

Attachment G

Applicant's Supplemental Information

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Brien F. McMahon
BMcMahon@perkinscoie.com
D. +1.415.344.7165
F. +1.415.344.7365

VIA ELECTRONIC MAIL

Diane Dillon
Chair
Napa County Board of Supervisors
County Administration Building
1195 Third Street
Suite 310
Napa, CA 94559

Laura J. Anderson
Deputy County Counsel
Napa County Office of County Counsel
1195 Third Street
Suite 301
Napa, CA 94559

Re: Hard Six Cellars Winery—Appeal of October 16, 2019 Decision of Napa County Planning Commission to approve application for Use Permit P16-00333

Applicants' Submission of Additional Information Regarding Appeal

Dear Chair Dillon and Ms. Anderson:

Applicants Wayne and Kara Fingerman (“Applicants”) provide this additional information in response to the assertions of Appellants on Appeal. As discussed, the Planning Commission properly found the Project is consistent with the Napa County General Plan and Agricultural Watershed (AW) Zoning District; and complies with the County Winery Definition Ordinance (and interpretive guidance); Zoning Code; Noise Ordinance; Conservation Regulations; and the California Environmental Quality Act (CEQA).

Appellants misinterpret the County’s winery development policies, standards and zoning regulations, and conflate existing environmental conditions on or proximate to Diamond Mountain Road (South Fork) with the Planning Commission’s well-supported findings of no evidence, let alone substantial evidence of any potentially significant *Project-related* environmental effects. Appellants’ assertions regarding the Planning Commission’s review of

the Project do not support a fair argument for an EIR under CEQA or otherwise demonstrate an abuse of discretion warranting reversal of the Planning Commission's approval. The Appeal should be denied.

I. Introduction--The Project

The Project property consists of approximately 53.04 acres within the AW (Agricultural Watershed) zoning district at 1755 S. Fork Diamond Mountain Road; APN: 020-100-014. The site currently includes four acres of vineyards with authorization to plant an additional two acres for a total of six acres of on-site vineyards. The Applicants also own four acres of vineyards on Hennessey Ridge.

The Project seeks construction of a new 20,000 gallon per year winery; 3,969 square foot two-story (main roof height of approximately 23 feet) winery structure, 7,135 square foot cave, 5,486 square foot uncovered work area, 1,185 square foot outdoor hospitality area and 168 square foot pump house and removal of an existing barn. The Project also includes installation of landscaping and restoration of the existing onsite pond; construction of a new wastewater system and associated infrastructure; and construction of a 5,000-gallon water storage tank and a 50,000-gallon fire protection water storage tank. The Project development area is 0.085+/- acres, and winery coverage is 0.76 acres (1.3%), with a 22% Project accessory / production ratio.

Applicants also sought approval of a Conservation Regulations Exception to allow re-grading of the existing access driveway to encroach into the required 55-foot stream setback by approximately 30 to 35 square feet; and an exception to the Napa County Road and Street Standards to the State Responsibility Area Fire Safe Regulations to allow for a reduction in

commercial width, a non-standard driveway connection to the nearest public road, and for a portion of road with slopes exceeding 18 percent but less than 20 percent without transition zones (sections of road not exceeding 10 percent for 100 feet in length immediately preceding and ensuing the section of road with the roadway grade of 18 to 20 percent).

The Project visitation includes daily tours and tastings by appointment only for a maximum of 16 persons per day and 80 maximum visitors per week¹, with included wine and food pairings. The Project Marketing Program includes two annual events of a maximum of 75 Persons² and one annual event with a maximum of 125 persons.³ On-premises consumption of wine produced on-site and purchased from the winery will occur in the outdoor patio and near the pond.

¹ Applicants originally requested 112 weekly visitors; the Planning Commission modified this to a maximum of 80.

² Applicants originally requested four 75-person events; the Planning Commission approved two.

³ Auction Napa Valley (ANV) events are not be included in the Project's marketing plan because they are covered by ANV's Category 5 Temporary Permit.

The Project will employ four (4) employees (three (3) full time and one (1) part-time) non harvest; two (2) additional employees (two (2) part time) during harvest, for a total maximum of six (6) employees.

II. Project Approval

The Project history is detailed in Staff's Board Agenda Letter prepared for the Planning Commission. Staff found the Project consistent with the County General Plan; AW Zoning Regulations; Winery Definition Ordinance (WDO); the County Zoning Code; Conservation Regulations; and that any potentially significant environmental impacts could be mitigated to less than significant. Staff recommended adoption of a Mitigated Negative Declaration and approval of the requested Conservation Regulations and Road and Street Standards Exceptions.

On October 16, 2019, the Planning Commission, on a 4-1 vote⁴, agreed with Staff's recommendations and approved the Project.

III. Appellants' Appeal

On November 13, 2019, Appellants appealed. Appellants' Appeal Packet asserted the following four purported grounds for appeal:

- The Project will adversely affect the Public Health, Safety and Welfare of the County.
- The Project is inconsistent with the WDO and inappropriately scaled relative to its purportedly remote mountaintop location.
- The Project is inconsistent with the Napa County General Plan.
- The Planning Commission erred by not requiring an EIR for the Project under CEQA with respect to biological resources.

Appellants' assertions and each of them are without merit. The Appeal should be denied.

IV. Standard of Review on Appeal

The Board of Supervisors exercises its independent judgment to determine whether the Planning Commission's decision was correct, based on review of the documentary record, including a transcript of the hearing, and such additional evidence which could not have been presented at the time the decision appealed was made. No other evidence shall be permitted, except upon a showing of good cause. Napa County Code §2.88.090.

For the reasons more particularly set forth in Applicants' Opposition to Appellants' for a *de novo* review and to augment the record, Applicants' maintain Appellants have not demonstrated good

⁴ Commissioner Anne Cottrell cast the lone "no" vote.

cause for a *de novo* review or for the Board's consideration of the untimely Reax Engineering fire safety assessment regarding the South Fork Diamond Mountain Road area submitted on January 20, 2020. Appellants submitted extensive written opposition and an environmental analysis by their environmental consultant and testified at the Planning Commission public hearing. Appellants were afforded ample due process to present their opposition fully at the Planning Commission public hearing. There is no justification for more.

- V. The Planning Commission Correctly Approved the Project Use Permit Application.
- A. The Project Will Not Adversely Affect the Public Health, Safety or Welfare of the County of Napa.

The Initial Study determined that Project will comply with current California Department of Forestry and California Building Code requirements for fire safety. The Project findings specify that various County divisions and departments have reviewed the Project. As discussed in Staff's report, these include the Napa County Fire Department, Engineering Division, and Public Works Department. These commented regarding site access, proposed wastewater disposal system, parking, building permits, and fire protection. The Napa County Fire Department further determined that Project wildfire impacts, as conditioned, would be less than significant.

Conditions incorporate these comments into the Project to ensure the protection of the public health, safety, and welfare. Appellants' assertions that South Fork Diamond Mountain Road is not safe due to traffic and fire hazard issues, and that allowing the Project will adversely impact public safety are contrary to the evidence presented to and fully considered by the Planning Commission. Accordingly, the Planning Commission properly found that granting the Project Use Permit, as conditioned, will not adversely affect the health, safety or welfare of the County.

- B. The Project Fully Complies with the WDO and County Zoning Ordinance and is Appropriate in Scale for its Location.

Appellants assert that the Project should not have been approved because a 20,000-gallon winery is out of scale for the purportedly "remote" Project mountaintop location and purportedly is inconsistent with the WDO. Appellants are wrong.

Staff provided a Winery Comparison Analysis with data regarding seven other producing wineries and one approved winery within a mile of the Project site. Three had approved production and weekly visitation and five had a greater number of marketing events than that approved for the Project. The Planning Commission correctly found that the Project is consistent with the AW Zoning District regulations. Wineries (Napa County Code §18.08.640) and agriculture accessory uses in connection with a winery (Napa County Code §18.20.030) are permitted in the AW District subject to an approved use permit. The Project complies with the WDO and all other requirements of the County Zoning Code.

Appellants erroneously assert that WDO Resolution 2010-48 precludes approval of the Project because of its location on the South Fork of Diamond Mountain Road. Resolution 2010-48, which provides “interpretive guidance” to the Board in reviewing winery-related sections of the County’s Zoning Ordinance, complements, not supersedes the Zoning Ordinance, and expressly recites that in the event of any conflicts, the Zoning Ordinance prevails. Resolution 2010-48 states only that the Board considers the remoteness of the location and quantity of wine to be produced and endeavors to ensure a direct relationship between access constraints and marketing and visitor programs.

The Planning Commission acknowledged Applicants’ neighbors’ concerns but found the Project location and scale appropriate and consistent with General Plan policies, the WDO and the Zoning Code. Indeed, members of the Planning Commission variously acknowledged that the Project property is zoned for agricultural uses such as the Project and the Planning Commission did not have policy to deny the Project based on mere location and should not attempt to create broader policy on a project-by-project basis in carrying out the County’s existing land use rules; that the Project proposed 20,000-gallon winery was an appropriate request for the location; and that Project road access is adequate.

C. The Project is Consistent with the General Plan.

Courts give great deference to an agency's determination concerning general plan consistency due to an agency’s “unique competence” to interpret its policies and the need for broad discretion to balance and construe those policies in light of the purposes of the General Plan. *Pfeiffer v. City of Sunnyvale City Council*, 200 Ca1.App.4th 1552, 1562-63. (2011); *see also Friends of Lagoon Valley v. City of Vacaville*, 154 Ca1.App.4th 807, 816 (2007). A project need not be an "exact match" with a General Plan, only compatible with its objectives and policies; consistency findings can be reversed only if based on evidence from which no reasonable person could have reached the same conclusion based on the evidence presented. *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* 102 Cal.App.4th 656,678 (2002). The Planning Commission engaged in precisely this reasoned balancing analysis when it found the Project consistent with the County General Plan.

The General Plan land use designation for the subject parcel is Agriculture Watershed. Agricultural Preservation and Land Use Goal AG/LU-1 guides the County to “preserve existing agricultural land uses and plan for agriculture and related activities as the primary land uses in Napa County.” Goal AG/LU-3 states that the County should “support the economic viability of agriculture, including grape growing, winemaking, other types of agriculture, and supporting industries to ensure the preservation of agricultural lands.” Goal AG/LU-3 and Policy AG/LU-2 recognize wineries as agricultural uses. The Project’s wine processing use supports the economic viability of agriculture within the County, consistent with Goal AG/LU-3 and Policy AG/LU-4. Authorizing a winery at the Project site supports the economic viability of the vineyard use on the property, consistent with Economic Development Goal E-1 and Policy E-1.

The General Plan generally recognizes the “Right to Farm”, specifically referenced in Policy AG/LU-15 and throughout the County Code. “Right to Farm” provisions ensure that agriculture remains the primary land use in Napa County and is not threatened by potentially competing uses or neighbor complaints. The General Plan reinforces the County’s long-standing commitment to agricultural preservation, urban centered growth, and resource conservation.⁵

D. The Planning Commission Correctly Adopted a Mitigated Negative Declaration for the Project and Properly Concluded there were No Unmitigated Project Biological Impacts.

In their Appeal, Appellants assert only purportedly significant biological impacts “on the delicate ecology of this mountaintop site” they claim will occur if the Project is approved. Appellants cite as evidence a “peer review” dated October 9, 2019 prepared by Huffman-Broadway Group a professional biologist citing several potentially significant adverse biological impacts resulting from the Project. Appellants further assert that potentially significant impacts to biological resources were also documented by the California Department of Fish and Wildlife in its October 10, 2019 letter. Appellants raise no additional CEQA issues in their Appeal.⁶

Pursuant to Napa County Code §2.88.050 A (4) and (5) governing the conduct of Appeals, any issue not raised by the appellant in the appeal packet shall be deemed waived, and where the basis of the appeal is an abuse of discretion of the approving authority (here, the Planning Commission) the grounds of appeal and the factual or legal basis for such grounds must be expressly stated or they are deemed waived. Appellants are deemed to have waived any CEQA arguments other than those directed to the asserted biological impacts of the Project

The Planning Commission appropriately focused on the appropriate scope of CEQA review-- does the Project have the potential to significantly impact the environment. The Planning Commission correctly concluded that with designated mitigation incorporated, it does not; its adoption of a Mitigated Negative Declaration was proper. Appellants failed to show that the record contains substantial evidence that would support a fair argument of a significant environmental impact related to biological resources. Their CEQA claim must be rejected.

⁵ As noted in the Commission’s Findings, the Project is also consistent with numerous additional General Plan Conservation Goals and Policies, including without limitation, relating to the use of available groundwater; availability of an adequate water supply; maintaining site recharge potential to the extent feasible; avoidance of significant adverse well interference or groundwater discharge; reducing landscaping water demand; incorporating operational features to reduce emissions of pollutants; and compliance with established fire safety standards.

⁶ Appellants’ Appeal Packet additionally raises fire safety concerns, but only in the context of the Planning Commission’s health, safety and welfare findings, not CEQA.

1. The Fair Argument Standard Requires Appellants to Demonstrate Substantial Evidence That The Project Has The Potential To Cause A Significant Environmental Impact.

Appellants “bear[] the burden of proof to demonstrate by citation to the record the existence of substantial evidence supporting a fair argument of significant environmental impact.” (Jensen v. City of Santa Rosa (2018) 23 Cal.App.5th 877, 886.) “Substantial evidence” is “fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact.” (Pub. Res. Code § 21080(e)(1); see also CEQA Guidelines (“Guidelines”) 14 § 15384(b).) It is “evidence which is of ‘ponderable legal significance . . . reasonable in nature, credible, and of solid value.’” (*Stanislaus Audubon Soc’y, Inc. v. Cty. of Stanislaus* (1995) 33 Cal.App.4th 144, 152 (quoting *Lucas Valley Homeowners Ass’n v. Cty. of Marin* (1991) 233 Cal.App.3d 130, 142).) Argument; speculation; unsubstantiated opinion or narrative; clearly inaccurate or erroneous evidence; evidence of social or economic impacts that do not physically impact the environment; and generalized concerns, fears, and suspicions about potential environmental impacts are not substantial evidence. (Pub. Res. Code §§ 21080(e)(2), 21082.2(c); Guidelines § 15384(a); see *Porterville Citizens for Responsible Hillside Dev. v. City of Porterville* (2007) 157 Cal.App.4th 885, 905 (general objections to project density not substantial evidence); *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 592 (generalized objections regarding aesthetic merit of building in urban area not substantial evidence).)

Appellants must further demonstrate that environmental impacts are significant. A “significant effect on the environment” is “a substantial, or potentially substantial, adverse change in the environment.” (Pub. Res. Code § 21068; Guidelines § 15382.) Determination of significance “calls for careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data.” (Guidelines § 15064(b)(1).) “The lead agency has substantial discretion in determining the appropriate threshold of significance to evaluate the severity of a particular impact.” (Jensen, *supra*, 23 Cal.App.5th at 885 (citation omitted).)

CEQA does not require analysis of social impacts or “community character” of a project that does not result in significant physical effects on the environment. *See Preserve Poway v. City of Poway*, 245 Cal. App. 4th 560 (2016) (psychological and social impact of replacement of horse facility with homes, i.e., community character concerns, not a significant environmental effect under CEQA). Nor does CEQA require an agency to consider the effects of existing conditions on a proposed project's future users or residents. CEQA mandates only an analysis of how a project might exacerbate existing environmental hazards. *California Building Industry Association v. Bay Area Air Quality Management District*, 62 Cal. 4th 369 (2015)

Under the “fair argument standard”, the Mitigated Negative Declaration may only be set aside if there is (1) *substantial* evidence (2) sufficient to support a *fair* argument (3) that the Project may have a *significant* effect on the environment based on the public agency’s applicable thresholds of significance. *Rominger v. Cnty. of Colusa*, 229 Cal. App. 4th 690, 713 (2014); *Citizens for Responsible Dev. v. City of W. Hollywood*, 39 Cal. App. 4th 490, 498–99 (1995).

2. Appellants Failed to Identify Substantial Evidence To Support A Fair Argument of Any Significant Project-Related Biological Impact.

Appellants assert the Project would significantly impact biological resources purportedly associated with: filling the onsite pond; rare plant mitigation; present erosion issues allegedly related to the proposed roadway improvements to allow regrading of the existing access driveway, and result in “tree loss and vegetation removal”. Staff’s thorough analysis of biological issues in the Initial Study (and as later summarized to the Planning Commission in the Board Agenda Letter concluded that the Project as mitigated would not result in significant biological impacts. Appellants’ consultant does not raise a fair argument to the contrary.

Staff found two special-status plants present within the study area that are listed by the California Native Plant Society (CNPS): Calistoga Ceanothus and Napa False Indigo. While these plants do not have State or Federal Listing, they are listed by the California Native Plant Society in Applicants’ Special-Status Plant Survey. Since avoidance of all special-status plants may be impractical, a mitigation plan was developed which addresses these special-status plants.

An assessment for Northern Spotted Owls was conducted and determined that the closest known Northern Spotted Owl territory is located just over a half-mile from the Project area. Site topography would ensure that noise from the project’s construction activities would not disturb the Northern Spotted Owl within their activity center. Staff determined the Project is located in unsuitable Northern Spotted Owl habitat and would not alter any Northern Spotted Owl habitat.

Sensitive animal species which could occur on the Project site include special-status birds and the western pond turtle.

Staff recommended (and the Planning Commission approved) the implementation of mitigation measures 6.12.a (special-status plants), 6.12.b (special-status bird species), and 6.12.c (western pond turtle) would reduce potentially significant impacts to a level of less than significant. In addition, if any placement of fill within the fresh water marsh of the pond identified in the Delineation of Potential Jurisdictional Waters on the Project site is proposed, further mitigation measure 6.12.d requires that consultation and permitting must be obtained from the U.S. Regional Water Quality Control Board and California Department of Fish and Wildlife prior to and during Project construction.

Appellants and their consultant fail to demonstrate why these mitigation measures would not be sufficient to reduce Project biological impacts to less than significant.

An erosion control plan or equivalent NPDES stormwater management plan, has been prepared in accordance with Section 18.108.080 and has been approved by the Director or designee. Appellants similarly fail to demonstrate why the approved erosion control plan, adopted in

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compliance with the County Code and supervised by appropriate County staff, would not be adequate to prevent any potentially significant erosion-related impacts.

For the foregoing reasons, the Appeal should be denied.

Very truly yours,

A handwritten signature in blue ink that reads "Brien F. McMahon". The signature is written in a cursive, flowing style.

Brien F. McMahon

cc: Adam Hoffman Esq. (via e-mail)
Robia Crisp, Esq. (via e-mail)