

## **Attachment C**

Appellants' Requests for Good Cause and  
Applicant's Opposition Thereto

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January 20, 2020

**VIA E-MAIL [Diane.Dillon@countyofnapa.org](mailto:Diane.Dillon@countyofnapa.org)**

Supervisor Diane Dillon  
Napa County Board of Supervisors  
Administrative Building  
1195 Third Street  
Napa, CA 94559

**Re: Hard Six Cellars Appeal Hearing  
Appellants' Request for De Novo Hearing and Request to Augment the Record**

Dear Chair Dillon:

As you know, this office represents Martin S. Checov and Timothy J. Bause (the "Appellants"), the owners and residents of the property located at 2031 Diamond Mountain Road in Calistoga, immediately south of, and adjacent to, the property located at 1755 Diamond Mountain Road, which is proposed for the development of the 20,000 gallon per year Hard Six Winery (the "Project"). The Planning Commission approved the Project on October 16, 2019 and our clients timely filed an appeal on November 13, 2019, and requested both a de novo hearing before the Board of Supervisors and an augmentation of the record with additional evidence that could not have been submitted at the time of the Planning Commission hearing.

We are writing to supplement the request for a de novo hearing and augmentation of the record based on good cause. As discussed in detail below, the Planning Commission failed to consider comments on the environmental document that included substantial evidence that significant environmental impacts associated with the Project may occur, and failed to make adequate findings to support its decision to approve the Project.

In this case, exceptional circumstances that precluded the Planning Commission from doing so included the following: (1) a public comment period for the Project's environmental document that ended the day before the Planning Commission hearing, leaving very little time for adequate response prior to hearing; (2) the submission of numerous, substantive comment letters and late correspondence that resulted in new, last-minute conditions of approval, mitigation measures and changes to the Project; and (3) a PG&E power outage in the days preceding the hearing that impeded communication and access to information. Moreover, as a matter of law, CEQA mandates de novo review by a board of supervisors that is required to make specific findings regarding significant environmental effects identified in an environmental document. (See *Vedanta Society of Southern California v. California Quartet* (2000) 84 Cal.App.4th 517, 529 ["CEQA requires not only de novo review by a board of supervisors, but de novo fact finding as well."].)

Accordingly, we respectfully request that you grant both a de novo review of the appeal by the Board of Supervisors and an augmentation of the record with an expert report responsive to matters raised for the first time at the October 16, 2019 Planning Commission hearing as they relate to traffic and safety.

#### **A. The Project and Timeline for Approval**

1. The Project. The Project site is currently developed with a single family residence, barn, a swimming pool, two 10,000-gallon water storage tanks, approximately four acres of vineyards, and a pond. The proposed Project includes the demolition of the existing barn and construction a 7,135 square foot wine cave, a two-story, 3,969 square foot winery structure, a 5,486 square foot outdoor work area, a 1,185 square foot outdoor hospitality patio, and an accessory pumphouse structure, together with four parking spaces, access road improvements, a wastewater treatment system, new water storage tanks, and reconfiguration of the existing pond that involves filling portions of it with cave spoils. The work proposed for the pond will involve removing it from service for an indefinite period of time, and then eventually reestablishing a pond in the same location, a process they describe as “restoring” the pond.

2. Required Entitlements. The proposed Project requires the County’s approval of the following entitlements: (1) a Winery Use Permit (P16-00333) for a new 20,000 gallon winery and Marketing Plan (the “Use Permit”); (2) an exception to the Napa County Road and Street Standards to allow for a reduction in commercial driveway width, a non-standard driveway in connection to the nearest public road, and for a portion of road with slopes exceeding 18% but less than 20% without transition zones (the “RSS Exception”); and (3) a Use Permit for an Exception to Conservation Regulations (P19-00315) to allow re-grading of the existing access driveway to encroach into the required 55-foot stream setback (the “Use Permit Exception”). A portion of the driveway that is greater than 100 feet in length is located within an easement on our clients’ property.

3. Permit and Environmental Review Processing Timeline. For purposes of satisfying the requirements of CEQA, Napa County Planning, Building, & Environmental Services (the Planning Department”) prepared an Initial Study and Mitigated Negative Declaration (“IS/MND”)<sup>1</sup> and filed it with the State Clearinghouse on September 12, 2019, with a recommendation for distribution to the California Department of Fish and Wildlife (“CDFW”) and the Regional Water Quality Control Board (“RWQCB”).

- On Friday, September 13, 2019, the 30-day public review period for the IS/MND began.

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<sup>1</sup> While the IS/MD utilizes a checklist form updated January 2019, with the exception of the Wastewater Feasibility Report prepared by Delta Consulting & Engineering of St. Helena dated May 16, 2016 and revised January 18, 2019, the analyses contained in the IS/MND are outdated and based on studies conducted in 2016 and 2017, including (1) the Water Availability Analysis prepared by Richard Slade & Associates, LLC dated February 9, 2017, (2) the Biological Habitat Evaluation Report prepared by Pacific Biology dated October 2016; (3) Delineation of Potential Jurisdictional Waters prepared by Vollmar Natural Lands Consulting dated October 2016; and (4) Traffic Impact Report prepared by Mark D. Crane dated January 14, 2017 (utilizing traffic counts taken in April 2016).

- On September 13, 2019, the County also published notice of public hearing on the Project scheduled for October 16, 2019.
- On October 8, 2019, PG&E announced a planned power safety shutoff for extreme fire danger due to forecasted high wind.
- Beginning on October 9, 2019, a public power outage caused major disruptions throughout the County and impacted governmental functions, including the Planning Department's ability to distribute information effectively, and to receive, review, and respond to comments, as well as the ability of the public to access, review, and respond to the same. The power outage continued through October 12, 2019.
- On October 10, 2019, the Planning Department released the staff report prepared for the Project (the "Staff Report").
- Prior to hearing, the County received numerous comments, including a letter from an interested Native American Tribe requesting consultation and specified mitigation measures, a letter from CDFW requesting specific mitigation measures relating to biological resources, and a letter from the Appellants, including an independent biological assessment.
- On October 15, 2019, the 30-day public review period for the IS/MND ended.
- On October 16, 2019, the Planning Commission conducted its one and only public hearing regarding the Project.

## **B. Good Cause Supports Granting De Novo Review by the Board**

Section 2.88.090.A of the Napa County Code provides that in hearing the appeal, the board shall exercise its independent judgment in determining whether the decision appealed was correct. Pursuant to subsection B, "[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." In other words, in hearing the appeal, the Board is required to exercise its independent judgment in reviewing the Planning Commission's decision for error, or upon a showing of good cause, may make a wholly independent decision on the proposed Project. We understand that a finding of "good cause" must be supported by specific facts and a rationale, *e.g.*, a substantial reason.

Good cause supports a de novo review by the Board of Supervisors that allows it to take a fresh look at the proposed Project without any obligation to accept the interpretations, conclusions, and findings of the Planning Commission because the Planning Commission was not fully apprised of all of the available evidence. As discussed in detail below and setting aside substantive issues raised in the comment letters, the timeline and circumstances immediately

preceding the public hearing resulted, in part, in the Planning Commission's failure to consider all of the relevant evidence in the record.<sup>2</sup>

1. Lack of Opportunity to Consider Comments on the Project and IS/MND.

Neither County staff nor members of the public were afforded enough time to review, prepare, submit, access, and respond to a substantial amount of information in the days preceding the hearing. Consequently, key analyses provided by staff regarding the Project's impacts in terms of traffic, safety, water supply and quality, and biological resources were presented to the public for the first time at the hearing. Under CEQA, a lead agency cannot insulate a CEQA document from public scrutiny by adding key disclosures or analyses after a public comment period closes; preventing public access in that way would be "inconsistent with the purpose of CEQA. . . ." (See *Friends of Old Trees v. Dept. of Forestry & Fire* (1997) 52 Cal.App.4th 1383, 1402, discussing *Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal. App.3d 1043, 1052.)

As a procedural matter, the Planning Department took an ad hoc approach to responding to comments, providing limited written responses to comments on the IS/MND and improperly adding new mitigation measures addressing previously unidentified impacts as conditions of Project approval, with no corresponding revisions to the IS/MND or Mitigation Monitoring and Reporting Program and without any apparent consideration of whether the IS/MND and its Mitigation Monitoring and Reporting Program should be recirculated. CEQA Guidelines section 15073.5 requires a lead agency to recirculate a negative declaration when the document is substantially revised after its public release but before its adoption. For purposes of determining whether recirculation is required, a "substantial revision" of the negative declaration is defined to mean "either (1) a new, avoidable significant effect is identified and mitigation measures or project revisions must be added in order to reduce the effect to insignificance, or (2) the lead agency determines that the proposed mitigation measures or project revisions will not reduce potential effects to less than significance and new measures or revisions must be required." (14 Cal.Code Regs., § 15073.5.)

2. Omission of Requisite Finding Relating to Comments on the IS/MND.

The Planning Commission's failure to consider the IS/MND, together with comments and responses is evidenced in the adopted findings. Specifically, in approving the Project, the Planning Commission failed to make the requisite finding that there is no substantial evidence that the Project will have a significant effect on the environment based on "the whole record before it (including the initial study and any comments received)" during the public-review process. (14 Cal. Code Regs., § 15074(b).) Here, seven recommended findings were made

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<sup>2</sup> Denying an opportunity for a de novo hearing is fundamentally inconsistent with the express terms of Public Resources Code 21177 and the doctrine of exhaustion of administrative remedies. The exhaustion doctrine "is fully served when parties raise all issues before the administrative body with ultimate or final responsibility to approve or disapprove the project, *even if those issues were not raised before subsidiary bodies in earlier hearings.*" (*Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 594, emphasis added; see also *ibid.* ["Our interpretation of section 21177 is consistent with the judicially created doctrine of exhaustion of administrative remedies the Legislature sought to codify when it adopted section 21177."].)

with regard to environmental review and none reflect the Planning Commission's consideration of the comments received during the public review process.

3. Misinformation and Incomplete Information Presented at Hearing.

As mentioned above, numerous comment letters on the IS/MND were submitted, including the following: (1) a letter from Middletown Rancheria Tribal Historic Preservation Department dated September 4, 2019, requesting consultation; (2) a letter from the California Department of Fish and Wildlife, a Trustee Agency, dated October 10, 2019; (3) a letter from the Appellants dated October 15, 2019, that included an expert report prepared by Huffman-Broadway Group, Inc., regarding biological resources; and (4) additional correspondence from members of the public expressing concerns regarding the Project's potential environmental impacts, particularly with respect to traffic, water supply, the scope and intensity of the Project, and biological resources.

At the hearing, staff provided inaccurate and incomplete information relating to the comment letters, largely dismissing significant environmental issues.

i. Tribal Cultural Resources

The comment letter submitted by the Middletown Rancheria Tribal Historic Preservation Department (the "Tribe") requested consultation and proposed five new mitigation measures to mitigate potential impact to tribal cultural resources during ground disturbing activities occurring in conjunction with the Project. At the hearing, planning staff indicated the letter was untimely but that the Tribe's concerns were nonetheless resolved with a new Condition of Approval to require an onsite meeting with the tribe and the applicant before project construction begins. (Transcript of Videorecorded Proceedings, Napa County Planning Commission Meeting of October 16, 2019, In Re: Item 7B Wayne and Kara Fingerman/Hard Six Cellars Winery/Use Permit #P16-00333 and Use Permit Exception to Conservation Regulations #19-00315 and Exception to the Napa County Road and Street Standards ("Transcript"), pp. 6-7 at line 19.)

Although the comment letter, dated September 4, 2019, was untimely under the notice and consultation requirements proscribed by Assembly Bill 50, it was not untimely for purposes of providing public comment on the IS/MND. At a minimum, the Planning Commission should have had the opportunity to consider the concerns raised by the Tribe, and the feasibility of the proposed mitigation measures to make an informed decision.

ii. Biological Resources

The Planning Department addressed the CDFW letter in a supplemental staff memo prepared after the Staff Report was published. At the hearing, planning staff explained, "So moving on to correspondence that you received after the Staff Report was published, you'll notice there's a PC memo. Within that there is a ... letter from the California Department of Fish and Wildlife. They outline some concerns with our biological resources analysis. As a result of that we prepared a Staff memo with some recommended changes or additions to, I think, about three mitigation measures." (Transcript, p. 7, at line 5.) Per the staff memo dated October 16, 2019, the draft recommended Conditions of Approval were revised to add three new Mitigation Measures MM BIO-5, MM BIO-6, MM BIO-7.

Again, the new mitigation measures were added without any discussion as to whether and/or how the County determined that such revisions did not require recirculation of the IS/MND pursuant to CEQA Guidelines section 15073.5, and the new mitigation measures were not added to the IS/MND or the Mitigation Monitoring and Reporting Program as required by CEQA. (See *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 655-656 [holding lead agency cannot propose mitigation measures and assume their efficacy without disclosing the extent and severity of underlying impacts in an appropriate CEQA document].)

### iii. Water Quality

The Appellants' letter transmitting the biological assessment they commissioned raised issues of potential environmental impacts relating to the filling of the existing pond, which would fall within the jurisdiction of the Regional Water Quality Control Board and potentially require a Lake and Streambed Alteration agreement with CDFW, as well as issues relating to rare plant mitigation that could require consultation with CDFW. At the hearing, however, staff explained that any concerns of the State were addressed:

One thing I did want to point out is in looking at the independent biological assessment, throughout the letter it alludes to the State may or may not permit this, concerns of what the State may say. In this case, though, we're lucky, we don't have to guess because we have a letter from the State, which outlines their concerns, and that's actually what our memo seeks to address with the Revised Conditions. So we feel like the State concerns have been addressed as part of that memo you have before you.

(Transcript, pp. 7-8 at line 21.) Even assuming for the sake of argument that CDFW comments were actually addressed, the issues relating to the requirements of the RWQCB raised in the expert report were entirely ignored. The Planning Commission, again, did not (or could not) consider substantial evidence relating to potential water quality impacts and concerns relating to filling the existing pond with cave spoils. And the new conditions were not recirculated, as required. (See 14 Cal. Code Regs., § 15073.5.)

In addition to the foregoing instances of the Planning Commission being presented with incomplete or inaccurate information regarding the comments on the IS/MND, questions about basic facts raised at the hearing, including whether Diamond Mountain Road is a two-lane or one-lane road, went unanswered. For example, the IS/MND (at page 23) and related Traffic Impact Study (at page 6) erroneously describe Diamond Mountain Road as a narrow, two-lane, rural County collector road. But at the public hearing, numerous commenters pointed out that the road is a single-lane road. (Transcript, p. 29 at line 14, p. 33 at line 6, p. 34 at line 6.) On rebuttal, the representative for the Project applicant offered detailed, anecdotal testimony relating to her ability to maneuver around a mail truck, a grape truck, a UPS truck, "and cars of all sizes," earlier in the week while in a vineyard truck, and yet she provided no clarification on this basic point—whether the road is a one- or two-lane road—nor was any confirmation sought by the commissioners. (Transcript, p. 41 at line 1.)

### **C. Good Cause Supports an Augmentation of the Record**

In addition to the foregoing, which support a finding of good cause for a de novo review by the Board of Supervisors, good cause supports an augmentation of the record because modifications to the Project's marketing plan, made for the first time at the hearing, resulted in an increase in the number of marketing events that would utilize shuttle operations. Shuttle service, which is a mitigation measure identified in the IS/MND to be provided for events for up to 125 people, was intended to mitigate broader transportation and safety impacts of the Project. As approved, shuttle operations would be allowed for events for up to 75 people (as opposed to events for up to 125 people). This resulted in a greater number of events per year that would utilize shuttle services, without any consideration for the impacts of the shuttle trips themselves and failing to address the broader concerns in a meaningful way. When considered together with the RSS Exception, which will allow a narrower road width than required under County standards and eliminates requirements for turnarounds and curves, the proposed shuttle operations raised new concerns relating to traffic and public safety. The Appellants retained an independent consultant to evaluate the potential impacts of the proposed shuttle operations, which require modification of Mitigation Measure MM-Trans-1, and seek to augment the record with the final report, which could not have been prepared prior to the Planning Commission's acceptance and approval of staff's recommendation at the hearing.

In addition, the Board should take into consideration the publicly available fire crises and evacuation advisories for Calistoga that were issued subsequent to the Planning Commission's action and underscore the need for de novo review and augmentation of the record with respect to matters of public safety. In the same vein, the Board should take into consideration the December 2019 Risk Assessment Report issued by the Diamond Mountain Firesafe Council.<sup>3</sup> The Risk Assessment Report emphasizes the need to undertake fire safety projects, including the urgent mandate to improve access "by widening areas for turnouts wherever possible," in direct contradiction to the Planning Commission's approval of the Project's access driveway (a significant portion of which lies on our client's property) that is *narrower* even than the existing minimum Napa County Road and Street Standards. (Risk Assessment Report, p. 30.)

Notably, at the planning commission hearing, Chair Gallagher also expressed frustration regarding the lack of any policy guidance from the Board relating to remote wineries that might otherwise have served as a formal basis to deny the Project of necessity. (Transcript, p. 51 at lines 24-28, p. 52 at lines 14-26.) In the absence of Countywide policy guidance on remote wineries, the Board should take de novo review and consider all available and up to date information pertaining to the Project's impacts on life safety.

### **D. Due Process Requires De Novo Review by the Board**

The fundamental requirements of procedural due process are (1) adequate notice, to give the party a chance to be heard before property interests are disturbed, and (2) the opportunity to be heard before a fair and impartial hearing body. (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612.) Before a person is deprived of a recognized property right, they have a right to present their position to the decisionmaking body at a fair hearing that is appropriate to the

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<sup>3</sup> The Risk Assessment Report is available at: [https://www.dropbox.com/sh/c1v76i20plkthho/AAAWbNM\\_mByO04Kn4l1SxulCa?dl=0](https://www.dropbox.com/sh/c1v76i20plkthho/AAAWbNM_mByO04Kn4l1SxulCa?dl=0) (as of January 20, 2020).



nature of the case. (*Id.* at 612.) Here, the Appellants own the property subject to the easement within which the Project applicant proposes to make certain driveway improvements under the Use Permit Exception, which potentially will be overburdened by the use serving the proposed commercial winery as opposed to the single family home, as contemplated when the easement was originally granted. As such, the Appellants' property rights are at stake and compel a de novo review by the Board as well as an augmentation of the record with pertinent information relating to issues raised at the Planning Commission hearing.

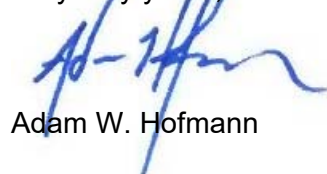
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The Appellants have engaged in the permit approval and environmental review processes in good faith and have made diligent efforts to submit reasonable and timely comments and participate actively in every opportunity afforded to them. They conscientiously worked within the timeframe established by the County, being mindful of everyone's time and without requesting any extensions of time, continuances or other accommodations. The Appellants have refrained from engaging in delay tactics or obstructing the process by making so-called "document dumps" at the eleventh hour as is commonly the case with project opponents. In fact, they are not opposed to the Project outright. However, there are serious environmental concerns supported by substantial evidence that were not properly considered and deliberated on by the Planning Commission. In considering a project of this magnitude, in a remote location and on a severely constrained site, the Board should have the opportunity to render a fully informed decision in a conscious and deliberative manner.

Based on the foregoing, we respectfully request that you grant our request for a de novo hearing before the Board of Supervisors and to augment the record with the attached fire safety assessment report dated January 20, 2020 and prepared by Reax Engineering.

We appreciate your time and consideration.

Very truly yours,



Adam W. Hofmann

AWH:rsc

#### Attachments

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January 20, 2020

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**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' Opposition to Appellants' Request for De Novo Review and to Augment  
Record with New Evidence on Appeal**

Dear Chair Dillon and Ms. Anderson:

Applicants Wayne and Kara Fingerman object to Appellants' request for a de novo hearing and to augment the record with new evidence on appeal.

Appellants had ample opportunity to submit written comments and technical reports to the Planning Commission. As described below, Appellants submitted extensive written comments opposing virtually every aspect of the Project. Appellants were also afforded in-person testimony at the Planning Commission Public Hearing of October 16, 2019. Appellants received more than adequate due process. Applicants submit there is no good cause for de novo review or to augment the record. Applicants would be prejudiced by having the Board conduct a de novo review or consider additional submissions.

## A. BACKGROUND

More than three years have elapsed from initial submission of the Project until the Planning Commission's approval. Applicants' Use Permit Application for a 20,000-gallon winery on their property located at 1755 Diamond Mountain Road (South Fork) was initially submitted on August 11, 2016 and resubmitted on January 24, 2017 (after redesign and relocation of Project wastewater treatment facilities to avoid removal of false indigo plants). (Item D, Planning Commission Supporting Documents). Applicants' Road & Streets Standards Exception Request for their existing driveway from Diamond Mountain Road (South Fork) to serve the proposed winery site on the Project parcel is dated January 8, 2018. (Item E, Planning Commission Supporting Documents). On April 11, 2018 Applicants submitted their application packet for Use Permit exception to Conservation Regulations to regrade a portion of the Project access driveway within the existing 55-foot creek setback to meet County engineering and/or fire comments related to minimum vertical carriage clearance for a fully loaded fire apparatus/truck. (Item F, Planning Commission Supporting Documents). Long before the Planning Commission hearing, Applicant also submitted the following technical analyses in support of the project: Richard C. Slade & Associates LLC Water Availability Analysis dated February 7, 2017 (Item G, Planning Commission Supporting Documents)<sup>1</sup>; Delta Consulting & Engineering Water Feasibility Report (Initial submittal dated May 16, 2016 and revised January 18, 2019) (Item H, Planning Commission Supporting Documents); Pacific Biology Biological Resources Survey, dated October 2016 (Item I, Planning Commission Supporting Documents); Traffic Impact Report dated January 24, 2017 (Item J, Planning Commission Supporting Documents); Graphics, PJC Architects, June 24, 2016 (Item K, Planning Commission Supporting Documents). These Project technical reports were publicly available on the County's website. A Winery Comparison Analysis was also performed (Item L, Planning Commission Supporting Documents).

Appellants were well aware of the Project through preliminary notice of the original Project Application more than two years before the Planning Commission hearing.

Staff prepared an Initial Study for the Project (September 11, 2019) (Item C, Planning Commission Supporting Documents). The Initial Study fully analyzed the Project's potential environmental impacts and recommended preparation of a Mitigated Negative Declaration.

The October 16, 2019 Planning Commission hearing was duly noticed. Staff prepared an Agenda Letter to the Planning Commission that was included in the public record available via Granicus in advance of the Planning Commission public hearing along with Project Supporting Documents.

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<sup>1</sup> Applicant's hydrology consultant Richard C. Slade & Associates LLC also responded on October 15, 2019 to late-received public comments on groundwater.

Numerous public comments were received, including from the Appellants. In response to public comments, Staff prepared a supplemental memorandum with proposed strengthening of mitigation measures regarding biological resources to address State agency comments.

On October 15, 2019, Appellants submitted an eight-page letter to the Planning Commission with extensive written comments on all aspects of the Project, including: its “Scope and Overall Environmental and Community Impact”, “Specific Environmental exceptions”, “Road exception” and specific comments regarding “CEQA and other Regulatory Concerns” (claimed Project deficiencies regarding “filling the pond”; deficiencies in the Initial Study regarding analysis of “rare plant mitigation”, “tree loss and vegetation removal”; asserted erosion control issues regarding the Project “road improvements”). Appellants’ environmental consultant Huffman-Broadway Group, Inc. also submitted a six-page technical report dated October 9, 2019 on behalf of Appellants regarding the Project description, cave construction, and Biological Resources section of the Initial Study, including regarding alleged environmental impacts associated with filling the onsite pond, rare plant mitigation, erosion issues allegedly related to the proposed roadway improvements to allow regrading of the existing access driveway, tree loss and vegetation removal. (Both are included in Item O, 7B, Public Comments Added after Initial Posting).

Appellants further contended that the County improperly rejected alternatives to the roadway exceptions. Appellants’ letter also asserted deficiencies in the Project Traffic Impact Study and Winery Comparison and further challenged Applicants’ calculations regarding production capacity and grape transport and claimed that neighbors who supported the Project did not represent the views of the Diamond Mountain community.

Staff prepared a further report to the Planning Commission for the October 16, 2019 hearing that specifically discussed all issues relevant to the Project approval. On October 16, 2019 the Planning Commission held a public hearing on and approved the Project Use Permit application.

## **B. APPELLANTS’ REQUEST FOR DE NOVO REVIEW**

In their appeal packet, Appellants request a de novo review of the appeal, pursuant to Napa County Code (NCC) Section 2.88.090(A). Appellants claim that good cause exists for a de novo review by the Board because 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 Winery Definition Ordinance (WDO) and the County General Plan in approving the Project.” Appellants further claim the Applicant presented “new testimony in rebuttal” at the Planning Commission hearing with Appellants allegedly “receiving no opportunity to produce a response” and complain that the Staff Report for the Project was posted to the County’s website only one week prior to that hearing date. Appellants also assert that 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.” Appellants fail to explain how any such power shutoff impeded Appellants’ ability to comment on the Project, and indeed, the voluminous nature of their comments belies any such contention.

**C. THERE IS NO GOOD CAUSE FOR DE NOVO REVIEW TO AUGMENT THE ADMINISTRATIVE RECORD WITH NEW EVIDENCE**

Pursuant to NCC 2.88.090(A), "the decision of the board on appeal shall be based on a review of the documentary record ..., and such additional evidence as may be presented which could not have been presented at the time the decision appealed was made." Appellants' claim of good cause for de novo review is based on conclusions related to the specific grounds of appeal. Appellants have presented no evidence or justification that a good cause basis exists for such a de novo review. The Project Use Permit Application was pending for more than three years prior to the October 16, 2019 Planning Commission public hearing that resulted in approval of the Project Use Permit. Appellants, Applicants’ close neighbors, were well aware of the project for years, received proper notice of the Planning Commission hearing and had ample notice and opportunity to comment on the Project and to submit all evidence they deemed appropriate for the Planning Commission’s consideration of the Project.

Appellants do not dispute that the Project Initial Study and technical analyses were fully available to Appellants and indeed numerous detailed objections of Appellants to them were specifically referenced in their written submission and at the October 16, 2019 Planning Commission public hearing. Appellants presented a full explanation of their opposition to the Project, both in their extensive letter opposition and through oral testimony at the Planning Commission hearing. Appellant Checov also testified in person at the Planning Commission hearing, specifically regarding the Diamond Mountain Road environment, traffic and production issues. Mr. Checov further referenced the six-page technical report prepared by Appellants’ environmental consultant Huffman-Broadway Group, Inc.

Appellants could have included any additional opposition materials in their oral and written submissions to the Planning Commission. Appellants fail to provide any credible explanation, let alone good cause why any purported new evidence or material could not have been presented to the Planning Commission long before the October 16, 2019 public hearing.

Appellants conflate the Planning Commission’s rejection of their opposition with the opportunity to present it. Appellants’ assertion that de novo review is somehow appropriate because the Planning Commission “ignored” their comments is not evidence that Appellants could not have presented, did not present, or were prevented from fully presenting their arguments.

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Nor is there any basis for Appellants' assertion that the Applicants deprived them from responding to alleged new evidence presented during rebuttal. Appellants' rebuttal was brief and did not introduce new issues or evidence not properly before the Planning Commission or fully noticed to the public.

Appellants' request for de novo review and to augment the administrative record with new evidence should be denied.

Very truly yours,



Brien F. McMahon

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