May 15, 2015

The Honorable Fawn McLaughlin
Chair, Planning Commission
Planning Department
891 Mountain Ranch Road
San Andreas, CA 95249

Re: Appeal of Decision of Planning Director Peter N. Maurer
Letter dated April 30, 2015 to Nick Jones, President, FCCI, Inc.

Dear Chair McLaughlin:

This Appeal is being filed by Joyce Techel, President, MyValleySprings.com, PO Box 209, 2216 Evans Road, Burson, CA 95224 and John A. Walker, 6725 Cane Lane, Valley Springs, CA 95252("Appellants").

Pursuant to Calaveras County Municipal Code (the "Code") section 17.06.0120, "Aggrieved party" means a person, organization, corporation, concerned citizen, or any individual or group which demonstrates to the appellant board that they have an interest, either financial or otherwise, in property affected by the decision of the original decision maker.

Appellant Techel meets these requirements because she lives in the Valley Springs Area affected by Hogan Quarry, and where the quarry is located. She has outstanding credentials and a reputation for caring about her community and her business clients who live in the Valley Springs community. She lives in the Valley Springs area. In addition, she is also President of MyValleySprings.com, a local organization whose supporters look to her for planning information and advice and count on her to represent their interests; her JT Kennels business clients live in the vicinity and affected areas of the proposed asphalt plant. Joyce was an involved party in Hogan Dan expansion in 2005-2006, and submitted comments to the county then. Further, she participated in the challenged determinations by having her counsel provide a letter of objections dated May 8, 2015.

Appellant Walker meets these requirements because he lives in the Valley Springs area affected by Hogan Quarry. He owns property directly across from Hogan Quarry (APN 71-022-011), paying property and other governmental taxes and assessments on that property.

As such, the Appellants are aggrieved parties. They have specific and defined interests in properties affected by this department’s decision. Because Appellant Walker has a “concrete” interest in a specific affected property, and because Appellant Techel and her organization have similar “concrete” interests in property

affected by Mr. Maurer's decision, both Appellants are an “aggrieved party” within the meaning of Code section 17.06.012.

They are also proper parties pursuant to Code section 17.98.070.A. On behalf of Appellant Techel, her counsel participated in the challenged determinations by providing a letter of objections dated May 8, 2015. Appellant Walker participated in the challenged determinations by providing a letter of objections dated May 15, 2015. Therefore, Appellants have participated in the administrative process prior to filing this appeal per Code section 17.98.070.A.

Pursuant to sections 17.98.020 and 17.98.070 of the Code, Appellants hereby appeal the decision of Planning Director Peter N. Maurer in his letter dated April 30, 2015, addressed to Nick Jones, President of Ford Construction Co., Inc.

Specifically, Appellants challenge the determination that the Code sections 17.40.020.A.8 and 17.42.020.A, which permit "concrete mixing and batch plant, ready-mix," also permit an asphalt plant at the site of the Hogan Quarry as a permitted use. Appellants further allege that a conditional use permit must be granted before an asphalt plant may be constructed or operated at that site. In any case, the Planning Director's determination and any conditional use permit, and any other discretionary permit or license, may be granted or issued only after full compliance with the California Environmental Quality Act ("CEQA") (Cal. Pub. Res. Code sections 21000 through 21187).

An Asphalt Plant is Not a Permitted Use.

Whereas previous versions of the Code expressly permitted asphalt batch plants, the current version of the Code does not. Rather than assume "concrete" includes asphalt, the common canon of statutory interpretation *expressio unius*—the expression of certain things excludes others—compels the conclusion that Code section 17.40.020.A.8 excludes asphalt batch plants. *See City of Corona v. Naulls*, 83 Cal. Rptr. 3d 1, 13 (Cal. Ct. App. 2008) (applying the rule *expressio unius* to find a land use not enumerated in a city's municipal code was impermissible). Indeed, other parts of the Code provide an express distinction between asphalt and concrete. *See, e.g.*, Code §§ 8.10.340.B.2 ("Any driveway . . . shall be provided with an asphalt or concrete surface."); 17.70.050.A ("Concrete may be substituted for a.c. [asphalt concrete] to the specifications of the department of public works."). The fact that asphalt appeared as a permitted use in prior versions of the Code but not in the current version confirms an intent to exclude an asphalt batch 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).

California courts, moreover, commonly distinguish between asphalt and concrete. *See, e.g.*, *Lugtu v. Cal. Highway Patrol*, 28 P.3d 249, 252 n.2 (Cal. 2001) (noting the shoulder was asphalt surfaced and adjacent to a concrete dyke); *Coggins v. Hanchette*, 338 P.2d 379, 380 (Cal. 1959) (noting the defendant agreed to cover the concrete floor with asphalt tile). Indeed, an asphalt plant is dissimilar to a concrete batch plant because of the burner to heat the asphalt, the products involved, and the production of odor.

If Mr. Maurer's interpretation is incorrect, an asphalt plant is not a permitted use by right for which no conditional use permit is required. Accordingly, an asphalt plant is a conditional use, and as such, it requires approval and validation of a conditional use permit. Code § 17.40.030; *see Sports Arenas Props., Inc. v. City of San Diego*, 710 P.2d 338, 341 (Cal. 1985) (finding a conditional but permitted use may be incompatible with applicable zoning, and therefore, a conditional use permit is required); *Cnty. of Imperial v. McDougal*, 564 P.2d 14, 17 (Cal. 1977) (observing that "a conditional use permit, unlike a nonconforming use, allows a use permitted rather than proscribed by the zoning regulations but because of the possibility that the permitted use could be incompatible in some respects with the applicable zoning, a special permit is required").

Petrochemical Manufacturing and Processing are Conditional Uses Requiring a Temporary Use Permit.

An asphalt plant involves petrochemical manufacturing or processing. Under Code section 17.42.030.A.15, petrochemical manufacturing or processing are conditional uses that requires a conditional use permit. The manufacture of asphalt requires the combination of a number of aggregates, sand, a filler such as stone dust, heat, and a binder, typically bitumen. The terms bitumen and asphalt are generally interchangeable, as 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 manufacturing and processing. *See, e.g.*, *Hallawell v. Union Oil Co.*, 173 P. 177, 179 (Cal. 1918) (noting commercial asphalt plant involved heating crude petroleum until it became viscous). The asphalt plant proposed at Hogan Quarry will involve petrochemical manufacturing and processing, and therefore, the plant requires a conditional use permit under the Code. *See* Code § 17.42.030.A.15.

An Asphalt Plant is Not Included in Existing Aggregate Mining Use Permits.

A prior planning director for Calaveras County, Director Larson, stated "A.C. hot plants are not included" in the existing Use Permit for aggregate mining operations. *See* Supervisor Minutes from October 12, 1993, Agenda Item 13. The precise issue was whether the right to operate an asphalt hot plant was included in the original Use Permit, and the unanimous conclusion was no. Both

the Planning Director and the County Counsel agreed that any expansion of the existing facilities would require an amendment to the original Use Permit, which would require a public hearing and environmental review under CEQA. The addition of an asphalt batch plant to the existing Hogan Quarry mining operation is a dramatic expansion of that operation. Not only would it require a modification of the existing permit, it may trigger a revision of the reclamation plan, an update of the Waste Discharge Requirements, and an update of the Storm Water Pollution Prevention Plan. At the very least, there should be public input and an opportunity for neighboring property owners to be included in the process.

The Director's Decision and a Conditional Use Permit Are Discretionary Decisions Subject to Compliance with the California Environmental Quality Act.

The California Environmental Quality Act, Public Resources Code sections 21000 *et seq.*, requires environmental review prior to the grant of any discretionary permit or license. See Cal. Pub. Res. Code § 21080(a). The Planning Director exercised discretion in determining—erroneously—that the asphalt plant is a permitted use. *See* Code § 17.40.020.G. (allowing the planning director to determine if industrial uses similar to enumerated uses are permitted uses); *Hunter v. City of Whittier*, 257 Cal. Rptr. 559, 565 (Cal. Ct. App. 1989) (finding the legislative criterion "the proposed use will be compatible with the permitted uses" gave administrative officials unduly broad discretion); *Long Beach v. Cal. Lambda Chapter of Sigma Alpha Epsilon Fraternity*, 63 Cal. Rptr. 419, 423 (Cal. Ct. App. 1967) (finding the city council exercised discretion in determining fraternity and sorority houses were a permitted use in a business district). Even if correct, the Director's decision can only be made after the County complies with CEQA's environmental review requirements.

Moreover, because that decision is incorrect, a conditional use permit is required. A conditional use permit is a discretionary decision. *See San Remo Hotel v. City & Cnty. of S.F.*, 41 P.3d 87, 122 (Cal. 2002) ("Whether to issue a conditional use permit is an adjudicative decision that is exercised at the discretion of the planning commission. . . ."). Accordingly, the County must comply with CEQA's environmental review requirements prior to issuing any conditional use permit for an asphalt plant. *See Friends of Sierra Madre v. City of Sierra Madre*, 19 P.3d 567, 580 (Cal. 2001) (finding CEQA requirements apply to discretionary projects approved by public agencies, including issuance of conditional use permits).

CEQA review is critical here because the proposed asphalt plant may have a number of significant environmental impacts, including, but not limited to:

1. Increased Truck Traffic. One hundred or more additional truck trips per day or night through Rancho Calaveras on Silver Rapids Road and surrounding neighborhoods will likely cause a major inconvenience and safety hazard to current residents. School bus routes will also be affected in these same

communities. Significant traffic can be associated with the trucking of asphalt concrete, which will result in additional congestion at the highway 12/26 intersection.

2. Increased Noise. Asphalt plants can produce significant noise during operational hours (day and night) that can be heard for miles and affect nearby residents.

3. Increased Toxicity. The Calaveras River and, potentially Cosgrove Creek, will be subject to potential toxic runoff, as the river is located near the base of Hogan Quarry, and the Creek is nearby. In addition to the site's close proximity to Hogan Reservoir, Cosgrove Creek is also home to many endangered or threatened species of wildlife.

4. Depleted Groundwater. Groundwater levels are already extremely low due to current drought conditions. An asphalt plant requires a water supply, which will further limit and exacerbate the lack of available water for existing residents and businesses.

5. Degraded Air Quality. Residents will be impacted by potentially toxic fumes during the plant's operating hours.

6. Tourism. Lake Hogan is home to many recreational outdoor activities, including swimming, boating, fishing, and camping. Truck traffic, noise, and pollution will all affect the County's tourism industry, decreasing the revenue derived from tourism.

In short, approving an asphalt plant, whether by interpretation or by conditional use permit, is a discretionary action that requires CEQA compliance. The County must complete its CEQA compliance before construction or operation of the asphalt plant may commence.

Respectfully Submitted,

Joyce Techel, President
MyValleySprings.com

John A. Walker