

STATE OF NORTH CAROLINA

**BEFORE THE MADISON COUNTY
BOARD OF ADJUSTMENT**

COUNTY OF MADISON

IN THE MATTER OF:

**DECISION BY
BOARD OF ADJUSTMENT**

**ZONING APPLICATION BEFORE
THE MADISON COUNTY BOARD
OF ADJUSTMENT
BY MADISON ASPHALT, LLC**

THIS CAUSE coming on for hearing before the Madison County Board of Adjustment (hereinafter "Board") upon an application filed by Madison Asphalt, LLC (hereinafter "Applicant") requesting a conditional use permit as may be allowed under the terms and provisions of Chapter 11 of the Land Use Ordinance of Madison County (hereinafter "Ordinance"). The public hearing on the application commenced on 22 April, 2019 and continued on 24 April, 2019, 6 May, 2019, 8 May, 2019, 15 May, 2019, 16 May, 2019, 17 June, 2019 and 18 June, 2019. **BASED UPON** the evidence presented at the hearing, the Board makes the following **FINDINGS**:

1. The Board as established under the terms and provisions of the Ordinance consists of seven (7) members, to wit:
 - KAREN KIEHNA, Chairman
 - ERNEST RAMSEY
 - DARLYNE RHINEHART
 - MIKE TUZIW
 - ROBERT BRIGGS
 - RICK MOLLAND
 - SHERRIE FRISBEE
2. Donny J. Laws, County Attorney for Madison County, appeared at the hearing as legal counsel for the Board.
3. The Applicant is a NC Limited Liability Company and T.J. Reed appeared at the hearing on behalf of the Applicant.

4. Albert Sneed of the Van Winkle Law Firm appeared at the hearing as legal counsel for the Applicant.
5. The Applicant and certain parties in opposition to the Application for the conditional use permit stipulated and agreed in the terms and provisions of a pre hearing agreement that a number of persons have standing to participate in this hearing in opposition to the Application, those persons are, to wit;
 - ED FELDMANN
 - LISA LONG FELDMANN
 - TIM REUMLER
 - BILLY JEAN HAYNIE
 - LINDA PAYNE
 - RONNIE PAYNE
 - DOUG BRUGGEMAN
 - EMILY SONTAG; (hereinafter "opposition parties")
6. Brian Gulden of Patla, Straus, Robinson and Moore, P.A. appeared at the hearing as legal counsel for those parties.
7. Four (4) additional persons contended that each had standing to participate in the hearing in opposition to the Application, to wit:
 - JAMES TIBBETTS
 - VIVIAN LONG
 - CONNIE MOLLAND
 - ANDREW CARLSON
 - a. James Tibbetts owns real estate located approximately $\frac{1}{4}$ to $1 \frac{1}{2}$ miles from the proposed asphalt plant site and Mr. Tibbetts opined that the value of his property would be adversely affected if the Board grants to Applicant the requested conditional use permit.
 - b. Vivian Long owns real estate and is constructing a residence on said property. Her property is located approximately 1 mile from the proposed asphalt plant site. She opines that the value of her property may be adversely affected and that her health may be adversely affected if the Board grants to Applicant the requested conditional use permit.

- c. Connie Molland is a part owner in a business known as Flow Gallery located in Downtown Marshall. The gallery is located approximately 1 to 1 ½ miles from the proposed asphalt site. Connie Molland opines that the business will be adversely affected if the Board grants to Applicant the requested conditional use permit.
- d. Andrew Carlson owns real estate located approximately 1 mile from the proposed asphalt plant site. Mr. Carlson opines that his health will be adversely affected if the Board grants to Applicant the requested conditional use permit.
8. The Applicant requested that two (2) members of the Board, Sherrie Frisbee and Rick Molland recuse themselves from participation in the hearing on the Application. That prior to the hearing, Sherrie Frisbee recused herself and at the hearing and prior to the presentation of substantive evidence Rick Molland recused himself from participation in the hearing on the Application.
9. The Parties questioned the remaining and participating Board Members regarding any ex parte communications made by any Board member relevant to the subject matter of this hearing. After examination, there were no additional requests for removal of any Board member.
10. The subject matter of the hearing was the written application by the Applicant requesting that the Board issue a Conditional Use Permit as allowed under the terms and provisions of Chapter 11 of the Ordinance for the location of an asphalt plant on a 2 acre site located at 3807 West 25/70 Hwy, Marshall, NC 28753 (hereinafter "Application").
11. The Application with all amendments thereto meets all design requirements of the Ordinance as required by the Ordinance in Chapter 3.6.8(4) and is a written application as required by Chapter 11.3.2(a) of the Ordinance.
12. All Notice provisions regarding this hearing as mandated under the terms and provisions of the Ordinance as well as the General Statutes of North Carolina were properly satisfied, including, without limitation, Notice to the Applicant, Notice to the owner, Notice to abutting land owners, posting Notice prominently on the property and Publication of Notice in the newspaper.

13. The Ordinance provides in Chapter 11.3.2 that “the Board shall not grant a conditional use permit unless and until ... (c) the Board ... finds that in the particular case in question the use for which the conditional use permit is sought will not adversely affect the health or safety of persons residing or working in the neighborhood of the proposed use, and will not be detrimental to the public welfare or injurious to property or public improvements in the neighborhood”, (hereinafter “standards”).

14. The burden of proof in establishing that the standards have been satisfied is on the Applicant.

15. The Applicant must satisfy the standards through the production of competent, material and substantial evidence.

16. That the Applicant offered evidence through its witnesses, to wit:

- T.J. REED
- CARLOS CARDENAS
- ROB VANDENMEIRACKER
- LYNN CARMICHAEL
- JUNFENG ZHANG
- JEFF HYDER.

17. The asphalt plant will produce air emissions of pollutants. The pollutants include criteria pollutants consisting of, inter alia, particulate, dust, sulfur dioxide, nitrogen oxide, carbon monoxide and volatile organic compounds; and hazardous air pollutants consisting of, inter alia, benzene, arsenic, formaldehyde and toluene.

18. Asphalt plants emit pollutants that can be detrimental to the health and safety of persons living in close proximity to asphalt plants.

19. North Carolina regulates 97 hazardous toxic pollutants emitted from asphalt plants.

20. North Carolina requires a person or entity to obtain a permit from its regulatory agencies prior to the construction of an asphalt plant in North Carolina.

21. The Applicant has applied for the required air quality permits from the North Carolina regulatory agencies in order to construct the asphalt plant consistent with the regulations.
22. To obtain the required permit, certain tests and studies are required to calculate and determine the amount of pollutants produced by the proposed asphalt plant, including particular air modeling tests.
23. The Applicant hired an environmental infrastructure and energy company named TRC to prepare the application and permit as required by the regulatory agencies, (hereinafter "TRC").
24. Rob Vandenmeiracker, an engineer with TRC prepared the application and performed the tests on behalf of the Applicant.
25. One of the tests is an air dispersion modeling analysis which is a computer program driven test wherein certain information is imputed into the program, including, without limitation, the location of the components and design of the proposed asphalt facility, meteorological data of the site, geographical data of the site, and emission rates of the proposed asphalt plant; all of which are used to predict the concentration of the pollutants emitted by the asphalt plant at various locations in and around the site.
26. The application and tests performed by TRC represent that the pollutants to be emitted at the proposed asphalt plant were within concentrations that the regulatory agencies would find acceptable, (hereinafter "TRC test results").
27. The TRC test results are based on an inaccurate foundation and faulty analysis and the test results are not credible for the purposes of this hearing for, inter alia, the following reasons:
 - a. The meteorological and geographical data used by TRC in its tests were based on data from a site in the Jupiter area of Buncombe County. The Jupiter area is that of rolling terrain having an approximate elevation of 2,150 feet to 2,200 feet. There are no deep or even shallow river valleys at the Jupiter site. Whereas, in contrast, the area of the proposed asphalt site has an elevation of approximately 1,963 feet to 1,990 feet and is located in a very deep river valley (French Broad River). Water from the proposed asphalt site drains down the canyons to the French Broad River from the site

and the winds blow up the canyons from the French Broad River to the site. The geographical information and meteorological information used by TRC is not representative of the geographical and meteorological present at the proposed asphalt site.

- b. Failure to use appropriate meteorological and geographical data representative of the proposed asphalt site results in testing that fails to accurately model and predict how pollutants are dispersed through the air in and around the proposed asphalt site.
- c. Pollutants produced at the site will be dispersed to various areas located at higher elevations North and Northeast of the proposed asphalt site, including, without limitations, all of the following sites which are located approximately ½ mile from the proposed asphalt site:
 - i. Madison County Cooperative Extension Facility
 - ii. Madison County Child Development Center
 - iii. Elderberry Nursing Home
 - iv. Madison County Ballfields.
- d. The TRC test results measure the level of pollutants only to a distance of ½ kilometer from the proposed asphalt site (hereinafter “receptor grid) and none of the 4 sites listed in the paragraph above are located within the area measured by the TRC testing.
- e. The TRC report did not adequately address the affect that the pollutants produced at the proposed asphalt site could have on persons sensitive to the pollutants. The receptor grid used by TRC was too small.
- f. In performing the tests, TRC acted in a careless manner, in that, inter alia:
 - The site plan locating and describing the proposed asphalt cement tanks and diesel fuel tanks were mislabeled and had to be corrected during the process of the hearing.
 - The number of tests of air pollutants that TRC stated were required to be tested did not match the number of the tests that were actually performed and included in the Application.

- Mr. Vandenmeiracker, testified that the site plan prepared by TRC provided for a containment area shown on the design to limit the impact of a spill at the site, which containment area he referenced as consisting of a square containment area being tertiary containment. That no such area appears on the site plan.
- There is no evidence in the record that anyone on behalf of TRC visited the proposed asphalt site.

28. That the Applicant offered evidence through its witness Jungeng Zhang, that the level of pollutants projected to be emitted at the proposed asphalt site would not adversely affect the health or safety of persons residing or working in the neighborhood of the proposed asphalt site and would not be detrimental to the public welfare or injurious to the property or the public improvements in the neighborhood. The opinion and evidence presented by Mr. Zhang is not based on an accurate or reliable foundation, including without limitation the finding stated above that the TRC report is not reliable, and therefore, the testimony of Mr. Zhang is found not to be credible

29. There are approximately 80-85 patients that currently reside in the Elderberry Nursing Home. That approximately ½ of the patients that reside in the nursing home suffer from COPD and the remainder of the patients suffer from congestive heart failure.

30. Inhaling any concentration of a particulate or benzene can have a detrimental effect on one's health, especially those persons who are residents in Elderberry Nursing Home.

31. The air flow system within the Madison County Child Development Center is not filtered. Children that attend the center are as young as 6 months and as old as 5 years.

32. Children also participate in activities that occur at the Madison County Cooperative Extension Facility and the Madison County Ballfields.

33. The children that play at these facilities often engage in hand to mouth behaviors that increase their exposure to pollutants and children's lungs are less complex and are much more highly sensitive to inflammatory particulates.

34. The proposed asphalt site is located within an existing and operating quarry.
35. Also located within the quarry and in close proximity to the proposed asphalt site is an operating concrete plant.
36. The quarry operation produces blasting which releases particulates into the air. Operation of the quarry is subject to regulation by North Carolina regulatory agencies, which require an air quality permit. The quarry operation is validly permitted.
37. The concrete plant produces emissions that are regulated and controlled by North Carolina regulatory agencies. The concrete plant is validly permitted.
38. The addition of the asphalt plant will increase the amount of pollutants that will be discharged from the asphalt plant to areas in and around the quarry, the concrete plant and the facilities referenced above.
39. The TRC test results did not show the totality of pollutants emitted from the proposed asphalt site, the concrete plant and the quarry.
40. The North Carolina regulatory agencies have the authority to require testing and approval of the cumulative emissions produced by the proposed asphalt plant in addition to those released by the operation of the quarry and the concrete plant if the agencies so elect. At present, the agencies are in the process of reviewing and have not made a final decision.
41. The Applicant offered evidence through its witness Lynn Carmichael, that an asphalt plant located at the proposed asphalt site would not adversely affect the value of real estate situated in close proximity to the proposed asphalt site. The opinion evidence presented by Ms. Carmichael is not based on a sound and reliable methodology and/or an accurate or reliable foundation and is not reliable and therefore the testimony of Ms. Carmichael is found not to be credible. In support of such finding, the Board further finds, inter alia:
 - a. Ms. Carmichael's analysis of the lands in and around the 7 asphalt plants located in Western North Carolina failed to produce reliable information showing that said lands were similar in nature to the

proposed asphalt site and the lands surrounding the proposed asphalt site.

- b. Ms. Carmichael did not know when a majority of the asphalt plants were constructed relative to the dates of her property sales evaluations.
- c. The 7 asphalt sites used in Ms. Carmichael's analysis were evaluated as a whole consistently in only one manner, that manner being analyzing comparative sales information for properties located near the respective sites for only 1 year, April 2018-April, 2019 and even that limited analysis indicated that the values of lands located in and around 2 of the asphalt plants, to wit: the plant located at 1188 Smokey Park Hwy, Asheville, NC; and the plant located at 5057 Grovestone Rd. , Black Mountain increased at a slower rate than properties located at a further distance from those respective asphalt plants.
- d. The Black Mountain site is similar to the proposed asphalt site in that both the Black Mountain site and the proposed site are located in close proximity to a quarry and a cement plant and the Black Mountain asphalt plant in Ms. Carmichael's analysis is 1 of the 2 sites which indicated that the value of property closer to the asphalt site increased slower than the value of property further away from the asphalt site from April, 2018 to April 2019.
- e. That Ms. Carmichael used additional sales data in her analysis of the Rogers asphalt site in Henderson County. However, Ms. Carmichael in her testimony stated that she looked only at the address and the distance of the sales from the site in performing her analysis and did not look at the "specifics" of the Rogers site relative to the proposed asphalt site.
- f. Factors which drive and establish the values of the property in and around the 7 asphalt sites analyzed by Ms. Carmichael are not consistent with the factors that drive and establish the value of the properties in and around the proposed asphalt site.

- g. That Ms. Carmichael used a very limited number of sales in parts of her analysis and it would be unrealistic to conclude that the values that resulted from her analysis were reliable.
 - h. There is no evidence in the record to show that the methodology used by Ms. Carmichael was an acceptable methodology used to appraise in a general manner, properties located in and around an industrial site, including asphalt plants.
42. Applicant proposes to operate the asphalt plant Monday through Friday from 6:00 a.m. to 5:00 p.m. and sometimes at night and on weekends.
43. Per the information set forth in the application with the regulatory agencies, the proposed asphalt plant is restricted to a maximum annual production of 100,000 tons. In the event that the asphalt plant operates at maximum production, the plant has the regulatory authority, based upon an 8-hour workday during a 5-day week, of producing 170 tons of asphalt per hour. During an 11-hour workday as proposed by the Applicant the asphalt plant can produce 1,870 tons per work day
44. Most trucks that will transport the Applicant's asphalt will have the capacity to carry approximately 15 tons of asphalt per truck.
45. Based on the numbers set forth hereinabove it would require approximately 125 trucks to visit the asphalt plant a day to remove all asphalt from the site if the asphalt plant ran at maximum production.
46. The Applicant has only 4 trucks that the Applicant owns that will be used to transport the asphalt. However, the Applicant will be selling the asphalt to other persons or entities who will be removing the asphalt.
47. Roads leading to and from the proposed asphalt site from the public road are 2 lane, unpaved roadways within the quarry site.
48. Applicant did not present any traffic flow plan regarding the traffic pattern of the trucks, any maintenance or safety features regarding the roadway or any idling policies regarding the trucks.

49. Applicant acknowledges the use and presence of a large amount of diesel fuel at the proposed asphalt site and further acknowledges that he will implement spill control measures to prevent site contamination from diesel fuel spills and leakage from the site. However, Applicant did not provide any plans or drawings to implement such measures other than his statement that he could use the owners "check dam."
50. The asphalt to be maintained at the proposed asphalt site must be kept at a heated temperature of approximately 300-360 degrees. There is a large quantity of diesel fuel located at the proposed asphalt site. The presence of diesel fuel reduces the flash point of the asphalt.
51. National fire safety and protection regulations provide for certain safety measures relative to the operation of asphalt plants. Those measures provide for the storage of water and foam at or near the asphalt plant to be available in the event of a fire at the site.
52. The proposed asphalt plant is located in or in close proximity to an area of Madison County which is in a wildfire environment. In the event that a wildfire reaches the proposed asphalt site, the presence of materials at the site, including diesel fuel, would exacerbate the intensity of the fire and increase the spread rate of the fire and the potential of the wildfire. This area includes the Coates Road Community where approximately 12 homes are situated.
53. Applicant presented no plan for fire safety measures at the proposed asphalt site, except that at the conclusion of the hearing, the Applicant stated and agreed to comply with all such fire safety measures that were required.
54. The operation of the various components and machinery of the asphalt plant located at the proposed asphalt site will produce an approximate maximum noise level of 98 decibels at or near the proposed asphalt site. The addition of the asphalt plant will increase the noise level produced and emanating from the quarry property.
55. Laura Evans owns a tract of land located at 285 Cabin Hollow Rd., Marshall, containing approximately 26 acres on which is located her residence. On her property she operates a day camp for 6 weeks during the summer hosting approximately 25 children per week ages 4-11 where the

children study farm life including outside activities of growing and maintaining a vegetable garden and growing and maintaining fruit trees, (hereinafter "Evans property").

56. The Evans property is located approximately ½ mile from the proposed asphalt site and from the Evans property, Laura Evans can:

- a. See and observe the quarry site;
- b. See the proposed asphalt site;
- c. See the dust plume when blasting occurs in the quarry;
- d. Hear the trucks operating in the quarry, especially the "beep, beep, beep sounds" when the trucks are backing;
- e. Hear people talking in the quarry on a clear day.

57. Jeannie Blethen owns a tract of land containing 25 acres which adjoins the Evans property and on which is located her residence, an apartment and a class room. On the property she operates a vineyard in the form of an agri-business. Patrons are charged a fee to participate in the vineyard business (hereinafter "Blethen property").

58. The Blethen property is located approximately ½ mile from the proposed asphalt site and from the Blethen property Jeannie Blethen can:

- a. see and observe the quarry;
- b. see the proposed asphalt site;
- c. hear the trucks being loaded with materials in the quarry;
- d. hear the "beep, beep, beep sounds" when backing up;
- e. hear the brake noise from trucks in the quarry.

59. Emily Sontag resides at 620 Tillery Branch Rd., Marshall, which is located .69 miles from the proposed asphalt site. Her 3 children reside with her. Ms. Sontag formerly resided in Savannah, GA and one of the reasons she relocated to her current address was to find a place that had cleaner air because her eldest daughter suffers from asthma.

60. From her residence Ms. Sontag can hear the "beep, beep, beep" of the trucks in the quarry. When the quarry blasts the resulting dust from the blast

engulfs her property and on 1 occasion, she coughed for 2 days as a result of the dust from the blast.

61. Lisa Carole Long Feldman resides at 796 Riverrun Road, Marshall, which is located approximately 800 feet from the proposed asphalt site and from her property she can observe the proposed asphalt site. She can also hear noise emanating from the quarry in the range of 40 decibels to 67 decibels at various times.

62. Doug Bruggeman resides at 606 Coates Rd., Marshall, which is located approximately 620 feet from the proposed asphalt site.

63. The height of the proposed smoke stack at the proposed asphalt site terminates at an elevation in close proximity to the elevation of Mr. Bruggeman's property.

64. Mr. Bruggeman's property has been on the market for sale since October, 2018 at which time he was receiving approximately 2 calls per week from persons interested in purchasing his property. Subsequent thereto, and after the filing of the Application subject to this hearing, Mr. Bruggeman has received only 1 inquiry as to the sale of his property.

65. Tim Reumler resides at 476 Riverrun Road, Marshall, which is located approximately 1,800 feet from the proposed asphalt site.

66. Mr. Reumler can hear the noise from the crusher and trucks operating in the quarry at his residence. The decibel level of that noise ranges from the mid 40's to the mid 50's.

67. Adam Reda resides on Coates Rd., Marshall, his residence is located approximately 1,389 feet from the proposed asphalt site. Mr. Reda's wife currently has a reactive respiratory disease.

68. The above referenced Laura Evans, Jeannie Blethen, Emily Sontag, Tim Reumler, John Bruggeman, Lisa Carol Long Feldman and Adam Reda all offered testimony regarding their concern as to the adverse effect that the

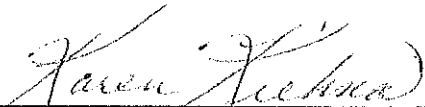
proposed asphalt plant may have on their health and/or the value of their property.

BASED UPON the foregoing **FINDINGS**, the Board makes the following **CONCLUSIONS**:

1. The parties to this proceeding are the Applicant and Ed and Lisa Long Feldmann; Adam Reda; Tim Reumler; Billy Jean Haynie; Linda and Ronnie Payne; Doug Bruggeman, Emily Sontag, James Tibbetts, Vivian Long and Connie Molland.
2. The parties are properly before this Board and this hearing was properly noticed as required by law and the Ordinance.
3. The Applicant did not present competent material and substantial evidence sufficient to support a finding that the use for which the Application was made, to wit: an asphalt plat, will not adversely affect the health or safety of persons residing or working in the neighborhood of the proposed use, and will not be detrimental to the public welfare or injurious to the property or public improvements in the neighborhood.

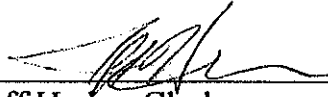
BASED UPON the foregoing **FINDINGS AND CONCLUSIONS** this Board **ORDERS** that the Conditional Use Permit requested in the Application be **DENIED**.

Signed this the 27th day of September, 2019.



KAREN KIEHNA, Chairman

The undersigned certifies that a copy of this Decision was filed with him as Clerk to the Madison County Board of Adjustment on this the 27th day of September, 2019.



Jeff Hyder, Clerk
Madison County Board of Adjustment

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the Decision in the above-entitled action upon the following:

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by email and/or depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care and custody of the United States Post Office Department, properly addressed to the opposing parties and/or to the attorney(s) for said parties.

This the 27 day of September, 2019.



Donny J. Laws
Attorney for Board of Adjustment