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December 29, 2015

VIA HAND DELIVERY

Clerk of the Board of Supervisors
Calaveras County
891 Mountain Ranch Road
San Andreas, CA 95249-9709

Re: Appeal of Planning Commission Determinations
Ford Construction and CB Asphalt Appeal 2015-029D

Dear Clerk of the Board of Supervisors:

This office represents Joyce Techel, President, MyValleySprings.com ("Techel"). In accordance with section 17.98.040 of the Calaveras County Code (the "Code"), we write to appeal the December 17, 2015 decisions of the Calaveras County Planning Commission in granting the above-described appeal[1] by appellants Ford Construction and CB Asphalt (jointly and hereinafter, "Applicant") and adopting Resolution No. 2015-019. The Planning Commission erred when they: 1) Permitted Applicant to withhold information from the Health Officer,[2] interfered with the Health Officer's inquiry, completely ignored his findings and then reviewed the substance of his findings without jurisdiction; 2) Acted *ultra vires*[3] of the authority granted them by the Board of Supervisors; 3) Abused their discretion by basing their findings on flawed, faulty, and erroneous reasons and evidence; 4) Intentionally applied a tortured interpretation of the Code; and 5) Failed to address CEQA issues.

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[1] We note that in applicant's appeal of July 10, 2015, they reference a combined appeal and payment for two appeals. However, we are appealing the outcome of the above-described appeal which constitutes a single appeal.
[2] Health Officer is defined pursuant to § 17.06.0960 and § 16.03.180; authority has been delegated to the Environmental Management Agency Administrator pursuant to §2.22.060 and Resolution 94-433. Throughout this appeal, "Health Officer" will refer to the EMA Administrator unless otherwise noted.
[3] Latin, meaning "beyond the powers."

By letter dated August 6, 2015, supplemental comment letters dated August 29, 2015, November 30, 2015, December 5, 2015 and December 9, 2015, and public testimony by Techel and MyValleySprings.com, Techel has participated in the administrative process, and has standing pursuant to section 17.98.070(A) of the Code to file this Appeal.

The Planning Commission's decision is highly prejudicial and injurious to the over 500 people who reside within a mile of the proposed plant, and to the people who depend on the water source just 800 feet from the plant; who will not have the benefit of conditions on a use permit to protect their health, safety, and well-being, and who will not have the thorough analyses from an environmental impact report to help properly craft those necessary conditions.

Background[4]

Code § 17.42.035 requires the County Health Officer to review plans for uses in the M2 zone 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". The Director of Environmental Health is delegated this authority by the Board of Supervisors.

On May 18, 2015 the Calaveras County Air Pollution Control District ("CCAPCD") received an application from Ford Construction and CB Asphalt for an Authority to Construct an asphalt plant at the Hogan Quarry in Valley Springs, which constituted a "change of use." The CCAPCD deemed the initial application incomplete on May 29, 2015. Applicant resubmitted their application on June 25, 2015.

Following review of the re-submitted application, the Environmental Management Agency Administrator,[5] acting as the Health Officer, reviewed the proposed type, quantity, and method of use of materials and substances for the asphalt plant, and determined there may be a significant environmental effect.

On July 2, 2015, the Health Officer transmitted his finding to the Planning Director. Pursuant to Code §. 17.42.035, The Planning Director notified Applicant they were required to obtain a conditional use permit. Applicant appealed these determinations to the Planning Commission. Subsequent to filing their appeal, Applicant was advised they had not yet submitted all information required pursuant to §17.42.035. On or around August 24, 2015 Applicant and EMA mutually developed a letter requesting additional information.

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[4] This background is informational. *See generally* Aug. 13 and December 10, 2015 Staff Reports.

[5] California Health & Safety Code section 101280 states, "Each agency shall employ as the immediate supervisor of the environmental health and sanitation services a director of environmental health who is a registered environmental health specialist and the agency shall employ an adequate number of registered environmental health specialists to carry on the program of environmental health and sanitation services."

As of December 10, 2015,[6] Applicant had still not yet submitted complete and consistent information to Health Officer. To date, there is no record Applicant ever submitted all information they agreed to provide.

1. **The Planning Commission Failed to Proceed in Accordance with the Law by Permitting Applicant to Withhold Information from Health Officer, by Interfering with Health Officer's Investigation and Analysis of Potential Effect of Hazardous Materials, by Completely Ignoring Health Officer's Findings, and by Reviewing the Substance of the Health Officer's Findings Without Jurisdiction**

   A. Applicant Failed to Comply with County Code by Withholding Information from the County Health Officer.

County Code requires Applicant to provide a "list or plan of all substances to be used or produced" to the County Health Officer. (See Code § 17.42.035). As of the December 10, 2015 Planning Commission meeting, Applicant had not yet provided either a consistent or complete list of hazardous materials to be used or produced by the project. (See Dec. 10, 2015 Staff Report at 2). This list was not some onerous task unilaterally forced onto Applicant. Rather, Applicant and Staff worked together developing a letter with terms agreed to between Health Officer and Applicant on or around August 24, 2015. (See Dec. 10, 2015 Staff Report at 2).

Through this jointly developed letter, Applicant and Applicant's counsel assured their cooperation with the Health Officer's inquiry into Hazardous Material use and production at Applicant's property. However, despite these assurances, Applicant never provided complete or consistent information as agreed to in the letter. Consequently, because they withheld information necessary for the Health Officer's determination, information the Code requires to be provided, Applicant's failure to provide information means they also failed to comply with Code § 17.42.035.

The Planning Commission erred and did not proceed in accordance with the law when they upheld Applicant's Appeal despite the fact Applicant failed to provide information to the Health Officer required by Code § 17.42.035.

   B. The Planning Commission Unlawfully Interfered with the Health Officer's Investigation and Analysis of Potential Effect of Hazardous Materials

[6] The date the Planning Commission voted to uphold Applicant's Appeal.

The Planning Commission was fully aware Applicant had not complied with Code requirements and had not yet provided all required information. (See Dec. 10, 2015 Staff Report at 2). The Planning Commission, in full knowledge Applicant was non-compliant, did not require Applicant to comply with the Code, but instead directed and instructed the County Health Officer to modify his methodology and inquiry into whether Applicant's use of Hazardous Materials may have an effect on the environment.

First, as will be explained further later in this document, the Planning Commission has no jurisdiction or authority over the Health Officer pursuant to the Code. Nothing can be found in the language of Code § 17.42.035 granting the Planning Commission authority to oversee the duties of the Health Officer.

To the contrary, the Code makes it abundantly clear that the Health Officer is under a completely different agency than what the Planning Commission has authority over. The Health Officer has "...general supervision over all matters pertaining to the health and sanitary conditions of the county." (emphasis added)(Code § 2.20.010).

In fact, the Health Officer's duties relate solely to "health" and are not related to "planning." Rather his duties are specifically "...to enforce the provisions of...[Title 17] ...pertaining to the maintenance and use of property, structures and buildings so far as matters of health are concerned." (emphasis added)(Code § 17.100.020).

In comparison, the Planning Department, its Director and representatives "...shall enforce the provisions of... [Title 17] ...pertaining to the use of land and structures and all other provisions not specifically covered by this chapter."(emphasis added)(Code § 17.100.030). Because the Health Officer's duties are "specifically covered," they do not fall under the rubric of "planning." When drafting the Code, the Board of Supervisors specifically provided that the Health Officer would operate independently from the Planning Department.

Because the Code clarifies the Planning Department's duties do not include matters of "health," and because the Code states "health" concerns are the purview of a different agency, there is no logical basis the Planning Commission would have any authority to direct or instruct the Health Officer in the discharge of his duties pursuant to the Code.

There is further evidence in the Code that the Planning Commission had no authority to instruct or direct the Health Officer in the discharge of his duties:

> "Planning commission" means the seven-member body appointed by the board of supervisors to review planning permit requests pursuant to the county code." (emphasis added)(Code § 17.06.1490)(See also Code § 16.03.340).

Nowhere in these sections, nor anywhere else in the Code is the Planning Commission granted any authority over the Health Officer.[7] In § 17.06.1490 the Board of Supervisors granted the Planning Commission authority to "review." In that same section, however, they limited their authority to review "pursuant to the county code." Although this section is silent as to having authority over other agencies, the limitation of "pursuant to the county code" definitely does not grant the Planning Commission any authority to direct or instruct the Health Officer in the discharge of his duties.

The mere fact a section of Code addressing land use issues requires an applicant to provide information to the Health Officer would not, even under the most twisted possible interpretation, somehow grant the Planning Commission authority over an Administrator of an unrelated agency. Health concerns are distinctly different that planning concerns. In drafting the Code, the Board of Supervisors recognized this distinction by granting authority for a health determination not to the Planning Department, but to the Health Officer, a properly educated and qualified person.[8]

The Planning Commission, whose concern is limited to planning and land use, has no authority pursuant to the Code, nor do they have any qualifications that would justify them interfering with the Health Officer's duties. Nothing in the Code can be logically construed to grant the Planning Commission jurisdiction over the Health Officer, let alone authority to direct and instruct the Health Officer on the methodology used to review a county health issue.

The Planning Commission, somehow mistakenly believed the Board of Supervisors granted them jurisdiction over the Administrator of an unrelated agency, interfered with the duty of, and directed, the Health Officer in the discharge of his duties.

Through their extra-jurisdictional actions, the Planning Commission did not proceed according to the law, and instead stepped far beyond its jurisdictional boundaries and usurped the authority granted by the Board of Supervisors.

a. Despite the Planning Commission's Unlawful Interference and Incomplete Information from Applicant, the Health Officer Still Determined There May be a Significant Effect on the Environment, of Which the Planning Commission Completely Ignored

By failing to provide required information to the Health Officer, Applicant failed to comply with Code § 17.42.035. Although the Planning Commission was made fully aware that Applicant

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[7] In fact, even the "Organization of Calaveras County Government" Chart (As of June 30. 2013) shows they are distinct and separate agencies under the Board of Supervisors. (See Exh. "A").

[8] Code § 2.22.070 specifically state "The director shall possess the minimum qualifications specified in Title 17, Section 1355, Subchapter 2, Article 2 of the California Code of Regulations. Note that the Board of Supervisors codified that the Director of Environmental Health was granted the powers of the Health Officer pursuant to Code § 2.22.060 and Resolution 94-433.

had not provided required information, and consequently was not in compliance with the requirements of § 17.42.035, the Planning Commission nonetheless forced the Health Officer to make his hazardous material determination using incomplete information.

Accordingly, the Health Officer made his determination based only on the incomplete and inconsistent information provided by Applicant as to whether "based on the type, method of use and quantity of hazardous materials proposed – may have a significant effect on the environment.[9] Despite the fact that Applicant failed to provide the required information, the Health Officer was still able to determine Applicant's project "may have a significant effect on the environment." (Dec. 10, 2015 Staff Report at 2).

Ultimately, the Health Officer reaffirmed during testimony at the Dec. 10, 2015 appeal that "...EMA cannot rule out the potential for the substances proposed to be used by the applicant... to have a significant effect on the environment." (Dec. 10 Staff Report at 2). However, despite testimony by the Health Officer, Staff Reports, and even a letter personally signed by Health Officer Dean M. Kelaita concurring with the EMA Administrator's determination, the Commission found "...there was no substantial evidence presented to the Planning Commission to support the Health Officer's determination." (Dec. 17, 2015 Resolution No. 2015-019 at 3, point. 3, "evidence")

Despite the Planning Commission's meddling with the Health Officer's inquiry, despite numerous pages of staff reports, despite testimony by the EMA Administrator, and despite a letter personally from the County's Health Officer that there may be a significant effect on the environment, members of the Planning Commission apparently believe the Board of Supervisors and general public would accept that no substantial evidence[10] exists to support the Health Officer's determination.

There is no logical basis for the Planning Commission to state that a determination resulting from hours and hours of work by an Agency Administrator and its staff, as well as planning staff, and even the County Health Officer equated "no substantial evidence." To do so requires the Planning Commission to completely ignore all of the work done by numerous county employees, an agency administrator and the Health Officer personally.

There can be no doubt the Commission didn't want a result requiring Applicant to adhere to the Code[11] and be required to apply for a conditional use permit. Rather than determining Applicant's appeal by reviewing the matter in compliance with the law, they instead "hung their hats" on incomplete and inconsistent information both in the engineer's reports and the Applicant's submissions to the EMA, while at the same time completely ignoring substantial evidence provided in the Staff Report, Testimony of EMA Director, and ultimately ignoring the

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[9] As reflected in the Dec. 10, 2015 Staff Report. To date, no record exists indicating Applicant provided complete information.
[10] Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (See Richardson v. Perales, 402 U.S. 389, 401 (1971), quoting from Consolidated Edison Co. v. NLRB, 305 U. S. 197, 229 (1938).
[11] See later in this appeal discussing Commissioner Tunno's statement "We voted that we didn't agree with the conclusions, regardless of the words chosen by staff to support its position."

existence of the submission by the County Health Officer himself.

b. Because There Was Even a Single Determination of May Be a Significant Impact, under the "Fair Argument" Doctrine the Planning Commission is Mandated to Require Environmental Review Despite Finding Contrary Evidence

Although CEQA implications are discussed later in this appeal, it is important to note that the Planning Commission did not have the discretion to favor the Applicant's arguments and simply ignore the County Health Officer's determination. This is because Code section 17.42.035 borrows language from the CEQA process insofar as the requirement to determine whether a project may have a significant effect on the environment. (See CEQA Guidelines Section 15064).

When the Code is reviewed relative to CEQA, it becomes clear that the language of 17.42.035 was based at least partially on CEQA Guidelines section 15063, "Initial Study." Accordingly, the doctrine of the "Fair Argument" standard would apply. Under this standard, if it can be fairly argued, based on substantial evidence and in light of the whole record that a project may have a significant environmental effect, then CEQA requirements cannot be avoided.

Here, although the Planning Commission chose to ignore the arguably substantial evidence provided by County Staff, EMA Administrator and even the actual Health Officer, they cannot circumvent the fact that (regardless of how many experts say to the contrary) there is evidence on the record that the project may have a significant environmental effect.

Because the language of 17.42.035 tracks CEQA, and through implementation of the Fair Argument standard, the Planning Commission cannot find a conditional use permit is not required when there is evidence on the record that a project may have a significant environmental effect.

C. Not Only Did Applicant Fail to Provide Complete Information to Health Officer Pursuant to § 17.42.035, They Subsequently Failed to Appeal the Requirement

As explained earlier, Applicant did not comply with Code § 17.42.035 because they failed to provide information to the Health Officer, even despite a mutually-developed letter assuring the Applicant would provide such information. Note that Applicant, however, did not appeal the requirement to provide this information.

Applicant only appealed two issues to the Planning Commission: 1) that "the Calaveras County Environmental Management Agency ("EMA") Administrator's determination that the

'applicant's proposal to add a Hot Mixed Asphalt Plant will involve the use of a hazardous material that may have a significant effect on the environment...'", and, 2) that "the Calaveras County Planning Director's July 2, 2015, determination that '[b]ecause the Health Officer did make this finding...' the Asphalt Plant required the issuance of a CUP."

Neither of these issues appeal the requirement Applicant is required to provide information to the Health Officer[12] to determine that "based on the type, method of use and quantity of hazardous materials proposed – may have a significant effect on the environment." (Dec. 10, 2015 Staff Report at 2)(See also Code § 17.42.035).

Compliance with County Code by Applicant was triggered on May 18, 2015 when Calaveras County was notified of an intended *change of use* of Hogan Quarry, when Ford Construction/ CB Asphalt applied for an Authority to Construct[13] with Calaveras County Air Pollution Control District. Pursuant to Code § 17.42.035, "...prior to a change of use...," Applicant was required to submit to the county health officer a list or plan of all substances to be used.

Applicant is required to provide the county health officer a "list or plan of all substances to be used or produced." Code § 17.42.035. Applicant and EMA met and jointly developed a letter delineating information regarding obtaining information Applicant failed to provide. (See Planning Commission Staff Report, Dec. 10, 2015 at 2). This letter was formally dispatched to Applicant on August 24, 2015. (See Planning Commission Staff Report, Dec. 10, 2015 at 2).

Even despite jointly developing a letter concerning the requesting information, Applicant failed to fully provide the information by November 5, 2015. (See Planning Commission Staff Report, Dec. 10, 2015 at 2). Although Applicant finally did provide some information, they failed to provide all requested (and "jointly developed") information to the Health Officer. (See Planning Commission Staff Report, Dec. 10, 2015 at 2).

> "The Director of Environmental Health and staff reviewed the additional information submitted by the applicant and found it to be <u>both incomplete and inconsistent</u> with prior information they submitted." (emphasis added) (Planning Commission Staff Report, Dec. 10, 2015 at 2).

Applicant's failure to provide required information on November 5, 2015 triggered yet another communication from EMA to Applicant on November 24, 2015, concerning "deficiencies in the information received November 5..." (Planning Staff Report, Dec. 10, 2015 at 2).

On November 30, 2015, EMA finally received some additional information from Applicant. Unfortunately, Applicant continued with their failure to provide complete information:

> "[T]he Director of Environmental Health and staff reviewed the additional information submitted by the applicant on November 30 <u>which still did not address all of the information</u>..." (emphasis added)(Planning Commission Staff

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[12] Note Applicant's time to appeal this requirement would have expired within 15 days of the EMA Administrator's determination. (See § 17.98.020).

[13] Note they constructed the plant in violation of County Code §17.100.060 and CEQA and <u>not</u> "prior to a change of use"

Report, Dec. 10, 2015 at 2).

In fact, as noted five times by the Health Officer at the December 10, 2015 Commission meeting, the Applicant has to date failed to provide complete information and clarify their inconsistencies. (December 10, 2015 Planning Commission Meeting Video, Part 1 and 2, http://calaverascap.com/video/).

There is no question Applicant failed to provide information as required by Code. Applicant did not appeal this requirement, they instead appealed the EMA Administrator's determination based on information provided by Applicant, when it is on record that Applicant failed to provide full information to the EMA Administrator.

D. The Planning Commission Erred by Permitting Appeal of a Determination When the Planning Commission Was Aware Applicant Had Failed to Comply With the Code Requiring Applicant to Submit Information to the Health Officer

The Planning Commission erred by even addressing the appeal about the Health Officer's determination when they knew Applicant had not complied with Code by providing full information. The Planning Commission should have simply denied Applicant's appeal because Applicant failed to comply with Code by withholding required information from the Health Officer. As noted earlier, Applicant failed to appeal the requirement to provide information in compliance of Code § 17.42.035.

It is axiomatic that compliance with the information production stage of code section 17.42.035 is necessary prior to the Planning Commission making a proper finding that a permit is not needed. Without a complete and detailed list of the hazardous materials, amounts, and uses, and without other complete and consistent information required and requested, the Planning Commission cannot make a logical finding that further review or a permit is not necessary.

The Planning Commission did not proceed in accordance with the law when they upheld Applicant's appeal despite their knowledge Applicant did not comply with § 17.42.035 requiring information to be provided to the Health Officer. Further the Planning Commission did not proceed in accordance with the law when Applicant failed to appeal the requirement to provide necessary information to the Health Officer.

By the Planning Commission upholding Applicant's appeal, despite the fact they did not even comply with the Code section their appeal was based on, the Planning Commission effectively rewrote County Code by exempting Applicant from compliance with the law when no such exemption may be found in the Code. The Planning Commission exceeded the authority granted by the Board of Supervisors, and accordingly, did not proceed in accordance with the law.

2. The Planning Commission Actions Were *Ultra Vires* of Authority Granted by the Board of Supervisors

A. The Planning Commission Has No Jurisdiction or Authority Over the Health Officer and Consequently the Planning Commission Had No Jurisdiction to Hear Applicant's Appeal of the Health Officer's Determination

On July 10, 2015, Applicant filed a combined appeal of two issues to the Planning Commission. Their first appeal was that:

> "...the Calaveras County Environmental Agency ("EMA") Administrator's July 2, 2015 determination that 'applicant's proposal to add a Hot Mixed Asphalt Plant will involve the use of a hazardous material that may have a significant effect on the environment...'" (July 10, 2015 Applicant Appeal Letter at 2)

Applicant filed this appeal pursuant to Code section 17.98.020, which provides:

> "A decision of any planning staff member may be appealed to the planning commission by following the appeal procedures in Section 17.98.070, (emphasis added)(Code § 17.98.020).

Unfortunately for Applicant, the EMA Administrator is not a "planning staff member." At no point does Applicant allege that somehow the EMA Administrator is a member of the Planning Staff, save the implication that they filed their appeal pursuant to this section. Neither the EMA, nor its Administrator is a "planning staff member."

In fact, the EMA Administrator, for the purpose of his appealed determination was performing "...such powers, duties, functions, and responsibilities as necessary to conduct and carry out environmental health and sanitation programs..." as delegated to him by the County Health Officer. (See Code § 2.22.060, See also Resolution 94-433 (as referenced in § 2.22.060). In other words, the Director of Environmental Health was acting on behalf of the County Health Officer.

Pursuant to Code and Resolution No. 94-433, "...the county health officer delegated to the director of environmental health such powers, duties, functions, and responsibilities as necessary to conduct and carry out environmental health and sanitation programs." (Code § 2.22.060). In other words, pursuant to 17.42.035, the Director of Environmental Health was acting on behalf of the County Health Officer.

The Health Officer is not a "planning staff member." The duties of the Health Officer are only of enforcement pertaining to matters of health regarding the use of property:

"It is the duty of the county health officer or his authorized representative to enforce the provisions of this title pertaining to... use of property... so far as matters of health are concerned." (emphasis added)(Code § 17.100.020).

The Health Officer's duties are distinctly different from the Planning Department. Where the Code specifically grants the Health Officer authority over matters of "health" (including "health" factors concerning the "use of property," The Planning Department (and its staff) do not have any authority over "health" factors and their authority is expressly limited and exclude "health" as they are only empowered to enforce "use of land... not specifically covered by this chapter."(Code § 17.100.030).

Section 17.42.035 makes it clear that "prior to a change of use... a project applicant 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." In other words, as part of the process of a "change of use," an applicant must submit information, not to the planning department, but to the Health Officer,[14]

Even further, Health Officer Dean M. Kelaita, M.D. is a member of Calaveras Public Health Services under the Calaveras Health and Human Services Agency. Similarly, the Environmental Management Agency Administrator is Jason Boetzer. Neither person nor their respective department are subordinates of the Calaveras County Planning Department. They clearly and definitely cannot be considered "planning staff members."[15]

Because neither the Public Health Services nor the Environmental Management Agency are under the control of the Planning Department, the Planning Commission had no authority to review the determinations made by the Health Officer. They had no authority to instruct EMA to "redo" its determination based on the personal opinions of members of the Planning Commission. Their acts of both instructing the Health Officer to revise their findings and also of determining the validity of their findings were ultra vires because the members of the Planning Commission simply had no legal authority to do so.

In other words, Applicant filed an appeal with the Planning Commission concerning the determination made by the Health Officer. Pursuant to Code, the Planning Commission is only authorized to review determinations made by planning staff. They failed to act in accordance with the law by hearing an appeal based on the substance of a determination made by an unrelated agency without the legal authority to do so.

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[14] As noted "or his designee," which would be EMA Administrator pursuant to 2.22.060 and Reso 94-433
[15] Refer to Exh. "A"

B. When the Planning Commission Directed and Instructed the Health Officer on Methodology of his Hazardous Material Inquiry, the Planning Commission Essentially Rewrote the Code, Usurping a Board of Supervisor Function

As explained earlier, the Board of Supervisors did not enact Code authorizing the Planning Commission with authority over the Health Officer, or for that matter, the Environmental Management Agency. When the Planning Commission directed and instructed the Health Officer to consider that the Applicant would "...assume project proponents' compliance with all laws and regulations..." (Resolution 2015-019 at 2), along with other instructions and directions given to the Health Officer at the August 13, December 17, 2015 meeting and other meetings, they exceeded the authority granted them under the Code, and by requiring the Administrator of another agency to follow their instructions, they essentially invented authority for themselves that simply doesn't exist in the Code. Additionally, by requiring the Health Officer to consider factors not in the Code, the Planning Commission usurped a function of the Board of Supervisors and did not proceed according to the law.

C. In Contravention of State Law, the Planning Commission Applied the Burden of Proof to the Wrong Party, and Applicant Failed to Meet Its Burden of Proof

Historically, the burden of proof has been referenced as *semper necessitas probandi incumbit ei qui agit*, or more simply, "the necessity of proof always lies with the person who lays charges." (here, , the Applicant). As a general rule, the "party desiring relief" bears the burden of proof.. (See Aguilar v. Atlantic Richfield Co., (2001) 24 P.3d 493, 871 citing Buss v. Superior Court (1997) 16 Cal.4th 35, 53-54, 65 Cal.Rptr.2d 366, 939 P.2d 766 [so holding under Evid.Code, §§ 115 & 500, as to the quantum and placement of the burden of proof, respectively].)

The Planning Commission was fully aware the burden of proof is on the appellant because County Counsel instructed them during the Applicant's appeal:[16]

> "That would be my advice to the planning commission. In general, an appellant would have the burden of proof of proving that there is no potential for significant impact. I would just ask in framing the record and sending your decision you keep that legal burden of proof in mind." (See Dec. 10, 2015 Video of Calaveras Planning Commission [supplied by Calaveras Public Access TV] at http://calaverascap.com/december-10-2015-calaveras-planning-commission-part-2/ [1:24:18 to 1:24:28]).

[16] During testimony, Applicant Counsel's was hesitant to agree despite this being the law.

The Code is silent as to whether an appellant or the County has the burden of proof in an appeal before the Planning Commission relative to Code § 17.42.035. However, California law clarifies and confirms County Counsel's instructions to the Commissioners:

> "Except as otherwise provided by law, a party has the burden of proof to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Cal. Evid. Code § 500).

Since the code is silent, the burden of proof was not "otherwise provided by law." Accordingly, when applying the burden of proof defined in § 500 to Applicant's appeal, Applicant was required to then prove the existence or nonexistence of facts essential to their appeal. (See Cal. Evid. Code §500).

So, not only does California law and the California Supreme Court make it clear the burden of proof was on the Applicant, but the Commissioners were expressly educated on this by County Counsel. But, despite knowing the Applicant had the burden of proof, and in contravention of state law, the Planning Commission misapplied the burden of proof to the wrong party by finding the EMA Administrator failed to prove his position:

> "After considering all the evidence and testimony presented by project proponents and the Environmental Management Agency Administrator, acting as Health Officer[17]...there was no substantial evidence presented to the Planning Commission to support the Health Officer's determination..." (emphasis added)(Resolution 2015-019 at 3, point 3)

In other words, the record does not reflect Applicant as meeting its burden of proof, as would be required for their appeal to have been upheld. Instead the record is clear the Planning Commission improperly applied a non-existing legal requirement of burden of proof against the EMA Administrator by finding that he had failed to demonstrate there "may be a significant impact."

Even the "centerpiece" of the Planning Commission's Resolution demonstrates the burden of proof was misapplied to the wrong party. The Resolution clearly demonstrates the Planning Commission's misapplication of the law by stating: "...there was not substantial evidence to support a finding [by the Health Officer] that the project... may have a significant effect on the environment..." (Resolution 2015-019 at 2). Based on this language and the record itself, no logical argument can be made other than that the Planning Commission improperly shifted the burden of proof from Applicant to Health Officer. There is no language on the record evidencing the Applicant had met its burden of proof, only evidence that the Health Officer failed to meet its burden, a burden that under the law actually belonged to Applicant.

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[17] Note Planning Commission completely ignored that County Health Officer himself (and not as a designee through the EMA) submitted a letter with essentially the same findings as EMA Administrator.

The Planning Commission failed to proceed in accordance with the law whether they mistakenly shifting the burden of proof away from Applicant or whether they felt it was in their purview to arbitrarily assign the burden of proof contrary to law.

3. The Planning Commission Abused Their Discretion When They Based Their Ruling on Flawed, Faulty and Erroneous Reasons and Evidence

A. Commissioner Stated During Planning Commission Meeting They Voted Against Evidence That Would Require a Conditional Use Permit

> "We voted that we didn't agree with the conclusions, regardless of the words that were chosen by staff to support its position." (See Dec. 17, 2015 Video of Calaveras Planning Commission [supplied by Calaveras Public Access TV] at http://calaverascap.com/december-17-2015-calaveras-planning-commission-part-2/ [22:41 to 22:50])(Comm'r Tunno explaining the resolution and reaction to public comment).

The days of "Wild West" justice and Judge Roy Bean are long gone. When a Commissioner admits on the record to essentially voting in favor of a particular outcome regardless of the facts or evidence presented, they have committed an abuse of discretion and failed to proceed in accordance with the law.

B. The Planning Commission Abused Their Discretion by Finding "No Substantial Evidence" to Support the Health Officer's Determination

The Planning Commission held that "...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." (emphasis added) (Resolution 2015-019, item 3 at 3).

The facts are clearly inapposite. Not only was the Staff Report of August 13, 2015 concerning this issue comprised of one-hundred and ninety-six pages, an additional fifteen pages of the Staff Report were prepared for the December 10, 2015 hearing. Further still, a letter from Dean Kelaita, M.D., the County Health Officer, expressed his opinion that "the proposed asphalt plant [ ] involves hazardous materials that have the potential for significant

environmental and public health effects."[18] (Letter from Calaveras County Health Officer, Dec. 7, 2015).

Arguably, the Planning Commission could have found Applicant to have *refuted* the submissions and testimony of both the Environmental Management Agency and the County Health Officer. However, it is not plausible that every single word uttered and document submitted would have constituted *no substantial evidence*, of which the Commission relied on as a fact when determining Applicant would not have to apply for a conditional use permit.

Accordingly, the Planning Commission abused its discretion and did not proceed in accordance with the law.

C. The Planning Commission Committed Prejudicial Error When They Misstated the Environmental Agency Director's Testimony

In the Resolution, the Planning Commission's evidence supporting "no substantial evidence" misquoted the Director:

> "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." (emphasis added)(Resolution. 2015-019, item 3 at Evidence).

The quote above is neither accurate nor complete. When commissioners questioned the Director about the magnitude of risk and accidents and attempts to quantify risks and accident history, the Director said that looking at the definition of 035, as there "may be" any chance of impact to the environment, rules and regulations, there is a possibility based on operations and materials...it's hard to quantify...spills do occur" and later, the possibility is "from normal operations, not just from accidents...things that can happen...drips and spills, leakage—that's part of operations that "may happen"—the risk." (See Dec. 10, 2015 Part 1 Video of Calaveras Planning Commission [supplied by Calaveras Public Access TV] at http://calaverascap.com/december-10-2015-calaveras-planning-commission-part-1/ [2:20 to 2:39])

Commission Chair McLaughlin pointed out, "Just because you can't quantify a risk doesn't mean it doesn't exist. Your charge, Jason, was really to determine the nature of the hazardous materials that would be used...we weren't asking and you didn't have to show how

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[18] Pursuant to 2.22.060, the "health officer retains such authority as necessary to meet all state and local requirements and responsibilities relating to public health, as provided by state law." Most likely, regardless of the EMA's determination, this would have meant that Applicant would also have had to address the actual Health Officer's determination – a matter addressed neither by the Applicant nor the Planning Commission.

often that might happen, just that those materials were being used and would trigger 035. It's not your job to quantify the risk, just that it exists." (emphasis added)(Dec. 10, 2015 Part 1 Video of Calaveras Planning Commission [supplied by Calaveras Public Access TV] at http://calaverascap.com/december-10-2015-calaveras-planning-commission-part-1/ [2:36 to 2:39]) (Commission Chair McLaughlin was the sole vote in support of the Director's findings and determination.)

When accused by Commissioner Tunno of "living in a closet" in his interpretation of code section 035, the Director responded,

"We have to look at every operation based on the method, type and quantity of materials, and type of operation. I've inspected asphalt plants before...I didn't live in a vacuum in Calaveras County... and seen some of the releases and just ongoing—it's part of the operations. It's looking at this—the ability to have a significant effect on the environment...even absent looking at compliance with all rules and regulations, hiccups occur in the operations and there may be a significant effect." (See Dec. 10, 2015 Part 1 Video of Calaveras Planning Commission [supplied by Calaveras Public Access TV] at http://calaverascap.com/december-10-2015-calaveras-planning-commission-part-1/ [3:03 to 3:04])In fact, in his actual testimony, he did not limit the potential strictly to accidents or mechanical mishaps. Rather, his words were narrowed and misconstrued by the Commission in an attempt to restrict and limit his testimony regarding what his standard is for when there "may be" an effect--is it just "a remote possibility of" (in commissioner's words) an effect on the environment. What the Director actually testified was that he:

> "Interpreted 17.42.035 as requiring him to find that there may be a significant effect if there is "the ability to" plus the method, type and use of hazardous materials...the quantity and the process." (See Dec. 10, 2015 Part 2 Video of Calaveras Planning Commission [supplied by Calaveras Public Access TV] at http://calaverascap.com/december-10-2015-calaveras-planning-commission-part-2/ [24:08-30:33])

Because the Planning Commission misstated the testimony of the Administrator and then relied on their misstated version to uphold the Applicant's appeal, this factual error caused prejudicial error in favor of the Applicant and harm to the County. Their use of misstated testimony has wrongfully deprived aggrieved parties of the CEQA review that would otherwise be required as part of the procedure to issue a conditional use permit. Accordingly, the Planning Commission did not proceed according to law.

D. The Planning Commission had No Authority to Direct the Health Officer to Conduct its Inquiry in a Different Fashion than Defined by County Code and Erred by Using What Amounts to a Tampered Determination to Uphold Applicant's Appeal

As discussed earlier in the appeal, although Planning Commission is authorized by Code to review determinations made by the Planning Department and its staff, the Planning Commission has no jurisdiction over the Health Department or the Health Officer.[19] As a result, the Planning Commission greatly erred when instructing and directing the Health Officer's process of inquiry and investigation that would otherwise allow him to arrive at an independent determination, especially when considering the Planning Commission instructed and directed the Health Officer on the methodology to be used for his determination.

Accordingly, the Planning Commission tampered with both the process and ultimately the outcome of the Health Officer's determination and then subsequently granted the Applicant's appeal using their inability to find "no substantial evidence" (Dec. 10, 2015 Staff Report at 3, point 3, "evidence"). By upholding Applicant's appeal based on evidence that the Planning Commission tampered with, without having jurisdiction, and subsequently found the very same evidence to have no value, the Planning Commission failed to proceed in accordance with the law.

E. The Planning Commission had No Authority to Review the Substance of the Health Officer's Determination and Erred by Conducting Review of the Substance of the Determination

As discussed earlier in this appeal, the Planning Commission is authorized by Code to review determinations made by the Planning Department and its staff, but the Planning Commission has no jurisdiction, and is without authority, over the Health Department or the Health Officer. As a result, the Planning Commission greatly erred when reviewing the determination of the Health Officer. Especially when considering the Planning Commission, without legal authority, instructed, directed, and limited the Health Officer on the methodology used to arrive at his determination.

The Planning Commission had no jurisdiction or authority to review the process, methodology or determination of the Health Officer. They subsequently upheld the Applicant's appeal based on finding that determination to have no value. Through these actions, the Planning Commission failed to proceed in accordance with the law.

F. Because the Planning Commission Knew Applicant had not Complied with Code § 17.42.035 by Providing Incomplete and Inconsistent Information to the Health Officer, the Commission Erred by Using Flawed and Incorrect Evidence to Uphold Applicants Appeal

The Planning Commission failed to follow in accordance with law when they forced the Health

[19] Refer also to Exh. "A"

Officer to make a determination based on incomplete information when they improperly limited the information Applicant was required to provide to the Health Officer. As discussed earlier, to date, the Applicant has not provided the information required and requested by the Health Officer (even after the Health Officer complied with the instructions and directions of the Planning Commission).

The Planning Commission, in their findings, explicitly deferred and relied upon the "Yorke Report" rather than the EMA's findings. (Dec. 17, 2015 Resolution No. 2015-019 at 3, point 3, "evidence"). This misplaced deference was in spite of the fact that the Yorke Report failed to answer specific questions that Applicant and EMA agreed upon in their mutually-developed letter of August 24.

> "As part of this response, a report was prepared by Yorke Engineering, LLC. Yorke's report failed to answer specific questions listed, and agreed upon, in the August 24 letter." (emphasis added)(Staff Report, Dec. 10, 2015 at 4, "Analysis").

The Commission further ignored the EMA's findings that the information provided by applicant was incomplete, and that the Applicant had submitted "constantly changing and inconsistent information."

> The applicant continues to submit constantly changing and inconsistent information on the type of hazardous materials, quantity, and method of use, including transportation of hazardous materials and location of tanks." (emphasis added)(Staff Report, Dec. 10, 2015 at 4, "Analysis").

Essentially, the Planning Commission was completely aware that Applicant had not yet complied with Code requirements because they had not even complied with the requirement to provide information to the Health Officer. Similarly, they were also aware that Applicant had provided incomplete and inconsistent information to the Health Officer.

Despite the Health Officer informing the Planning Commission on numerous occasions that Applicant had failed to meet its requirements under the Code, the Planning Commission ignored the incompleteness and inconsistencies of the provided information and relied upon that information anyway. In doing so, the Planning Commission failed to proceed in accordance with law.

4. Planning Commission intentionally applied a tortured interpretation of section 17.42.035 of the Code to Skew the Outcome

The Revised Resolution 2015-019 is not supported with findings and evidence. The new resolution says, "...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..." (Dec. 17, 2015 Resolution No. 2015-019 at 1, main caption)

This is not supported by the findings and evidence. On page 3 under Finding 3, Evidence, it says the engineers reports concluded "not likely to be significant effects", and then says "chances... of a release or mishap that would result in a significant effect...is sufficiently remote to not trigger a finding of potentially significant impact..." and continues, "when the chance of a significant impact...is as remote as the Commission finds it to be under these facts." (emphasis added)

"Not likely to be" and "Remote chances...that would result" in significant impact does not add up to "will not have" an effect in the Resolution. These "chances" remain the same as "may result in a significant effect."

Commissioners' reasons for finding no evidence under 035: Commissioner Wooster, ""May" imposes a higher standard than "could." I think there has to be something more than that to make a finding of 035." Comm'r Tunno, "I don't see a significant environmental consideration. The standard of "may" cannot be in the "universe of possibility." Commissioner Muetterties, "035 concerns are not documented in this report—only "could be an accident"." (See Dec. 10, 2015 Part 2 Video of Calaveras Planning Commission [supplied by Calaveras Public Access TV] at http://calaverascap.com/december-10-2015-calaveras-planning-commission-part-2/ [2:48 to 2:56 minutes])

The Planning Commission's interpretation led to an absurd result, and accordingly, Applicant's appeal should be reversed. (See United States v. Granderson, 511 U.S. 39, 47 n.5 (1994) (dismissing an interpretation that would lead to an absurd result).

a. The "remoteness" of a Significant Impact Does Not Obviate a "May" Or The Health Officer Correctly Determined there "May" be a Significant Impact

"The Planning Commission does not believe that the intended result of 17.42.035 is to require a conditional use permit when the chance of a significant impact on the environment is as remote as the Commission finds it to be under these facts." (See Item 3 of Resolution 2015-019 (Evidence)[20])

Staff provided substantial evidence to support a finding that the project.... MAY have a significant effect on the environment. Finding 3 states "...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

[20]Refer to fn. 8.

proposed change in use, such that there may be a significant effect on the environment." When commissioners asked what the word "may" meant and if the standard was "remote possibility of", the Director responded that "may" meant "the ability to" have an effect, plus the quantity, type of material, and process." This ability to have an effect was clearly demonstrated in the Director's staff report and testimony at the hearing. Finding 3 is in error.

5. Planning Commission's Failure to Address CEQA Issues

A. Doctrine of "Fair Argument"

The language of the Code determining when both a permit and CEQA review is required: "may be a significant effect on the environment" is almost verbatim of CEQA guidelines determining when an environmental impact report would be required: "may have a significant effect on the environment."(CEQA Guidelines, section 15064 (a)(1)).

Naturally, it makes sense that the County would utilize the same standard for a permit as for when an environmental impact report would be required. If there is no environmental impact, then consequently neither a permit nor an environmental impact report would be necessary.

Conversely, if there may be an environmental impact, an environmental impact report would be necessary to evaluate the impact of a project and to select appropriate mitigation measures. Accordingly, a permit would be used to convert these mitigation measures into enforceable permit conditions.

Because the Board of Supervisors borrowed language for CEQA regulations when drafting the Code, it is instructional to review CEQA regulations and caselaw as it would apply to relevant sections of the Code.

The CEQA test for determining if a project "may have a significant effect" is called the fair argument test. "[I]f 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, sec. 15064 (f)(1).)

Here, the "lead agency" would effectively be the county. Under the "fair argument" test, the lead agency, in this case the Planning Commission, was well aware the EMA Administrator determined Applicant's project "may be a significant impact."

So, in applying the "fair argument" doctrine, even if the Planning Commission had properly determined Applicant presented substantial evidence refuting the EMA Administrator's determination, as a "lead agency" they are still required to prepare an environmental impact

report.

In other words, the Planning Commission did not proceed in accordance with the law because they were not at liberty to ignore the fair argument that there may be a significant impact simply because there was already an argument to the contrary in the record.

B. The Planning Commission Ignored Other Code Sections Requiring Applicant to Obtain a Conditional Use Permit and Conduct CEQA Review When Upholding Applicant's Appeal

Not only did the County's former Environmental Management Agency's Administrator determine earlier this year that the proposed plant will involve asphalt as a hazardous material (See Moss Letter to CB Asphalt, Ford Construction, and Kindermann Henderson, dated July 2, 2015, at 2), so too does California law define asphalt as a hazardous material.

California law defines "hazardous material" as a material listed in California Health and Safety Code § 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). For example, 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. [Diesel fuel is also on the list of materials.] These materials meet the definitions of hazardous materials pursuant to Ca. Health & Safety 25501(n)(1)(2) et seq.

Notwithstanding the Planning Commission's current interpretation of Code § 17.42.035, they also completely ignored the requirements of § 17.42.030, where the Code lists uses requiring approval and validation of a conditional use permit, including "[c]hemical manufacturing, processing utilizing hazardous or toxic materials" and "[p]etrochemical drilling, manufacturing, processing, [and] packaging." *See* Code § 17.42.030(A)(4), (15). The Planning Commission ignored § 17.42.030(A)(4) and also § 17.42.030(A)(15). An asphalt plant involves using a petroleum. *See* June 25 Staff Report 4–5. Although the Planning Commission chose at the December 17, 2015 meeting to not require a conditional use permit as required by § 17.42.035, the proposed asphalt plant involves processing petrochemicals and utilization of hazardous materials, and therefore, still requires a conditional use permit pursuant to §§ 17.42.030(A)(4) and (A)(15) of the Code.

The definition of "asphalt" is bitumen, a constituent of a mixture used in paving streets and highways, found in a natural state or obtained by the *processing of crude oil*." Ballantine's Law Dictionary (3d ed. 2010) (emphasis added). By definition, therefore, producing asphalt

involves petrochemical processing. *See, e.g.*, *Hallawell v. Union Oil Co.*, 36 Cal. App. 672, 676 (1918) (noting commercial asphalt plant involved heating crude petroleum until it became viscous). The asphalt plant will involve petrochemical processing, therefore, the plant requires a conditional use permit under Code § 17.42.030.A.15.

Accordingly, the Planning Commission, when considering the impacts that upholding the Applicant's appeal should have considered related Code requirements that would also have required Applicant to obtain a conditional use permit.

C. Neighboring Counties Require Environmental Impact Reports for Asphalt Plants

Although merely a persuasive discussion, the Planning Commission did not look to neighboring jurisdictions with issues concerning asphalt plants to see if there were problems or solutions to address the instant issues. In fact, a number of the issues raised by the community and aggrieved parties concerning the installation and operation of an asphalt plant have been considered and addressed not only by a neighboring county, but also a northern California city.

Environmental Impact Reports on asphalt plants from Amador and Sonoma Counties show that asphalt plants have a significant impact on noise, odor, air quality, and traffic, which is why both Amador and Sonoma Counties require use permits for asphalt plants.

The Planning Commission should have at least reviewed or considered some of the implications inherent to asphalt plants.

D. Determination of a Conditional Use Permit is a Discretionary Act, and Accordingly, is Subject to Review Pursuant to the California Environmental Quality Act

By upholding Applicant's appeal, the Planning Commission *de facto* exempted Applicant's project from a conditional use permit, and consequently exempted them from the CEQA review that otherwise would have been required to be undertaken. It was made clear that the purpose of the appeal was to obviate the need for a conditional use permit. The appeal itself acted as a determination that a conditional use permit would not be required. As such, the appeal became a *de facto* discretionary action by the Planning Commission.

Because the proposed plant requires a conditional use permit, the plant is subject to review under the California Environmental Quality Act ("CEQA"). Whether to issue a conditional use permit 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 conditional use permit. 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).

What this means is that the Planning Commission "put the cart before the horse" by requiring the Health Officer to consider mitigating factors in his determination under Code § 17.42.035. This section was intended to be a "threshold" inquiry, which if met, would then require additional study which would then consider mitigating factors. In effect, the Planning Commission's actions bypassed the threshold inquiry by requiring the Health Officer to consider factors not otherwise part of the inquiry. In other words, the Commission did their "own version" of a CEQA study bypassing the public's right to be involved in that process.

E. Asphalt Fumes and Diesel Fuel are Hazardous Substances Requiring a Conditional Use Permit

California law and County Code dictate the project requires a conditional use permit, a discretionary decision subject to CEQA. Calaveras County Code § 17.42.035 provides:

> Prior to a change of use, 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)

Asphalt fumes, asphalt and diesel fuel 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§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 and Safety Code § 25591 (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.

Accordingly, the Planning Commission did not proceed in accordance with the law, and should not have upheld Applicant's appeal.

F. The Language of Section 17.42.035 is Clear (Plain and Unambiguous) And There Was No Basis to Find a Requirement to Interpret It So that It Obviates Environmental Review

The Planning Commission erred when they 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." (Resolution at 2).

What was determined to be vague and ambiguous centers around the apparent incongruity between the word "may" in "The health officer shall review the plan or list to determine.... [ ] ..is such that there may be a significant effect..." (emphasis added)(Code § 17.42.035) contrasted with the word "is" in the subsequent sentence, "If there is a significant effect, the health officer shall notify the planning director." (emphasis added)(Code § 17.42.035).

This apparent discrepancy between "may" and "is" can be resolved by reviewing United States Supreme Court caselaw, when interpreting the law. There is no need to resort to legislative history when the language itself can be reviewed on its face. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("'[w]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.'" (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

Here, the use of the word "may" in one sentence and the use of the word "is" in a subsequent sentence can be easily determined to mean precisely what the word meant. If the Health Officer determined that there "may" be a significant impact, then the drafters meant for the "is" to represent a positive finding by the Health Officer as to the prior sentence where the use of the word "may" existed. To read otherwise requires reading a missing portion into the Code, which would amount to a non-permissible expansion of the statute. (See Lamie v. United States Tr., 540 U.S. 526, 538 (2004) (refusing to read an absent word into a statute because the result would not be the construction of the statute but the enlargement of it).

Further still, the Planning Commission's interpretation essentially limited the entire purpose of the "may" sentence, or at a minimum made it surplusage to the subsequent sentence using the word "is." Proper statutory interpretation avoids any reading that results in any text becoming surplus, as courts assume the drafters of statutes and ordinances purposefully

include, or exclude, the words in and not in the statute or ordinance. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991) (construing statutes "so as to avoid rendering superfluous any parts thereof"); *see, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002) (interpreting "law" narrowly to avoid rendering "regulation" superfluous).

A common-sense interpretation of the Code would have found precisely the result that the Health Officer found, being that if there "may" be a significant effect on the environment, Applicant would have been required to conduct an environmental impact report.

G. Adding an Asphalt Plant to the Hogan Quarry Would Require a Mining Use Permit and an Amendment to the Existing Reclamation Plan.

Section 17.06.1240 of the Code provides that "[m]ineral extraction" means the land use of recovering or removing mineral resources from the earth. "'Mineral resource production' means the accessory uses, facilities or services involved in mineral extracting as permitted by the mining permit." Code § 17.06.1240. Under this definition, the facilities involved in mineral extraction must be authorized by a use permit. *See* Larson Letter to County Board of Supervisors 2–3, September 6, 1993 [hereinafter 1993 Larson Letter]. The Planning Commission determined that Hogan Quarry is a vested mine and therefore has no use permit, only a reclamation plan. *See* June 25 Staff Report 6. Accordingly, the addition of an asphalt plant to the Hogan Quarry would require a mining use permit.

In fact, one of the Planning Department's conditions of approval of the Hogan Quarry's Mining Reclamation Permit 90-15 was that "[a]ny change in the nature of the proposed operation, shall require a distinct and separate Mining Use Permit and Mining Reclamation Plan application and approval." Calaveras Cnty. Planning Comm'n 2, Meeting of September 6, 1990. As such, the proposed asphalt plant requires a mining use permit and an amendment to the existing reclamation plan, both of which necessitate public hearings and environmental review under CEQA.

Conclusion

In conclusion, Code section 17.42.035 requires the proposed plant to obtain a conditional use permit once the Health Officer determines that the type, method of use, and/or quantity of hazardous substances that will accompany the proposed change in use may be a significant effect on the environment.

Accordingly, we respectfully request that the Board reverse the Planning Commission's decision and sustain Techel's appeals. Specifically, the Board should reverse the Planning Commission's upholding of Applicant's appeal and find the proposed plant requires a conditional use permit necessitating CEQA review and a full environmental impact report.

Supplemental Documentation

Techel reserves the right to submit additional and supporting facts, law, and other documentation as soon as feasible after filing this appeal.

Very truly yours,

GRUNDMAN | LAW℠

Andrew Grundman
Attorney at Law

c: Clients; File

Att: Exh "A" (County Org Chart)

EXHIBIT “A”

COUNTY OF CALAVERAS,
STATE OF CALIFORNIA
COMPREHENSIVE ANNUAL FINANCIAL REPORT

For the Fiscal Year Ended
June 30, 2013

Prepared by the Office of
Auditor-Controller

Rebecca Callen
Auditor-Controller

Appendix A

Organization of Calaveras County Government

(As of June 30, 2013)