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October 31, 2023

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Planning Commission

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RE: Hearing – November 1, 2023
VINEYARD 29, LLC (CHARLES McMINN) / VINEYARD 29 / USE PERMIT
MAJOR MODIFICATION NO. P20-00062 & EXCEPTION TO THE NAPA
COUNTY ROAD & STREET STANDARDS

Water Audit California ("Water Audit") is an advocate for the public trust.

As a preliminary matter, Water Audit takes exception to the notice of, documents provided, and findings presented for this hearing. That conduct has precluded proper and thoughtful review of the application, as it is uncertain if Notice for the Planning Commission November 1, 2023 Hearing is sufficient. The Current Projects never included: Previous Conditions of Approval, Water Availability Analysis & Water System, Wastewater Feasibility Study, Northern Spotted Owl Study, Traffic Study, Stormwater Control Plan, County GRAPHICS, Winery Comparison and Summary of Changes. The Notice is in the County's Current Projects webspace, but the Notice to Interested Parties List doesn't exist. The Notice is dated October 5, but no Newspaper confirmation or publication date is identified. Also the Notice was posted on the website October 11, 20 days before Hearing, but the website does not include the important documents for the public to have time to review. Furthermore, the Clerk only posted the Agenda online on October 25.

Through Government Code § 65800 et seq. the Legislature conveyed to the county the authority to adopt regulations and ordinances to promote the general welfare of the State's residents, while providing that the county's may exercise the maximum degree of control over zoning matters. Government Code § 65101 states in part: "The legislative body [i.e. the Board of Supervisors] may create one or more planning commissions each of which shall report directly to the legislative body."

The Napa County Planning Commission performs the function of a planning agency. Its five members are each appointed by the supervisor representing one of the counties' five districts for a term that expires one month after the appointing supervisor is no longer in office.

The County remains subordinate to the control and direction of the senior levels of government. Napa Ordinances Title 16 and Title 18 were required to conform the County to state law. The state endows the highest priority on fish and wildlife protection and conservation. "The Legislature finds and declares that the protection and conservation of the fish and wildlife resources of the state are of utmost public interest.

Fish and wildlife are the property of the people, and provide a major contribution to the property of the state ..." (Fish and Game Code § 1600) This statement is one of the foundations of Water Audit's mission, both generally and herein. By simply stating that no impacts exist, Applicant has arbitrarily and wholly failed to discuss the substantial potential off-site impacts of the project.

The essential idea of the public trust doctrine is that the government holds and protects certain natural resources in trust for the public benefit. (See *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387, 452, 456; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 441; *Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 521.)

Public trust theory has its roots in the Roman and common law. (*United States v. 11.037 Acres of Land* (N.D. Cal. 1988) 685 F. Supp. 214, 215.) Its principles underlie the entirety of the State of California. Upon its admission to the United States in 1850, California received the title to its tidelands, submerged lands, and lands underlying inland navigable waters as trustee for the benefit of the public. (*People v. California Fish Co. (California Fish)* (1913) 166 Cal. 576, 584; *Carstens v. California Coastal Com.* (1986) 182 Cal.App.3d 277, 288.) The People of California did not surrender their public trust rights; the state holds land in its sovereign capacity in trust for public purposes. (*California Fish, Ibid.*)

The courts have ruled that the public trust doctrine requires the state to administer as a *trustee* all public trust resources for current and future generations, precluding the state from alienating those resources into private ownership and requiring the state to protect the long-term preservation of those resources for the public benefit. (*National Audubon, supra*. 33 Cal.3d 419, 440-441; *Surfrider Foundation v. Martins Beach 1, LLC* (2017) 14 Cal.App.5th 238, 249-251.)

The public trust fulfills the basic elements of a trust: intent, purpose, and subject matter. (*Estate of Gaines* (1940) 15 Cal.2d 255, 266.) It has both beneficiaries, the people of the state, and trustees, the agencies of the state entrusted with public trust duties.

The beneficiaries of the public trust are the people of California, and it is to them that the trustee owes fiduciary duties. As Napa County is a legal subdivision of the state, it must deal with the trust property for the beneficiary's benefit. No trustee can properly act for only some of the beneficiaries – the trustee must represent them all, taking into account any differing interests of the beneficiaries, or the trustee cannot properly represent any of them. (*Bowles v. Superior Court* (1955) 44 C2d 574.) This principle is in accord with the equal protection provisions of the Fourteenth Amendment to the US Constitution.

A public trust trustee "**may not approve of destructive activities without giving due regard to the preservation of those [public trust] resources.**" (*Center for Biological Diversity, Inc. v. FPL Group, Inc.* ("Bio Diversity") (2008) 166 Cal.App.4th 1349, 1370, fn. 19, 83 Cal.Rptr.3d 588.) [Emphasis added]

Common law imposes public trust considerations upon County's decisions and actions. (*Biological Diversity, supra.* 166 Cal.App.4th 1349; *Environmental Law Foundation v. State Water Resources Control Board* ("ELF") (Cal. Ct. App. 2018) 26 Cal.App.5th 844.) The courts have recognized the State's responsibility to protect public trust uses whenever feasible. (See, e.g., *National Audubon, supra.* 33 Cal.3d 419, 435; *California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585, 631; *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187, 289.) Napa County, under Public Resources Code, section 6009.1, has an affirmative duty to administer the natural resources held by public trust solely in the interest of the people of California.

The public trust doctrine requires the State (i.e. Napa County), as a trustee, to manage its public trust resources (including water) so as to derive the maximum benefit for its citizenry. Even if the water at issue has been put to beneficial use, it can be taken from one user in favor of another need or use. The public trust doctrine therefore means that no water rights in California are truly "vested" in the traditional sense of property rights.

Furthermore, there can be no vested rights in water use that harm the public trust. Regardless of the nature of the water right in question, no water user in the State "owns" any water. Instead, a right to water grants the holder thereof only the right to use water, a "usufructuary right". The owner of "legal title" to all water is the State in its capacity as a trustee for the benefit of the public. Both riparian and appropriative rights are usufructuary only and confer no right of private ownership in the watercourse, which belongs to the State. (*People v. Shirokow* (1980) 26 Cal.3d 301 at 307.)

Contrary to the proposed Negative Declaration, the proposed project does have potentially significant environmental impacts. Further, the proposed project application omits critical information, necessary for an informed review and decision.

1. Agenda Packet 7A. VINEYARD 29, LLC STAFF REPORT at pdf pg 17/18 Staff reports that the Road Exception Request “generally meets Napa County Road and Street Standards (RSS) except for approximately 500-feet where the roadway width is 15.8 to 17.8-feet and is located within the setback of an extrapolated stream and abuts a steep slope.” Staff dismisses the Tier 3 WAA determination “because the project engineer has demonstrated that the project well is not within 1,500-feet of a significant steam[sic], there is not a hydraulic connection to a navigable waterway and therefore no impacts to public trust resources.” And also “according to the study, the existing standard system will be used to dispose of only the domestic wastewater generated from the winery. No additional domestic wastewater treatment or dispersal system is needed.” **The dispersal system is not identified anywhere in the Agenda Packet.**
2. Agenda Packet 7A. VINEYARD 29, LLC att A. FINDINGS at pdf pg 30 finds “The project will not require a new water system”. At att B. Conditions of Approvals (COA) and MEMORANDUM finds “Implemented conditions and determinations” only by Planning, Building, and Environmental Services (PBES). It did not include “Public Works”. **However, both statements in findings and COA are in direct conflict with statements in att D. INITIAL STUDY at pdf pg 139 stating that there is indeed a “New PUBLIC WATER SYSTEM” and the Groundwater Management-Wells requires determinations jointly between Public Works and PBES.**

In any event, whether or not the project will require a new water system, the County must consider potential injury to the public trust from the activities sought to be authorized by the Application. A common law doctrine, the public trust is continuously evolving to protect the public’s use and needs in California’s waterways. In *Environmental Law Foundation v. State Water Resources Control Board* (2018) 16 Cal.App.5th 844, 858 (*ELF*) the court held that groundwater extractions that diminish public trust surface water flows can be enjoined as injuries to the public trust.

3. Agenda Packet att B. COA & MEMORANDUM at pdf pg 58 from Engineering Memorandum stating in its approval for the Road and Street Standards Exception that a 500 ft road section (almost half of the driveway is entirely within the setbacks to an existing unnamed stream. **CDFW and Caltrans are named as Regulatory and Trustee Agency in the Initial Study / Negative Declaration but are not included in the COA memoranda, and neither is the Public Works Groundwater Memorandum.**
4. Agenda Pack tatt B. COA & MEMORANDUM at pdf pg 76/8 from Environmental Health “7. Since all or part of the proposed process wastewater reuse system is to be installed on a separate parcel from the facility it is to serve, an agreement to grant a sewage easement or an approved sewage easement must be filed.” **The agenda packet does not identify what parcel, or site any septic system or sewage easement.**

5. Agenda Pack tatt B. COA & MEMORANDUM at pdf pg 76/8 from Traffic Engineer states “The Registered Civil Engineer, upon completion of the improvements, must certify to the Department of Public Works that the improvements are made in accordance with all conditions of approval. Any improvements located on Caltrans Right-of-Way will require separate coordination and permitting process.” **As noted above, there is no Caltrans Memorandum.**
6. Agenda Packet att C. Previous COA at pdf pg 91/2 is a 22-year old document: 2001 PUBLIC WORKS Department Inter-Office Memo states its recommended condition: “3. The estimated annual daily traffic count for HWY 29 was 14,800 at LODI LANE, taken from the 1998 Caltrans traffic counts. This count combined with an estimated daily average of 5 employees and 13 visitors/deliveries indicate that **a left turn lane on Highway 29 is required.**”
7. Agenda Packet att D. Initial Study/Neg Dec at pdf pg 123/4 claims “9. An unnamed drainage channel with intermittent flows travels through the approximate center of the project site, daylighting just below the winery buildings via an outfall structure and extending as an open channel al the way to N. St. Helena Highway where it exits the project site via a culvert under the highway. This channel is not mapped as a blue line stream.” **However, on the County Current Projects GIS, I captured both satellite map with drainage channel culvert and lower existing well proximate to Hwy 29, and a USGS topo map with channel and lower existing well proximate to BLUELINE tributary to Napa River.**
8. Agenda Packet att D. Initial Study / Neg Dec at pdf pg 137 HAZARDOUS MATERIALS “It would not be reasonably foreseeable create upset or accident conditions... involve the release of hazardous materials into the environment” On the County’s Electronic Document Retrieval website (EDR), there is an historic document from 1998 that proves **there were hazardous materials on that parcel.** Also, a 2014 Erosion Control Plan Notice of Determination P14-00071 claiming “the area to be disturbed is not situated on a recognized hazardous waste site or in a biologically sensitive area and would not exacerbate any known landslide... In addition, it will not contribute to increases in local off-site stream flows or sediment levels...” It affirms the Project Location Specific “located within the Napa River – Upper St. Helena Reach Drainage located... approximately 1,00 feet south... Lodi Lane.”
9. Agenda Packet att E. Application Materials at pdf pg 155 Application Form is for only 1 APN 022-200-027. **It does not include the APN for parking on 022-200-026 or APN for Winery Process Wastewater dispersal on 022-230-012 Block 7 Vineyard. It does not include Notice to Neighboring Interested Parties.** At pdf pg 157 **it does not include the “Checklist of Required Application Materials, or Water Supply/Waste Disposal System, or Toxic Materials List.”** Staff reiterates its authority “such investigations including access to County Assessor’s Records as are deemed necessary by the County Planning Division for preparation of reports related to this application.”

10. Agenda Packet att F. Road and Street Standards (RSS) Exception identifies 500 ft of road in the stream setback. The GRAPHIC UP2.2 Winery Grading is the only one with the RSS sections of non-compliant road grading. The symbol for Flowline on the LEGEND had dot dot dot dash, but the graphic the Flowline is only dot, dot, dash. **There is no 25" or 65" setback from flowline identified.**
11. Agenda Packet att G. WAA & Water System Feasibility at pdf pg 193 **Table of Contents has NO WCRs, NO PROXIMATE WELLS Site Plan; NO NEW WELL SITE.**
12. Agenda Packet att H. Wastewater Feasibility at pdf pgs 211/12 and 230 "The irrigation will be applied to areas of vineyards on the winery and neighboring parcel outside well setback requirements." **Where is the authority to disperse wastewater on adjacent parcel?**
13. Agenda Packet att H. Wastewater Feasibility at pdf pg 216-221 Appendix 2 McCollum Engineering Investigation of Existing Septic System has **no maps or site plans of septic field.** Leach lines are now 4" pvc, and seven leach lines in the field. **No identification on any map in agenda packet, and the inspection report is vague and incomplete:**

GENERAL INFORMATION

Is the house/structure presently occupied? Yes

How many bedrooms? N/A

If commercial use, how many employees (FT/PT)? N/A

How many units served by this system? 2

Any other septic systems of the property? Yes. If yes, how many? 1

14. Agenda Packet att H. Wastewater Feasibility at pdf pg 215 is the only USGS Quadrangle from Applicant consultant RSA+ and dated 2015 when Ryan Gregory was still Vice President (see <https://www.napasan.com/167/Ryan-Gregory> "He worked as Vice President of the local civil engineering firm RSA+, and resigned from the firm on December 29, 2016 to prioritize his job as Supervisor.")
15. Agenda Packet att K. Stormwater Control Plan at pdf pg 333 Attachment 1 cover page identifies "Vicinity Map, USGS Map..." **However the vicinity map omits the Napa River altogether in name and blueline. Followed by a "USGS" map that is NOT a USGS Map.** It is from the County's GIS, and instead of selecting the USGS base map appearance, it **selected an appearance with no water or topographic distinction.**
16. Agenda Packet att L. GRAPHICS at pdf pg 351 UP2.1 "Proposed Winery Plan" has identified a "65ft SETBACK from TOB." However, a County EDR 2001 SD Job # 92-13723 Overall Septic Plan by Napa Valley Vineyard Engineering, Inc. identifies a "25ft SETBACK from TOB."
17. Agenda Packet att L. GRAPHICS at pdf pg 347 Staff includes two COUNTY "Existing Conditions" Slides: Satellite Wide Shot & Satellite a little Closer. **There is NO PROPOSED Conditions Slide. There is no USGS Quadrangle or topo map.**

18. Agenda packet att D. Initial Study/Neg Dec at pdf pg 122 has **conflict in location description** “Agricultural Watershed...2.230 feet North of the St. Helena Limits”. It omits the earlier descriptive relationship with “Napa River – Upper St. Helena Reach Drainage” per EDR 2014 ECP NOD P14-00071.

Cross checking, **at the far west portion of the project parcel 022-200-027 is another well. It is not identified anywhere in the Agenda Packet.** Both the unidentified Well permit and its Well Completion Report are on record with the EDR. At EDR 022-200-026 (formally 022-200-022) is a 2017 County Correspondence with the 1992 Lot Line Adjustment #6259, #6260 between it and Application Project parcel 022-200-027 (formally 022-200-023). In the General Notes the Water Source is both **“City of St. Helena and On-site WELLS.”** I also found a Septic System Plot Plan with section of line 18” under the flow line of drainage swale. **Nowhere are these septic fields in the Agenda Packet.**

Another historic document from the EDR for the remaining smaller parcel after the lot line adjustment is 022-200-026. In 1991 there was a permit pulled to do Septic System Repair Receipt #29376. The Proposed Use is Residential. Water Supply is Public. And name of Water Supply Agency is City of Calistoga. **Neither Calistoga nor City of St. Helena have been considered as an alternative source of water supply for the current VINEYARD 29 Application.**

Conclusion

For the foregoing reasons, and for the reasons previously expressed at earlier proceedings for this application, Water Audit respectfully requests that the Planning Commission deny the proposed Negative Declaration, and if the Applicant should wish to continue, that subsequent applications address the comments made.

Respectfully,



William McKinnon
General Counsel
Water Audit California