

MEIBEYER LAW GROUP



TRUSTED COUNSEL TO THE WINE INDUSTRY

March 15, 2012



Chairman Jeff Manfredi and Commissioners
Nicholas Kite, Walter Kusener, and
Carol Bush
c/o City of Calistoga
Planning and Building Department
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Re: Brian Arden Winery Application

Chairman Manfredi and
Commissioners Kite, Kusener, and Bush:

I represent Mark and Teresa Aubert of Aubert Wines, the property most immediately impacted by the Brian Arden Winery application. On their behalf I submit this letter contesting the Negative Declaration proposed to be issued for this project, and to oppose the approval of the Conditional Use Permit for this project as proposed. Along with this letter I submit numerous supplemental materials that support our contentions. A number of those materials were already submitted to City departments but, at this juncture, I do not know which materials will be included in your packet. I apologize for any duplication that might occur.

1. CEQA. The project has not been properly analyzed under the California Environmental Quality Act ("CEQA"). Staff prepared a Negative Declaration, which is the lowest level of environmental review contemplated under CEQA. With regard to certain matters regarding Hydrology and Traffic the staff concluded that the project posed "Less Than Significant Effect". We believe that determination was made in error.

A. Hydrology. In Section IX (Hydrology and Water Quality) of the Initial Study the staff determined that the project would have a "Less Than Significant Effect" regarding subpart (c) "altering the existing drainage pattern of the site or area ... in a manner which would result in substantial erosion or siltation on-or off-site"; subpart (d) "substantially alter[ing] the existing drainage pattern of the site or area ... or substantially increase the rate or amount of surface runoff in a manner which would result in flooding on- or off-site"; and subpart (e) "creat[ing] or contribute[ing] runoff water which would exceed the capacity of existing or planned storm water drainage systems...". These conclusions were based on Delta Consulting & Engineering's analysis based on Use Permit Plans prepared by James Casssayre. Delta Engineering concluded that "the flow patterns of the storm water runoff will be maintained to pre-construction conditions. The runoff

March 15, 2012

Page 2

will exit the property at the southern corner of the property similar to the pre-construction conditions. In addition, the detention basin and other hydrologic energy reducing features proposed in the plans will reduce the post-construction flows to be less than the pre-construction conditions." These conclusions are in error based on engineering and factual evidence.

Attached to this letter are the following documents:

1. A letter from Doug Sterk of Sterk Engineering dated March 13, 2012, together with two topographical surveys.
2. A letter from Joseph Briggs dated March 13, 2012.
3. A letter from the neighbor, Donald Luvisi dated March 14, 2012.
4. A letter from Bartelt Engineering dated February 14, 2012.
5. Memorandum from Joe Gaffney of Green Valley Consulting Engineers hired by the City of Calistoga, dated February 6, 2012.

Mr. Sterk, the engineer for the Briggs Winery, the predecessor to Aubert Wines, observed the site conditions before the construction of the Briggs Winery and the access driveway to that winery. As stated in his letter, based on the topographical survey extending into the applicant's property, he determined that **no water** entered the Briggs/Aubert property, as natural drainage in this area flows easterly toward the Luvisi property. Historically water would leave the project's property and flow as "sheet flow" onto that property, no drainage swales or ditches diverted water to the south toward the Briggs/Aubert property and were not needed because no water flowed in that direction.

As noted by Mr. Sterk, the roadway was constructed without crowning in the center so that the historical sheet flow would pass over the road uninterrupted toward the Luvisi property. Mr. Sterk's calculations of historical flow are confirmed by Mr. Luvisi's observations at the property owned by his family for approximately 100 years. Water historically did not drain to the south and the only reason that any flow may now be diverted toward the Aubert property is due to a build-up of soil and debris on the disturbed area on the Luvisi property beneath which the City of Calistoga installed a water line without returning the surface to its natural level grade. Thus, the diversion of water toward the Aubert property violates California drainage laws by wholly changing the direction of the historical flows.

March 15, 2012

Page 3

Moreover, wherever the water is being discharged, Bartelt Engineering has fully reviewed the project engineer's calculations and plans and has determined that: "Under the proposed post-construction condition, flows are being broken up, redirected and allowed to release as concentrated point discharges which have higher flow rates than the pre-construction conditions". This conclusion is supported by the field conditions and topo provided by Mr. Sterk. Moreover, "the proposed project will discharge at rates that peak sooner, last longer and will be greater overall than current conditions" necessitating further study by the applicant to determine that this discharge will not adversely impact regional storm water distribution facilities. No such study has been done.

It is obvious from this evidence that the applicant's entire storm water plan is based on false assumptions regarding the pre-construction drainage patterns and rates in this area. In the February 6, 2012 Green Valley Memorandum, questions regarding these calculations were raised and appear not to have ever been addressed as there has been, to our knowledge, no subsequent review by Green Valley Consulting Engineers. The mere fact that storm water will be diverted to the Aubert property, which is located at a much lower elevation, and has developed a drainage system that is limited only to the amount of water runoff that results from its impervious surface and not new water flows from the Arden property, is by definition a significant environmental effect. Moreover, there is indisputable evidence (in the Delta Engineering report itself) that the Arden storm water plan will change the water flows from "sheet flow" to "concentrated point discharge" at higher and longer flow rates. This change will cause erosion where none existed as well as impacts on area drainage facilities, all of which impacts are clearly significant adverse environmental effects. As a result, under CEQA, if there is "fair argument" that a project generates a "Significant Effect" which is not mitigated (and no mitigation measures for these hydrology issues have been identified in the Initial Study), then an Environmental Impact Report is required. *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 75 and *Friends of "B" Street v. City of Hayward* (1980) 106 Cal. 3d 98, 1000-1003. The Aubert family has provided expert testimony from Bartelt Engineering regarding the existence of significant environmental impacts. Credible expert testimony that a project may have a significant impact, even if contradicted, is generally dispositive and under such circumstances, an EIR Must be prepared. (*City of Livermore v. Local Agency Formation Com.* (1986) 184 Cal.App.3d 531, 541-542.). We have also provided substantial evidence from neighbors who have long-standing connections to this property and have much historical knowledge about the drainage patterns. Statements of area residents who are not environmental experts may qualify as substantial evidence if they are based on relevant personal observations or involve "nontechnical issues." (See e.g., *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 583; *Ocean View Estates Homeowners Assn. v. Montecito Water Dist.* (2004) 116 Cal.App.4th 396, 402.)

March 15, 2012

Page 4

The neighbors believe there are mitigation measures that could be adopted for this project, but the applicant has failed to consider them due to the erroneous analysis of the pre-construction conditions. The post-construction flows are a direct consequence of the amount of impervious surface to be developed on this small parcel of land. And, the location of the buildings and other impervious surface near the driveway bordering the Luvisi property eliminates the opportunity to utilize the vineyard on the Brian Arden property to return the project's discharge to sheet flows prior to reaching the Luvisi property. It would be a simple measure to reduce the size of the buildings and impervious surfaces and locate the parking area at the Solage end of the property so that water can be collected at that end of the property at a much greater distance from the Luvisi property. The applicant's design, comprised of large buildings and substantial hardscape, has created the conditions that generate a significantly greater amount of water that needs to be dispersed from the site so the applicant has the responsibility, and the opportunity, to mitigate those impacts.

The fact that the applicant's engineer does not conclude that a significant environmental effect exists does not negate the requirement of the Environmental Impact Report because: "If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could still be 'fairly argued' that the project might have a significant environmental impact (using *Friends of "B" Street test*). *Sundstrom v. County of Mendocino* (1988) 202 CA3d 296." *Longtin California Land Use Law*, 2011 Supplement, Section 4.55{1}, pages 458-459. As a result, if the applicant does not willingly develop mitigation measures for this project the City's response should be to require an EIR.

B. Traffic Issues. In Section XVI the staff determined that the project would have "Less Than Significant Effect" on traffic. This conclusion was based on the W-Trans focused traffic analysis dated November 29, 2011. In that study, W-Trans performed a left turn warrant analysis based on methodology updated by the State of Washington that was derived from the Transportation Research Board. Under that methodology no left turn was warranted at the intersection of the combined private driveway to be utilized by the Bryan Arden Winery and Aubert Wines. According to staff, based on research and discussions with Caltrans staff, this methodology is consistent with the Caltrans Highway Design Manual.

Attached to this letter is a peer review of W-Trans' traffic analysis conducted by Crane Transportation. As noted in that review, the Lava Vine Winery was required, based on the application of Napa County's Left Turn Warrant analysis, to install a left turn lane. As set forth in the attachment to the

March 15, 2012

Page 5

Crane Transportation review, 20 trips per day triggers the requirement of a left turn at a private driveway given the traffic flows along the Silverado Trail under Napa County's standards. The project's traffic exceeds that level, independent of the traffic that will also utilize the same private driveway to access Aubert. Notwithstanding the applicability of Napa County's warrants to the Lava Vine Winery project, Napa County determined it had no jurisdiction over this project because the portion of the Silverado Trail that fronts the project (for the short distance from the point where the Silverado Trail enters the City of Calistoga until just south of the Lava Vine project) is owned by the City of Calistoga as that land was annexed to the City.

Staff did not require the applicant to adopt the Napa County standards notwithstanding the fact that it is Napa County, not Caltrans, that has jurisdiction over and maintains essentially all of the Silverado Trail, and even though the Napa County Standards are substantial evidence that a significant environmental impact exists. Moreover, the application of the Napa County left turn warrants would undoubtedly create a safer traffic condition at this intersection, particularly when the access road for the Residential Area of the Silver Rose project is located only 100 feet west of the project driveway.

We believe that a jurisdictional quirk regarding ownership of the Silverado Trail should not negate the consideration of the need for safety measures at this intersection when two wineries will utilize the same driveway with their combined traffic flows, and either winery would trigger a left turn requirement under Napa County standards. As noted above: "If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could still be 'fairly argued' that the project might have a significant environmental impact". *Longtin* at pages 458-459.

2. GENERAL PLAN. The Aubert family is not opposed to development of the adjacent property, and is not even opposed to a winery on that property. But, the scale and scope of this project flies in the face of all of the General Plan guidelines that are applicable to this very sensitive property located at a strategic entrance to the City of Calistoga immediately adjacent to one of its scenic treasures – Mt. Washington. This property is located in the Entry Corridor Overlay and the Maxfield Adams Beverage Company Overlay, and is also designated Rural Residential under the General Plan. Under the General Plan guidelines for all of those designated areas, development **must** be subordinate to agriculture. This project wholly fails to observe that requirement and the specific guidelines set forth for each designation. A more extensive discussion of these

March 15, 2012

Page 6

issues is addressed in my letter of October 24, 2011 to Mr. McNab, attached, but this memo highlights the most critical issues.

A. Entry Corridor. Under LU-26 (“Entry Corridor Overlay”), “The principal entrance points into Calistoga provide a unique opportunity for community identity. It is important to preserve and protect the ‘country town’ appearance of Calistoga by ensuring that **development is of a scale subordinate to agricultural uses of properties located at these entry corridors.**”

Under LU-33, “New buildings should reflect **small-scale, low-rise design characteristics with an understated visual appearance** and should maintain existing small town rural and open space qualities.”

The square footage of the project is now 15,492 square feet. In July the applicant represented that its project had been reduced to 7,800 square feet. In fact, that representation wholly ignored the other 6,110 square feet of space contained in the covered breezeway/crush pad, the second floor in the tasting room and office building, the mezzanine and catwalks, as well as the covered porches and the roof decks clearly intended for marketing activities as the project at the second Design Review hearing actually totaled 13,990 square feet. At that time the applicant was asked by the Commission to scale back the project. Instead, it is now 1,592 square feet larger than when it was evaluated in July.

In addition, since July the applicant has raised the floor level of the winery by three additional feet to construct a detention basin under the winery structures necessitated by the excessive drainage resulting from the scale of the project. As a result, the peak of the roof is now 38’ feet above the elevation of the driveway at its intersection with the Silverado Trail. What was a monumental project in July has grown in height and square footage.

The two story design of the facility, particularly with the wide expanse of glass that will produce glare and off-site illumination, makes the winery monumental in size and design. This project is far from a “low-rise” development, as required in the Entry Corridor. In 2005 the Planning Commission refused to grant design review approval to the Thomas inn project for this exact same property. In the staff report for that project, staff indicated that a one story height limit was appropriate in the Entry Corridor by noting: “The proposed two-story development, near the base of Mt. Washington and at the entrance to Calistoga, is not in tune with the low-key residences and businesses in the vicinity” [Staff Report dated April 27, 2005 for Application

March 15, 2012

Page 7

CDR 2005-02, at page 6, lines 198 – 199]. In addition, at page 7, lines 261 – 265 the report further stated: “The two-story construction is imposing in the entry corridor and would screen the natural landscape features of Mt. Washington and the neighboring agricultural operations. The height of any structure in this area should be low-rise and should complement the natural landscape. This proposal is designed as a focal point or monument in a peripheral area of the City.”

The Solage project is a model for a project that complies with the Entry Corridor requirements. The boundary of that property is developed with vegetation that screens its parking lot as well as the improvements within the project, which themselves are setback and one story in height. The Brian Arden project wholly ignores those principals with its height, mass and design.

B. Maxfield-Adams.

Similarly, the Brian Arden project ignores the General Plan guidelines for the Maxfield – Adams Beverage Company overlay. Under those guidelines, as is true for the Entry Corridor and the Rural Residential General Plan designation, the City must “[e]nsure that new development is of a scale subordinate to the agricultural uses of properties located at these entry corridors”. As a result, “Permissible uses include: ... **wineries, provided that these uses are clearly subordinate to the primary agricultural use.**” ... **Residential densities normally allowed under the Rural Residential designation shall apply to the PD area.**

Other restrictive guidelines apply in the Maxfield-Adams overlay:

“Protection of natural resources, including **retention of onsite drainage**, mature trees, and sensitive habitat. (as discussed extensively above, the project abysmally fails to comply with the drainage guidelines)”

“Minimization of grading” which the project cannot comply with considering the magnitude of the improvements, and the construction of the detention basin.

There should be a “landscaped setback from Silverado Trail” which is wholly lacking in this project, in contrast to the Solage project.

March 15, 2012

Page 8

“Due to Mount Washington’s visual and open space significance, private construction on its slopes shall be prohibited” which the project fails to observe through the construction of a large retaining wall.

Finally, and of utmost importance for this project, the General Plan specifically requires, the “minimization of impact on adjacent land uses, including appropriate siting of noise generators, lighting, and building location, height and style.” The proposed project violates these guidelines in several regards. The large-scale height and size of the proposed winery will impact on the viewscape to the Palisades from the Aubert property. Moreover, the parking area located immediately adjacent to the Aubert property will necessarily be a “noise and light” generator. We believe the parking area must be moved away from the Aubert property to comply with these mandates in the General Plan. The location of the parking toward the Solage end of the site will allow landscaping along Silverado Trail to screen the parking area as occurs at Solage. We also urge the Commission to specify, for any project that is ultimately approved at this site, that no parking should be permitted on the common driveway and utility easement shared between these two parcels because the development of parking in this nearby location will generate adverse impacts on adjacent land uses which are precluded in this PD Overlay District, and no parking should be visible from the Silverado Trail which will be the case for vehicles parked on the roadway.

C. Planned Development Zoning. As noted in the staff report prepared for the Design Review hearings for this project, when “approving a planned development, the Planning Commission may require higher standards or allow lower standards for the PD district than may be required for use, height, parking, traffic circulation, landscaping and other elements with which the zoning regulations are concerned. Absent established planned development standards the Planning Commission should consider practically whether the project presents a high quality design and site layout that will ensure compatibility with the surrounding properties and hillside. This can be in terms of landscape sufficiency, parking adequacy, height limitations, scaling and massing of structures, etc.”

We urge the Commission to give particular consideration to the Rural Residential General Plan designation, as well as the policies of the Maxfield-Adams and Entry Corridor overlay, in considering what development standards should be applicable to this property. We believe, given the critical location and visibility of this property, the Commission should apply restrictive Planned Development guidelines similar to the restrictions that would be applied to Mr. Luvisi’s property just across the driveway which also has a Rural Residential

March 15, 2012

Page 9

designation under the General Plan, but happens to be subject to Rural Residential zoning. The Commission is free, as noted above, to be as restrictive as it deems appropriate.

Under guideline LU-18 the General Plan provides for Rural Residential designated property that: "In order to offset the cost of preserving large lots in agricultural production, the following uses may also be permitted if they conform to all relevant General Plan policies: **small-scale wineries and inns**; ..." There is no definition of "small-scale winery" in the General Plan, but there is within the RR Zoning District regulations that provide that a "small scale winery" is one that allows up to 2,000 cases of production on parcels two acres in size. [Under the RR zoning regulations a "large scale" winery is defined as a winery up to 4,000 cases on parcels exceeding four acres, so Mr. Luvisi, with an eleven acre parcel can only develop up to a four thousand case winery. It makes no sense to us why the "PD" designation for this property justifies, much less requires, the Commission to approve a 10,000 case winery – five times larger than would be permitted on any other two acre parcel designate Rural Residential under the General Plan].

This petite parcel at a critical location is distinguishable from other parcels in the PD Zoning District such as the Solage and Silver Rose properties, or the Bounsall property, as those properties are much larger properties more suitable for commercial development. This property is only approximately two gross acres, and even less net acres when all of the portion of the property on the slope of Mt. Washington is eliminated due to the prohibition of construction on Mt. Washington. We believe, given the factors noted above, the Commission should look to the RR Zoning Regulations for guidance in shaping development guidelines for this parcel to ensure that any approved development is truly "subordinate to agriculture". We believe the project, as presently constituted, falls far short of that requirement.

The on-site vineyard is effectively landscaping, not agriculture, and will not produce a meaningful proportion of the winery's grapes, much less the 20% of the winery's production that is required for small-scale wineries, or the 30% that is required for large-scale wineries in the Rural Residential Zoning District where those standards were implemented to ensure that the winery development is subordinate to the primary agricultural use of the property.

Moreover, the proportion of marketing and accessory use at this project suggests that it is primarily intended to be a restaurant and/or event center rather

March 15, 2012

Page 10

than a winery that is subordinate to agriculture as required under the General Plan guidelines for Maxfield Adams, Entry Corridor and the RR General Plan areas. Napa County's Winery Definition Ordinance ("WDO") has imposed restrictions on the scope and intensity of accessory uses to ensure that wineries are truly supportive of agriculture rather than principally commercial operations.

Under the WDO, the TOTAL accessory use (office, storage, rest rooms, and ALL marketing and retail facilities) cannot exceed 40% of the size of the production facility to ensure that the retail, commercial activities are accessory and subordinate in nature. By way of example, the August Briggs (now Aubert) property next door has a total of 8,200 sf of space (far less than the 15,492 sf project proposed for this even more sensitive property located much closer to the Silverado Trail). Moreover, the total square footage of the production facility at Aubert is 6,000 sf, while the accessory and retail square footage is only 2,200 sf - clearly less than 40% of the production facility.

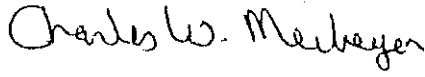
On the other hand, in the Brian Arden Winery project the applicant proposes **more than 60% of the total improvements to be utilized for retail and other accessory uses** – including indoor and outdoor event space, including second story decking, a pizza oven, four fireplaces, and excessively large offices and gathering areas for the requested maximum of 40-60 visitors per day. While the PD Zoning District regulations may allow, but only if approved in the use permit, public tours, tastings and events, as noted above, there is no requirement that all of those entitlements be granted to any applicant. Rather, we would encourage the Commission to review the allowable activities for a RR zoned property outlined in my October 24th letter as guidance for the appropriate intensity of development and operation that should be allowed on this sensitive property. Nothing requires that the applicant be granted carte blanche freedom to operate a commercial activity on this agricultural property at a critical location. Moreover, all of the General Plan guidelines suggest the entirely opposite result – a reduction in the size, scale and scope of this project.

In sum, the Aubert family believes that the project poses significant threat of environmental harm through the development of a misguided drainage plan and the failure to implement safe traffic mitigation measures and feel they must insist that those issues be addressed before any project can be approved. And, they believe the project violates clear and express General Plan guidelines due to

March 15, 2012
Page 11

its size, scale, design, and proposed operations. They would welcome another winery, or any other good neighbor, who would sensitively develop this very special property. But, this project is wrong for this location. They encourage the applicant to either scale back their proposal, or to locate winery in an appropriate location and they ask the Commission to deliver this same message to the applicant.

Very truly yours,


Charles W. Meibeyer *CS*

Enclosures (as stated)

cc: Mark and Teresa Aubert
Mr. Ken McNab
Mr. Erik Lundquist
Ms. Michelle Kinyon
Mr. Dan Takasugi