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VIA ELECTRONIC MAIL & U.S. MAIL

Ms. Diane Severud
Clerk of the Board of Supervisors
Calaveras County
891 Mountain Ranch Road
San Andreas, CA 95249-9709
dseverud@co.calaveras.ca.us

Re: Appeal of Planning Commission Determinations

Dear Ms. Severud:

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 July 9, 2015 decisions of the Calaveras County Planning Commission that the proposed asphalt plant at Hogan Quarry (1) is a permitted use by right in M1 and M2 zones and does not require a conditional use permit, and (2) does not require a mining use permit or an amendment to the existing reclamation plan. By letter dated May 14, 2015, and a supplemental letter dated June 2, 2015, Techel previously appealed these issues to the Planning Commission and has standing under section 17.98.070(A) of the Code to file this Appeal.

An Asphalt Plant is Not a Permitted Use By Right in an M1 or M2 Zone.

At the site of the Hogan Quarry, which is located in an M2 zone, CB Asphalt, Inc. and Ford Construction propose to construct and operate an asphalt plant. Under section 17.42.020 of the Code, an asphalt plant is not a permitted use, therefore, the plant requires Planning Commission approval and validation of a conditional use permit under section 17.42.030.

Section 17.42.020(A) permits all uses enumerated under section 17.40.020, which enumerates the permitted uses in an M1 zone. The Planning Commission determined an asphalt plant is a permitted use under 17.40.020(A)(8), which permits "[c]oncrete mixing and batch plant, ready-mix." This section of the Code, however, does not include an asphalt plant, and the Planning Commission's reliance on it was in error.

The Planning Commission's underlying assumption is that the word "concrete" in section 17.40.020(A)(8) of the Code includes both concrete and asphalt. *See* Email of Peter Maurer to Cliff Edison, May 11, 2015 ("I have made an interpretation of the Zoning Ordinance that an asphaltic concrete batch plant is a permitted use in the zone, since a concrete batch plant is permitted and the zoning ordinance does not differentiate between the types of concrete"). Other parts of the Code, however, expressly distinguish between concrete and asphalt. *See, e.g.*, Code §§ 8.10.340(B)(2) ("[a]ny driveway . . . shall be provided with an asphalt or concrete surface"); 17.70.050(A) ("[c]oncrete may be substituted for a.c. [asphalt concrete] to the specifications of the department of public works"). Because the Code distinguishes between asphalt and concrete in some sections but omits asphalt in section 17.40.020(A)(8), the Board of Supervisors (the "Board") should conclude the drafters of the Code purposely excluded asphalt in section 17.40.020(A)(8). *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)). The text of section 17.40.020(A)(8) does not include "asphalt," and the Board should resist reading the word "asphalt" into the section. *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).

The history of the Code also confirms the drafters' intent to exclude an asphalt plant as a permitted use. The first zoning code in 1961, Ordinance 250, listed "asphalt plant" and "cement manufacture" as distinct permitted uses in industrial or "M" districts. *See* Code section 19(a)(3) (1961). As stated above, the current version of the Code includes "concrete mixing" but omits "asphalt plant" as a permitted use. The fact that asphalt appeared as a permitted use in a prior version of the Code but not in the current version confirms the purposeful exclusion of an asphalt plant as a permitted use. *See Felder v. State*, 116 So. 3d 605, 607 (Fla. Ct. App. 2013) (finding the removal of language in an amended statute evidenced legislative intent to exclude the language); *State v. Cleppe*, 635 P.2d 435, 438 (Wash. 1981) (finding the omission of words from a precursor statute in a current statute showed legislative intent to exclude the words).

In 1978, when the County repealed Ordinance 250 and adopted Ordinance 945, the Code made no explicit references to concrete or asphalt as permitted uses in either M1 or M2 zones. *See* Code §§ 36.02, 38.02 (1978). Rather, section 36.04 provided that "[r]eady mix plants" were a use in M1 districts subject to a conditional use permit. *Id.* § 36.04(D) (1978). The Planning Commission determined that this evidenced the drafters' intent to lump asphalt and concrete under the term "ready-mix plant," even though common industry usage of the term "ready-mix" connotes concrete. *See* Calaveras Cnty. Planning Dep't, Planning Comm'n Staff Report 4, June 25, 2015, *available at* http://planning.calaverasgov.us/Portals/planning/

Planning%20Commssion/2015-029%20Staff%20Report%2006-25-15.pdf [hereinafter June 25 Staff Report]; *see, e.g.*, APAC, Materials, *available at* http://apac-texas.com/central-texas/materials/ (last visited July 21, 2015) (distinguishing between "ready mix concrete" and "hot mix asphalt"); Weldon Materials, Home, *available at* http://www.weldonmaterials.com/ (last visited July 21, 2015) (same). Even if the 1978 version of the Code did lump concrete and asphalt together under the term "ready-mix plant," it is of little import now when the current version of the Code expressly distinguishes between concrete and asphalt. Distinguishing between asphalt and concrete was also less important when all ready mix plants required a conditional use permit, as per the 1978 version of section 36.04(D).

Moreover, if "batch plant, ready mix" includes concrete and asphalt, as the Planning Commission determined, the words "concrete mixing" in Code section 17.40.020(A)(8) would be mere surplus. 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 requires the Board to find an asphalt plant is not a permitted use by right in an M1 or M2 zone.

An Asphalt Plant Requires Approval and Validation of a Conditional Use Permit Necessitating CEQA Review.

Section 17.42.030 of the Code lists uses that require 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 section 17.42.030(A)(4) and gave short shrift to section 17.42.030(A)(15), in determining that an asphalt plant involves using a petroleum product but does not involve drilling or manufacturing the petrochemical itself. *See* June 25 Staff Report 4–5. Rather than drilling or manufacturing petrochemicals, the proposed asphalt plant would involve processing petrochemicals and utilizing hazardous materials, therefore, sections 17.42.030(A)(4) and (A)(15) of the Code require a conditional use permit.

The definition of "asphalt" is a "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 section 17.42.030.A.15.

Moreover, the County's Environmental Management Agency's Administrator already determined the proposed plant will involve a hazardous material—asphalt. *See* Moss Letter to CB Asphalt, Ford Construction, and Kindermann Henderson, dated July 2, 2015, at 2.

Indeed, 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 petrochemical processing utilizing a hazardous material pursuant to California law. Accordingly, section 17.42.030(A)(4) of the Code requires a conditional use permit.

The purpose of an M1 zone is to provide locations for diverse industrial uses in proximity to commercial and residential areas. Code § 17.40.010. Zoning maps of Calaveras County show land in an M1 zone across the street from the MATC Medical Clinic and land zoned M2 adjacent to the Mountain Oaks School. "Industrial uses in the M1 zone should not be obnoxious by reason of smoke, noise, odor, dust or similar objectionable effects." *Id.* 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. Thus, the Planning Commission's determination that an asphalt plant is a permitted use by right in an M1 zone (and therefore in an M2 zone) would allow the construction and operation of an asphalt plant directly next to a school and a medical clinic without a conditional use permit. The Board should reject the Planning Commission's interpretation because it would lead to this absurd result. *See United States v. Granderson*, 511 U.S. 39, 47 n.5 (1994) (dismissing an interpretation that would lead to an absurd result).

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).

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 1993, Don Deem sought to add an asphalt plant to the site of an existing aggregate mine without obtaining an amendment to his use permit. 1993 Larson Letter 1. At that time, the Planning Commission determined that "A.C. hot plants introduce a different type of processing beyond that which is normally conducted at a gravel pit." *Id.* at 2. Planning Director Larson determined that of the six aggregate sites in Calaveras County, asphalt plants were allowed only at Chili Gulch and Teichert. *Id.* "None of the other four permits identifies A.C. processing facilities as an allowed use/activity. Since two permits specifically include A.C. plants, there is no evidence that A.C. plants were intended or implied as part of the other four." *Id.*

In Techel's appeal to the Planning Commission, the Commission dismissed this evidence, finding Deem's request concerned adding an asphalt plant only at Douglas Flat aggregate mine. *See* June 25 Staff Report 6. Director Larson expressly found, however, that Deem "requested that the Planning Commission make a policy decision to allow A. C. processing facilities at *all existing aggregate mines*, whether or not it was described by the use permit." 1993 Larson Letter 2 (emphasis added). Regardless, Director Larson determined that there was "no evidence that A. C. plants were intended or implied as part of the other four" aggregate sites including Hogan Quarry, and she concluded that amending a mining use permit to add a new facility or new processing activity, such as an asphalt plant, which was not part of the original use permit, would require environmental review and public hearings. 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.

In conclusion, the proposed plant is not a permitted use by right in an M2 zone. The asphalt plant would involve petrochemical processing that utilizes a hazardous material—asphalt—a use that requires a conditional use permit. A conditional use permit is discretionary necessitating CEQA review. Furthermore, the County cannot grandfather in the

plant under the Hogan Quarry's nonexistent mining use permit or current reclamation plan. Instead, the plant would require a new mining use permit and trigger an amendment to the reclamation plan, which again necessitate CEQA review. Accordingly, we respectfully request that the Board reverse the Planning Commission and sustain Techel's appeals. Specifically, the Board should find that the proposed plant requires a conditional use permit, a mining use permit, and an amendment to the existing reclamation plan, each of which necessitate CEQA review and a full environmental impact report.

Very truly yours,

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