

Sour Grapes: The Grape Vineyard Planting Industry Faces Heightened Scrutiny from Land Use Regulatory Agencies

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A controversy concerning the expansion of vineyard development has been fermenting over the last several years among the verdant hillsides of California's premium wine grape growing regions. In response to a growing demand for premium California varietal wine grapes and a corresponding significant increase in price per ton, wine grape vineyard planting has increased at a very rapid rate, particularly in California's coastal counties. The explosive demand for specific appellations (geographic designations) and vineyard specific wines (terriors) has fueled the expansion of vineyard planting into previously designated open space, underutilized agriculture land, and converted grazing land. This expansion has caught the attention of local government officials who have begun to regulate vineyard expansion through the enactment of local vineyard development ordinances. In turn, state and federal land use and natural resource regulatory agencies have increased their scrutiny of vineyard development through the vigilant enforcement of existing natural resource laws and regulations.

Viewed for years in the same light as other California agriculture, the wine industry and the environmental impacts of vineyard development mostly avoided regulatory oversight. Recently, however, that has changed and vineyard developers now find themselves facing significant regulatory oversight. Some of this increased scrutiny is fueled by the fact that much of California's premium wine grapes are grown in some of California's most scenic, desirable, and biologically diverse geographic locations. Ironically, much of what gives California wine grapes their unique characteristics and high quality--their unique microclimate and geography--also is partially responsible for the increased scrutiny from government agencies. In addition, the premium wine grape growing regions often contain an activist citizenry with an interest in land use and natural resources. This combination has placed vineyard developers in a different position than other California agriculture because the potential impacts of rapid expansion are great, the local population is vocal and regulatory agencies are paying attention.

The Cast of Regulatory Characters

Regulation of land use and natural resource protection is the responsibility of all three levels of government: local, state, and federal. Often times, understanding where one jurisdiction ends and the other begins is like solving a complex puzzle. Each level of government can pass laws and adopt regulations that impact landowners. In the past, agricultural land uses, including vineyard development, were not subject to the same levels of land use and natural resource regulation. Times have changed. Now local governments, through locally adopted vineyard planting ordinances and the California Environmental Quality Act ("CEQA") regulate vineyard development and planning. Likewise, the State of California and the federal government both play a role in regulating vineyard planting and development through several state and federal land use and natural resource laws.

With a cast of regulators that includes the local, state and federal governments, the red-tape is abundant, complex and difficult to navigate. Beginning with a summary of the role local governments play, then assessing the state and federal roles in regulating vineyard development, this article attempts to unravel the red-tape.

The Local Response: Are Napa and Sonoma County Ordinances A Precursor?

In what could likely be a precursor to local ordinances throughout California's premium wine grape growing regions, Napa and Sonoma County have suffered through lawsuits and public debates in an attempt to regulate vineyard development. Napa County was the first local government to regulate vineyard development through its passage of its Hillside Ordinance in 1991 and adoption of accompanying Conservation Regulations. The new ordinance was partly the result of public concern regarding highly visible vineyard development on steep terrain. Napa County's Hillside Ordinance focuses on the impacts of erosion caused by hillside grading and its impact on water quality. As part of the Hillside Ordinance, no clearing of land for new agricultural uses can take place within specific setbacks from streams. (Napa County Conservation Regulations § 18.108.25). In addition, the County requires that proposed development for sites with ground slopes of 5% or greater are permitted only after County approval of Erosion Control Plans submitted by the applicant. (Napa County Conservation Regulations § 18.108.70).

In February 2000, Sonoma County passed the Vineyard Erosion and Sediment Control Ordinance ("Vineyard Ordinance") to establish erosion and sediment control, riparian setback and maximum slope requirements specifically for vineyard planting. The Vineyard Ordinance was the genesis of a very focused and vocal public controversy concerning the impact of vineyard expansion was having on the County. The requirements of the Vineyard Ordinance are very similar to Napa County's Hillside Ordinance. A proposed vineyard development requires the submission of notification to the County Agriculture Commission and the ordinance prohibits vineyards on hillsides with slopes greater than 50 percent, terrain so steep that few vineyards are planted anyway. The ordinance requires that growers have certified erosion- and sediment-control plans for vineyards planted on erodible hillsides with slopes of 15 percent to 50 percent. (Vineyard Ordinance § 30-70). Erosion-control plans must be prepared by civil engineers or other licensed professionals and submitted to the County's Agricultural Commissioners office. The Sonoma County version also requires setbacks from streams ranging from 25 to 50 feet. (Vineyard Ordinance § 30-72).

Both ordinances represent Sonoma and Napa County's attempt to control where and under what conditions vineyard development occurs. The other premium wine growing regions in California, including Lake County, Mendocino County, Monterey County, San Luis Obispo County and Santa Barbara County have either adopted or are planning to develop similar ordinances in response to public pressure to control vineyard development. Public interest organizations have taken a keen interest in vineyard development in many of these counties and are exerting pressure at the local level to add or strengthen local government regulation.

What about the California Environmental Quality Act?

As almost any land developer in California understands, improvement of land usually triggers review under CEQA. Under the Public Resources Code, CEQA was designed to allow public participation in government decision making and was conceived to require public agencies to consider the environmental impacts of its decisions. In general, CEQA only applies to projects where a public agency retains discretion to approve or disapprove the project. (Pub. Res. Code § 21080(a)). It was generally thought that compliance with local government vineyard development ordinances was outside of CEQA oversight because it was thought that the

approval of vineyard development typically does not require discretionary approval. However, in September 1999, the Sierra Club succeeded in its challenge of the Napa County Hillside Ordinance on the grounds that the County's approval of erosion control plans was discretionary. (see *Sierra Club v. Napa County*). As a result of the Sierra Club challenge, Napa County's approval of erosion control plans is now subject to CEQA review which significantly expands the environmental review process and the public input.

Sonoma County, on the other hand, believes that it crafted its Vineyard Ordinance to make it ministerial, similar to a building permit, and outside of CEQA. Specifically, under Sonoma County's ordinance, erosion control plans apply only to vineyards and are approved if they comply with the Vineyard Ordinance's standards. Sonoma County, through statutory craftsmanship, has attempted to limit CEQA's impact by taking any discretionary approval out of the process. So far this has been successful. However, other local governments and vineyard developers should be aware that as more local governments seek oversight of vineyard development, the more likely it is that CEQA will apply. Moreover, if CEQA is triggered, the financial impacts to the vineyard developer and to the local governments will likely increase exponentially.

The California Department of Fish and Game is Not Only About Fishing Licenses

In California, the Department of Fish and Game ("CDFG") is charged with protecting the biological resources within California through two different methods. First, the CDFG enforces the California Endangered Species Act. Second, the CDFG enforces Section 1603 and Section 5605 of the Fish and Game Code concerning impacts to streams within the state. Under the California Endangered Species Act, CDFG may authorize the incidental take of California endangered species through the issuance of 2081 incidental take permits. This process, will likely include dedications of mitigation acreage to off-set impacts to species.

Vineyard developers will most likely interact with CDFG through its Section 1603 Streambed Alteration Agreement program which makes it unlawful for any person to substantially divert or obstruct the natural flow or substantially change the bed, channel or bank of any river, stream or lake designated by the department, or use any material from the streambeds, without first notifying the department of that activity. (Fish & Game Code § 1603). The CDFG asserts broad jurisdiction under its Section 1603 program. CDFG's definition of a stream may not coincide with a landowner's definition of a stream.

For vineyard development it is imperative that landowners consider the role that CDFG may play in approving any work that will impact drainages, even seasonal ones, through grading or other development activities. The CDFG has increased its scrutiny of vineyard development activities in reaction to the same public opposition to vineyard expansion and development that triggered the enactment of local ordinances, as well as the more frequent occurrence of unauthorized impacts to streams or drainages.

Other State Agencies of Concern: The Regional Water Quality Control Board and the Department of Forestry

For the vineyard developer, several other state regulatory agencies may have jurisdiction over new vineyard development or expansion. Their involvement may be partially dictated by the types of impacts that the proposed expansion causes. For example, the Regional Water Quality Control Board ("RWQCB") and the California Department of Forestry ("CDF") both may play a role in vineyard development. The RWQCB regulates waters of the state to ensure water quality is not impacted by development activities through the Porter-Cologne Act and also implements a portion of the federal Clean Water Act through the Section 401 Water Quality Certification program.

The CDF regulates logging on privately-owned lands in California. These laws are found in the Forest Practice Act which was enacted in 1973.

The Timber Harvesting Plan ("THP") is the blueprint submitted by a landowner to CDF outlining what timber they want to harvest, how it will be harvested, and the steps that will be taken to prevent damage to the environment. In the past decade many vineyard developers converted forest land to vineyards. Not only is this conversion controversial, but it also requires compliance with CDF's reporting procedures and preparation of a THP.

The Federal Role: The Federal Clean Water Act and the Federal Endangered Species Acts.

Congress passed the Clean Water Act ("CWA") to restore and maintain the chemical, physical, and biological integrity of the nation's waters. (33 U.S.C. § 1251(a)). Under Section 404 of the Clean Water Act, the Army Corps of Engineers ("Corps") is charged with the duty to regulate "the discharge of dredged or fill material into the navigable waters..." 33 U.S.C. § 1344(a). For vineyard developers this means that any work done in streams and drainages is likely regulated, as well as grading conducted in adjacent wetlands and some ponds, provided some sort of fill material is discharged. The 404 permit program requires landowners to apply to the Corps and to obtain authorization from the Corps to discharge.

The Corps has increased its scrutiny of vineyard development due to the public outcry over perceived impacts to water quality caused by discharges and erosion associated with hillside grading. Vineyard developers should know that the type of permitting program is dictated by the level of impacts that are proposed, as the Corps has both a nationwide permitting program and an individual permitting program depending on the level of impacts.

The Endangered Species Act forms the basis for the federal protection of threatened plants, insects, fish and wildlife. The United States Fish and Wildlife Service ("Service") administers the Endangered Species Act on behalf of the United States. All federal actions, such as obtaining a Section 404 permit from the Corps, must comply with the Endangered Species Act. (16 U.S.C. 1536). The Endangered Species Act prohibits the "taking" of listed species, however, the Fish and Wildlife Service may issue incidental take permits for threatened and endangered species. (16 U.S.C. § 1539(b)). In instances where a federal permit is required, the action agency (for example the Corps) must consult with the Service to assess the potential impacts on protected species caused by the federal action.

For the vineyard developer, the federal Endangered Species Act may play a significant role where a federal permit is required. Typically, if grading activities in preparation for a new vineyard require the filling of a drainage ditch, pond, or wetland that is under the jurisdiction of the Corps, then the Endangered Species Act will be triggered and the Service will also have to review the proposed project. California hosts a plethora of listed species, and the old adage that one cannot lift a shovel in California without impacting an endangered species applies to vineyard developers as much as it does to housing developers.

Conclusion

As California's premium wines continue to gain international acclaim and the demand for premium varietals continues, the need to feed that demand by continued vineyard expansion will increase. However, the impacts of vineyard expansion activities must be taken into consideration and vineyard developers must ensure that they comply with the litany of laws and regulations that now govern vineyard development. The specific climate, terrain and geography that makes California's varietals so robust deserves nothing less.

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