



A Tradition of Stewardship
A Commitment to Service

Agenda Date: 10/13/2015
Agenda Placement: 8A
Set Time: 9:00 AM PUBLIC HEARING
Estimated Report Time: 3 Hour

NAPA COUNTY BOARD OF SUPERVISORS Board Agenda Letter

TO: Board of Supervisors
FROM: David Morrison - Director
Planning, Building and Environmental Services
REPORT BY: Charlene Gallina, SUPERVISING PLANNER - 299-1355
SUBJECT: Appeal Hearing - Reverie on Diamond Mountain Winery

RECOMMENDATION

Consideration and possible action regarding an appeal filed by George Caloyannidis to a decision by the Planning Commission on June 17, 2015 to approve the Reverie On Diamond Mountain Winery - Use Permit Major Modification No. P13-00027 to allow the following: 1) increase the approved production capacity from 5,000 to 9,200 gallons per year with a condition on estate grown grapes for the net increase of 4,200 gallons; 2) the 1,460 sq.ft. second floor area of the winery building to be allocated to accessory use; 3) use of the 4,710 +/-sq.ft. cave for wine production, case storage and wine barrel storage; 4) increase in approved number of employees from two (2) full-time employees plus one (1) part-time employee during harvest to a maximum of five (5) full-time employees; 5) authorize on-premises consumption of the wines produced on-site, consistent with Business and Professions Code §23356, 23390, and 23396.5 (also known as AB 2004 (Evans 2008 or the Picnic Bill)) within the winery building, in the redwood grove, and other designated outdoor areas; 6) catered food and wine pairings; 7) abandonment of an existing septic system and the installation of a new code compliant domestic and winery waste system subject to Condition of Approval No. 2(I); 8) installation of a temporary crush pad cover; 9) installation of a new ADA compliant parking space; 10) installation of a new well; and 11) recognition and authorization of "by appointment visitation" and a marketing plan.

The approval includes a Use Permit Exception (No. P15-00141) to the Conservation Regulations with regards to retention of the following: 1) the portal for the existing wine cave that encroaches into the 45-foot creek setback for the small tributary creek on the property; and 2) the minor landscaping improvements along a portion of Teal Creek that are within the required setback of that creek. The approval also includes an Exception to the Napa County Road & Street Standards to allow for a reduction in the required 20 foot roadway width to preserve unique features of the natural environment.

The project is located on a 39.83 acre parcel approximately 1,000 feet west of Diamond Mountain Road and approximately 4,000 feet from its intersection with State Highway 29/128, within the AW (Agricultural Watershed) Zoning District; 1530 Diamond Mountain Road, Calistoga, CA, APN: 020-440-005.

ENVIRONMENTAL DETERMINATION : Consideration and possible adoption of a Negative Declaration. According to the proposed Negative Declaration, the proposed project would have no potentially significant environmental impacts. This project site is not on any of the lists of hazardous waste enumerated under Government Code Section 65962.5.

(CONTINUED FROM OCTOBER 6, 2015)

EXECUTIVE SUMMARY

The matter before the Board involves an appeal by a neighbor to the Planning Commission's (the Commission) decision on June 17, 2015, to approve an application to expand the Reverie on Diamond Mountain Winery (Reverie Winery or the Winery) located at 1530 Diamond Mountain Road, Calistoga. An appeal packet was submitted by Appellant George Caloyannidis (Appellant) within the required timeframe.

On October 6, 2015, the Board opened the public hearing and continued the hearing to October 13, 2015. The Appeal raises issues regarding CEQA baseline, illegal activity, after-the-fact permit approvals and adequacy of the use permit findings.

PROCEDURAL REQUIREMENT

1. Chair introduces item and requests that staff briefly delineate the issues on appeal in front of the Board.
2. Staff delineates the issues on appeal.
3. Chair reports on whether or not, in her discretion, the Chair has previously made a "good cause" finding upon request by the Appellant or the Applicant to either: (a) augment the record with new evidence on existing issues and/or (b) hear the matter de novo (e.g., entirely fresh hearing). If no member of the Board, the Applicant or Appellant makes such a request, the Chair's prior determination stands as to Applicant and/or Appellant.
4. Chair asks if any "interested party" wants to assert that "good cause" exists to: (a) augment the record with new evidence on existing issues and/or (b) hear the matter de novo (e.g., entirely fresh hearing). The Chair may authorize either or both of the above requests. This decision by the Chair may be overruled by a majority of the Board. If no member of the Board makes such a motion, the request will be considered denied. [As of the date this report was prepared, no one has asserted no good cause exists to augment the record.]
5. Chair opens public hearing, invites staff presentation and testimony from Appellant, followed by interested parties and Applicant. Appellant has the final rebuttal.
6. After the Board has heard all testimony and received evidence from Appellant, Applicant, Staff and interested parties supporting each, Chair closes the public hearing.
7. A motion of intent is made and seconded to take one or more of the following actions: (a) Deny the Appeal; (b) Uphold the Appeal; (c) Deny the appeal and modify the Commission's decision; and/or (d) Remand the matter back to the Commission for reconsideration.
8. Following the Board's action, refer the matter to County Counsel's office for preparation of a Resolution of Findings of Fact and Decision on Appeal, as applicable.
9. Chair calls for the votes on the motion and refers the matter to County Counsel's office for preparation of a Resolution of Findings of Fact and Decision on Appeal.

FISCAL IMPACT

Is there a Fiscal Impact?

No

ENVIRONMENTAL IMPACT

Consideration and possible adoption of a Negative Declaration. According to the proposed Negative Declaration, the proposed project would have no potentially significant environmental impacts. This project site is not on any of the lists of hazardous waste enumerated under Government Code Section 65962.5.

BACKGROUND AND DISCUSSION**CURRENT STATUS AND ACTIONS BEFORE THE BOARD:**

The matter before the Board is an Appeal to the Planning Commission's decision on June 17, 2015 to approve Reverie Winery Use Permit Major Modification No. P13-00027 to allow the following: 1) increase the approved production capacity from 5,000 to 9,200 gallons per year with a condition on estate grown grapes for the net increase of 4,200 gallons; 2) the 1,460 sq. ft. second floor area of the winery building to be allocated to accessory use; 3) use of the 4,710 +/-sq.ft. cave for wine production, case storage and wine barrel storage; 4) increase the approved number of employees from two (2) full-time employees plus one (1) part-time employee during harvest to a maximum of five (5) full-time employees; 5) authorize on-premises consumption of the wines produced on-site, consistent with Business and Professions Code §23356, 23390, and 23396.5 (also known as AB 2004 (Evans 2008 or the Picnic Bill)) within the winery building, in the redwood grove, and other designated outdoor areas; 6) catered food and wine pairings; 7) abandonment of an existing septic system and the installation of a new code compliant domestic and winery waste system subject to Condition of Approval No. 2(I); 8) installation of a temporary crush pad cover; 9) installation of a new ADA compliant parking space; 10) installation of a new well; and 11) recognition and authorization of "by appointment visitation" and a marketing plan.

The approval includes a Use Permit Exception (No. P15-00141) to the Conservation Regulations with regards to retention of the following: 1) the portal for the existing wine cave that encroaches into the 45 ft. creek setback for the small tributary creek on the property; and 2) the minor landscaping improvements along a portion of Teal Creek that are within the required setback of that creek. The approval also includes an Exception to the Napa County Road & Street Standards to allow for a reduction in the required 20-foot roadway width to preserve unique features of the natural environment. The use permit modification, Conservation Regulation Exception, and the Road and Street Standards Exception are hereafter referred to as the Project.

The Commission held two public hearings on the Winery. After considering all written and verbal evidence presented, the Planning Commission closed the public hearing and voted 3:1 (Cottrell absent) to adopt the Negative Declaration for the Project and approve: 1) an Exception to the Road and Street Standards; 2) Conservation Regulation Exception Findings (P15-00141); and 3) Use Permit No. P13-00027-MOD as conditioned.

On June 29, 2015, subsequent to the Commission's decision and within the prescribed period, a Notice of Intent to Appeal was filed by Appellant. On July 14, 2015, an Appeal Application was submitted by Appellant within the required timeframe.

Pre-Hearing Conference

In an effort to clarify the County's procedural requirements and expectations regarding appeals of Planning Commission decisions, the County Counsel's office has initiated a pilot program whereby a pre-hearing conference is held with the parties (applicant and appellant) and the Chair of the Board to discuss estimates of the

time length of their respective presentations, the scope of evidence and testimony they intend to present, together with witness lists explaining who the witness is, the subject matter they will testify about, and length of their testimony. Any witness not appearing on the witness list at the pre-hearing conference will be treated as an ordinary member of the public and be allotted the usual three minutes of speaking time.

A pre-hearing conference was held on September 10, 2015 with Applicant and his counsel, Appellant, an attorney representing a potential buyer of the Property (real party in interest), the Chair, and County Counsel. At that time, Appellant stated that he would present two witnesses but in a later voicemail indicated that he had no witnesses that he expected to testify in support of Appellant's position. Applicant's team including the attorney for the real party in interest identified the following six individuals: Carl Butts (CAB Engineering), Dalene Whitlock (W-Trans), Jeanette Owen (FirstCarbon Solutions), John C. Shook and Rick Shone (Nordby Wine Caves), and Douglas Patterson (CalOSHA) as witnesses expected to testify in support of Applicant's position for a total of approximately 90 minutes. It was agreed by Appellant and Applicant that witnesses not previously identified at the pre-hearing conference could testify as ordinary members of the public subject to the three minute limit.

County Code Section 2.88.090(A) provides that with respect to appeals of Planning Commission decisions, the Board shall exercise its independent judgment in determining whether the decision appealed was correct. Section 2.88.090 further provides that the Board's appeal hearing shall be based on the documentary record, including transcripts of the Commission's hearing, plus any evidence that could not have been presented as those hearings, unless the Chair affirmatively permits any additional evidence based on good cause shown. The Chair's decision may be overruled by a majority of the Board. As of the date of preparation of this report, neither Appellant nor Applicant has requested good cause be found to augment the record of the Commission. Applicant's team provided a letter dated September 16, 2015 from Mr. Douglas Patterson, Senior Engineer, State of California, Division of Occupational Safety & Health, Mining & Tunneling Unit regarding two State permits issued for the cave which was discussed at the Planning Commission and is not considered new evidence.

STATED BASIS FOR THE APPEAL AND STAFF RESPONSE:

The following outlines the Basis of the Appeal as contained in the appeal submitted by Appellant. For convenience, staff has numbered each issue and provided a summary, but recommends the Board review the actual appeal for details. Background materials and staff reports from the Commission's hearings are attached, and the hearing transcripts have been provided to the Board.

Typically, when a Planning Commission action is appealed to the Board of Supervisors it involves a land use matter that has yet to be built and/or implemented. In this case, the action being appealed is the Commission's authorization of a winery expansion that previously occurred and operated for years without required permits. Consequently, this violation aspect of the request plays heavily into the Appeal. Although Appellant takes issue with some elements of the granted entitlement, a substantial component of the Appellant's objection centers on process, Staff/Applicant credibility, and degree of consequence/reward perceived from the retroactive nature of the approval.

As described in more detail below, the Commission was not legally required to consider the outstanding violations in deciding on the merits of the Applicant's requested use permit modification. The Commission was legally obligated to base its decision on whether the project met the required use permit findings, and whether the proposal was consistent with the County General Plan. Neither the consideration of a use permit application nor the CEQA analysis are the appropriate vehicles for remedying the violations. Violations should be addressed through the code enforcement process. If satisfactory compliance is still not achieved, then the County has the option to consider revocation of the use permit entirely.

Although the existence of violations are insufficient, in and of themselves, to deny the application, they may be considered a factor by the Board in determining the extent to which the use permit may be modified. For instance, if the Board found that the past violations represent an unfair business practice, it is within the Board's discretion to partially grant the Appeal and approve a modified Project. In this case, the extent of the violations could be a relevant factor in considering modifications such as reductions in requested production and/or visitation/marketing; additional environmental enhancements of the creek; and/or removal of unpermitted improvements.

Subsequent to the Planning Commission's approval of this Project, the County has updated its Standard Conditions of Approval for Winery projects. The Commission's older version of the Standard Conditions of Approval is included in the administrative record for this hearing. However, should the Board of Supervisors express intent to deny the Appeal and uphold the Commission's approval of the Project, or approve a modified version of the Project, County Counsel will provide the updated current version of the Conditions of Approval to the Board along with the findings for consideration and adoption.

GROUND OF APPEAL:

The following outlines the basis of the Appeal as contained in the Appeal dated July 14, 2015. For convenience, Staff has numbered each issue and provided a summary, but recommends the Board review the actual Appeal for details.

Appeal Ground No. 1: Appellant asserts that the Commission's findings are inadequate for failure to address the requirement that that the Project will not adversely affect the...welfare of the County pursuant to County Code Section 18.124.070(C). Therefore, the findings do not provide the analytic route from evidence to action as articulated by the California Supreme Court in *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506. Issuing a use permit to legalize uses that have been illegally initiated and maintained for years can adversely affect the public welfare. The Commission believed it could not consider the illegality of Applicant's prior conduct. The Staff Report erroneously implies as much. The Commission should have denied the permit because the Commission failed to consider the impact on the welfare of the County by authorizing existing code violations.

Staff Response: County Code Section 18.124.070 contains the seven "findings" that must be made for issuance of a use permit or modification thereto. It is well established under *Topanga* and its progeny that the findings must be supported by substantial evidence in the record as a whole and must provide the analytical route the administrative agency traveled from evidence to action. (*Topanga* at p. 515) County Code Section 18.124.070 (C) requires the Commission to find: "That grant of the use permit, as conditioned, will not adversely affect the public health, safety or welfare of the county." Here, the Commission specifically made a finding (Finding No. 11) that the Project will not adversely affect the public health, safety or welfare of the County of Napa. Finding No. 11 was supported by the following analysis in the Staff Report:

"Analysis: Various County divisions and departments have reviewed the project and commented regarding water, waste water disposal, access and fire protection. Conditions are recommended which will incorporate these comments into the project to assure ongoing protection of the public health and safety."

Conditions of Approval Nos. 3 (A) – (D), adopted by the Commission incorporate more than 75 specific requirements from Engineering Services, Environmental Health, Fire and the Building departments or divisions all of which are intended to ensure compliance with applicable County regulations and protection of public health, safety and welfare.

While Staff concedes Appellant's point that the analysis underneath Finding No. 11 omitted a specific reference to the words "welfare of the County", this is not a fatal error because case law is clear that although findings must be discernable, strict formality is not required. (*Craik v. City of Santa Cruz* (2001) 81 Cal.App.4th 880, 884.) It is proper to look to transcripts of the hearing for findings contained in statements made by decision-makers and oral remarks made at a public hearing. (*Harris v. City of Costa Mesa* (1994) 25 Cal. App. 4th 963, 971.) "Findings need not be stated with judicial formality. Findings must simply expose the mode of analysis, not expose every minutia." (*Craik*, at p. 884.) "Findings are to be liberally construed to support rather than defeat the decision under review." (*Topanga*, at p. 1356.) Administrative findings may be general as long as they satisfy the dual requirements of making intelligent review by the courts possible and apprising the parties of the basis for administrative action. (*Swars v. Council of City of Vallejo* (1949) 33 Cal.2d 867, 873.) Here, the Commission properly referred to the Staff Report, the Conditions of Approval, oral remarks at the hearings and the record as a whole and determined that the Project would not adversely affect the County's welfare.

Appellant claims that the Commission could not have found the Project consistent with the general welfare of the County because approval of the Project authorizes illegal uses that have been maintained for many years and therefore the Commission should have denied the Project. None of the seven findings required for grant of a use permit under County Code Section 18.124.070 require the Commission to find that an applicant has not violated the terms of a previously issued conditional use permit. In *Baird v. County of Contra Costa* (1995) 31 Cal.App.4th 1265, a neighbor group claimed that the county erred by refusing to consider evidence of purported violations of the original use permit. The Court rejected the neighbor's claim and noted that none of the findings required by the county's ordinance for issuance of a use permit required a finding that the applicant has not violated the terms of a previously issued conditional use permit. Therefore, the county was not required to consider evidence of purported violations of an original conditional use permit pursuant to which the applicant operated an addiction treatment facility in determining whether to grant a permit expansion. As in the *Baird* case, Napa County's use permit ordinance does not require a finding that the applicant has not violated the terms of a previously issued use permit.

Even though the Commission was not legally required to consider violations of Applicant's previous use permit, the record is clear that the nature and extent of the violations was a focus of public comment, the Staff Report and the Commission's discussions. Appellant's assertion that the Commission somehow believed it could not consider the illegality of Applicant's prior conduct is belied by the administrative record. The first page of the Initial Study/Negative Declaration prepared for the Project clearly states in bold and underline: "**The use permit entitlement request evaluated in this Initial Study pertains to an existing winery that has previously expanded beyond the limits of its use permit without required County approvals. The subject property is presently in violation of County Code, although it is noted that the subject use permit modification was submitted voluntarily by the applicant prior to the County initiating a code enforcement case.**" (See Initial Study/Negative Declaration page 1.)

Likewise, the Staff Report clearly identified and articulated each of the various components of the Project that were constructed or performed without use permit or building permit approval. Furthermore, the decision-making options that were outlined by Staff for the Commission included, among others, denial of the Project or revocation. Appellant and other members of the public commented at length on the illegal uses and the history of the Project during the public hearings. Appellant's reliance on Commissioner Phillips comment that "we evaluate this application as a current project, not how we got here" does not mean that Commissioners ignored or were not cognizant of the violations and their ability to deny the Project. The Commission clearly understood the illegal conduct that was at issue and the potential

implications of approving such activity as reflected by the following from Commissioner Basayne: “This application resides squarely in the present concern of providing after-the-fact use permits and by doing so, possibly encouraging more violations that –from the prospective of some individuals.” (See Transcript of Planning Commission Hearing dated June 3, 2015, at 67:19-22.) Commissioner Cottrell also stated “But what we have also seen here is a failure to follow some of the important Napa County regulations and the result of that means there have been impacts that have not been vetted in a public place and also it means that we don’t fully know what those impacts are.” (See Transcript of Planning Commission Hearing dated June 3, 2015, at 75:7-11.)

The Commission properly considered the nature and extent of the code violations before rendering their decision. As explained by Deputy Director McDowell in his written Staff Report and verbal presentation to the Commission, code violations essentially come in two forms: 1) activities/actions that are prohibited by code and thus are not approvable; and/or 2) activities/action that are otherwise permissible but required permits have not been obtained. In this case, the violation was the result of the Applicant exceeding the bounds of their permit and constructing facilities without the benefit of a permit. The violations were not prohibited activities. As a discretionary use permit, the Commission was under no obligation to approve the Project as submitted, but there was also no aspect of the Project directly in conflict with County Code. The Commission, and the Staff Report, noted that the approach in evaluating the proposed Project was to consider the existing unauthorized improvements and uses from the perspective as if they did not already exist. The Commission ultimately found that the improvements and expanded uses, as conditioned, were acceptable.

Appeal Ground No. 2: Appellant disputes Applicant’s contention and credibility that the permit application was “voluntary.” It appears Applicant did not seek a permit to legalize existing uses until the threat of a County audit and when Applicant decided to sell the property.

Staff Response: Whether or not the permit application was “voluntary” or motivated in part by some other factor such as a potential sale of the Property are not factors which would legally justify denial by the Commission. As noted above in Staff Response to Appeal Ground No. 1, the findings required for issuance of a use permit are located in County Code Section 18.124.070. That section contains the seven findings which must be made by the Commission in order to grant a use permit or modification thereto. None of the seven findings require that an application for a use permit be made voluntarily or with good faith intentions “to come clean.” The findings required for issuance of a use permit are specifically related to the use being proposed and are not designed nor intended to be used to judge an applicant’s intentions, credibility, and motivations.

Appeal Ground No. 3: Appellant claims that the Applicant’s credibility is undermined by several factors including, but not limited to, Applicant’s statements that he was unaware of required County approvals, Applicant’s inconsistent positions about scope of the “existing” illegal uses, and statements to neighbors about the size and scope of the requested permit.

Staff Response: The question of Applicant’s credibility had little bearing on the Staff’s recommendation, as well as the Commission’s decision. As noted in the Staff Report and in Staff’s presentation, arriving at a recommendation on the Project was difficult given that the code violations were not outright prohibited activities. The Applicant had a right to request approval for these activities, so it was necessary to determine if the various components of the Project were otherwise supportable had they not already been implemented. Whether the Applicant was forthright in disclosing how the violations occurred was not pertinent to the question of whether they should now be approved. In moving forward with a request to legitimize past

unauthorized actions, an applicant who has years of multiple code violations generally has either been unfamiliar with the code requirements, has knowingly chosen to ignore the code, or as is typical in most code cases involves some combination thereof. For this matter, whether this was a case of unfamiliarity with code requirements or willful disregard is not a factor in determining if the request to correct the violations warrants approval. Use Permit entitlements run with the land. If approval of the Project was warranted as a result of a new owner (who has not caused a violation) acquiring a site, then approval was warranted even if the original violating property owner retained the land. The grant or denial of additional entitlement must be based on the ability (or lack thereof) to make the required use permit findings, and consistency with the County General Plan.

Recommendations were made on the individual components of the proposal based on whether they would have been supported had they not yet been implemented. It is from this perspective that Staff made the following recommendations: 1) the increase in production was modest and reasonable; 2) that some level of increased visitation and marketing was reasonable, but not to the extent requested by the Applicant; 3) that the amount of outdoor visitation/marketing areas was extensive and did not need to encroach within creek setbacks; 4) an alternative location for one of the cave portals outside of the creek setback would have been possible, but some level of creek setback encroachment was supportable given that the original winery was allowed within the creek setback; and 5) that creek setback encroachments were only supportable if the Project included some form of environmental enhancement component. The Commission generally agreed with Staff's points except that they granted higher levels of visitation and marketing than Staff recommended and allowed the owner to maintain the existing extent of outdoor visitation/marketing areas. Applicant agreed to implement stream corridor enhancements to offset the creek encroachments.

Appeal Ground No. 4: Appellant contends the Commission's authorization of the alleged illegal improvements distorts the CEQA process and creates a CEQA loophole which violates the spirit of the CEQA process. When an illegal use is allowed to continue, the illegal use sets the baseline for any CEQA analysis. As a result, no meaningful CEQA review can be performed where the landowner seeks to authorize an existing illegal use. This creates incentives to build or expand uses without obtaining prior approvals. The County's widespread non-enforcement creates a CEQA loophole and violates the CEQA spirit.

Staff Response: CEQA is an environmental disclosure statute and is not intended to be an enforcement mechanism or punitive. Public agencies have other enforcement or punitive tools outside of the purview of CEQA that may be utilized to redress illegal activity. The CEQA Guidelines and case law interpreting the guidelines hold that the baseline for a continuing project is the current environmental condition, even if the project has not undergone prior environmental review. (*Center for Biological Diversity v. Department of Fish and Wildlife* (2015) 234 Cal.App.4th 214, 248.) The "normal" rule is that the baseline must reflect the "physical conditions existing at the time [the] environmental analysis" begins. (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 320; 106 Cal.Rptr.3d 502; 226 P.3d 985.) This is true even if the current condition includes unauthorized and even environmentally harmful conditions that never received, and, as a result of being incorporated into the baseline, may never receive environmental review. (*Citizens for East Shore Parks v. California State Lands Com.* (2011) 202 Cal.App.4th 549, 561; 136 Cal.Rptr.3d 162.) (*Center for Biological Diversity v. Department of Fish and Wildlife, supra*, 234 Cal.App.4th at 249.)

A long line of appellate cases have addressed Appellant's contentions and provide legal support for the County's use of existing, unauthorized activity as the baseline for the Reverie Winery. For example, in *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428 (*Riverwatch*), [Division One of the Fourth

Appellate District] approved the county's chosen baseline, *which included illegal development that had occurred at a mining operation seeking a use permit*. The respondents could not, said the court, essentially turn back the clock and insist upon a baseline that excluded existing conditions. (*Id.* at pp. 1452–1453 [91 Cal.Rptr.2d 322].) How present conditions come to exist may interest enforcement agencies, but that is irrelevant to CEQA baseline determinations—even if it means preexisting development will escape environmental review under CEQA.” (*Riverwatch*, at pp. 1452–1453 [91 Cal.Rptr.2d 322].) *Center for Biological Diversity v. Department of Fish and Wildlife*, *supra*, 234 Cal.App.4th at 249-250. (Emphasis added.)

Consistent with the state CEQA Guidelines and the County's Local Guidelines for Implementing CEQA, the Negative Declaration properly relied on the existing, unauthorized activities as the appropriate baseline.

Appeal Ground No. 5: Appellant claims that the Project has cumulatively considerable traffic impacts. The W-Trans Traffic Study relied upon by the Commission was compiled from outdated records as traffic in the vicinity has increased substantially in the past two years. The traffic study did not account for the unknown actual data for traffic generated by wineries and vineyards in the vicinity and several undeveloped sites. The already entitled and likely future additional vehicle trips in the immediate vicinity should have been considered in assessing cumulative traffic impacts. Additionally, the proposed mitigation measure requiring use of an eight passenger vehicle for carpooling is disingenuous.

Staff Response: The Project's contribution to cumulative traffic impacts was evaluated in the Negative Declaration adopted by the Planning Commission. The Project traffic engineer, W-Trans, properly calculated the potential for additional traffic generated from the proposed increase in the Project's intensity, and relied upon current information. Appellant claims that traffic has increased substantially but provided no evidence to substantiate the claim. The traffic analysis did factor in traffic generated by other wineries, vineyards, as well as all other land uses generating traffic in the vicinity. The analysis found that the Project would result in 15 additional daily trips, of which six (6) would occur during the weekday p.m. peak hour which is the period of highest general road congestion in Napa County. The report also found that Diamond Mountain Road functions at Level of Service A, which is a free flowing traffic condition, and that these conditions would not degrade as a result of the Project.

With respect to cumulative impacts, the Negative Declaration relies on the 2008 Napa County General Plan EIR to account for reasonably foreseeable future traffic generated by other possible new land uses in the vicinity of the Project. The Negative Declaration properly concludes that six (6) additional trips to the network during the weekday p.m. peak period would not result in a cumulatively considerable contribution to the significant cumulative traffic impacts identified in the 2008 Napa County General Plan EIR.

Appellant mischaracterizes the Applicant's commitment to use an eight passenger van for carpooling as a "mitigation measure." The Negative Declaration found that the Project's incremental contribution (e.g., six (6) additional trips in the weekday p.m. peak hour) would not result in a cumulative contribution to future cumulatively significant traffic impacts. Six (6) trips in the course of a one hour period is the equivalent of one trip every 10 minutes. Mitigation is not required. In addition, Appellant asserts that the passenger van is a disingenuous commitment on behalf of the Applicant; however, Appellant fails to provide any evidence that the passenger van will not be utilized as committed to by the Applicant. It is speculative to claim that Applicant's commitment is disingenuous. Further, use of the van is not obligatory to mitigate traffic congestion. Should the Board uphold the Commission's action, County Counsel will update the Conditions of Approval and include a condition reflecting Applicant's commitment to utilize the van. This condition was inadvertently left out of the final version of the Commission's Conditions of Approval.

Appeal Ground No. 6: Appellant asserts that the County did not properly evaluate the impact of the Applicant's use of tailings from the cave excavation. The disposition of the amount of fill from the cave would have required a grading permit and an erosion control plan. An engineering analysis could determine the original terrain configuration by extracting 2,348 or 3,510 cubic yards of fill from the vineyard paths and quite accurately evaluate the effects of non-engineered fill placement on them through computer simulations. Erosion events into Teal Creek could be ascertained, contrary to Staff's position, by factoring in available rainfall data.

Staff Response: Appellant is correct that the County did not evaluate the impact of the cave tailings. However, the County's position is consistent with CEQA case law on baseline. Under CEQA, the County properly considered the past use of tailings from the cave excavation as part of the existing setting, although the use permit request sought after-the-fact approval of this component. As noted in Staff Response to Appeal Ground No. 4, the baseline under CEQA is normally the physical conditions existing at the time CEQA review is commenced or at the time at which the application is submitted. This is appropriate even if the existing physical condition is the result of illegal or unpermitted activity as was the case for this Project. In addition, it cannot be determined with certainty where all cave spoils were taken and whether those spoils would have triggered a grading permit and/or engineered fill. Applicant has represented that the cave spoils were spread on vineyards and vineyard roads, which would not necessarily trigger a grading permit or require an engineered fill analysis. The cave was constructed in 2001 and 2008. Cave spoils have been in place for at least seven years so that evaluation of erosion potential at this point would serve little to no purpose assuming it were possible to determine with certainty the final resting place of the cave spoils.

In addressing the code violations on the Property, Staff's approach was to request that the Applicant include a stream restoration component. The stream restoration component also served to address the required findings for grant of a Conservation Regulation Use Permit Exception (Conservation Exception) to allow the previously unauthorized improvements within the creek setbacks to remain. Should the Board determine that the required findings for grant of a conservation regulation cannot be made, resolution of the unauthorized activity and improvements could alternatively be achieved by prohibiting use of the cave for Winery use; removal of all unauthorized improvements from creek setbacks; and, return of wine production, visitation and marketing to the previously authorized levels. Staff did not recommend this course of action to the Commission. Generally, property owners are more likely to be willing to correct violations if they retain some level of benefit to their land. Forcing the Applicant to remove the cave portal, work areas and driveways in the creek setback would have resulted in substantial new earth disturbance in the creek areas. Given the decades of creek channel and setback encroachment that had occurred on this site and sites both up and downstream of the Project (legally before the Conservation Regulations were adopted), Staff believed requiring offsetting stream restoration was a better path to enhance and preserve (what remains of) the creek corridor than would have been served by having the unauthorized improvements removed.

Appeal Ground No. 7: Appellant claims Applicant's contention that the use permit is necessary to prevent the Winery from going out of business is unsupported by the record.

Staff Response: Applicant and his representatives provided substantial testimony, including submission of a written business plan, in support of the requested visitation and marketing levels. The Commission considered this business plan as well as how the proposed Project compared to other similarly sized wineries. The Applicant and his representatives claimed that the Reverie Winery would be forced out of business if they had to comply with the level of visitation authorized in the prior use permit. The Commission conducted a thorough evaluation of the request in this regard, and ultimately voted (3:1 –

Commissioner Cottrell being absent) to support the level of visitation and marketing put forth by Applicant. Closing comments from those Commissioners supporting the higher visitation and marketing levels reflect that whether or not the current property owner would go out of business was a not a significant factor relied on by the Commission in their decision-making process. They expressed support for higher visitation/marketing because they felt the application was reasonable and that the site was well suited for those levels. See for example Commissioner Scott's statement: "This is a very reasonable application." (See Transcript of June 3, 2015, at 69:27-28.) Also Commissioner Basayne's statement: "And I also wanted to say that I am supportive of a phased visitation plan as proposed by the applicant. And I think that that [sic] is reasonable ..." (See Transcript of June 17, 2015, at 26:9-13.)

Appeal Ground No. 8: Appellant contends there are numerous gaps in the administrative record and without this information (fully set forth in Appellant's Appeal), the Commission could not make an informed decision and the public could not knowledgeably comment on the proposal.

Staff Response: Staff believes all relevant information was provided to the Commission and the public. Appellant has not articulated how any alleged gaps in the administrative record, assuming any exist, resulted in a prejudicial abuse of discretion, resulted in the lack of a fair and impartial hearing or resulted in a lack of facts supporting the Commission's decision.

As is common practice, the Commission was provided with a complete set of the Project's administrative record in advance of the hearings. Commissioners diligently read and familiarize themselves with all background materials, as well as conducting site visits if they deem it necessary. The Commission's record was thorough, detailed and provided an ample evidentiary basis from which to make an informed decision. Likewise, public notice of the environmental document's availability and notice of the hearing was providing in accordance with County Code and State Law. Project files containing the entire administrative record were available throughout the process. Staff's response to each purported gap in the administrative record is outlined below:

First Point – Appellant contends a folder from Applicant Representative Gilbreth did not contain all permits for the Project and was not examined by the Commission.

Response: Late in the public hearing shortly before the Commission conducted their deliberations, Mr. Gilbreth submitted a notebook dated June 16, 2015 containing a letter and evidence on historical approvals and permits that he claimed had authorized the caves (see Attachment F, June 17, 2015 Planning Commission Staff Report - Correspondence Received after Packet Mail Out or at the Meeting). This evidence was provided during the public hearing to Commissioners, Staff, and copies were made available to the public. Mr. Gilbreth stated that the folder contained all required permits; however the folder contained only a letter from the State Agency.

Second Point – The exact date of the cave excavation should have been part of the public record and the date upon which the County began to require cave permits.

Response: Staff requested this information numerous times from Applicant during processing of the application. Throughout the process Applicant represented that the cave was constructed at some point in the mid to late 1990's. Shortly before close of the public hearing on June 17, 2015, Applicant's representative (Mr. Gilbreth) submitted evidence that an initial phase of the cave was constructed in 2001 and later expanded in 2008. Although this information was revealed late in the process, it was revealed in the public hearing and was part of the public record.

The Staff Report and a considerable amount of the Commission's discussion focused on trying to understand the County's regulatory process for allowing winery uses within caves. The administrative record is clear that even prior to the County's current permitting practices for caves that use permit entitlements and tenant improvement building permits (plumbing/mechanical/ventilation, etc.) were required for the caves (and other unauthorized building construction) at the time Applicant installed the improvements. This point is not disputed by Applicant. The exact date of the violation was not pertinent to the Commission's decision to authorize the cave after-the-fact.

Third Point – The information that the cave was constructed in two phases rather than one was missing from the Staff Report.

Response: During processing of the application, Applicant could not say with certainty when the cave was constructed other than to represent that it had occurred at some point in the mid to late 1990's. Applicant did not represent that the cave had been constructed in phases. At the time the Staff Report was composed, evidence that the cave had been constructed in 2001 and 2008 had not yet been revealed and therefore was not included in the Report. As noted earlier, the request before the Commission was to determine if the existing cave should be allowed for winery use. Whether that cave was constructed in one phase in the 1990's or in two phases in the 2000's had little bearing on the Commission's decision on how the cave would be treated going forward.

Fourth Point – The size of the cave on record varies from 3,510 sq. ft. to 3,700 sq. ft. The Commission "recognized" a cave of 4,710 sq. ft.

Response: The evidence of State permitting for the cave submitted by Mr. Gilbreth indicates the smaller cave size. The "as built" Project plans submitted with the use permit application, which were prepared by a licensed engineer, identify the cave as 4,710 sq. ft. which is what was "recognized" and approved by the Commission. It is not disputed that the property owner failed to obtain all required permits nor submit all required plans at the time the Project was constructed.

Fifth Point – The June 3, 2015 Staff Report indicates that the Property was selected for the 2012 Napa County Wine Audit, but the results of that audit, which Appellant asserts are crucial to the CEQA analysis, were not included in the CEQA documentation.

Response: The Reverie Winery was selected to participate in and did participate in the audit process even though they had applied for a use permit modification to update their entitlement and bring their permit into compliance. The Planning Commission Report dated July 17, 2013 disclosed that their tours and tastings/marketing program was not in compliance, as well as unauthorized production levels (8,400 gallons actual versus 5,000 gallons). Appellant contends that the results are crucial to the CEQA process, but does not state why they are crucial. The CEQA document prepared for the Project properly described the full extent of the violations existing on the Property.

Sixth Point – While the Commission was lead to believe the Reverie Winery was audited in the 2012 Wine Audit, the Planning Director responded to Appellant's correspondence submitted after the Planning Commission's decision by stating that the Winery was not included in the audit.

Response: The June 3, 2015 Staff Report correctly acknowledged that the Reverie Winery was selected for the 2012 Wine Audit and remained in the audit process until its completion. However, a follow up evaluation

was not conducted in 2013 because the Applicant was actively processing their use permit modification. As previously noted, the extent of the violations that existed prior to the use permit modification submittal was disclosed to the Commission and public.

Seventh Point – The extent of the violations were acknowledged by Applicant, but the duration of the violations was not made available to the public.

Response: The June 3, 2015 Staff Report provides a detailed listing of the violations plus a development history of the Property. The Property history section of the Staff Report provides general information on the duration of violations, and was made available to the public in advance of the hearing.

Eighth Point – No computer simulation of potential environmental damage to Teal Creek from deposition of cave tailings without erosion control measures was provided.

Response: Cave tailings were deposited on the site a minimum of seven years ago. County Staff from Planning, Engineering and Environmental Management Divisions visited the site over the course of processing the application and found no evidence of erosion hazard violations. Appellant assumes cave tailings were applied to the Property without erosion control measures, but site inspections by qualified Engineering Division Staff found no evidence of environmental damage from erosion hazards.

Appeal Ground No. 9: Appellant argues the Commission should have imposed a condition prohibiting the Property from creating a connection with the Calistoga Hills Resort. It will be impossible to monitor whether the properties have been illegally joined and therefore a condition should be required specifying no access between the properties and that a six-foot high solid concrete wall with no openings should be built.

Staff Response: During the course of the Commission's hearings it was disclosed that the owner of the property adjoining this Winery site is or was in contract to purchase the Property. That adjoining property, which is located within the city limits of the City of Calistoga, is approved for a large resort hotel development. Concerns were raised at the hearings that the Reverie Winery could be used by the resort in a manner inconsistent with County policies if the use permit modification was granted. It was speculated that resort guests would access the Reverie Winery if a connection was installed. Applicant's representatives testified that no connection was proposed as part of this Project, and asserted that the real estate deal was not a certainty. Applicant's representatives also noted that ownership of a winery is not evidence that the winery would be operated in a fashion conflicting with County Code and/or its use permit entitlement.

Conditions imposed by the County must have a rational nexus to the project being regulated. No connection to the resort was proposed with the modification. It is remote and speculative to assume that a connection would be requested if the resort property owner acquires this site. Should the resort acquire this site, and desire a connection, that change to the Project would be subject to a use permit modification. Any requested modification would be evaluated for consistency with County Zoning and the General Plan, most notably, the provisions of Measure J/P concerning expansion of urban uses onto agriculturally-designated land.

Appeal Ground No. 10: Appellant claims the County is aiding in unfair business practices by turning a blind eye to use permit violations by Applicant.

Staff Response: The Property is presently in violation of County Code. Under current and long-standing code enforcement practices, property owners with violations are afforded the opportunity to request

retroactive approval of developments/uses implemented without required permits. The Planning Commission acted consistently with how the County has treated similar code violation cases in the past.

Should the Board find that the extent of past violations represent an unfair business practice, it is within the Board's discretion to either grant the Appeal and deny the Project, or partially grant the Appeal and approve a modified Project. Modifications to the Project could include, but are not limited to, delaying and/or reducing proposed production and/or visitation/marketing; requiring greater environmental enhancements to offset violations within creek setbacks; and/or requiring removal of some or all of the various unauthorized prior development.

Appeal Ground No. 11: Approving illegal uses without consequences encourages more violations of the County Code and prevents appropriate CEQA review. It is also an insult to the majority that do comply.

Staff Response: Please see the Staff Response to Appeal Ground No. 4 incorporated here by reference. Were the County to evaluate the Project utilizing any other baseline, the County would potentially be running afoul of judicial interpretations of CEQA.

The Applicant's representatives claimed they had been subject to significant consequences associated with the cost of processing an after-the-fact application including double the usual building permit fees, and costs from the imposition of the restoration plan imposed by the Commission. Testimony was provided by interested third parties that these costs to the Applicant were costs they would have been subject to anyway had they requested approval before implementing the Project and that the doubled building permit fees was inconsequential.

Planning Commissioners struggled in their deliberations on this issue considerably, as noted in Staff Response to Ground of Appeal No. 10 above. Ultimately a majority of the Commission determined that their role was to focus on weighing the merits of the proposal before them over applying consequences or punitive measures beyond the double fee building permit stipulated in the County Fee Resolution. As such, a majority of the Commission supported approval of the Project at the visitation/marketing levels requested by the Applicant subject to a restoration plan and other Conditions of Approval.

Should the Board find that the extent of past violations represent an unfair business practice, it is within the Board's discretion to either grant the Appeal and deny the Project, or partially grant the Appeal and approve a modified Project. Modifications to the Project could include, but are not limited to, delaying and/or reducing proposed production and/or visitation/marketing; requiring greater environmental enhancements to offset violations within creek setbacks; and/or requiring removal of some or all of the various unauthorized prior development.

Appeal Ground No. 12: Appellant asserts that forcing an appellant to challenge a decision without having the final decision available to him is unfair. The Commission's final decision, including the findings, was not available in the file when Appellant reviewed it on July 10 in preparation for this Appeal. The County failed to produce the requested documents by the Appeal filing date.

Staff Response: The Commission's decision was final on June 17, 2015. Commissioner Basayne made a motion at that hearing which accomplished several things, including adopting the modified Conditions of Approval which limited maximum annual visitation to no more than 10,800 visitors. A video of the Commission's June 17 hearing was available for review prior to Appellant's deadline for filing an appeal packet. County Code Section 2.88.050 requires an appellant to file an appeal packet within ten working

days following submittal of a notice of intent to appeal. A notice of intent to appeal must be filed within ten working days from the date of decision of the approving authority. Although Staff was finalizing the Conditions of Approval to reflect the Commission's final action on June 17, the Commission's final decision was available for review by Appellant prior to the deadline for filing an appeal packet. It should be further noted that during preparation of the Final Approval letter, dated July 9, 2015, Staff had discovered an error in the calculation of the yearly visitation maximum that was discussed with the Commission on June 17, 2015.

Based upon the correspondence provided by the Applicant's Attorney dated June 9, 2015, the Applicant had offered to modify their visitation downward to 6,800 visitors in the first year and thereafter increase the annual visitation by 1,000 visitors for three years, providing a total of 9,800 visitors versus their original request of 10,840 annual visitors. (See Attachment F, June 17, 2015 Planning Commission Staff Report - Applicant Proposal – Restoration Plan & Other) Given this error, the maximum annual visitation was adjusted by Staff to 9,800 visitors. However, Staff did not apply this restriction on annual marketing events (an additional 440 annual visitors) per Commission direction. Should the Board want to adjust these numbers; such changes will be incorporated into the final version of the Commission's Conditions of Approval.

Updated Conditions of Approval:

Subsequent to the Planning Commission's approval of the Project, the PBES Department and County Counsel updated the Standard Conditions of Approval for Winery projects. The older version of the Standard Conditions of Approval is included in the administrative record for this hearing because that was what was adopted by the Commission. However, should the Board of Supervisors express an intent to deny the Appeal and uphold the Commission's approval of the Project, or approve a modified version of the Project, as part of the findings resolution prepared by County Counsel, the updated current version of the Conditions of Approval will be provided to the Board for consideration and adoption. The conditions have been reformatted to be more consistent and consolidate duplicative language that existed.

SUPPORTING DOCUMENTS

- A . Appeal Packet
- B . Correspondence from David Gilbreth - 9-16-15
- C . Public Comments
- D . Project Approval Letter
- E . June 17, 2015 Planning Commission Transcripts
- F . June 17, 2015 Planning Commission Staff Report
- G . June 3, 2015 Planning Commission Transcripts
- H . June 3, 2015 Planning Commission Staff Report
- I . Graphics

CEO Recommendation: Approve

Reviewed By: Liz Habkirk