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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF PLACER

MEADOW VISTA PROTECTION, Petitioner and Plaintiff, v. CHEVREAUX AGGREGATES, INC.; COUNTY OF PLACER; COUNTY OF PLACER PLANNING DEPARTMENT; and DOES 1 through 50, inclusive, Respondents and Defendants.	Case No: SCV 19614 Complaint Filed: 7/12/06 PLAINTIFF MEADOW VISTA PROTECTION'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION OF THIRD CAUSE OF ACTION FOR DECLARATORY RELIEF Date: 5/15/07 Time: 8:30 a.m. Dept.: 4 Trial: 11/13/07 Judge: The Hon. Charles D. Wachob

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INTRODUCTION

Defendant Chevreaux Aggregates, Inc.'s Opposition to Meadow Vista Protection's Motion for Summary Adjudication (Opposition) is a classic example of obfuscation: burden the Court with so many documents detailing the history of mining operations since 1947, whether material or not, that it would at least ***appear*** that a trial is necessary to "sort it all out."[1] However, Defendant cannot obfuscate several significant admissions which are germane to the ***narrow***, material issue raised in the Motion for Summary Adjudication: lapse of asphalt plant operations.

First, Defendant admits that it did not operate an asphalt plant from 1975 to 2001, or from 2002 to the present, which is well beyond the 12-month time period referenced in the lapse ordinance.

Second, even if it is assumed that the Surface Mining and Reclamation Act (SMARA) encompasses asphalt operations (which it does not), it is undisputed and admitted that Defendant has ***never*** "continuously" operated an asphalt plant. As such, it cannot have obtained a vested right to operate an asphalt plant under SMARA's vested rights provision.

Third, even if it is further assumed that Defendant has a vested right to operate an asphalt plant (which it does not), the lapse ordinance would nevertheless apply. There is established case law, including the seminal California Supreme Court vested rights opinion in *Avco Community Developers, Inc. v. South Coast Regional Commission* (1976) 17 Cal.3d. 785, that a vested right can nevertheless lapse from nonuse.

Finally, it is undisputed that neither CUP-853 (the reclamation permit), Defendant's Reclamation Plan – Part B, nor Defendant's quarry permit (LDA-1030) contain ***any*** reference to the operation of an asphalt plant. Related thereto, LDA-786 (the asphalt plant CUP) does not authorize "intermittent" operation, nor does it describe an asphalt plant as an "accessory use."

For the foregoing reasons, this Court should grant the Motion for Summary Adjudication, as there are no disputed issues of ***material*** fact.

[1] All of Defendant's own "undisputed facts" are immaterial as set forth in MVP's separately filed Response to Defendant's Statement of Undisputed Facts, incorporated herein by reference.

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ARGUMENT

I.
NONE OF THE EVIDENCE PROFFERED BY DEFENDANT ESTABLISHES OPERATION OF AN ASPHALT PLANT BETWEEN 1995 AND 2001 OR BETWEEN 2002 AND THE PRESENT; THEREFORE, THIS EVIDENCE FAILS TO CREATE A TRIABLE ISSUE OF MATERIAL FACT

It is ***undisputed*** that Defendant's asphalt plant did not operate between 1995 and 2001. (UMF No. 17; Defendant's Response to UMF No. 17; see also Opp. at p. 18:24-27.) Defendant also has failed to introduce any evidence of asphalt operations from 2002 through the present, conceding two separate five year lapses. Either timeframe is sufficient to trigger the Placer County lapse ordinance. Moreover, in recent discovery responses served after the filing of the instant motion, Defendant admitted that no asphalt plant or appurtenant structure has even been ***present*** at its site during these time periods. (See Responses to Requests for Admission Nos. 1-9, Exhibit 1 to Declaration of Timothy V. Kassouni (Kassouni Declaration) filed herewith.)

The application of the lapse ordinance to defendant's asphalt operation is a question of law, not fact.[2] Therefore, the primary issue of material fact is the date of nonoperation. (See *Billmeyer v. Plaza Bank of Commerce* (1995) 42 Cal.App.4th 1086, 1099 ["materiality depends on the ***issues in the case***; evidence which does not relate to a matter in issue is ***immaterial***"], emphases in original.) Since defendant has admitted significant lapses well in excess of the lapse ordinance, there are no triable issues of material fact and this Court can and should grant the motion as a matter of law.

II.
THIS COURT'S ROLE IS TO APPLY THE PLACER COUNTY LAPSE ORDINANCE TO THE UNDISPUTED FACTS, NOT REDRAFT THE ORDINANCE TO SATISFY DEFENDANT'S PUBLIC POLICY CONCERNS

Relying in great measure on the Declaration of Louis H. Merzario, Jr. – a procedurally defective declaration replete with objectionable legal conclusions[3] – Defendant devotes a

[2] Defendant states several times that the application of the lapse ordinance to its asphalt activities is a question of fact. (See, e.g., Opp. at pp. 2:7-9; 25:24-26.) This is not so: "It is elementary that the construction of a statute and the question of whether it is applicable present ***solely questions of law***." (*Dean W. Knight & Sons, Inc. v. State of California ex. rel. Department of Transportation* (1984) 155 Cal.App.3d 300, 305, emphasis added.)

[3] See Plaintiff Meadow Vista Protection's Objections to Evidence filed herewith.

substantial portion of its Opposition to a recitation of public policy arguments which may be proper for a governmental entity with legislative powers, but not a neutral court of law. These public policy arguments express Defendant's ***desire*** that the Placer County lapse ordinance be amended to carve out an exception for asphalt plant operations. Examples include the following:

- Defendant's operations are purportedly "seasonal and intermittent, depending on the market for the material" (Opp. at 18:7-9);
- "By its very nature, production at an asphalt plant is directly dependent upon the local markets" (Opp. at 19:3-4);
- Asphalt plants are "portable" (Opp. at 19:12);
- Travel time and ambient temperatures are "limiting factors" (Opp. at 19:14);
- Defendant's asphalt operations are "highly dependent upon governmental contracts . . ." (Opp. at 19:15-16); and
- Asphalt plants and their production are "directly related to local demand for product" (Opp. at 20:2).

Without citation to legal authority, Defendant asserts that the foregoing facts establish that the underlying land use has "not been abandoned." (Opp. at 20:4.) However, there is nothing in the Placer County Zoning Ordinance that carves out a "lapse" exception under such circumstances. Thus, even if it is assumed, *arguendo*, that the above facts are true, they are immaterial to the lapse issue and do not create triable issues of fact.[4] These facts may be relevant if presented to the County of Placer as a public policy argument to amend the zoning ordinance to carve out an exception for asphalt plants. However, it is not this Court's role to make public policy decisions and rewrite the zoning ordinance to accommodate Defendant's desire. This Court must follow the plain meaning of the actual words of the zoning ordinance:

> These appeals to policy considerations are, at bottom, entreaties to take action that would take us outside judicial function. 'Respect for the political branches of our government requires us to interpret the laws in accordance with the expressed intention of the Legislature, and we have 'no power to rewrite the statute … to make is conform to a presumed intention [that] is not expressed.' [Citation omitted.]

(*Faulder v. Mendocino County Board of Supervisors* (2006) 144 Cal.App.4th 1362, 1379.)

[4] It is apparent that Defendant is attempting to convert the Motion for Summary Adjudication into a motion based solely on an abandonment argument. However, it is principally based on the Placer County "lapse" ordinance.

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The undisputed fact is that a separate CUP (LDA-786) was issued for operation of an asphalt plant, and the lapse provision of the Placer County Zoning Ordinance does not contain an exclusion for asphalt plant operations.

III.
THE COUNTY HAS NEVER DETERMINED THAT LDA-786 HAS NOT LAPSED, AND EVEN IF THE COUNTY MADE SUCH A DETERMINATION, IT WOULD NOT BE VALID OR BINDING

A. Defendant Mischaracterizes Communications from the County as Final Determinations that LDA-786 Has Not Lapsed, when Subsequent Documents Clearly State that No Final Determination Has Been Made

The County has never formally determined that LDA-786 has not lapsed. At page 8 of its Opposition, defendant quotes from a series of e-mails from Bill Combs of the Planning Department to various agencies. The latest of these e-mails is dated February 16, 2005. However, defendant selectively ignores Mr. Combs' letter of February 22, 2005 to Daniel Palmer of Teichert Construction wherein Mr. Combs stated:

> I did give you a call to advise you that Tony LaBouff, County Counsel, and Fred Yeager, Planning Director, had reviewed the files and had made a preliminary determination that LDA-786 appeared to have established rights for the Teichert project to proceed. ***I later advised you that Mr. LaBouff had decided to investigate the case further, which has been on going. At no time did I advise you to begin moving equipment and starting operation at the Chevreaux site.***

(Exhibit 25 of MVP's Documentary Evidence, emphasis added.)

Similarly, defendant quotes from the February 25, 2005 memorandum of County Counsel Anthony LaBouff: "The County . . . has acted as if there has not been a lapse. It could be argued that the permit holder could reasonably rely upon such actions of the County in exercising its business judgments." (February 25, 2005 Memorandum, UMF No. 27, Exhibit 27 of MVP's Documentary Evidence.) Notably, Defendant omits the very next sentence, which states,

> In order to make any ***ultimate determination*** as to whether the permit has lapsed and whether the activity proposed by Teichert Construction requires a new conditional use permit, the following type of additional information is necessary: … 3) How frequently, and for what lengths of time was an asphalt batch plant in operation on the site from 1987 through 2001? 4) Has each plant been placed on

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> the site as needed and then removed after the production is over or are there any appurtenant structures that are associated with the operation of an asphalt batch plant on the site?

(*Id.*, emphasis added.) Far from making a determination of nonlapse in this memorandum, County Counsel was actually seeking additional information from the permit holder and incorporating the language of the lapse ordinance in his inquiry.

Moreover, County Counsel wrote to Defendant's counsel on March 22, 2005, stating:

> [T]his office continues to question whether the Teichert proposal falls within the bounds of the permit that was granted to Joe Chevreaux in 1972. … ***[T]he issue of lapse has never been fully addressed***. The fact that the County determined, in 1987, that the permit was valid at that time ***does not conclusively establish its status almost 20 years later***, especially in light of the amendment to the County ordinances in the interim to include new standards concerning lapse.

(March 22, 2005 letter to Brigit Barnes**,** Exhibit 29 of MVP's Documentary Evidence, emphases added; UMF No. 29.) This letter post-dates the prior memorandum by nearly a month. Obviously, Mr. LaBouff had made no conclusive determination of nonlapse in his prior memorandum.

B. Even if the February 25, 2005 Memorandum Is an Official Determination of Nonlapse, the Determination Is Not Valid or Binding Because It Would Contravene the County Zoning Code, As a Matter of Law, in Violation of *Markey*

Even assuming, arguendo, that the County had at some point after 1995 determined that LDA-786 has not lapsed, this determination would not be binding. As set forth in *Markey v. Danville Warehouse and Lumber, Inc.* (1953) 119 Cal.App.2d 1,[5] a county or municipality may not issue a permit or make a determination which is contrary to the express terms of a county zoning ordinance.

In *Markey*, the county issued a building permit for a concrete mixing plant on the basis of "a favorable opinion of a Deputy District Attorney and approval of the County Planning Commission." (*Id.* at p. 6.) However, the applicable county ordinance allowed land use permits to be issued "for enumerated purposes only." (*Ibid.*) Those purposes did not include concrete plants. Nevertheless, appellant argued that the county's subjective analysis and subsequent

[5] A copy of the *Markey* case is attached hereto as Exhibit 1 for the Court's ease of reference.

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issuance of the permit validated the use. In rejecting this argument, the court stated:

> The Board [of Supervisors] has then no power to grant such permit [unless] the ordinance is amended through proper legislative procedure. [Citation.] Even an express permit granted by the board contrary to the terms of the ordinance would be of no effect . . . . ***[A]cts of the administrative and legal functionaries involved can certainly no more influence the force of the ordinance or cause a vested right in appellants or an estoppel than an invalid permit of the Board of Supervisors itself."*** (*Id.* at p. 6-7, emphases added.)

Thus, even if Placer County had publicly and officially determined that LDA-786 has not lapsed (which it has not), such a determination would be ineffective. In light of ***the undisputed fact*** that there has been no use of LDA-786 for periods of time well in excess of the lapse ordinance's terms, the County ***has no power*** to decide that the lapse ordinance does not apply.

IV.
THE DEFINITION OF "SURFACE MINING OPERATIONS" IN SMARA DOES NOT INCLUDE THE OPERATION OF AN ASPHALT PLANT; ON THE CONTRARY, IT IS LIMITED TO THE "MINING OF MINERALS ON MINED LANDS"

Defendant contends that there are five "vesting defenses," all of which have been "necessarily" ignored.[6] (Opp. at 13:24-26; 13:21-22.) One of these "vesting defenses" – the contention that Defendant's right to manufacture asphalt is deemed vested under SMARA beginning in 1976 (Opp. at 14:2-5) – can be disposed of as a matter of law. First, Public Resources Code section 2735 defines "surface mining operations" for purposes of SMARA:

> Surface mining operations means all, or any part of, the process involved in the mining of minerals on mined lands by removing overburden and mining directly from the mineral deposits, open-pit mining of minerals naturally exposed, mining by the auger method, dredging and quarrying, or surface work incident to an underground mine. Surface mining operations shall include, but are not limited to:
>
> (a) Inplace distillation or retorting or leaching.
> (b) The production and disposal of mining waste.
> (c) Prospecting and exploratory activities.

This definition does not even remotely suggest that an asphalt plant can be encompassed within the definition of "surface mining operations." As such, Defendant's repeated attempt to

[6] MVP does not have the initial burden of disproving affirmative defenses in its moving points and authorities,

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manufacture its own definition of "surface mining operations" to include asphalt plant operations conflicts with the above statutory definition and should therefore be rejected as a matter of law.

Defendant has proffered no triable issue of material fact that would supplant this Court's role in applying the plain meaning of the statutory definition of "surface mining operations." Defendant admits as much when it contends that "SMARA Section 2713 confirms all ***rights to mine*** are protected as valuable property rights which cannot be 'taken' without just compensation, thus confirming the constitutional protection of Chevreaux's mining rights." (Opp. at 23:6-8, emphasis added.) However, a "right to mine" does not include the right to operate an asphalt plant, as noted in the statutory definition of "surface mining operations." It is therefore not surprising that ***Defendant has proffered no evidence that its SMARA permit CUP-853 confirmed a vested right to operate an asphalt plant***. Even if CUP-853 did confer upon Defendant the vested right to operate an asphalt plant, SMARA would not preempt a local lapse ordinance, as noted below. Furthermore, this Court cannot "create" a definition of surface mining operations in conflict with statutory definition. (*Faulder v. Mendocino County Board of Supervisors, supra*, 144 Cal.App.4th at p. 1379.)

Defendant's contention that a 1985 Placer County Counsel opinion establishes the vested right to operate an asphalt plant pursuant to SMARA is likewise meritless and fails to create a triable issue of material fact. Defendant cites what it believes to be the relevant portion of the opinion at 6:25:

> It is our opinion that . . . any surface mining operations which establish the existence of a vested right under SMARA may extend into areas set aside for mining even though these areas were not being mined at the time of adoption of SMARA or local ordinances which implement that act.

This language does not state that Defendant was the recipient of a vested right to operate an asphalt plant pursuant to SMARA. On the contrary, the opinion restricts itself to "surface mining operations," which is consistent with the limited scope of SMARA. As noted above, the definition of "surface mining operations" does not include operation of an asphalt plant.

contrary to defendant's implication. (*Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468.)

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Certainly, the Legislature could have expanded the definition of "surface mining operations" to include asphalt operations, but it did not do so.

V.
OTHER THAN LDA-786, DEFENDANT ADMITS THAT NONE OF ITS CONDITIONAL USE PERMITS REFERENCE OPERATION OF AN ASPHALT PLANT

In addition to the foregoing, neither Defendant's Reclamation Plan, its SMARA use permit (CUP-853), nor its quarry permit (LD-1030) references the operation of an asphalt plant.[7] Indeed, the very title sheet for Defendant's Reclamation Plan – Part B,[8] indicates that it is directed toward the "Chevreaux quarry at Meadow Vista." Conspicuously absent is a reference to an asphalt plant. Page 2 of the Reclamation Plan – Part B describes the mineral commodity mined: "a) andecite and other minerals classified as MRZ-2 pursuant to the Surface Mining and Reclamation Act . . ." Page 6 of the Reclamation Plan – Part B defines mining method: "Drilling and blasting on a multibench quarry. Overburden is stripped and stockpiled for respreading over the mined area. The hardwalk will be excavated to an elevation which is six feet above high water . . . Overburden which is removed will be stockpiled adjacent to undisturbed overburden next to Lake Combie and the Bear River . . ." Page 7 of the Reclamation Plan – Part B defines processing: "After blasting the rock fragments are hauled to a primary crusher. From there they are hauled to secontary [sic] crushers, classified and stockpiled." Further, LDA-1030, Defendant's quarry permit, identifies the proposed development as follows: "Rock crushing, screening and washing plant for grading materials, etc." (Exhibit 3 attached hereto.) Conspicuously absent is any reference to an asphalt plant, which is precisely why a separate permit was issued for such an operation (LDA-786).

In sum, ***nothing in the Reclamation Plan – Part B, CUP-853 or LDA-1030 reference the operation of an asphalt plant, nor could they, as SMARA only addresses surface mining operations***. Therefore, there is no triable issue of material fact regarding application of SMARA

[7] For ease of reference, MVP has attached CUP 853 and Reclamation Plan –Part B as Exhibit 2 herein. The documents are also contained in Exhibit 63 to Defendant's Documentary Evidence. LDA-1030 is attached hereto as Exhibit 3.

[8] Part A of Defendant's Reclamation Plan pertains to its dredging operation in the Bear River and is not relevant to

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to the Placer County lapse and abandonment provisions. This Court should therefore rule as a matter of law that Defendant has no vested right to operate an asphalt plant as a result of Reclamation Plan – Part B, CUP-853 or LDA-1030.[9]

VI.
EVEN IF IT IS ASSUMED, ARGUENDO, THAT SMARA ENCOMPASSES ASPHALT OPERATIONS, PLACER COUNTY'S LAPSE ORDINANCE MUST NEVERTHELESS BE ENFORCED

A. SMARA Does Not Supersede Local Land Use Zoning Ordinances

Defendant contends that the 1995 Placer County Zoning Code "lapse ordinance" does not apply to LDA-786 in light of Defendant's purported "vested uses." (Opp. at 25:24-25.) However, nothing in SMARA prohibits local governmental entities from adopting ordinances which establish a lapse of previously permitted operations, or operations vested under SMARA. Public Resources Code section 2715 provides in part:

> No provision of this chapter or any ruling, requirement, or policy of the board is a limitation on any of the following: . . . (f) on the power of any city of county to regulate the use of buildings, structures, and land as between industry, business, residences, open space (including agriculture, recreation, the enjoyment of scenic beauty, and the use of natural resources), and other purposes.

Moreover, defendant's Reclamation Plan Permit, CUP 853, expressly provides: "All operations and reclamation activities shall be in compliance with local state and federal regulations and permits" (Exhibit 2 hereto at p. iii; Exhibit 63 of Defendant's Documentary Evidence.)

B. A Determination of Vested Rights Under SMARA Requires "Continuous" Use, and It Is Undisputed and Admitted That There Has Been No "Continuous" Use of an Asphalt Plant

Even if it is assumed, arguendo, that SMARA encompasses the operation of an asphalt plant, it is undisputed that Defendant has not "continuously" operated an asphalt plant, which is

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this motion.

[9] Defendant's contention that MVP seeks invalidation of CUP-853 and the Reclamation Plan issued in 1987 is a gross misrepresentation of the issues presented in the instant motion. (Opposition at 23:19-21.) MVP does not challenge the "validity" of CUP-853, or the Reclamation Plan, both of which are irrelevant and immaterial to the question of whether operation of an asphalt plant at Defendant's site has lapsed.

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a necessary component of SMARA's vested rights provision. (Pub. Resources Code, § 2776.) That section provides in part:

> (a) No person who has obtained a vested right to conduct surface mining operations prior to January 1, 1976, shall be required to secure a permit pursuant to this chapter ***as long as the vested right continues*** and as long as no substantial changes are made in the operation except in accordance with this chapter. …

(Emphasis added.)

Defendant has not created a triable issue of material fact regarding application of SMARA to the lapse ordinance, because ***Defendant has failed to proffer any evidence that it has "continuously" operated an asphalt plant. Indeed, Defendant has admitted that there has been no such continuous operation***. Defendant only contends that its *surface mining operations* have been continuous, whereas the asphalt operations have been only "intermittent." The Court is requested to consider the following admissions in the Opposition:

- "Since 1946 to the present, CHEVREAUX has continuously conducted surface mining operations on the Property." (Opp. at 3:4-5);
- "CHEVREAUX'S surface mining operations are continuous and seasonal." (Opp. at 17:14.);
- "CHEVREAUX'S surface mining operations are continuous and seasonal; and its asphalt operations are seasonal and intermittent in nature due to market forces." (Opp. at 17:12-13.)

The foregoing descriptions of Defendant's alleged continuous surface mining operations must be contrasted with its admission that its asphalt plant operations have not been continuous, but have rather been "intermittent" in nature:

- Defendant's "asphalt operations are seasonal and intermittent …" (Opp. at 17:13.);
- "Chevreaux's surface mining operations included the production of asphalt on an intermittent basis." (Opp. at 17:24-25, based on submitted declaration of Chief Financial Officer and Treasurer Judy Simpson.);
- Reference to the "periodic, intermittent processing of asphalt." (Opp. at 18:5-6, citing memorandum from County Counsel Anthony J. La Bouff dated February 25, 2005.);
- Reference to the "intermittent nature of asphalt production." (Opp. at 19:2-3);

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- "The asphalt plant operations took place on an intermittent basis, and have been permitted as an intermittent use under two land use permits approved by Placer County …" (Opp. at 19:5-7).

Defendant itself thus clarifies the crucial factual distinction between surface mining operations (continuous) and asphalt plant operations (intermittent). This is not a distinction without a difference. As noted above, SMARA's vested rights provision (Pub. Resources Code, § 2776) requires continuous operation. Thus, even if it is assumed, *arguendo*, that an asphalt plant is encompassed within the provisions of SMARA, Defendant's own admission that the asphalt plant was only operated intermittently allows this Court to rule as a matter of law that SMARA has no application to the lapse ordinance, and that Defendant has not established a vested right under SMARA to conduct asphalt operations.[10]

To illustrate the difference between a "continuous" use and an "intermittent" use, consider the definition of "continuous" in Black's Law Dictionary: "**Continuous.** Uninterrupted; unbroken; not intermittent or occasional; so persistently repeated at short intervals as to constitute virtually an unbroken series." (Black's Law Dictionary, 5th Ed. (1979), Exhibit 4 herein.)[11]

Furthermore, nothing in the language of LDA-786, the conditional use permit authorizing operation of an asphalt plant, contains any allowance for "intermittent" use. As such, Defendant's contention that asphalt plant operations were "permitted as an intermittent use" (Opp. at 19:6) has no factual support and fails to create a triable issue of material fact.

C. The California Supreme Court Has Rightly Recognized that Vested Rights Can Lapse

Just as rights may vest in a permit to develop land, so too may those rights lapse following a period of nonuse. (*Avco Community Developers, Inc. v. South Coast Regional Commission*, *supra*, 17 Cal.3d 785, 797-798; *Hansen Brothers Enterprises, Inc. v. Board of Supervisors of Nevada County* (1996) 12 Cal.4th 533, 552; *Hill v. City of Manhattan Beach* (1971) 6 Cal.3d 279, 285-286.

[10] Defendant pushes the envelope in describing its asphalt plant operations as "intermittent." One operation in 32 years and no operation at all in 26 years, from 1975 to 2001, can hardly be called "intermittent." (Opposition at 18:12-22.) MVP knows of no "seasonal" use that comes around only once every 32 years.

[11] It should be noted that Defendant's quotation of Public Resources Code section 2776 is truncated, conveniently

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Although a party may obtain vested rights in a nonconforming use (see *Hill*, *supra*, 6 Cal.3d at p. 285), it is established that "[n]onuse is ***not*** a nonconforming use." (*Id*. at p. 286, emphasis added.) To allow a party to simply reestablish a lapsed use without a new permit would cause a "serious impairment of the government's right to control land use policy." (*Avco Community Developers, Inc.*, *supra*, 17 Cal.3d at p. 797.) The inevitable consequence would be to impress upon such development "an exemption of indeterminate duration from the requirements of any future zoning laws." (*Id*. at p. 798.)

Moreover, if the basis on which a party claims vested rights has, itself lapsed "any vested right has likewise lapsed or been abandoned." (*City of West Hollywood* (2003) 105 Cal.App.4th 1134, 1148; *Oceanic California, Inc. v. North Central Coast Regional Commission* (1976) 63 Cal.App.3d 57, 75 [finding that any vested rights which developer could claim either lapsed or had been abandoned after developer allowed permit to expire].)

Therefore, even if Defendant could claim vested rights in the permit originally issued in 1972, such rights have lapsed as a result of the years of inactivity following Placer County's adoption of the lapse ordinance in 1995.

VII.
DEFENDANT'S ASPHALT PERMIT DOES NOT AUTHORIZE "INTERMITTENT" OPERATION, NOR DOES IT DESCRIBE AN ASPHALT PLANT AS AN "ACCESSORY USE"

The bulk of Defendant's Opposition is based on the theory that an asphalt plant is an intermittent, "accessory use" to surface mining operations. However, neither the word "intermittent" nor the word "accessory" appears on the face of LDA-786 or even in the minutes from the public hearing on that permit. Moreover, this theory of intermittent, accessory use has no basis in case law, SMARA or the Placer County Code. The only evidence Defendant provides to support this argument is a declaration from its "expert," Louis Merzario, which purports to make legal conclusions disguised as factual declarations.[12] For example, Mr.

leaving out the crucial "continues" language. (See, e.g., Opp. at 4:10-15.)

[12] MVP has filed separate objections to defendant's proffered documentary evidence, including the declaration of Mr. Merzario. Among other objections, all of the declarations fail to comply with the procedural requirements of

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Merzario states the following objectionable legal conclusion: "It is my declaration that the permitting of an asphalt plant at the [Defendant] mine site in Placer County was appropriate as an accessory use to the surface mining operation permitted under LD-1030, and is still a permitted use today." (Declaration of Louis Merzario, Exhibit B to Defendant's Documentary Evidence, at p. 3:5-7.) In turn, the only ***statutory*** bases for Mr. Merzario's conclusion are irrelevant and immaterial zoning ordinances from Ventura, Shasta and Alameda Counties—not Placer County.

The Placer County Code specifically treats asphalt (paving) operations as distinctly separate from surface mining operations, permitting asphalt plants in only two zoning districts (C3 and IN) while allowing surface mining in 11 zoning districts (RA, RF, RES, IN, INP, AE, F, FOR, O, TPZ and W). (See Placer County Code, § 17.06.050(D) attached as Exhibit 5.) This evidences the County's intent ***not*** to treat asphalt as a related, accessory use to surface mining; otherwise it would be permitted in all of the zones where surface mining is permitted. Defendant notes that local jurisdictions "routinely consolidate … various land uses into a single permit." (Opp. at p. 16:27-28.) If that is so, Placer County's failure to consolidate defendant's surface mining and asphalt operations indicates intent to treat them as separate uses.

Even assuming, arguendo, that the asphalt plant is an accessory use to the surface mining operation, defendant has not produced a single authority which indicates that an accessory use cannot lapse as long as the principal use continues, or that an accessory use vests along with a principal use. Indeed, the lapse ordinance appears in the section of the code titled "Permit time limits, exercising of permits, and extensions" and speaks ***only*** to permits: "the ***permit*** shall be deemed to have lapsed. No use of land, building or structure for which a ***permit*** has lapsed shall be reactivated, re-established or used unless a new ***permit*** is first obtained as provided by this subchapter. The site of a lapsed ***permit*** shall be used only for uses allowed in the applicable zone district." (Placer County Code, § 17.58.160(B)(3), emphases added, Exhibit 6 hereto.) Thus, the underlying ***use permit*** lapses independent of other permitted uses which may be

Code of Civil Procedure section 437c(d) and should be disregarded.

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occurring on the same property.[13]

VIII.
DEFENDANT'S UNDISPUTED NONOPERATION OF AN ASPHALT PLANT FROM 1995 THROUGH 2001 AND FROM 2002 THROUGH THE PRESENT PRECLUDES A FINDING OF NONCONFORMING USE AS A MATTER OF LAW

A. Defendant Misquotes and Misrepresents the Placer County Ordinance Provision Regarding Continuation of an Existing Use

Defendant asserts, without authority, that the lapse ordinance "only applies to those uses ***established*** after 1995." (Opp. at p. 26:8, emphasis added.) Defendant then egregiously misquotes the code within its opposition:

> Continuation of an existing use. . . . the requirements of this Chapter 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 and as provided by Sections 17.60.120, et seq. (Nonconforming Uses).

(Opp. at p. 26:10-13.) Defendant omits the word "except" in the final phrase, thereby failing to accurately represent to the Court the application of this statute. The statute correctly reads as follows: "and ***except*** as provided by Sections 17.60.120, et seq." (Placer County Code, § 17.02.030(C), Exhibit 7 hereto, emphasis added.)

B. The Placer County Ordinance Expressly Provides that the Asphalt Plant Is Presumed Abandoned Due to Non-Use

Placer County Code section 17.60.120 (Exhibit 8 hereto) in turn addresses nonconforming uses. At section 17.60.120(G), the code explains how nonconforming status may be lost:

> ***If a nonconforming use of land or a nonconforming use of a nonconforming 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, and all other applicable provisions of this chapter. (Emphases added.)

Thus, even assuming arguendo that defendant's asphalt operation is a nonconforming

[13] Defendant also grossly misstates the deposition testimony of Placer County Air Pollution Control District employees, as set forth in MVP's separately filed Response to Defendant's Separate Statement of Undisputed Facts, No. 31. Moreover, the opinions and determinations of APCD staff are not material, as the APCD has no jurisdiction

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use, cessation of use for one year or more creates a ***presumption*** of abandonment "without further action by the county." In addition, further use of the site "shall" comply with "all" provisions of the chapter, including the lapse ordinance. This language effectively mirrors the provisions of the lapse ordinance and has the same legal effect on defendant's asphalt operation.

IX.
THIS COURT HAS ALREADY REJECTED DEFENDANT'S STATUTE OF LIMITATIONS ARGUMENT

Defendant previously raised the identical statute of limitations argument in its general and special demurrer, filed in August of 2006. The statute of limitations argument was fully briefed and argued by Defendant's counsel at the hearing on the demurrer in October of 2006, and this Court specifically rejected the argument on the record. In the interest of brevity, MVP incorporates by reference its opposition defendant's demurrer, a copy of which is attached to the Kassouni Declaration as Exhibit 5.

In short, MVP does not challenge LDA-786's validity at issuance. MVP merely seeks to invalidate the permit via the controlling 1995 lapse ordinance. The statute of limitations argument is unavailing.

X.
THE MOTION IS PROCEDURALLY PROPER

Defendant's contention that the MSA does not completely dispose of the third cause of action is meritless. It is established that for summary adjudication purposes, separate wrongful acts give rise to separate causes of action. Whether they are pleaded in the same or single counts is not determinative. (*Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1854 [one of two unrelated acts of legal malpractice that were alleged in a single cause of action could be summarily adjudicated].)

CONCLUSION

For the foregoing reasons, MVP respectfully requests that the Court grant the motion for summary adjudication.

over the issue of lapse of LDA-786.

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DATED: May 10, 2007.

Respectfully submitted,

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LIST OF EXHIBITS

Exhibit 1: *Markey v. Danville Warehouse and Lumber, Inc.* (1953) 119 Cal.App.2d 1

Exhibit 2: CUP 853 and Reclamation Plan –Part B

Exhibit 3: LDA-1030

Exhibit 4: Black's Law Dictionary, 5th Ed. (1979)

Exhibit 5: Placer County Code, § 17.06.050(D)

Exhibit 6: Placer County Code, § 17.58.160(B)(3)

Exhibit 7: Placer County Code, § 17.02.030(C)

Exhibit 8: Placer County Code, § 17.60.120