

## ***Saddleback Canyons Conservancy***

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*-Preserving Our Canyons-*

## **Rural Canyons Conservation Fund**

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RuralCanyons.org



February 6, 2018

Orange County Board of Supervisors  
c/o Orange County Public Works  
Development Services/Planning  
300 North Flower Street  
Santa Ana, CA 92703

Via Hand Delivery

RE: PA080053, “Red Rock Gardens,” 17521 Santiago Canyon Road, Silverado, CA; Appeal of Approval by the Orange County Planning Commission (“Planning Commission”) on January 24, 2018

Dear Supervisors:

Pursuant to Section 7-9-150.4 of the County of Orange Zoning Code, the Saddleback Canyons Conservancy and the Rural Canyons Conservation Fund hereby appeal approval of the above referenced project (“Project”), including the adoption of the Mitigated Negative Declaration for the Project. The Project consists of a Use Permit allowing an existing single-family dwelling to be used for commercial activities including outdoor events such as weddings, anniversaries, parties, and fundraisers, with up to 200 guests per event and with an initial maximum of 12 such events per year, along with commercial production, packing, and shipping of fruits and plants.

The same applicant proposed a similar project—a use permit for 35 outdoor events per year—in 2000, designated as PA000125, which was denied by the Planning Commission based on its incompatibility to the surrounding land uses, traffic generation, and other considerations. The applicant appealed the denial to the Board of Supervisors in July of 2001, the Board remanded the application to the Planning Commission for reconsideration, and the Planning Commission reaffirmed its July 2001 denial. In December 2001, in response to a second appeal, the Board upheld the Planning Commission’s denial and found that it “[a]grees with the determination that the proposed use as a commercial wedding center is not compatible with the surrounding uses and the A1 ‘General Agriculture.’” The applicant returned in 2003, filing a similar application, PA030091, for 22 outdoor events per year. County planning staff recommended denial based on General Plan inconsistency, noise impacts to residents and wildlife, traffic safety, conflicts with the Fire Code for a commercial use for indoor activities, and septic system capacity. The

Planning Commission then continued the matter to a date uncertain, and the application was ultimately closed in 2008 due to inactivity.

From 2000 through 2004, the applicant held wedding events on the Project site under Temporary Use Permits (“TUPs”) issued by the County, but from 2005 through late 2015, was denied further TUPs due to code violations, nonconformance with the Zoning Code related to the commercial activities occurring on the site, and lack of resolution of noise, fire protection, and traffic control. In November of 2015, the County reinstated the applicant’s access to TUPs, but the applicant has not sought any since then. (OC Development Services/Planning Report, September 27, 2017, pages 4-5.)

This letter sets forth in detail the grounds for our appeal of the current Project, and has been submitted with the required appeal fee and mailing envelopes.

### **1. The Project is Not Consistent with the Orange County General Plan.**

The Land Use Element of the Orange County General Plan designates the Project site as 1A, Rural Residential, which allows residential land uses only and does not allow the commercial uses included in the Project.

“This category is applied to areas in which limited residential use is compatible with the natural character of the terrain. Development under this category will require special consideration due to topography and other factors. The building intensity standard for Rural Residential ranges from 0.025 to 0.5 dwelling units per gross acre (DU/AC).” (Orange County General Plan, Land Use Element, page III-12.)

While the Land Use Element makes explicit allowance for specific commercial uses under other designations, it does not do so for the Project’s 1A designation. Approval of the Project violates state law, which requires that all development be consistent with the County’s adopted General Plan.

### **2. The Project is Not Consistent with the Silverado-Modjeska Specific Plan.**

The Project site lies within the boundaries of the Silverado-Modjeska Specific Plan (“SMSP”), which designates it as Rural Residential.<sup>1</sup> The SMSP states that commercial facilities are only allowed in existing commercial sites and “shall not be allowed in any residential category in this plan.” (SMSP, page 3.)

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<sup>1</sup> In testimony to the Planning Commission on January 24, 2018, the Project proponent attempted to cast doubt on whether the Project site in fact lies within the boundaries of the SMSP. However, the Project site is clearly within the SMSP’s boundaries, and the County did not entertain the Project proponent’s assertion. There is no basis for asserting that the Project site is somehow an island unto itself.

In addition, the Project site lies within the SMSP's Scenic Highway Overlay, in which the SMSP explicitly prohibits commercial land uses. "Neighborhood Commercial sites will not be allowed within the scenic highway corridor." (SMSP, page 8.)

The SMSP implements the Orange County General Plan within the Project area, pursuant to state law:

"After the legislative body has adopted a general plan, the planning agency may, or if so directed by the legislative body, shall, prepare specific plans for the systematic implementation of the general plan for all or part of the area covered by the general plan." (Government Code section 65450.)

In addition, the Orange County General Plan explicitly makes mandatory the implementing SMSP:

"TRANSITION AREAS FOR RURAL COMMUNITIES"

New development within the Silverado-Modjeska Specific Plan planning area shall be rural in character and shall comply with the policies of that plan in order to maintain a buffer between urban development and the Cleveland National Forest." (Orange County General Plan, Growth Management Element, Policy 6.)

Thus inconsistency with the SMSP constitutes inconsistency with the Orange County General Plan.

### **3. The Project is Not Consistent with the Orange County Zoning Code.**

The Project site is zoned A1, General Agricultural, under the Orange County Zoning Code. Section 7-9-55.1 of the Zoning Code sets forth the Purpose and intent of the A1 District:

"The A1 District is established to provide for agriculture, outdoor recreational uses, and those low intensity uses which have a predominately open space character. It is also intended that this district may be used as an interim zone in those areas which the General Plan may designate for more intensive urban uses in the future."

As set forth in the County's Initial Study PA080053 at page 60, the uses permitted within the A1 Zoning District do not include the commercial events proposed by the Project. While Section 7-9-55.4 allows "commercial outdoor recreation" under a use permit, the uses included in the Project, such as weddings, anniversaries, parties, and fundraisers, do not fit the Zoning Code's definition of "commercial recreation":

"Commercial recreation: Any use or activity where the primary intent is to provide amusement, pleasure or sport but which is operated for financial gain. It includes establishments where food and beverages are sold as a secondary or

ancillary use, but does not include restaurants, night clubs and cocktail lounges.”  
(Zoning Code Section 7-9-24.)<sup>2</sup>

Thus the Planning Commission erred in finding the Project consistent with the intent and purpose of the A1 District, because the Project’s uses are not “commercial recreation.” Even if such uses could somehow be characterized as “commercial recreation,” state law barred the Planning Commission from permitting them, because Government Code section 65860(a) requires that all zoning be consistent with the adopted general plan.

“65860. (a) County or city zoning ordinances shall be consistent with the general plan of the county or city by January 1, 1974. A zoning ordinance shall be consistent with a city or county general plan only if both of the following conditions are met: (1) The city or county has officially adopted such a plan. (2) The various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses, and programs specified in the plan.”

As explained above, the Orange County General Plan and the implementing SMSP prohibit the Project’s commercial uses. Thus in approving the Project, the Planning Commission created zoning inconsistent with the governing general plan, contrary to state law requiring that any conflict between zoning and the general plan be resolved in favor of the general plan.

Legal considerations aside, the violated land use policies should be respected as a matter of sound planning. Allowing the Project will erode the residential nature of the community and set a precedent for other property owners in the area, enabling those with rural homes on large parcels to convert their residences into profit-making event centers, agricultural packing houses, and other commercial enterprises. This is unfair to neighbors who bought their residential properties in reliance on the General Plan, the SMSP, and the residential zoning designation, reasonably expecting that their properties would not end up in commercial areas.

“A zoning scheme, after all, is similar in some respects to a contract; each party foregoes rights to use its land as it wishes in return for the assurance that the use of neighboring property will be similarly restricted, the rationale being that such mutual restriction can enhance total community welfare.” (*Topanga Association for a Scenic Community v. County of Los Angeles*, (1974) 11 Cal.3d 506, 517.)

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<sup>2</sup> At the January 24, 2018, Planning Commission hearing, OC Public Works Deputy Director Colby Cataldi stated: “[i]t’s Orange County Planning department staff’s interpretation that ‘outdoor recreation’ is more aligned with the American Planning Association’s interpretation as well. So when you talk about mini-golf courses, tennis court centers, driving ranges, motorcycle tracks, things of that nature, that is staff’s perspective of the definition, too, on the larger industry standard, so to speak, even though our zoning code doesn’t specifically call it out to that level of detail.” The uses described by Deputy Director Cataldi have an “open-to-the-public” feature that the Project lacks. The Project, in contrast, is proposed for private events that would appear not to fit the American Planning Association’s nor the County’s characterization of “outdoor recreation.”

That the commercial use is intermittent (but still high frequency at an initial limit of 12 events per year) does not change the fact that incremental changes such as this will cumulatively negatively impact the Silverado-Modjeska area's rural residential character while intensifying traffic impacts on Santiago Canyon Road and degrading its scenic highway corridor designation.

Faced with the mismatch between the Project and the A1 zoning, the applicant seeks to ride the coattails of the similarly-zoned Giracci Vineyards project, located within the SMSP boundaries and approved by the County in 2010. (OC Development Services Report, September 27, 2017, Attachment 4, Letter of Explanation and Justification.) Such attempts are misplaced, however, due to key differences between the two projects, as correctly summarized by County staff in the table below.

<b>Giracci Vineyards and Red Rock Wedding Gardens Comparison</b>		
<b>COMPONENT</b>	<b>GIRACCI VINEYARDS</b>	<b>RED ROCK (PROPOSED PROJECT)</b>
General Plan (Consistency)	1B (Suburban Residential) (Consistent)	1A (Rural Residential) (Inconsistent)
Silverado-Modjeska Specific Plan (SMSP) (Consistency)	Rural Residential (Legal Non-Conforming) Commercial Activity Established In 1968 prior to SMSP adoption	Rural Residential (Inconsistent) No commercial activity onsite prior to adoption of the SMSP
Zoning (Consistency)	A1 (General Agricultural) (Legal Non-Conforming) Commercial Activity Established In 1968 prior to SMSP adoption	A1 (General Agricultural) (Inconsistent)
Commercial Use Established	Yes: 1968 (prior to SMSP adoption)	Not Established
Current Land Use	Commercial Stables   Vineyard Offsite Alcohol/Retail Sales Wine Tasting   Special Events Facility   Single-Family Residence	Single-Family Residence
Santiago Canyon Road Sight Distance	Unobstructed Visibility	Impaired Visibility
Events-Per-Year	Up to Twenty (20) <sup>1</sup>	Twenty (20)
Closing Hours	Special Events: Sundown Wine Tasting/Retail Sales: 5:00 p.m.	10:00 p.m. Guests 11:00 p.m. Staff
Onsite Infrastructure	Adequate	Improvements necessary
Last Planning Commission Action	Denied	Action yet to be taken
Last Board of Supervisors Action	Approved on 09.28.10	Action yet to be taken

<sup>1</sup> A new, supplemental Condition of Approval (COA No. 28) was added at the September 28, 2010 Board of Supervisors meeting requiring annual review of all conditions of approval. Non-compliance with the conditions may require reconsideration of the use permit.

(OC Development Services/Planning Report, September 27, 2017 at page 18.)

While both projects are zoned A1, General Agricultural, and subject to the SMSP, the County approved Giracci's conforming commercial uses because they were established prior to the enactment of the SMSP and thereby grandfathered. The current Project, on the other hand, is proposing new non-conforming uses and thus cannot be approved. Also, the Orange County General Plan designates Giracci as 1B, Suburban Residential, which explicitly allows commercial uses, while the current Project is designated 1A, Rural Residential, which does not allow commercial uses. (Orange County General Plan, Land Use Element, Revised October 2015, page III-10 – III-12.)

#### **4. In Approving the Project, the Planning Commission Improperly Granted a *De Facto* Zoning Variance.**

By granting the Project relief from the restrictions of the A1 Zoning District—restrictions that apply to similarly situated properties in the area—the Planning Commission effectively granted the Project a zoning variance. But this was improper because the Orange County Zoning Code required accompanying findings that the Planning Commission failed to make.

“For variance applications. In addition to the findings required by paragraph (1) of this subsection, the following findings shall be made by the approving authority prior to the approval of any variance application:

a. Special circumstances. There are special circumstances applicable to the subject building site which, when applicable zoning regulations are strictly applied, deprive the subject building site of privileges enjoyed by other property in the vicinity and subject to the same zoning regulations. (The special circumstances shall be specified in the adopted finding.)

b. No special privileges. Approval of the application will not constitute a grant of special privileges which are inconsistent with the limitations placed upon other properties in the vicinity and subject to the same zoning regulations, when the specified conditions are complied with.” (Orange County Zoning Code Section 7-9-150.3(e)(2).)

Clearly, neither of these required findings could be made for the Project.

#### **5. Approval of the Project Violates the California Environmental Quality Act (CEQA).**

In approving the Project, the Planning Commission sought to comply with CEQA by adopting a mitigated negative declaration (“MND”) for the Red Rock Gardens Project. But this was improper under CEQA, which provides a low threshold, the “fair argument standard,” for preparation of an environmental impact report (EIR):

“If the lead agency determines there is substantial evidence in the record that the project may have a significant effect on the environment, the lead agency shall prepare an EIR (*Friends of B Street v. City of Hayward* (1980) 106 Cal. App. 3d 988). Said another way, if a lead agency is presented with a fair argument that a

project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68).” (CEQA Guidelines section 15064(f)(1).)

An MND should not have been adopted because the record before the Planning Commission abounds with substantial evidence of potentially significant environmental impacts that have not been adequately analyzed and not appropriately mitigated, evidence supporting numerous “fair arguments” in fact provided to the Planning Commission by area residents familiar with the Project, its history, and the surrounding area.

A. Acknowledged Inconsistency with the Orange County General Plan, the Silverado-Modjeska Specific Plan, and the Zoning Code

Appendix G of the CEQA Guidelines explicitly requires an inquiry into whether the proposed project would

“b) Conflict with any applicable land use plan, policy, or regulation of an agency with jurisdiction over the project (including, but not limited to the general plan, specific plan, local coastal program, or zoning ordinance) adopted for the purpose of avoiding or mitigating an environmental effect” (CEQA Guidelines, Appendix G, 3.10, Land Use and Planning.)

The answer here is a definite “yes” due to the Project’s acknowledged and unmitigated inconsistencies with the Orange County General Plan, the SMSP, and the Zoning Code. (Initial Study PA080053 at page 60.) Thus the “potentially significant environmental impact” box must be checked for this category, and an EIR—not an MND—prepared for the Project.

B. Traffic Impacts

An MND is only appropriate where there clearly will not be any significant environmental impacts. The traffic “study” summarized in a letter barely over two pages submitted by a Dr. Khoury in support of this project is simply inadequate. At a minimum, the letter fails to address the Saddle Crest 65-home residential development, roughly one mile away and currently being constructed, which will add an estimated 780 vehicle trips per day to Santiago Canyon Road. The letter instead relies on outdated information that excludes current and foreseeable development projects, evident from Dr. Khoury’s conclusion:

“Due to the status quo of traffic flows in the vicinity of the project site over the last 5 years, Dr. Khoury concludes that the impacts of the project on the surrounding roadway network have not changed from those captured in the 2011 traffic update letter.”

This conclusion is flawed. There is no “status quo of traffic flows.” There are real and significant concurrent impacts on Santiago Canyon Road that have not been addressed, including the Saddle Crest development (780 vehicle trips per day on Santiago Canyon Road), Sky Ridge at El Toro

and Valley Vista (84 homes), and the developments on El Toro Road at Glenn Ranch Road (900+ new homes). Baseline traffic volume for Santiago Canyon Road has not been properly established and impacts have not been adequately studied.

Compounding the lack of accurate baseline traffic data, the proposed MND underestimates the Project's own traffic impacts. The Initial Study states that each event at the project site will generate 67 vehicle trips per event. This assumption is based on speculation that each guest will carpool with two other guests (200 guests divided by 3 = 67). But this is an underestimation. Instead of trying to minimize the analysis of potential traffic impacts from the Red Rocks Project, the Initial Study should have assumed the worst-case scenario, i.e., 200 vehicles (one for each guest) per event, plus vehicle trips for caterers and commercial vendor trucks coming and going for party setup and takedown.

The Project also includes commercial agricultural production with packing for wholesale distribution to be located onsite. Yet no mention is made of the traffic that would be generated from the packing employees engaged in this commercial activity, nor the commercial traffic (presumably trucks) that would be used for offsite transportation and distribution of the agriculture to retail outlets.

In sum, traffic generated from this project represents a potentially significant impact requiring an EIR. The EIR must include a proper traffic analysis, taking into consideration all current and foreseeable development in the area, plus the actual impacts of all of the Project's commercial activities.

### C. Significant Traffic Safety Impacts

Access to and from the Project site via Santiago Canyon Road presents several significant and serious safety hazards, including:

- (i) lack of visibility by vehicles traveling north on Santiago Canyon Road as they approach the Project's access road due to its location on a "blind curve" at the top of a hill;
- (ii) an increase in collisions involving bicycles and motorcycles traveling on Santiago Canyon Road.

A fair argument for this hazardous situation is supported by the written observations and data submitted by numerous area residents to the Planning Commission, including in the comment letters of Jill Hitchcock, Derek Bayles, Esq., Saddleback Canyons Conservancy, Rural Canyons Conservation Fund, the Inter-Canyon League, Ken Liem, Mr. and Mrs. Michael Gertner, Robert Mantor Hanson, and Wendy Hayter. (Comment Letters Received on CEQA Initial Study.) Residents' observations constitute a fair argument of a potentially significant traffic impact requiring environmental review. (*Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist.* (2013) 215 Cal.App.4th 1013.) Thus an EIR must be prepared, describing the Project's impacts on traffic safety along with feasible mitigation measures and project alternatives.



#### D. Noise Impacts

The MND concludes that noise generated by the Project's outdoor events will be "inaudible" to nearby residents, based on a 2009 letter from P.A. Penardi & Associates. This letter, however, which is barely over one page in length, is severely flawed and cannot support the MND's conclusion.

First, the California Board of Professional Engineers, Land Surveyors, and Geologists has no record of the letter's author, P.A. Penardi, who identifies himself only as an "acoustical consultant." His firm, P.A. Penardi & Associates, advertises itself as home remodelers and renovators in the Big Bear Lake, CA area, with no mention of noise or acoustical analyses. (<https://www.ehardhat.com/directory/engineers/CA/big-bear-lake/p-a-penardi-associates/1729590>.) Thus Mr. Penardi's qualifications to determine the Project's noise impacts are questionable.

Second, the letter appears to consider only noise coming from inside the Project residence, when in fact the outdoor events are to occur on the exterior patio. "As you requested, we have recently reevaluated potential community noise impacts based upon the planned hosting of wedding receptions at the north end of your residence *within the proposed room addition*." (Penardi Letter, page 1, emphasis added.)

Third, the letter fails to reflect any actual measurements of Project noise off the Project site. Instead, sound levels were measured "in the immediate vicinity of the music system loudspeakers," and the results calculated at a distance of 740 feet away using a theoretical formula that failed to take into account the actual terrain.

Not surprisingly, these theoretical predictions of inaudible noise are contradicted by the actual experience of nearby residents who report loud noise emanating from previous outdoor events at the Project site. (MND comment letters from Ken Liem, Derek Bayles, and Larry and Colleen Bass.) Their letters support a fair argument that the Project may have a significant impact on noise, requiring that an EIR be prepared.

The MND relies on a similar letter from consulting biologist, Steven G. Nelson, for its claim of no significant noise impact on sensitive wildlife. His letter is also fatally flawed in that it contains no actual measurements of any kind, only a theoretical estimate based on the questionable sound levels stated in the flawed Penardi letter and an unsourced reference to 60 dbA as "the noise level commonly used as a threshold for impacts to birds." Nor does Mr. Nelson's letter mention any "sensitive wildlife" other than birds.

Such slipshod analysis fails to provide the substantial evidence that CEQA requires to support the MND's conclusion of no significant noise impacts.

#### E. Impacts on Water Quality and Exposure to Hazardous Materials

These sections of the MND restrict consideration to “activities typical of residential uses,” and completely ignore the proposed agricultural and packing house impacts. This inadequate project description invalidates the MND. An EIR must be prepared, describing the types and intensities of the planned agricultural activities, along with their associated pollutants and hazards, such as pesticides and fertilizers, emitted into the environment and handled by the agricultural workers.

#### F. Exposure to Fire Hazard

The proposed project, located in a Very High Fire Severity Zone, clearly exposes large numbers of people attending the events to extreme fire hazards, as the recent history of uncontrollable wildfires in the area all too amply demonstrates. Yet the MND relies solely on the future preparation of fuel modification and fire protection plans to conclude that no significant impact will result. Preparation of such plans after Project approval can in no way prevent the significant exposure to fire hazard inherent in the very location of a project that literally invites large numbers of people into a known fire trap.

#### G. Impacts on Air Quality

While revealing that the region is significantly impacted in several categories of air pollution, the MND focuses on the proposed project’s individual contributions under residential standards, claiming that they constitute insignificant contributions to the existing impacted conditions and therefore require no mitigation. But CEQA requires examination of the project’s cumulative impacts, and the imposition of available mitigation measures to minimize them. Further, the analysis must include all of the proposed uses of the project, including commercial and agricultural.

The analysis of particulates due to fugitive dust also fails to address the long-term use of a dirt parking lot.

#### H. Impacts to Wildlife

Whiting Ranch Wilderness Park borders the subject property on the south. Impacts on wildlife due to light and noise from the Project must be properly analyzed in an EIR. As explained above, the cursory and threadbare noise analysis provided by Steven G. Nelson is restricted to birds and is based on the flawed analysis of the Penardi letter.

In conclusion, we urge your Board to support the thorough and consistently correct analyses and recommendations of the County’s planning staff and grant this appeal.

Please include this letter in the official record of this project.

Sincerely,

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Ray Chandos  
Secretary Treasurer  
Rural Canyons Conservation Fund

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Gloria Sefton and Rich Gomez  
Co-founders, Saddleback Canyons Conservancy