



**MINUTES OF THE REGULAR MEETING OF THE
CITY OF HAYWARD PLANNING COMMISSION
Council Chambers
Thursday, November 8, 2018, 7:00 p.m.
777 B Street, Hayward, CA 94541**

MEETING

A regular meeting of the Hayward Planning Commission was called to order at 7:00 p.m. by Chair Faria.

CALL TO ORDER Pledge of Allegiance

Commissioner Willis led in the Pledge of Allegiance.

ROLL CALL

Present: COMMISSIONERS: Willis, Andrews, Bonilla, Patton, McDermott
CHAIRPERSON: Faria
Absent: COMMISSIONER: Goldstein

Staff Members Present: Brick, Buizer, Chan, Emura, Nichols, Pearson, Wilfong

General Public Present: 32

PUBLIC COMMENT:

There were none.

PUBLIC HEARINGS: For agenda item No. 1, the decision of the Planning Commission is final unless appealed. The appeal period is 10 days from the date of the decision. If appealed, a public hearing will be scheduled before the City Council for final decision.

1. Appeal of Denial of a Proposed Temporary Concrete Recycling Facility at 24701 Clawiter Road (APN: 439-0020-002-03) Kimberly Douglas for Bay Area Concrete Recycling (BACR), LLC. (Applicant)/S&A Investment Holdings (Owner) Requiring an Administrative use Permit Application 201801996. (Continued from October 11, 2018)

Commissioner Patton disclosed a long-term professional relationship with the applicant's attorney, Mr. Moore of Wendel Rosen, and said there is no conflict of interest. Assistant City Attorney Brick said that was acceptable and that Commissioner Patton had discussed this with him prior to the meeting.

Associate Planner Emura announced that Water Pollution Control Administrator Wilfong is in attendance and will speak to the environmental issues including sediment track out.



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Associate Planner Emura provided a synopsis of the staff report and a PowerPoint presentation. Mr. Emura noted that he is the planner for the applicant's facilities on Clawiter Road and Depot Road.

Water Pollution Control Administrator Wilfong presented the BACR Stormwater Chronology and presented a PowerPoint presentation. Ms. Wilfong spoke about numerous issues at the Clawiter site which includes: problems with recycled concrete as it creates a fine dust which is extremely toxic, the lack of adequate dust control that has been going on for several years, impacts to aquatic ecosystems, the surrounding neighborhood, and the storm drains. Ms. Wilfong said the Hayward Municipal Code Section 11-5.22-Reduction of Pollutants in Stormwater are strict regulations prohibiting sediment and pollutants from entering the stormwater system. She spoke about Municipal Regional Permit (MRP) 2.0 codes that are being violated. Ms. Wilfong is concerned that these issues will become a liability as the City will have to intervene to clean up these pollutants.

Associate Planner Emura continued his synopsis of the staff report and presented the findings for denial. Mr. Emura spoke about an incomplete topographical survey that was submitted at the last minute by the applicant which does not allow for review by Planning staff in order for staff to have this document available to the Planning Commission. Mr. Emura said he included the option that the Planning Commission can deny the appeal without prejudice which will allow the applicant the option to resubmit their application. Mr. Emura encouraged the Commission to review the presentation, the fact that the previous temporary use permit had expired, and the timeframe that the applicant took to submit the application for the Depot Road facility.

Associate Planner Emura confirmed for Commissioner Patton that the applicant has requested a continuance in order to further address the issue and continue working with staff. Assistant City Attorney Brick acknowledged that the application must go through an administrative process and that the facility has been allowed to operate for approximately five years.

Associate Planner Emura confirmed for Commissioner Willis that the noise study was ordered when BACR applied for an Administrative Use Permit (AUP) for an outdoor storage shed. Mr. Emura said the noise study at the Depot Road site was conducted when the facility was not in operation for the concrete recycling. Mr. Emura said a noise study was never conducted at the Clawiter Road site and that this study is usually required at the time of the initial application, but the applicant never responded to the City's "Incomplete" letter. Mr. Emura said there were no enforcement actions early on as staff worked with the applicant towards the goal to have the Depot Road site up and operating, and that the applicant waited until after the Clawiter Road site's Temporary Use Permit expired to submit a new application. Mr. Emura said it would be difficult for staff to predict how soon



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the Depot Road site would be operational as it does not appear that the applicant was moving very quickly as evidenced by the applicant not responding to the 'Incomplete' letter. Mr. Emura confirmed for Mr. Willis that BACR has been operating outdoor concrete recycling operations illegally at the Clawiter site since the Code Enforcement complaint in 2013, and because of these issues and concerns, per the staff report, staff recommended to the applicant to look for another more suitable site such as Depot Road where similar heavy industrial uses were located.

Associate Planner Emura confirmed for Commissioner McDermott that a business license was issued for Slurry Solutions, but that there are now multiple businesses on the Clawiter Road site. Mr. Emura said there are code violations for building an office and bathroom, and the applicant also expanded into the rear yard which justified requiring an application for a site plan review. Mr. Emura said the applicant did submit a response to the building permit, but never addressed the site plan review. Mr. Emura said a lot of the permits for which the applicant applied are incomplete and that other departments might not know this is an illegal operation.

Associate Planner Emura confirmed for Commissioner Andrews that there are C3 requirements for the facility, but that the applicant's plans were not detailed enough, which is important to have a complete topographic survey. Water Pollution Control Administrator Wilfong said the applicant has a Qualified Stormwater Pollution Prevention Plan Practitioner (QSP) on site hired as BACR's consultant, and the QSP's opinion differs from City staff as to what is appropriate discharge onto the City streets. Ms. Wilfong says the pictures demonstrate what is occurring at the facility regarding environmental impacts, and that, in general, businesses need to set up their own controls to follow the City's regulations. Mr. Emura explained for Ms. Andrews that per the Bay Area Air Quality District (BAAMQD), there is an exception if an operation processes less than 5,000 tons of concrete per year, then the facility does not have to apply for an Authority to Construct Permit, but that is not the case with BACR.

Planning Manager Buizer explained for Commissioner Bonilla that if the Planning Commission upholds staff's recommendation to deny the application for a Temporary Use Permit for a Concrete Recycling Center on Clawiter Road, the applicant can then appeal that decision to the City Council. The City Council would then consider the appeal at a public hearing and if the City Council upholds the Planning Commission's decision, then staff would work towards shutting down the illegal operations. Water Pollution Control Administrator Wilfong said the environmental process is separate from the planning process, and steps will be taken to correct the environmental violations.

Mr. Allan Moore, with Wendel Rosen, attorney for the applicant, spoke about his professional relationship with Planning Commission Patton, Principal Planner Lochirco and



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Development Services Director Simpson, and that this does not constitute a conflict of interest. Mr. Moore spoke about the temporary use permit application and that the applicant is moving forward with the permitting application for Depot Road. Mr. Moore said BACR has complied and responded to the issues and provided their commitment to making these changes. Mr. Moore said staff did not include the applicant's response in the staff report.

Mr. Tim Bauers, representing applicant, spoke about the appeal which would allow BACR to continue operations at Clawiter Road until operations can be transferred to the Depot Road site. Mr. Bauers cited City of Hayward ordinance #01-05 that states 100% of demolition concrete needs to be recycled. Mr. Bauers spoke about the non-communication from Planning staff and said the applicant's permit was deemed complete on July 6. Mr. Bauer invited the Planning Commission to visit the site.

Ms. Kimberly Douglas, applicant, said BACR is a minority owned business and spoke about problems with the permitting process and the issues she has run into, and said the omitted report should have been provided to the Planning Commission. Ms. Douglas spoke about the discussion with Water Pollution Control Administrator Wilfong regarding the permit that was not routed to Ms. Wilfong's team for review. Ms. Douglas requested the Planning Commission send the proposal for the Temporary Use Permit back to Planning staff as she is confident that they can work things out to allow the Clawiter Road facility to continue operating. Ms. Douglas noted that almost all concrete recycling operations are outdoors.

Commissioner Willis asked about the timeline for the concrete recycling operations to be transferred to Depot Road; Mr. Bauers said it could take up to one year and that once the permit is approved and after the California Environmental Quality Act (CEQA) review, then BACR will need to submit building plans and continue with the submission process. Mr. Bauer confirmed that BACR is operating without a City Temporary Use Permit, but that they are operating in full compliance with the water board. Mr. Moore said the City is allowing BACR to operate while they are going through the application process. Mr. Willis has concerns that BACR is not working towards compliance with environmental issues at Clawiter Road and asked if staff is willing to work with the applicant on these issues while Depot Road is being developed.

Planning Manager Buizer shared that this item was scheduled to come before the Planning Commission on October 11, and that it was at the request of the applicant that the item was continued to allow BACR time to provide additional information. Ms. Buizer said during these discussions with the applicant there was never a time that staff indicated that they would change their position. Ms. Buizer said in reviewing the additional information, staff did not feel this information addressed the issues and decided to move forward with the public hearing for denial of the appeal. Ms. Buizer said the additional information came



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post staff's decision to deny the Temporary Use Permit and to bring the item before the Planning Commission for consideration. Ms. Buizer said if the Commission would like staff to reconsider, then the Commission can remand the item back to staff and it would take time to analyze the new information and conduct further studies.

In response to Commissioner Willis, Assistant City Attorney Brick said the Commission has three options:

- 1- Uphold the appeal. The item would then be remanded back to staff for further analysis including the CEQA analysis, and the item could then return to the Planning Commission with a recommendation
- 2- Reject the Appeal and uphold staff's decision, which bars the applicant from submitting a similar application for one year for Clawiter Road. Mr. Brick said the applicant can still move forward with Depot Road.
- 3- Reject the appeal without prejudice. Then the applicant can resubmit a Temporary use Permit application within one year with new information for Clawiter Road

Mr. Brick clarified that the current use at Clawiter Road is not permitted and is illegal despite any of these options.

Commissioner Patton appreciates Mr. Moore's comments about presenting additional information in order to have a balanced argument. Mr. Patton asked how BACR's concrete recycling operation lines-up with the City's long-term goals. Mr. Bauer said in the original appeal the key finding is per the City's requirements that 100% of demolition concrete is to be recycled. Mr. Moore spoke about the transition of the industrial area to more technology uses and noted that Associate Planner Emura recommended the Depot Road site which is why BACR invested in that site.

Mr. Michael Milani, Civic Surveyor for the project, spoke about the Depot Road site, how they have worked with Planning staff, the difficult permitting process, and what was involved. He said BACR has come up with a resolution to every issue, and he appealed to the Planning Commission to send this item back to Planning staff.

Planning Manager Buizer reminded everyone that the item before the Planning Commission is the Temporary Use Permit request to continue to operate an outdoor concrete recycling facility for Clawiter Road. Ms. Buizer said the application was denied at staff level and the applicant has filed an appeal.

Commissioner Andrews asked about the applicant's continued use of the unpermitted operation on Clawiter Road. Planning Manager Buizer said historically when staff discovers illegally operating uses, and once staff alerts the operator that they are operating without the appropriate land use approvals, that if the operator is moving forward to



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obtain these approvals, the City typically meets them halfway and allows the operation to continue. Ms. Buizer said the primary issue for BACR is land use authority to operate and environmental consequences of the ongoing operation that are becoming an issue, as was presented by Water Pollution Control Administrator Wilfong.

Assistant City Attorney Brick added that staff allowing a use to continue while they explore options to correct issues is not the same as the use being legal and noted that staff is going out of their way to help the applicant secure what is needed to make the use legal.

Commissioner Andrews asked the applicant about community outreach regarding complaints. Mr. Moore said a stopgap measure is that BACR has offered to wash cars affected by the dust. Ms. Douglas said the only neighbor that has come forward has been DW Nicholson, and BACR is working with them regarding offering Visa gift cards for employees to wash their cars.

Commissioner Bonilla asked staff about the late BACR report and the communication issues. Assistant City Attorney Brick said the late BACR report was submitted post denial and it was not included because it was not relevant to the item before the Commission. Associate Planner Emura said that staff met with Ms. Douglas and Mr. Bauers regarding keeping the Clawiter Road site open. Mr. Emura said he does not understand why BACR is saying there were communication issues as he had suggested to BACR to apply for the AUP for the temporary use and told the applicant that he would include their document for the Planning Commission to review. Mr. Bonilla asked why the applicant has not been able to comply. Mr. Bauers said BACR has complied as they have controls in place to control the dust and have met all the conditions required by the State and BAAQMD.

Chair Faria opened the public hearing at 9:11 p.m.

Mr. Gabriel Irving, Hayward contractor, spoke in favor of the applicant and said there is a great need and benefit to have concrete recycling facilities.

Mr. Gerald Carroll spoke on behalf of DW Nicholson. DW Nicholson met with BACR about four years ago and BACR has not upheld any of their promises to mitigate the dust impacts such as using water vapor to control the dust, which was only used for a short time. BACR had promised to cease concrete crushing at 11 a.m., whereas the operation actually continues until 4 p.m. and BACR conveyed to DW Nicholson that this was supposed to be a short-term project. Mr. Carroll said the dust shown on the display blows right into DW Nicholson's property, BACR has 13 violations at \$5K each, they have not addressed community concerns and the appeal should be denied. Mr. Carroll displayed pictures where spills and piles of dirt have damaged DW Nicholson property and destroyed fences.



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Mr. Carroll invited the Planning Commission to visit DW Nicholson's site to see the impact from the dust and urged the Commission to stop the health hazard.

Chair Faria allowed Mr. Carroll to read a statement from Mr. Alan Nielso as Mr. Nielso had to leave. Mr. Nielso is an employee of DW Nicholson. The statement spoke to the issues of airborne dust, toxic silica present in the concrete dust, how the dust is everywhere in the building and on and in their cars, and he was concerned about his health and the health of his fellow employees and neighboring businesses. Mr. Nielso said concrete dust contains silica that is covered by OSHA regulations and can cause lung cancer and breathing health issues. Mr. Nielso asked for the City to intervene on the part of the people living and working in this area and protect them from this hazardous health issue.

Mr. Moore spoke about the legalities of an appeal that requires that all evidence submitted should be reviewed and that the report submitted on October 4, 2018 should have been provided to the Planning Commission.

Mr. Bauer spoke about the silica generated from the concrete crushing. BACR has worked diligently with OSHA to make sure that their employees are protected and have controls in place to make sure that all the silica is contained and is not present in the fugitive dust that leaves the property.

Chair Faria closed the public hearing at 9:24 p.m.

Commissioner Willis noted that in the past the Planning Commission has not always agreed with the staff recommendation. He encourages businesses to come to Hayward, but the Clawiter Road site is not zoned for heavy industrial use and currently BACR has violated the laws and has continued to operate without a permit, even after the permit was denied. Mr. Willis said this is a concern as it has been five years since the plan to move their operation to Depot Road, but nothing has happened. Mr. Willis wants to make sure that if the Commission upholds the appeal that BACR complies with all conditions and obtains a Temporary Use Permit for a specific amount of time.

Commissioner Andrews sympathizes with BACR as it offers jobs to Hayward residents, it is expensive to recycle concrete, and the industrial area is in transition. She is glad that BACR has found an alternate site on Depot Road and hopes this process can be expedited as this is a valuable service. Ms. Andrews said unfortunately there have been years of violations that have not been addressed, there are community concerns that the City staff has gone out of their way to work with BACR to address, but these issues still have not been resolved.

Commissioner Bonilla empathizes with blue collar jobs being impacted, but his major concerns are the environmental and health impacts that have not been addressed. Mr. Bonilla



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cannot support the appeal.

Commissioner Patton commented that he sees the value and need for the concrete recycling operation, but five years is a long time to be operating illegally. Mr. Patton said he has not heard anything from the applicant that the Planning Director's finding of denial was incorrect, and he will not uphold the appeal.

Commissioner McDermott commented that she was diligent in reading the material and listened to all the discussion and from her experience that if an applicant needs to conduct business that they will comply with all the required conditions. She expressed concerns that the Clawiter Road site appears to be a permanent site as BACR has installed offices and additional unpermitted equipment. Ms. McDermott agrees with Commissioner Patton that there is a need for this type of operation. Ms. McDermott shared that she works on Clawiter Road and her car gets dirty just driving by BACR and understands the comments from DW Nicholson and that Depot Road appears to be a viable option. Ms. McDermott said BACR needs to operate within the guidelines established by the City, County and other regulatory agencies. Ms. McDermott does not support the appeal.

Chair Faria noted, as mentioned by Commissioner Willis, that the Planning Commission has had denials come before the Commission in the past and based on the information provided, the Commission has not always followed staff recommendations. Ms. Faria said this is not the case for this item, there has been an ongoing situation for five years, there was a delay in October at the request of the applicant, and then the applicant states there was an issue in getting information to staff. Chair Faria pointed out that even though the applicant said they have met with Development Services Director Simpson, Ms. Simpson signed and approved the staff report to reject the appeal and uphold staff's decision of denial of the Temporary Use Permit. Ms. Faria will be supporting the staff recommendation.

Commissioner Bonilla made a friendly amendment to include the language "without prejudice" in the motion.

Commissioner Patton asked for clarification about the motion to include the language "without prejudice" and if the applicant can appeal the Planning Commission's decision to the City Council, Assistant City Attorney Brick said including the words "without prejudice" modifies the staff's decision for denial. Mr. Brick said the motion would be "rejecting the appeal without prejudice" and this would end this application, but since the Planning Commission is modifying the Planning Director's decision to deny, the applicant can resubmit an application for the Clawiter Road facility within a year. Mr. Brick added that if the applicant appeals to the City Council, the City Council can then modify the Planning Commission's decision and reinstate the Planning Director's decision. Assistant City Attorney Brick confirmed for Commissioner Willis that if the Planning Commission upholds



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the staff recommendation with the modification that the denial is “without prejudice”, the applicant can resubmit an application to Clawiter Road within the year.

Assistant City Attorney Brick confirmed for Chair Faria that no matter what the Planning Commission decides, BACR is not legally allowed to operate on Clawiter Road, even if the Commission sustained the appeal and sends the item back to Planning staff, the use would still not be authorized.

Commissioner Willis stated that this operation is not legally possible on Clawiter Road because of the zoning, and the outdoor operation is being conducted without the proper controls for pollutants.

Commissioner Willis made a motion, seconded by Commissioner Patton, to approve the staff recommendation upholding the Development Services Director’s denial of the application with the modification that the denial is without prejudice. The motion passed with the following vote:

AYES:	Commissioners Willis, Andrews, Bonilla, Patton, McDermott, Goldstein Chair Faria
NOES:	None
ABSENT:	Goldstein
ABSTAIN:	None

APPROVAL OF MINUTES

2. Approval of Minutes of the Special Planning Commission Work Session Meeting of October 11, 2018

Commissioner Willis made a motion, seconded by Commissioner Patton, to approve the Special Planning Commission Work Session Minutes of October 11, 2018. The motion passed with the following vote:

6:0:1 (AYES: Willis Jr., Andrews, Bonilla Jr., Faria, Patton, McDermott; ABSENT: Goldstein)



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3. Approval of Minutes of the Planning Commission Meeting Minutes of October 11, 2018.

Commissioner Willis made a motion, seconded by Commissioner McDermott, to approve the Planning Commission Meeting Minutes of October 11, 2018. The motion passed with the following votes

6:0:1 (AYES: Willis Jr., Andrews, Bonilla Jr., Faria, Patton, McDermott; ABSENT: Goldstein)

4. Approval of Minutes of the Planning Commission Meeting Minutes of October 25, 2018.

Commissioner Willis made a motion, seconded by Commission McDermott, to approve the Planning Commission Meeting Minutes of October 25, 2018. The motion passed with the following votes:

6:0:1 (AYES: Willis Jr., Andrews, Bonilla Jr., Faria, Patton, McDermott; ABSENT: Goldstein)

COMMISSION REPORTS

Oral Report on Planning and Zoning Matters:

Planning Manager Buizer reminded everyone that City offices will be closed November 19 through November 23, 2018. Ms. Buizer wished everyone a Happy Thanksgiving.

Commissioners' Announcements, Referrals:

Commissioner Patton announced that he received an invitation to a community meeting for the surplus Caltrans properties and asked staff to provide him with information. Planning Manager Buizer said staff can provide background information to the Planning Commission at a future meeting.

Commissioner Andrews congratulated Chair Faria for winning her election to the Eden Township Healthcare District Directors.

ADJOURNMENT

Chair Faria adjourned the meeting at 9:51 p.m.



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APPROVED:

A handwritten signature in cursive script, appearing to read "Ray J.", is written over a horizontal line.

Ray Bonilla, Jr., Secretary
Planning Commission

ATTEST:

A handwritten signature in cursive script, appearing to read "Denise Chan", is written over a horizontal line.

Denise Chan, Senior Secretary
Office of the City Clerk

