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June 14, 2022

VIA EMAIL AND U.S. MAIL
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Christa L. Shaw
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Office of the County Counsel
County of Sonoma
575 Administration Drive, Rm. 105A
Santa Rosa, CA 95403

Re: *VJB Vineyards & Cellars / PLP05-0009*

Dear Ms. Shaw:

This letter is written to you following the Board of Zoning Adjustments ("BZA") hearing last Thursday, June 2, 2022. As you know, the BZA requested several changes to the conditions of approval ("COA"), which Staff indicated would be incorporated and presented at a subsequent meeting of the BZA. The requested changes range from minor to illegal. They include requests for permeable surfacing in the Shaw parking lot, a "compliance monitor" at each entry point, monthly reporting on the number of visitors, and a cap on the number of visitors to 252 until several, significant construction components are accomplished. We will address each of these requests individually; however, they all constitute a proposed taking of a vested right.

VJB Cellars and Winery was permitted at least as early as 2013, following receipt of a final certificate of occupancy. The permittees had at that point made significant improvements in reliance on that use permit and have been operating under that use permit continuously ever since. The use permit does not limit the number of guests VJB may entertain. Importantly, no violations have been recorded nor nuisance complaints filed. Following the request by the County Department of Environmental Health, the permittees sought the installation of a range hood over the stove. It was this action that has triggered a nearly five year review process.

California's common law rule regarding vested property rights precludes a city or county from enforcing changed zoning regulations when the owner has obtained a building permit, performed substantial work, and incurred substantial liabilities in good faith reliance on the permit. *Avco Community Developers, Inc. v. South Coast Regional Commission*, (1976) 17 Cal. 3d 785, 791. Though later cases have narrowed the *Avco* rule, the basic premise remains intact. Here, VJB has obtained numerous use and building permits, performed significant work in reliance thereon, and has incurred staggering liabilities.[1] Their 2007 use permit is unquestionably vested.

[1] It is worth noting here that the liabilities incurred by the developers in *Avco* for the development of nearly 8,000 acres of land in coastal Orange County are less than those incurred by VJB in reliance and furtherance of their use permit to develop a parcel of only a few acres, in order to obtain a use permit simply to legalize a range hood requested by the County itself.

The County would be within its rights to impose later-adopted rent control ordinances, updated fee schedules, or police power ordinances. *See People v. H & H Properties*, (1984)154 Cal. App. 3d 894, 900 (imposition of later enacted rent control ordinance not a violation of vested right where only tentative and final map previously approved); *Russ Building Partnership v. City & County of San Francisco* (1988) 44 Cal. 3d 839, 847 (open-ended condition requiring participation in some type of transportation funding warranted imposition of later-adopted transit impact fee); and *Davidson v. County of San Diego*, (1996) 49 Cal. App,. 4th 649, 648 (vested rights may be impaired through subsequent police power enactments necessary to protect public health or safety). However, in all such cases, development had not yet been finalized nor operations commenced. No restriction on the *extent* of development was approved. And, in all cases the restrictions were imposed as a result of newly adopted ordinances, not the personal preferences of regulators.

Some of the BZA's requests can be accommodated. Others, like the requirement to hire additional staff or an outside third party to perform "compliance monitoring" and the ridiculous imposition of a 252-guest cap, are attempted unlawful takings by the County. Hiring additional staff or requiring the payment of additional fees for a third party review of compliance impose considerable expense and will have environmental impacts that were never contemplated by the existing environmental review documents. This condition may well trigger a further recirculation of the SMND due to traffic and sewer impacts. Recirculation would be more complicated than a simple revision to add one additional hour of operation, as requested by the permittees, which Permit Sonoma staff testified would delay the BZA decision some 8 to 9 months. The County already has authority to monitor the septic system and the owner has diligently done his self monitoring. At no time has the system been shown to be out of compliance. Requiring a reduced visitor count until the new system is installed is not warranted. If the system were under stress or near failure it would be a different story.

Imposing a cap of 252 guests constitutes a baseless restriction on the permittee and their ability to run their business. The guest count of 313 as proposed in the original COA is based on quantified review of the septic capacity of the new septic system, not the ad hoc preference of a layperson. Absent evidence of the system's failure, the County has no rational basis to curtail the financial success of this community-serving business at all.[2]

The BZA considered imposing this guest-count cap until various construction components are accomplished: the septic installation, Shaw parking lot, Shaw right-turn lane, Shaw parking restrictions, and a noise fence. The BZA Members seemed to believe this a reasonable restraint, one designed to "encourage compliance" by the permittee. However, according to the County's own public website, the following average timelines will impede the required permits:

Septic Permit: 21 weeks
Encroachment Permit: 16 weeks
Grading Permit: 24 weeks
Improvement Plans: 121 weeks to first review

[2] Further, the County has been treating similarly situated businesses in the Kenwood area quite differently. One need look no farther than Tips Roadhouse, where a dramatic increase in use has apparently been permitted despite the property falling on Ag-zoned land, and the Kenwood Inn (now Salt & Stone). We are uncertain the reason VJB has received such disparate treatment, but we will discover the cause if necessary.

Given Mr. Orr's representation that recirculation of the MND would take between eight and nine months, the Board's new COA would restrict VJB's business potential by nearly a third for three years. This is unacceptable and unlawful.

The County is attempting to drastically infringe on VJB's economically beneficial use of its vested permit and property. When government creates a regulation that negates all economically beneficial use of a property, when state nuisance law would otherwise permit the use, a taking has occurred. *Lucas v. South Carolina Coastal Commission* (1992) 505 U.S. 1003. In hamstringing VJB's operations with construction timelines that are largely outside their control, the BZA is negating the economic benefits of VJB's vested permit.

VJB would be within its rights to initiate legal action currently, despite no final decision having issued from the BZA or Board of Supervisors. The Supreme Court has held Plaintiffs need no longer pursue expensive and lengthy administrative processes before seeking judicial review. *Pakdel v. City and County of San Francisco* (2021) 594 U.S. Lexis 3557, 141 S. Ct. 2226. The Court in *Pakdel* also opened up the possibility that a property owner's legal expenses may be covered, since a §1983 claim grants the court discretion to award attorney's fees and costs to the prevailing party.

The County has exposed itself to legal vulnerabilities just by *asking* for the permittees to reduce their business operations in the absence of a nexus. Just as the seminal *Nollan* and *Dolan* decisions impose a nexus and rough proportionality standard on the permit conditions, the Supreme Court recently ruled that this standard applies event to a requirement to pay money, and even if the permit is denied for failure to agree to the condition. *Koontz v. St. Johns River Water Management District*, (2013) 570 U.S. 595. In cavalierly demanding the 1/3 reduction in VJB's guest count, and the commensurate 1/3 reduction in revenues, the County is requiring VJB to pay money in order to obtain this permit- unconstitutional under *Koontz*, and lacking both nexus or proportionality under *Nollan* and *Dolan*.

We appreciate the fact that the BZA chair closed the public hearing. However, the straw vote taken by the BZA would have many unintended consequences, some of which are outlined herein. For this reason, we will be requesting that the public hearing be re-opened if the Board intends to vote on the proposed changed COA as these takings must be discussed by the public and codified in the record.

We very much appreciate your time and consideration of the points made herein. Should you have any questions or desire further input, please advise.

Very truly yours,

ERIN B. CARLSTROM

/ebc
c: client