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SUPERIOR COURT OF CALIFORNIA
COUNTY OF PLACER

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF PLACER

MEADOW VISTA PROTECTION , a non-profit corporation, Petitioner and Plaintiff, vs. COUNTY OF PLACER, PLACER COUNTY BOARD OF SUPERVISORS and DOES 1 through 10, Respondents and Defendants CHEVREAUX AGGREGATES, INC.; and DOES 11 through 100, Real Party in Interest and Defendant	Case No. SCV - 22244 Filing Date: January 9, 2008 **PETITIONER'S OPENING BRIEF** Date: April 24, 2009 Time: 1:30 p.m. Dept: 42 Judge: Honorable Charles D. Wachob **FILED BY FAX**

TABLE OF CONTENTS

Page

I. INTRODUCTION AND SUMMARY 1

II. FACTUAL BACKGROUND 4

A. CHEVREAUX'S OPERATIONS AT THE MEADOW VISTA QUARRY 4

B. COUNTY'S ACTIONS REGARDING CHEVREAUX'S RECENT ATTEMPTS TO INSTALL A PERMANENT ASPHALT FACILITY AT THE MEADOW VISTA SITE 6

C. RELATED ACTION BEFORE THIS COURT 9

D. COUNTY'S ZONING CODE 10

III. STANDARD OF REVIEW 11

A. REVIEW OF STATUTES AND ORDINANCES 11

B. PETITIONER'S MANDAMUS AND DECLARATORY RELIEF CLAIMS . . 12

1. Review of the County's "Lapse" Determination under Code of Civil Procedure §1094.5 13

2. Review of County's Failure to Act under Code of Civil Procedure §1085 13

3. Review under Code of Civil Procedure §1060 14

IV. ARGUMENT 15

A. THE 1995 ZONING CHANGE FOR THE MEADOW VISTA SITE NO LONGER ALLOWS ASPHALT PROCESSING AS A CONFORMING USE 15

1. Chevreaux's Asphalt Operations Are Inconsistent with Existing Zoning 16

2. Chevreaux Was Not Conducting Asphalt Operations at the Time of the 1995 Zoning Change and Thus Did Not Acquire Vested Rights to Do So as a Non-conforming Use 17

3. A Non-conforming Use must Be Continuous to Retain Status as a Vested Right 20

B. WERE CHEVREAUX'S ASPHALT ACTIVITIES CONSIDERED TO HAVE VESTED AT THE TIME OF THE ZONING CHANGE, THOSE RIGHTS WERE SUBSEQUENTLY ABANDONED DUE TO NON-USE 22

C. A NON-CONFORMING USE SHALL NOT BE ENLARGED, NOR INCREASED TO A MORE INTENSIVE USE THAN THAT WHICH IT WAS CHARACTERIZED BY IN THE PRIOR TWELVE MONTHS 23

1. Chevreaux's New Asphalt Proposals Greatly Exceed Prior Operations in Intensity and Scope, Contrary to County Code 24

a. The Baseline of Chevreaux's Past Operations Demonstrate Occasional Daytime Use of Low Intensity Using Temporary Facilities 24

b. Chevreaux's New Proposed Asphalt Operations are a Substantial Increase in the Intensity of Past Use and Concomitant Increase in Impacts on the Local Community 24

2. Chevreaux's New Proposed Facility is in a New Location 25

D. UNDER COUNTY CODE, THE COUNTY MUST REQUIRE A NEW PERMIT FOR ANY SUBSTANTIAL EXPANSION OF A SURFACE MINING OPERATION 25

E. THE COUNTY ABUSED ITS DISCRETION IN DETERMINING THAT CHEVREAUX'S 1972 ASPHALT PERMIT DID NOT LAPSE THROUGH NON-USE 26

F. PETITIONER ALSO SEEKS DECLARATORY RELIEF ON ITS CLAIMS . . 30

V. CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases

Agnew v. State Board of Equalization
(1999) Cal.4th 310 11

Alameda County Land Use Association v. City of Hayward
(1995) 38 Cal. App. 4th 1716 14

Berkeley Keep Jets Over the Bay Comm.. Board of Port Commissioners of the City of Oakland
(2001) 91 Cal. App. 4th 1344 . . . . . 26, 27

California Assn. for Health Services at Home v. State Dept. of Health Services
(2007) 148 Cal. App. 4th 696 . . . . . 3, 13

California Beer & Wine Wholesalers Assn. v. Dept. of Alcoholic Beverage Control
(1988) 201 Cal. App. 3d 100 11

Citizens for Responsible Government v. City of Albany
(1997) 56 Cal. App. 4th 1199 27

Citizens to Preserve Overton Park v. Volpe
(1971) 401 U.S. 402 27

City of Cotati v. Cashman
(2002) 29 Cal.4th 69 14

City of Santee v. County of San Diego
(1989) 214 Cal. App.3d 1438 27

Conlan v. Bonta
(2002) 102 Cal. App. 4th 745 13

County of San Diego v. McClurken
(1951) 37 Cal. 2d 683 . . . . . 15, 17, 22, 23, 25

Diamond Multimedia Systems, Inc. v. Superior Court
(1999) 19 Cal. 4th 1036 28

Dienelt v. County of Monterey
(1952) 113 Cal. App. 2d 128 . . . . . 17, 21, 24

Endangered Habitats League v. County of Orange
(2005) 131 Cal. App.4th 777 13

Environmental Defense Fund, Inc. v. Coastside County Water Dist.
(1972) 27 Cal. App.3d 695 27

Families Unafraid to Uphold Rural El Dorado County v. Bd. of Supervisors
(1998) 62 Cal. App. 4th 1332 11

Foxgate Homeowners' Assn. v. Bramalea California, Inc.
(2001) 26 Cal.4th 1 28

Gentry v. City of Murrieta
(1995) 36 Cal. App.4th 1359 27

Hanson Brothers Enterprises, Inc., v. Board of Supervisors of Nevada County
(1996) 12 Cal. 4th 533 . . . . . 3, 4, 15, 17, 18, 20-23

Hill v. City of Manhattan Beach
(1971) 6 Cal. 3d 279 15

Morris v. Harper
(2001) 94 Cal. App.4th 52 13

Mycogen Corporation v. Monsanto Company
(2002) 28 Cal. 4th 888 15

No Oil, Inc. v. City of Los Angeles
(1974) 13 Cal.3d 68 27

Paramount Rock Co. v. County of San Diego
(1960) 180 Cal. App. 2d 217 . . . . . 18, 24

People ex Rel. Department of Conservation v. El Dorado County
(2005) 36 Cal. 4th 971 19

Planning & Conservation League v. Department of Water Resources
(2000) 83 Cal. App. 4th 892 11

Redwood Coast Watersheds Alliance v. State Board of Forestry and Fire Protection
(1999) 70 Cal. App. 4th 962, ... 14

Rogers v. Detrich
(1976) 58 Cal. App. 3d 90 13

San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino
(1984) 155 Cal. App. 3d 738 11

San Diego Police Officers Association v. City of San Diego Civil Service Commission
(2002) 104 Cal. App. 4th 275 14

Sego v. Santa Monica Rent Control Bd.
(1997) 57 Cal. App. 4th 250 13

Selinger v. City Council of Redlands
(1989) 216 Cal. App. 3d 259 14

Shepherd v. Superior Court
(1976) 17 Cal. 3d 107 13

Sunset Drive Corp. v. City of Redlands
(1999) 73 Cal. App. 4th 215 13

Village Laguna of Laguna Beach, Inc. v. Board of Supervisors
(1982) 134 Cal. App.3d 1022 27

Yamaha Corp. of America v. State Board of Equalization
(1998) 19 Cal. 4th 1 12

Statutues

Code of Civil Procedure
§ 1085 . . . . . 3, 12, 14, 26
§ 1060 . . . . . 3, 12, 14, 30
§ 1094.5 . . . . . 3, 13

Pub. Res. Code
§ 2710 19
§ 2728 19
§ 2770, subd. (d) 19
§ 2772. 19
§ 2773 19

County Code

§ 17.04.030 . . . . . 16, 22, 27
§ 17.06.030(B) 11
§ 17.02.030.C 17
§ 17.02.050.C 11, 28
§ 17.06.050 10
§ 17.02.050.A.1. 22
§ 17.06.050(B)(1)-(5) 10
§ 17.06.050(B)(5) 11
§ 17.24.010 17
§ 17.40.010 . . . . . 16, 17
§ 17.46.010 . . . . . 5, 10, 16
§ 17.52.110.A 16
§ 17.52.110.B.1.a 16
§ 17.56.270(D) 25
§ 17.56.300 11
§ 17.58.160(B)(2)(b) 5, 8, 26, 27, 29
§ 17.60.120 18
§ 17.60.120.A 16, 23, 24
§ 17.60.120.G 22, 23
§ 17.62.170. 9

I. INTRODUCTION AND SUMMARY

This case involves Petitioner and Plaintiff Meadow Vista Protection's ("Petitioner") challenge to the County's failure to comply with applicable law, including mandatory provisions of County Code,[1/] in regulating the asphalt plant activities now being proposed at the Chevreaux Aggregates, Inc. ("Chevreaux") mining facility located in Meadow Vista, California ("Meadow Vista site.")

Surface mining has occurred at the Meadow Vista site since around 1947. In 1963, the County adopted comprehensive zoning, which established Industrial and Recreation and Forestry zoning for the Meadow Vista site. Thereafter the County issued a permit in 1965 to Chevreaux's predecessor to conduct surface mining and processing at the site. In 1971, the County issued a separate use permit to Chevreaux for an asphalt concrete plant. In 1972, the County approved a new permit for the asphalt plant which appears not to have considered or set any limits on the intensity of use that might affect adjoining neighboring land uses, including the community of Meadow Vista through which Chevreaux relies for connector roads to deliver fresh asphalt to area projects. The record indicates that asphalt processing occurred on the site until approximately 1976, after which it fell into disuse, while Chevreaux instead concentrated on its surface mining and processing operations.

This case addresses whether Chevreaux is now entitled to resume its asphalt processing operations at the Meadow Vista site, and if so, the extent of that entitlement. A critical question, which the County has steadfastly refused to address, is the effect of the County's 1995 zoning change, which rezoned the location of the prior permitted asphalt facility from"Recreational Forest" – which previously allowed asphalt operations – to "Residential Forest" - which explicitly does not. *See* Discussion, Section IV.A, *infra.* At the time of this zoning change, there is no dispute that asphalt operations were *not* occurring nor was any asphalt plant in existence at the Meadow Vista site or that no operations were occurring until approximately six years later when a Chevreaux subcontractor, Teichert, operated a temporary facility for approximately eight months. Under established case law, the County's zoning change and Chevreaux's lack of asphalt operations during this time means Chevreaux can no longer continue asphalt production as a matter of vested right.

[1/]Petitioner has submitted what it believes to be relevant portions of the present County Code as Exhibit One to its Request for Judicial Notice. The record also contains excerpted code sections.

In 1995, the County also enacted a "lapse ordinance," which states that permits "shall be deemed to have lapsed" if the use, or structure required for that use, is discontinued for more than 12 consecutive months. The County lapse ordinance applies specifically to Chevreaux's 1972 permit for asphalt processing, which was not being exercised in 1995 nor was so for the following six years until 2001. There is nothing ambiguous about the County's ordinance or its application to Chevreaux's discontinuance of its asphalt operation for the six years following the ordinance adoption.

The County's zoning change and lapse ordinance demonstrate an intent to bring local zoning and permitting up to date. Zoning and ordinances are subject to the policies of the County General Plan, which must itself be updated every 20 years. The new zoning for this area and the lapse ordinance prevent industries no longer in compliance with zoning to be phased out over time where not exercised. Here, Chevreaux' asphalt operations became non-conforming in 1995. Chevreaux's subsequent lack of use eliminated its permit rights under the County's lapse ordinance and its vested rights under County Code provisions addressing non-conforming uses. *See* Sections IV.B, E, *infra.*

Even if this Court were to find that Chevreaux had either vested or permit rights to continue asphalt production at the Meadow Vista site, the record shows that in the last several years, Chevreaux has demonstrated an intent to expand its asphalt production. This expansion is unlawful because asphalt production is a non-conforming use under the statute. *See* Discussion, § IV.C, *infra.*

Finally, were the court to consider Chevreaux' facilities as a single surface mining operation, applicable County Code requires the County to undergo a new permit process due to the substantial expansion of the mining operations based on increased asphalt production and nighttime diesel truck delivery through the feeder streets of the Meadow Vista community. *See* Section IV.D, *infra*.

Petitioner brings this action because the County has refused to consider the impacts of Chevreaux's expanding asphalt operations. In the last several years, the County Air Resources Control Board, in recognition of the significant changes proposed to occur, has issued several air permits to these facilities. Yet the County, the lead agency for land use determinations with the potential for environmental impacts, has *never* addressed the appropriateness of the commensurate land use expansion – or the noise and pollution effects of nighttime truck travel through the local feeder streets of Meadow Vista – under applicable zoning and County ordinances.

The record shows that the County and Real Party have relied on a single argument to justify the County's inaction, which is that Chevreaux has a vested and lawfully permitted right to continue asphalt production – without limitation under County Code - as an "intermittent" use that may disappear and then reappear in whatever form that Chevreaux or one of its subcontractors believes to be appropriate at the time. As discussed below, there is no legal support for this theory as applied to the factual situation in this case. In particular, the facts here are in contrast to the quarrying operation addressed in *Hanson Brothers Enterprises, Inc., v. Board of Supervisors of Nevada County* (1996) 12 Cal. 4th 533, which the Supreme Court found could continue as a non-conforming use because the overall surface mining operation had been continuous. Here, asphalt production - a nonconforming use under County Code – has *not* been continuous. Thus, under *Hanson Brothers,* it may not continue as a non-conforming use under current zoning. *See* Discussion, Section IV.A.3, *infra.*

Respondents and Chevreaux will no doubt raise procedural objections intended to prevent this Court from reaching the merits of this action. However, through its actions – and more importantly inaction[2/] - the County has demonstrated that it does not intend to regulate Chevreaux's installation and use of an asphalt facility at the Meadow Vista site according to law. Thus mandamus relief pursuant to Code of Civil Procedure §§ 1085 & 1094.5 is appropriate. As discussed in Sections III.B.3 and IV.F, *infra,* Petitioner also brings its declaratory relief challenge pursuant to Code of Civil Procedure § 1060 because in the absence of judicial relief, Petitioner has no other adequate remedy.[3/]

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[2/]Under law, Petitioner has the right to compel the performance of an action legally required. *California Assn. for Health Services at Home v. State Dept. of Health Services* (2007) 148 Cal. App. 4th 696, 705 and Cases cited at Section III.B.2, *infra.*

[3/]Petitioner requests declaratory relief that the County's November 7, 2007 lapse determination was unlawful, that the operation of an asphalt facility at the Meadow Vista site is a non-conforming under the County zoning code, that such non-conforming use was not grand-fathered at the time of passage of the 1995 zoning change or has since been discontinued under County Code, that the changes in use and location of the asphalt facility constitute an unlawful expansion of a non-conforming use and/or a substantial change in surface mining operations pursuant to County code. *See* Petitioner's Verified Petition for Writ of Mandate and Complaint for Declaratory Relief, ("Petition"), p. 1, ¶ 1.

II. FACTUAL BACKGROUND

A. CHEVREAUX'S OPERATIONS AT THE MEADOW VISTA QUARRY

The record indicates that surface mining or "quarrying"[4/] has occurred at the Meadow Vista site since around 1947. *See e.g.,* Administrative Record Document No. 70, Excerpts of Record No. 9, page 146 (hereinafter "AR 70, EOR 9, p. 146.") In 1963, Placer County established its first comprehensive zoning with designated land uses consistent with Chevreaux's historic surface mining operation. *Id.*

The 1963 zoning applied Recreation & Forestry ("R & F") district to the bulk of the quarry operation. *Id.* The R & F district allowed for the "development and processing of natural resources including mines, quarries, . . ., rock crushers, paving and concrete batch plants." *See* AR 1914, EOR 50, p. 5588.[5/] *See also* AR 117, EOR 25, p. 261. The zoning also included Industrial or M District on a smaller part of the quarry operation where surface mine processing occurred. AR 70, EOR 9, p. 146. The Code also stated that "Accessory uses … in any district may be permitted where such uses … are incidental to and do not alter the character of the premises in respect to their use for purposes permitted in the District." *See* AR 1914, EOR 50, p. 5589.

In 1965, the County issued a permit to Chevreaux's predecessor, Edward Pruss, for a surface mining operation. AR 72, EOR 10, p. 151. The permit describes the development as a quarry for shot rock extraction and a "crushing, screening and washing plant for grading materials." *Id.;* AR 76, EOR 12, p. 155. The record describes the operation as continuous and "year round," AR 73, EOR 11, p. 152, with an average of "20 truck loads per day." AR 76, EOR 12, p. 156.

The County issued an asphalt permit (LDA-691) to Chevreaux in 1971 based on the County's determination that a conditional use permit ("CUP") was necessary. AR 79, EOR 13, p. 163. In

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[4/] A "quarry" "is similar to a mine, in the sense that the material removed, be it mere rock or stone or valuable marble, is removed because of its value for some other purposes [than development of the site]. It is distinguished from a mine in the fact that it is usually open at the top and front . . . and, in the ordinary acceptation of the term, in the character of the material extracted . . . ." *Hansen Brothers Enterprises, Inc. v. Board of Supervisors, supra,* 12 Cal.4th at 545, n. 7.

[5/] *See* far left column on the bottom, listing uses that would be considered consistent with Recreational and Forest Zoning. This description cannot be read on the printed page but can be viewed at a zoom of approximately 200% on the electronic CD version of the AR page 5588.

1972, Chevreux obtained a new CUP (LDA-786), AR 80, EOR 14, p. 165, that authorized the relocation of the asphalt concrete plant from its former location at the gravel operation approximately 600 feet to the northeast along the river to the quarry area. AR 70, EOR 9, pp. 146-147.

The asphalt permit (LDA-786) states as conditions of approval that the new site "is to be a permanent location for an asphalt batch plant," and that such plant must be approved by the local Air Pollution Control District and the Central Valley Regional Water Quality Control Board before operation. *See* AR 81, EOR 15, p. 166. The permit documents do not address the timing or size of the proposed operation.[6/]

The record appears conflicted on the precise extent of actual operations that occurred pursuant to the asphalt permit. Testimony indicates that operation was sporadic and almost always during the daytime. *See* AR 705, EOR 41, p. 2695-2697. After 1976, any permanent asphalt operations that may have occurred pursuant to the permit were abandoned and structures removed. *See* AR 86, EOR 19, p. 189. Permanent facility asphalt operations did not occur in the 1980s and 1990s. *See* AR 382, EOR 34, p. 1633. Between 1990 and 2001, no asphalt operations, even temporary, occurred at the Meadow Vista site and the record shows that no asphalt plant or structure was in existence during this time. *See e.g.* AR 89, EOR 20, p. 194; AR 623, EOR 40, p. 2477; AR 33, EOR 5, p. 065 ("There is no asphalt concrete plant at this location.")

In or around 1995, the County adopted an ordinance, codified at Placer County Code § 17.58.160(B)(2)(b), which required permits to be actively utilized or they would lapse and be then subject to a new permit requirement. *See* Petitioner's First Request for Judicial Notice, Ex. 1, page 67. (Hereinafter "RJN, Ex. 1:67.") In and around 1995, the County also rezoned the Meadow Vista quarry site to Residential/Forestry, which limits "Manufacturing and Processing Uses" to "electric generating plants" and "recycling collection stations" and does not include asphalt processing. See County Code § 17.46.010; RJN Ex. 1:52-53; AR 895, EOR 49, p. 3172. At the time these code changes were enacted, no asphalt operations were occurring nor was any asphalt facility structure

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[6/]In 2005, the County Counsel reviewed the permit and observed that there "is no condition that explicitly restricts either the quantities of material to be produced on the site from the operations or the hours of operation. The permit does not have an expiration date. In theory, the operation could be 24 hours per day, 7 days a week, 52 weeks a year." AR 165, EOR 28, p. 588.

located at the Meadow Vista quarry. AR 85, EOR 18, p. 184; AR 33, EOR 5, p. 065. The record thus indicates that the County was aware of Chevreaux's existing surface mining operation but did not consider asphalt operations or structures as a component of the ongoing Chevreaux's ongoing operations. *See* AR 893, EOR 47, p. 3168; AR 894, EOR 48, p. 3170.

In April 25, 2001, a third party contractor, Kiewitt Pacific Co, filed an application for an air permit to construct a "new facility." AR 350, EOR 31, p. 1538. Kiewitt's proposed plant was to have a maximum production rate of 400 tons per hour of asphalt, 4,000 tons per day, with hundreds of pounds per hour discharge of priority pollutants such as particulate matter (PM 10) and nitrogen oxide (NOx) and volatile organic compounds (VOCs), the primary constituents of smog. AR 350, EOR 31, p. 1538. Kiewitt subsequently ceased its temporary asphalt processing at the Meadow Vista quarry on or about September 21, 2001. *See* AR 12, EOR 2, p. 015.

In 2005, Teichert Construction applied to install a new asphalt plant at the Meadow Vista quarry with the County. AR 363, p. 1572. Teichert explained that the purpose of the project was to provide asphalt to the Highway 80 rehabilitation project on a contract with Caltrans. *See also* Petitioner's Motion to Augment the Administrative Record ("Motion to Augment"), Ex. 2. The project would consist of the production and transport of approximately 290,000 tons of asphalt concrete over two construction seasons. The anticipated hours of operation of the plant would be from 7:00 p.m. to 5:30 a.m. Sunday through Thursday. Operation would include "14-15 trucks hauling during the hours of 7:00 p.m. and 5:30 a.m.. Each truck would haul 8 to 10 loads each for a total of 240-260 truck trips per night during a 10.5 hour shift." *Id.*, p. 2. Teichert subsequently withdrew this request in March 2005. AR 421, EOR 35, p. 1758.

In March 2006, Chevreaux applied for a new air permit to construct and operate an asphalt facility at the quarry. *See e.g.* AR 346, EOR 30, p. 1530. The permit was issued on October 24, 2007 with similar limits as the prior Teichert application. *See* AR 375, EOR 32, pp. 1598-1602.

B. COUNTY'S ACTIONS REGARDING CHEVREAUX'S RECENT ATTEMPTS TO INSTALL A PERMANENT ASPHALT FACILITY AT THE MEADOW VISTA SITE

On February 25, 2005, in response to attempts by Teichert and Chevreaux to conduct asphalt processing operations on a sustained and 24 hour basis at the quarry, County Counsel wrote that consistent nighttime truck travel through the Meadow Vista community is new and unprecedented

and raises significant issues:

> From the limited information provided to us however the operations appear to have been substantially smaller in volume historically and exercised during daylight hours generally. At the 1972 Zoning Administration hearing proposed condition on hours of operation was expressly rejected after the owner offered to follow policy regarding hours of operation except in emergencies. Over the course of 30 years the practice of Caltrans for highway renovation have shifted to nighttime operations. One can assume this is because of business reasons of the State including the management of traffic congestion at construction sites and the availability of technology to work at night. This change in practice and pattern of the State results in contracts being let for nighttime operations. It does not appear to this office that the existing permit is broad enough to include routine lengthy nighttime operations without CEQA review.

See AR 165, EOR 28, p. 592.

On March 22, 2005, County Counsel found:

> [T]here is no evidence that any operation has ever been run that operated only through nightime hours as is currently being proposed. Regardless of the lack of specificity in operating hours in the original permit, the record of the hearing in 1972 does not support an inference that Mr. Chevreaux was intending to preserve the right to operate throughout the night on a sustained basis. There is doubt whether the intent of LDA-786 as issued was to grant the right to engage in unlimited nightime operations.

AR No. 425, EOR 36, p. 1798. County counsel concluded that the new asphalt operations "far exceeds any previous use" in terms of the "level and manner of production." *Id.,* p. 1799.

During this time, Petitioner's members attempted to persuade the County to take some kind of action to address the new expanded asphalt facility and its proposed nightime operations. In response to concerns, the County convened a "local advisory group of physicians and health care professionals" called the Ad Hoc Air Pollution Advisory Committee. On March 10, 2005, the Committee issued their consensus findings, that the pollutants from the asphalt operations – including open truck loads of asphalt through the Meadow Vista community – are some of the most important and harmful components of air pollution. AR 711, EOR 43, pp. 2707-2708. The Committee concluded:

> It is the consensus opinion of this advisory group, that the intensive asphalt production and diesel truck traffic associated with the current Teichert proposal with its associated increases in air pollution in close proximity to homes, play grounds, parks and schools will likely result in at least short terms negative health impacts.

Id. at 2708. The Committee recommended that regulatory agenies "evaluate the unique roles that various factors, including the community microclimate, geography, traffic patterns, school locations, and public activity practices would play in exposure levels and associated health impacts. *Id.*

On February 14, 2005, a local Meadow Vista resident wrote to the County noting that Chevreaux's asphalt operations were unlawfully expanding and, in addition, was no longer allowed by current County zoning. *See* Declaration of John Blodger, Ex. A; Motion to Augment, Ex. 1. Subsequently on March 21, 2005, Susan Brandt Hawley wrote a letter on behalf of Petitioner providing information showing that the regular nightime asphalt operations and truck travel proposed for the new facility were unprecedented and represented an large increase in any prior use that had occurred in the past. AR 705, EOR 41, p. 2694.

On September 16, 2005, the law firm of Soluri & Emrick sent a letter on behalf of Petitioner to the County requesting that the County take action with respect to Chevreaux' quarry and proposed asphalt operations at the Meadow Vista quarry. AR 69, EOR 8, pp. 130-144.

The County did not respond directly to any of these letters or requests. Petitioner subsequently filed its lawsuit in Case No. SCV 19614 approximately a year later, on July 12, 2006.

In February 28, 2007, in the midst of the litigation in Case No. SCV 19614, Chevreaux's attorney Bridget Barnes requested the County Planning Director to make a determination that Chevreux's asphalt permit (LDA-786) had not lapsed under County Code § 17.58.160(B)(2)(b). *See* AR 24, EOR 3, pp. 34-37. On May 18, 2007, the Planning Director provided a determination that Chevreaux's asphalt permit (LDA-786) was a permanent, intermittent use that had not lapsed under County Code. *See* AR 1, EOR 1, pp. 001-003.

The Director's determination was appealed by a local Meadow Vista resident named Richard Goodwin. *See* AR 160, EOR 27, pp. 451-452. Petitioner submitted comments on behalf of itself and Mr. Goodwin in support of Mr. Goodwin's appeal on the issue before the Board of whether Chevreaux's asphalt permit (LDA-786) had lapsed under County Code § 17.58.160(B)(2)(b). *See* AR 378, EOR 33, pp. 1615-1620. On November 7, 2007 the Board held a hearing at which Petitioner's members testified and upheld the Planning Director's determination. *See* AR 288, EOR 29, pp. 1195-1290. At the hearing, County Counsel reiterated that the proceeding was confined to the narrow issue whether Chevreaux's asphalt permit had "lapsed" under Section 17.58.160 and would not address or consider comments relating to impacts of the asphalt facility on the local community or the issue of

Chevreaux's "vested rights."[7]

Following the Board's hearing, Petitioner's counsel sent a letter on November 29, 2007 to the County requesting that the County take action on Petitioner's prior inquiries regarding the legality of Chevreaux's proposed asphalt operations at the Meadow Vista quarry, in particular whether Chevreaux had vested rights to conduct and/or expand its asphalt operations in light of the zoning for the quarry area. *See* RJN, Ex. 2 & Graf Decl., ¶ 2. Petitioner never received a response to this letter.

Petitioner thereupon filed its Petition for Writ of Mandate and Complaint for Declaratory Relief on January 9, 2008 challenging both the County's lapse determination and the County's failure to take mandatory action under the County Code, as discussed in Sections IV.A-D, *infra*.

C. RELATED ACTION BEFORE THIS COURT

On July 12, 2006 Petitioner filed a Petition for Writ of Mandate and Complaint for Declaratory Relief against Chevreaux and the County of Placer. (Placer County Superior Court Case No. SCV 19614). On October 10, 2006, the Court granted the County's demurrer to Petitioner 's first cause of action against the County for failing to enforce the terms of Chevreaux's quarry perrmit under County Code § 17.62.170. The Court ruled that the County's specific enforcement authority under County Code § 17.62.170 was discretionary and thus not enforceable through a mandamus action. The Court also granted Chevreux's demurrer to MVP's 6th and 7th Causes of action for private nuisance and trespass. Petitioner subsequently dismissed its 5th Cause of Action for public nuisance without prejudice.

On or about February 22, 2007, Petitioner moved for Summary Adjudication on its 3rd Cause of Action for declaratory relief that Chevreaux's use permit authorizing an asphalt plant had lapsed and thus asphalt production could not occur at the subject site unless Chevreaux applied for and obtained a new use permit. Chevreaux moved for judgment on the pleadings on Petitioner's 2nd Cause of Action alleging that Chevreaux's activities exceeded the scope of their conditional use

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[7] *See e.g.,* AR 288, EOR 29, pp. 1206-1208 ("Now the issue here actually is quite narrow. There are number of issues that are really not before the Board today...Its question of the interpretation of the ordinance...So this is not determination as to whether they have vested rights....Third this hearing is not an examination of the environmental setting for LDA-786... this really isn't an evaluation of the environmental impacts of LDA786.")

permit LD-1030. Chevreaux also moved for judgment on the pleadings on Petitioner's 3rd Cause of Action, and 4th Cause of Action for injunctive relief. On June 19, 2007, the Court denied Petitioner's motion for summary adjudication on its 3rd Cause of Action and denied Chevreaux's Motion for Judgment on the Pleadings on Petitioner's 2nd, 3rd and 4th Causes of Action.

Following the Court's ruling, former counsel for Petitioner withdrew based on financial issues. New counsel substituted into the case on October 23, 2007. *See* Declaration of Michael Graf ("Graf Decl."), ¶ 2. At a subsequent November 27, 2007, status conference, Petitioner and Chevreaux stipulated to continue the trial in their action until such time as the County's proceedings relating to Chevreaux's asphalt permit were concluded, including any judicial review. Thereafter the parties stipulated to continue their action until the completion of proceedings in this case.

D. COUNTY'S ZONING CODE

The County's zoning code delineates the "uses of land ...in each zone and combining district," which are allowed as a matter of right, which are subject to permit conditions, and which are not allowed. A summary table of these zoning districts and appropriate uses are set forth in County Code § 17.06.050 (Land use and permit tables.) *See* RJN Ex. 1:30-40. County Code § 17.06.050 lists appropriate Manufacturing and Processing Uses for Residential Forestry zoning as "electric generating plants" (which require a conditional use permit) and "recycling facilities," which require a permit according to Permit requirements set by Article 17.56.170. RJN Ex. 1:33-34. *See also* County Code § 17.46.010 (Residential Forest Designation), RJN Ex. 1:53. No manufacturing uses are allowed. *Id.*

Land uses that are listed on the tables in Section 17.06.050 may be permitted as a matter of right, or be subject to informal or formal permit procedures. *See* RJN Ex. 1:30-31 (Code § 17.06.050(B)(1)-(5)).[8/] Land uses" that are not listed on the tables or are not shown in a particular

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[8/]The most stringent permit requirement for an allowed use within a zoning district is a conditional use permit or CUP. A CUP "is required for certain land uses that may be appropriate in a zone, depending on the design of the individual project, and the characteristics of the proposed site and surroundings. Such uses can either raise major land use policy issues or could create serious problems for adjoining properties, the surrounding area, and their populations if such uses are not appropriately located and designed. The purpose of a conditional use permit is to allow planning department staff and the Placer County planning commission to evaluate a proposed use to determine if problems may

zone district are not allowed, except where otherwise provided by Sections 17.06.030(B) (Exemptions from land use permit requirements), 17.56.300 (Temporary uses), or 17.02.050.C (Allowable uses of land). None of these sections apply to alter the use restrictions that apply to each designated zone.[9/]

III. STANDARD OF REVIEW

A. REVIEW OF STATUTES AND ORDINANCES

The applicable review standard for this Court to interpret statutory and regulatory law is *de novo*. *Planning & Conservation League v. Department of Water Resources* (2000) 83 Cal. App. 4th 892, 912. Further, where statutory or regulatory interpretation does not invoke the expertise of the agency, no deference is owed to an agency's interpretation of its governing statute. *California Beer & Wine Wholesalers Assn. v. Dept. of Alcoholic Beverage Control* (1988) 201 Cal. App. 3d 100, 107. *See also Families Unafraid to Uphold Rural El Dorado County v. Bd. of Supervisors* (1998) 62 Cal. App. 4th 1332, 1342; *San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal. App. 3d 738, 753.

An agency's determination as to the construction of regulation or statute is not entitled to any special deference by a reviewing court; rather it is only "one of several interpretive tools that may be helpful." *Agnew v. State Board of Equalization* (1999) Cal.4th 310, 322.

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occur, to provide the public with an opportunity to review the proposed project and express their concerns n a public hearing, to work with the project applicant to adjust the project through conditions of pproval to solve any potential problems that are identified, or to disapprove a project if identified problems cannot be acceptably corrected." *See* RJN Ex. 1:31. (Section 17.06.050(B)(5)).

[9/]Section 17.06.030(B) exempts the following from land use regulation: 1. Ordinary repairs and maintenance, if the work does not result in any change in the approved land use of the site or building, or the addition to, enlargement or expansion of the building. 2. Activities of the federal government on leased or federally owned land; 3) Activities of Placer County or any district that the board of supervisors governs; 4) Activities of the state of California on leased or state owned land when used exclusively for a governmental purpose; and 5.) Certain school, water, wastewater, and electrical power facilities of local agencies. *See* RJN Ex. 1:28. Section 17.56.300 is limited to temporary uses and requires discretionary County review. Section 17.02.050.C allows for uses of land that are not specifically listed for the zoning designation where the planning director finds that the use will 1) be consistent with the goals, objectives and policies of the general plan; 2) meet the purpose and intent of the zoning district that is applied to the site; 3) share characteristics common with those listed in the zoning district, and will not be of greater intensity, density, or generate more environmental impact than the uses listed in the district; and where the Director's findings are reviewed and approved by the Planning Commission at a noticed public hearing. RJN Ex. 1:04.

> An agency interpretation of the meaning and legal effect of statute is entitled to consideration and respect by the courts however unlike quasi-legislative regulations adopted by an agency to which the Legislature has confided the power to make law and which if authorized by the enabling legislation bind this and other courts as firmly as statutes themselves the binding power of an agency's interpretation of statute or regulation is contextual. Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation.

Yamaha Corp. of America v. State Board of Equalization (1998) 19 Cal. 4th 1, 7. *Yamaha* reiterated that it is the court's job to exercise independent judgment over the legal interpretation of a statute in a specific factual context:

> Courts must in short independently judge the text of the statute taking into account and respecting the agency's interpretation of its meaning, of course, whether embodied in formal rule or less formal representation. Where the meaning and legal effect of statute is the issue, an agency's interpretation is one among several tools available to the court. Depending on the context it may be helpful enlightening even convincing. It may sometimes be of little worth. *Considered alone and apart from the context and circumstances that produce them agency interpretations are not binding or necessarily even authoritative. ..*

Id. at 7-8. (emphasis added.)

B. PETITIONER'S MANDAMUS AND DECLARATORY RELIEF CLAIMS

In this action, Petitioner brings an administrative mandamus claim under Code of Civil Procedure § 1094.5 based on the County's erroneous determination that Chevreaux's asphalt permit had not lapsed under County Code. *See* Petition, ¶¶ 23-27 (1st Cause of Action.)

Petitioner also brings traditional mandamus claims under Code of Civil Procedure § 1085 based on the County's failure to take action where required by a statute or ordinance. *See* Petition, ¶¶ 28-37 (2nd Cause of Action- Failure to Regulate Asphalt Facility as Nonconforming under the Zoning Code); ¶¶ 38-40 (3rd Cause of Action- Failure to Regulate Substantial Expansion of Chevreaux's operation.)

Finally, Petitioner brings declaratory relief claims under Code of Civil Procedure § 1060 requesting a ruling that addresses the County's regulatory obligations regarding Chevreaux's proposed asphalt facility. *See* Petition, ¶¶ 41-42 (4th Cause of Action.)

Below is a summary of the standard of review for each of these Civil Procedure sections.

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1. Review of the County's "Lapse" Determination under Code of Civil Procedure §1094.5

The standard of review in an action to set aside an agency determination made as the result of a proceeding in which by law a hearing is required is whether the agency abused its discretion. Code Civ. Proc. § 1094.5. Abuse of discretion is shown if (1) the agency has not proceeded in a manner required by law; or (2) the determination is not supported by substantial evidence." Code Civ. Proc. § 1094.5(b).

Where an agency's legal interpretation is contrary to law, that constitutes a failure to proceed according to law and an abuse of discretion under Section 1094.5. *See e.g., Endangered Habitats League v. County of Orange* (2005) 131 Cal. App.4th 777, 793 ("the use of an erroneous legal standard is a failure to proceed in the manner required by law that requires reversal.")[10/]

2. Review of County's Failure to Act under Code of Civil Procedure §1085

Petitioner may through traditional mandamus compel the performance of an action legally required. *See e.g., California Assn. for Health Services at Home v. State Dept. of Health Services, supra,* 148 Cal. App. 4th at 705*; Conlan v. Bonta* (2002) 102 Cal. App. 4th 745, 752 ; *Morris v. Harper* (2001) 94 Cal. App.4th 52, 58; *Rogers v. Detrich* (1976) 58 Cal. App. 3d 90, 104. Indeed, a decision <u>not to take regulatory action</u> may itself constitute an abuse of discretion. *See e.g., Morris v. Harper, supra,* 94 Cal. App.4th at 58. "[A]lthough mandamus is not available to compel the exercise of the discretion in a particular manner or to reach a particular result, it does lie to command the exercise of discretion--to compel some action upon the subject involved under a proper interpretation of the applicable law." *Id.; See also Shepherd v. Superior Court* (1976) 17 Cal. 3d 107, 118; *Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal. App. 4th 215, 222; *Sego v. Santa Monica Rent Control Bd.* (1997) 57 Cal. App. 4th 250, 255.

[10/]As set forth below in Section IV, E, *infra*, Petitioner does not challenge the evidence showing that in the past Chevreaux or its subcontractors have engaged in asphalt operations at the Chevreaux quarry and that such use could well be characterized as "intermittent" due to the long periods of inactivity and absence of appurtenant structural facilities as shown in the record. Instead, Petitioner challenges the County's legal interpretation of the zoning code, Section 17.58.160.B.2.b, which defines "lapse" as a discontinuance of use for a period of greater than 12 months. *See* RJN Ex. 1:67.

In this case, as set forth below in Sections IV.A-D, the County has an affirmative obligation to regulate Chevreaux's proposed asphalt operations as non-conforming under the zoning code, or, at the least, an unlawful expansion of Chevreaux's surface mining operation. The County's failure to do so is contrary to law and thus the proper subject of a mandamus action under Code of Civil Procedure § 1085.

3. Review under Code of Civil Procedure §1060

Declaratory relief is appropriate in "cases of actual controversy relating to the legal rights and duties of the respective parties." Code Civ. Proc. § 1060. The construction of a statute is a proper subject of declaratory relief. *See e.g.,City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79. *See also San Diego Police Officers Association v. City of San Diego Civil Service Commission* (2002) 104 Cal. App. 4th 275, 279-280; *Redwood Coast Watersheds Alliance v. State Board of Forestry and Fire Protection* (1999) 70 Cal. App. 4th 962, 970.

Here, the County's actions are based on a flawed legal interpretation regarding the rights of Chevreaux to begin major asphalt operations in Meadow Vista. Because important rights and duties affect Meadow Vista citizens are at issue, declaratory relief is proper. *See Alameda County Land Use Association v. City of Hayward* (1995) 38 Cal. App. 4th 1716, 1723 (declaratory relief lies "when the parties are in fundamental disagreement over the construction of particular legislation, or they dispute whether a public entity has engaged in conduct or established policies in violation of applicable law.")

In particular, there are no more facts necessary for this Court to issue declaratory rulings on the legal rights and obligations of the parties. *See Alameda County Land Use Association v. City of Hayward, supra,* 38 Cal. App. 4th at 1722 ("A controversy is 'ripe' when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made.") Here, the Court has enough information to be able to provide "intelligent and useful" direction to affected parties on the relevant issues in this case such as 1) the effect of the zoning change on Chevreaux's right to conduct asphalt operations and/or 2) the effect of Chevreaux's discontinuance of asphalt use and facilities for the entire decade of the 1990s on Chevreaux's right today to commence an intensive asphalt operation in Meadow Vista. *See Selinger v. City Council of*

Redlands (1989) 216 Cal. App. 3d 259, 272.[11] *See also* Section IV.F, *infra;* Petition, ¶ 42, pp. 8-9.

IV. ARGUMENT

A. THE 1995 ZONING CHANGE FOR THE MEADOW VISTA SITE NO LONGER ALLOWS ASPHALT PROCESSING AS A CONFORMING USE

In 1995-1996, as part of the development and adoption of the Meadow Vista Community Plan, the County rezoned the eastern portion of Chevreaux's 1995 from "Recreational Forestry" to "Resident Forest," in which asphalt processing was no longer permitted as a conditional use. During the period prior to, during, and after this zoning change, between 1990 to 2001, neither Chevreaux nor anyone else was operating an asphalt facility at the Meadow Vista quarry. The record shows instead that at the time of the zoning change, the County was specifically aware that Chevreaux was conducting ongoing surface mining operations but no asphalt processing. Thus, the new zoning specifically allowed for continued surface mining but *not* asphalt production.

As discussed below, given these facts, Chevreaux has no right to continue asphalt production at the Meadow Vista site. The site has operated as a hard rock quarry and gravel operation for decades and will continue to do so. But the County Code no longer allows asphalt production to function as a component of surface mining operations for zoning purposes.

The County and Chevreaux have argued that asphalt production has been intermittent and thus its lack of operation for over a decade may be considered a normal part of the activity. As applied to a non-conforming use, this theory runs counter to the fundamental policies underlying zoning, which encourage the elimination over time of non-conforming uses. *See Hanson Brothers Enterprises, Inc., v. Board of Supervisors of Nevada County, supra,* 12 Cal. 4th at 568 ("The ultimate purpose of zoning is . . . to reduce all nonconforming uses within the zone to conformity as speedily as is consistent with proper safeguards for the interests of those affected."); *Hill v. City of Manhattan Beach* (1971) 6 Cal. 3d 279, 285; *County of San Diego v. McClurken* (1951) 37 Cal. 2d 683, 687.

The change in zoning regulation has significant consequences for Chevreaux's recent proposal to install and operate a more intensive, permanent asphalt plant at the site. Even if the Court *were* to find that asphalt production was a lawful non-conforming use, such a use *may not be expanded or*

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[11] *See also Mycogen Corporation v. Monsanto Company* (2002) 28 Cal. 4th 888, 898.

intensified beyond the use existing at the time the activity became non-conforming. *See* County Code § 17.60.120.A; RJN Ex. 1:72. Here, at the least, Chevreaux may not intensify its past use, which was occasional, involving smaller projects and almost always limited to *daytime* truck travel.

1. Chevreaux's Asphalt Operations Are Inconsistent with Existing Zoning

Chevreaux's proposed asphalt processing operations are no longer consistent with current zoning for the eastern portion of the Meadow Vista site, which was rezoned in 1995 from Recreational Forestry to a combined Residential Forest (RF) and Mineral Reserve (MR) district.[12/] The RF zoning allows for surface mining, but not asphalt processing. *See* RJN Ex. 1:52-53 (County Code § 17.46.010.)[13/] The MR zoning is a combined district formed "to identify lands that may contain valuable mineral resources" and "to provide for the extraction of mineral resources and the reclamation of lands subsequent to such extraction, so as to maintain the economic viability of mining while minimizing adverse impacts to the environment, public health, safety and welfare." *See* RJN, Ex. 1:57 (County Code § 17.52.110.A.)[14/] Thus, the combined RF-MR zone allows for surface mining operations, defined in terms of "extracting crushed and broken stone," *see* RJN Ex. 1:16 (Code § 17.04.030 (definitions of Mining, Surface and Subsurface), but *not* asphalt production.

[12/]*See* RJN, Ex. 3; Graf Decl., ¶ 4. These images taken off the County's website demonstrate that current zoning in the location of the prior and proposed new asphalt factility location is zoned RF (Residential Forest) with an MR (Mineral Reserve) overlay. *Compare* to AR 112, EOR 24, p. 248, showing prior and new facility locations. AR No. 117, EOR 25, p. 261 (asphalt location is in RF-B-X-SP-MR zoning.)

[13/]Instead, manufacturing and processing uses allowed in the new zone are limited to "electric generating plants" and "recycling collection stations." *See* RJN Ex. 1:53. *See also* Doc No. 895, EOR 49, p. 3172. The Code does allow for asphalt production, but only in areas zoned "industrial." *See e.g.,* RJN Ex. 1:47-48; County Code § 17.40.010 Industrial (IN). In these areas, asphalt production is included as a component of "paving materials," *see* RJN Ex. 1:48, defined as "the manufacture of various common paving and roofing materials, <u>including bulk asphalt</u>, <u>paving blocks made of asphalt</u>, creosote wood and <u>various compositions of asphalt and tar</u>." *See* RJN Ex. 1:19 (County Code § 17.04.030) ("Definitions of land uses, specialized terms and phrases.")

[14/]Under County Code,"land use permit requirements, design and development standards that apply to land uses within the -MR combining district shall be the same as otherwise required by Sections 17.06.060 et seq., for the zone with which the MR district is combined, except that a "land use proposed within the -MR combining district shall not be approved unless the granting authority first makes the finding that the proposed use will not impede or interfere with the establishment or continuation of mineral extraction operations on the site." *See* Section 17.52.110.B.1.a. RJN, Ex. 1:57.

Instead, current County zoning addresses asphalt as a component of "Paving Materials" production, which is now expressly limited to Industrial or Heavy Commercial districts. *See* RJN Ex. 1:47-48 (Code § 17.40.010 (Industrial)); RJN Ex. 1:42-43 (Code § 17.24.010 (Heavy commercial)).

In sum, the County's new zoning scheme permitted Chevreaux to continue to conduct surface mining operations, but not asphalt production. This was a reasonable exercise of its zoning power, which followed the adoption of the Meadow Vista Community Plan in May of 1996.[15/]

2. Chevreaux Was Not Conducting Asphalt Operations at the Time of the 1995 Zoning Change and Thus Did Not Acquire Vested Rights to Do So as a Non-conforming Use

"The ultimate purpose of zoning is . . . to reduce all nonconforming uses within the zone to conformity as speedily as is consistent with proper safeguards for the interests of those affected." *Dienelt v. County of Monterey* (1952) 113 Cal. App. 2d 128, 131. For this reason California law also follows a strict policy against extension of nonconforming uses which have ceased operation. *See County of San Diego v. McClurken, supra,* 37 Cal. 2d at 687. *See also Hanson Brothers, supra,* 12 Cal. 4th at 568.

County Code provides that it "is unlawful and a violation of this code for any person to operate or maintain a land use established according to the requirements of the zoning ordinance in any manner that violates any provisions of this chapter." RJN Ex. 1:02 (County Code § 17.02.030.C.) However, the Code provides that zoning requirements "are not retroactive in their effect on a use of land that was lawfully established before this chapter or any applicable amendment became effective, except where an alteration, expansion or modification to an existing use is proposed." *Id.*[16/]

[15/] *See Hanson Brothers Enterprises, Inc., v. Board of Supervisors of Nevada County, supra,* 12 Cal. 4th at, 551 ("Adoption of a zoning ordinance which is not arbitrary and does not unduly restrict the use of private property is a permissible exercise of the police power and does not violate the taking clause of the Fifth Amendment of the United States Constitution and comparable provisions of the California Constitution, *even when the law restricts an existing use of the affected property*.") (emphasis added.)

[16/] "Zoning ordinances and other land-use regulations customarily exempt existing uses to avoid questions as to the constitutionality of their application to those uses. 'The rights of users of property as those rights existed at the time of the adoption of a zoning ordinance are well recognized and have always been protected.'" *See Hanson Brothers Enterprises, Inc., v. Board of Supervisors of Nevada County, supra,* 12 Cal. 4th at 552.

County Code § 17.60.120 states: that "nonconforming uses shall not be enlarged, extended expanded nor increased to occupy a larger area, nor a more intensive use *than that which it was characterized by in the prior twelve months*." RJN Ex. 1:72 (County Code § 17.60.120.A) (emphasis added.) This code provision is consistent with applicable case law that non-conforming uses do *not* carry over when not occurring at the time the zoning change occurred. *See Hanson Brothers Enterprises, Inc., v. Board of Supervisors of Nevada County, supra,* 12 Cal. 4th at 552 ("When continuance of an existing use is permitted by a zoning ordinance, the continued nonconforming use must be similar to the *use existing at the time the zoning ordinance became effective*.") (emphasis added.) *See also Paramount Rock Co. v. County of San Diego* (1960) 180 Cal. App. 2d 217, 225 ("Under the zoning ordinance in question....petitioners' property may be used for the purposes to which it was devoted on December 28, 1956, i.e., *existent* nonconforming uses.") (emphasis added.)

"In determining whether the nonconforming use was the same before and after the passage of a zoning ordinance, each case must stand on its own facts." *Hanson Brothers, supra,* 12 Cal. 4th at 552. Here, there were no asphalt processing facility or activities at the Meadow Vista quarry in the 12 months prior to the adoption of the 1995 zoning ordinance. *See* AR 893, EOR 47, p. 3168; AR No. 85, EOR 18, p. 184 (Chevreaux's information Report for SMARA Reclamation Plan); AR 623, EOR 40, p. 2477. Thus, Chevreaux has no vested right to conduct asphalt operations as a non-conforming use under applicable zoning, but could continue to conduct surface mining operations.

The record shows that the County's 1995 zoning change for the area was intended to update zoning in the Meadow Vista area in conjunction with the adoption of the Meadow Vista Community Plan, which was ultimately approved by the County Board of Supervisors in May 1996. AR 879, EOR 46, p. 3093. At this time, the County was aware of and took steps to ensure that Chevreaux's surface mining operation would continue in the area. However, there is no discussion at the time of the zoning change and adoption of the Meadow Vista Community Plan of Chevreaux's past asphalt operations, nor any consideration that such operations would continue in the future.[17/]

[17/]The Meadow Vista Community Plan was approved by the Board through the adoption of an EIR but never *once* considers the impacts of asphalt plant operations or asphalt truck traffic on Meadow Vista citizens. *See* AR 879, EOR 46, pp. 3093-3110. The most reasonable explanation for this omission would be the County did not consider this to be a legally conforming use worthy of review.

For example, letters from the County indicate that the County was aware of the existence of ongoing surface mining operations, which would continue to be conforming under the new zoning designation of "Mineral Resource and Water." *See* AR 893, EOR 47, p. 3168. Thereafter, upon completion of the Meadow Vista Community Plan in 1996, this designation was changed to the similar Residential - Forest overlaid with a combined Mineral Reserve district, which, as discussed above, allowed for surface mining operations but not for asphalt processing. *See* AR 895, EOR 49, pp. 3172-3173.

The County's belief that the new zoning would not affect Chevreaux's mining operations was reasonable because, at this time, Chevreaux represented its surface mining operations as *not* including asphalt processing. For example, in its SMARA information Report,[18/] Chevreaux stated that its surface mining processing was limited to rock crushing and stockpiling:

> 19a. Processing: After blasting the rock fragments are hauled to a primary crusher. From there they are hauled to secondary crushers, classified and stock-piled.

See AR. No. 85, EOR 18, p. 184.

Due to these representations, and the lack of any ongoing asphalt activity, the 1995 EIR for the Meadow Vista Community Plan describes Chevreaux's operations at the quarry as follows:

> Operations at this facility include the excavation and processing of aggregates. The plant typically operates 5 days a week, 10-12 hours per day, and starts in the early morning hours. .... Periodic blasting activities and heavy truck traffic also contribute to the ambient noise environment at this location. *There is no asphalt concrete plant at this location*, although a permit has been obtained for such operation.

AR No. 33, EOR 5, p. 065. (emphasis added.) Thus, in 1995, the County was aware of Chevreaux's ongoing surface mining operation but was also aware that *no asphalt operations or structure existed*

[18/]Chevreaux's Reclamation plan had been submitted to the County in 1985. *See* AR No. 85, EOR 18, pp. 177-187. A Reclamation Plan was required under the Surface Mining and Reclamation Act of 1975 (SMARA), Cal. Pub. Res. Code § 2710 et seq. SMARA provides for 'home rule,' with the local lead agency having primary responsibility. A lead agency is usually the city or county. (§ 2728.) The mining operator submits the reclamation plan and financial assurances to the lead agency for review. (§ 2770, subd. (d); § 2772.) The Board, through regulations, specifies minimum statewide reclamation standards. (§ 2773.) *See People ex Rel. Department of Conservation v. El Dorado County* (2005) 36 Cal. 4th 971, 984. The County in this case made a legal conclusion that a Reclamation Plan was required under SMARA, even though a new permit for surface mining would not be required. *See* AR. No. 84, EOR 17, pp. 172-175.

at the quarry site, and thus the zoning change prohibiting asphalt production was appropriate.[19/]

In sum, the record shows that the County's zoning change was implemented with the intent to retain Chevreaux's right to continue surface mining extraction, but *not* asphalt processing. Under the terms of the County's Code, the fact that no asphalt processing was occurring at the time that the ordinance was passed, or in the 12 months preceding its adoption, meant these rights did not carry over as a lawful non-conforming use. In sum, Chevreaux did not obtain vested rights to continue asphalt processing as a non-conforming use at the time the zoning change occurred. *See Hanson Brothers, supra,* 12 Cal. 4th at 552 ("Nonuse is not a nonconforming use.")[20/]

3. A Non-conforming Use must Be Continuous to Retain Status as a Vested Right

At the November 7, 2007 hearing the County found that Chevreaux's asphalt facility was an "intermittent" use and thus incapable of lapse under the County Code. *See* AR 288, EOR 29, p. 1289; AR 1, EOR 1, p. 3.[21/] However, the County's reasoning supporting its interpretation of the lapse ordinance has no application to the entirely separate determination whether an intermittent use can be considered vested when it was not operating at the time a zoning change rendered it nonconforming.

As discussed, the "purpose of zoning is . . . to reduce all nonconforming uses within the zone to conformity as speedily as is consistent with proper safeguards for the interests of those affected."

[19/]Indeed the County expressly communicated to Chevreaux that its zoning action would preserve the "status quo" of continued surface mining. *See* AR No. 894, EOR 48, p. 3170.

[20/]In its lapse determination, the County found that vested rights once exercised under the terms of a permit cannot be revoked or limited without providing for due process. *See* AR 1, EOR 1, p. 002. Petitioner agrees that the County is required to conduct a hearing and make findings before it can adjudicate permit rights. Here, however, it is the loss of conforming status for the activity, not the continuing validity of the permit, that leads to the loss of any prior vested right that may have existed to conduct asphalt operations. In this case, the zoning hearing provides due process to affected persons, after which the new zoning automatically takes effect. *See Hanson Brothers, supra*, 12 Cal. 4th at 551 (zoning ordinance pursuant to noticed hearing may lawfully restrict use of property.)

[21/]As discussed in Section IV.E, *infra,* this determination by the County as to the terms of Chevreaux's permit is contrary to the plain language of the County lapse ordinance.

Dienelt v. County of Monterey, supra, 113 Cal. App. 2d at 131.[22/] To allow a non-conforming use to become vested and continue into the future based on "intermittent" use would turn these policies on their head and likely raise a spectre of similar claims based on the past "intermittent" nature of numerous outdated land uses that are no longer in compliance with the zoning code.

The Supreme Court's decision in *Hanson Brothers* is not contrary to this result. In *Hanson Brothers*, Hansen testified "that the Bear's Elbow mining operation has been continuous since 1954, and that the operation included 'taking the available material from the river and combining it with material from the banks, the hillsides and producing a usable material." *See* 12 Cal. 4th at 545. (emphasis added.) The appellate court affirmed the trial court's ruling that the gravel mining and upslope mining were separate operations and that the upslope mining was not a valid non-conforming use since it was not being exercised at the time of the zoning change. *Id.* at 542.

The Supreme Court disagreed because for purposes of considering vested rights and the scope of a non-conforming use, it was improper to consider gravel and upslope surface mining as separate operations. *See Hanson Brothers, supra,* 12 Cal. 4th at 546. The Court acknowledged, however, that were such operations to be considered separate, each would have to have "continuous" operation in order to retain vested rights:

> Were the operations treated separately, we would encourage continuous and unnecessary hillside quarrying to retain the right to exploit that area even at times when riverbed gravel, a replenishing resource, was adequate to meet the needs of the aggregate business.

Id. at 570. (emphasis added.) Once the overall gravel and upslope mining was considered a single operation, evidence in the record supported the fact that such operation had been "continuous." *See Hanson Brothers, supra,* 12 Cal. 4th at 546 ("The overall aggregate production and sales operation had been continuous.") *See also* AR 151, EOR 26, p. 389 (legal definition of "continuous.")

Here, in contrast, the use for which non-conforming status is sought is not surface mining – which as discussed above was specifically protected by the County in enacting its 1995 zoning and Meadow Vista Community Plan – but instead a use – asphalt processing for "Pavement Materials"

[22/] It if for this reason that a nonconforming use is limited to that "use existing on the effective date of the zoning restriction and continuing since that time in nonconformance to the ordinance." *Hill v. City of Manhattan Beach*, *supra*, 6 Cal. 3d at 285.

– that is clearly prohibited by the current zoning on the parcel.[23/] To find that such a use need not be continuous would be the same as finding that Hanson's overall surface mining operation need not have been continuous, a finding contrary to the Supreme Court's discussion in *Hanson Brothers.*

B. WERE CHEVREAUX'S ASPHALT ACTIVITIES CONSIDERED TO HAVE VESTED AT THE TIME OF THE ZONING CHANGE, THOSE RIGHTS WERE SUBSEQUENTLY ABANDONED DUE TO NON-USE

Chevreaux's discontinuance of use for its asphalt plan between the years 1995 and 2001 raises a presumption that the use has been abandoned, and no further use may occur in the absence of county action. County Code § 17.60.120.G states:

> If a nonconforming use of land or a nonconforming use of a conforming building is discontinued for a continuous period of one year, it shall be presumed that the use has been abandoned. Without further action by the county, further use of the site or building shall comply with all the regulations of the zone district in which the building is located, (Sections 17.60.060 et seq.)

See RJN Ex. 1:73.[24/] Here, the County has taken no action that might cure the lack of conformity between Chevreaux's asphalt operations and current zoning on the parcel.[25/]

Provisions such as 17.60.120.G "further the purpose of zoning laws which seek to eliminate nonconforming uses. 'The ultimate purpose of zoning is . . . to reduce all nonconforming uses within the zone to conformity as speedily as is consistent with proper safeguards for the interests of those affected.'" *Hanson Brothers, supra,* 12 Cal. 4th at 556. *See also County of San Diego v. McClurken*, *supra,* 37 Cal. 2d at 686 ([T]he object of such a provision is the gradual elimination of the nonconforming use.")

Here, the discontinuance of asphalt production and lack of asphalt plant structure during these years means that even if Chevreaux was found to have a non-conforming use for asphalt production at the project site, that use must be found to have been abandoned due to the approximate six years

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[23/]*See* Section IV.A, *supra;* RJN Ex. 1:19 (County Code § 17.04.030) (definition of "Paving Materials" production.)

[24/]As discussed above, the language "shall" creates a mandatory duty on the part of the County. *See* County Code § 17.02.050.A.1. (Interpretation). *See* RJN Ex. 1, p. 04.

[25/]Such action might include a rezoning that would allow the use to recommence or where the reason for non-conforming status is the lack of a permit, the issuance of such permit.

of non-use following the conferral of non-conforming status.[26/]

C. A NON-CONFORMING USE SHALL NOT BE ENLARGED, NOR INCREASED TO A MORE INTENSIVE USE THAN THAT WHICH IT WAS CHARACTERIZED BY IN THE PRIOR TWELVE MONTHS.

A valid non-conforming use must be similar to the use existing at the time the zoning ordinance became effective. *See Hanson Brothers, supra*, 12 Cal. 4th at 552 ("Intensification or expansion of the existing nonconforming use, or moving the operation to another location on the property is not permitted. (citing *County of San Diego v. McClurken, supra*, 37 Cal. 2d at 87-688.)) County Code § 17.60.120.A incorporates these common law principles:

> [N]onconforming uses shall not be enlarged, extended, expanded nor increased to occupy a larger area, nor a more intensive use than that which it was characterized by in the prior twelve months.

See RJN Ex. 1:72. As discussed above, there was no existing asphalt production occurring at Chevreaux's site in the twelve months prior to and after the passage of the RF-MR zoning for Meadow Vista that no longer permitted asphalt processing. *See* Discussion, Section IV.A-B, *supra.* Thus, there can be no non-conforming use that could have lawfully come into existence.

Were the Court to find nevertheless that Chevreaux had the right to conduct asphalt processing at the Meadow Vista site as a lawful non-conforming use, it is clear that the recent proposals by Chevreaux to recommence a much more intensive asphalt operation exceeds the baseline non-conforming use that has existed in the past. Further, the record shows that the new asphalt facility is to be located approximately 1,000 feet away from its prior non-conforming use. Each of these increases or changes are prohibited, and the County has a mandatory duty under law to take the action necessary under its code.

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[26/]The Supreme Court has noted that "[a]lthough abandonment of a nonconforming use terminates it in all jurisdictions..., ordinances or statutes which provide that discontinuance of a nonconforming use terminates it have not been uniformly construed. Some have been held to create a presumption of abandonment by nonuse for the statutory period, others considered to be evidence of abandonment. In still other jurisdictions the nonconforming use is terminated when the specified period of nonuse occurs, regardless of the intent of the landowner. *Hanson Brothers Enterprises, Inc., v. Board of Supervisors of Nevada County, supra,* 12 Cal. 4th at 556. In this case, the lack of use creates a presumption of abandonment with the result that, "without further action by the County, further use of the site ...shall comply" with all applicable zoning regulations. *See* County Code § 17.60.120.G

1. Chevreaux's New Asphalt Proposals Greatly Exceed Prior Operations in Intensity and Scope, Contrary to County Code

Under County Code § 17.60.120.A, a nonconforming use of land may not be "enlarged, extended, expanded nor increased to occupy a larger area, nor a more intensive use than that which it was characterized by in the prior twelve months." RJN, Ex. 1:72. The purpose of this provision is to ensure that non-conforming uses are limited and phased out over time. *See Dienelt v. County of Monterey, supra,* 113 Cal. App. 2d at 131 ("The ultimate purpose of zoning is . . . to reduce all nonconforming uses within the zone to conformity as speedily as is consistent with proper safeguards for the interests of those affected."); *Paramount Rock Company, Inc. v. County of San Diego*, *supra,* 180 Cal. App. 2d at 229 ("[C]ourts throughout the country generally follow a strict policy against their extension or enlargement.")

a. The Baseline of Chevreaux's Past Operations Demonstrate Occasional Daytime Use of Low Intensity Using Temporary Facilities

The record shows that although Chevreaux's 1972 asphalt permit was for a permanent asphalt plant, no such plant was operating in the 1980s and 1990s. Indeed the Meadow Vista Community Plan states in 1996 that "there is no asphalt concrete plant at [the Chevreaux Quarry] location, although a permit has been obtained for such operations." *See* AR 33, EOR 5, p. 065.

The record also shows that the prior asphalt process that did take place was occasional and of generally low intensity. AR 86, EOR 19, p. 189; AR 382, EOR 34, p. 1633; AR 89, EOR 20, p. 194; AR 623, EOR 40, p. 2477. The record also shows that truck travel of asphalt – and other materials – was during the day and only rarely, if ever, past 7 pm at night. *See* AR 705, EOR 41, pp. 2695-2697; AR No. 425, EOR 36, p. 1798; AR 165, EOR 28, p. 592. The record shows that the only traffic estimate of Chevreaux's overall operation was *20 trucks a day.* AR 76, EOR 12, p. 156.

b. Chevreaux's New Proposed Asphalt Operations are a Substantial Increase in the Intensity of Past Use and Concomitant Increase in Impacts on the Local Community

In contrast to this past use, Chevreaux's new proposal for asphalt operations at the Meadow Vista quarry includes ongoing, steady asphalt processing utilizing a permanent facility and requiring consistent and heavy truck traffic between the hours of 7 p.m. and 8 a.m. through the residential streets of Meadow Vista. *See* Motion to Augment, Ex. 2, pp. 1-2. (project would consist of production

and transport of approximately 290,000 tons of asphalt concrete operating from 7:00 p.m. to 5:30 a.m. Sunday through Thursday and including 240-260 truck trips per night.) .

Further, increased asphalt production would consist of producing up to 4,000 tons of asphalt per night, with resulting discharge of thousands of pounds of particulate matter, nitrogen oxide (NOx) and volatile organic compounds (VOCs),primary constituents of smog. AR 350, EOR 31, p. 1538.

This proposed new operation is a substantial and unprecedented expansion of a non-conforming use and is thus contrary to law. *See* AR No. 425, EOR 36, pp. 1798-1799. (County Counsel find there is "no evidence that any operation has ever been run that operated only through nightime hours as is currently being proposed"....the proposal "would appear to be a level and manner of use that far exceeds any previous use" which "impermissibly expands beyond its original scope.")

2. Chevreaux's New Proposed Facility is in a New Location

The proposed facility is in a different location, approximately 1,000 feet from the permitted location. *See* AR 112, EOR 24, 248. The moving of the permitted facility that is now non-conforming is contrary to law. *See County of San Diego v. McClurken*, *supra,* 37 Cal. 2d at 687.

D. UNDER COUNTY CODE, THE COUNTY MUST REQUIRE A NEW PERMIT FOR ANY SUBSTANTIAL EXPANSION OF A SURFACE MINING OPERATION

As discussed above, the zoning changes enacted in 1995-1996 by the County no longer permit asphalt production to be considered a part of surface mining operations. *See* Discussion, Sections IV.A-B, *supra*. *Were* Chevreaux's asphalt operations considered to be a conforming component of the surface mining operation, however, its expansion in use still triggers the need for a new permit.

Placer County Code § 17.56.270(D) states:

> No person shall conduct surface mining operations or permit another person to conduct surface mining operations on his/her property unless a conditional use permit and reclamation plan have first been approved...Conditional use permit and reclamation plan approval are required for all surface mining operations in all zones where surface mining is allowed; and <u>shall be required for the expansion or substantial change of operation of any surface mine for which such expansion or changes have nor been previously approved.</u>

See RJN Ex. 1, p. 59 (emphasis added.) This Code provision requires a new permit wherever there is a substantial change in surface mining operation not previously been reviewed by the County.

If the Court were to find that asphalt processing is part of the surface mining operation, than the construction of a permanent asphalt facility proposing to produce and deliver asphalt in up to 260

truck loads along residential streets throughout the night, *see* Motion to Augment, Ex. 2, p. 2, constitutes a "substantial change" in the overall operation, which must be reviewed in a permit proceeding under this section. *See* AR No. 425, EOR 36, p. 1799 (new proposal "far exceeds any previous use" in terms of the "level and manner of production."); AR 705, EOR 41, pp. 2695-2697 (describing recollections of past use.)[27/]

As discussed above, Petitioner may through traditional mandamus compel the performance of an action legally required. Here, the expansion in use for Chevreaux's asphalt processing plant and operations triggers, at the least, the need for a new permit under County Code. The County's failure to require a new surface mining permit, as set forth above, is contrary to law and thus subject to mandamus action under Code of Civil Procedure § 1085.

E. THE COUNTY ABUSED ITS DISCRETION IN DETERMINING THAT CHEVREAUX'S 1972 ASPHALT PERMIT DID NOT LAPSE THROUGH NON-USE

As discussed above, after 1995, Chevreaux's right to conduct asphalt operations was dependent upon whether it was entitled to continue a non-conforming use under County code and common law. Nevertheless, in response to a request by Chevreaux's attorney, the County proceeded in 2007 to expend considerable resources and time on an evaluation of a far narrower determination; whether Chevreaux's asphalt permit had "lapsed" under County Code § 17.58.160(B)(2)(b).

This "administrative process" was conducted in the midst of ongoing litigation in Petitioner's related action against Chevreaux, *at the request of Chevreaux's attorney*, in an action where the County had managed to extract itself based on the narrow grounds of prosecutorial discretion. As such, it is inherently suspect, based on the well-considered case law that agencies must not be allowed to support their decisions with post-hoc rationalizations.[28/]

[27/] *See e.g., Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners of the City of Oakland* (2001) 91 Cal. App. 4th 1344, 1372 ("Petitioners next contend that the EIR failed to address adequately the potential disturbance to area residents resulting from increased nighttime air cargo operations. Specifically, they claim the EIR omitted significant information about the ADP's potential interference with sleep, including physiological response and annoyance from increased nighttime overflights. We conclude that this contention has merit.") (emphasis added.)

[28/] Where the agency was initially a defendant in the underlying litigation, the proposition that the agency may thereupon render an administrative determination supportive of its position is contrary to the well settled case law against allowing agencies to adopt post-hoc findings to support prior

However the Court chooses to review this matter, Respondents' determination that Chevreaux's asphalt permit (LDA-786) was a permanent, intermittent use that had not lapsed is contrary to the unambiguous provisions of Code § 17.58.160(B)(2)(b), which states that a permit shall lapse under the following circumstances:

> After a use has been established and/or operated as approved, *the use (if no appurtenant structure is required for its operation) is discontinued for more than twelve consecutive months, or (if an appurtenant structure is required for the conditionally-permitted use) the structure is removed from the site for more than twelve consecutive months*.

See RJN Ex. 1:67 (emphasis added.) If this event occurs, "the permit shall be deemed to have lapsed" and cannot be "reactivated, re-established or used unless a new permit is first obtained." *Id.* (County Code § 17.58.160(B)(3). (emphasis added.)

This language is plain and unambiguous: a permit has "lapsed" under County Code where the use is discontinued for more than 12 months or the appurtenant structure – in this case the asphalt plant [29/] – is removed from the site for more than 12 consecutive months. As discussed above, there is no factual dispute that in the 6 years following the enactment of the lapse statute in 1995, there was no asphalt operation at the Chevreaux site and no asphalt plant structure – required for the use to continue – at the site. *See e.g.,* AR 89, EOR 20, p. 194; AR 623, EOR 40, p. 2477; AR 33, EOR 5, p. 065 ("There is no asphalt concrete plant at this location.")

Under general principles of statutory interpretation, where statutory language is unambiguous there is no need for judicial construction:

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administrative or litigation positions. *See Citizens to Preserve Overton Park v. Volpe* (1971) 401 U.S. 402, 420; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 79, 86; *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal. App.3d 1022, 1026; *Environmental Defense Fund, Inc. v. Coastside County Water Dist.* (1972) 27 Cal. App.3d 695, 706; *See also Berkeley Keep Jets Over the Bay Committee, supra,* 91 Cal. App. 4th at 1359; *Citizens for Responsible Government v. City of Albany* (1997) 56 Cal. App. 4th 1199, 1221; *Gentry v. City of Murrieta* (1995) 36 Cal. App.4th 1359, 1402; *City of Santee v. County of San Diego* (1989) 214 Cal. App.3d 1438, 1451.

[29/]The asphalt plant that was removed during the 1990s is an "appurtenant structure" under County Code § 17.04.030. ("Structure means any artifact constructed or erected, the use of which requires attachment to the ground, or over one hundred twenty (120) square feet in area or over six feet in height, or any structure that requires a building permit, including any building, but not including fences or walls six feet or less in height, or concrete flat work such as patios or planters less than twelve (12) inches in height.") *See* RJN, Ex. 1:22A.

> As with any statutory construction inquiry, we must look first to the language of the statute. (1) "To determine legislative intent, a court begins with the words of the statute, because they generally provide the most reliable indicator of legislative intent." ...If it is clear and unambiguous our inquiry ends. There is no need for judicial construction and a court may not indulge in it. ...'If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs.' [citations omitted.]

Diamond Multimedia Systems, Inc. v. Superior Court (1999) 19 Cal. 4th 1036, 1047. *See also Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 14 (Because the language ...is clear and unambiguous, judicial construction of the statutes is not permitted unless they cannot be applied according to their terms or doing so would lead to absurd results.")

Here, there is nothing in the ordinance language suggesting that "intermittent" use of a permit is adequate to avoid the lapsing of the permit right. The language is simply not capable of an interpretation which adds absent language to form a contrary meaning that "a lapse will not be deemed to have occurred where the underlying use is found to be 'intermittent' in the discretion of the Planning Director."[30/] Such language does not exist in the Code and may not be added by judicial construction.

Beyond its plain language, it seems likely that the purposes of the lapse ordinance are undermined by the County's narrow interpretation as applied to Chevreaux's now and then asphalt operations. Indeed, the lapse ordinance is another way to promote the central zoning objective, discussed above, that non-conforming, older permitted uses be phased out over time, particularly when they fall into disuse. Here, a plain reading of the statute does not lead to an "absurd result," *see Foxgate Homeowners' Assn.. supra,* 26 Cal.4th at 14, but instead promotes a central zoning objective to ensure that an unexercised permit must be reapplied for before it can again become legally valid.

This is an appropriate result in this case. As discussed above, Chevreaux originally obtained its permit in 1972. The permit documents contain no discussion of traffic issues, time or size of the operation. As noted by County Counsel, "[i]n theory, the operation could be 24 hours per day, 7 days a week, 52 weeks a year." AR 165, EOR 28, p. 588.

The record shows, however, that at the time of the permit grant, the general operation was "20

[30/]Other zoning code provisions provide such discretion in certain circumstances. *See e.g.* RJN Ex. 1:04 (County Code § 17.02.050.C (allowing for land uses not specifically listed for the zoning designation where the planning director makes certain findings.)) But not in the lapse ordinance.

trucks a day total" with daytime use. *See* AR 76, EOR 12, p. 156. Indeed, County Counsel found that "the record of the hearing in 1972 does not support an inference that Mr. Chevreaux was intending to preserve the right to operate throughout the night on a sustained basis." AR No. 425, EOR 36, p. 1798. In contrast, here, the new proposal is nighttime operations consisting of up to 260 truck trips between the hours of 7 p.m. and 5:30 a.m. Motion to Augment, Ex. 2, p. 2. Meanwhile, no agency has reviewed the air pollution impacts of this level of traffic consisting of diesel trucks with open beds of freshly made asphalt operating continously on local community streets, next to residents and school yards.[31/]

The changes that are being proposed are significant, yet were never addressed in the prior permit. Indeed, County Counsel had stated in the record that the new asphalt proposal "far exceeds any previous use" in terms of the "level and manner of production" AR No. 425, EOR 36, p. 1799, and for that reason the existing permit is not "broad enough to include routine lengthy nighttime operations without CEQA review." *See* AR 165, EOR 28, p. 592.

The lapse ordinance was written precisely to require County officials to address situations such as this one where an operator must appropriately apply for a new permit where non-use has occurred over a long period and circumstances have changed since the issuance of original permit over 35 years ago. The lapse ordinance *does* provide the County discretion whether to approve a new permit. But it does not provide discretion for the County to continue to rely on a permit that has lapsed and no longer adequately addresses the impacts of the newly proposed activity.

To adopt any other reading of the statute would not only conflict with the rules of statutory interpretation as discussed above, it would set a dangerous precedent that all permit holders in the County could potentially rely on to allow for recommencement of activities based on antiquated permits that no longer address the evolving relationships between land uses under local zoning.

Accordingly, the County's determination that Chevreaux's asphalt permit has not lapsed under County Code § 17.58.160(B)(2)(b) constitutes a failure to proceed according to law and thus an abuse

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[31/]As discussed above, the County's Ad Hoc Air Pollution Advisory Committee made a consensus finding that "the intensive asphalt production and diesel truck traffic associated with the current ...proposal with its associated increases in air pollution in close proximity to homes, play grounds, parks and schools will likely result in ...negative health impacts." AR 711, EOR 43, p. 2708.

of discretion under Code of Civil Procedure § 1094.5.

F. PETITIONER ALSO SEEKS DECLARATORY RELIEF ON ITS CLAIMS

As discussed in Section IV.B.3, *supra, a*n actual case or controversy has arisen between Petitioner and the County regarding the following questions of law (also discussed above) thereby requiring declaratory relief under Code of Civil Procedure § 1060. *See also* Petition, ¶ 42, pp. 8-9.

- whether Chevreaux's asphalt permit has lapsed due to non-use pursuant to County Code § 17.58.160(B)(2)(b);

- whether the construction of an asphalt plant and processing activities is a nonconforming use under County Code § 17.46.010;

- whether the asphalt plant and processing activity at the Meadow Vista quarry is a valid non-conforming use where there were no asphalt processing facilities or activities at the Meadow Vista quarry occurring in the 12 months prior to the adoption of the 1995 ordinance that changed the zoning on the parcel;

- whether the asphalt plant and processing activity at the Meadow Vista quarry is a valid non-conforming use under common law where such activities ceased operation between approximately 1976 and 2001.

- whether the asphalt plant and processing activity at the Meadow Vista quarry is a valid non-conforming use under County Code § 17.60.120.G where such activities were discontinued for a continuous period of one year, between approximately 1976 and 2001 and between 2001 and 2006, and thus presumed to be abandoned;

- whether Chevreaux's new proposal for asphalt operations at the Meadow Vista quarry including increases in asphalt processing utilizing a permanent facility and requiring consistent and heavy nightime truck traffic between constitutes an unlawful expansion of a non-conforming use;

- whether Chevreaux's proposal to move the location of its non-conforming asphalt processing activities is contrary to law;

- whether, if Chevreaux's asphalt processing plant and operations are considered to be "conforming" as part of the allowable surface mining operation, the proposed expansion of asphalt operations constitutes a substantial change in the surface mining operation, thereby requiring a new surface mining permit under County Code § 17.56.270(D).

V. CONCLUSION

Based on the foregoing, Petitioner requests the Court to issue a Peremptory Writ of Mandate ordering the relief set forth in Petitioner's Petition and Prayer for Relief, pp. 9-10, ¶¶ 1-3.

DATED: February 9, 2009

Law Offices

By: _____

By: Michael W. Graf
Attorney for Petitioner Meadow Vista Protection

P017 Petitioner's Opening Brief.wpd

PROOF OF SERVICE

I am employed in the County of Contra Costa, State of California. I am over the age of 18 and not a party to the within action; my business address is 227 Behrens Street, El Cerrito California, 94530. On this date I caused the attached:

PETITIONER'S OPENING BRIEF

PETITIONER'S MOTION TO AUGMENT THE ADMINISTRATIVE RECORD (EXS. 1-2)

PETITIONER'S FIRST REQUEST FOR JUDICIAL NOTICE, EXS. 1-3

DECLARATION OF MICHAEL GRAF IN SUPPORT

DECLARATION OF JOHN BLODGER IN SUPPORT

EXCERPTS OF RECORD BINDER

to be served as follows:

x **By Overnight Mail** On the date written below, at El Cerrito, California, I placed a true copy of the above written document in a sealed envelope(s) and placed it for collection and mailing, addressed as follows:

Jay-Allen Eisen Law Corporation 2431 Capitol Avenue Sacramento CA 95816	Richard Crabtree Law Offices of Richard L. Crabtree 1395 Ridgewood Drive, Suite 300 Chico, CA 95973

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, aand that this declaration is executed this February 9, 2009, Contra Costa County, California.

Michael Graf

Proof - Opening Brief Packet.wpd