



Agenda Date: 7/27/2015

Agenda Placement: 6A

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## Napa County Agricultural Protection Advisory Committee **Board Agenda Letter**

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**TO:** Agricultural Protection Advisory Committee

**FROM:** David Morrison - Director  
Planning, Building and Environmental Services

**REPORT BY:** David Morrison, Director, Planning, Building & Environmental Servi - (707) 253-4805

**SUBJECT:** Discussion and Tentative Recommendation Regarding Variances and Code Compliance for Winery-Related Uses in Agricultural Zoning

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### **RECOMMENDATION**

This meeting is being conducted by the Agricultural Protection Advisory Committee and County staff to allow for input, discussion, and tentative recommendation regarding proposals for amending the County Zoning Code. The focus of this meeting concerns: (1) variances; (2) code compliance; and (3) issues related to these topics.

### **EXECUTIVE SUMMARY**

That the Agricultural Protection Advisory Committee:

1. Receive the staff presentation and ask any clarifying questions;

2. Accept public testimony; and
3. Discuss and take tentative action regarding recommendations concerning variances and the code compliance program.

### **FISCAL IMPACT**

Is there a Fiscal Impact?                      No

### **ENVIRONMENTAL IMPACT**

ENVIRONMENTAL DETERMINATION: The proposed action is not a project as defined by 14 California Code of Regulations 15378 (State CEQA Guidelines) and therefore CEQA is not applicable.

### **BACKGROUND AND DISCUSSION**

#### **CONFIDENTIAL DATA:**

At the meeting of July 13, the Committee requested that County Counsel prepare an analysis on whether suggested items to be included in any mandatory annual reporting would be considered confidential and proprietary. Counsel's office was also requested to provide the legal citations, where appropriate. Please see the following:

<b>Information</b>	<b>*Confidential (Yes / No?)</b>	<b>Basis</b>
Sharing of TTB reports regarding production and grape sourcing.	<b>**Yes</b>	<p><b>Section:</b> Government Code Section 6255  <b>Argument:</b> The public interest served by not disclosing **taxpayer records clearly outweighs the public interest served by disclosure in light of the public's interest in the County of Napa acting in harmony with federal laws – such as Section 6103 of Title 26 of the U.S. Code – that have designated the information contained in these records highly-sensitive such that the agencies and individuals identified therein are required to maintain these records as confidential.</p> <p>Food &amp; Agricultural Code Section 56254 affords similar protection to financial statements as collected by the director as specified in that section.</p>
Data utilized by the County of Napa to calculate the total gallons of wine	<b>Yes</b>	<p><b>Section:</b> Government Code Section 6255  <b>Argument:</b> The public interest served by not</p>

produced for the year. (California Dept. of Food & Agriculture-related data.)		disclosing the records clearly outweighs the public interest served by disclosure in light of the public's interest in the County of Napa acting in harmony with state laws that recognize the proprietary nature of such data. For example, Section 55601.05 of the Food & Agricultural Code has designated this information contained in these types of records highly-sensitive such that the Secretary of Food & Agriculture is required to maintain these records as confidential except in limited circumstances.
Data utilized by County to calculate percentage of grapes obtained in Napa County to determine compliance with 75% rule. (California Dept. of Food & Agriculture-related data.)	<b>Yes</b>	<b>Section:</b> Government Code Section 6255 <b>Argument:</b> The public interest served by not disclosing the records clearly outweighs the public interest served by disclosure in light of the public's interest in the County of Napa acting in harmony with state laws that recognize the proprietary nature of such data. For example, Section 55601.05 of the Food & Agricultural Code has designated this information contained in these types of records highly-sensitive such that the Secretary of Food & Agriculture is required to maintain these records as confidential except in limited circumstances.
Visitor counting methodology and totals.	<b>No</b>	Neither the California Public Records Act nor any other state law would enable the County of Napa to withhold disclosure of these records if presented with a Public Records Act request for them.
Summary of major marketing events and attendance.	<b>No</b>	Neither the California Public Records Act nor any other state law would enable the County of Napa to withhold disclosure of these records if presented with a Public Records Act request for them.
Description of retail merchandise on sale.	<b>No</b>	Neither the California Public Records Act nor any other state law would enable the County of Napa to withhold disclosure of these records if presented with a Public Records Act request for them.
Description of any site rental activity.	<b>No</b>	Neither the California Public Records Act nor any other state law would enable the County of Napa to withhold disclosure of these records if presented with a Public Records

Description of food preparation facilities and assurance of compliance with Environmental Health standards for food preparation and public water supply.	<b>No</b>	Act request for them.  Neither the California Public Records Act nor any other state law would enable the County of Napa to withhold disclosure of these records if presented with a Public Records Act request for them.
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**\*DISCLAIMER:**

The County of Napa ("County") will maintain the confidentiality of records requested pursuant to a California Public Records Act request to the extent applicable law allows, and unless required to release the information pursuant to a court order, law, or validly issued subpoena. If the County is required to release any of the above-referenced records via a court order, law, or validly issued subpoena, then the County will provide reasonable notice to the data provider prior to disclosure in order to give the data provider an opportunity to legally challenge the release of the records.

While the County will cooperate with the data provider to the extent the County is able in the data provider's challenge of any disclosure, the County will not, however, provide any legal support, advice, or services in support of any challenge to the disclosure of the records at issues.

**REVISED PROPOSAL X:**

At the June 22, 2015, meeting of the APAC, the Committee directed staff to revise Proposal X to include a column to allow for wineries on 10 acres parcels in the AW (Agricultural Watershed) Zone. The revised table is provided in Attachment A. Proposal X will be the primary topic for the August 10, 2015, agenda.

**VARIANCES:**

The following is a summary of proposals that have been submitted to date relating to the issue of variances:

**Proposal O – Rudy Von Strasser:**

Retain the current variance rules without any revision.

**Proposal Q – Christina Benz/Farm Bureau:**

All variances requested must contain evidence that supports all the necessary findings before the variance is allowed. In the case of winery setbacks, no variance shall be allowed that results in less than a 500 foot setback from any major roads in the Napa County, and any other setback variance requests must be agreed to by the adjoining neighbor(s).

**Proposal R – Charlie Hossom:**

Variances to County Code should be the exception and not the norm. Variances that improve public safety,

facilitate traffic flow, or are otherwise beneficial, should be granted. Variances to County Code that ignores the original intent such as setbacks should not be granted approval.

**Proposal S – Ginna Beharry:**

Only grant variances when all of the required findings are strictly met. Variances, road exceptions and conservation regulation exceptions are appropriate planning tools but should not be used to make a winery 'fit' on a parcel.

**Proposal T – Shari Gardner:**

Limit the extent of variances to 20%.

**Proposal X – Winery Use Permit Framework:**

Variances should be limited to 25% for public road setbacks when the parcel on which the winery is located is between 1 and 20 acres in size. Variances for public road setbacks should be limited to 15% when the subject parcel is between 20 and 40 acres. Where the parcel is greater than 40 acres, wineries shall meet all public road setbacks.

**COMPLIANCE:**

Although the matter of ensuring regulatory compliance by wineries was not included in the tasks assigned to the APAC by the Board of Supervisors, the Board also indicated that the Committee was free to address other issues as appropriate. The issue of how to improve the existing code compliance program has been raised by several APAC members, as well as comments from the public.

It should be noted that the issue of code enforcement continues to be a high priority of the Board of Supervisors, which had added two new enforcement officers over the past six months, and has directed staff to regularly report back with recommendations on improving regulatory compliance. The first enforcement workshop was held in March of this year. At that time, the Board directed staff to implement the following six recommendations:

- ) Hire a new officer;
- ) Establish a community clean-up program;
- ) Increase the amount of fines and penalties;
- ) Consider a building amnesty program;
- ) Clarify the Temporary Certificate of Occupancy process; and
- ) Expand the wine audit.

The next workshop is scheduled for August 11.

Regulatory compliance was also a topic of interest to the Napa County Grand Jury, which issued their report on the subject in May. Their relevant recommendations are provided herein for the Committee's reference.

1. Increase the number of yearly winery code enforcement audits from the current rate of 20 audits per year so that every winery would be audited at least every five years or at such intervals that the Planning Commissioners or County Supervisors deem to be appropriate.

2. Develop a process for monitoring and inspecting winery water treatment and disposal. A plan for monitoring water usage should also be implemented.
3. Make the inspection reports of non-compliant wineries more transparent to the public in much the same fashion as health code violations of restaurants are reported.
4. Establish and publish a range of penalties and/or operating restrictions for non-compliance infractions of use permit requirements. Such action should encourage wineries to be more cognizant of the cost of non-compliance.

The County's response to the Grand Jury is scheduled for August 11.

In addition, some portions of Option F (proposals that did not directly address the seven tasks assigned to the Committee by the Board of Supervisors) also relate to the issue of compliance and are provided as follows:

**Option F – Various:**

1. Establish a one-year moratorium on new or amended winery applications.
2. Establish a fee as part of the use permit to pay for a code enforcement position, dedicated to monitoring and enforcing winery use permit requirements.
3. Require all wineries to comply with existing County regulations.
4. Require wineries to annually report grape source, wine production and visitation counts to Napa County in order to verify compliance.

Finally, those individual proposals that deal with the issue of compliance are herein provided for the Committee's reference, including one new suggestion: Proposal Z, offered by staff.

**Proposal P – Dan Mufson:**

Establish a mandatory compliance program with the following components:

1. It will apply to all existing and new wineries.
2. The data will be submitted online to create a database.
3. An annual sworn affidavit by the Owner/President must be submitted certifying their use permit compliance.
4. Formal audits will be performed by County personnel trained for this purpose, or third-party audit firms.
5. The program is to be funded by fees based on visitation (tasting, events) and/or permitted wine production. The funding goal is to support annual audits of 33% of the wineries.
6. There will be a schedule of mandatory penalties for non-compliance based on the factor in question: In addition to monetary fines, the penalties will mandate a return to the operations outlined in the original Conditions of Approval, and thereafter, a three-year waiting period, with clean audits, to apply for any use permit modifications for production or visitation increases.
7. The components of the audit will include: production, grape sourcing, visitation, retail sales, the approved marketing plan, events, temporary events, food costs for food and wine pairing events, water usage and waste water volumes and handling. The Audit could include a review of the winery's Conditions of Approval.

**Proposal W – Self Certification:**

Establish a self-certification process to ensure that each winery is actively aware of the terms of its Use Permit and to raise awareness and align members of the winery management team regarding compliance of each condition. Most inadvertent non-compliance will be quickly eliminated by such a program and the awareness of marketing and sales personnel to WDO requirements would dramatically reduce the pressure for non-compliant events and initiatives.

The filings would be confidential. The self-certification would be made by the principal officer of the entity owning or leasing the winery facility. The officer would attest to its accuracy and completeness. If subsequently shown to be inaccurate or complete, penalties will be at the discretion of the Planning Director.

The self-certification process would include:

- ) Sharing of TTB reports regarding production and grape sourcing;
- ) A calculation showing compliance with the total production maximum;
- ) A calculation showing compliance with 75% rule;
- ) Visitor counting methodology and totals;
- ) Summary of major marketing events and attendance;
- ) Description of retail merchandise on sale;
- ) Description of any site rental activity; and
- ) Description of food preparation facilities and assurance of compliance with Environmental Health standards for food preparation and public water supply.

If not in compliance with some component of the Use Permit, a three-year program, including interim milestones to achieve compliance, would be required, subject to approval by Planning Director (or Zoning Administrator). Penalties would be imposed only if a winery failed to complete an approved compliance plan.

In lieu of the existing random winery audit program, filings would be subject to discretionary review by the Planning Director for up to 2 percent of the total filings annually (similar to the IRS selection for audit standards). Reduces total workload to 8-10 per year and targets most likely issues.

**Proposal Y – Napa Valley Vintners (Peter McCrea):**

A principal officer of each winery would be required to annually submit to either the County, or an independent auditing firm under contract to the County, the following:

- ) The amount of permitted wine production, per the approved Use Permit;
- ) The amount of wine actually produced;
- ) Compliance with the County's 75% rule, to the extent applicable; and
- ) TTB and CDFA reports to verify the above information.

All data would be kept confidential to the County. Production figures would be considered in terms of the 3-year rolling average currently used by the County to determine compliance.

If a winery is found to be non-compliant with any of the above requirements, then County staff would undertake additional investigation into other aspects of the operation, including, but not limited to the

following:

- ) Visitation;
- ) Marketing events;
- ) Food and wine pairings, including compliance with Environmental Health standards; and
- ) Retail merchandise.

**Proposal Z – Staff:**

Staff has the following comments and observations on the issue of code enforcement.

Staff supports the concept of self-certification, as included in several proposals. However, self-certification is valuable only to the extent that it can be independently verified. Several of the criteria that have been suggested cannot be easily confirmed, or are currently not within the County's authority. For instance, water usage would require mandatory meters and monitoring on private wells, which is required on select wineries but is not presently required countywide. Similarly, waste water treatment is the responsibility of the Regional Water Quality Control Board, not the County. Visitation is particularly problematic. Wineries generally maintain log books or other means of counting visitors, but the log books cannot be verified for their accuracy. To be credible and to allow for successful prosecution of violations, standards must be defined and quantifiable.

The suggestion that wineries be provided three years to come into compliance allows violators to continue to violate permit requirements. This creates an unfair business advantage, allows operators to continue to impact health and safety and/or the environment, and establishes a CEQA baseline that reduces the need for mitigation of potential environmental impacts.

The County currently uses a formula to calculate civil penalties in the case of illegal vineyard conversions. The formula takes into account the acreage of the disturbance, the value of the varietal planted, and the length of time that the violation has occurred. There is no similar process for determining civil penalties for violating wineries. As a result, it is difficult for both businesses and the public to understand the potential consequences of illegal behavior.

The code enforcement program is largely supported through the general fund. Penalties and fines have helped to offset the cost of the program in the past, but would not likely cover the cost of code enforcement to meet its new expanded mandate. A fee to cover the cost of the broader compliance program would reduce the impact to the taxpayers in paying for additional policing of the wine industry.

Based on the above, staff offers the following outline for a code enforcement program, borrowing ideas included in Proposals P, W, and Y:

- ) Reporting must be submitted annually, by all wineries that have use permit approval within the unincorporated area;
- ) The principal officer of each winery shall sign a document certifying the amount of wine produced, compliance with the 75% rule, as applicable, and compliance with all conditions of approval;
- ) Copies of ATTB and CDFA forms shall be provided to the County to verify the above information;
- ) All data collected shall remain confidential to the extent allowed under the law;
- ) Enforcement and compliance review fees shall be adopted to support the cost of the expanded compliance review;



- ) Subject to applicable law, the County shall prepare a formula for calculating civil penalties associated with violating wineries;
- ) A more in-depth compliance review will be held if the winery is exceeding their annual production limit, or is in violation of the 75% rule. In-depth compliance reviews will also be held to investigate complaints received from the public;
- ) If it is determined that a violation has occurred, then the winery must immediately comply with the conditions of its use permit. An application to modify the use permit to correct the violation may not be submitted for one year;
- ) Staff will provide an annual report to the Planning Commission regarding the number of wineries found to be in violation during the previous year, and a summary of production, crush, and 75% compliance aggregate data.

Recommendations of the APAC will be forwarded to the Planning Commission on September 2, 2015. In turn, the Commission will be making their recommendations to the Board of Supervisors on November 24, 2015. At that time, the Board may support, modify, or decline any or all recommendations and provide direction to staff regarding implementation of specific proposals. Many of the recommendations considered to date would require ordinances; some may require General Plan amendments. Staff would begin to draft the necessary documents, including any required CEQA analysis. Public workshops would likely be held, followed by public hearings before both the Planning Commission and Board of Supervisors. Staff conservatively estimates that any new programs would likely be approved in the Spring of 2016, at the earliest. Depending on the action, ordinances may require 30 to 60 days to become effective. As a result, any new code enforcement program may not be initiated until mid-2016, with the first reports becoming available in 2017, after the ATTB and CDFA forms have been filed.

#### **SUPPORTING DOCUMENTS**

- A . Attachment A - Revised Proposal X
- B . Corrected - Draft June 22, 2015 Minutes
- C . Draft July 13, 2015 Minutes
- D . Correspondence received
- E . Attachment E - Staff Responses to Farm Bureau Questions
- F . Attachment F - WDO EIR Mitigation Measures

Recommendation: Approve

Reviewed By: Melissa Frost