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VIA EMAIL
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Re: Comments of the Valley of the Moon Alliance on the Revised Subsequent Mitigated Negative Declaration for the VJB Vineyard and Cellars Project (PLP05-0009)

Dear Mssrs. Hillegas, Wick and Goldstein:

On behalf of the Valley of the Moon Alliance ("VOTMA"), we respectfully submit the following comments on Sonoma County's (the "County's") Revised Subsequent Mitigated Negative Declaration ("RSMND") for the VJB Vineyard and Cellars Project (the "Project;" PLP05-0009), pursuant to the California Environmental Quality Act ("CEQA"), Public Resources Code ("PRC") section 21000 *et seq*. Please include these comments in the public record for this Project. These comments build on and incorporate by reference all of VOTMA's prior comments in this matter (PLP05-0009), as well as its separately submitted comments on the RSMND.

The RSMND erroneously uses as the "baseline for analysis" the "existing activities" at the VJB tasting room, restaurant and marketplace, rather than the conditions that would exist if VJB had abided by its 2007 use permit. RSMND at 4. Using an "existing activities" baseline here is a sham because the existing environment closely mirrors what the post-Project environment would be. As the RSMND acknowledges, VJB has already completed – *without the required County approvals or CEQA review* – a substantial portion of the "proposed" Project, which consists principally of "[a]uthoriz[ing] a restaurant with 144 seats within a 3,125 square foot portion of an existing patio," including:

- "authoriz[ing] daily use of the existing" – yet illegal – "commercial kitchen, pizza oven and barbeque,"
- constructing a 53-space off-site parking lot at 75 Shaw Avenue to service patrons, and
- installing a 1,500-gallon septic system (not yet built).

RSMND at 3.

For example, the "275 foot commercial kitchen on the patio (not clearly disclosed on building plans) was installed in violation of the 2007 use permit, which expressly did not permit a commercial kitchen, via Building Permit BLD11-4212." *Id.* at 2. The 400-square foot internal commercial kitchen was also built in violation of the 2007 use permit, which, again, "expressly did not permit a commercial kitchen." *Id.* (quote). The ministerial building permit (BLD09-2123) issued for the internal kitchen cannot excuse that prohibition. Sonoma County Code of Ordinances § 26-92-210(a) ("All departments, officials and public employees of the county which are vested with the duty or authority to issue permits or licenses shall conform to the provisions of [the Zoning Regulations] chapter and shall issue no such permit or license for uses, buildings or purposes where the same would be in conflict with the provisions of this chapter. Such permit or license, if issued in conflict with the provisions of this chapter, shall be null and void"). In addition, the "outdoor patio currently includes a dining area with restaurant service and 144 table seats," which contrasts sharply with the "approved patio/picnic area" whose "site plans showed four picnic tables." *Id.* It also appears that VJB has already constructed and begun operating the 53-spot off-site parking at 75 Shaw Avenue that is purportedly part of the new project, as demonstrated in VOTMA's October 16, 2018 comments to the County.

In sum, the "scale of the commercial activity" on the Project site has vastly "exceeded the scope of the previously studied and approved project." RSMND at 3. Using an "existing activities" baseline in this context thus violates CEQA and vitiates informed governance and public involvement.

The CEQA Guidelines provide that "[g]enerally, the lead agency should describe the physical environmental conditions as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced." CEQA Guidelines § 15125(a)(1). But a strict existing conditions baseline might not be appropriate "[w]here existing conditions change or fluctuate over time, and where necessary to provide the most accurate picture practically possible of the project's impacts." *Id.* That is particularly the case where the project applicant itself changes the environmental conditions

before CEQA review is completed, like VJB did here.

Save Our Peninsula Committee v. Monterey County Board of Supervisors (2001) 87 Cal.App.4th 99, is illustrative. A key question there was how much water was used at baseline on the site of the proposed residential development project. The court struck down the lead agency's decision to use a baseline of conditions that developed after the environmental review process had commenced, explaining that:

> Production of water on the property during the lengthy environmental review process was controlled by the applicants. It was in their interests to elevate water production figures in order to establish as high a baseline as possible. While we do not speculate as to whether this occurred, we believe water production figures generated towards the end of the environmental review process must be regarded with some caution in these circumstances.

Id.

Here, whether or not VJB intended to circumvent CEQA review, it established "as high a baseline as possible" by building and operating two commercial kitchens, an expanded dining patio, and a 53-spot off-site parking lot – the primary components of the "proposed" Project – before applying for County approval. *Id.* Because the existing environment closely mirrors what the post-Project environment would be, it is impossible to "provide the most accurate picture practically possible of the project's impacts" based on a strict existing conditions baseline. CEQA Guidelines § 15125(a)(1).

The RSMND provides *zero* information to the decisionmakers and the public by simply comparing the environmental conditions with the existing (yet illegal) operation of the two commercial kitchens, expanded dining patio, and off-site parking lot to the environmental conditions with those same activities after permitting. That comparison ignores the real ongoing environmental impacts that would be caused by VJB's continued operation of the commercial kitchens, expanded dining patio, and off-site parking lot. Those activities would not be allowed to continue without Project approval. They are thus the *cause* of the Project's environmental impacts, not part of the baseline environmental conditions. Because a strict existing conditions baseline "would tend to be misleading" and "without value" to the County or the public, the baseline should instead be the conditions that would exist if VJB had abided by its 2007 use permit. *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* ("*Smart Rail*") (2013) 57 Cal.4th 439, 445.

In addition to complying with CEQA, it also behooves the County to analyze the "commercial kitchen and restaurant activities" (including operation of the off-site parking lot designed to accommodate more patrons) from a "health and safety standpoint under the County's zoning and police power," as it had originally planned to do in its January 2020 Subsequent Mitigated Negative Declaration ("SMND") before changing course in the RSMND. SMND at 3. By treating the "commercial kitchen and restaurant activities" and their environmental impacts as existing conditions, the County makes it much harder to show a "reasonable relationship" between the Project and any exactions the County wishes to impose to protect public health and

safety. *See, e.g., Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854.

The RSMND cites *Center for Biological Diversity v. Department of Fish & Wildlife* ("*CBD*") (2015) 234 Cal.App.4th 214, 249 to support its use of an "existing activities" baseline. VJB's legal counsel similarly cited *Fat v. County of Sacramento* ("*Fat*") (2002) 97 Cal.App.4th 1270 in their February 14, 2017 letter to the County for the proposition that even if VJB's 2014 application was "characterized to legalize existing uses, the existing conditions baseline would still be the appropriate baseline." Both cases are inapposite.

In *CBD*, the Department of Fish and Wildlife prepared an environmental impact report to study the environmental impacts of continuing its hatchery and stocking enterprise. Because the enterprise had been ongoing under state sanction (and eventually even a CEQA categorical exemption) since the late 1800's, the Department used the existing (and legal) operations as the baseline, which the court upheld.

In *Fat*, a small public use airport in Sacramento County had been operating for nearly 25 years without a valid permit from the County (since its original permit expired in 1973). In 1997, the airport owner and operators applied to the County for a conditional use permit ("CUP") to both resolve the legal status of airport operations and obtain authorization to expand the airport. The County adopted a negative declaration for the project, using the existing conditions (as of 1997) as the baseline for analysis. The court held that substantial evidence supported the County's use of an existing conditions baseline to study the airport's environmental impacts. The court emphasized that the airport operations had already undergone an unchallenged CEQA review by the Airport Land Use Commission of Sacramento, Sutter, Yolo, and Yuba Counties just five years before the 1997 CUP application. *Fat*, 97 Cal.App.4th at 1281. In addition, the court noted that there was evidence of irreversible "environmental damage" during the period when the airport was operating without a County permit, including the killing of "some legally rare species" and destruction of their habitat. *Id.* at 1281 (first quote), 1275 (second quote). Because the environment had been permanently altered, it would not have presented an accurate picture of the airport's impacts going forward to use a baseline of conditions before the airport had permanently changed the environment.

Here, by contrast to both *CBD* and *Fat*, VJB's "proposed" project had never previously been approved or studied under CEQA. Indeed, VJB's 2007 use permit expressly *excluded* the currently "proposed" activities. RSMND at 3, 4. Instead, VJB illegally and prematurely commenced a major portion of the "proposed" Project before ever applying for a permit or undergoing CEQA review. Furthermore, unlike the airport in *Fat*, the primary environmental impacts from VJB's tasting room, restaurant and marketplace are not irreversible impacts that have already occurred; they are the air pollution, traffic, noise, and other environmental degradations caused by the *continued operation* of the project. Those impacts are only properly understood and mitigated by comparing the environment with the currently unpermitted commercial kitchens, restaurant, and off-site parking lot operations to a baseline of the "environment's state *absent the project*" -- i.e., the conditions that would exist if VJB had abided by its 2007 use permit. *Communities for a Better Environment v. South Coast Air Quality Management* District (2010) 48 Cal.4th 310, 315 (emphasis added); *Smart Rail*, 57 Cal.4th at 447 (same).

We are confident that defining CEQA's "existing conditions" to exclude unlawful construction of the project that commenced before CEQA analysis began preserves effective CEQA and public review as the law requires. Alternatively, although not as protective of the public nor as consistent with CEQA, the County could instead define "existing conditions" as those that existed when VJB filed its original application to modify the 2007 use permit governing its tasting room operations. That date is August 5, 2014. Allowing VJB to repeatedly restart the "existing conditions" date by repeatedly amending and supplementing its application after August 5, 2014 would allow VJB to end-run meaningful CEQA and public review.

Respectfully submitted,

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