

Attachment A

Appeal Filed by Martin S. Checov and Timothy J. Bause

APPEAL PACKET-ADDITIONAL SHEETS
Appealing Hard Six Winery: P16-00333, P19-00315

Appellants' Names and Contact Information:

Martin S. Checov
Timothy J. Bause
2031 Diamond Mountain Road (South Fork)
Calistoga, CA 94515
(707) 942-1093
mchecov@omm.com
tbause@aol.com

Reasons for Appeal:

INTRODUCTION

The Planning Commission committed a prejudicial abuse of discretion when it approved Hard Six Winery's use permit applications #P16-00333-UP and P19-00315-UP (the "Project"), approved an exception to the Napa County Road and Street Standards ("RSS"), and adopted a Mitigated Negative Declaration ("MND") for the Project.

The principal reasons for this appeal are that the Planning Commission erroneously concluded that the Project would not adversely affect the public health, safety, and welfare of the County; and that substantial evidence before the Planning Commission shows that the Project could have a number of potentially significant adverse impacts on the environment including, but not limited to, biological resources and public safety. Accordingly, and as a matter of law, the Planning Commission failed to comply with the California Environmental Quality Act, Pub. Res. Code § 21000, *et seq.* ("CEQA"), in adopting the MND and approving the Project without first requiring the preparation of an environmental impact report ("EIR"). Accordingly, and in light of the substantial evidence produced by diverse opponents of the Project (collectively, "Opponents"), the Board of Supervisors ("BOS" or "Board"), in exercising its independent judgment in determining whether the decision was correct, must reverse the Planning Commission and remand the Project for further proceedings or, in the alternative, deny the Project outright.¹ Moreover, good cause exists for a *de novo* review and presentation of additional evidence that could not have been submitted at the time of the October 16, 2019 hearing and decision.

PROJECT BACKGROUND

The Hard Six project is proposed on a 53.04-acre parcel (APN 020-100-014), more than 2.2 miles up

¹ As legal and factual bases of this Appeal, Appellants incorporate by reference all materials submitted to the Planning Commission orally and in writing, including but not limited to the letter from Appellants dated October 15, 2019; the peer review report from Huffman-Broadway Group dated October 9, 2019; the letter from the California Department of Fish and Wildlife dated October 10, 2019; and the letter from George Caloyannidis dated October 12, 2019.

Diamond Mountain Road on land designated Agriculture, Watershed, and Open Space (“AWOS”) and zoned Agricultural Watershed (“AW”).

The Project proposes a 20,000 gallons per year wine production facility; 7,135 square feet of caves; a total of 6,249 visitors per year; water storage tanks; access road improvements; and an expended septic system. The Project will consume 1,127,314 gallons of water per year and will require importation via truck of 87.6% of the grapes necessary for its production. Diamond Mountain Road can only be accessed via Highway 29.² The South Fork is a dead-end road with no other viable outlet in the event of an emergency. Diamond Mountain Road has numerous branches, splitting off onto several other roads, including Pacheteau Road, Sharp Road, Diamond Mountain Road–South Fork, and Diamond Mountain Road–North Fork. There are dozens of homes and vineyards sharing this road. All individuals traveling to homes and vineyards on Diamond Mountain Road must use the single entrance and exit point at the intersection of Diamond Mountain Road and Highway 29.

DISCUSSION—FACTUAL AND LEGAL GROUNDS FOR APPEAL

A. Standard of Review

Pursuant to Napa County Code (“NCC”) § 2.88.070, “[a]ny appeal of a decision of the approving authority for which a notice of appeal has been filed in the manner required by this chapter shall be heard by the board unless withdrawn pursuant to the Section 2.88.060.” Moreover, § 2.88.090 of the NCC requires the BOS to “exercise its independent judgment in determining whether the decision appealed was correct,” and “[u]pon a showing of good cause, the chair of the board may authorize a *de novo* review and/or the presentation of additional evidence which could not have been presented at the time of the decision appealed from.”

Here, good cause exists for a *de novo* review because, as will be shown below, the Planning Commission ignored virtually all of the substantial evidence presented by Opponents pertaining to the public safety, environmental, and other adverse impacts that the Project is likely to create, and in so doing violated numerous provisions of the NCC, the WDO, and the General Plan in approving the Project. Moreover, the Applicant presented new testimony in rebuttal at the hearing with Opponents receiving no opportunity to produce a response. The Project has been the subject of a single public hearing on October 16, 2019, and the staff report for the Project was posted to the County’s website one week prior to that hearing date (October 10, 2019). PG&E initiated a public power safety shut off from October 9-12 in the Calistoga area, which complicated the public’s ability to review and respond to the posted materials. Following the hearing, yet another out-of-control fire and evacuation action in the region underscored the County’s need for heightened attention to environmental and safety considerations presented by developments of this nature in mountainous, forested terrain. Thus, good cause exists for a *de novo* review and the presentation of additional evidence which could not have been presented prior to the Planning Commission’s decision to approve the Project.

² Appellants recognize that Sharp Road eventually connects to Petrified Forest Road. However, that road’s topography and narrowness make it unsafe as a viable egress from the area, and it has been closed to vehicular traffic for many years, with only the efforts of the Diamond Mountain FireSafe Council bringing about a serious prospect of its being opened as a viable emergency egress route in the future.

B. The Grant of a Use Permit to Hard Six Winery Will Adversely Affect the Public Health, Safety and Welfare of the County and its Communities.

Under NCC § 18.124.070(C), the Planning Commission “shall make” a written finding that “[t]he grant of the use permit, as conditioned will not adversely affect the public health, safety or welfare of the county.” While the Planning Commission purported to make an finding that the grant of the Hard Six use permit, “as conditioned, will not adversely affect the public health, safety or welfare of the County of Napa,” that finding places the Project site in a vacuum, with the Planning Commission expressly disregarding the fact that the Project lies on a remote mountaintop—located at the end of 2.2 miles of a steep (approximately 1000 feet in elevation gain) and narrow (primarily one lane), dilapidated mountain road that is frequently strewn with forest debris—and is burdened by innumerable existing dangerous conditions that, if the Project is approved in its current form, will exacerbate and thus adversely affect the environment, public health, safety and welfare of the County of Napa, its residents and any visitors to the facility. The adverse environmental, health, safety and welfare impacts of this Project must be viewed not just from a blinkered, narrow focus on the Project site, but from a wider perspective that includes, at the very least, other residents and property owners on Diamond Mountain Road (or roads accessed by Diamond Mountain Road), as well as any and all current and future users and visitors of Diamond Mountain Road (or roads accessed by Diamond Mountain Road), as all such individuals are within the “County of Napa,” the contextual analysis that is required under NCC § 18.124.070(C).³

Several Opponents of the Hard Six project produced evidence in the form of letters and presentations at the Planning Commission hearing on the Project demonstrating that Diamond Mountain Road, under existing conditions, is unusually hazardous, even treacherous at points, and that the approval of the Project as proposed would dramatically exacerbate those conditions, unquestionably resulting in adverse impacts on the health, safety and welfare of the “County of Napa.” The Staff Report confirms that the proposed project site, along with the residences and properties of numerous neighbors, are located in a “Very High Fire Hazard Severity Zone.” Mr. Caloyannidis’ October 12th letter and enclosed photographs illustrate the sharp turns and difficult maneuvers required to scale the higher reaches of Diamond Mountain Road via which the Project would be accessed. The Applicant responded to such concerns by proposing to substitute shuttle buses for events, but larger transports are precisely the types of vehicles that will have the most difficulty navigating Diamond Mountain Road, and are calculated create obstructions for fire equipment and evacuation access during emergencies (including the fire crises that historically coincide with the timing of the harvest and crush activities during which the Project proposes to host the largest events and numbers of visitors).

In light of all of the above-outlined existing road condition, fire, and safety issues on Diamond Mountain Road (and roads accessed by Diamond Mountain Road), Hard Six’s addition of car trips, bus trips, and truck trips to import grapes on Diamond Mountain Road will not only cause further deterioration of the already perilous physical condition of the road, but will also lead to more accidents, incidents, fires and other public safety issues, especially when the Project seeks to attract 6,249 annual visitors who will be imbibing alcohol and tackling the twists and turns of Diamond Mountain Road.

In summary, the County has systematically failed to consider the health, safety and welfare impacts of the Hard Six Project on the Diamond Mountain community and visitors of Diamond Mountain Road, all of whom are clearly within the “County of Napa.” Such a flagrant omission is in direct violation of NCC

³ Appellants’ property is not merely adjacent to the Project site but, in addition: (1) the driveway, from which the Planning Commission granted an exemption from RSS requirements, crosses more than 100 feet of Appellants’ land pursuant to an easement referred to in the record; and (2) Diamond Mountain Road—South Fork dead-ends at their front door, where visitors missing the hair-pin turn into the Project’s driveway will have no alternative to turn around—all imposing a unique risk burden on their property.

§ 18.124.070(C) and California state law. *See BreakZone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205, 1246 (2000) (determining that “[i]n reaching a decision on an application for a CUP it is also appropriate for an agency to consider traffic, parking, safety, noise and nuisance problems; these clearly represent concerns that are well within the domain of the public interest and public welfare”).

C. The Project is Inappropriately Scaled Relative to Its Remote Mountaintop Location.

The Winery Definition Ordinance (“WDO”) and the 2010 WDO Amendment seek to ensure the protection of not only agricultural interests, but also the public’s safety and welfare by placing reasonable limitations on the size and scope of both production facilities and marketing programs. Of critical importance to the Project is Napa County Resolution No. 2010-48 to the 2010 WDO (Interpretive Resolution to Ordinance No. 1340), Exhibit A, Section III, which is titled “The Appropriate Intensity of Marketing Programs” (jointly referred to as the “2010 WDO”). It declares that:

To ensure that the intensity of winery activities is *appropriately scaled*, the County considers the remoteness of the location and the amount of wine to be produced at a facility when reviewing use permit proposals, and endeavors to ensure a direct relationship between access constraints and on-site marketing and visitation programs (emphasis added).

Opponents of the Hard Six project have furnished the County with evidence that the proposed Project site, which is 2.2 miles and almost a thousand feet in elevation up Diamond Mountain Road, is not only as remote and rural a backwoods location that could be conceived within Napa County, but also suffers from severe and potentially life-threatening access constraints. In combination, these indisputable facts mandate that the County significantly reduce both the volume of wine to be produced at the facility and the on-site marketing and visitation program to a size that is suitable for the remote location.

The Planning Commission erred in abdicating its obligation under the WDO to ensure that the Project is appropriately scaled to the remote and rural location in which it is being proposed. The comparative analysis employed by both the County and the Applicant ignore that many of the cited comparisons with production facilities licensed for more than 10,000 gallons are a mile or more closer to Highway 29, and require less than half the climb up the height of the Mountain.

Taking into consideration the size and scope of the production and marketing activities of the wineries on Diamond Mountain Road, the striking commonality among them is that they are rationally and sensitively scaled—based on either their parcel size or their location on dead-end roads, or both. Given that the Project is being proposed for the dead-end South Fork of Diamond Mountain Road, the same standards and considerations must be applied to Hard Six.

Another factor critical to determining the appropriate volume of wine to be produced at the remote Project location is that only 12.4% of the proposed production will be derived from on-site grapes, requiring an unprecedented magnitude of vehicular transport to the site dwarfing that of the other approved high-elevation Diamond Mountain wineries (which naturally focus on estate production and have never floated a destination custom-crush business plan like that of the Project).

More specifically, as referenced above, NCC § 18.124.070(C) requires the County to find that “[t]he grant of the use permit, as conditioned will not adversely affect the public health, safety or welfare of the county.” As it relates specifically to the Project’s size, and the non-contiguous vineyards relied upon to reach that size, the larger the Project’s permitted production and marketing, the greater the chances are that the public health, safety and welfare will be endangered as result of more car, truck, and other

equipment (or even pedestrian) traffic on Diamond Mountain Road. It was incumbent on the Planning Commission to consider the risks inherent in such a remote site and only grant a permit scaled and tailored to the location; the Board should correct the Planning Commission's failure to do so.

D. The Project is Inconsistent with the Napa County General Plan.

The Planning Commission adopted the staff's recommended finding that the Project is consistent with the Napa County General Plan. However, while this finding recites several specific General Plan provisions, it is almost devoid of even the flimsiest analysis of how those provisions apply to the Project's impacts on public safety.

The first goal of the Safety section of the General Plan provides that "[s]afety considerations will be part of the County's education, outreach, planning, and operations in order to reduce loss of life, injuries, damage to property, and economic and social dislocation resulting from fire, flood, geologic, and other hazards." Goal SAF-1. Reinforcing this mandate, Goal SAF-3 declares that it is the "goal of Napa County to effectively manage forests and watersheds, and to protect homes and businesses from fire and wildfire and minimize potential losses of life and property." Accordingly, Policy SAF- 16 requires that "development in high wildland fire hazard areas shall be designed to minimize hazards to life and property." Policy SAF-20 mandates that "[a]ll new development shall comply with established fire safety standards" and consider the "[a]bility for a safe and efficient fire department response ... [t]raffic flow and ingress/egress for residents and emergency vehicles" and "[p]otential impacts to emergency services and fire department response." Policy SAF-38 requires the "County to achieve the goals, objective, and actions of the [Napa Operational Area Hazard Mitigation Plan (NOAHMP)], including ... [p]romoting a fire safer community ... [and] [m]inimizing the risk of wildfire at the urban interface."

Opponents of the Project have provided incontrovertible evidence outlining the existing fire danger on Diamond Mountain Road, especially because it is a dead-end road, which will hamper rescue and escape efforts. The Project is located approximately 2.2 miles up a dead-end road in a "Very High Fire Hazard Severity Zone," the most hazardous category of rating established by CalFire. Mr. Caloyannidis' October 12th letter documents how vehicles can become "stuck" on Diamond Mountain Road. The Project will introduce some 6,249 visitors per year, which vastly increases the chances of individuals unfamiliar with the area starting a fire or failing to understand how to safely evacuate in the event of a fire. This is completely contrary to the safety goals of the General Plan.⁴

For all of the reasons stated above, the Planning Commission violated several provisions of the Napa County Code, the WDO (and the 2010 Amendment), and the General Plan when it approved the Project.

E. Approval of the Project without First Preparing an EIR Violates CEQA

It is well settled that CEQA establishes a "low threshold" for initial preparation of an environmental impact report ("EIR"), especially when presented with 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 when "[t]here is no substantial evidence, in light of the whole record before the lead agency, that

⁴ Symptomatic of the short shrift given by the Planning Commission to its obligation to conduct "outreach" to the community, the record reflects no consultation whatever with the local Diamond Mountain FireSafe Council, a vital organization carrying the charter to improve fire safety, prevention, escape and response in the face of steadily mounting peril in this zone.

the Project may have a significant effect on the environment,” or when all potentially significant impacts of a project will be avoided or reduced to insignificance. Pub. Res. Code § 21080(c); *see also* CEQA Guidelines 15070(b).8. The CEQA Guidelines provide that substantial evidence “include[s] facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.” CEQA Guidelines § 15384(b). The courts will set aside a mitigated negative declaration if its conclusions are not based on substantial evidence in the record. *Sundstrom v. County of Mendocino*, 202 Cal.App.3d 296, 311 (1988). In addition, “[w]hen assessing whether an EIR is required ... the local agency is required to compare the newly authorized land use with the *actually existing conditions*; comparison of potential impacts ... with potential impacts under the existing general plan is insufficient.” *Christward Ministry v. Superior Court*, 184 Cal. App. 3d 180,190 (1986) (emphasis added); *accord*, *City of Antioch v. City Council*, 187 Cal. App. 3d 1325, 1332 (1986) (determining that “conformity with the general plan for the area ... does not insulate a project from the EIR requirement, where it may be fairly argued that the project will generate significant environmental effects”).

The CEQA Guidelines, 14 Cal. Code Regs. § 15000 et seq., (“CEQA Guidelines”) dictate that an initial study must provide the factual basis, with analysis included, for making the determination that no significant impact will result from the project. CEQA Guidelines § 15063(d)(3). An agency must prepare an EIR whenever it is presented with a “*fair argument*” that a project may have a significant effect on the environment, even if there is also substantial evidence to indicate that the impact is not significant. *No Oil, Inc. v. City of Los Angeles*, 13 Cal.3d 68, 75 (1974); *Friends of B St. v. City of Hayward*, 106 Cal.App.3d 988, 1002 (1980) (emphasis added); Guidelines § 15064(t)(1); *see also* Pub. Res. Code § 21151. Critically, where there are, as here, conflicting opinions in the record regarding the significance of an impact, California courts embrace “a preference for resolving doubts in favor of environmental review when the question is whether any such review is warranted.” *Stanislaus Audubon Soc’y v. County of Stanislaus*, 33 Cal.App.4th 144, 150-51 (1995). For purposes of CEQA, “substantial evidence” is defined as including: “facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.” 14 Cal.Code.Reg. § 15064(f)(5). Thus, under the CEQA statute and regulations, if there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the lead agency “shall treat the effect as significant and shall prepare an EIR.” *Id.* at § 15064(g).

With regard to the Hard Six Project, Opponents produced substantial evidence demonstrating that there is at the very least a “fair argument” that the Project may have substantial environmental effects on biological resources on the delicate ecology of this mountaintop site. Appellants commissioned and submitted a peer review prepared by a professional biologist citing several potentially significant adverse impacts resulting from the Project. *See* Huffman-Broadway Group letter dated October 9, 2019. Potentially significant impacts to biological resources were also documented by the California Department of Fish and Wildlife in its October 10th letter. The Planning Commission ignored these expert opinions, and neither the Planning Commission nor county staff provided a response to rebut the conclusions offered in the letters.

CONCLUSION

For the reasons set forth above, the Planning Commission’s adoption of the MND for the Project should be overturned. The Board of Supervisors should grant a *de novo* review of the Project, and either deny the Project application outright, or remand the Project to the Planning Commission with direction to staff to retain the appropriate qualified experts to conduct an impartial EIR consistent with CEQA requirements, and further require the Project to comply with the Napa County Code, the WDO, and the General Plan as fully elaborated above. Most compellingly, the 2010 WDO Amendment counsels that

careful analysis be conducted in situations where a winery project is to be located in a remote area with access constraints. This Project is the archetype for the kind of development contemplated by the 2010 WDO Amendment—for this reason alone, the Project should have been rejected in its current form at the outset, and following its fatally defective approval by the Planning Commission, must now be sent back to the drawing board.

Timothy J. Baure

Mr. L. S. Chon