

APPENDIX E
GRAND JURY REPORT

GENERAL GOVERNMENT COMMITTEE

LAND USE

BACKGROUND:

Napa County has been characterized as a unique and fragile geophysical environment possessing special conditions of soil, water and climate favoring the raising and production of quality agricultural crops and produce. "Napa County's 513,000 acres of land and water consist mostly of mountain ridges and narrow valleys stretching across the County on a northerly-southerly axis."* Scarcely one third is level enough for conventional development. For these reasons "Napa County still retains much of its rural character and agricultural productivity."

In 1954-55, Napa County adopted the Napa County General Plan. The establishment of the Napa Valley Agricultural Preserve in 1968 was a bold and visionary step toward permanent preservation of Napa Valley soil for agricultural use. At a time when agricultural land in the seven-county Bay Area was being displaced at the rate of 24,000 acres per year, the Ag

*Unless otherwise noted, all quotes are from the Napa County General Plan.

Preserve placed 25,000 acres of valley floor agricultural land under protective agricultural zoning. The Ag Preserve served to halt urban sprawl, and created the promise that valley soil would forever serve agricultural purposes and preserve the rural character and quality of Valley life. In 1973-75 the land use, conservation and open space elements of the General Plan were adopted, and they were revised in 1982-83.

As required by State laws, the General Plan defines and delineates the management of Napa County's physical resources. The plan is "in a sense a constitution for the county's future," ... "a program for the protection and development of the unincorporated area of Napa County" . . . "a guide which enables citizens to anticipate the County's reaction to individual development programs or projects." And "While the plan is flexible it is nevertheless legally binding; development proposals such as land subdivisions and use permits must, by State law, be considered in the light of its contents." Subordinate ordinances and regulations must conform to and support the General Plan.

The essence of the General Plan is to: "ensure the long term protection and integrity of those areas identified in the General Plan as agricultural, open-space and undevelopable . . . (as well as to) stimulate the development of those areas in the General Plan for residential, commercial, and industrial (uses)." In short, the intent of the Plan is to: "PRESERVE AGRICULTURE, and CONCENTRATE URBAN USES IN EXISTING URBAN AREAS."

In its intent to preserve agriculture, the General Plan is explicit, repetitive, and direct regarding the distinction and separation between agricultural and urban functions and use.

Webster's Dictionary defines agriculture as "the science and art of farming; tillage; the cultivation of the ground for the purpose of producing vegetables, and fruits; the art of preparing the soil, saving and planting seeds, caring for the plants and harvesting the crops. In a broad sense the word includes gardening, or horticulture, and also the raising of livestock."

The Napa County General Plan defines that: "AGRICULTURE WILL BE CONSIDERED THE PRODUCTION OF FOOD AND FIBER, THE GROWING OF CROPS, PRODUCE AND FEED AND THE RAISING OF LIVESTOCK AND ANIMALS."

The Plan defines Urbanizing to include "the subdivision, use or development of any parcel of land that is not needed for the agricultural use of that parcel," for "THE IMPACTS OF URBANIZATION ARE FOR ALL PRACTICAL PURPOSES IRREVERSIBLE. PRODUCTIVE FARMLAND AND URBANIZATION ARE NOT COMPATIBLE."

FINDING:

In recent years there has been an increase in the number of commercial, promotional, cultural, and entertainment activities occurring in wineries and other facilities located on agriculturally zoned land outside of city limits. These activities include concerts, cooking classes, art shows, benefits, and non-agricultural meetings and seminars. These activities are urban uses and by definition are not needed for the "production of food and fiber, the growing of crops, produce and feed and the raising of livestock and animals."

The increase in these urban activities underscores the growth of wineries and other facilities as cultural and community centers, and raises

questions as to their urbanizing influence when they are located outside of cities and towns or industrial parks. The movement of people from populated urban areas to less populated rural areas opposes the major intent of the Plan and creates problems of traffic, sanitation, and other services, and requires solutions associated with the urban environment.

The occurrence of these activities is a threat to the permanent preservation of agricultural soil and are illegal as defined by the current Napa County General Plan.

The Board of Supervisors, Planning Commission, Conservation, Development and Planning Department, and the County Counsel's Office have not consistently coordinated their efforts to prevent the occurrence of activities on Ag zoned land which violate the General Plan.

The Board of Supervisors, Planning Commission, Conservation, Development and Planning Department, and County Counsel's Office are legally bound to uphold and enforce conformance with the General Plan.

RECOMMENDATION:

In order to protect, in fact, its unique and fragile agricultural soil and watershed resource, the Napa County Board of Supervisors, the Napa County Planning Commission, the Conservation, Development and Planning Department, and the Napa County Counsel's Office must:

1. Support and enforce the intent, content and specific goals of the General Plan.
2. Confine urban uses to urban areas.
3. Direct an examination of existing ordinances and use permit procedures.

4. Repeal or amend ordinances which do not conform to and support the General Plan.
5. Cooperate to ensure inter-department review of land use recommendations prior to Board of Supervisors' approval.

FINDING:

The Webster's Dictionary definition of a winery is "a place where wine is made."

The current process of redefining a winery is the third time in the 1980's that the issue of "what is a winery" has been raised. By General Plan definition, wineries are an industrial use. They are allowed on agriculturally zoned land as agricultural processing facilities. The current Napa County zoning ordinance definition of a winery states:

"Winery"

"Winery" means a building or portion thereof used for the crushing of grapes, the fermenting and processing of grape juice, or the aging, processing and storage of wines. It may include on-site disposal of winery waste generated on the site, bottling of wine, the warehousing and shipping of wine, plus related office and laboratory activities as accessory uses. Retail and wholesale activities conducted within the winery shall be limited to wines produced on the site or wines produced by the winery at other locations. Sec. 12047.
(Ord. 629, 3-11-80)

The proliferation of non-conforming and accessory uses, and the participation of the Board of Supervisors, the Planning Commission, and the Conservation and Planning Department in the current further redefinition of a winery appears to accede to the very commercial and urbanizing pressures the County General Plan has committed to avoid and keep separate from agriculturally zoned land.

The danger is that each redefinition allows a new level of commer-

cial, cultural, or promotional activity occurring on Agricultural Preserve or Agricultural Watershed land which in turn establishes precedent and legal foundation for expanding future non-agricultural uses.

The allowance of an industrial use on agricultural land has created urbanizing influences not confined to urban areas. The containment of urban uses in urban areas depends upon strict government enforcement as well as private industry cooperation and willingness to support the General Plan.

Failure to enforce the General Plan can only lead to the erosion and ultimate demise of the Ag Preserve because the uniqueness and international reputation of the Napa Valley will continue to invite development and activities conducive to further blurring of the agricultural/industrial and urban separations.

RECOMMENDATION:

In order for Napa County to maintain an Agricultural Preserve, the continuing process of redefining a winery based upon non-conforming accessory uses should cease.

Further, the Board of Supervisors, Planning Commission, and the Conservation, Development and Planning Department should consider the placement of future primary and secondary industrial and commercial uses in the County's industrial or commercial zoned developments.

FINDING:

"The General Plan is a policy document for the entire community and it may only be amended in the public interest." "The Plan should only be amended when the ...County, with the support of a broad consensus, determines a change is necessary." (State of California General Plan Guidelines, 1987, p. 63)

RECOMMENDATION:

In the absence of the demonstration of such a broad consensus for a change in the General Plan, the County should not accommodate continuing requests for non-conforming uses on agriculturally zoned land.

1987-88 GRAND JURY

GENERAL GOVERNMENT COMMITTEE

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Jack Jensen, DDS, Chairman

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GENERAL GOVERNMENT

LAND USE

MINORITY REPORT

BACKGROUND

This minority report is made to augment the committee's report on land use. It is offered as an alternative which should be considered because of the age of the General Plan's Land Use Element and the controversy surrounding it.

FINDING:

The Land Use Element of the General Plan has not been changed substantially since 1972. Applications for amendments to the General Plan occurring more than twice a year indicate basic changes are needed in its content. Sixteen such amendments are pending at this time in Napa County. This vacillation by the County creates uncertainty for applicants and can be very costly.

"The State Office of Planning and Research in its General Plan guidelines (1987 edition) and most communities in California recommend a five year review process. The intent of the Napa County General Plan is to limit major reviews to every 10 years. In today's rapidly changing

society, this will likely lead to numerous requests for individual amendments which may prove difficult to handle on a piecemeal basis."

(p. 114 Zucker Report July 1987)

RECOMMENDATION:

Rather than continuing the practice of numerous amendments which the County has allowed and cognizant of the fact that many inconsistencies in the General Plan and Zoning Ordinance exist, the Committee minority report strongly recommends that the County undertake a comprehensive revision of the General Plan. This process should begin immediately and a full time consultant should be hired to expedite the review. Public meetings in all areas of the County would give citizens the opportunity to voice their opinions as to present values, attitudes and goals. After the required public hearings at the Commission and the Board levels a new General Plan would be adopted by majority resolution. This would be the "constitution" that would govern the County for the next five to ten years.

FINDING:

"There are inconsistencies between the General Plan and Zoning Ordinances both of which are in need of updating." (p. 22 Zucker Report July 1987)

RECOMMENDATION:

If Napa County chooses to continue allowing urban uses on agriculture lands then changes need to be made in the General Plan so that all similar applications are treated equally.

If Napa County determines to uphold the General Plan as adopted in 1973-75 and revised in 1982-83 then commercial (urban related) activities should, henceforth, be denied. Ordinances which do not conform to the General Plan should be repealed or amended.

Angela Pieper

Angela Pieper

APPENDIX F

MEMO FROM COUNTY COUNSEL REGARDING DWDO

INTER-OFFICE MEMO



TO: Board of Supervisors
FROM: Robert Westmeyer, County Counsel
RE: What is a Winery Ordinance -- General Plan Amendments
DATE: Nov. 13, 1989 OUR FILE NO. 180.031

The current definition of a winery provides in part that existing wineries are given eighteen months to establish by use permit certain uses to be denied to all new wineries. The uses consist of public tours and tastings, public promotional activities, picnic areas for winery guests, and the display and sale of wine-related items bearing the winery's name, logo or Napa Valley appellations (hereafter "eighteen-month uses"). The Board has requested that this office provide it with an analysis as to whether or not this approach is lawful. You will find attached a memorandum to the Board of Supervisors from Margaret Woodbury regarding this subject (see pages 2 and 3 of the memo). The conclusion of the memo is that such a procedure is not lawful because it violates that portion of the federal constitution which requires that all parties be treated equally under the law.

It is possible for the Board to allow all wineries to engage in the "eighteen-month uses" through the use permit process since this does not treat new and old wineries differently. Alternatively, the Board could permit no one to apply for such "eighteen-month uses". If the Board permits no one to apply for "eighteen-month uses", no additional General Plan language is needed. If, on the other hand, the Board wishes to allow both existing and new wineries to apply for the "eighteen-month uses", additional General Plan language will be required to enable a finding of General Plan consistency to be made.

You will also note that it is the recommendation of this office that Sections 12202(g)(5)(iii) and 12232(g)(5)(iii) also be deleted since they will adversely affect the ability of the County to defend the seventy-five percent rule.

The draft EIR contains some language that might be interpreted as meaning that the EIR consultant believes that tours and tastings are not consistent with the existing General Plan. If that is the case, I do not agree with the consultant's conclusion and believe that current language exists in the General Plan that authorizes

tours and tastings as well as the rest of the activities identified in the What is a Winery ordinance. However, the General Plan language admittedly is somewhat general in nature and therefore subject to varying interpretations. Therefore, revising the General Plan language to clarify those ambiguities is desirable since public hearings need to be held on the ordinance anyway. I have asked the Planning Director to provide the Board with possible changes to the text of the Land Use Element of the Napa County General Plan which, in his view, will clarify that all of the activities that will be permitted in the Definition of a Winery ordinance are also permitted by the General Plan (excepting the "eighteen-month uses" described above).

The remaining issue involving Mr. Peatman's request that has not been withdrawn relates to small wineries. The Board may wish to consider whether it wishes to amend the What is a Winery ordinance to continue to allow small wineries as permitted uses. If this is the Board's direction, it is recommended that the Board direct the Planning Department to review existing small winery standards and to prepare any necessary revisions (such as minimum lot size, separation between wineries, etc.) to ensure that future small wineries are consistent with the intent of the Winery Definition. Note that the proposed language within the ordinance limits wineries to ten-acre parcels, using 75% Napa County grapes. If it does not do so, more likely than not all small wineries will become legal nonconforming uses upon adoption of the ordinance.

RW:plg
S:1240

INTER-OFFICE MEMO



DATE: October 16, 1989

TO: Board of Supervisors
FROM: Margaret L. Woodbury, Chief Deputy County Counsel
RE: Proposed Winery Definition Ordinance -- Legal Issues

Based upon a review of the proposed winery definition ordinance and research into the legal issues raised by its provisions, it is my opinion that the following portions of the proposed ordinance are most likely to stimulate legal challenge based upon federal or state constitutional or statutory issues. In this memorandum, the relevant text of each provision of concern is summarized, followed by a brief summation of the legal problems, and an assessment of the likelihood of successful legal challenge. Legal problems arising from environmental concerns are not addressed.

1. Unrestricted Retail Sales of Wine-Based Products of 14% or Greater Alcohol Content: §§12202(g)(5)(iii) and 12232(g)(5)(iii)

Summary of Provisions. These two subparagraphs (iii) would allow in the AP and AW zoning districts with a use permit the retail sale of brandy, port, sherry or other wine or wine-based product with an alcohol content of 14% or more produced by or for the winery irrespective of the place where the product is manufactured or the county of origin of the grapes from which the wine or wine-based product was made. By contrast, subparagraphs (i) and (ii) of these same provisions permit retail sales of wine with a use permit in these two zones only if the products soled are fermented, refermented or bottled at the winery or, if produced by or for the winery elsewhere, are made from grapes grown in Napa County.

Summary of Legal Issues.

- a. U.S. Constitution, Article XIV, clause 2 ("No state shall...deny to any person within its jurisdiction the equal protection of the laws")
- b. Calif. Constitution, Article 1, §7(a) ("A person may not be...denied equal protection of the laws...")
- c. Calif. Constitution, Article 1, §7(b) ("A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens...")

Assessment of Likelihood of Successful Legal Challenge. The likelihood of successful legal challenge on all or a combination of the above grounds is high. Although the proposed regulation is merely an "economic" regulation as opposed to one affecting "fundamental rights", it can still withstand legal challenge on any of the above constitutional grounds only if it bears some rational relationship to a conceivable and legitimate state purpose [Hibernia Bank v. State Board of Equalization, (1st District, 1985) 166 Cal.App.3d 393]; 62 Ops.Cal.Atty.Gen. 180 (1979)]. Since the County has adequate commercially-

zoned acreage where generic or non-locale specific winegrape products can be sold successfully, the sole justification for permitting retail sales of wine under (i) or (ii) on agriculturally-zoned land is the demonstrable marketing tie-in between premium wine products and the site, either specific or by appellation, of production of the source material. With the fall of generic wine prices in recent years and the continuing high price of County agricultural land it is becoming increasingly the case that premium winegrape production provides one of the few remaining economically-viable agricultural uses of the County's agriculturally-zoned land. This marketing advantage thus promotes continued use of agricultural lands within the County for agricultural purposes. Such promotion is legitimate since the preservation of agricultural land is a declared interest of the State of California (Williamson Act, Government Code §51220). However, this tie-in does not exist where the product is neither made locally nor utilizes local agricultural products, so there does not appear to be any rational relationship between (iii) and any legitimate state purpose.

2. Allowing Existing Wineries 18 Months to Establish by Use Permit Certain Uses to be Denied Immediately to all New Wineries: §§ 12202(i), 12232(k)

Summary of Provisions. These two provisions grandfather-in public tours, public promotional activities, winery guest picnic areas, and display and sale of wine-related items with the winery or appellation logo in AP and AW zoning districts if engaged in by existing wineries who established those uses either before the uses were prohibited or by obtaining authorization pursuant to use permit during a time when permitted by local ordinances. By doing so these provisions recognize the legal nonconforming status of these prior uses (although not calling it by that name) and confer upon that status protection from the usual "phase-out" rules of the County's present regulations pertaining to legal non-conforming uses. Granting such protection from involuntary loss of legal status is probably within the leeway which the courts permit local agencies when dealing with regulation of legal nonconforming uses.

The problem is with the second half of the first sentence of both provisions. This would give all existing wineries which have not heretofore legally engaged in these uses 18 months to request and be granted use permits for these uses, even though identical new wineries would not be entitled to request authorization for such uses. Since these uses would not exist at the time of adoption of the winery definition ordinance, they would never qualify as legal nonconforming uses.

Summary of Legal Issues.

- a. See (a), (b), and (c), in (1), above.
- b. Government Code section 65852 (all zoning regulations "shall be uniform for each class or kind of building or use of land throughout each zone...")
- c. 15 USCA §2 (Sherman Anti-Trust Act): (It is a felony to

"monopolize, or attempt to monopolize or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations..")

Assessment of Likelihood of Successful Legal Challenge. The likelihood of successful legal challenge on the basis of the constitutional grounds set forth in (a), above, to this difference in the treatment of existing wineries who have not presently established on a legal basis any of these public accessory uses and new wineries which will not be permitted to engage in these uses is extremely high. While the courts grant counties and cities wide leeway as to existing uses due to constitutional constraints because immediate abolition of all or part of a viable non-nuisance businesses may give rise to claims of inverse condemnation under the federal and state constitutions, no such differential protection can be granted to uses established illegally or not yet established at all.

In addition, this provision may well be successfully challenged under (b), above, since state law does not permit local agencies to adopt discriminatory rules for the same types of future uses (wineries) on essentially similar properties within the same zoning districts.

While this provision certainly would promote monopolization of these public use activities by existing wineries as opposed to new wineries, successful challenge under §2 of the Sherman Anti-Trust Act is unlikely unless the County adopts this provision with statements such as "this is what the industry wants, we should not change what the industry wants, this is to protect existing businesses and discourage new businesses, etc.". This is because §2 requires a conspiracy between the regulating county and the regulated (and benefitted) industry which then results in monopolization of economic activities. Mere unilateral adoption by a governmental entity of a regulation which has monopolistic results within the regulated industry will not give rise to a §2 violation (Fisher v. Berkeley, 475 U.S. 260 (1986))

3. Restricting Winery Production Capacity Expansions to Projects Utilizing at least 75% Napa County-Grown Grapes: §§12419; 12423

Summary of Provisions. While the application of these two provisions to the various types of wineries is rather complicated, the basic idea (§12419) is that whenever an existing winery expands beyond its presently authorized or legally-established capacity or beyond its present "winery development area", the expansion capacity must obtain no less than 75% of its winegrape source material from grapes grown within Napa County. The winery development area is defined as 120% of the presently-developed area of an existing winery or 15 acres, whichever is greater (§12423).

Summary of Legal Issues.

- a. (a), (b), and (c) of (1), above.
- b. (b) and (c) of (2), above.
- c. U.S. Constitution, Article 1, §8 ("The Congress shall Power...to

regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"--and, by implication, the states cannot do so unless expressly permitted by the Congress)

- d. U.S. Constitution, Article 1, §10 ("No State shall...pass any... Law impairing the obligation of Contracts")
- e. U.S. Constitution, Article 4, §2 ("The Citizens of each State shall be entitled to the Privileges and Immunities of Citizens in the several States.")
- f. 15 USCA §1 (Sherman Anti-Trust Act ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal...")

Assessment of Likelihood of Successful Legal Challenge. Despite the long list of issues raised by this proposal, it is actually the most likely of the three areas to withstand legal challenge, particularly if "winery development area" is limited to existing developed areas, eliminating the 20% unrestricted expansion area for existing wineries. Without this modification of §12423, the state law against non-uniform regulations within a given zone might support on its own a successful challenge to this provision.

The reason for this optimism is that there appears at least in concept to be a rational relationship between the 75% rule and the promotion of the preservation of Napa County agricultural land. This is because of such land is primarily used for premium winegrape production and that type of product is highly dependent both for actual quality and consumer acceptance upon its identification with the geographically-unique production areas of its source material. This rational relationship may be sufficient to overcome the equal protection arguments and, combined with the rather minimal effect on interstate commerce (there is by nature of the product very little interstate importation of grapes for this premium market), may overcome the privileges and immunities arguments since the latter comes into play only when local regulations will have a profound effect on interstate harmony [72 Ops.Cal.Atty.Gen. 86 (1989)].

This minimal effect and the inherent geographic identification of the County's premium product may also overcome arguments based upon the Commerce Clause, especially since the federal and state governments have already recognized the special area-specific nature of these products through their various appellation regulations. A good discussion of this is contained in a legal opinion in the possession of our office which was prepared by the legal firm of Townsend & Townsend.

Section 1 of the Sherman Anti-Trust Act applies to local agencies only if the activities regulated are not ones in which the relevant State has expressed an interest in state or local control (Community Communications Company v. City of Boulder 455 U.S.40 (1982) and the many subsequent cases which expanded on the state action concept). However, in this instance, the proposed rule promotes in a rational way the preservation of agricultural

lands, a purpose which the Legislature of the State of California has declared to be of paramount importance in the preface to the Williamson Act and the state planning agency has found to be of such importance in the CEQA Guidelines, that it has listed (Appendix G, §y) impairment of agricultural lands as a significant adverse environmental impact which must be considered whenever a local agency is considering approval of a discretionary permit. For this reason, challenge to this provision based solely on §2 is unlikely to be successful.

As discussed above, because this provision may have some mildly monopolistic effects in favor of existing wineries, §2 of the Sherman Anti-Trust Act may be a problem, but only if the 20% expansion area is not deleted and that action is explained with the sort of statements indicative of county-industry collusion described in (2), above. Without this provision, the rule would apply evenly to all owners within the zone except those grandfathered-in as to existing legal capacity for independent constitutional reasons (to avoid inverse condemnation) and it is unlikely that anyone could, under these circumstances, show either a significant monopolistic effect or intent to create such an effect on either a local or interstate basis.

Finally, the constitutional prohibition against the local adoption of laws or regulations which impair existing contracts should not by itself support a successful legal challenge. While it is common in the industry for wineries to enter into long-term contracts with growers for grapes, it is unlikely that a court would feel particularly sympathetic towards persons who entered into purely speculative contracts to buy grapes in future years for production capacity for which they had not obtained discretionary approval at the time of execution of the contracts. Since the proposed ordinance grandfathers-in all legally-authorized or legally-established capacity, the 75% rule would not impair any long-term contracts supplying only that capacity.

Margaret L. Woodbury