

## **Attachment D**

Determination of Good Cause Decision  
issued by the Chair



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**Board of Supervisors**

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**Diane Dillon**  
Chair

**DETERMINATION OF GOOD CAUSE REQUEST TO  
AUGMENT THE DOCUMENTARY RECORD AND  
REQUEST FOR DE NOVO REVIEW REGARDING  
THE HARD SIX WINERY APPEAL HEARING**

January 27, 2020

TO: Adam Hoffman, Esq. on behalf of Appellants  
Robia Crisp, Esq. on behalf of Appellants  
Brien McMahon, Esq. on behalf of Applicant

FROM: Chair Diane Dillon

RE: Hard Six Cellars Winery Appeal Hearing – Good Cause Determination

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As the Chair of the Napa County Board of Supervisors, I have received and reviewed Appellants' November 13, 2019 and January 20, 2020 requests for the appeal hearing to be de novo and to augment the record. I have also reviewed Applicant's January 20, 2020 opposition to such requests. My decision on the requests is as follows:

1) **Appellants' Request for De Novo Review.** Appellants request a de novo hearing of the appeal pursuant to Napa County Code Section 2.88.090(A). Appellants claim that good cause exists because 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. Appellants allege the Planning Commission's failure to confirm whether the road was a one- or two-lane road requires that the Board hold a de novo hearing. According to Appellants, new mitigation measures were also added that required recirculation of the Mitigated Negative Declaration ("MND"). Lastly, Appellants assert that CEQA mandates a de novo review by the Board pursuant to *Vedanta Society of Southern California v. California Quarter* (2000) 84 Cal. App. 4<sup>th</sup> 517 ("Vedanta").

**Brad Wagenknecht**  
District 1

**Ryan Gregory**  
District 2

**Diane Dillon**  
District 3

**Alfredo Pedroza**  
District 4

**Belia Ramos**  
District 5

**Decision and Rationale:** Denied.

- a) Number of Lanes. The number of lanes on Diamond Mountain Road is one of the grounds identified in Appellants' appeal and will be considered by the Board. This issue does not qualify as a good cause basis for the hearing to be de novo.
- b) New Mitigation Measures and Recirculation. The biological mitigation measures that were added were in response to a comment letter from California Department of Fish and Wildlife ("CDFW"). The MND identified that the project may have a potential impact on special-status birds. To reduce that potential impact, the MND included a mitigation measure that requires preconstruction surveys be performed prior to any vegetation or land disturbance to reduce impacts to special-status birds. CDFW's comment letter requested that the preconstruction surveys also include Northern Spotted Owl and roosting bats. The MND and the supporting biological reports discussed Northern Spotted Owl and roosting bats but concluded that the site did not contain suitable habitat; however, because CDFW requested that these species be included in the surveys, the Planning Commission added CDFW's requested mitigation measures to address these two bird species. CDFW also requested an invasive species management plan to prevent invasive bull frogs from harming western pond turtle. The potential impact to western pond turtle was identified in the MND but the mitigation was expanded to include an invasive species management plan.

The Chair finds that because these additional mitigation measures strengthened and amplified existing mitigation measures and were not the result of a new unavoidable significant effect, recirculation was not required. (CEQA Guidelines Section 15073.5 (b)(4).) New mitigation measures may be adopted without triggering recirculation if they are added in response to comments on environmental impacts already identified in the mitigated negative declaration. Adding conditions of approval that will not create new significant impacts and that are not necessary to mitigate significant impacts will also not trigger recirculation. CEQA Guidelines Section 15073.5 (c)(3); *Clews Land & Livestock v. City of San Diego* (2017) 19 Cal.App.5th 161, 197.) No new mitigation measures were added regarding water quality.

- c) The *Vendata* case. The case relied upon by Appellants is not applicable here because it involved a tie vote on certification of an environmental impact report ("EIR"). In *Vedanta*, the Orange County Board of Supervisors, after one member recused himself, voted 2-2 on an EIR for a proposed 705-unit mobile home park. Orange County then determined that the Planning Commission's certification of the EIR, which had been appealed to the supervisors, remained in effect. The Court ruled that a 2-2 vote on an EIR is not enough to certify the document. Instead, CEQA requires that the elected body make an affirmative decision on environmental documents. The court held, "[A] board cannot validly provide for an approval of an EIR by tie vote. In doing so, it would be circumventing the protections provided by CEQA to expose elected decision makers to

the political consequences of any decision to certify an EIR.” Unlike in *Vendata*, this appeal does not involve a tie vote nor certification of an EIR.

The Chair finds that Appellants’ good cause justification for a de novo hearing concerns the very grounds of appeal that will be heard and considered by the Board including, but not limited to, the adequacy of the environmental document, and the Planning Commission’s consideration of all the evidence and lack of due process. Appellants have not provided a substantial reason for an entirely fresh hearing. Appellants had ample notice and opportunity to be heard at the Planning Commission hearing. A new project submittal courtesy notice was sent to Appellants in August 2017, more than two years before the Planning Commission hearing. Notice of the public hearing was mailed to Appellants on September 12, 2019, some 34 days before the hearing. The Planning Commission staff report was posted to the County’s website one week prior to the hearing date. In fact, Appellants testified and submitted written evidence prior to the hearing. Proper notice was given, Appellants had ample opportunity to comment on the Project and submit relevant evidence, and the Commission hearing was recorded electronically. While Appellants cite to a PG&E initiated 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 have not articulated how the shutoff impeded their ability to comment on the Project. Appellants also could have but did not request that the Planning Commission continue the hearing as a result of the shut off. The Board will have the benefit of the record below and the testimony that was considered by the Commission as well as the Commission’s deliberations. For all of the reasons set forth above, Appellants’ request for a de novo hearing is denied.

**2) Appellants’ Request to Augment the Record with The Reax Fire Safety Assessment.**

Appellants request that the record be augmented to allow new information regarding fire safety in the form of a Fire Safety Assessment from Reax Engineering dated January 20, 2020 (the “Fire Assessment”). Appellants claim that the newly imposed requirement to use shuttle service for the two other 75 person marketing events raised new concerns relating to traffic and public safety. Appellants assert that they retained Reax Engineering “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 [Fire Assessment], which could not have been prepared prior to the Planning Commission’s acceptance and approval of staff’s recommendation at the hearing.”

**Decision and Rationale:** Granted. The use of shuttle service for the 125 person marketing event was included as a mitigation measure in the MND that was released 34 days prior to the Planning Commission hearing. The Applicant also included the use of shuttle service as part of their project description in the use permit application that was submitted on July 24, 2017. While the proposed use of shuttle service on Diamond Mountain Road was known to Appellants in advance of the hearing, the shuttling program was intensified at the Planning Commission hearing and Appellants did not have an opportunity to consult with experts or provide evidence on this matter. The Chair finds that because the Fire Assessment could not have been provided

to the Commission and because of the importance of fire safety issues in general, good cause exists to augment the record with the Fire Assessment.

**3) Appellants' Request to Augment the Record with the Diamond Mountain Neighborhood Community Firewise Evaluation.** Appellants request that the record be augmented to allow new information in the form of a report entitled Diamond Mountain Neighborhood Community Firewise Evaluation dated December 2019 and prepared by Carol Rice (the "Fire Evaluation"). Appellants assert that Fire Evaluation, which post-dates the Commission's hearing, should be considered because it emphasizes the need to undertake fire safety projects, including widening areas for turnouts wherever possible.

**Decision and Rationale:** Granted. The Fire Evaluation is dated December 2019 and was prepared by an independent consultant hired by the Diamond Mountain Fire Safe Council, not Appellants. Because the Fire Evaluation did not exist at the time of the Commission's action, it could not have, in good diligence, been presented to the Commission for consideration. As such, good cause exists to augment the record with the Fire Evaluation.

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