



**Resource Management
Agency
COUNTY OF TULARE
AGENDA ITEM**

BOARD OF SUPERVISORS

KUYLER CROCKER
District One
PETE VANDER POEL
District Two
AMY SHUKLIAN
District Three
EDDIE VALERO
District Four
DENNIS TOWNSEND
District Five

AGENDA DATE: September 15, 2020

Public Hearing Required	Yes	<input type="checkbox"/>	N/A	<input checked="" type="checkbox"/>
Scheduled Public Hearing w/Clerk	Yes	<input type="checkbox"/>	N/A	<input checked="" type="checkbox"/>
Published Notice Required	Yes	<input type="checkbox"/>	N/A	<input checked="" type="checkbox"/>
Advertised Published Notice	Yes	<input type="checkbox"/>	N/A	<input checked="" type="checkbox"/>
Meet & Confer Required	Yes	<input type="checkbox"/>	N/A	<input checked="" type="checkbox"/>
Electronic file(s) has been sent	Yes	<input checked="" type="checkbox"/>	N/A	<input type="checkbox"/>
Budget Transfer (Aud 308) attached	Yes	<input type="checkbox"/>	N/A	<input checked="" type="checkbox"/>
Personnel Resolution attached	Yes	<input type="checkbox"/>	N/A	<input checked="" type="checkbox"/>
Agreements are attached and signature line for Chairman is marked with tab(s)/flag(s)	Yes	<input type="checkbox"/>	N/A	<input checked="" type="checkbox"/>
CONTACT PERSON: Celeste Perez PHONE: (559) 624-7010				

SUBJECT: Findings in Support of the Board's Tentative Decision to Deny the Appeal by the Wonderful Company

REQUEST(S):
That the Board of Supervisors:

1. Adopt written findings in support of the Board's tentative decision to deny The Wonderful Company's appeal of the Resource Management Agency's issuance of Building Permit Nos. A2000938 and A2001028 for ARO Pistachio Inc.; and
2. Direct staff to distribute the adopted findings and notify the parties of the Board's final decision to deny the appeal.

SUMMARY:
The Resource Management Agency issued building permits A2000938 and A2001028 on May 20, 2020 and June 2, 2020 respectively. Building Permit A2000938 would allow ARO Pistachio to install three (3) pistachio storage silos with catwalks and stair system, referencing MIM 17-034. Additionally, Building Permit A2000938 would allow for (8) pistachio storage silos, (4) dryers, (1) receiving pit, (1) pre-cleaner, (1) wet huller also referencing MIM 17-034.

RMA issued these permits in accordance with existing land use, zoning regulations, use permits, the California Environmental Quality Act, and all current standards, policies, and practices of Tulare County.

The Building Permits were also found to comply with the previously issued Special Use Permit PSP 96-074 (ZA), the Initial Study/ Negative Declaration, subsequent

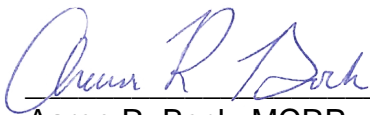
SUBJECT: Findings in Support of the Board's Tentative Decision to Deny the Appeal by the Wonderful Company

DATE: September 15, 2020

Minor Modifications Nos MIM 15-006, 17-0732, and 18-009 (March 2, 2018), and their associated Notices of Exemption. None of these approvals received opposition until The Wonderful Company filed an appeal to the building permits in June.

The Wonderful Company appealed these building permits on June 3, 2020. Pursuant to County procedure, the Board held an administrative appeal hearing on August 25, 2020, during which time the Board received evidence, heard public testimony, and was presented with arguments of the parties. Following the close of testimony, the Board deliberated, tentatively denying The Wonderful Company's appeal, and directing staff to prepare written findings in support of that decision. This agenda item will present those proposed findings (Attachment A) for the Board's consideration and possible approval. When adopted, the findings shall be distributed to the parties and public to notify that the Board's decision to deny the appeal is now final.

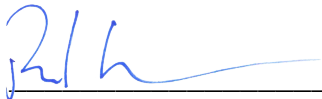
ADMINISTRATIVE SIGN-OFF:



Aaron R. Bock, MCRP, JD, LEED AP
Assistant Director



Michael Washam
Associate Director



Reed Schenke, P.E.
Director

Attachment A - Written Findings in support of the Board's tentative decision to deny The Wonderful Company's appeal of the Resource Management Agency's issuance of Building Permit Nos. A2000938 and A2001028 for ARO Pistachio Inc.

BEFORE THE BOARD OF SUPERVISORS COUNTY OF TULARE, STATE OF CALIFORNIA

IN THE MATTER OF FINDINGS IN) Resolution No. _____
SUPPORT OF THE BOARD'S)
TENTATIVE DECISION TO DENY)
THE APPEAL BY THE)
WONDERFUL COMPANY)

UPON MOTION OF SUPERVISOR _____, SECONDED BY
SUPERVISOR _____, THE FOLLOWING WAS ADOPTED BY THE
BOARD OF SUPERVISORS, AT AN OFFICIAL MEETING HELD SEPTEMBER 15, 2020,
BY THE FOLLOWING VOTE:

AYES:
NOES:
ABSTAIN:
ABSENT:

ATTEST: JASON T. BRITT
COUNTY ADMINISTRATIVE OFFICER/
CLERK, BOARD OF SUPERVISORS

BY: _____
Deputy Clerk

* * * * *

1. Adopted written findings in support of the Board's tentative decision to deny The Wonderful Company's appeal of the Resource Management Agency's issuance of Building Permit Nos. A2000938 and A2001028 for ARO Pistachio Inc.; and
2. Directed staff to distribute the adopted findings and notify the parties of the Board's final decision to deny the appeal.

Exhibit A
Findings and Conclusions

Findings for the Denial of the Appeal filed by the Wonderful Company regarding a Decision by the Tulare County Resource Management Agency (RMA) to issue to ARO Pistachio Inc. Building Permit Nos. A2000938 and A2001028 (Matter No. 2020649)

With respect to the Appeal of Wonderful Company regarding the Tulare County Resource Management Agency decision to issue Building Permit Nos. A2000938 and A2001028 on May 20, 2020 and June 2, 2020 respectively (“Building Permits”), to ARO Pistachio Inc. for the installation of three (3) pistachio storage silos with catwalks and stair system, under Building Permit A2000938, referencing Minor Modification No. MIM 17-034, and eight (8) pistachio storage silos, four (4) dryers, one pre-cleaner, and one wet huller, under Building Permit A2001028, also referencing MIM 17-034, the Tulare County Board of Supervisors, hereby incorporates all of the records by reference and denies the appeal and affirms the RMA issuance of Building Permit Nos. A2000938 and A2001028 based on substantial evidence, and hereby finds and concludes as follows:

The Wonderful Company and Wonderful Citrus II LLC (collectively, “Wonderful Company” or “Appellant”) filed this appeal of Building Permit Nos. A2000938 and A2001028 on June 3, 2020 challenging decisions preceding and the validity of the issuance of the Building Permits. The Appellant and Respondents ARO Pistachio Inc. and Touchstone Pistachios, Co. (“Respondents”) submitted extensive briefing to the County. On August 25, 2020, the Tulare Board of Supervisors held a formal evidentiary hearing on the Appeal of Building Permit Nos. A2000938 and A2001028.

1. The Board Denies the Appeal Because the Land Use Approvals for the ARO Facility Were Issued in Accordance with Applicable Land Use and Zoning Regulations, the California Environmental Quality Act, and All Applicable Standards, Policies, and Practices of Tulare County; Remain Valid; and Are Not Subject to Appeal.

Appellant argues that the Building Permits are impermissible because the underlying land use approvals authorizing the ARO Pistachio, Inc. processing facility (“ARO Plant”) are void. The core of Appellant’s claims concern the validity of improvements to the ARO Plant approved through PSP 96-074 and MIM 17-034. Appellant claims that the County did not follow the correct procedure in approving the improvements under MIM 17-034 as minor modifications. Special Use Permit PSP 96-074 was issued for the ARO Plant in 1996 and was subsequently modified three times with MIM 15-006, MIM 17-034, and MIM 18-009 (collectively, “Land Use Approvals”). The Board finds that the underlying land use approvals remain valid as follows:

- a. The Special Use Permit Remains Valid. Condition of Approval 11 of PSP 96-074 states the Special Use Permit, “shall expire... two years after the use is... discontinued or abandoned.” The Board is not persuaded by the information from federal and state regulatory agencies that operations were discontinued or abandoned at the ARO Plant. There are no RMA Records to indicate that the use ever stopped on this site, since Google Earth Images/Records suggest that there

were activities consistent with by right uses and permitted entitlements occurring onsite between 2004 and 2010. These activities include the continued processing of pistachios from the growing of trees, harvesting, and the use of equipment for the existing facilities on site (Staff Report, Attachment 1-B – Google Imagery 1994 through 2018). In the course of the Appeal, the County also received a declaration from Adam Orandi attesting under penalty of perjury that certain agricultural processing activities continued to occur at the ARO Plant. The Board therefore finds that PSP 96-074 remains valid.

- b. The Minor Modifications Complied with the County Code. The Tulare County Zoning Code Chapter 3, Section 18 gives the Zoning Administrator the authority to delegate to the Planning and Development Director the authority to approve “minor modifications to the site development plan” that do not “substantially change or alter the use approved or conditions imposed” and PSP 96-074 provides that the Planning and Development Director may issue “minor modifications” of use permits provided that those modifications “do not materially affect the determination of the Zoning Administrator.” None of the issued Minor Modifications alter the “use” authorized or alter a condition imposed.
 - i. “Use” is defined by the Tulare County Zoning Code to mean “[t]he purpose for which land or building is arranged, designed, or intended or for which either is or may be occupied or maintained.” The “use” authorized by PSP 96-074 is an agriculture processing facility. This “use” has not been changed by any of the Minor Modifications.
 - ii. The conditions of approval in PSP 96-074 are found on the third and fourth pages of the permit document. None of the conditions of approval contained in PSP 96-074 limit operations at the ARO Plant to fewer than 10 employees or to processing twice the product grown on site. The conditions of approval have not been “substantially changed” by any of the Minor Modifications.
 - iii. The determination of the Zoning Administrator is articulated on the third and fourth pages of PSP 96-074. None of these determinations limit operations at the ARO Plant to fewer than 10 employees or to processing twice the product grown on site. None of the Minor Modifications have “materially affect[ed] the determination of the Zoning Administrator.”
 - iv. Appellant’s contention that the improvements are not properly processed as minor modifications is barred by the statute of limitations. The Minor Modification challenged by Appellant was approved in July 2017. The validity of MIM 17-034 is subject to Government Code (“Gov. Code”) § 65009(c)(1). *Stockton Citizens for Sensible Planning v. City of Stockton* (2012) 210 Cal.App.4th 1484, 1491-92. Gov. Code § 65009(c)(1) provides a 90-day statute of limitations that prohibits *any* action to “attack, review, set aside, void, or annul . . . [a] conditional use permit, *or any other permit*” (emphasis added).

- c. The County Complied with CEQA. An Initial Study and Negative Declaration was prepared and completed in compliance with the California Environmental Quality Act (“CEQA”) and the State Guidelines for the implementation of CEQA for the proposed Special Use Permit. After review and consideration of the information contained in the Negative Declaration, the County found that the Special Use Permit would not have a significant effect on the environment. This determination was not appealed within the statute of limitations period. For MIM 15-006, the County determined that the minor modification on land utilized for the existing agricultural packing facility was categorically exempt from CEQA (Guideline §§ 15301, 15302, 15303) as pertaining to existing facilities, replacement of existing structures, and new construction or conversion of small structures. The Notice of Exemption (“NOE”) for MIM 15-006 was filed on April 6, 2015. No appeal was filed to challenge the County Decision to approve MIM 15-006. The second minor modification was approved by the County in July 2017, consistent with Tulare County Development Standards, CEQA and the State CEQA Guidelines. The County determined that the minor modification was categorically exempt from CEQA (Guideline § 15303) as new construction that would not result in any change in land use. The NOE for MIM 17-034 was filed on July 18, 2017. No appeal was filed to challenge the County Decision to approve MIM 17-034. The most recent minor modification was approved by the County in February 2018, consistent with Tulare County Development Standards, CEQA and the State CEQA Guidelines. The County determined that the minor modification was categorically exempt from CEQA (Guideline §§ 15301, 15302, 15305) as pertains to improvements to existing facilities within the existing facility footprint. No appeal was filed to challenge the County Decision to approve MIM 18-009. The Board finds that any challenges to the validity of the County’s compliance with CEQA as to these land use approvals is now time barred.

2. The Board Denies the Appeal Because Building Permits A2000938 and A2001028 Are Consistent with the Land Use Approvals for the ARO Plant.

Appellant contends that the Building Permits authorize improvements beyond the improvements contemplated in the Land Use Approvals in two ways: first, by authorizing dryers in excess of the number approved in the Land Use Approvals and, second, by authorizing the installation of a wet huller and pre-cleaner under Building Permit A2001028. The Board finds as follows:

- a. The Dryers Are Authorized by the Land Use Approvals. MIM 15-006 authorized the installation of eight pistachio dryers. These are depicted in the approved site plan for MIM 15-006. Nevertheless, these were not specifically listed because the dryers are considered an accessory function of pistachio processing and incidental and accessory structures and equipment do not require independent land use approval. MIM 17-034 authorized an additional twelve, taller dryers. These were depicted in the site plan and included in the listed equipment. The minor modifications therefore authorize a total of twenty pistachio dryers on the site. Eight of these were built in 2015 under MIM 15-006 and subject to a deferred submittal for final inspection and building permits. Four dryers authorized under

MIM 17-034 have been built, four more are under construction. This is consistent with the improvements authorized by the minor modifications.

- b. The Processing Equipment Is Authorized by the Land Use Approvals. Pre-cleaners and wet hullers are “equipment”, which are allowed by-right within the AE-40 Zone. The County’s Zoning Ordinance specifically allows for these items, as they are components of processing. Approval of this equipment was implicit in the approval of the processing plant. Section 9.7-B.3 (AE-40 Zoning) of the Tulare Zoning Code allows for incidental and accessory structures by right including storage tanks, storehouses, silos, other farm buildings, etc. It does not call for “pre-cleaner and wet hullers” to specifically require a use permit. Nevertheless, this equipment was depicted in the approved site plans for MIM 15-006 and MIM 17-034. The inclusion of the pre-cleaner and wet huller was therefore consistent with the Land Use Approvals.

3. The Board Denies the Appeal Because the Location of Silos and Storage Facilities on Property Line Does Is Consistent with Land Use Approvals and County Practice.

Appellant challenges the legality of the Building Permits based on the placement of the silos and storage facilities on the property line and within the setback, contending that such action requires a variance. The Board finds as follows:

- a. The Land Use Approvals Are Effective As to Both Parcels. The ARO Plant is owned and operated by the Orandi Family, and the two parcels are owned by members of the Orandi Family and comprise the ARO Plant site. When PSP 96-074 was approved in December 1996, the Special Use Permit applied to the original 78.48 acre parcel (APN 319-13-019). As is the County’s standard practice, the Special Use Permit runs with the land. The Decision on PSP 96-074 was subsequently recorded against the 78.48 acre parcel (APN 319-13-019) (Recorded Doc. No. 2001-44615), and remains recorded against the full 78.48 acres. The original 78.48 acre parcel (APN 319-13-019) was subsequently divided in 2011 into two parcels (APN 319-13-022 and APN 319-13-023), owned by members of the Orandi family and continuously operated as one pistachio agricultural operation. Condition of Approval (COA) 4 of PSP 96-074 states, “Any structures built shall conform to the building regulations and the building line setbacks of the Ordinance Code of Tulare County insofar as said regulations and setbacks *are applicable* to such structures except as modified herein.” The County’s standard practice with agricultural and industrial operations, is that building line setbacks are not applicable (as stated in COA 4) when agricultural processing applications that have buildings, structures, operations, or equipment that cross property lines where the setbacks are not applicable due to family or company partner’s ownership of both properties. The County has always allowed deviations from the original site plan and agricultural setbacks for building permits through plan check process as long as they are reasonable. Staff looks at joint users under one use as within the “yard” area under the setback rules of the County. The Board finds that the Building Permits allowing silos and storage facilities on the property line, straddling two parcels, and within the setbacks are

consistent with the land use approvals, the County Code and the County's standard practice.

4. The Board Denies the Appeal Because the ARO Plant is Not a Public Nuisance or Public Health Risk

Appellant claims that the ARO Plant and its operations pose a public nuisance and public health risk, based on 2019 odor, excessive flies, misplaced waste and fertilizer fire complaints. Appellant relies on records from the San Joaquin Valley Air Pollution Control District ("Air District"). The Board hereby finds as follows:

- a. There Is No Evidence that the ARO Plant Is a Nuisance. There is no record that ARO Plant and its operations are a public nuisance or present a public health threat. To prove a nuisance, the activity must impair the use and enjoyment of land in a way that is "substantial and unreasonable." The County has no code enforcement violations (open or closed), code compliance or enforcement requests or reports on record for the ARO Plant or the site. The Air District records of complaints provided by Appellant show that the Air District investigated the complaints and found no violations.
- b. The ARO Plant is Protected by the Right to Farm Act. The ARO Plant is an agricultural operation. Under the Tulare County Code, an agricultural operation includes not only actual production, but also "harvesting and *processing* of any agricultural commodity . . . and any commercial agricultural practices performed as incident to or in conjunction with such agricultural operations, including preparation for market, delivery to storage or to market, or to carriers for transportation to market." Tulare County Code § 7-29-1000 (emphasis added). Agricultural operations are protected by the Right to Farm Act and Tulare County Code section 7-29-1055. Section 7-29-1055 of the Tulare County Code provides that "[n]o agricultural operation, conducted or maintained for commercial purposes, and in a manner consistent with the proper and accepted customs and standards established and followed by similar agricultural operations in the same locality, shall be or become a nuisance, private or public, due to any changed condition in or about the locality, after the same has been in operation for more than three years if it was not a nuisance at the time it began." The Board finds that the challenges, odor complaints and fires, that ARO Plant has had are similar to other nut processors, including Appellant.

5. The Board Denies the Appeal Because the Issuance of Building Permits A2000938 and A2001028 Did Not Violate CEQA.

The Appellant alleges that the issuance of the Building Permits violated the California Environmental Quality Act ("CEQA") in four ways: first, that the County did not analyze the environmental effects of the expansion; second, that the County cannot rely on an exemption for

the Building Permits; third, that the County failed to make the required CEQA findings; and, fourth, that the County improperly piecemealed the expansion. The Board finds as follows:

- a. The County Complied with CEQA in the Issuance of the Land Use Approvals. The County prepared a negative declaration for PSP 96-074 in 1996. Each subsequent minor modification was accompanied with a duly published notice of exemption. The County's determination that the modifications were exempt is entitled to deference, but in any case any challenge to that compliance is now time barred.
- b. The Issuance of Building Permit Nos. A2000938 and A2001028 Did Not Require Additional CEQA review. Issuance of the Building Permits were exempt from CEQA on the grounds that building permits encompass activities involving ministerial authority. The Building Permits are merely implementing projects approved under the Minor Modification, MIM 17-034. MIM 17-034 was approved by the County in July 2017. The County determined that the minor modification was categorically exempt from CEQA (Guideline § 15303) as new construction that would not result in any change in land use. The NOE for MIM 17-034 was filed on July 18, 2017. No appeal was filed to challenge the County Decision to approve MIM 17-034. The CEQA Guidelines specifically provide that the issuance of a building permit is presumed ministerial. Guidelines § 15268(b). When an initial project is approved, subsequent approvals which comply with it are ministerial. "Where a use is consistent with applicable zoning, and a conditional use permit . . . has been obtained, then the next step generally would be to obtain a building permit, the issuance of which is *presumptively a ministerial rather than discretionary act.*" *Friends of Davis v. City of Davis* (2000) 83 Cal. App. 4th 1004, 1010-11 (citing *Day v. City of Glendale* (1975) 51 Cal.App.3d 817, 820-821; CEQA Guidelines § 15268(b)).
- c. No Additional Environmental Impacts Have Been Identified. The ARO Plant may only be operated within the bounds of the permits issued to it by the County, the Regional Water Quality Control Board, and the Air District. Further, the County and the State have both found that agricultural processing facilities such as the ARO Plant enhance rather than detract from the value and production of the agricultural lands they serve. *See* Gov. Code § 51238.1; Tulare County Zoning Code § 9.7.E.34. The County is further persuaded by the ERM Report submitted on August 21, 2020 that the expansion will not result in any additional environmental impacts.
- d. No Additional CEQA Findings Were Required. Because the Building Permits were ministerial and were therefore not independently subject to CEQA, the County was therefore not required to make findings under CEQA Guidelines § 15162.
- e. The Expansion Was Not Improperly Piecemealed. The agency must analyze possible future expansions related to a project when those expansions are a "reasonably foreseeable consequence" of the project. The separate expansions of

the ARO Plant are independent. Nothing in the improvements authorized by MIM 15-006 compelled or required the improvements authorized by MIM 17-034. Similarly, the development of the anaerobic pond is wholly divorced from the expansion of the processing equipment. The minor modifications are not reasonably foreseeable consequences of each other.

6. The Board Denies the Appeal Because Appellant Has Abandoned Its Additional Claims.

In its letter initiating the appeal, Appellant made several claims that are now abandoned including, *inter alia*, that the approval of MIM 17-034 and the Building Permits violated Government Code § 51238.1, that the clearing necessary for the improvements authorized by the minor modifications was not authorized, and that the privacy fence was not authorized. The Board hereby finds that these and any other claims Appellant failed to advance through its briefing and failed to bring before the Board at the August 25, 2020 hearing are abandoned and are therefore denied.