

April 29, 2015

**SENT BY ELECTRONIC MAIL**

Chair Diane Dillon and Members of the Board  
of Supervisors  
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Chair Heather Phillips and Members of the  
Planning Commission  
c/o Melissa Frost  
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Re: Napa County Code Enforcement/Compliance

Dear Chairs Dillon and Phillips and Members of the Board of Supervisors and Planning  
Commission:

Abbott & Kindermann, LLP represents Beckstoffer Vineyards in various land use matters. For the reasons discussed in this letter, Beckstoffer urges the County cease processing after-the-fact permits to bring illegally constructed structures and/or illegally converted winery tasting rooms and event structures into compliance, and further to prohibit the illegal increase in marketing activities, events and employees. Wineries that are out of compliance with their use permits or that are operating without any permits should not be rewarded for such behavior to the detriment of those who do comply. The County's continued willingness to issue after-the-fact permits has spawned excessive noncompliance by various wineries big and small throughout the County. Instead of routinely issuing after-the-fact permits, it is time for the County to commence strict enforcement of existing permits. If, after enforcement citations have been issued, a winery continues to flagrantly violate its existing permit, the County should commence the revocation process.

**Background Facts**

On August 6, 2014, the Napa Valley Register reported that almost half of the wineries randomly audited in 2013 were out of compliance with their use permits. Of the 20 of the wineries audited, eight were out of compliance. That's 40 percent of wineries that were out of compliance. The specific violations noted in the audit included a winery with a cap of 400 weekly visitors hosting 1,400 people in a week. Assuming this only occurred one week out of the year, this might not be deemed an egregious violation, but what if it was happening *every* week? What impact was this having on the neighbors and local roadways? Perhaps an increase of 1,000

people each week at this anonymous winery might not be so impactful alone, but what if there is another winery down the road doing the exact same thing or worse – say holding multiple marketing events at the same time in violation of its permit? (Notably, there were two wineries prohibited from holding marketing events that each held seven and eight marketing events.) Would these violations be cumulatively significant and/or cumulatively considerable? Presumably, the limitations on winery permits are included for a reason: to prevent excessive noise, traffic, and other impacts on the environment, including neighbors and neighborhoods.

Amazingly, if this percentage of non-compliance were extrapolated to the total number of wineries operating in the Valley (approximately 400 wineries), the County would have to presume that upwards of 160 wineries are currently operating out of compliance either by having more events, more visitors, and/or producing more wine than their permits allow.

At the Board of Supervisors and Planning Commission joint workshop held on March 10, 2015, the development of new wineries in Napa County was discussed. The issue of ongoing code violations at existing wineries was also mentioned at this meeting. The Napa Valley Grapegrowers, the Winegrowers of Napa County and the Napa Valley Vintners encouraged the County to enforce its existing regulations and to follow through on its General Plan policies. These groups issued a joint statement, which reads in pertinent part as follows:

“Strict oversight of existing procedures, paired with fewer creative solutions to non-conforming parcels, will go a long way toward diminishing community and industry concerns.”

Beckstoffer Vineyards whole-heartedly embraces this proposed approach. Far too often, the County is apt to allow permit and code violations to continue (sometimes for years) without any serious attempt to bring violators into compliance. Even when the County does issue code enforcement citations, it directs the violators to submit a planning application to amend the existing entitlements (typically a conditional use permit), whereby the violator seeks forgiveness as opposed to having gone through the proper entitlement process to expand its use *before* effectuating the expanded use. The concern is that allowing code violators to come into compliance after perfecting their egregious violations (e.g., exceeding production capacity, erecting structures and/or converting office spaces into tasting rooms without obtaining a building permit, etc.) creates an unfair playing field and penalizes those who comply with the law. In short, the County’s failure to enforce its code, allowing ongoing violations and issuing after-the fact permits, encourages more violations. As discussed in detail below, this process is having the practical effect of allowing these winery owners/operators to skirt CEQA compliance. They do so by claiming that a new and elevated “baseline” - created by the code violations that have been allowed to continue for years at a time – must be considered for purposes of the CEQA analysis of the after-the-fact permit.

## Circumventing CEQA

Any time a non-exempt discretionary project is proposed to an agency, that agency must determine if the project may have a significant effect on the environment. To do this, agencies typically prepare an initial study which considers all phases of project planning, implementation, and operation. An initial study includes a description of the project and an identification of the environmental setting and potential or actual environmental impacts.

The term “environmental setting” is not defined by CEQA; however, CEQA Guidelines section 15360 defines “environment” as follows:

[T]he physical conditions which exist within the area which will be affected by a proposed project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historical or aesthetic significance. The area involved shall be the area in which significant effects would occur either directly or indirectly as a result of the project. The “environment” includes both natural and man-made conditions.

Section 15125 of the Guidelines discusses the content of an environmental setting section of an EIR, and has been interpreted to apply to negative and mitigated negative declarations as well. Subsection (a) of section 15125 provides that the description of the physical environmental conditions in the vicinity of the project (including the project site), should reflect the state of the environment as it exists at the time environmental analysis is commenced. It further states that the description of the environmental setting *normally* constitutes the baseline physical conditions by which a lead agency determines whether an impact is significant. (Cal. Code Regs. Tit.14, § 15126, subd. (a).)

When the County waits or refuses to timely enforce code violations and then grants violators after-the-fact permits, it not only encourages (rather than discourages) noncompliance, but it can affect the legitimacy of the environmental review conducted for a project because the CEQA baseline can be altered. Regardless of whether this outcome is intended, it is the same – the purpose of CEQA is undermined and circumvented, and many “impacts” go unstudied and unmitigated. Worse yet, the County’s continuous issuance of after-the-fact permits undercuts the cumulative impacts analysis in the County’s General Plan such that the cumulative impacts analysis can no longer be relied upon, and instead, a new cumulative impacts analysis must be conducted for each and every discretionary project review.

By way of example, imagine a winery’s conditional use permit allows for 25 events per year, a maximum of 250 visitors per day, and 25 full time employees. Imagine also that the winery decides it would like to increase its marketing capabilities and revenues and simply starts accepting 400 visitors per day, holding 50 to 100 events per year and increases its number of employees to 75 people. Such arbitrary increases would double the number of events and people

travelling to and from the winery, many times during peak traffic hours. And, depending on the type of events being held, the increase in activity could be having noise, traffic, and other impacts on the environment. Yet, the County might be wholly unaware of this until one or more neighbors (or a competitor winery) complained, or the winery was part of a random audit. Presumably, upon learning of the permit violations, County Code Enforcement would issue a citation and/or the Planning Department would issue a cease and desist order for failure to comply with the permit issued. Instead, what appears to be happening is that a Code Enforcement citation is issued and then the winery is directed to file an application for an after-the-fact permit increasing the limits on events, visitors, and employees to allow the expanded uses. Ironically, the permit application identifies the “existing” expanded use, effectively increasing the baseline of the environmental impacts analysis, and understating the true impacts of the project. In short, unless the County starts considering the after-the-fact applications according to the pre-violation baseline, the County should issue cease and desist orders, requiring violators to stop the activities in excess of their permit allowances and restricting them from applying for their proposed increased operations until at least one year after they have come into compliance.

### **The County Can And Must Enforce Its Code**

Citizens are becoming more vocal in their opposition to the County’s practice of issuing after-the-fact permits. They are confused as to why the County hasn’t done more to address this spiraling problem. The County often defends its consideration of these after-the fact permit approvals on the grounds that Due Process must be observed. The County is correct that it must comply with its ordinances, state statutes, and the state and federal constitutions. However, while County staff must comply with required processes, the County’s appointed and elected officials are not required to bend to the whimsies of wineries under the fabricated threat of the County’s economic ruin should it choose to start making wineries comply. In fact, Chapter 18.144 of the Napa County Code provides the appointed and elected officials with all the ammunition they need to direct their staff and legal counsel to enforce the entitlements issued by the County.

Under Chapter 18.144, the County can revoke permits for non-compliance. To be clear, we are not suggesting revocation would be appropriate for wineries that bring their facilities into compliance within a reasonable time frame (i.e., cease hosting unauthorized marketing events, allowing visitation in excess of permit limits, etc.). However, revoking permits for wineries where the violations are chronic and flagrant is exactly what – and all – the County needs to start doing to send a message to the community and wineries that such violations will not be tolerated and non-compliance will not be rewarded. Importantly, the County does not require additional funds to effectuate this outcome. The County would likely need to only revoke one or two high-profile winery permits to send a message to others that no winery is above the law – no one winery owner is so powerful it can manipulate the law.

## Conclusion

The County's after-the-fact permitting process encourages non-compliance and unfairly penalizes those who do comply with the permitting process. After-the-fact permitting must stop. Beckstoffer respectfully requests that the County cease processing all after-the-fact permit applications where there have been significant exceedances of marketing events, wine production, and visitation, and order those permits revoked should the wineries fail to come into compliance with their permits. It further requests that you require all wineries that have converted structures to marketing venues without the requisite permits to restore such structures to their original condition or revoke the wineries' permits for non-compliance. The County's continued consideration and approval of after-the-fact permits where egregious non-compliance has occurred is unacceptable and Beckstoffer will exercise the necessary remedies to ensure that such after-the-fact permits are challenged.

Very truly yours,

A handwritten signature in blue ink that reads "Katherine J. Hart". The signature is written in a cursive style with a large initial "K".

Katherine J. Hart

cc: David Morrison  
John McDowell