality fail. We are talking about scant few vehicles in any scenario and none during rush hour flow directions. The Initial Study considers up to 48 trips on the most intense use days (24 vehicles coming and going). All of these trips the Balloons generate are over at about 9:30 a.m. And Mr. Rauch is wrong with regards to not accounting for guests and balloon pickups, the Initial Study clearly states, "Following the launch, the transport vehicles and equipment truck follow the balloon to the landing site...." These traffic levels are well below even mitigatable standards pursuant to the County's CEQA guidelines. By right uses like a day care center or horse boarding facility can generate vastly more traffic than that and during peak hours.

As to Mr. Rauch's arguments regarding biological resources and cultural resources, the Initial Study is far more thorough. His arguments fail to provide anything more than the naked conjecture that seemingly every balloon launch will result in a disaster with a balloon landing in an endangered species habitat or protected wetland. Nothing could be farther from the truth. And worse, he entirely misses the meaning of cultural resources under the CEQA Guidelines.

As to his arguments 8, 9 and 10 they are so superficial as to fail on their face to create any reasonable arguments, let alone evidence.

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Balloons Above the Valley has always followed the Code of Conduct that it ushered into existence to begin with. The staff report states that Balloons Above the Valley is in good standing and we have worked with staff for over year on this application to ensure staff has all information that they have sought. Arguments about the existence or efficacy of the PBPANC are novel, but it must be noted that a late filing at the Secretary of State's office is actually commonplace for entities and does not actually legally eliminate the entity from existence or function. County staff have recently communicated with the PBPANC to get data related to this project and others and received that information. The entity functions right now and my client communicated with its current President today. PBPANC reporting issues should not affect this application in any way.

In conclusion the CEQA documents the County has prepared are thorough. As are the findings and the conditions of approval. And Mr. Rauch's arguments fail to rise to the level of even a fair argument under CEQA law for the reasons stated above.

The application should be approved because it meets all of the counties criteria and then some. It is important to remember that one of those criteria is that every neighbor within 500 feet of the launch site be supportive of the application. That was the case when the application was submitted and it remains the case now.

Thank you very much for your time and consideration. I regret that this analysis has to be rushed to you, but the time frames are what they are.

Cordially



Scott Greenwood-Meinert

Attachments


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DIVISION 3. OBLIGATIONS [1427 - 3273] (*Heading of Division 3 amended by Stats. 1988, Ch. 160, Sec. 14.*)

PART 3. OBLIGATIONS IMPOSED BY LAW [1708 - 1725] (*Part 3 enacted 1872.*)

1708.8. (a) A person is liable for physical invasion of privacy when the person knowingly enters onto the land or into the airspace above the land of another person without permission or otherwise commits a trespass in order to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a private, personal, or familial activity and the invasion occurs in a manner that is offensive to a reasonable person.

(b) A person is liable for constructive invasion of privacy when the person attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a private, personal, or familial activity, through the use of any device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the device was used.

(c) An assault or false imprisonment committed with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff is subject to subdivisions (d), (e), and (h).

(d) A person who commits any act described in subdivision (a), (b), or (c) is liable for up to three times the amount of any general and special damages that are proximately caused by the violation of this section. This person may also be liable for punitive damages, subject to proof according to Section 3294. If the plaintiff proves that the invasion of privacy was committed for a commercial purpose, the person shall also be subject to disgorgement to the plaintiff of any proceeds or other consideration obtained as a result of the violation of this section. A person who comes within the description of this subdivision is also subject to a civil fine of not less than five thousand dollars (\$5,000) and not more than fifty thousand dollars (\$50,000).

(e) A person who directs, solicits, actually induces, or actually causes another person, regardless of whether there is an employer-employee relationship, to violate any provision of subdivision (a), (b), or (c) is liable for any general, special, and consequential damages resulting from each said violation. In addition, the person that directs, solicits, actually induces, or actually causes another person, regardless of whether there is an employer-employee relationship, to violate this section shall be liable for punitive damages to the extent that an employer would be subject to punitive damages pursuant to subdivision (b) of Section 3294. A person who comes within the description of this subdivision is also subject to a civil fine of not less than five thousand dollars (\$5,000) and not more than fifty thousand dollars (\$50,000).

(f) (1) The transmission, publication, broadcast, sale, offer for sale, or other use of any visual image, sound recording, or other physical impression that was taken or captured in violation of subdivision (a), (b), or (c) shall not constitute a violation of this section unless the person, in the first transaction following the taking or capture of the visual image, sound recording, or other physical impression, publicly transmitted, published, broadcast, sold, or offered for sale the visual image, sound recording, or other physical impression with actual knowledge that it was taken or captured in violation of subdivision (a), (b), or (c), and provided compensation, consideration, or remuneration, monetary or otherwise, for the rights to the unlawfully obtained visual image, sound recording, or other physical impression.

(2) For the purposes of paragraph (1), "actual knowledge" means actual awareness, understanding, and recognition, obtained prior to the time at which the person purchased or acquired the visual image, sound recording, or other physical impression, that the visual image, sound recording, or other physical impression was taken or captured in violation of subdivision (a), (b), or (c). The plaintiff shall establish actual knowledge by clear and convincing evidence.

(3) Any person that publicly transmits, publishes, broadcasts, sells, or offers for sale, in any form, medium, format, or work, a visual image, sound recording, or other physical impression that was previously publicly transmitted, published, broadcast, sold, or offered for sale by another person, is exempt from liability under this section.

(4) If a person's first public transmission, publication, broadcast, or sale or offer for sale of a visual image, sound recording, or other physical impression that was taken or captured in violation of subdivision (a), (b), or (c) does not constitute a violation of this section, that person's subsequent public transmission, publication, broadcast, sale, or offer for sale, in any form, medium, format, or work, of the visual image, sound recording, or other physical impression, does not constitute a violation of this section.

(5) This section applies only to a visual image, sound recording, or other physical impression that is captured or taken in California in violation of subdivision (a), (b), or (c) after January 1, 2010, and shall not apply to any visual image, sound recording, or other physical impression taken or captured outside of California.

(6) Nothing in this subdivision shall be construed to impair or limit a special motion to strike pursuant to Section 425.16, 425.17, or 425.18 of the Code of Civil Procedure.

(7) This section shall not be construed to limit all other rights or remedies of the plaintiff in law or equity, including, but not limited to, the publication of private facts.

(g) This section shall not be construed to impair or limit any otherwise lawful activities of law enforcement personnel or employees of governmental agencies or other entities, either public or private, who, in the course and scope of their employment, and supported by an articulable suspicion, attempt to capture any type of visual image, sound recording, or other physical impression of a person during an investigation, surveillance, or monitoring of any conduct to obtain evidence of suspected illegal activity or other misconduct, the suspected violation of any administrative rule or regulation, a suspected fraudulent conduct, or any activity involving a violation of law or business practices or conduct of public officials adversely affecting the public welfare, health, or safety.

(h) In any action pursuant to this section, the court may grant equitable relief, including, but not limited to, an injunction and restraining order against further violations of subdivision (a), (b), or (c).

(i) The rights and remedies provided in this section are cumulative and in addition to any other rights and remedies provided by law.

(j) It is not a defense to a violation of this section that no image, recording, or physical impression was captured or sold.

(k) For the purposes of this section, "for a commercial purpose" means any act done with the expectation of a sale, financial gain, or other consideration. A visual image, sound recording, or other physical impression shall not be found to have been, or intended to have been, captured for a commercial purpose unless it is intended to be, or was in fact, sold, published, or transmitted.

(l) (1) For the purposes of this section, "private, personal, and familial activity" includes, but is not limited to:

(A) Intimate details of the plaintiff's personal life under circumstances in which the plaintiff has a reasonable expectation of privacy.

(B) Interaction with the plaintiff's family or significant others under circumstances in which the plaintiff has a reasonable expectation of privacy.

(C) If and only after the person has been convicted of violating Section 626.8 of the Penal Code, any activity that occurs when minors are present at any location set forth in subdivision (a) of Section 626.8 of the Penal Code.

(D) Any activity that occurs on a residential property under circumstances in which the plaintiff has a reasonable expectation of privacy.

(E) Other aspects of the plaintiff's private affairs or concerns under circumstances in which the plaintiff has a reasonable expectation of privacy.

(2) "Private, personal, and familial activity" does not include illegal or otherwise criminal activity as delineated in subdivision (g). However, "private, personal, and familial activity" shall include the activities of victims of crime in circumstances under which subdivision (a), (b), or (c) would apply.

(m) (1) A proceeding to recover the civil fines specified in subdivision (d) or (e) may be brought in any court of competent jurisdiction by a county counsel or city attorney.

(2) Fines collected pursuant to this subdivision shall be allocated, as follows:

(A) One-half shall be allocated to the prosecuting agency.

(B) One-half shall be deposited in the Arts and Entertainment Fund, which is hereby created in the State Treasury.

(3) Funds in the Arts and Entertainment Fund created pursuant to paragraph (2) may be expended by the California Arts Council, upon appropriation by the Legislature, to issue grants pursuant to the Dixon-Zenovich-Maddy California Arts Act of 1975 (Chapter 9 (commencing with Section 8750) of Division 1 of Title 2 of the Government Code).

(4) The rights and remedies provided in this subdivision are cumulative and in addition to any other rights and remedies provided by law.

(n) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

(Amended by Stats. 2015, Ch. 521, Sec. 1. (AB 856) Effective January 1, 2016.)

Hedge, Emily

From: Greenwood-Meinert, Scott <sgreenwood-meinert@coblentzlaw.com>
Sent: Tuesday, September 1, 2020 1:32 PM
To: Hedge, Emily
Cc: Anderson, Laura
Subject: Request for Modification of Condition of Approval

Follow Up Flag: Follow up
Flag Status: Flagged

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Emily, following up on RGD Acoustic's letter of yesterday indicating that fans can be turned on before 7:00 a.m., as early as 6:45 a.m., the Balloons Above the Valley requests that COA 1.1, and also 4.12(c) to read as follows:

1. We have revised the language as follows.
Hours of Operation
 - a. 6:00 a.m. - Arrive at site.
 - b. 6:45 a.m.- Use of fans for partial inflation of balloons in preparation for launching.
 - c. 7:00 a.m. - Use of burners and other equipment and launches of balloons.
 - d. 9:30 a.m. - Site must be vacated.

I don't mean to be too brief on this, but I am writing another letter regarding application. Please let me know if you need anything else in this regard. Thank you.

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