

THE BOARD OF SUPERVISORS OF THE COUNTY OF STANISLAUS
BOARD ACTION SUMMARY

DEPT: Board of Supervisors

BOARD AGENDA #: *A-7

AGENDA DATE: May 9, 2017

SUBJECT:

Approval to Set a Public Hearing on May 23, 2017, at 9:20 a.m., to Consider an Appeal of the Planning Commission's Approval of Use Permit Application No. PLN2015-0130 The Fruit Yard Amphitheater

BOARD ACTION AS FOLLOWS:

No. 2017-235

On motion of Supervisor Olsen, Seconded by Supervisor Withrow

and approved by the following vote,

Ayes: Supervisors: Olsen, Withrow, Monteith, DeMartini, and Chairman Chiesa

Noes: Supervisors: None

Excused or Absent: Supervisors: None

Abstaining: Supervisor: None

1) Approved as recommended

2) Denied

3) Approved as amended

4) Other:

MOTION:

ATTEST: 
ELIZABETH A. KING, Clerk of the Board of Supervisors

File No.

**THE BOARD OF SUPERVISORS OF THE COUNTY OF STANISLAUS
AGENDA ITEM**

DEPT: Board of Supervisors

Urgent

Routine



BOARD AGENDA #: *A-7

AGENDA DATE: May 9, 2017

CEO CONCURRENCE:

4/5 Vote Required: Yes No

SUBJECT:

Approval to Set a Public Hearing on May 23, 2017, at 9:20 a.m., to Consider an Appeal of the Planning Commission's Approval of Use Permit Application No. PLN2015-0130 The Fruit Yard Amphitheater

STAFF RECOMMENDATIONS:

1. Set a Public Hearing on May 23, 2017, at 9:20 a.m., to Consider an Appeal of the Planning Commission's Approval of Use Permit Application No. PLN2015-0130, The Fruit Yard Amphitheater.

DISCUSSION:

On April 20, 2017, the Planning Commission approved Use Permit Application No. PLN2015-0130 – The Fruit Yard Amphitheater and adopted a Mitigated Negative Declaration for this project on a 4-1 vote. This project is a request to amend an existing planned development to allow a 3,500 person capacity amphitheater, with a 5,000 square foot covered stage, a 4,000 square foot storage building and parking lot to the rear of the stage, and an additional 1,302-space temporary parking area, for a maximum of 12 amphitheater events per year. The use permit also includes a request for a covered seating area of approximately 4,800 square feet and a 1,600 square foot gazebo to be developed in the existing park area and replacement of the existing pylon freestanding pole sign with an electronic reader board sign. The project is located at the southwest corner of Geer Road and Yosemite Boulevard/State Highway 132 (7948 Yosemite Boulevard), east of the Community of Empire and west of the City of Waterford.

An appeal of the Planning Commission's approval was submitted on May 1, 2017 by the following residents: Richard and Barbara Heckendorf; Robert Boulet and Michelle Bell; Judy Crisp; Robert Wolfley; Matthew and Tina Smith; Tim Douglas; and, Kent Johnson. Upon receiving an appeal, the Board of Supervisors places an item setting a public hearing date and time on their agenda for consideration. Once a public hearing date is approved, the Clerk of the Board is required to publish a Notice of Public Hearing in a newspaper of general circulation. The Planning and Community Development Department notifies surrounding property owners by mail, and prepares the public hearing agenda item.

Approval to Set a Public Hearing on May 23, 2017, at 9:20 a.m., to Consider an Appeal of the Planning Commission's Approval of Use Permit Application No. PLN2015-0130 The Fruit Yard Amphitheater

At this time, this item simply sets the date and time for a hearing on the matter before the Board of Supervisors to consider the appeal.

POLICY ISSUE:

In accordance with Stanislaus County Code Section 21.112.040, all appeals of the Stanislaus County Planning Commission's Decision are filed with the Stanislaus County Board of Supervisors.

FISCAL IMPACT:

There is a nominal fiscal impact associated with setting this public hearing for mandatory newspaper publishing and the notification of property owners by mail. These expenses are covered by a portion of the \$622.00 Planning Commission appeal fee paid by the Appellant.

BOARD OF SUPERVISORS' PRIORITY:

Setting a public hearing to consider an appeal of the Planning Commission's decision is consistent with the Board's priority of A Well-Planned Infrastructure System.

STAFFING IMPACT:

There are no staffing impacts associated with this item.

CONTACT PERSON:

Elizabeth King, Clerk of the Board of Supervisors (209) 525-4494

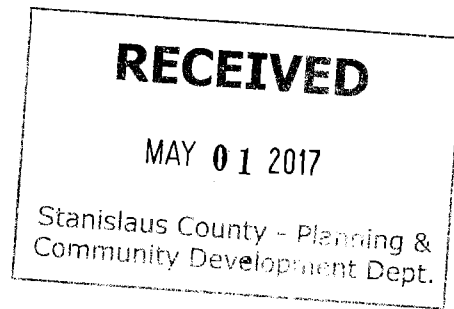
ATTACHMENT(S):

1. Appeal Letter
2. Letter from Clerk of the Board confirming receipt of appeal

Attachment 1

May 1, 2017

Board of Supervisors
Stanislaus County
1010 10th Street
Modesto, Ca 95354



Dear Board of Supervisors:

This letter is submitted as an appeal to the April 20, 2017 Stanislaus County Planning Commission Action to approve USE PERMIT APPLICATION NO PLN2015-0130 THE FRUIT YARD APMPHITHEATER APN: 009-017-004. The action included the adoption of a Mitigated Declaration and Mitigation Monitoring Plan pursuant to CEQA Guidelines Section 15074(b) by finding that on the basis of the whole record, including the Initial Study, and any comments received that there is no substantial evidence that the project will have a significant effect on the environment. The action maintains that the project will not, under these circumstances, be detrimental to the health, safety and general welfare of the persons residing or working in the neighborhood of use, and that it would not be detrimental or injurious to property and the improvements in the neighborhood.

We respectfully disagree with this finding. In making this finding, the Planning Commission relied on mitigation measures that are nonspecific and fail to have an enforcement mechanism to avoid impacts. The measures rely on "after the fact" adjustments with no clear steps to avoid the identified impacts until the adjustments are made. This is not only detrimental to the health and safety of the nearby residents, but fails to meet the requirements of the California Environmental Quality Act. Mitigation measures must be designed to be specific, enforceable, and designed to eliminate or reduce impacts to the greatest extent feasible. We have offered alternatives that we feel accomplish this goal; however, neither staff nor the Planning Commission chose to incorporate these strategies into the project. As such, the undersigned appeal the Planning Commission decision approving the project.

This appeal is consistent with a petition signed by 140 residents in the effected neighborhood. We believe that the CEQA document did not adequately address:

1. Noise impacts of the proposed project;
2. The physical impacts of this project on the residents' use and enjoyment of their property;
3. Community recourse and the consequential enforcement of the proposed mitigation measures;
4. Light pollution and the environmental impacts of an electronic sign with motion elements.

The environmental mitigation study identifies several types of noise and identifies a "model" to provide a mitigation plan to address the impacts of the noise. The consultants acknowledge that such models fail to take into consideration local conditions and rely on testing and verification in the field. The mitigation measure requires testing for two "large" events, greater than 500 in attendance, but fails to take into account difference in music types, crowd noise, or other sounds that cannot be anticipated at

this time. It does not distinguish between the qualities or genre of the music (country versus rap versus pop versus rock). Different types of music have different music sound mixes and as a consequence different noise carrying characteristics. The noise study states that events of 2,000 or more attendees should only be held during the “day”, presumably ending by 7 p.m.; however, no such limitation or mitigation measure was identified in the Initial Study.

The study identifies crowd noise and C level sound (the booming sound of base). The study proposes to study the noise and then to identify how the impact may be mitigated. The assumption that this type of noise can be mitigated is speculative. These are the most disruptive sounds to our sleep and concentration. The property owner has held unpermitted musical events that are far smaller (roughly 50 attendees) that have disrupted residents’ sleep patterns and can be heard a long distance (over 1.5 miles).

Even the consideration of the approval of amplified music beyond 10 p.m. is in contrast with the Stanislaus County Ordinance No. C.S. 1070, specifically Section 10.46.060 Item D. which states “Sound-Amplifying Equipment and Live Music. No person shall install, use or operate sound-amplifying equipment, or perform, or allow to be performed, live music unless the sound emanating from the sound amplifying equipment or live music shall not be audible to the human ear at a distance greater than 200 feet. To the extent that these requirements conflict with any conditions of approval attached to an underlying land use permit, these requirements shall control.” Staff has indicated this ordinance is unenforceable; however, this is the standard adopted by the Board of Supervisors to ensure consistency with its General Plan. We have never gotten a clear explanation as to why this ordinance is not enforceable; however, we suspect it is due to a lack of Sheriff Department resources. This is the very reason why we feel the project should not be approved. If the applicant fails to comply, the County has no resources to ensure that the operator complies.

The noise study looks at an “average” environmental condition. It ignores the reality of the real world where humidity, wind and air pressure may affect how noise carries. The noises envelop, the area that the projects activity may impact, will vary from performance to performance. The Fruit Yard’s neighbors do not live in an average world. But some of the recommendations of the study are also ignored by the staff recommendations.

We maintain that if a resident’s sleep or life style is disrupted by any sound within their home that that is a significant physical impact. In the past, neighbors have heard the Fruit Yard's music, crowd noise and C-level bass sounds in their homes and their bedrooms. This has made it difficult for the residents and their children just to go to sleep. The neighborhood residents have suggested night time limits of 9:00 p.m. to be assured that their home life would not be disrupted. The sound study suggests that events with 2,000 or more attendees should only be held during the day (we believe this means end at 7 p.m.). This testimony has been dismissed or just ignored. Perhaps all amplified events should have been limited to afternoon hours. The impact of activities at the Fruit Yard have been documented and continuously observed by residents for over twenty years. Their experience has documented very real impacts and these impacts have not been necessarily addressed or mitigated in this report.

Perhaps the most concerning aspect of the study is the lack of recourse or clear definition of corrective actions. If a mitigation measure is not enforced, or enforceable, it is not an allowable CEQA mitigation measure.

For example, the very definition of event is even questionable. An event can be defined as covering a one day, a weekend, or even a week long performance. We are uncertain whether this limit includes weddings, events in the park and events outside of the restaurant. The report does not give clear guidance on this issue.

The study notes that if the mitigation measures fail, the Planning Director can take actions to remedy the situation but fails to identify the specific actions or limitations that will occur. Those affected by the impacts are left to guess what measures will be taken, when they will be taken, how long it will take to correct the situation, and whether events will continue in light of the impacts. This issue is particularly important since activities at the Fruit Yard have not been neighborhood friendly.

The enforcement mechanisms will not ensure compliance with the standards because they rely on the applicant to self-monitor. However, in the past, noise complaints directed to Fruit Yard staff have been dismissed and ignored. In fact, in at least one specific case, the Fruit Yard staff told a neighbor they were afraid to tell the operator or the DJ to turn down their amplifiers. This simply is not a viable mitigation measure. Furthermore, the County acknowledges in the staff report that the County Sheriff does not enforce the County's noise ordinance or the requirements of permits like these. So even if monitoring of the two "large" events does show compliance, any particular operator could violate the standard and no one would be in a position to enforce the standards. We have argued that an independent sound engineer needs to be employed for all future (concerts, weddings...) events to control the equipment that is being used and to ensure compliance with the noise studies. These measures have been rejected by staff and the Planning Commission.

The recourse of neighbors' complaints of noise, traffic, security and other supposedly mitigated impacts is to be addressed in a yet to be defined "good neighborhood policy." This document has "put the cart before the horse." It is logical to assume that an issue is not mitigated until the mitigation is complete, not to be named at a later date. Again any policy will need to have an enforceable mechanism to ensure that the promoters holding the event are monitored and adjustments are made in "real time", not by "after the fact" analysis under theoretical conditions.

It has been noted several times in Planning Commission meetings that Stanislaus County does not presently have an enforceable noise ordinance. Enforcement of the noise ordinance is the responsibility of the Sheriff Department but noise concerns do not even show on the department's website. Quite frankly we agree that crime prevention should be the highest priority of the Sheriff Department. The Sheriff Department patrols over 1600 square miles of land and it is not surprising that if one calls the Sheriff's administrative office responsible for nuisance reports at 10:00 p.m. you may get a recorded message. The lack of policing resources in the County is a major reason why the Board of Supervisors

should deny this application in its entirety. These uses do not belong in areas where there are no resources to enforce the provisions of the permit.

We also have concerns about safety. Large events like these require a significant security plan. Even with a comprehensive security plan in place, the Sheriff Department is likely to be called upon if an event gets out of hand. With all of the existing public safety issues in the County, particularly during evening hours, why create a new and remote site that requires back up resources from the Sheriff Department?

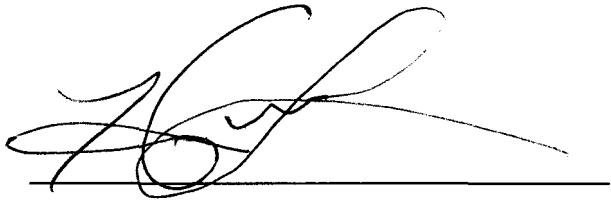
Finally, the Planning Commission overrode staff's recommendation denying an electronic message board for the property. The property currently has a static non-electric billboard that is available to advertise events at the amphitheater. The client had suggested that the moving element of the sign might be used to advertise the restaurant specials. There is no need to approve an electronic message board that will add flashing light and glare into an agricultural area. No mitigation, or identification, of light impacts was considered in the Planning Commission action.

As we noted above there are impacts that are not adequately addressed in the environmental document. They have been ignored, defined as insignificant or just not mitigated. As an illustration, the applicant argues the County has already authorized the construction of the amphitheater through the issuance of a grading permit that indicated the movement of dirt for an amphitheater. They believe, and apparently the Planning Commission concurred, they can pull a Sheriff special event permit and use the amphitheater despite the fact it was never permitted in the original General Plan Amendment and this conditional use permit has not yet been approved. It is clear from this application the County did not permit an amphitheater in the original General Plan Amendment and that the grading permit wording was issued in error. The idea that, even if this Conditional Use Permit is not granted, the County would issue a permit for a special event to use the amphitheater is infuriating and we believe illegal. This is the kind of thing we constantly hear from the County. The applicant knew the amphitheater was not approved, they were notified at the time dirt was being moved, they continued to improve it by adding grass, concrete, fencing and landscaping, and the County did nothing to stop them. Now that it's there, the response from the County staff and Planning Commission is there is nothing they can do about it now so we might as well try to figure out how to make it work. Seeking forgiveness seems to be the rule in the County and it only begets more seeking forgiveness. Why comply with any County law when the County takes this approach to the enforcement of those laws?

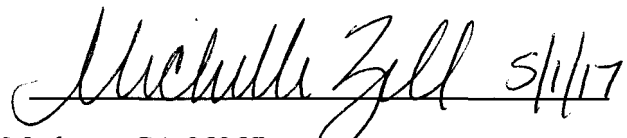
We have tried to work with the applicant but our suggestions have been dismissed and ignored. Because of the problem these kinds of uses have created in other parts of the County, County staff has gone as far as the applicant has been willing to take the mitigation measures. We have asked for greater limitations on the days and times of operation but the response has been that the applicant would be unwilling to have these measures incorporated into the project. From our perspective, this tells us there has been no independent evaluation of either the impacts or the identification of mitigation measures by the County as the lead agency for the project. It appears the applicant has undue influence over the County's determination which has eroded its independence in identifying feasible mitigation measures for the project.

We propose that the Board of Supervisors rescind the Planning Commission's action, deny the application, and reject the proposed CEQA document as the impacts are not fully mitigated to a level of insignificance. Measures that could accomplish this goal can and should be identified and we are willing to work with the County to develop mitigation measures that will properly meet these goals.

Thank you for your consideration of this appeal.

Barbara Heckendorf 

Richard & Barbara Heckendorf, 679 Weyer Road, Modesto, CA 95357

Robert Boulet & Michelle Bell 5/1/17  5/1/17


Robert Boulet & Michelle Bell, 501 Weyer Road, Modesto, CA 95357

Judy Crisp 4-30-2017

Judy Crisp, 601 Weyer Road, Modesto, CA 95357

Robert Wolfley 5/1/17

Robert Wolfley, 9536 Yosemite Blvd., Modesto, CA 95357

Matthew & Tina Smith 4/30/17  4/30/17

Matthew & Tina Smith, 655 Weyer Road, Modesto, CA 95357

Tim Douglas 5/1/17

Tim Douglas, 548 Hopper Road, Modesto, CA 95357

Kent Johnson 4/30/17

Kent Johnson, 566 Wellsford Road, Modesto, CA 95357

Attachment 2



CLERK OF THE BOARD OF SUPERVISORS

STANISLAUS COUNTY

1010 10th Street, Suite 6700, Modesto, CA 95354
Phone: 209.525.4494 Fax: 209.525.4420

May 4, 2017

Richard and Barbara Heckendorf
679 Weyer Road
Modesto, CA 95357

Matthew and Tina Smith
655 Weyer Road
Modesto, CA 95357

Robert Boulet and Michelle Bell
501 Weyer Road
Modesto, CA 95357

Tim Douglas
548 Hopper Road
Modesto, CA 95357

Judy Crisp
601 Weyer Road
Modesto, CA 95357

Kent Johnson
566 Wellsford Road
Modesto, CA 95357

Robert Wolfley
9536 Yosemite Blvd.
Modesto, CA 95357

RE: Appeal of Planning Commission's Approval of Use Permit Application No.
PLN2015-0130 The Fruit Yard Amphitheater APN: 009-017-004

To Whom It May Concern:

We received your Letter of Appeal regarding the Planning Commission's approval of Use Permit Application No. PLN2015-0130 The Fruit Yard Amphitheater (APN: 009-017-004). An item requesting the Board of Supervisors schedule a public hearing on Tuesday, **May 23, 2017 at 9:20 a.m.**, to consider this appeal, will be on the Board of Supervisors' May 9, 2017, agenda.

For further information, please call the Planning and Community Development Department at 525-6330 or the Board of Supervisors at 525-4494.

Sincerely,

Elizabeth A. King
Clerk of the Board of Supervisors

cc: Supervisor Kristin Olsen, District 1
Planning & Community Development Department



CLERK OF THE BOARD OF SUPERVISORS

ELIZABETH A. KING

1010 Tenth Street, Suite 6700, Modesto, CA 95354
Phone: 209.525.4494 Fax: 209.525.4420

**NOTICE OF PUBLIC HEARING
APPEAL OF THE PLANNING COMMISSION'S APPROVAL OF USE PERMIT
APPLICATION NO. PLN2015-0130 THE FRUIT YARD AMPHITHEATER.**

NOTICE IS HEREBY GIVEN that on May 23, 2017 at the hour of 9:20 a.m., the Stanislaus County Board of Supervisors will meet in the Chambers, Basement Level, Tenth Street Place, 1010 10th St., Modesto, CA, to consider an appeal of the Planning Commission's approval of Use Permit Application PLN2015-0130 – The Fruit Yard Amphitheater, a request to amend an existing planned development to allow a 3,500 person capacity amphitheater, with a 5,000 square foot covered stage, a 4,000 square foot storage building and a parking lot to the rear of the stage, and an additional 1,302 space temporary parking area, for a maximum of 12 amphitheater events per year. The use permit also includes a request for a covered seating area of approximately 4,800 square feet and a 1,600 square foot gazebo to be developed in the existing park area and replacement of the existing pylon freestanding pole sign with an electronic reader board sign. A CEQA Mitigated Negative Declaration will be considered.

NOTICE IS FURTHER GIVEN that at the said time and place, interested persons will be given the opportunity to be heard. Material submitted to the Board for consideration (i.e. photos, petitions, etc.) will be retained by the County. If a challenge to the above application is made in court, persons may be limited to raising only those issues they or someone else raised at the public hearing described in this notice, or in written correspondence delivered to the Board. For further information call (209) 525-6330.

BY ORDER OF THE BOARD OF SUPERVISORS

DATED: May 9, 2017

ATTEST: ELIZABETH A. KING, Clerk of
the Board of Supervisors
of the County of Stanislaus,
State of California.

BY:

Pam Villarreal, Assistant Clerk



The Modesto Bee

modbee.com

Vida

AFFIDAVIT OF PUBLICATION

Account #	Ad Number	Identification	PO.	Cols	Lines
341787	0003072867	HEARING PLN2015-0130 PAM VILLARREAL	ING PLN2015-0130 PAM VILLAR	1	51

Attention:

CO STAN BOARD OF SUPERVISORS
 1010 10TH ST STE 6700
 MODESTO, CA 95354

**Declaration of Publication
 C.C.P. S2015.5**

STATE OF CALIFORNIA)
) ss.
 County of Stanislaus)

NOTICE OF PUBLIC HEARING
 APPEAL OF THE PLANNING COMMISSION'S APPROVAL OF USE PERMIT APPLICATION NO. PLN2015-0130 THE FRUIT YARD AMPHITHEATER

NOTICE IS HEREBY GIVEN that on May 23, 2017 at the hour of 9:20 a.m., the Stanislaus County Board of Supervisors will meet in the Chambers, Basement Level, Tenth Street Place, 1010 10th St., Modesto, CA, to consider an appeal of the Planning Commission's approval of Use Permit Application PLN2015-0130 - The Fruit Yard Amphitheater, a request to amend an existing planned development to allow a 3,500 person capacity amphitheater, with a 5,000 square foot covered stage, a 4,000 square foot storage building and a parking lot to the rear of the stage, and an additional 1,302 space temporary parking area, for a maximum of 12 amphitheater events per year. The use permit also includes a request for a covered seating area of approximately 4,800 square feet and a 1,600 square foot gazebo to be developed in the existing park area and replacement of the existing pylon freestanding pole sign with an electronic reader board sign. A CEQA Mitigated Negative Declaration will be considered.

NOTICE IS FURTHER GIVEN that at the said time and place, interested persons will be given the opportunity to be heard. Material submitted to the Board for consideration (i.e. photos, petitions, etc.) will be retained by the County. If a challenge to the above application is made in court, persons may be limited to raising only those issues they or someone else raised at the public hearing described in this notice, or in written correspondence delivered to the Board. For further information call (209) 525-6330.

BY ORDER OF THE BOARD OF SUPERVISORS. DATED: May 9, 2017. ATTEST: ELIZABETH A. KING, Clerk of the Board of Supervisors of the County of Stanislaus, State of California. BY: Pam Villarreal, Assistant Clerk.
 MOD-3072867 5/12

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years, and not a party to or interested in the above entitled matter. I am a printer and principal clerk of the publisher of the The Modesto Bee, which has been adjudged a newspaper of general circulation by the Superior Court of the County of Stanislaus, State of California, under the date of February 25, 1951 Action No. 46453. The notice of which the annexed is a printed copy has been published in each issue thereof on the following dates, to wit:

May 12, 2017

I certify (or declare) under penalty of perjury that the foregoing is true and correct and that this declaration was executed at Modesto, California on:

Date: 12th, day of May, 2017

Cynthia A. Mathamua

Signature