

**Chateau Calistoga Mobile Home Park  
223 Champagne West  
Calistoga, CA 94515  
(707) 942-5101**

September 30, 2021

Senior Planner, Zack Tusinger  
Planning & Building Department,  
City Manager, Mayor Chris Canning,  
City Council Members

Calistoga City Hall  
1232 Washington St.  
Calistoga, CA 94515

To all this concerns:

We are writing this with concern for our senior resident's mental health and physical well being.

We have been made aware of and have experienced the horrific screaming coming from peacocks that are now living on the property adjacent to the north side of our 55yrs and older Mobile Home Community. The screams from these beautiful birds are so obnoxious and loud that we, the managers, can hear them at our home over on the south side of the park!

Please help us to ensure that our senior members of our community can have the peaceful and quiet enjoyment while they a living in their own homes.

Thank you,  
  
Mike and Cebreena Oliver, Managers  
Chateau Calistoga

Oct. 7, 2021

Re: Public Hearing Item: 345 Silverado Trail

Dear Planning Commission,

I am writing as President of the Chateau Calistoga Mobile Home Owners Organization in regards to the Review Compliance and Use Permit Amendment for the former Helmer property.

The noise from the peacocks especially, as well as the non-native bird species trapped in the aviary, has been a disturbance to many of our residents here for some time. The birds'

loud cries have been heard on the opposite side of the Park on Champagne S. Residents have made complaints to the City, met with the Police Chief and other City officials.

Hopefully, this Oct. 13<sup>th</sup> meeting will be a further step in solving this situation. It is our understanding that as a result of the continuing complaints, a site visit by City officials occurred, code violations were found, and citations were issued. Many cities forbid having peacocks and roosters within city limits- this would be good for Calistoga to adopt. The unpermitted duck and aviary enclosures for non-native bird species also contributes greatly to the noise our residents must deal with daily, most especially at feeding times. Chateau Calistoga is a 55+ community – people move here to have peace and quiet. The peacocks and aviary birds are not conducive to peace or quiet.

On behalf of the residents who must listen to the screeches of the peacocks and the barrage of sounds from the trapped non-native birds and ducks in the aviary day in and day out, I implore you to deny this absentee owner's Use Permit Amendment and see that he is held accountable to remedy each and every citation.

Sincerely,

Rose LeClerc

President, Chateau Calistoga Home Owners Organization.

707-494-6422

210 Champagne W, Calistoga

LAW OFFICES OF

**PAUL J. DOHRING**

1220 WASHINGTON STREET  
CALISTOGA, CALIFORNIA 94515  
TELEPHONE (707) 942-1298

October 9, 2021

Samantha Thomas, Associate Planner  
Planning & Building Department  
City of Calistoga  
1232 Washington Street  
Calistoga, California 94515  
[sthomas@ci.calistoga.ca.us](mailto:sthomas@ci.calistoga.ca.us)

**Re: My Client: Rick Ali**  
**Subject Property: 345 Silverado Trail (APN 011-050-032)**  
**Subject Application: Helmer Conditional use Permit U2003-12 Review  
Compliance of Conditions of Approval, Use Permit  
Amendment request UP-2021-9 and Design Review DR  
2021-2**

Dear Ms. Thomas:

**Introduction**

My client Syed (“Rick”) Ali has just recently shared with me the Staff Report for Use Permit Application UP-2021-9 and Design Review DR 2021-2 and retained me to assist him with the resolution of remaining issues of concern arising from his use of the above-referenced property. To date, Staff from several city departments (fire, police, public works, building and planning) have demonstrated a high degree of professionalism and a sincere effort to work with Mr. Ali in a cooperative manner and with a focus on solutions. As a result, Mr. Ali and his architect Mr. Benjamin Hertz are very pleased to be working with you and the Planning Commission. Much progress has been made over the past several weeks to resolve many of the issues detailed in the Staff Report, even though the exhaustive list of unsubstantiated claims presents an unfair portrayal of Mr. Ali which likely prejudices his rights to due process.

While Mr. Ali wishes to fully cooperate in this important process and fully acknowledges that some mistakes have been made, he cannot acquiesce to several of the Staff Report’s conclusions and recommendations because they are inconsistent with the evidentiary record and are likely

precluded under longstanding California law. Mr. Ali is particularly troubled by the apparent conclusion that bird sounds are somehow offensive or disruptive in nature. He would hope that there would be a reconsideration of this basic premise, and a paradigm shift as to what actually constitutes offensive noise, since many in the community find the sound of birds pleasing, peaceful and comforting. Additionally, Mr. Ali is saddened by the recommendation against his bird enclosures because it is undisputed that this alleged “issue” arises from unsubstantiated noise violation claims under Calistoga Municipal Code § 8.20.010. He is deeply troubled that false accusations asserted by neighbors (whose veracity is now subject to serious doubt) are apparently being relied upon as the basis for the city’s exercise of its police power.

Likewise, the Staff Report’s recommendation against proposed accessory buildings appears to be based on an outdated drainage study from 2002-2003 and drainage conditions from the early 2000s. We all know that Climate Change conditions likely have substantially changed or reduced water flow patterns over the past 18 years. Moreover, the general restriction on accessory buildings is contrary to the zoning code allowance for accessory buildings by right.

Finally, Mr. Ali has concerns about the precise language of proposed additional conditions of approval in the Resolution related to transient occupancy restrictions, utility easement restrictions and the inoperable helicopter sculpture because there is no supporting nexus in the record to support these conditions: They are based on unfounded allegations and will interfere with Mr. Ali’s due process, equal protection and property rights.

Despite these serious concerns, Mr. Ali and his team remain focused on a reasonable resolution of disputed issues, and we intend to reciprocate with the same cooperative spirit and professionalism shown by Staff. We appreciate the balanced nature of the Staff Report and the apparent recognition that many of the “alleged” violations do not appear to be supported by the required substantial evidence: The repeated use of words such as “alleged,” “may,” “could,” “potentially,” or “might” (or other similar adjectives) in numerous Staff Report statements align with our belief that the statements do not constitute the “substantial evidence” necessary to support many conclusions drawn in the Staff Report.

### **Current Status of the Property**

It is my understanding that the parcel in question is approximately 7.37 acres and located approximately 1,500 feet southeast of the intersection of Silverado Trail and Rosedale Road. The parcel is located within the General Plan’s Silverado Trail Planned Development Overlay. It presently has a zoning designation of Planned Development PD 2002-2 Maxfield Planned Development District.

This planned development district regulates development on the 7.37-acre parcel. The PD 2002-2 Maxfield Planned Development District has been important to the community, as it contains two large parcels located at a key entrance to town in an area of outstanding natural beauty and surrounded by open space and Mt. Washington as a unique backdrop.

However, it is extremely important to place Mr. Ali's property and uses in context. The property is relatively secluded behind Mt. Washington and does not pose a threat to the aesthetics of the Silverado Trail corridor. Since the creation of the planned development corridor, much has happened in the area which has changed it forever: Solage, Four Seasons Hotel and residential development, Aubert Winery and Brian Arden Winery to name a few developments.) Under these circumstances, the need for the planned development overlay governing Mr. Ali's parcel and its uses has substantially eroded over the years, and the need for strict adherence to policies protecting a "key entrance," as reflected in the Staff Report analysis, appears to already have been defeated by changed circumstances, including other more intensive and intrusive surrounding development.

### **The City's Exercise of Its Police Power Is Not Unlimited**

A city has the police power to protect the public health, safety and welfare of its residents. This right is set forth in the California Constitution, which states "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal. Const. at. XI, section 7. However, the police power conferred by the Constitution is not unlimited. The extent of the power may vary based on the subject matter over which it is exercised. If a police power regulation goes too far, it may be challenged as unlawful. The means employed to effect its exercise may be neither arbitrary nor oppressive but must bear a real and substantial relation to an end that is public, specifically, the public health, safety, or morals, or some other aspect of the general welfare.

From a due process perspective, California courts prohibit governmental action that arbitrarily or unreasonably deprives a person of life, liberty, or property. From an equal protection perspective, the courts also require that similarly situated persons be treated in an equal manner. These rights are fundamental.

Here, Mr. Ali is quite disappointed that many unfounded and unproven allegations have been made against him which have generated undue scrutiny over otherwise lawful activities. As you know these allegations have created the need for a costly and time-consuming response, including the subject use permit amendment application and the hiring of many expert consultants. Although some permitting and design review application mistakes have been made and they are being rectified, the litany of concerns set forth in the record appear to have arisen more out of spite than legitimate concern. Due process cannot be assured when actions taken by the government are based on false accusations. Equal protection cannot be assured if the government requires a property owner to take actions not required of others in the community.

Upon closer scrutiny of the record—particularly the police response logs-- you and the Planning Commission will conclude that concerns raised about noise, parties, transient occupancy, helicopters and public safety are completely without merit. And yet here we are having to defend against these allegations through this daunting use permit amendment process.

### **Unsupported Noise, Helicopter and Transient Occupancy Complaints**

An adjudicative or quasi-judicial administrative decision may be challenged by Administrative Mandamus when a hearing in the underlying administrative proceeding is required by law, evidence is taken and the decision maker is vested with the discretion to determine contested factual issues. (Code of Civil Procedure § 1094.5.) The standard of review for Administrative Mandamus is usually the substantial evidence test, however, when the underlying decision substantially affects a fundamental vested right, the independent judgment test applies. (Code of Civil Procedure § §1094.5(b)-(c)); *Goat Hill Tavern v City of Costa Mesa* (1992) 6 CA4th 1519, 1525.) Under the substantial evidence test, a court determines if there is substantial evidence to support the findings and if the findings support the decision. Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly inaccurate or erroneous.

Here, there is no substantial evidence to support claims that Mr. Ali has violated Calistoga Municipal Code § 8.20.010 which provides in pertinent part:

The persistent maintenance and emission of any noise or sound produced by human, animal, electrical, radio or mechanical means between the hours of 10:00 p.m., and 7:00 a.m., next ensuing, which by reason of its raucous or nerve-racking nature, disturbs the peace, quiet or comfort, or is injurious to the health of any person, constitutes a public nuisance.

Rather than substantial evidence of any violations, the Calistoga Police Logs establish that the noise complaints from a resident at the adjacent mobile home park frequently fall outside the restricted time period of 10:00 pm to 7:00 am, But more importantly, these complaints are completely without merit. As such, they should not be relied upon to support a recommendation to remove the bird enclosures. Upon closer review, you will find the following findings in the police logs:

**6-05-2021 21:58:57**

Music. Homeowner turned off music (No finding of persistent raucous or nerve-racking nature music)

Warning

**7-21-2021 11:25:57**

Peacock "Noises". (No finding of persistent raucous or nerve-racking noise)

Case Closed

**7-22-2021 9:00:17**

Loud Peacock. (No finding of any noise)

Case Closed

Samantha Thomas  
October 9, 2021  
5 of 10

**8-09-2021 5:01:34**

Extremely loud Peacocks (Finding: "Quiet on Arrival")

Case Closed

**8-10-2021 6:30:53**

Peacock for last hour (Owner contacted but no finding of any noise)

Case Closed

**8-17-2021 20:06:03**

Loud Peacocks (Finding: "Quiet on Arrival")

Case Closed

**8-17-2021 20:11:09**

Loud Peacocks (Finding: "Peacocks Quiet on Arrival")

Case Closed

**8-19-2021 22:45:49**

Noise Complaint; Alleged "party" (Finding: Only Four Individuals Talking; No finding of persistent raucous or nerve-racking noise)

Case Closed

Given these unsubstantiated noise complaints, it would be unfair, unjust and inappropriate for Mr. Ali to remove the protective netting enclosures for a few birds. Under Mr. Ali's religious beliefs, feeding birds is an act of grace and kindness. He does this purely out of charity and love for animal life, not to offend neighbors or operate a commercial venture. He provides a very modest netted sanctuary – in an extremely rural and isolated setting-- merely to protect a few birds against predators. Without this protection, the raccoons and hawks would kill and eat these precious and delightful birds. And Mr. Ali finds this prospect painfully heartbreaking.

Under these circumstances, we would propose to work on other solutions short of removing the bird enclosures, including potentially using sound barrier infrastructure or technology. We do not believe these actions are needed but we are willing to explore all reasonable, cost-effective options.

In addition to the lack of substantial evidence to support alleged noise violations, there is absolutely no evidence whatsoever to support alleged helicopter takeoffs and landings or short-term rental activity on the subject parcel. The neighbors who reported these alleged violations should be admonished about the legality and propriety of making false claims to the police. Their claims are highly inappropriate and should not be the basis of any Planning Commission findings or additional unjustified conditions of approval.

### **General Plan Inconsistency**

As you know, Government Code § 65860 requires a city's zoning ordinance to be consistent with its general plan. When a zoning ordinance becomes inconsistent due to a general plan update or amendment, the city is required to enact a consistent zoning ordinance within a "reasonable time." (Government Code § 65860(c).)

Here, Mr. Ali's property is designated in the Calistoga General Plan Land Use Element as Rural Residential with a Planned Development Overlay (Silverado Trail Planned Development Overlay (PD-1)). It is important to note that this portion of the General Plan was updated in 2015. However, the 2002 zoning designation of Planned Development PD 2002-2 Maxfield Planned Development District in the zoning code was never updated to make it consistent with the General Plan Update in 2015.

As it stands today, the zoning code applicable to Mr. Ali's property is inconsistent with the 2015 Update to the General Plan. This has both legal and practical consequences for the city and Mr. Ali.

A general plan must not only be internally consistent but vertically consistent with other land use and development approvals such as specific plans and the agency's zoning and development regulations. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d, 553, 570.) Thus, a zoning ordinance that is inconsistent with the city's general plan is invalid when passed and one that was originally consistent but has become inconsistent must be brought into conformity with the general plan. To date, the city has failed to bring its zoning regulations applicable to Mr. Ali's parcel into conformity with its 2015 General Plan Update.

The 2015 General Plan designation provides in pertinent part:

Land uses shall be limited to agriculture, residences and visitor accommodations, including hotels, motels, and destination resorts. Agriculture uses may include, but are not limited to, horticulture, floriculture, viticulture, apiaries, and similar uses (excluding stockyards or commercial feeding of animals), and related uses such as wineries and retail wine sales, provided that these uses are clearly subordinate to the primary agricultural use. Residential uses may include single-family homes, mixed density development and senior retirement center....

Unfortunately, the agricultural uses expressly allowed under the city's General Plan (as updated in 2015) do not carry over to current zoning code regulations applicable to Mr. Ali's parcel. Under the applicable Calistoga Municipal Code (17.24.130) the following uses are expressly allowed on Mr. Ali's property:

A. Uses Allowed without a Use Permit.



1. Home occupations in accordance with Chapter 17.43 CMC.
2. ....
3. Uses determined by the Planning Commission to be similar in nature, as provided in the procedures in Chapter 17.03 CMC.
4. One accessory dwelling unit in accordance with Chapter 17.37 CMC.

B. Uses Allowed with a Use Permit.

1. One single-family dwelling.
2. ....
3. Uses determined by the Planning Commission to be similar in nature as provided in the procedures in Chapter 17.03 CMC.

C. Allowed Accessory Uses. Accessory buildings and uses that are clearly incidental and subordinate to the main use, such as a detached garage, storage shed, workshop, or similar building; provided, that no accessory use shall be established or accessory building constructed prior to the construction of a main building, or on a lot separate from the main building. Minimum setbacks for accessory buildings and structures shall comply with the standards provided in Chapter 17.38 CMC, except that no accessory building or structure shall be located in the required front setback. (Emphasis added)

As you can see, agricultural and visitor accommodation uses provided under the General Plan are not even listed in the applicable zoning code. Therefore, Section 17.24.130 of the zoning code is inconsistent with the General Plan and legally invalid.

Not only is this legally problematic for the city but also practically challenging for Mr. Ali. His bird enclosures, for example, could easily be considered agricultural uses under the General Plan's broad definition: "Agriculture uses may include, but are not limited to, horticulture, floriculture, viticulture, apiaries, and similar uses...." (Emphasis added.) At the very least the allowance of birds on the property is certainly "similar in use" to other agricultural uses. (See similar in nature comparison to other agricultural uses below)

### **"Similar In Nature" Determination**

In other relevant areas of the Municipal Code, examples of "agricultural uses" and "accessory buildings" are provided. For example, Calistoga Zoning Code section 17.14.020 B 4. provides that the following uses are allowed with a use permit in Rural Residential (RR) zoning districts:

"Light agricultural uses including farms on a commercial scale devoted to the hatching, raising, fattening, or marketing of animals such as, but not limited to, poultry, rabbits, goats, sheep, pigs; aviaries and kennels; the grazing and

experimental or selective breeding or training of cattle or horses; provided, that such use is not a part of, nor conducted as, stock feed or livestock sales yards, or a commercial riding academy located on the same premises.”

Thus, it would be reasonable to conclude that the uses contemplated Mr. Ali are similar in nature to the agricultural uses that should be allowed to be consistent with the city’s current General Plan. They are uses that can be determined by the Planning Commission to be similar in nature, as provided in the procedures in Chapter 17.03 CMC. Likewise, the accessory buildings contemplated Mr. Ali can easily be determined to be similar in nature to the accessory buildings allowed for in the zoning code if they are not already determined to be allowed by right.

### **The Proposed Garages Are Allowed By Right as Accessory Buildings**

With regard to accessory buildings and uses, Calistoga Municipal Code §17.24.130 C provides in pertinent part:

Allowed Accessory Uses. Accessory buildings and uses that are clearly incidental and subordinate to the main use, such as a detached garage, storage shed, workshop, or similar building; provided, that no accessory use shall be established or accessory building constructed prior to the construction of a main building, or on a lot separate from the main building. Minimum setbacks for accessory buildings and structures shall comply with the standards provided in Chapter 17.38 CMC, except that no accessory building or structure shall be located in the required front setback. (Emphasis added)

Mr. Ali now understands the concern about locating accessory buildings and structures within the setbacks, and the need for advanced design review, and through this process he is fully prepared to address these issues of concern. However, if the wetlands issue is resolved, under Section 17.24.130 C Mr. Ali is allowed to locate accessory buildings elsewhere on his property by right. Therefore, the recommendation against allowing accessory structures on the existing pads is premature and unlawful until the report from the biologist working on the wetlands issue is complete. Preliminary findings from the biologist indicate that there is no current wetlands issue. If that is the case, it would be unwarranted and unlawful to preclude Mr. Ali from proceeding with his accessory building plans given that he is permitted to do so by right under Section 17.24.130 C. Moreover, it would appear that any oversight over potential wetlands issues would fall to the Regional Water Quality Control Board, not the city.

### **Additional Proposed Conditions of Approval in The Resolution Are Excessive**

In California, property development is considered a privilege and not a right. (*Associated Home Builders, Inc. v. City of Walnut Creek* (1971) 4 Cal. 3d 633, 638.) However, the *Nollan* and *Dolan* cases have limited the extent in which public agencies may condition development. Specifically, cities may impose conditions on development so long as the conditions are

reasonable and there exists a sufficient nexus between the conditions imposed and the projected burden of the proposed development. (*Nollan v. California Coastal Commission* (1987) 483 U.S. 825 at 834-835.) Further, cities must prove that such conditions have a “rough proportionality” to the development’s impact. (*Dolan v. City of Tigard* (1994) 512 U.S. 374at 391.)

Here, Mr. Ali takes exception to proposed Conditions of Approval #s 10, 14, 15 and 17 because the conditions as currently drafted are unreasonable and there is an insufficient nexus between the conditions imposed and the projected burden of proposed development.

As stated earlier, and seemingly confirmed by the Staff Report the construction limitation in the 20-foot utility easement was suggested by Public Works as a condition of allowing the proposed RV and garage pads. However, the language of Condition of Approval #10 is overbroad, inappropriate and violative of Mr. Ali’s property rights as fee title owner of the land upon which the easement lies. In particular, the proposed condition assumes without proof that all construction activities within this easement (located on Mr. Ali’s parcel) would necessarily interfere with the use of the utility easement. That assumption is incorrect, and it is contrary to longstanding California real property law governing easements and a property owners’ inherent right to reasonable use of their own land. In the spirit of compromise, Mr. Ali would agree to the following language: “10. No actions or activities shall be taken that unreasonably interfere with the use of the existing 20-foot utility easement.”

With regard to Condition of Approval #14, again it is undisputed that the alleged need for this condition is not based on substantial evidence in the record and therefore there is an insufficient nexus between the condition requiring the helicopter to be placed on gravel or a pad to prevent “potential” petroleum leakage and the projected burden of this development. Additionally, this condition would not treat Mr. Ali the same as others in the community who are not necessarily required to place farm equipment, boats, RVs, lawn mowers, leaf blowers, vehicles or other similar gas-powered vehicles or equipment on gravel or pads. We believe it sufficient to simply establish that the helicopter sculpture is non-operational without the need for a condition indisputably stemming from a false accusation.

With regard to Condition of Approval #15, as stated above, the current ordinance ostensibly prohibiting “aviaries” (which Mr. Ali does not believe he maintains on the property) is legally problematic because it is inconsistent with the 2015 General Plan Update allowing agricultural uses and activities and precludes Mr. Ali or a future owner from exercising his right to have a “similar in nature” determination. Moreover, it is undisputed that the need for this condition is not based on substantial evidence in the record and therefore there is an insufficient nexus between the condition precluding “aviaries” and the projected burden of this activity.

With regard to Condition of Approval #17, again it is undisputed that the alleged need for this condition is not based on substantial evidence in the record and therefore there is an insufficient nexus between the condition prohibiting short-term rentals and the projected burden of this development. Moreover, a condition forever precluding visitor accommodations is legally

Samantha Thomas  
October 9, 2021  
10 of 10

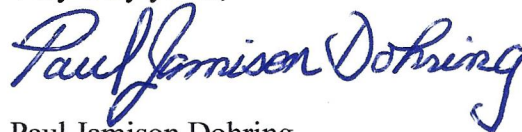
problematic (if Mr. Ali or a future owner wished to apply for a short-term rental permit in the future) because it is inconsistent with the 2015 General Plan Update allowing visitor accommodations and precludes Mr. Ali from exercising his right to have a “similar in nature” determination. Given the lack of any evidence whatsoever of any past short-term rental violations, we propose that Condition of Approval #17 be eliminated because it would unfairly prejudice any future request by Mr. Ali or a subsequent owner of the property.

### Conclusion

My client has submitted his requests for use permit amendments and design review in good faith to accommodate proposed uses which are consistent with the small-town rural character of the surrounding area and complementary to current and future development. Because the 2015 General Plan Update regulating development on the property unquestionably allows for Mr. Ali’s requested uses or uses deemed similar in nature, and because the current zoning regulations are unquestionably inconsistent with the 2015 General Plan Update, Mr. Ali believes it is in the best interests of all concerned to grant all of his amendment and design review requests. In the alternative, Mr. Ali would encourage the Planning Commission to approve all of the uncontested requests as recommended by Staff and allow Staff and Mr. Ali to work through the remaining issues of concern to create a mutually satisfactory resolution that would avoid the need for further legal intervention.

Should you wish to discuss my client’s positions and requests further, please do not hesitate to contact me. Thank you for your continuing professional courtesy and cooperation.

Very truly yours,



Paul Jamison Dohring

PJD:ak

cc Client; Zach Tusinger, Planning & Building Director ([ztusinger@ci.calistoga.ca.us](mailto:ztusinger@ci.calistoga.ca.us)) and Planning Commissioners: Chair Scott Cooper, Vice Chair Tim Wilkes, Commissioner Alissa McNair, Commissioner Doug Allan, Commissioner Jack Berquist ([plans@ci.calistoga.ca.us](mailto:plans@ci.calistoga.ca.us))