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Latham & Watkins, LLP response to Shute, Mihaly & Weinberger, LLP Letter

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File No. 056406-0001

February 17, 2016

VIA FEDERAL EXPRESS

Chair Alfredo Pedroza
Supervisor Brad Wagenknecht
Supervisor Mark Luce
Supervisor Diane Dillon
Supervisor Keith Caldwell
c/o Gladys Coil, Clerk of the Board
Napa County Administration Building
1195 Third Street, Suite 310
Napa, CA 94559

Re: Response to Nancy Hammonds and Charlotte Blank Letter Regarding Proposed Development Agreement and Use Permit Modification for Caymus

Dear Chair Pedroza and the Honorable Members of the Board of Supervisors:

We, together with Kay Philippakis of Farella Braun + Martel LLP, represent Caymus Vineyards ("Caymus"), a winery located in Napa County, California. On February 8, 2016, Caymus received a copy of a letter sent to the County of Napa ("County") from Shute, Mihaly & Weinberger LLP on behalf of two individuals, Nancy Hammonds and Charlotte Blank, concerning Caymus' proposed Use Permit Modification and Development Agreement.

In the letter, Ms. Hammonds and Ms. Blank assert that the County cannot allow Caymus to proceed with proposed construction on Caymus' property without first conducting environmental review. The purpose of the February 9th Board of Supervisors meeting, however, was neither to address the proper level of environmental review for the Use Permit Modification and Development Agreement nor to modify the Amendment to Judgment Pursuant to Stipulation ("Amended Judgment") between the County and Caymus. Regardless, Caymus fully believes its Use Permit Modification qualifies for a categorical exemption to environmental review under the California Environmental Quality Act ("CEQA"), and as previously discussed with County staff, Caymus does not intend to seek any modification of the Amended Judgment until after the Board has taken action on the proposed Use Permit Modification.

I. THE BOARD MEETING REGARDING THE TERMS OF THE DEVELOPMENT AGREEMENT WAS NOT THE PROPER TIME TO ADDRESS CEQA ISSUES

As County Staff emphasized during the Board's February 9 meeting, the purpose of the Board's meeting was to discuss the proposed terms of the proposed Development Agreement. The Development Agreement would "provide a mutually agreed upon framework that would be binding on both parties with regards to [Caymus'] pre-Winery Definition Ordinance (WDO) status and rights, as well as [Caymus'] obligations concerning affordable housing, traffic, fire, and other impacts." (*Id*.) As the Staff Report indicates, the Director of Planning, Building and Environmental Services and County Counsel did not request a determination of CEQA issues. The Director only requested the Board take public comment and provide direction to staff on the proposed terms of the Development Agreement. (*See* Staff Report (Feb. 9, 2016) at 1.) Indeed, "[t]he proposed action to provide staff direction is not a project." (*Id*. at 2.)

Contrary to Ms. Hammonds' and Ms. Blank's assertions, the Board need not make any CEQA determination at this time. The appropriate time to address any CEQA issues will be when the Use Permit Modification and Development Agreement are before the Planning Commission in March and the Board in April. (*See id*. ["The Development Agreement will be evaluated under CEQA prior to its being considered for final action."].) Thus, Ms. Hammonds' and Ms. Blank's request for environmental review at this stage is premature.

II. FUTURE OPERATIONS UNDER THE USE PERMIT MODIFICATION WILL NOT RESULT IN INCREASED OR SIGNIFICANT ENVIRONMENTAL IMPACTS

Ms. Hammonds and Ms. Blank contend that Caymus' future operations will negatively impact the surrounding community and environment if the County approves the Use Permit Modification. This is plainly incorrect. Caymus' proposed Use Permit Modification will result in a *reduction* in environmental impacts from current conditions. The new permit will not result in an increase in wine production, and Caymus seeks to demolish certain structures and reduce the size of other facilities. (*See id.* at 3; *see also* Exhibit B to the Staff Report, Reduced Project Description [the revised Use Permit Modification seeks, among other things, approval to demolish 6,695 square feet of buildings and a single-family dwelling, remodel an existing building, construct a greenhouse within already developed area, and improve existing access roads].) None of the replacement structures, including the road improvements and greenhouse, adds to Caymus' capacity.

In addition, Caymus vigorously disputes that current operations violate any existing permits. The current wine production and accessory uses are not "unlawful," and Caymus' operations do not contribute to "substandard and dangerous traffic conditions." (*See* Hammonds/Blank Letter at 2.) Ms. Hammonds and Ms. Blank improperly attribute prior drunk driving incidents to Caymus without any support whatsoever. Further, Ms. Hammonds and Ms. Blank provide no support for their assertions that Caymus' current operations are unlawful. In fact, the County and Caymus expressly agreed that neither party has admitted liability as part of stipulating to the entry of the Final Judgment Pursuant to Stipulation, a copy of which is attached

as Exhibit 1. (*See* Section 2. B. ["The parties, without admitting liability whatsoever and desiring to avoid any further claims, litigation or controversies arising from the disputes . . . and matters alleged in the complaint on file herein, have stipulated to the entry of this Judgment."].)

III. THE PROPOSED USE PERMIT MODIFICATION QUALIFIES FOR EXEMPTION FROM ENVIRONMENTAL REVIEW

A. The Use Permit Modification Qualifies for the Categorical Exemption for the Replacement or Reconstruction of Structures

Ms. Hammonds and Ms. Blank argue that Caymus' proposal to reconstruct certain buildings within the existing WDO boundaries does not qualify for a CEQA exemption, yet completely fail to address contrary authority. CEQA Guideline section 15302 provides an exemption for the "replacement or reconstruction of existing structures or facilities where the new structure will be located on the same site as the structure replaced and will have substantially the same purpose and capacity as the structure replaced." (14 Cal. Code Regs. § 15302.) Projects that qualify for the "replacement exemption" include, but are not limited to: the replacement of a commercial structure with a new structure of substantially the same size, purpose, and capacity; and replacement or reconstruction of existing utility systems and/or facilities involving negligible or no expansion of capacity. (*See id*; *see also* Cal. Pub. Res. Code, §§ 21083, 21084.)

As demonstrated in *Dehne v. County of Santa Clara*, courts do not interpret "same site" literally; the replacement structures need not have the exact same footprint or exact same scope or location of operations as the prior structures. (*See* (1981) 115 Cal.App.3d 827, 837.) It is sufficient that the replacement structure is located on the same overall project site. (*See ibid*.)

In *Dehne*, the court held a proposed reconstruction project categorically exempt from CEQA.[1] (*Id*. at 842.) A landowner wanted to modernize its cement manufacturing plant, which would include: (a) replacing six kilns with a single kiln; (b) removing smokestacks; (c) adding an option to burn coal at the plant; and (d) repositioning new structures within the four to six acres occupied by the present plant. (*Id*. at 832.) Plaintiffs argued the categorical exemption for reconstruction and replacement should not apply because "same site" should be interpreted as "the new facility must be in precisely the 'same physical location' as the old one." (*Id*. at 837.) The court rejected this overly narrow interpretation, looking to the reasonable scope of "same site," as can be inferred from other sections in the CEQA Guidelines. (*Ibid*. ["[F]or the exemption to have internal consistency, 'same site' must be construed in a way that includes structures of 'substantially' the same size…Obviously the site need not be in exactly the same location if the new structure need not be exactly the same size."].) Instead, the court held that the facilities comprising the new plant must be reconstructed within the area bounded by the existing plant. (*Id*. at 838.)

[1] The court decided *Dehne* under a previous version of CEQA Guidelines, Section 15302, then Section 15102. The language of the two sections remains the same.

Consistent with *Dehne*, Caymus proposes to replace certain of its structures on the vineyard property without increasing its wine production levels or visitors. Caymus is not required to rebuild any structures in exactly the same location; Caymus' proposal to stay within the pre-WDO "winery development area" as that term is defined in Napa County Code Section 18.104.210 that existed upon the effective date of the WDO suffices. In fact, the *Dehne* court interpreted "same site" flexibly to allow the landowner "to position the replacement structures in such a manner as to have the least damaging aesthetic effect on the surrounding environment while still qualifying for exemption." (*Ibid*.) Therefore, Caymus has the flexibility to reconstruct buildings within its existing "winery development area" in a manner that has the least damaging effect on the environment.

Rather than addressing *Dehne*, Ms. Hammonds and Ms. Blank rely on an inapplicable case for the proposition that the County must undergo environmental review because, collectively, Caymus' proposals do not qualify for an exemption. (*See* Hammonds/Blank Letter at 3.) However, *Arviv Enterprises, Inc. v. South Valley Area Planning Commission* does not apply to the circumstances presented here. (*See* (2002) 101 Cal.App.4th 1333.)

In *Arviv Enterprises*, over the course of several years, a developer submitted four applications to build houses, proposing the construction of a handful of houses at a time. (*Id*. at 1337-1338.) The city approved the first three applications, which allowed the developer to build a total of seven houses. (*Id.* at 1338.) However, the city ultimately imposed a moratorium on construction until the city prepared a full environmental impact report; after the fourth application, the city had realized the big-picture project consisted of a 21-house development. (*Id.* at 1342-1343.) As the court noted, *Arviv Enterprises* "is the direct result of *inadequate*, or *misleading* project descriptions." (*Id*. at 1346 [emphasis added].) The developer "never intended a two or three house project," but rather "he always envisioned a 21-house development." (*Ibid.*) The inaccurate and misleading project descriptions in numerous, serial applications allowed the developer to disguise or minimize cumulative environmental impacts and hide behind categorical exemptions. (*Ibid.*) In fact, the developer acknowledged that the categorical exemption for projects of single-family residences only applied to the construction of three or fewer houses, not to a 21-house development. (*Id.* at 1343.)

Unlike the developer in *Arviv Enterprises*, Caymus is not disguising or hiding environmental impacts or seeking categorical exemptions based on several misleading or inaccurate project descriptions. The County and the public have been informed of the full extent of the proposed project in an open, transparent process. Based on a review of the entire project, County staff determined that Caymus' proposed Use Permit Modification could qualify for the replacement exemption. (*See* Letter from County Staff to Caymus (Sep. 1, 2015).) Thus, *Arviv Enterprises* does not apply.

B. The Unusual Circumstances Exception to Categorical Exemptions Does Not Apply

Moreover, there is no evidence the Use Permit Modification poses a reasonable possibility of adverse environmental impacts due to unusual circumstances. A project is not exempt if there is a reasonable possibility of a significant effect on the environment due to unusual circumstances. (14 Cal. Code Regs. § 15300.2(c).) The application of the unusual circumstances test involves two distinct inquiries: (1) whether the project presents unusual circumstances, and (2) whether there is a reasonable possibility that a significant environmental impact will result from those unusual circumstances. (*North Coast Rivers Alliance v. Westlands Water Dist.* (2014) 227 Cal.App.4th 832, 869.) "[I]t is not alone enough that there is a reasonable possibility the project will have a significant environmental effect." (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1115.)

As the California Supreme Court in Berkeley Hillside Preservation Case made very clear last year, the Board of Supervisors has discretion to determine whether or not unusual circumstances exist, and its determination will not be second guessed by the Courts so long as there is substantial evidence to support that determination. "Whether a particular project presents circumstances that are unusual for project in an exempt class is an essentially factual inquiry, 'founded on the application of the fact-finding tribunal's experience with the mainsprings of human conduct'" 60 Cal. 4th 1086, 1114 (quoting People v. Louis (1986) 42 Cal. 3d 969).

The unusual circumstances exception does not apply in this situation. First, Caymus proposes to reduce the size of its existing operations , and, therefore, the Use Permit Modification will not have any adverse impacts on the environment. Second, Caymus' proximity to traffic intersections and a creek do not necessarily constitute unusual circumstances. (*See Banker's Hill, Hillcrest, Parkwest Cmty. Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 278 [traffic offset did not constitute an unusual circumstance]; *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1350-1351 [project's location at a particular intersection was not an unusual circumstance]; *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1191, 1208 [applying the unusual circumstances exception to proposed landfill due to landfill's location on top of a "major drinking water aquifer in highly permeable sands and gravel that provide a direct pathway for landfill pollutants to move to groundwater."].) Accordingly, neither of the criteria enumerated in *North Coast Rivers Alliance* apply to Caymus' Use Permit Modification. Therefore, the County can—and should—apply the replacement exemption to the Use Permit Modification and there is substantial evidence to support any determination by the Board that there are no unusual circumstances with regard to Caymus' reduced project.

IV. THE COUNTY HAS THE DISCRETION TO USE EXISTING CONDITIONS AS THE BASELINE FOR ENVIRONMENTAL REVIEW

The County has the discretion to use current conditions, including current levels of wine production and visitors, as the appropriate baseline for any environmental determination under CEQA. The proper baseline for CEQA analysis is the existing environmental setting at the time

environmental review is commenced. Thus, Ms. Hammonds' and Ms. Blank's contention that the County cannot review Caymus' Use Permit Modification compared to existing winery activities is plainly incorrect. (Hammonds/Blank Letter at 3.) In fact, Ms. Hammonds and Ms. Blank fail to address any of the "existing baseline" cases that apply to the Use Permit Modification.

The significance of a project's impacts can be ascertained only after the physical conditions against which those impacts are to be measured is established; any adverse environmental conditions already existing as part of the baseline will not be significant impacts of a project. Generally, the existing environmental setting at the time agencies commence environmental review should constitute the baseline against which the agencies should assess the significance of project impacts. In evaluating a project's potentially significant impacts on the environment, a lead agency:

> should normally limit its examination to changes in the existing physical conditions in the affected area as they exist at the time the notice of preparation is published, or where no notice of preparation is published, at the time environmental analysis is commenced. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant.

(14 Cal. Code Regs. § 15125(a); s*ee also Envtl. Planning & Info. Council v. Cnty. of El Dorado* (1982) 131 Cal.App.3d 350 [an environmental impact report must focus on impacts to the existing environment]; *Save Our Peninsula Comm. v. Monterey Cnty. Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 121 ["[T]he impacts of the project must be measured against the 'real conditions on the ground.'"].)

Recent caselaw generally affirms the use of an existing conditions baseline. For example, in *Communities for a Better Environment v. S. Coast Air Quality Management District*, the Supreme Court of California held that a baseline must reflect "existing physical conditions in the affected area . . . rather than the level of development of activity that could or should have been present according to a plan or regulation." ((2010) 48 Cal.4th 310, 320-321 [internal citations, quotations, and emphasis omitted].) Likewise, courts of appeal have affirmed that the proper baseline for CEQA analysis must reflect current, operative conditions. (*See, e.g.*, *Citizens for East Shore Parks v. Cal. State Lands Comm'n.* (2011) 202 Cal.App.4th 549.) In *Citizens*, the court considered what environmental baseline to apply to CEQA review of Chevron USA Inc.'s renewal of an operating lease for a marine terminal in the San Francisco Bay. The State Lands Commission used the current, operational level of the marine terminal as its baseline, and project opponents argued that the baseline should have excluded the use of the terminal. (*Id.* at 558.) The court rejected the opponents' argument, stating that the proper baseline for analysis of environmental impacts is "what [is] actually happening," not what might happen or should be happening. (*Ibid.*)

Accordingly, existing conditions are the appropriate baseline and should be applied when the County considers the proposed physical changes to the winery as part of the Use Permit

Modification. The County should look to the current daily number of visitors and yearly amount of wine produced on-site by the winery. In addition, the winery's current operations do not violate Caymus' current Use Permit, as those operations are expressly authorized. Therefore, there is no reason for the County to use any baseline other than the "current condition" baseline.

V. ANY POTENTIAL SECOND AMENDMENT TO THE JUDGMENT PURSUANT TO STIPULATION DOES NOT CIRCUMVENT THE COUNTY'S PROCEDURE FOR MODIFYING USE PERMITS

Contrary to Ms. Hammonds' and Ms. Blank's assertions that Caymus' proposal to further amend its judgment with the County circumvents the County's Code requirements, Caymus does *not* propose to contract away the County's permitting power. The proposed Second Amendment to Judgment does not take the place of the County's normal permit process. As the Director of Planning, Building and Environmental Services acknowledged, the purpose of the new amendment is "to allow [Caymus] sufficient time for construction of their new case goods, storage, bottling and production facility in Cordelia and relocation of the 800,000 gallons of wine to Cordelia." (Staff Report at 3.) Delays in the approval process of the Use Permit Modification have caused delays in Caymus' voluntary reduction in operations at its current facility. Caymus simply seeks some flexibility in its voluntary reduction in operations.

Further, Ms. Hammonds' and Ms. Blank's reliance on *Trancas Property Owners Association v. City of Malibu* is unavailing. ((2006) 138 Cal.App.4th 172.) In *Trancas*, the city entered into a written settlement agreement with the developer to approve one of the project's final subdivision maps and to exempt a downsized development from present or prospective zoning restrictions. In return, the developer agreed to dismiss the pending lawsuit against the city. (*Id.* at 175.) The court held that the settlement agreement was intrinsically invalid because the agreement included commitments by the city to take or refrain from regulatory actions regarding the zoning of the project, an action that may not be lawfully undertaken by contract. (*Id*. at 180-181.) The government cannot contract away its right to exercise police power in the future. (*Id*. at 181.)

Here, the County has not contracted away its right to exercise police power in the future, and the Amended Judgment and proposed Second Amendment do not supplant the County's normal permit process. The Second Amendment does not alter any uses, nor does it commit the County to take or refrain from certain regulatory actions. Hence, the parties are negotiating a Development Agreement to accompany the Use Permit Modification in order to fix the County's and Caymus' respective rights and obligations. (*See* Staff Report at 1; *see also Trancas*, *supra*, 138 Cal.App.4th at 182 ["[T]here exist procedures by which a landowner-developer and a city or county may lawfully agree to permit a described development project," such as a development agreement.].)

In any event, Caymus intends the proposed modification to the Amended Judgment be effective only *after* the Board has taken action on Caymus' Use Permit Modification. No decision on the Second Amendment need be made before the hearing on the Use Permit Modification.

VI. CONCLUSION

For the reasons explained above, the County is not required to consider and mitigate any environmental impacts from Caymus' proposed Use Permit Modification at this time or prior to the Board's action on the Use Permit Modification. Caymus' proposed project will reduce the size of Caymus' operations and qualifies for the categorical exemption for replacement structures. Furthermore, the County is entitled to use current conditions as the baseline for any environmental review and may enter into a Second Amendment to the Judgment Pursuant to Stipulation after taking action on the Use Permit Modification.

Sincerely,

Christopher W. Garrett

Christopher W. Garrett
of LATHAM & WATKINS LLP

cc: Laura Anderson, Esq.
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February 8, 2016

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Re: Proposed Development Agreement and Use Permit for Caymus Vineyards

Dear Chair of the Board:

This firm represents Nancy Hammonds and Charlotte Blank on matters related to operations at the Caymus Vineyards winery. As the Board knows, Caymus has been violating its use permit for years. These unlawful activities have included building unpermitted structures on the Caymus property as well as producing wine in excess of Caymus's permitted level (110,000 gallons per year) by more than tenfold.

The County is now considering a new use permit and proposed development agreement that would allow Caymus to significantly reconfigure structures on its property as well as increase its wine production to 660,000 gallons per year. We understand that the County does not plan to analyze or mitigate the environmental impacts that will accompany the facility modifications and proposed large-scale increases in permitted uses at Caymus Vineyards. The California Environmental Quality Act, Pub. Res. Code § 21000 et seq. ("CEQA"), however, requires the County to consider and mitigate the environmental impacts from approving projects like Caymus's proposal. Thus, allowing Caymus's construction and use expansion without first conducting environmental review is both inappropriate and unlawful.

In its recent enforcement action against Caymus Vineyards, the County correctly recognized that Caymus's unpermitted activities have caused substantial harm to Napa's community and its environment, which are discussed in more detail below. However, these impacts are not set in stone and it should not be a foregone conclusion that these adverse conditions will persist absent the County's action to make them legal. In fact, Caymus has no legal right to continue with excessive wine production, especially where it negatively impacts the surrounding community.

First, excessive noise and traffic will result from approving the currently unlawful wine production and accessory uses. For instance, Conn Creek Road, which provides access to Caymus, already suffers from a significant growth in traffic following increases in wine production, winery events, and tastings from wineries located on or near the road. At the same time, more vehicles are using Conn Creek Road to bypass heavy traffic on Silverado Trail and SR 29. Tastings and winery events, like those held at Caymus Vineyards, contribute to this traffic problem by increasing the number of drunk drivers on Napa's roads. In fact, in a single weekend last month, two serious drunk driving incidents occurred on the segment of Conn Creek Road between Silverado Trail and Rutherford Road. One incident involved a drunk driver hitting a telephone pole and fence and then crossing over Conn Creek Road and crashing into a vineyard. The other involved a drunk driver veering off the road and crashing into a rock wall on the Caymus property. Permitting Caymus to expand its tasting facilities and increase production at its winery will only serve to exacerbate increasingly poor and dangerous traffic conditions on Conn Creek Road. CEQA requires an analysis of the extent that unpermitted production levels and other uses at Caymus contribute to such substandard and dangerous traffic conditions before the County may grant a use permit to Caymus.

Additionally, noise impacts can be especially burdensome in rural locations like the area surrounding Caymus Vineyards. Construction and demolition activities, as well as wine production and onsite winery events can generate very loud noise levels. Notably here, Caymus is proposing to significantly alter its facilities by demolishing six buildings, constructing new interior driveways and parking spaces, erecting a new 8,200 square-foot greenhouse, as well as constructing other improvements on the property. *See* Staff Report at 3. All of these activities will foreseeably increase noise generated on Caymus's property and will impact nearby residents.

Despite the foreseeable environmental impacts associated with approving a use permit and development agreement for Caymus, we understand that Caymus has suggested that its project would qualify for exemptions from CEQA. This is incorrect. First, the significant increase in permitted wine production at Caymus will be accompanied by traffic and noise impacts and, consequently, does not qualify for a

CEQA exemption. *See* 14 Cal. Code Regs. § 15300 et seq. Nor do Caymus's proposals to demolish six existing buildings, construct new interior driveways and parking, or construct a largescale greenhouse fall within the terms of any of CEQA's categorical exemptions. *See id.* Even if some of these activities did qualify for a CEQA exemption individually, collectively they do not. *See Arviv Enterprises, Inc. v. South Valley Area Planning Com.* (2002) 101 Cal.App.4th 1333, 1340, 1346-48 (agencies must consider the whole of the action in determining whether a project qualifies for a categorical exemption). Thus, the County must prepare a CEQA-compliant negative declaration or environmental impact report to fully consider the environmental impacts of these activities, and mitigate them where necessary.

It appears that Caymus is further attempting to avoid legally-required environmental review by presenting its application as a "Reduced Project" compared to existing winery activities. *See* Staff Report, Exhibit B. The County should reject Caymus's attempt to gain from its illegal conduct by labelling its proposed increase in permitted uses as a reduction in actual uses. The County must use CEQA's environmental review process to fully evaluate the impacts caused by the increase in permitted production levels that Caymus proposes. *See Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 445 (authorizing the use of alternative baselines when an existing-conditions analysis would deprive the lead agency and the public of information about a project's impacts). Without such analysis, the County will not be sufficiently informed to require measures that are necessary to mitigate the environmental impacts that have resulted from Caymus's years of unlawful activities.

Finally, the staff report notes that Caymus is proposing to amend its judgment with the County to allow Caymus to produce 800,000 gallons of wine in 2017. Staff Report at 3. The proposed amended judgment appears to improperly circumvent the County's process for modifying use permits. The County's code requires that "modifications to an approved use permit *shall be processed in the same manner and in compliance with the procedures set forth herein for use permits*." Napa County Code § 18.124.130. The code does not allow the County to alter permitted uses through litigation settlements. In fact, doing so would be illegal. *Trancas Property Owners Assn. v. City of Malibu* (2006) 138 Cal.App.4th 172, 182 (agencies may not use settlement agreements to avoid their legally mandated zoning processes).

For all of these reasons, the County should not amend the Caymus judgment, enter into a development agreement, or approve a use permit for Caymus Vineyards until it has fully considered and mitigated the environmental impacts from Caymus's proposed project.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

Ellison Folk

cc: Nancy Hammonds

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