Andrew S. Grundman
Attorney at Law

ag@grundmanlaw.com

GRUNDMAN | LAW℠

Sazerac Building
Old Sacramento
928 2nd Street, Floor 3
Suite 301
Sacramento, CA 95814

Mailing Address:
1017 L Street #201
Sacramento, CA 95814

P:(916) 273-4811
F:(916) 273-4816

August 6, 2015

VIA ELECTRONIC MAIL & U.S. MAIL

Peter N. Maurer
Planning Director
Calaveras County Planning Department
891 Mountain Ranch Road
San Andreas, CA 95249
pmaurer@co.calaveras.ca.us

Brian S. Moss
Administrator
Calaveras County Environmental Management Agency
891 Mountain Ranch Road
San Andreas, CA 95249
bmoss@co.calaveras.ca.us

Re: Opposition to Appeal 2015-029D of CB Asphalt, Inc. and Ford Construction

Dear Mr. Maurer & Mr. Moss:

This office represents MyValleySprings.com, and we write in support of the Environmental Management Agency Administrator's (the "Administrator") determination that the proposed asphalt plant at the Hogan Quarry will involve the use of hazardous materials that may have a significant effect on the environment, and the Planning Director's determination that given the Administrator's finding, the asphalt plant requires a conditional use permit ("CUP"). We further urge Calaveras County to require a full environmental impact report in accordance with the California Environmental Quality Act ("CEQA").

A. Hot asphalt and asphalt fumes are hazardous substances; therefore, the proposed asphalt plant requires a CUP. The issuance of a CUP is a discretionary decision subject to CEQA.

Hot asphalt and asphalt fumes are hazardous substances that may have a significant effect on the environment. The proposed plant, therefore, requires a CUP. Calaveras County Code (the "Code") section 17.42.035 entitled "Hazardous or toxic materials" provides:

> 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. The health officer shall review the plan or list to determine if the type, method of use or quantity of substance(s) is such that there may be a significant effect on the environment associated with the substances. If there is a significant effect, the health officer shall notify the planning director. *Such uses shall require approval and validation of a conditional use permit, regardless of whether the use is prescribed as a permitted or conditional use in this chapter.*(emphasis added).

In other words, even if the proposed plant is a permitted use by right under the Code, because it will involve the use of a substance that may have a significant effect on the environment, it requires a CUP.

1. *Hot asphalt and asphalt fumes are hazardous substances that may have a significant effect on the environment.*

The California Health and Safety Code defines "hazardous material" as a material listed in California Health and Safety Code section 25501(n)(2) that, because of its quantity, concentration, or physical or chemical characteristics, poses a significant present or potential hazard to human health and safety or to the environment if released into the workplace or the environment. Cal. Health & Safety Code § 25501(n)(1). Hazardous materials include any substance listed in section 339 of Title 8 of the California Code of Regulations. *Id.* § 25501(n)(2)(D). Section 339 of Title 8 of the California Code of Regulations lists "[a]sphalt (petroleum) fumes" as a hazardous substance. "Any liquids; and products that could give rise to asphalt fume under normal conditions are included." Cal. Code Regs. tit. 8, § 339 n.6. Therefore, the proposed asphalt plant will involve the use of hazardous substances—hot asphalt and asphalt fumes—that pose a potential hazard to human health or to the environment under California law.

The U.S. Occupational Safety and Health Administration Hazard Communication Standard also considers hot asphalt to be a hazardous substance. *See* 29 C.F.R. § 1910.1200. The Hazard Summary for asphalt provides that hot material can cause severe eye and skin burns on contact, and hydrogen sulfide from heated material can accumulate in vapor space of tanks and containers. Contact between heated material and water can cause a violent eruption. Other states, such as New Jersey, also consider hot asphalt and asphalt fumes to be hazardous substances, and companies list asphalt on their material safety data sheets as required by federal and state law. *See* N.J. Dep't of Health & Senior Servs. Hazardous Substances Fact Sheet 1, April 2007, *available at*

nj.gov/health/eoh/rtkweb/documents/fs/0170.pdf; Tesoro Material Safety Data Sheet Asphalt 1, Nov. 29, 2010, *available at* www.montmech.com/hasp/MISC/MSDS/MSDS files\12007Asphalt.pdf.

In fact, CB Asphalt, Inc. and Ford Construction (collectively, "Appellants") admit hot asphalt and asphalt fumes are hazardous substances. In Appellants' attorney's June 24, 2015 letter to Mr. Moss, in response to his letter to Appellants dated May 29, 2015, Appellants listed "asphalt cement" as one of the materials the asphalt plant would use. And the Material Safety Data Sheet that Appellants submitted as Attachment 1 to the letter indicates the product "Petroleum Asphalt Cements," including "Asphalt Cements" and "Bitumen" pose known hazards: exposure to this product can be irritating to eyes, respiratory system and skin; heated material can cause thermal burns; heated material may liberate hydrogen sulfide; and long-term exposure to high concentrations of asphalt fumes may cause chronic bronchitis and pneumonitis. Similarly, in Appellants' attorney's letter to Mr. Maurer dated April 29, 2015, Appellants admit that the plant will use "standard liquid asphalt," which several governmental agencies regulate because it is a "material deemed hazardous."

It is surprising, therefore, that Appellants argue section 17.42.035 of the Code is unconstitutional because it vests the health officer with too much unilateral authority. *See* Appellants' July 7, 2015 Letter to Planning Commission Chair McLaughlin 5 [hereinafter Appellants' July 7 Letter]. As stated above, under California and federal law, hot asphalt and asphalt fumes are hazardous substances that may have a significant effect on the environment. Mr. Moss's determination under section 17.42.035 of the Code, therefore, is hardly based wholly on his judgment and experience. For the same reason, Appellants' argument that section 17.42.035 of the Code is unconstitutionally vague because it does not define "substances" is a nonstarter, as California law defines "hazardous material" by statute and regulation. Cal. Health & Safety Code § 25501(n)(1); Cal. Code Regs. tit. 8, § 339 n.6 (noting "[a]ny liquids; and products that could give rise to asphalt fume under normal conditions are included" in the list of hazardous materials).

2. *Because the proposed plant involves the use of hazardous substances that may have a significant effect on the environment, the Calaveras County Code requires a CUP.*

Once the Administrator determined that the proposed plant would involve hazardous substances that may have a significant effect on the environment—as he had to under California law—section 17.42.035 dictated the requirement of a CUP. "Such uses *shall require* approval and validation of a conditional use permit, regardless of whether the use is prescribed as a permitted or conditional use in this chapter." Code § 17.42.035 (emphasis added). The Code provides that the term "shall" in the Code "denote[s] mandatory." *Id.* § 8.05.050; *see also Tarrant Bell Prop., LLC v. Superior Court of Alameda Cnty.*, 51 Cal. 4th 538, 544 (2011) (finding "[u]nder 'well-settled principles of statutory construction,' we 'ordinarily' construe the word 'may' as permissive and the word 'shall' as mandatory").

In short, Mr. Maurer's determination in his July 2, 2015 letter to Appellants is correct. Because Mr. Moss found the proposed plant would involve the use of hazardous substances that may have a significant effect on the environment, the Planning Director was "required by ordinance" to inform the Appellants "that approval and validation of a conditional use permit through the Planning Department will be required as a precondition to constructing or

operating an asphalt plant at Hogan Quarry."

Appellants' resort to the legislative history of section 17.42.035 is unnecessary. *See generally* Appellants' July 7 Letter 8–9. When the California Supreme Court must determine whether a statute is sufficiently specific to meet constitutional standards, the court looks "first to the language of the statute, then to its legislative history." *People v. Rubalcava*, 23 Cal. 4th 322, 332 (2000). California courts cannot consider the legislative history where the language of the statute is clear on its face. *Cnty. of Sacramento v. Llanes*, 168 Cal. App. 4th 1165, 1176 (2008). Because section 17.42.035 of the Code is clear on its face, requiring a CUP for any substance that may have a significant effect on the environment, as defined by California law, the legislative history of section 17.42.035 is irrelevant.

Regardless, Appellants' resort to legislative history is unavailing. Appellants argue the legislative history shows the drafters of section 17.42.035 intended the section to apply only to manufacturers of hazardous or toxic materials. That is exactly what Appellants are—manufacturers of asphalt—and California law defines liquid asphalt and asphalt fumes as hazardous. Moreover, Appellants' proposed test of streamlining approval for hazardous substances that "would not have a significant effect on the environment" misreads section 17.42.035, which requires a CUP whenever there "may be a significant effect on the environment." Indeed, the County cannot be certain what effects the proposed plant may have on the environment without an environmental impact report.

The July 23 Engineering Evaluation released by the Air-Pollution Control District regarding the Authority to Construct (the "Evaluation") is flawed, and the County cannot rely on it. First, the Evaluation included EPA estimates of toxic air pollutants for batch plants, not drum mix plants, and Appellants described the project on page 23 of the Evaluation as a "Drum-Mix Asphalt Concrete Hot Plant." A drum-mix plant operates continuously rather than manufacturing asphalt in batches. By operating without interruption, a drum-mix plant produces almost double the output of a batch plant, more than 300 hundred tons per hour, resulting in significantly greater emissions than a batch plant. EPA, Office of Air Quality Planning and Standards, Emissions Monitoring and Analysis Division, *Hot Mix Asphalt Plants - Emission Assessment Report* 1, December 2000, *available at* www.epa.gov/ttnchie1/ap42/ch11/related/ea-report.pdf (noting a drum mix plant produces about 200,000 tons of hot mix asphalt per year compared to a batch plant, which produces approximately 100,000 tons per year). Second, none of the tables in the Evaluation list hydrogen sulfide, which hot mix plants emit at significant levels. *See* N.C. Div. Air Quality Toxics Protection Branch Air Toxics Analytical Support Team Investigation No. 01007 and 01008, Aug. 29, 2003, at ix, *available at* http://www.ncair.org/toxics/studies/salisbury/Salisbury_final_report.pdf. Nor does the Evaluation address air pollutants emitted by trucks. The Appellants' admit the plant may utilize over 10,000 trucks annually, to haul liquid asphalt and reclaimed asphalt payment to and from the plant. The proposed plant, therefore, requires a more complete and accurate environmental review.

3. The issuance of a CUP is a discretionary decision that requires CEQA review.

The Planning Director's determination that a CUP is a precondition to construction or operation of the asphalt plant compels CEQA review. A "conditional use permit" is a "land use permit issued in a zone for uses which have the potential to be incompatible with neighboring

land uses and zoning and are to be permitted following a public hearing in which interested parties have the opportunity to comment." Code § 17.06.0560. Whether to issue a CUP is a discretionary decision. *See Kay v. City of Rancho Palos Verdes*, 504 F.3d 803, 810 (9th Cir. 2007) (holding "[t]he decision whether to issue a conditional use permit is 'discretionary by definition'") (quoting *Breakzone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205, 1223 (2000); *San Remo Hotel v. City & Cnty. of S.F.*, 27 Cal. 4th 643, 695 (2002) (finding "[w]hether to issue a conditional use permit is an adjudicative decision that is exercised at the discretion of the planning commission").

CEQA applies to discretionary projects approved by public agencies, including the issuance of conditional use permits. *Friends of Sierra Madre v. City of Sierra Madre*, 25 Cal. 4th 165, 185 (2001). Accordingly, CEQA requires an environmental impact report for the proposed asphalt plant, a project involving the discretionary decision of the Calaveras County Planning Commission to issue a CUP. *See Miller v. City of Hermosa Beach*, 13 Cal. App. 14 1118, 1131 (1993) (finding CEQA requires an environmental impact report in connection with discretionary projects to be approved by public agencies, including the issuance of conditional use permits).

a. Now is the appropriate time for an Environmental Impact Report.

Appellants argue CEQA applies only to "private activities that are authorized by a public agency," arguing CEQA review is premature at this time. *See* Appellants' July 7 Letter 4 (citing *Neighbors for Fair Planning v. City & Cnty. of S.F.*, 217 Cal. App. 4th 540 (2013)). Under CEQA, however, "local agencies must prepare or cause to be prepared, certify as complete, and consider a final EIR *before* approving or disapproving any project they propose to 'carry out or approve,' if the project may have significant environmental effects. *Neighbors for Fair Planning*, 217 Cal. App. 4th at 547 (emphasis in the original). The County should not delay an environmental impact report "beyond the time when it can, as a practical matter, serve its intended function of informing and guiding decision makers." *Id.* Appellants argue the County has not committed to the project "if it retains the ability to later modify or reject the application for a discretionary entitlement." Appellants' July 7 Letter 4. The Supreme Court of California expressly rejected that argument. *See Save Tara v. City of West Hollywood*, 45 Cal. 4th 116, 135 (2008) (finding a "public entity that, in theory, *retains legal discretion to reject a proposed project* may . . . have as a practical matter committed itself to the project") (emphasis added).

Approval of a private project occurs "upon the earliest commitment to issue or the issuance by the public agency of a discretionary contract, grant, subsidy, loan, or other form of financial assistance, lease, permit, license, certificate, or other entitlement for use of the project." 14 C.C.R. § 15352(b). In other words, approval occurs "when the agency *first* exercises its discretion to execute a contract or grant financial assistance, not when the *last* such discretionary decision is made." *Neighbors for Fair Planning*, 217 Cal. App. 4th at 548 (emphasis in the original). The issuance of a CUP, therefore, would constitute "approval" of the asphalt plant under California law, and the County must prepare an environmental impact report before issuing the CUP. *Id.* at 547.

To summarize, CEQA review and an environmental impact report are inevitable preconditions of the Appellants' proposed asphalt plant. California law compels the conclusion that hot asphalt and asphalt fumes are hazardous substances that may have a significant effect on

the environment. As such, the Code requires the County to approve and validate a CUP. Whether to issue a CUP is a discretionary determination by definition, which requires CEQA review and an environmental impact report. Accordingly, the Planning Commission should deny the Appellants' appeal.

Very truly yours,

GRUNDMAN | LAW℠

Andrew Grundman
Attorney at Law