

COUNTY OF CALAVERAS, STATE OF CALIFORNIA
PLANNING COMMISSION

RESOLUTION NO. 2015-019

>>A RESOLUTION FINDING THAT THE USE OF HAZARDOUS SUBSTANCES AT THE ASPHALT PLANT PROPOSED TO BE OPERATED AT THE HOGAN QUARRY WILL NOT HAVE A SIGNIFICANT EFFECT ON THE ENVIRONMENT, AND BECAUSE OF THAT DETERMINATION A CONDITIONAL USE PERMIT IS NOT REQUIRED PURSUANT TO CALAVERAS COUNTY CODE SECTION 17.42.035

WHEREAS, the Calaveras County Code, Section 17.42.035, requires that prior to a change of use, issuance of a business license, or issuance of a building permit, whichever occurs first, a project proponent shall submit to the county health officer or his designee a list or plan of all substances to be used or produced by the proposed business; and

WHEREAS, on May 18, 2015, the Calaveras County Air Pollution Control District received an application for an Authority to Construct for an asphalt plant at the site of the Hogan Quarry, 3650 Hogan Dam Road, Valley Springs, Assessor's Parcel No. 050-003-001, a change of use of the site; and

WHEREAS, pursuant to Section 17.42.035, the Health Officer shall review the plan or list of substances to determine if the type, method of use, or quantity of the substance(s) is such that there may be a significant effect on the environment associated with the substances; and

WHEREAS, the information submitted by the project proponent to complete the application for an Authority to Construct contained the information required by the Health Officer to complete his determination under Section 17.42.035; and

WHEREAS, on July 2, 2015, the Health Officer reviewed the application and determined that the asphalt plant's use of hazardous materials may have a significant effect on the environment; and

WHEREAS, Section 17.42.035 requires that when the Health Officer finds that there may be a significant effect he shall notify the Planning Director and requires approval and validation of a conditional use permit, regardless of whether the use is prescribed as a permitted use or a conditional use; and

WHEREAS, the applicants for the asphalt plant, Ford Construction and CB Asphalt, filed a timely appeal of that determination; and

WHEREAS, On August 13, 2015, the Planning Commission determined that the addition of an asphalt plant is a "change of use" triggering Section 17.42.035; and

WHEREAS, On August 13, 2015, the Planning Commission determined that the language of .035 is not plain and unambiguous and therefore requires analysis of legislative history to assist in its interpretation of the drafter's intent; and

WHEREAS, On August 13, 2015, the Planning Commission determined that Section 17.42.035 requires the Health Officer to notify the Planning Director if there may be a significant effect on the environment (as opposed to only if there is a significant effect on the environment) and that it requires the Planning Director to require a conditional use permit upon receiving such notification from the Health Officer; and

WHEREAS, On August 13, 2015, the Planning Commission determined that Section 17.42.035 is not unconstitutionally vague and is not an unlawful delegation of the Board's authority to the Health Officer; and

WHEREAS, On August 13, 2015, the Planning Commission determined that Section 17.42.035 requires the Health Officer to presume, in determining whether or not there may be a significant effect on the environment, that an applicant would abide by all laws and regulations that existed at the time of the proposed change of use and were relevant to the Health Officer's determination; and

WHEREAS, On August 13, 2015, the Planning Commission directed the EMA to assume applicant's compliance with existing rules and regulations for the purpose of the Health Officer completing his determination under Section 17.42.035 and to obtain from the project proponent whatever additional information it deems necessary to conduct that new analysis; and

WHEREAS, The Health Officer has duly attempted to obtain all additional information necessary to the new analysis and has duly re-analyzed applicant's proposed use applying the presumption directed by the Planning Commission, and his determination continues to be that the type, quantity, and/or method of use of hazardous materials proposed by the project proponent may have a significant effect on the environment; and

WHEREAS, the Planning Commission considered all of the information presented to it, including its staff report, information presented by the appellants and project proponent, and public testimony presented in writing and at the meeting;

BE IT THEREFORE RESOLVED, that the Planning Commission grants the project proponents' appeal, finding that—assuming project proponents' compliance with all relevant laws and regulations--there was not substantial evidence to support a finding that the project, by virtue of the type, quantity, and/or method of use of substances to be used in conjunction with it, may have a significant effect on environment, based on the following findings:

1. The County Health Officer must review with, in conjunction with a proposed change of use in the General Industrial (M2) zone, a list or plan of all substances to be used or produced by the proposed business.

Evidence: The proposed asphalt plant is a change of use at the Hogan Quarry. The Health Officer, who is also the Air Pollution Control Officer, obtained the necessary information about substances in the project proponent's application with the Air Pollution Control District for an Authority to Construct and in the project proponent's November 5 and November 30 submittals of additional information to the EMA.

2. The list of substances proposed to be used at the proposed asphalt plant includes asphalt, also known as bitumen, and diesel fuel.

Evidence: CB Asphalt submitted a list of substances to be used at the plant. Asphalt and diesel fuel are on the list of materials. These materials meet the definition of hazardous materials pursuant to the California Health and Safety Code, Chapter 6.95, Section 25501(n) (1) (2) et seq.

3. After considering all the evidence and testimony presented by project proponents and the Environmental Management Agency Administrator, acting as Health Officer, and assuming the project proponents' compliance with all relevant laws and regulations, there was no substantial evidence presented to the Planning Commission to support the Health Officer's determination that the type, method of use, and/or quantity of hazardous substances that will accompany the proposed change in use, such that there may be a significant effect on the environment.

Evidence:

Both the County's engineer and project proponents' engineer issued reports quantifying emissions and other potential hazards related to the proposed asphalt plant, and both reports concluded that there were not likely to be significant effects. While the Environmental Management Agency Director and the County's Public Health Officer have relevant training and experience, their documentation and reports were not as persuasive and did not include as much relevant quantification as the reports of the two engineers. The Environmental Management Agency Director testified that he interpreted 17.42.035 as requiring him to find that there may be a significant effect if there is any potential, however remote, for an accident or mechanical mishap involving hazardous materials. The evidence, including but not limited to the engineer's reports, suggests that the chances of an accidental release or mechanical mishap involving the asphalt plant that would result in a significant effect on the environment—and assuming project proponents' compliance with the myriad of applicable laws and regulations related to the project—is sufficiently remote to not trigger a finding of potentially significant impact under 17.42.035. The Planning Commission does not believe that the intended result of 17.42.035 is to require a CUP when the chance of a significant impact on the environment is as remote as the Commission finds it to be under these facts.

4. Section 17.42.035 of the County Code does not operate as unconstitutional delegation of its land use policymaking authority to the Health Officer.

Evidence: A County Board of Supervisors is endowed under California law with broad discretion to create land use policies within its jurisdiction. The language and legislative history of 17.42.035 evidence a policy decision by the Board of Supervisors to require otherwise permitted uses in industrial zones to obtain conditional use permits in those circumstances where materials or substances involved with the proposed use have the potential to significantly affect the environment. The Board of Supervisors lawfully implemented this policy by assigning its Environmental Health Officer, whose routine duties include the assessment and mitigation of risks pertaining to hazardous materials in the County, the task of reviewing a project proponent's proposed use of hazardous materials in industrial zones and determining whether this use involves a potentially significant effect on the environment.

5. Section 17.42.035 of the County Code is not unconstitutionally vague.

Evidence: Section 17.42.035 clearly and unambiguously requires a project proponent to provide the Health Officer with lists or plans describing substances and materials to be used in conjunction with the project. Section 17.42.035 does not prohibit any conduct by the public or subject the public to punishment for failure to comply with its terms.

PASSED AND ADOPTED by the Planning Commission of the County of Calaveras, at a regular meeting of the Planning Commission held on December 17, 2015 on a motion by Commissioner _____ and seconded by Commissioner _____.

AYES:
NOES
ABSTAIN:
ABSENT:

Chair, Planning Commission

ATTEST:

Peter N. Maurer, Planning
Director

The project files are available for public review in the Planning Department, County of Calaveras, Government Center, 891 Mountain Ranch Road, San Andreas, CA. 95249, between the hours of 8:00 a.m. and 4:00 p.m.