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May 18, 2015

**RE: REVERIE WINERY MAJOR USE PERMIT MODIFICATION # P13-00027MOD**

I reviewed the Reverie Use Permit Application file on May 15, 2015.

**A) CEQA MANDATORY FINDINGS OF SIGNIFICANCE (XVII "b")**

*"Does this project have impacts that are individually limited, but cumulatively considerable? ('Cumulatively considerable' means that the incremental effects of a project are considerable when viewed in connection with the effects of past projects, the effects of other current projects and the effects of probable future projects)".*

Planning has determined that there are "less than significant" impacts. I believe the impacts are significant.

**B) "PAST PROJECTS":**

The number of projects without permits Mr. Kiken has undertaken on his property over the years have had considerable impacts as we will see below are not easy to quantify due to the passage of time. However, by any definition these are "Past Projects" the impacts of which CEQA needs to account for.

*This is a serious systemic problem when past projects are undertaken without permits and accommodated with new Use Permits because any subsequent CEQA will be deficient unless it fully accounts for their impacts.*

**Unless the impacts of past violations are identified, accounted for and mitigated, any subsequent CEQA such as this, sanctifies and issues a clean bill on the entire project including its past violations and its unmitigated impacts.**

CEQA must address this issue in a satisfactory manner.

## **C) MISSING MATERIAL INFORMATION:**

### **C-1) EXTENT OF PAST USE PERMIT VIOLATIONS:**

While both the applicant and CEQA document state that the winery has been in violation of its Use Permit, neither state the extent of the violations or the time period of same. In a letter to the Diamond Mountain Road community, Mr. Kiken states that: *"While the new permit may appear to increase these (visitations and wine production limits), the new permit will allow less than what we have been doing"* (1). The applicant must provide the extent of *"what we have been doing"* so that CEQA can begin to identify the extent of the past project.

The extent and duration of Use Permit violations is missing material information.

It has been reported and confirmed that the Reverie Winery is under contract for sale. In this particular case, this may have major implications. Mr. Kiken by his own statement is *"contractually prohibited from directly responding"* to the question on whether his winery is under a sales contract (2).

More important, it is also reported from a credible source that the buyer is the same - or an entity controlled by - the new owner (Rosewood Hotels) of the adjoining Calistoga Hills entitled development located within the City of Calistoga.

If the buyer is indeed the one reported, serious issues arise. The driveway to Mr. Kiken's residence directly abuts the development at the ridge level which raises the likelihood of joint uses between the two which may be the reason why it is Mr. Kiken and not the future Reverie owner who is the front person to this application.

Rosewood Hotels is not in the wine business but the physical connection of the two properties present a unique angle to the future use of the winery as it can easily comingle the unlimited events at the adjacent resort which lies in a different jurisdiction making it impossible for the County to regulate traffic and various exchanges between the two entities. Even audits of income and charges recorded between the entities completely according to the law, will not be able to pinpoint and police the actual winery activity.

This is missing material information in assessing the future impacts of the Use Permit as required by CEQA.

### **C-2) IMPACTS OF "PAST PROJECTS" - GRADING / EROSION CONTROL:**

The existing caves were constructed reportedly at a time when no drilling permits for caves were required. However, the Clos Pegase Winery permit issued in 1987 included the permit for its caves. The Reverie caves were drilled after that date.

Planning needs to confirm this fact by citing the time as of which such permits were required.

However, the applicant states and CEQA has accepted the fact that the cave tailings *"were kept on the property and used to improve the vineyard roads"*. According to my calculations these tailings were in the order of a minimum 20,000 cubic yards, the equivalent of 2,000 truck loads. Having used such quantities to improve vineyard roads is not credible due to the sheer volume of soil. Obviously, they were also used as fill for other purposes in a hillside setting, an activity which would have required grading permits at the time as well as an erosion control plan, none of which were obtained. These were

violations with potentially serious environmental consequences, especially due to the immediate proximity of streams. They violated County RSS, California Building Code CBC and Napa County Regulations Sec. 18.108.

CEQA refers to Erosion Control Plan # 93391-ECPS administratively approved by Conservation, Development & Planning Department in 8/9/1994 authorizing *"the construction of the residence, access drive, swimming pool and septic water system"*. However, I could find no record of an erosion control plan - required since 1991 - for the vineyard which was planted after that date on 20% steep slopes.

Further related violations as a direct result of failing to obtain the required permits and avoid inspections is the fact that the Portal of the cave encroaches into the setback of the tributary creek and that portions of the caves lie within the leach field setback requirement.

Failure to obtain the above permits for grading, fill, compaction, encroachments to stream setbacks all in such close proximity to streams were serious violations for which, had Mr. Kiken been caught by the Department of Fish & Game, the California Water Quality Control Board or Napa County, would have triggered serious penalties, fines and orders to undertake remedial actions.

The obvious purpose for procuring permits with their associated studies and inspections is to prevent negative impacts on the environment and it is obvious that construction activity was undertaken in an environment sensitive setting.

The above amount to a minimum of **6** serious primary environmental quality violations - with numerous derivative ones - the negative impacts of which none of the respective agencies were given a chance to identify and remedy at the time.

CAB Consultants now states that a CRMR has been prepared for the current use permit modification purposes.

**The CEQA Negative Declaration implicitly sanctifies all past environmental violations and gives the winery a clean bill.**

In view of the above, CEQA finding: *"The proposed project COULD NOT have a significant effect on the environment, and a NEGATIVE DECLARATION will be prepared"* is not credible because it fails to account for prior environmental damage of a *"Past Project"* unless it can certify that none had occurred.

The same applies to CEQA finding that the project will have a, *"less than significant impact in substantial soil erosion or the loss of top soil"* unless it can certify that the amount of fill from 20,000 cubic yards of cave tailings did not cause loss of top soil and that erosion control measures were undertaken in its placement and that an erosion control permit was procured during vineyard planting operations on 20 degree slopes.

CEQA must provide proof of the vineyard erosion control plan if one exists.

### **C-3) IMPACTS OF "PAST PROJECTS" - BUILDING PERMITS:**

Mr. Kiken converted the winery second floor for winery purposes without building permits, including structural, electrical, plumbing, heating. Though the cave drilling may not have required a permit, electrical, plumbing and ventilation in it did require them.

The two pre-existing structures for winery material storage and vineyard equipment shop located within a stream setback were modified, enclosed and expanded, and one other was built from the ground up, all without building permits. They were subsequently demolished by Permit B14-01281 which was issued 18 months **after** the current Use Permit Modification was submitted, for obvious reasons. A minimum of **12** building code violations are indicative of the prevailing culture at this winery.

#### **C-4) TRAFFIC IMPACT HWY 29 - NEARBY "FUTURE PROJECTS":**

CEQA finds that the traffic impact of the project will be "*less than significant*". It bases this finding on a W-Trans study, not included in the file provided to me for review.

When one considers that under this application, wine production will almost double, bottling lines, packaging deliveries and bottle exports will double, total winery area including the improved caves will more than triple, daily visitors will double, event guests will double along with double the caterers, serving personnel, food preparers, party supply trucks etc, finding that traffic impact will be "*less than significant*" is simply not credible.

With almost 50% of county wineries operating in excess of Use Permit limits, County data on traffic projections are no longer accurate making CEQA and EIR findings questionable. We have no reliable data on traffic counts from the existing Diamond Mountain Road wineries unless they are audited.

More important, CEQA has failed to consider the traffic impacts of two important future projects:

\* The already entitled Wallis Winery and event center at its to be restored historic winery with additional buildings at 1670 Pachateau Road, a tributary to Diamond Mountain Road.

\* The aforementioned Calistoga Hills resort major development which according to its own traffic study is projected to add 1,500 vehicle trips per day on to Hwy 29 just 1/4 mile north of the Diamond Mountain Road intersection.

In addressing the traffic congestion at the Hwy 29 / Lincoln Avenue intersection, the development's EIR states: "*For these reasons (lack of space), physically constructing the improvements is not feasible; therefore, the residual significance of the impact is significant and unavoidable*". Short of denying the resort's application, the City of Calistoga accepted a \$ 267,795 in lieu fee. However, this fee does nothing to enhance traffic flow at an intersection with an "F" rating even before the impact of 1,500 daily vehicle trips.

While CEQA states that the 3/4 mile section of Hwy 29 to the Diamond Mountain Road intersection "*operates without capacity limitation*", it must rely on data from an outdated study. During the past 12 to 18 months, traffic at times exceeds the resort's traffic study maximum waiting period of a little over 1 minute. It can now be 3 minutes and longer with traffic at times backed up all the way to Diamond Mountain Road. In fact, on certain Fridays, traffic has been backed up all the way to Azalea Springs Road.

CEQA must account for the impacts of verified traffic data from existing wineries on Diamond Mountain Road, impacts from the Wallis Winery and the Calistoga Hills Resort future developments as well as from current traffic counts on Hwy 29 from Diamond Mountain Road to Calistoga.

#### **C-5) TRAFFIC - COUNTY WIDE "FUTURE PROJECTS" - "CUMULATIVE IMPACTS":**

CEQA guidelines do not limit the impact radius of "future projects" within a municipality. There is no doubt that traffic patterns within the county have already reached unsustainable levels. One only needs to look at the projections in the county's General Plan EIR's Circulation Element to see how many dysfunctional Level "D -F" road segments and intersections were in 2007. The 2030 projections are

downright frightening requiring 6 and 4 - lane arteries traversing the county just to bring levels to a "C" rating. This of course will not happen. But what will happen is that traffic on the existing roads will deteriorate to intolerable - downright dysfunctional - levels.

As far as "future projects" are concerned in assessing the traffic impacts of this application, there are approximately **55 pending minor, major and new winery applications in the pipeline**, all contributing in a minor or major extent to traffic increases to an overburdened network.

**At this time, there is no project with no matter how small a contribution it makes to overall traffic levels within the county which qualifies for a "less than significant" impact assessment. Unfortunately, CEQA provides no check box for a "more than significant" rating, because this is the true impact of any addition to traffic no matter how small.**

CEQA must recognize that there is no "less significant" impact to an already significant condition. Any addition to traffic must analyze and factor in county wide cumulative impacts.

#### **D) DIAMOND MOUNTAIN ROAD LEVEL "A" RATING:**

The Diamond mountain Road residents are proud of their road Level "A" rating and so are numerous hikers, bikers from the Napa Valley and from all over the world who use it. It is safe, it is shady and pristine with the best redwoods in the county and a with a stream along the road.

It, and most neighborhood hillside roads in the county - Soda Canyon is another good example - need protection as a natural resource rather than being viewed by the County as opportunity sites for increased development until they are degraded to level "C" and worse as County policies have been doing with most of its roads.

**All neighborhood level "A" hillside roads in the county are an integral part of the spirit of the AW environment. We cannot afford to degrade that as well.**

#### **E) HOLD AND HAUL WASTE SYSTEM:**

The increased levels the Reverie winery seeks require a Hold and Haul waste system, meaning that its waste needs to be hauled away in trucks in order for it to operate under sanitary conditions. This adds more trucks on Diamond Mountain Road and indicates that this winery is stretching the limits of sustainability. Its life depends on mechanical devices commonly referred to in the medical field as "life support".

What has the Reverie Winery been doing with its excess sewage waste?

#### **F) WINERY OPERATIONS IN A SUBSTANDARD ENVIRONMENT:**

The application review contains a number of conditions before increased production and visitations are permitted. They range from a code compliant new well and sewage disposal system (Hold and Haul), wider access roads for fire safety, setbacks from streams etc. all of which were not required for

operation within the limits of the existing Use Permit; all designed for a safe and sanitary operation for the authorized production and number of visitors.

For many years the Reverie winery, by Mr. Kiken's own admission, has been **exceeding** even the production and visitation levels it is seeking to have recognized under this Use Permit Modification.

**It follows that the winery has been producing wines and accepting visitors in a substandard and unsafe, unsanitary environment without a code compliant well or sewage disposal system. This is an even more serious violation to be added to its record.**

#### **G) VOLUNTARY DISCLOSURE / CREDIBILITY:**

The CEQA review states that "On February 4, 2013, Use Permit Major Modification P13-00027 was voluntarily submitted by the property owner, "as well as, in response to being selected to participate in the Winery Audit process". This language is ambiguous in as much as it implies that the disclosure of Use Permit violations was voluntary.

However, if the disclosure was made **after** the owner was notified that he would be subject to an audit, characterizing the action as "voluntary" is misleading at best and may solicit more lenient treatment under false premises.

Planning must clarify that timeline because if the disclosure took place after the notification of the pending audit, it cannot be considered voluntary.

**With a minimum of 6 major environmental violations and a minimum of 12 building code violations to his record, the applicant lacks any credibility that he will comply with any of the terms of any new Use Permit.**

#### **H) THE CONDITIONAL USE PERMIT LAW:**

In examining California case law as laid out in the *Governor's Office of Planning and Research* (3), it is my opinion that it is time for the County to reexamine the way it has been applying it, especially in recent past and in view of the changing environment and conditions.

##### **H-1) QUOTES FROM THE GOVERNOR'S GUIDLINES:**

\* "A Conditional Use Permit (CUP) allows a city or county to consider special uses which may be essential or desirable to a particular community, but which are not allowed as a matter of right within a zoning district".

##### **H-2) CASE LAW PROTECTING THE PUBLIC INTEREST:**

\* "To enable a municipality to control certain uses which could have detrimental effects on the community" (*Neighborhood Action Group v. County of Calaveras* (1984 156 Cal. App.3d 1176).

\* "The proposed use is in the best interest of public convenience and necessity and will not be contrary to the public health, morals, or welfare (*Upton v. Gray* (1969) 269 Cal.App.2d 352).

\* "The establishment, maintenance and conducting of the use for which a use permit is sought will not, under the particular case, be detrimental to the public welfare or injurious to property or improvements in the neighborhood" (*Hawkins v. County of Marine* (1976) 54 Cal.App.3d 586).

\* "Any use found to be objectionable or incompatible with the character of the city and its environs due to noise, dust, odors or other undesirable characteristics may be prohibited" (*Snow v. City of Garden Grove* (1961) Cal.App.2d 496).

\* "Such use would be essential or desirable to the public convenience or welfare, and will not impair the integrity and character of the zoned district or be detrimental to the public health, safety, morals or welfare" (*O'Hagen v Board of Zoning Adjustment* (1971) 19 Cal.App.3d 151).

### **H-3) LAW PROTECTING THE OWNER:**

\* "The condition must substantially further a legitimate public purpose; the condition must further the same public purpose for which it was imposed; and the property owner may not be required to carry a disproportionate load in furthering the public purpose (*California Land-Use and Planning Law*, 9th edition).

### **H-4) CHANGING CRITERIA IN EVALUATING USE PERMITS:**

**Napa County is at a cross roads due to changing conditions affecting public interest criteria.**

**While the case could be made in the past to justify an overall benefit to the community in evaluating a certain development - generally that being increased revenue to the county - the standards for evaluating overall benefit have changed due to the strained infrastructure to unsustainable levels, its accelerating wear and tear due to overcapacity and the associated degradation of the quality of life.**

**Much of what in the past was considered a benefit may now be outweighed by overall detrimental effects. This changes the criteria and requires a different analysis by which a Conditional Use Permit may be evaluated so than on balance it serves rather than works against the public interest.**

**CEQA Negative Declarations and acceptable EIRs assess only the lack of negative environmental impacts. The Granting of a Conditional Use Permit must satisfy an additional requirement, that of a public benefit. Much of the Case Law requires that it's effect is "essential or desirable to the public convenience or welfare". In other words, it must have a residual positive outcome. Current coditions make such an assessment much more complex than it used to be.**

**At this point in time, a credible argument can be made that the current County's policy of granting Conditional Use Permits while consistently ignoring public input on the detrimental effects on neighborhoods and the community who are the ones at the forefront of quality of life, is acting directly against California Case Law.**

### **I) CONCLUSIONS:**

At issue is how to handle the Reverie violations for its skirting both environmental and building codes to its advantage and contrary to the public interest. Sanctions must be severe because if they are not, they will accelerate the rapidly increasing culture of permissiveness.

\* The granting of the Use Permit Modification to the Reverie winery furthers no public purpose, neither does it provide any benefit to the community or the neighborhood as the spirit of that law requires.

\* All impacts of such a Use Permit - even "insignificant" ones - have negative impacts on the community, especially cumulative ones, designed solely to further the financial interest of a single person at the expense of the community. This is contrary to the spirit of the Conditional Use Permit Law.

\* The Reverie winery is not being forced to carry an undue burden for any public purpose. It already was granted a Use Permit which it has been violating in both production and visitation levels, presumably for many years.

\* The Reverie winery by its patent disregard for the laws and regulations of the county by making "improvements" on its lands without environmental and building permits is the last to be deserving discretionary treatment afforded by a Use Permit Modification.

**As a result, all assurances by the applicant regarding production levels, visitation levels, event numbers, modes of transportation by high capacity passenger vehicles to minimize traffic impacts and all assurances towards land stewardship and respect for the law and the neighborhood lack credibility. Yet, this is the sole premise on which this CEQA Negative Declaration relies on and by which it assures the public.**

\* The Reverie winery must bring all its structures to Building Code compliance and use them under its existing Use Permit levels without a Use Permit Modification. It is obvious that its location on this particular site cannot sustain increased production or visitations as it has reached levels beyond sustainability as evidenced by the need of a Hold and Haul sewage disposal system. There is no reason why the County ought to accommodate this kind of winery environment.

\* As demonstrated by the County in the past, its lax policy of monitoring Use Permit compliance has resulted in an environment of lawlessness. It is unfortunate that compliance which was based on trust and good faith has been taken widespread advantage of. Among other effects, it has resulted in the County's loss of reliable data in preparing credible CEQA and EIRs.

**It also demonstrates that the honor system on which almost all CEQA Negative Declarations on Use Permits rely has been compromised exposing the urgent need for a more effective system.**

It is imperative for the County to restore its waning credibility or the public will have no alternative but to resort to the initiative process. This is not a healthy way to govern.

## **The fate of the Reverie application will be a significant test case**

Enclosures / Attachments:

- (1) Kiken Letter dated May 12, 2015
- (2) Kiken email dated May 14, 2015
- (3) Governor's Conditional Use Guidelines and Case Law