

Attachment E

Appellants' Supplemental Information

BLOCK & BLOCK

ATTORNEYS

July 31, 2020

By Electronic Mail

Chair Diane Dillon
Supervisor Brad Wagenknecht
Supervisor Ryan Gregory
Supervisor Alfred Pedroza
Supervisor Belia Ramos
Napa County Board of Supervisors
1195 Third Street, Ste 305
Napa, CA 94559

Re: Anthem Winery Appeal

Dear Chair Dillon and Supervisors:

I represent Paul Rowe and Jeff Atlas, the closest neighbors to Anthem Winery, who are asking the Board to reverse the Planning Commission's approval of the winery's expansion.

The winery already has a permit for 30,000 gallons with an entrance on Redwood Road. To support increased production and visitation, it is proposing to shift its entrance to Dry Creek Road, on the opposite side of the hill, and to utilize a steep, narrow, 1,700-foot long road which does not meet County Road and Street Standards. The road was built as the driveway for a small single family home. Development into a winery entrance requires, among other changes, the construction of a 250-foot long one-way bridge over a waterway on the winery's property and use two easements on Paul Rowe's land as turnouts.

Because the road is nonconforming, the winery requested an unprecedented number of road and street standard exceptions. Staff called the request "unique and unmatched" in recent experience (Engineering Division Memorandum to Planning Division, January 21, 2020, page 2 of 5). The Planning Commission approved all 16 exception requests without seriously considering the neighbors' objections.

The road as approved is unsafe. It is too narrow to allow for ingress by firefighting apparatus and concurrent evacuation by civilians. The one-way bridge is a choke point, so dangerous that fire safety regulations do not *allow* it to be approved without sizable turnouts at both ends. The Planning Commission's decision elevates private interests above public safety. It is bad public policy and terrible precedent for our County.

A. Background

In 1996, Anthem's predecessor, Jessup Cellars, received a use permit for the production of 30,000 gallons of wine per year and five tastings per week (Project Statement, August 29, 2017, page 1). County fire officials approved the entrance to the winery on Redwood Road. Although the Jessup permit was modified in 2001 and 2012 to allow expanded use, access to the expanded winery remained on Redwood Road. That entrance is still in use today.

Justin and Julie Arbuckle bought Jessup Cellars in 2006, presumably intending to use the existing road. They subsequently purchased an adjoining property with a small house on it. The lot is a flagpole lot with a long, thin "pole" extending downhill to Dry Creek Road. The road was built to serve a single house on the lot; it was narrow because it was designed solely as a residential driveway.

The flagpole "pole" is approximately 1,700 feet long with a travel way that varies in width from 14 to 18 feet (Driveway Exception Request, January 12, 2018, *passim*). There is no room for shoulders. The road is bounded on one side by Paul Rowe's property and a steep slope on the other. Jeff Atlas' house is located at the base of the slope about three-quarters of the way up the road.

Because the road is so narrow, the then-owner of the flagpole lot, Dick Lemon, obtained two easements from his neighbor, Ken Daly, who owned what is today the Rowe property. The purpose of the lower easement was to facilitate access to and from Dry Creek Road. The purpose of the upper easement was to enable Lemon to avoid crossing a waterway on his property by veering onto the Daly property instead.

Lemon and Daly amended both easements twice. The amendments were necessary because Lemon unintentionally built the road outside the bounds of the easements as described in the easement deed. In the second amendment, dated October 1996, the easements were modified to conform to the road as built and remain that way today. The easements do not include any areas of the Rowe property except what is occupied by the road (Kevin Block PowerPoint, Anthem Winery Access Road, October 3, 2018, page 12).

Anthem filed this application in 2014, seeking to significantly expand production and visitation. To support the expansion, the winery proposed to shift its entrance from Redwood Road to Dry Creek Road. County Road and Street Standards ("CRSS") require that a winery entrance road have a minimum width of 20 feet (CRSS, revised February 4, 2020, page 13). Because the proposed entryway road was too narrow, and could not be widened, the winery submitted a request for 16 exceptions to the road width and other standards.

The winery's road proposal included the use of two easements on Paul Rowe's land. Rowe first learned that the Winery intended to use his property when he saw the road plans (Letter from Paul Rowe to David Morrison, August 21, 2017, page 2). He was upset because the Arbuckles had never approached him about using the easements.

The winery may not use the easements without Rowe's permission for two reasons. First, the easements were created exclusively to serve a small single family home; use by winery and tourist traffic is beyond the scope of the easements and would constitute overburdening, which may be enjoined by a court.

Second, the easements are appurtenant to the Lemon parcel. Anthem Winery is on the Jessup Cellars parcel. The easements may not be used to access the Jessup Cellars parcel, as a matter of law, because they are not appurtenant to it. Rowe has expressed a willingness to modify the easements to allow some winery use but nothing has come of that invitation (Letter from Paul Rowe to Planning Commission, February 4, 2020, page 3).

Instead of attempting to gain access over Rowe's property, the winery proposed to construct a 250-foot long bridge over a waterway flowing through a gully on the Anthem property. The proposed bridge has a maximum width of 14 feet and is therefore classified as a one-way bridge because two vehicles traveling in opposite directions cannot pass each other. Were the vehicles to meet on the bridge, one of them would have to back up to allow the other to proceed.

The Planning Commission approved the bridge based on staff's conclusion that, because it had turnouts at both ends, the one-way bridge was as safe as a two-way bridge. The Commission approved all 16 of the winery's requests for exceptions to road and street standards, resulting in this appeal.

B. The One-Way Bridge

CALFIRE regulations, known as the SRA Fire Safe Regulations, establish minimum fire protection standards for construction and development in the State Responsibility Area ("SRA"), which includes the Anthem property. SRA Fire Safe Regulations are codified in the California Code of Regulations and have the force of law.

The regulations establish a variety of road standards intended to provide "unobstructed traffic circulation during a wildfire emergency" and, specifically, to ensure that firefighting apparatus can enter a site while civilians evacuate concurrently (SRA Regs. § 1273.00). To that end, all roads must have a minimum of two 10-foot traffic lanes, not including shoulders and striping (SRA Regs. § 1273.01).

The regulations also govern bridges. They allow counties to approve a one-way bridge so long as the bridge has unobstructed visibility from one end to the other "and turnouts at both ends" (SRA Regs. § 1273.07(d)). A turnout must be at least 12 feet wide and 30 feet long with a minimum 25-foot taper on each end (SRA Regs. § 1273.06).

Napa County has incorporated large portions of the SRA Fire Safety Regulations into its local road and street standards verbatim, including the 20-foot minimum road width standard and the requirement that one-way bridges have inter-visibility and turnouts.

A bridge with only one traffic lane may be authorized by Napa County; however, the bridge shall have unobstructed visibility from one end to the other and turnouts at both ends.

(CRSS, page 15).

The bridge approved by the Planning Commission does not have turnouts at both ends. Instead, the winery proposes to use what it characterizes as a 40-foot wide easement on the Rowe property as a “pull-out” to allow fire trucks to pass in case of emergency (Driveway Exception Request, January 12, 2018, page 7). It also proposes to post yield signs at various locations along the flagpole road, giving inbound traffic the right of way over outbound traffic (W-Trans Amended Final Traffic Analysis, March 7, 2018, page 7; Emergency Ingress/Egress Plan, revised April 7, 2017, Attachment 1).

The winery’s bridge proposal violates applicable law. Neither local road standards nor state fire regulations provide for “pull outs.” They clearly call for “turnouts,” as expressly defined in the regulations, at both ends (SRA Regs. § 1273.06; CRSS, page 14 and Detail C-11). The easement on Mr. Rowe’s property, even if it were 40 feet wide, does not qualify as a turnout.

The County lacks authority to exempt the Winery from the turnout requirement for several reasons. First, an application for road standard exceptions must specify the specific sections for which exceptions are sought (CRSS, page 3). The Winery’s application did not request a turnout exception; the Engineering Division did not recommend one; and the staff report makes no mention of the issue. On this issue, the public was caught unaware.

There is something deeply disturbing about the County granting an exception that the applicant did not request. Doing so takes the County out of the role of neutral arbiter and makes it an advocate for the project. Such action can only feed the growing public perception that the deck is stacked in favor of applicants and against neighbors. The burden is, and should remain, on the applicant to say exactly what it wants, and that request should define the limits of the County’s decision.

Second, even if the winery had asked for an exemption from the turnout requirement, the County could not grant one. Applicable regulations, state and local, grant the County discretion to approve a one-way bridge, provided the bridge *shall* have turnouts at both ends (SRA Regs. § 1273.07(d); CRSS, page 15). To lawyers, the word “shall” is mandatory, “may” is permissive. Use of the word “shall” in this case limits the County’s discretion. The County has discretion to approve a one-lane bridge, but, if it does so, the bridge must have turnouts on both ends. The two turnout requirement is not a road standard that can be waived; it is a condition which must be attached to a waiver of the road width standard for bridges. That is how a court will read these regulations.

Finally, even if the County could grant a turnout exemption, and even if “pull-outs” were allowed, the upper easement could not serve that purpose. The easement is not 40 feet wide, as the winery represents. Remember, it was amended in 1996 to conform to the paved road, which

is 10 to 15 feet wide at that location. The easement is 60 feet away from the bridge and is pointing downhill, away from the flow of traffic that would supposedly use it (Driveway Plans Option 2, June 5, 2018, Sheet 3A). No reasonable person, looking at the juxtaposition of the easement and the bridge, would conclude that the easement is a viable emergency pull-out.

Moreover, the easement was created solely for residential (not winery) use for the benefit of the Lemon (not the winery) parcel. Legally, the easement may not be used as a pull-out, or for any other purpose, for traffic traveling to or from the winery. For the County to premise approval of this project on such use embroils it in a violation of the landowner's property rights. Since Paul Rowe is a litigator with one of the leading law firms in the country, the likelihood of litigation must be considered.

In sum, the Planning Commission approved a one-way bridge without turnouts at both ends in violation of county road standards and state fire regulations. Without the bridge, entrance to the Winery from Dry Creek Road is not viable. The project may proceed, but only by continuing to use the Redwood Road entrance, which it has been using for 25 years.

C. Other Road Exceptions

There is ample reason to reject the winery's request for road exceptions apart from the one-way bridge. First is the sheer number of requests. The winery is seeking 16 exemptions covering the entire length of the road. Ten of the requests are for width exceptions (14 to 18 feet instead of 20 feet). The remaining requests seek permission for a 17-foot wide gate (instead of 22 feet); a 20% slope (instead of 18%); and an exceptionally short vertical curve (20 feet instead of 100 feet).

The winery is not asking for road exceptions; it is asking for approval of a substandard road. If this road is good enough, a lot of others will be too. The Board can expect to adjudicate many more road controversies in coming years. Instead, the Board should hold that road exceptions are meant to be exceptional, and should not swallow the rule.

The Commission erred when it approved a reduction in the width of the entrance gate. Its decision is premised on the winery's use of the lower easement on the Rowe property as "a turnout area on each side of the gate" (Driveway Exception Request, January 12, 2018, page 3 of 6). Its decision is, curiously, also conditional, valid only if "the proposed gate and its location does not obstruct the proposed 22-foot turnaround for residential and emergency vehicles extending into the adjacent driveway easement . . ." (Engineering Division Memorandum to Planning Division, June 14, 2018, page 5 of 5). Staff said that such qualifying language was "uncommon" but necessary in case the turnout areas proved unworkable (Engineering Division Memorandum to Planning Division, January 21, 2020, page 3 of 5).

The Board should reject this approach out of hand. First, the easement designated as a turnout does not extend to both sides of the gate; it is on the southeast side only (Driveway Plans Option 2, June 5, 2018, Sheet 1A). Second, the easement does not provide an additional 22 feet of space; staff is looking at the easement before it was amended in 1996. The current easement, as

amended, is no more than 2 to 4 feet wide. Third, the easement cannot serve as a turnout for winery traffic, because its scope is limited to residential use.

Road exceptions should not be approved without evidence that the mitigations proposed to support them will work. There is no such evidence in this case. Kicking the can down this substandard road does not save this substandard gate.

D. The Stream

The Planning Commission should have considered county conservation regulations in evaluating the bridge, which will require grading and construction in and around the affected waterway. The Commission avoided doing so by defining the waterway as a “drainage” and not a stream (Board Agenda Letter, February 5, 2020, page 8).

The conservation regulations apply to streams, defined to include “[a]ny watercourse which has a well-defined channel with a depth greater than four feet and banks steeper than 3:1 and contains hydrophilic vegetation, riparian vegetation or woody vegetation including trees species great than ten feet in height” (NCC 18.108.030). This waterway meets the vegetation requirements, since it contains hydrophilic plants and trees over 10 feet, but is allegedly not a “definitional stream” because it lacks four-foot banks that are steeper than 3:1 (Initial Study, page 14 of 43).

Mike Podlech, a specialist in stream classification, disagrees. He measured the waterway on January 28, 2020 and concluded that, at the bridge location, it has a depth of five feet or more and nearly vertical banks. He classifies the channel as a Class II watercourse transitioning to Class III within a few hundred feet upstream of the bridge (Mike Podlech Memorandum to Kevin Block, January 31, 2020, page 3).

The winery’s own road plans confirm that Podlech is correct. Sheet 3A of the option 2 plan shows a cross-section of the bridge and the waterway. The plan is to scale. It shows a well-defined channel with banks that are 5 to 6 feet high and a slope of approximately 1:1 (Driveway Plans Option 2, June 5, 2018, Sheet 3A). Photographs taken by Podlech and others confirm this information (Mike Podlech Memorandum to Kevin Block, January 31, 2020, pages 6-7).

Because the waterway is a definitional stream, construction of the bridge is subject to the conservation regulations. Strict setbacks restrict or prohibit grading, construction and the removal of vegetation (NCC 18.08.025); mandatory erosion control protections apply (18.108.070); activity is subject to strict oversight and enforcement (18.108.135-140); and permission is needed in the form of an erosion control plan before work begins (NCC 18.108.070).

Photographs of bridges similar to the one being proposed indicate that it will rest on concrete abutments built into the stream banks. Construction of the bridge will obviously require significant activity within the stream setback. Even if the waterway were not a “definitional stream,” it would qualify as an ephemeral or intermittent stream, defined as any stream that does not meet

“definitional stream” criteria, and would still be subject to a 35-foot setback under current conservation regulations (NCC 18.108.025(B)(1), 18.108.030).

The Planning Commission has the power to grant an exception to the conservation regulations in connection with a use permit but only if (i) an exception is requested and (ii) the Commission makes specific findings (iii) after a public hearing (18.108.040). Here no exception was requested and no findings were made. Application of the conservation regulations to this project was simply ignored.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin Block", written in a cursive style.

Kevin Block