March 21, 2017

Blake Hillegas
Planning Supervisor
Permit Sonoma
County of Sonoma

Re: PLP05-0009 Application for Use Permit

Dear Mr. Hillegas,

The Valley of the Moon Alliance (VOTMA) submits these comments on yet another iteration of VJB Vineyard and Cellars' (VJB) efforts to amend and modify its October 9, 2007 Use Permit. For convenience, we will forward in a separate email VOTMA's **five** prior sets of comments submitted in this proceeding.

A. Procedural Overview

That VOTMA is now submitting its 6th set of comments in this proceeding, stretching back to August 2014, spotlights VJB's almost flaunting strategy of duck and weave to avoid facing the fact that it is, and has been for years, in violation of various conditions of its existing use permit. VJB's brazen tactics to both seek dispensation for its longstanding excessive-use operations in violation of its use permit, *and* additional permission to expand its uses beyond even its existing unlawful operations, all while seeking release/cancellation of various of the very conditions that were included in its original use permit as a way to avoid and mitigate the precise safety and traffic and other impacts that the proposed overuse would produce, leaves one in almost speechless wonderment of VJB's effort to turn the concept of regulation on its head.

For reasons unclear to VOTMA, Permit Sonoma (PS, formerly PRMD) has, over the last almost three years never been able to muster the courage, despite five dispensation amendment filings by VJB, to engage VJB head-on in an enforcement proceeding pushing back against VJB's continuing conduct in violation of various of the October 9, 2007 Final Conditions of Approval in PLP-05-0009. Nor has PS even taken the more modest intermediate action of actually denying the requested amendments to the use permit. That simple action alone would have long ago dispensed with VJB's apparent penchant for taking an inch of authorization and expanding it into a mile of operational excessiveness.

VOTMA is frustrated with and disappointed in PS's timidity and lack of regulatory backbone to hold VJB to the conditions of its use permit. PS's apparent willingness to consider new "amendments" every six months or so has allowed this amended use permit proceeding to be transformed into the administrative equivalent of a hybrid between a *Frankenstein* movie and the remake of *Groundhog Day.* In that remake, twice a year over the last couple of years VJB has rolled out the latest

version of its monster. All the while, over a period stretching going on three years now, VJB has been operating in violation of its use permit. Doubtless it is willing to keep playing this game until PS finds a way out of its self-induced administrative purgatory.

Despite PS' own past public acknowledgment that VJB's operations were in fact in violation of the use permit conditions, VOTMA finds itself yet again responding to a new amendment to the use permit application that expands the additional parking spaces (and traffic) available to bolster VJB's unrelenting growth model. This is administrative process madness.

VOTMA asks that PS reject the tendered further amendment as substantively incomplete and not supported by current adequate traffic, wastewater, noise, greenhouse gas and other studies necessary for PS to conduct an initial study to assess the further impacts of this proposal. That initial study would compare the February 14, 2017 updated proposal to baseline operations, as they would be forecast to exist consistent with VJB being in full compliance with existing conditions of approval.

VJB's latest effort is procedurally improper in any event. VJB's effort to modify the use permit for APN 050-275-028 (PLP05-0009) by constructing a commercial parking lot on a second separate non-contiguous parcel (APN 050-275-052) completely ignores the fact that it is requesting a *new* use permit for that separate parcel. That requested permit merits a separate proceeding to evaluate that proposal and its impacts on the community, including, *but not limited to,* the impacts on and relationship with VJB own use permit amendment proposal. VJB is attempting to force *two* use permits down the throat of the community under the guise of one proceeding. PS should deny that improper and illegal permitting exercise out of hand.

Having thus cut off the head of the latest hydra, even if only temporarily, PS should inform VJB that PS deems all prior proposed amendments to be effectively withdrawn. PS should also then immediately take steps to consolidate the information it has acquired to date in this proceeding and supplement it with any investigations/inspections it deems appropriate, with an eye towards preparing a report, with recommendations, addressing VJB's state of compliance with the existing Conditions of Approval.

PS should not simply fall prey to yet another VJB stalling tactic and let the status quo stand while PS begins to process the February 14, 2017 proposal as yet another in a line of VJB use permit amendment proposals in PLP05-0009.

B. <u>Comments on VJB's February 14, 2017 Proposal</u>

VOTMA will not burden the record of PLP05-0009 by repeating all the shortcomings of the VJB core *expansion proposal.* Nor will it highlight here, on a line-by-line basis,

the continuing defects in logic or rationale, or the lack of merit in VJB's proposed changes and/or release of conditions that serve only to sanctify its current operations in violation of the existing use permit. We have done that many times before. We refer to our prior comments and incorporate them here. We will focus instead on the more glaring issues presented by the latest proposal.

1. Special Events vs. Ongoing Events—Terminology vs. Reality

Let's be honest about what the VJB proposal is—it's a massive expansion of VJB's operational activities.

As envisioned, VJB was authorized to construct and operate a building that contained a tasting room with a "market place" and that also housed "associated offices." The existing residence was designated as a residence secondary to the approved commercial use. A large "wine case storage building" was also authorized to be constructed. That was it.

VJB was authorized to operate its wine tasting room from 10 am to 4 pm. Those hours could be expanded if VJB made certain traffic improvements deemed necessary to address traffic and safety issues associated to its location on Shaw Road, immediately off of Highway 12. Similarly, VJB could begin to host special events once those improvements were made. VJB was allowed 15 special events per year, with a maximum attendance of 100 per event. So VJB had a tasting room with a marketplace and could host 1500 people per year for special events. VJB's proposal included 21 primary paved parking spaces and 16 unpaved auxiliary spaces to provide the anticipated parking requirements for that activity.

VJB now wishes to amend its use permit to construct a 53 stall parking lot on a separate lot (89 Shaw) across the street from its Shaw Avenue facility. It also wants PS to "acknowledge," give "recognition" of, and make "clarification" to in the use permit the outdoor spaces VJB has established as a picnic/dining area, and that it has commercial kitchens that should be allowed to be used to support outdoor dining of BBQ/pizza food service/sandwiches prepared on-site in those kitchens. It wants to commence wine and food paring service as well, presumably again using those commercial kitchens not authorized in the use permit.

VJB has magnanimously offered to relinquish its right to having 15 special events a year if PS will simply sign off on this new and improved business plan, make its existing food service and other condition violations copasetic (and ignore its past open violations), and release it from the obligation to implement traffic and safety improvements on Highway 12 and Shaw Avenue that are "not feasible." Oh yes, to the extent that the new parking lot is not needed for VJB's own use, it asks that the adjacent businesses across the street (housed under leases in buildings believed to owned or controlled by VJB's owners) also be allowed to fully use those spaces, during times and for extended hours not defined.

An elementary school student can do the math on the "give and get" of this proposed deal. Assuming, as PS seems to do generally for wine tasting operations, that 2.5 people arrive in every car, and assuming that the occupants of every car take maybe an hour to eat their on-site prepared sandwiches, BBQ, pizza and taste VJB's wines and other beverages, that would be 53 x 2.5 x 6 hrs = 795 potential additional customers *per day* served by VJB or its affiliated entities. That would be over 5,500 customers (or 2,226 car trips one way) per week. While VOTMA does not believe that VJB would stretch its use to the absolute limit, that limit does *theoretically* (under the assumptions stated) equate to over 290,000 additional customers a year. Add to that the release from the financial obligation to construct the right turn lane from Shaw to Highway 12 and the left turn lane from Highway 12 to Shaw and you have quite an attractive get for VJB. So what is your give VJB? Well, that would be 1500 customers per year that you would no longer be able to host (conditional on constructing the left turn lane on Highway 12) for special events.

PS should see this farce for what it is—a massive open door for VJB's commercial exploitation of Kenwood. The absurdity of proposing that since VJB will not be doing special events, the left turn requirement should be released, becomes readily apparent when it is viewed in the larger context of the "perpetual" special event that results from crowding hundreds of customers daily onto the VJB site via this new parking lot and continuing the ongoing unauthorized activities. It bears remembering that VJB does not propose that customers who currently come by bus or limo, or who drive and park along Shaw and Maple and wherever they can in Kenwood, will stop doing so. Not at all. These 53 stalls are intended to add new customers to VJB's till.

Viewed in a simple light, PS must evaluate what the authorized limits of occupancy are for the VJB facility and whether it should grant permission to VJB to blow through the 2007 authorization. How much traffic is too much traffic? How many cars are too many cars? How much safety do you want to compromise to generate more and more commercial activity adjacent to a public park/dog park and a residential area? Will PS put a limit on the number of wine tasting/marketplace (unauthorized deli) customers allowed over a day or an hour or a month? That ominous growth impact is the reality presented by this proposal, not how many special events are being relinquished.

2. <u>One Project or Two Projects—Nature of Review Required</u>

PLP05-009 established the use permit governing 60 Shaw (APN-050-275-028). Regardless of whether the owner of 60 Shaw is also the owner of 75 Shaw (or 89 Shaw for that matter), the use of 75 Shaw would be governed by any use permit that has been approved for that specific parcel (APN-050-275-052). To VOTMA's knowledge, no application has been filed for a use permit to convert 75 Shaw to a commercial parking lot. If and when such an application is filed PS will be required to subject that application to the litany of studies, reviews and impact assessments that the proposed use of that parcel will warrant. Residents of Kenwood should be

given notice and the opportunity to provide input and express concerns about a proposal to convert what had previously been a residential use into a specific significant commercial use. Interested parties and governmental agencies should be given that same independent assessment opportunity. CalTrans in particular should be consulted with this plan, which, in VOTMA's view, has the clear potential to have a significant adverse impact on both Highway 12 and local traffic, and on the environment of Kenwood.

Not the least of these studies would be the environmental and traffic impact assessments of stuffing 53 stalls into this one parcel. VJB's previous traffic studies supporting its prior proposed amendments were, in VOTMA's view, inadequate and failed to fully assess those proposed projects from a traffic volume and flow perspective. They were also entirely silent on cumulative impacts on Highway 12 traffic in the Shaw Avenue area and Kenwood generally, resulting from various projects pending, in permitting or planned (e.g. SCI, Kenwood Vineyards, Kenwood Plaza, Ledson/Cunningham winery, Elnoka Senior Living, among others). Those traffic studies that VJB has previously submitted, directed at an entirely different proposal, are now, in any event, outdate even for those uses. They certainly cannot be simply repurposed for this 53 stall parking lot proposal.

It is noteworthy that VJB's submitted 2 page "Updated Access Analysis for VJB Marketplace," dated May 27, 2016, and included as an attachment to the February 14, 2017 proposal, does not address the 75 Shaw Avenue 53 parking stall proposal. It does address the 89 Shaw Avenue 35 stall proposal (two parcels down from 75 Shaw and owned also by VJB's owners) in three somewhat conclusory paragraphs. That "analysis" essentially concludes that as of 2013 there was not that much traffic on Shaw Avenue and so the potential for pedestrian access problems from that parking lot to the entrance of VJB ("that most pedestrians can cover in about a minute") is "low." It finds that "…drivers can be expected to pass around pedestrians using the roadway, if necessary." It finds that "the potential for conflict between pedestrians and vehicles is expected to be minimal…" in the limited distance "through which pedestrians may need to share the roadway [with cars]."

So at this point the complete analytical support for a separate parking lot across Shaw Avenue from VJB's facility appears to be that 1) the distance that cars and pedestrians must share the road is small, 2) pedestrians can cross the street (at the corner or mid-street?) to get to VJB in about one minute, 3) there wasn't much traffic in 2013, and 4) drivers can be expected to pass around pedestrians, "if need be."

That does not seem like an adequate level of support for a proposal to build a 53-stall parking lot mid-block on a residential street with a park, no sidewalks and with traffic in both directions, as well as entering and exiting (as would be the case if the use permit conditions were complied with) the VJB facility. VOTMA can easily imagine that the 53 stall parking proposal mid block will produce significant additional traffic on Shaw to Highway 12 making the right turn lane *more* critical,

and making left turns on to Highway 12 from Shaw Avenue and left turns from Highway 12 onto Shaw very difficult, if not virtually impossible.

Since 60 Shaw and 75 Shaw are not adjoining parcels, but rather are across the street from each other (and have no inherent entitlement to a pedestrian crossing across Shaw at that point in any event), pedestrians will be required (if they don't cross illegally) to go to down the street to Shaw/Highway 12 or up the street to Shaw/Clyde to cross over to VJB. There are serious safety, weather, lighting, and road/surface condition issues that need to be considered with this plan, as well as the potential intoxicated state of pedestrians. VJB has provided nothing useful to assess the wisdom and safety of its proposal or the impact on the community. It has floated the regulatory equivalent of a trial balloon.

VJB's proposal also warrants further attention to the business operations of the establishments that will share the excess stall space with VJB. The status of access to the parking lot during periods of non-use, and the relationship to the public park and its use as a dog park also bear attention. The present application, even if it had been filed in support of an application for a use permit for the correct separate parcel, contains nothing that would answer these important questions. When PS accepts an application for processing it should have at least some minimal checklist for what must be submitted for an application to be accepted and for meaningful evaluation to commence. Nothing here suggests that is the case.

PS should simply reject outright this effort to use PLP05-009 as a shortcut vehicle to authorize a significantly changed use for 75 Shaw Avenue. Each parcel must stand its time in a separate docket and undergo public and agency scrutiny. VJB has the burden of providing the information required for that to occur and has failed to provide it in this instance.

3. Everything Else

a. CEQA Baseline

Now is probably not the time to debate the correct CEQA baseline. But VJB's counsel asserts in a memo included in its filing packet that the existing conditions baseline (i.e., how VJB is currently operating, *whether or not* in violation of the Conditions of Approval) would be the appropriate baseline to use in evaluating the environmental impacts of the proposed amendments and modifications to the use permit. VOTMA acknowledges the core concept that, where adequately supported by substantial evidence and justified by the circumstances of the case, it would not be an abuse of discretion to use the existing physical conditions of a project as the baseline. But VOTMA believes that the inverse is also true—that where there is substantial evidence and in view of the particular circumstances of the case (here the misinformation and misleading effect of using existing operations that are in violation of the use permit), it would not be an abuse of discretion to set the baseline in reference to conditions that would be forecast to prevail were existing use

permits conditions faithfully and fully honored. The Supreme Court's *Smart Rail* case VJB's counsel cites does reference the existing conditions baseline as the norm and the default, but does not exclude a different result where circumstances warrant and the alternative approach avoids an assessment that could be uninformative or misleading. As the Court stated in *Smart Rail* "an agency does have the discretion to completely omit an analysis of impacts on existing conditions when inclusion of such analysis would detract from an EIR's effectiveness as an informational document, either because an analysis based on existing conditions would be uninformative or because it would be misleading to decision makers and the public." As stated, the key to the approach is to ensure that the resulting assessment under CEQA is an informative document. VOTMA suggest that it would be misleading and not informative to the CEQA review process to ignore the effects of VJB's ongoing violations of the use permit on its existing operations.

In *Fat,* another case relied on counsel, the party subject to prior enforcement for a non-permitted use who was nonetheless seeking use of existing conditions, had received approval from another agency for the use and was willingly coming under the jurisdiction of the permitting agency for the first time for a use permit. *Fat* does not stand for the proposition that existing operation baselines must be used even where the existing operations are in violation of the existing use permit.

VOTMA suggests that the *Fat* circumstances are not the situation here. VJB is well known to PS, is subject to the jurisdiction of PS and is operating under a use permit issued by PS. There are credible allegations of how VJB has been operating under its use permit, and about non-compliance with several of those terms. This has always been the elephant in the room that VJB has been trying to avoid addressing, and has long (too long) been open to question. This isn't about shutting down a partially permitted operating airport as in *Fat*. It's about whether parking spaces have been continued to be used when they were supposed to be vacant for provide space for a right turn area; its about whether vehicle egress out a gate to Maple Avenue should *continue* when the conditions clearly forbid that use; its about whether "lobster and crab events" are events that are prohibited until a left turn lane has been constructed, its about how a wine case storage building becomes a tasting room and more, and its about whether a market place is allowed to sell only prepackaged sandwiches or can instead become a deli that prepares sandwiches and pizza on-site using raw materials in a commercial kitchen and made available to customers for seated dining at the facility. VOTMA and the Kenwood community have raised these issues for years; they are still outstanding. They are why, and precisely why, VJB is requesting several of the changes that are reflected, specifically by condition number, in the latest filing and filings made more than a year ago.

VJB's counsel tenders *Smart Rail* as resolving the question about whether, even if VJB is currently violating its use permit, the baseline should still be the physical conditions as they exist even under operations that violate the use permit. VOTMA believes that *Smart Rail* and *Fat* do not mandate that result, and that those cases leave plenty of room for a different baseline if supported by substantial evidence

and is required to provide an informative CEQA document. That question will likely not be resolved by PS.

In that circumstance, VOTMA believes the better approach, and one specifically alluded to by the Court in *Smart Rail*, is to hedge the planning process by making sure that analysis can proceed under two alternative baseline assumptions. One would assume that VJB's proposal should be assessed against the existing physical/operational baseline; the other would assess the proposal against a forecast baseline that limited the market place to pre-packaged goods under ordinary operation, and for special events the food service authorization granted in condition 59, consistent with the use permit and that sized the facility operational level consistent with the existing on-site parking. That would allow the amendments to be evaluated two ways on an equal footing, pending resolution of the legal issue. That is a reasonable approach to this issue.

b. Condition 59 vs. Condition 26

VOTMA will close these comments with one other point. It is one, as suggested in 3a above, that goes to the heart of the problem VOTMA has had with VJB's incessant push to validate its view of what activities it is currently allowed to conduct at 60 Shaw Avenue.

VOTMA does not have the benefit of the entire history and inside story of the VJB project that VJB has, including a Staff Report dated March 8, 2007 cited by VJB (that VOTMA does not recall seeing in the PS public files). VOTMA recognizes that VJB has asserted that it has obtained explicit or implicit approval, informally if not formally, from the County for the scope of its current food service activities. VOTMA cannot assess those positions absent some tangible direct evidence. VJB has not provided that to date.

VOTMA understands that when the County uses the term "market place" that is a designation that restricts the food products sold to pre-packed food products that do not entail on-site preparation. Tasting rooms are granted this option as an adjunct to their permitted activities—pre-packaged sandwiches are allowed; on-site prepared sandwiches are not allowed. That is a market place; it does not constitute broader food service and is not a deli with outside dining.

Based on its proposed modifications to Conditions of Approval 59, VJB appears aware of this distinction, even if it does not acknowledge it. Condition 59 governs allowed activities during special events. The pertinent sentences that VJB has focused on in Condition 59 read as follows: "With the exception of barbecued food, only catered food may be offered to guests at special events. A commercial kitchen is not permitted." The rest of Condition 59 addresses other issues relating to special events.

In its February 14, 2017 updated proposal VJB indicates (page 7) that it requests deletion of several sentences in Condition 59. It reasons that because VJB is offering to withdraw the "right" to conduct special events, much of Condition 59 is "superfluous." Nonetheless, VJB says that its proposed modifications to retain Condition 59 still make sense because "Condition 59 specifically anticipated barbequed food." (VJB does not note that the condition apparently anticipated barbequed foods only during special events.) VJB indicates that since it had already obtained a Building Permit (BLD11-4212) for construction of the barbeque, pizza oven and related facilities in 2011 and constructed and is operating that facility daily, it wants "to bring Condition 59 into conformance with actual improvements now located at the project site." Accordingly, VJB requests that condition 59 be amended to read in its entirety as follows "With the exception of barbequed food *and sandwiches*, only catered food may be offered to guests *purchasing food at the deli, pizza or barbeque areas."* (*italics* added)

VJB's "amendment" does several interesting things. First it transforms Condition 59 into a condition that applies to ongoing activities, and not only special events. Second, it drops the sentence in Condition 59 that precludes commercial kitchens. Third, it adds a reference to "sandwiches" that did not exist in Condition 59. Finally, it expands that permission to sell sandwiches, pizza and barbeque to guests over the entire facility (i.e., the deli) during ordinary daily operations.

It is apparent from the foregoing that VJB is trying to clean up a hole in its use permit—it needs to expand when barbeque can be offered to guests, and it needs to include pizza and on-site prepared sandwiches to the list of food service authorized to be offered. It effort is understandable; its knowledge of the gap in its permit is apparent.

This is confirmed by looking at Condition 26. That condition is short and to the point. "Obtain and maintain all required Food Industry Permits from Sonoma County Environmental Health Division, if required for wine tasting activities and special events. *No other food service was requested or authorized by this permit.*" (emphasis added)

To VOTMA that condition is fairly self-evident. VOTMA will caveat that months ago it requested from the County the opportunity to review any Food Industry Permits issued to VJB from the Sonoma County Environmental Health Division, but did not receive a reply to it inquiry. Such permits may exist that give VJB the apparent belief that the Condition 26 was either to be ignored or was legally superseded, but VOTMA does not have that information.

Lacking such information, we fall back, as we must, on the language of the current use permit. Condition 26 indicates that no other food service was requested by VJB or authorized by the use permit other than for wine tasting and special events. Condition 59 authorizes barbequed food, but only during special events. VJB seeks to modify Condition 59 to override Condition 26 and allow food service in the form

of "sandwiches" purchased by customers at the deli and barbeque and pizza from the outdoor kitchen, and to eliminate the general prohibition of commercial kitchens. VJB may not like that close reading of the Conditions, but the words do speak for themselves.

Given the foregoing, VOTMA again urges PS to reject the February 14, 2017 proposal as either improperly filed or incomplete, or both. PS should instead take a close look at the controlling conditions of the current use permit and prepare an appropriate report assessing whether VJB is currently operating consistent with its permit. That sort of analysis would inform both whether enforcement action should be taken, what the baseline should be for CEQA purposes, and whether and to what extent PS should reject, revise, limit or otherwise condition any VJB request to initiate a new higher intensity level of food serving activity.

In summary, VOTMA opposes any approval that would allow VJB to ramp up its operation via a new 53 stall parking lot across the street. The effect of such approval would be that essentially every day would become de facto a special events day at VJB. PS should not impose that significant adverse impact on the Shaw/Maple neighborhood or the Kenwood community.

Thank you for the opportunity to comment.

Kathy Pons
President
Valley of the Moon Alliance

cc: via USPS
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