



Board Agenda Item 13

DATE: July 18, 2023

TO: Board of Supervisors

SUBMITTED BY: Steven E. White, Director
Department of Public Works and Planning

SUBJECT: Appeal of Planning Commission's approval of Unclassified Conditional Use Permit Application No. 3755-A and 3755-B (Appellant: City of Fresno; Applicant: Pete LoCastro, Area Operations Manager, Cemex; Owner: Cemex Construction Material Pacific, LLC)

RECOMMENDED ACTION(S):

1. **Consider appeal of the Planning Commission's approval of Unclassified Conditional Use Permit Application No. 3755-A and 3755-B proposing to allow an additional four years of operating time (extend expiration date to July 28, 2027) for an existing aggregate operation, processing plant, and related uses on a combined 476 acres located at 13475 N. Friant Road and 147575 N. Friant Road. Both sites are located within the AE-20 (Exclusive Agriculture, 20-acre minimum parcel size) zone district; and**
2. **If the Appeal is denied and the Planning Commission's approval of Unclassified Conditional Use Permit Application No. 3755-A and 3755-B is upheld:**
 - a. **Determine that in accordance with Section 15162 of the California Environmental Quality Act (CEQA) that the project is not subject to preparation of a supplemental Environmental Impact Report (EIR) and the previously prepared EIR may be used for consideration of this proposal; and**
 - b. **Determine that the project is also exempt under Sections 15061(b)(3) and 15301 (Existing Facilities) of the CEQA Guidelines and direct staff to file a notice of exemption with the County Clerk and State Clearinghouse; and**
 - c. **Move to determine the required Findings can be made as described within the staff report and approve Unclassified Conditional Use Permit No. 3755 subject to the Conditions of Approval and Project Notes listed in Attachment D with a maximum extended operating period of four additional year ending on July 28, 2027; and**
 - d. **Uphold the Planning Commission's additional condition of approval, requested by Staff, requiring that the Applicant enter into an indemnification agreement with the County and provide a financial security to cover legal costs associated with the approval of Conditional Use Permit Application No. 3755-A and 3755-B, as modified, and direct Staff and the Applicant to return within 45 days with execution-ready indemnification and security agreements.**

The Project includes both the Plant Site and the Quarry Site. The Plant Site (UCUP 3577-A) is

located on approximately 122 acres on the west side of N. Friant Road 0.65-miles north of Willow Avenue, and approximately 1.5-miles north of the nearest boundary of the City of Fresno (APNs: 300-070-56S, 57S, 58S, 59S, and GOS) (13109 N. Friant Road) (Sup. Dist. 2).

The Quarry Site (UCUP 3577-B) is located on approximately 354 acres on the west side of N. Friant Road at its intersection with Merrill Avenue, and approximately 2.0-miles north of CEMEX's current Plant Site (APNs 300-040-19, 300-040-20, 300-080-0IS, 300-250-12 and a portion of 300-310-01) (13757 N. Friant Road) (Sup. Dist. 5).

This item comes before your Board on Appeal of the Planning Commission's approval of the subject application (five in favor, two opposed, with one Commissioner absent) at its June 8, 2023 hearing. The Zoning Ordinance requires your Board to determine, independent from the decision of the Planning Commission, whether the application should be approved, approved with stated conditions, or denied. A copy of the Planning Commission's action is included as Attachment A. This item pertains to locations in District 2 and 5.

ALTERNATIVE ACTION(S):

If your Board is unable to make the required Findings for granting Unclassified Conditional Use Permit No. 3755-A and 3755-B, a motion to overturn the Planning Commission's decision, stating the basis for your inability to make the Findings, would be appropriate.

FISCAL IMPACT:

There is no Net County Cost associated with the recommended action. Pursuant to the County's Master Schedule of Fees, the Applicant/Owner has paid \$5,261.50 in land use processing fees to the County for the processing of the Classified Conditional Use Permit. The City of Fresno, as Appellant has paid a \$508 appeal fee to the County.

DISCUSSION:

Planning Commission Appeal

The previously approved CUP and the current CUP to amend the expiration date are processed pursuant to Section 816.3-U and 858 of the Zoning Ordinance. Per Zoning Ordinance Section 873-F your Board in considering approval or denial of the CUP must consider the following five Findings:

1. That the site for the proposed use is adequate in size and shape to accommodate said use and all yards, spaces, walls and fences, parking, loading, landscaping and other features required by this Division, to adjust said use with land and uses in the neighborhood.
2. That the site for the proposed use relates to streets and highways adequate in width and pavement type to carry the quantity and kind of traffic generated by the proposed use.
3. That the proposed use will have no adverse impact on abutting property and surrounding neighborhood or permitted use thereof.
4. That the proposed development is consistent with the General Plan.
5. That the conditions stated in the resolution are deemed necessary to protect the public health, safety and general welfare.

Under Section 873-H.1 of the Zoning Ordinance, your Board's review of the appeal is de novo, meaning

your Board's determination is not bound by the findings or conclusions of the Planning Commission, as if the matter had not been heard before.

The Planning Commission considered the Staff Report (Attachment B) at its June 8, 2023 meeting. The Applicant's testimony generally concurred with the Staff Report except that they reiterated their request for a four-year time extension rather than the one-year recommended in the Staff Report and asserted that the project could also be determined to be compliant with CEQA based on an exemption for existing Facilities as specified under Section 15301 of the CEQA Guidelines. Compliance with CEQA can be based on more than one provision of CEQA, and it would be appropriate to consider adoption of both provisions if the motion is to approve. The Applicant also provided additional testimony supporting the application and clarifying that the proposed application does not change the existing entitlements or operations in any manner except for the extension of the expiration date.

Eight speakers presented information in support of the proposal asserting the benefits CEMEX brings to the workers and the community at large. Eight speakers were in opposition to the application stating the existing operation has caused issues such as dust, water, and traffic. The Commission was provided seven written comments submitted after the Staff Report was published, four were in opposition, two were natural, and one was in support (Attachment E).

A representative of the San Joaquin River Parkway and Conservation Trust stated the certified and supplemental EIRs only applies to the processing of the Beck resources (now reclaimed) and therefore, the Staff Reports CEQA exemption (Section 15162) is baseless, and cited other concerns about changing conditions.

A motion was made by Chairman Abrahamian and seconded by Commissioner Arabian to determine that the required Findings can be made as described within the Staff Report and approve Unclassified Conditional Use Permit No. 3755 subject to the Conditions of Approval and Project Notes listed in Exhibit 1, extending the expiration date for operations by four additional years, ending on July 28, 2027, and to include the additional Condition of Approval requiring the Applicant to enter into an Agreement to indemnify, and (at the County's request) defend the County in any litigation arising from the approval of the Project, and to provide a financial security to secure the Applicant's indemnity obligations.

CEQA Findings

The Planning Commission relied on section 15162 of the CEQA Guidelines to determine that the project is not subject to preparation of a supplemental EIR and the previously prepared EIR may be used for consideration of this proposal.

During the Planning Commission hearing, the Applicant stated (1) that the project is categorically exempt from further review as an existing facility under Section 15301 of the CEQA Guidelines and (2) that it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment compared to the existing baseline (CEQA Guidelines, § 15061(b)(3)). Supporting this conclusion is the 2018 case *World Business Academy v. California State Lands Commission*, in which the Court of Appeal determined that the existing facilities exemption applied even to the extension of an operating license for the Diablo Canyon nuclear power station.

Staff concurs with the Applicant that the project is also exempt under Sections 15061(b)(3) and 15301. If your Board approves Recommended Action No. 2, Department staff will file a Notice of Exemption with the State Clearinghouse.

Condition of Approval - Indemnification Agreement and Security

In approving the Project, the Planning Commission imposed the following condition of approval at Staff's request:

“The Applicant/ Appellant [sic] shall enter into an agreement indemnifying the County for all legal costs associated with its approval of UCUP No. 3755 and provide security in an amount determined by the County for any such legal costs incurred. The agreement and payment of security shall be due unless the litigation period has expired, in which case the requirements for the indemnification agreement and security shall be considered null and void.”

The Recommended Actions request that your Board specifically uphold this additional condition of approval, modified to delete the language “/ Appellant” from the first line, as the Applicant in this instance is an appellee.

Fulfillment of this condition of approval will require the execution of an Indemnity and Defense Agreement by the Applicant and County, and the execution of a financial instrument meeting the requirements of the Indemnification and Defense Agreement, such as an Escrow Agreement, between the same parties and a qualified financial institution.

Staff will return to your Board at a later date to seek approval of these agreements. Staff further requests that your Board impose a 45-day time limitation on the return to your Board with approval-ready agreements.

Appeal

On June 22, 2023, the City of Fresno filed an appeal to the Planning Commission’s decision (See Attachment C), asserting that that the existing EIR is no longer adequate for the proposed project because substantial changes have occurred with respect to the circumstances under which the project is undertaken. These changes will require major revisions of the previous EIR. They attached their comment letter dated March 15, 2013, which, in summary, asserts that:

1. Historical environmental records were not adequately provided for public review.
2. The use of the previous environmental document was inappropriate and does not cover the area of the entitlement under consideration (CUP 3093).
3. There is no attached record of environmental review which allows for the extension of time beyond the horizon year shown in Draft EIR 3157 or supplemental EIR 3174.
4. There is no attached record of environmental review which analyzed the additional gravel truck volumes shown in either Draft EIR 3157 or Supplemental EIR 3174.
5. The current application for a time extension is beyond the horizon year listed in the Draft EIR 3157 and Supplemental EIR 3174.
6. The current application for a time extension lists employees at 110 which is beyond the scope of both the Draft EIR 3157 and Supplemental EIR 3174.

The issues raised in the City’s appeal questions the appropriateness of using previous environmental documents from prior approvals for this request. Under CEQA Section 15162, previously adopted environmental documents may be used unless there is substantial evidence, not just a fair argument, assertions regarding significant specific types of changes as defined in Section 15162. The arguments from the City are assertions, but do not provide substantial evidence as required by 15162 to warrant preparation of additional environmental documents. Staff notes that Supplemental EIR 3174 included additional environmental analysis of the Lone Star processing plant and prior environmental document has been available on the Cemex webpage for public review.

Staff also notes that the process to provide for a limited time extension of the operation is identical to the process undertaken in 2003 to approve Unclassified Conditional Use Permit Nos. 3063 and 3064, which extended the operating time to 2023. That 2023 action was not appealed or challenged. A more detailed discussion of the specific provisions of 15162 is contained within the Staff Report to the Planning Commission (Attachment B). Additionally, your Board may also utilize the exemption allowed under Section 15301 for existing facilities as previously described

Board Action

If your Board is able to make the required Findings for granting Unclassified Conditional Use Permit Application No. 3755-A and 3755-B, a motion to deny the appeal of the Planning Commission's decision, per Recommended Action 2.a through 2.d on page one of this Agenda Item, which would uphold the Commission's approval action, would be appropriate.

ATTACHMENTS INCLUDED AND/OR ON FILE:

Attachments A-E
On file with Clerk - Resolution

CAO ANALYST:

Salvador Espino