

Andrew S. Grundman
Attorney at Law

GRUNDMAN | LAWSM

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

ag@grundmanlaw.com

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

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

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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: Opposition to Appeal of CB Asphalt, Inc. and Ford Construction

Dear Ms. Severud:

This office represents MyValleySprings.com, and we write in support of the Planning Commission's July 9, 2015 determination that the California Environmental Quality Act ("CEQA") applies to the Air Pollution Control Officer (the "Control Officer")'s issuance of an Authority to Construct ("ATC") to CB Asphalt, Inc. and Ford Construction ("Appellants"). With respect to CEQA, we further urge the County to require a full environmental impact report.

A. The decision to issue an ATC is discretionary, requiring CEQA review.

1. The decision to issue an ATC is discretionary.

Appellants allege an ATC is ministerial, but an ATC is discretionary. Any person building any source of air contaminants shall first obtain an ATC from the Control Officer. See Calaveras Cnty. Air Pollution Control Dist. ("APCD") Rule 401. The Control Officer may decide to conduct a pre-application conference with the applicant to ascertain the information the applicant must include in the application. See APCD Rule 404. Upon receipt of an application, the Control Officer must determine if the application is complete, and if not, the Control Officer requests additional information. See APCD Rule 406. Even after the Control Officer deems an application complete, he may require the applicant to clarify or supplement the information in the application. *Id.* The Control Officer may also decide to require a professional engineer registered in California to certify the information in an application. See APCD Rule 403.

Upon receipt of a complete ATC application, the Control Officer, his staff, and a contract engineer review the proposal in terms of potential emissions and health risks. See *id.*; Moss Email to Kearney et al., April 28, 2015. The Control Officer may require the applicant to monitor applicable pollutants for one year prior to consideration of an application for an ATC. See APCD Rule 408. This analysis contributes to the conditions the Control Officer will include in the ATC and the Permit to Operate ("PTO") to regulate the new operation's

emissions. The Control Officer then issues a preliminary decision on whether to approve without conditions, approve with conditions, or disapprove an ATC application.

If the Control Officer approves the ATC, he may then require additional monitoring for a period of time that he determines to assess whether the operation complies with national ambient air quality standards. See APCD Rule 408. This may include a demonstration that the applicants can operate the equipment under the conditions in the ATC, including source testing. See Calaveras Cnty. Planning Dep't, Planning Comm'n Staff Report 11, June 25, 2015. All of this occurs prior to the Control Officer's issuance of a PTO, which will include conditions to insure compliance with air pollution controls, including emissions testing or air monitoring. Furthermore, the Control Officer issues PTOs annually and therefore annually inspects facilities to confirm the machinery or equipment complies with requirements regarding the emission of air contaminants.

This complex process—from application, to approval, to ongoing monitoring of compliance, all of which includes numerous decisions and potentially over a year of time—is anything but ministerial. Moreover, whereas some air pollution control districts have adopted a ministerial process for the issuance of ATCs, Calaveras County has not, so there is little to guide the Control Officer's decisions regarding the ATC. See generally APCD Rules; see also Calaveras Cnty. Planning Dep't, Planning Comm'n Staff Report 2, July 2, 2015 (finding "it is clear that the Calaveras County Air Pollution Control District has not" adopted a ministerial process for issuance of ATCs).

2. *Because an ATC is discretionary, CEQA requires an environmental impact report.*

The requirements of CEQA apply to discretionary projects approved by public agencies. See Cal. Pub. Res. Code § 21080(a); *Friends of Sierra Madre v. City of Sierra Madre*, 25 Cal. 4th 165, 185 (2001). A "project" is any activity that may cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment, and which is an activity that involves a public agency's issuance of a lease, permit, license, certificate, or other entitlement for use to a person. Cal. Pub. Res. Code § 21065(c). CEQA defines "project" "extremely broadly" to maximize protection of the environment. *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster*, 52 Cal. App. 4th 1165, 1188–89 (1997); *Nelson v. Cnty. of Kern*, 190 Cal. App. 4th 252, 271 (2010). Accordingly, CEQA requires an environmental impact report for the proposed asphalt plant, a project that may have a direct or indirect physical change on the environment, which involves the discretionary decision of the Control Officer to issue an ATC. See *Miller v. City of Hermosa Beach*, 13 Cal. App. 4th 1118, 1131 (1993) (finding CEQA requires an environmental impact report in connection with discretionary projects to be approved by public agencies, for example, the issuance of conditional use permits).

B. Appellants' appeal regarding the ATC is irrelevant.

The Appellants' appeal on this issue is largely irrelevant. The proposed asphalt plant, not the ATC, is the "project" requiring CEQA review. Regardless, the Planning Director has already determined the plant will require a conditional use permit because it involves the use

of a hazardous substance—asphalt—which necessitates a conditional use permit subject to CEQA review.

1. *The plant is the project requiring CEQA review.*

Under CEQA Guidelines, the term "project" refers to the activity under consideration, "which may be subject to several discretionary approvals by governmental agencies." 14 C.C.R. § 15378(c). "The term 'project' does not mean each separate governmental approval." *Id.* "Whether an activity constitutes a project subject to CEQA is a *categorical question* respecting whether the activity is of a general kind with which CEQA is concerned, without regard to whether the activity actually will have environmental impact." *Rominger v. Cnty. of Colusa*, 229 Cal. App. 4th 690, 701 (2014) (emphasis added) (quoting *Muzzy Ranch Co. v. Solano Cnty. Airport Land Use Comm'n*, 41 Cal. 4th 372, 381 (2007)).

Here, Appellants plan to construct and operate an asphalt plant, and the plant is the "project" requiring CEQA review. The question is not whether the ATC is discretionary or ministerial. The question is whether the construction and operation of an asphalt plant, which involves heating petrochemicals to extreme heats and the production of asphalt fumes, is the type of activity with which CEQA is generally concerned. The requirement of an ATC merely illustrates that the proposed asphalt plant is an activity that involves the issuance of a permit or other entitlement by a public agency, bringing the proposed plant within the definition of "project" under California law. See Cal. Pub. Res. Code § 21065(c).

2. *Asphalt fumes are a hazardous substance; therefore, the proposed plant requires a conditional use permit, a discretionary decision subject to CEQA.*

Even if an ATC is ministerial, which it is not, California law and the Calaveras County Code (the "Code") dictate that the project requires a conditional use permit, a discretionary decision subject to CEQA. Calaveras County Code (the "Code") section 17.42.035 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).

Because the plant will involve the use of a substance that may have a significant effect on the environment, it requires a conditional use permit.

Asphalt fumes are a hazardous substance 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. The proposed asphalt plant, therefore, will involve the use of a hazardous substance pursuant to California law. Indeed, the Calaveras County Health Officer has already determined as much. See Moss Letter to Appellants 2, July 2, 2015 (finding "[a]sphalt is . . . a hazardous material").

Because the proposed plant involves the use of a hazardous substance that may have a significant effect on the environment, the Code requires a conditional use permit. "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 also provides the meaning of certain terms in the Code, and "shall" "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").

The issuance of a conditional use permit is a discretionary decision that requires CEQA review. 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").

As stated above, 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). Accordingly, even if the decision to issue an ATC is ministerial, under controlling California law, the decision to issue a conditional use permit is discretionary. The proposed plant, therefore, requires CEQA review. See *Friends of Sierra Madre*, 25 Cal. 4th at 185 (finding a conditional use permit is a discretionary decision to which CEQA applies).

In short, CEQA review and an environmental impact report are inevitable preconditions of the Appellants' proposed asphalt plant. An ATC is a discretionary decision, necessitating CEQA review. Regardless, whether the decision to issue an ATC is discretionary or ministerial is largely irrelevant because the plant is the project that categorically requires CEQA review. Moreover, if the plant becomes operational, it will emit asphalt fumes, a substance that California law defines as a hazardous material that may have a significant

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effect on the environment. The Code mandates the approval and validation of a conditional use permit for a project that involves a substance that may have a significant effect on the environment. The issuance of a conditional use permit is by definition a discretionary decision that requires CEQA review under California law. The Board of Supervisors, therefore, must reject Appellants' appeal.

Very truly yours,

GRUNDMAN | LAWSM

Andrew Grundman
Attorney at Law