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By B. Mulhern, Deputy

1 Michael W. Graf (CA Bar # 136172)
2 227 Behrens Street
3 El Cerrito, California 94530
4 Tel: (510) 525-7222
5 Fax: (510) 525-1208

Attorneys for Petitioner and Plaintiff

6 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
7 IN AND FOR THE COUNTY OF PLACER

8 MEADOW VISTA PROTECTION , a non-profit)
9 corporation,)

10 Petitioner and Plaintiff,)

11 vs.)

12 COUNTY OF PLACER, PLACER COUNTY)
13 BOARD OF SUPERVISORS and DOES 1)
through 10,)

14 Respondents and Defendants)
15 _____)

16 CHEVREAUX AGGREGATES, INC.; and)
17 DOES 11 through 100,)

18 Real Party in Interest and Defendant)
_____ /

Case No. SCV - 22244

Filing Date: January 9, 2008

PETITIONER'S OPENING BRIEF

Date: April 24, 2009

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Dept: 42

Judge: Honorable Charles D. Wachob

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1 **I. INTRODUCTION AND SUMMARY**

2 This case involves Petitioner and Plaintiff Meadow Vista Protection’s (“Petitioner”) challenge
3 to the County’s failure to comply with applicable law, including mandatory provisions of County
4 Code,^{1/} in regulating the asphalt plant activities now being proposed at the Chevreux Aggregates,
5 Inc. (“Chevreux”) mining facility located in Meadow Vista, California (“Meadow Vista site.”)

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

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

27 _____
28 ^{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.

1 In 1995, the County also enacted a “lapse ordinance,” which states that permits “shall be
2 deemed to have lapsed” if the use, or structure required for that use, is discontinued for more than 12
3 consecutive months. The County lapse ordinance applies specifically to Chevreaux’s 1972 permit for
4 asphalt processing, which was not being exercised in 1995 nor was so for the following six years until
5 2001. There is nothing ambiguous about the County’s ordinance or its application to Chevreaux’s
6 discontinuance of its asphalt operation for the six years following the ordinance adoption.

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

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

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

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

1 The record shows that the County and Real Party have relied on a single argument to justify
2 the County’s inaction, which is that Chevreaux has a vested and lawfully permitted right to continue
3 asphalt production – without limitation under County Code - as an “intermittent” use that may
4 disappear and then reappear in whatever form that Chevreaux or one of its subcontractors believes
5 to be appropriate at the time. As discussed below, there is no legal support for this theory as applied
6 to the factual situation in this case. In particular, the facts here are in contrast to the quarrying
7 operation addressed in *Hanson Brothers Enterprises, Inc., v. Board of Supervisors of Nevada County*
8 (1996) 12 Cal. 4th 533, which the Supreme Court found could continue as a non-conforming use
9 because the overall surface mining operation had been continuous. Here, asphalt production - a
10 nonconforming use under County Code – has *not* been continuous. Thus, under *Hanson Brothers*,
11 it may not continue as a non-conforming use under current zoning. *See* Discussion, Section IV.A.3,
12 *infra*.

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

20 //

21 //

22
23 ^{2/}Under law, Petitioner has the right to compel the performance of an action legally required.
24 *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*.

25 ^{3/}Petitioner requests declaratory relief that the County’s November 7, 2007 lapse determination was
26 unlawful, that the operation of an asphalt facility at the Meadow Vista site is a non-conforming under
27 the County zoning code, that such non-conforming use was not grand-fathered at the time of passage
28 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. CHEVREAU'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 Chevreau'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 Chevreau'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 Chevreau in 1971 based on the County's determination that a conditional use permit ("CUP") was necessary. AR 79, EOR 13, p. 163. In

^{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 acceptance 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.

1 1972, Chevreux obtained a new CUP (LDA-786), AR 80, EOR 14, p. 165, that authorized the
2 relocation of the asphalt concrete plant from its former location at the gravel operation approximately
3 600 feet to the northeast along the river to the quarry area. AR 70, EOR 9, pp. 146-147.

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

9 The record appears conflicted on the precise extent of actual operations that occurred pursuant
10 to the asphalt permit. Testimony indicates that operation was sporadic and almost always during the
11 daytime. *See* AR 705, EOR 41, p. 2695-2697. After 1976, any permanent asphalt operations that
12 may have occurred pursuant to the permit were abandoned and structures removed. *See* AR 86, EOR
13 19, p. 189. Permanent facility asphalt operations did not occur in the 1980s and 1990s. *See* AR 382,
14 EOR 34, p. 1633. Between 1990 and 2001, no asphalt operations, even temporary, occurred at the
15 Meadow Vista site and the record shows that no asphalt plant or structure was in existence during this
16 time. *See e.g.* AR 89, EOR 20, p. 194; AR 623, EOR 40, p. 2477; AR 33, EOR 5, p. 065 (“There is
17 no asphalt concrete plant at this location.”)

18 In or around 1995, the County adopted an ordinance, codified at Placer County Code §
19 17.58.160(B)(2)(b), which required permits to be actively utilized or they would lapse and be then
20 subject to a new permit requirement. *See* Petitioner’s First Request for Judicial Notice, Ex. 1, page
21 67. (Hereinafter “RJN, Ex. 1:67.”) In and around 1995, the County also rezoned the Meadow Vista
22 quarry site to Residential/Forestry, which limits “Manufacturing and Processing Uses” to “electric
23 generating plants” and “recycling collection stations” and does not include asphalt processing. *See*
24 County Code § 17.46.010; RJN Ex. 1:52-53; AR 895, EOR 49, p. 3172. At the time these code
25 changes were enacted, no asphalt operations were occurring nor was any asphalt facility structure

26
27 ^{6/}In 2005, the County Counsel reviewed the permit and observed that there “is no condition that
28 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.

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

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

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

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

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

27 On February 25, 2005, in response to attempts by Teichert and Chevreaux to conduct asphalt
28 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

1 and raises significant issues:

2 From the limited information provided to us however the operations appear to have been
3 substantially smaller in volume historically and exercised during daylight hours generally. At
4 the 1972 Zoning Administration hearing proposed condition on hours of operation was
5 expressly rejected after the owner offered to follow policy regarding hours of operation except
6 in emergencies. Over the course of 30 years the practice of Caltrans for highway renovation
7 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.

8 *See* AR 165, EOR 28, p. 592.

9 On March 22, 2005, County Counsel found:

10 [T]here is no evidence that any operation has ever been run that operated only through
11 nighttime hours as is currently being proposed. Regardless of the lack of specificity in
12 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 nighttime operations.

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

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

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

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

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

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

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

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

19 The Director's determination was appealed by a local Meadow Vista resident named Richard
20 Goodwin. *See* AR 160, EOR 27, pp. 451-452. Petitioner submitted comments on behalf of itself and
21 Mr. Goodwin in support of Mr. Goodwin's appeal on the issue before the Board of whether
22 Chevreaux's asphalt permit (LDA-786) had lapsed under County Code § 17.58.160(B)(2)(b). *See* AR
23 378, EOR 33, pp. 1615-1620. On November 7, 2007 the Board held a hearing at which Petitioner's
24 members testified and upheld the Planning Director's determination. *See* AR 288, EOR 29, pp. 1195-
25 1290. At the hearing, County Counsel reiterated that the proceeding was confined to the narrow issue
26 whether Chevreaux's asphalt permit had "lapsed" under Section 17.58.160 and would not address or
27 consider comments relating to impacts of the asphalt facility on the local community or the issue of
28

1 Chevreaux's "vested rights."^{7/}

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

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

10 **C. RELATED ACTION BEFORE THIS COURT**

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

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

25
26 ^{7/}*See e.g.*, AR 288, EOR 29, pp. 1206-1208 ("Now the issue here actually is quite narrow. There
27 are number of issues that are really not before the Board today...Its question of the interpretation of
28 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.")

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

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

11 **D. COUNTY’S ZONING CODE**

12 The County’s zoning code delineates the “uses of land ...in each zone and combining district,”
13 which are allowed as a matter of right, which are subject to permit conditions, and which are not
14 allowed. A summary table of these zoning districts and appropriate uses are set forth in County Code
15 § 17.06.050 (Land use and permit tables.) *See* RJN Ex. 1:30-40. County Code § 17.06.050 lists
16 appropriate Manufacturing and Processing Uses for Residential Forestry zoning as “electric
17 generating plants” (which require a conditional use permit) and “recycling facilities,” which require
18 a permit according to Permit requirements set by Article 17.56.170. RJN Ex. 1:33-34. *See also*
19 County Code § 17.46.010 (Residential Forest Designation), RJN Ex. 1:53. No manufacturing uses
20 are allowed. *Id.*

21 Land uses that are listed on the tables in Section 17.06.050 may be permitted as a matter of
22 right, or be subject to informal or formal permit procedures. *See* RJN Ex. 1:30-31 (Code §
23 17.06.050(B)(1)-(5)).^{8/} Land uses” that are not listed on the tables or are not shown in a particular

24
25 ^{8/}The most stringent permit requirement for an allowed use within a zoning district is a conditional
26 use permit or CUP. A CUP “is required for certain land uses that may be appropriate in a zone,
27 depending on the design of the individual project, and the characteristics of the proposed site and
28 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

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

4 III. STANDARD OF REVIEW

5 A. REVIEW OF STATUTES AND ORDINANCES

6 The applicable review standard for this Court to interpret statutory and regulatory law is *de*
7 *novo*. *Planning & Conservation League v. Department of Water Resources* (2000) 83 Cal. App. 4th
8 892, 912. Further, where statutory or regulatory interpretation does not invoke the expertise of the
9 agency, no deference is owed to an agency's interpretation of its governing statute. *California Beer*
10 *& Wine Wholesalers Assn. v. Dept. of Alcoholic Beverage Control* (1988) 201 Cal. App. 3d 100, 107.
11 *See also Families Unafraid to Uphold Rural El Dorado County v. Bd. of Supervisors* (1998) 62 Cal.
12 App. 4th 1332, 1342; *San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino*
13 (1984) 155 Cal. App. 3d 738, 753.

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

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

22 ^{9/}Section 17.06.030(B) exempts the following from land use regulation: 1. Ordinary repairs and
23 maintenance, if the work does not result in any change in the approved land use of the site or building,
24 or the addition to, enlargement or expansion of the building. 2. Activities of the federal government
25 on leased or federally owned land; 3) Activities of Placer County or any district that the board of
26 supervisors governs; 4) Activities of the state of California on leased or state owned land when used
27 exclusively for a governmental purpose; and 5.) Certain school, water, wastewater, and electrical
28 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.

1 An agency interpretation of the meaning and legal effect of statute is entitled to consideration
2 and respect by the courts however unlike quasi-legislative regulations adopted by an agency
3 to which the Legislature has confided the power to make law and which if authorized by the
4 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.

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

8 Courts must in short independently judge the text of the statute taking into account and
9 respecting the agency's interpretation of its meaning, of course, whether embodied in formal
10 rule or less formal representation. Where the meaning and legal effect of statute is the issue,
11 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. . .*

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

13 **B. PETITIONER'S MANDAMUS AND DECLARATORY RELIEF CLAIMS**

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

17 Petitioner also brings traditional mandamus claims under Code of Civil Procedure § 1085
18 based on the County's failure to take action where required by a statute or ordinance. *See* Petition,
19 ¶¶ 28-37 (2nd Cause of Action- Failure to Regulate Asphalt Facility as Nonconforming under the
20 Zoning Code); ¶¶ 38-40 (3rd Cause of Action- Failure to Regulate Substantial Expansion of
21 Chevreaux's operation.)

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

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

26 //

27 //

28 //

1 **1. Review of the County’s “Lapse” Determination under Code of Civil Procedure**
2 **§1094.5**

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

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

12 **2. Review of County’s Failure to Act under Code of Civil Procedure §1085**

13 Petitioner may through traditional mandamus compel the performance of an action legally
14 required. *See e.g., California Assn. for Health Services at Home v. State Dept. of Health Services,*
15 *supra*, 148 Cal. App. 4th at 705; *Conlan v. Bonta* (2002) 102 Cal. App. 4th 745, 752 ; *Morris v.*
16 *Harper* (2001) 94 Cal. App.4th 52, 58; *Rogers v. Detrich* (1976) 58 Cal. App. 3d 90, 104. Indeed,
17 a decision not to take regulatory action may itself constitute an abuse of discretion. *See e.g.,*
18 *Morris v. Harper, supra*, 94 Cal. App.4th at 58. “[A]lthough mandamus is not available to
19 compel the exercise of the discretion in a particular manner or to reach a particular result, it
20 does lie to command the exercise of discretion--to compel some action upon the subject
21 involved under a proper interpretation of the applicable law." *Id.*; *See also Shepherd v.*
22 *Superior Court* (1976) 17 Cal. 3d 107, 118; *Sunset Drive Corp. v. City of Redlands* (1999) 73
23 Cal. App. 4th 215, 222; *Sego v. Santa Monica Rent Control Bd.* (1997) 57 Cal. App. 4th 250,
24 255.

25 ^{10/}As set forth below in Section IV, E, *infra*, Petitioner does not challenge the evidence showing
26 that in the past Chevreux or its subcontractors have engaged in asphalt operations at the Chevreux
27 quarry and that such use could well be characterized as “intermittent” due to the long periods of
28 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.

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

6 **3. Review under Code of Civil Procedure §1060**

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

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

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

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

2 **IV. ARGUMENT**

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

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

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

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

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

28 ^{11/}See also *Mycogen Corporation v. Monsanto Company* (2002) 28 Cal. 4th 888, 898.

1 *intensified* beyond the use existing at the time the activity became non-conforming. *See* County Code
2 § 17.60.120.A; RJN Ex. 1:72. Here, at the least, Chevreaux may not intensify its past use, which was
3 occasional, involving smaller projects and almost always limited to *daytime* truck travel.

4 **1. Chevreaux’s Asphalt Operations Are Inconsistent with Existing Zoning**

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

16
17 ^{12/}*See* RJN, Ex. 3; Graf Decl., ¶ 4. These images taken off the County’s website demonstrate that
18 current zoning in the location of the prior and proposed new asphalt facility location is zoned RF
19 (Residential Forest) with an MR (Mineral Reserve) overlay. *Compare* to AR 112, EOR 24, p. 248,
20 showing prior and new facility locations. AR No. 117, EOR 25, p. 261 (asphalt location is in RF-B-X-
21 SP-MR zoning.)

22 ^{13/}Instead, manufacturing and processing uses allowed in the new zone are limited to “electric
23 generating plants” and “recycling collection stations.” *See* RJN Ex. 1:53. *See also* Doc No. 895, EOR
24 49, p. 3172. The Code does allow for asphalt production, but only in areas zoned “industrial.” *See*
25 *e.g.*, RJN Ex. 1:47-48; County Code § 17.40.010 Industrial (IN). In these areas, asphalt production
26 is included as a component of “paving materials,” *see* RJN Ex. 1:48, defined as “the manufacture of
27 various common paving and roofing materials, including bulk asphalt, paving blocks made of asphalt,
28 creosote wood and various compositions of asphalt and tar.” *See* RJN Ex. 1:19 (County Code §
17.04.030) (“Definitions of land uses, specialized terms and phrases.”)

29 ^{14/}Under County Code, “land use permit requirements, design and development standards that apply
30 to land uses within the -MR combining district shall be the same as otherwise required by Sections
31 17.06.060 et seq., for the zone with which the MR district is combined, except that a “land use
32 proposed within the -MR combining district shall not be approved unless the granting authority first
33 makes the finding that the proposed use will not impede or interfere with the establishment or
34 continuation of mineral extraction operations on the site.” *See* Section 17.52.110.B.1.a. RJN, Ex. 1:57.

1 Instead, current County zoning addresses asphalt as a component of “Paving Materials”
2 production, which is now expressly limited to Industrial or Heavy Commercial districts. *See* RJN Ex.
3 1:47-48 (Code § 17.40.010 (Industrial)); RJN Ex. 1:42-43 (Code § 17.24.010 (Heavy commercial)).

4 In sum, the County’s new zoning scheme permitted Chevreux to continue to conduct surface
5 mining operations, but not asphalt production. This was a reasonable exercise of its zoning power,
6 which followed the adoption of the Meadow Vista Community Plan in May of 1996.^{15/}

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

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

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

22 ^{15/}*See Hanson Brothers Enterprises, Inc., v. Board of Supervisors of Nevada County, supra*, 12 Cal.
23 4th at, 551 (“Adoption of a zoning ordinance which is not arbitrary and does not unduly restrict the
24 use of private property is a permissible exercise of the police power and does not violate the taking
25 clause of the Fifth Amendment of the United States Constitution and comparable provisions of the
26 California Constitution, *even when the law restricts an existing use of the affected property.*”) (emphasis added.)

27 ^{16/}“Zoning ordinances and other land-use regulations customarily exempt existing uses to avoid
28 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.

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

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

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

26
27 ^{17/}The Meadow Vista Community Plan was approved by the Board through the adoption of an EIR
28 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.

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

8 The County’s belief that the new zoning would not affect Chevreux’s mining operations was
9 reasonable because, at this time, Chevreux represented its surface mining operations as *not* including
10 asphalt processing. For example, in its SMARA information Report,^{18/} Chevreux stated that its
11 surface mining processing was limited to rock crushing and stockpiling:

12 19a. Processing: After blasting the rock fragments are hauled to a primary crusher.
13 From there they are hauled to secondary crushers, classified and stock-
piled.

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

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

17 Operations at this facility include the excavation and processing of aggregates. The plant
18 typically operates 5 days a week, 10-12 hours per day, and starts in the early morning hours.
19 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.

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

23 ^{18/}Chevreux’s Reclamation plan had been submitted to the County in 1985. See AR No. 85, EOR
24 18, pp. 177-187. A Reclamation Plan was required under the Surface Mining and Reclamation Act
25 of 1975 (SMARA), Cal. Pub. Res. Code § 2710 et seq. SMARA provides for 'home rule,' with the
26 local lead agency having primary responsibility. A lead agency is usually the city or county. (§ 2728.)
27 The mining operator submits the reclamation plan and financial assurances to the lead agency for
28 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.

1 at the quarry site, and thus the zoning change prohibiting asphalt production was appropriate.^{19/}

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

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

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

16 As discussed, the "purpose of zoning is . . . to reduce all nonconforming uses within the zone
17 to conformity as speedily as is consistent with proper safeguards for the interests of those affected."
18
19

20
21 ^{19/}Indeed the County expressly communicated to Chevreux that its zoning action would preserve
22 the "status quo" of continued surface mining. *See* AR No. 894, EOR 48, p. 3170.

23 ^{20/}In its lapse determination, the County found that vested rights once exercised under the terms of
24 a permit cannot be revoked or limited without providing for due process. *See* AR 1, EOR 1, p. 002.
25 Petitioner agrees that the County is required to conduct a hearing and make findings before it can
26 adjudicate permit rights. Here, however, it is the loss of conforming status for the activity, not the
27 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.)

28 ^{21/}As discussed in Section IV.E, *infra*, this determination by the County as to the terms of
Chevreux's permit is contrary to the plain language of the County lapse ordinance.

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

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

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

17 Were the operations treated separately, we would encourage continuous and unnecessary
18 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.

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

23 Here, in contrast, the use for which non-conforming status is sought is not surface mining –
24 which as discussed above was specifically protected by the County in enacting its 1995 zoning and
25 Meadow Vista Community Plan – but instead a use – asphalt processing for “Pavement Materials”
26

27 ^{22/} It is for this reason that a nonconforming use is limited to that “use existing on the effective date
28 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.

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

4 **B. WERE CHEVREAU’S ASPHALT ACTIVITIES CONSIDERED TO HAVE VESTED**
5 **AT THE TIME OF THE ZONING CHANGE, THOSE RIGHTS WERE**
6 **SUBSEQUENTLY ABANDONED DUE TO NON-USE**

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

10 If a nonconforming use of land or a nonconforming use of a conforming building is
11 discontinued for a continuous period of one year, it shall be presumed that the use has been
12 abandoned. Without further action by the county, further use of the site or building shall
13 comply with all the regulations of the zone district in which the building is located, (Sections
14 17.60.060 et seq.)

15 See RJN Ex. 1:73.^{24/} Here, the County has taken no action that might cure the lack of conformity
16 between Chevreaux’s asphalt operations and current zoning on the parcel.^{25/}

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

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

26 ^{23/}See Section IV.A, *supra*; RJN Ex. 1:19 (County Code § 17.04.030) (definition of “Paving
27 Materials” production.)

28 ^{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.

1 of non-use following the conferral of non-conforming status.^{26/}

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

5 A valid non-conforming use must be similar to the use existing at the time the zoning
6 ordinance became effective. *See Hanson Brothers, supra*, 12 Cal. 4th at 552 (“Intensification or
7 expansion of the existing nonconforming use, or moving the operation to another location on the
8 property is not permitted. (citing *County of San Diego v. McClurken, supra*, 37 Cal. 2d at 87-688.))

9 County Code § 17.60.120.A incorporates these common law principles:

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

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

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

24 //

25 ^{26/}The Supreme Court has noted that “[a]lthough abandonment of a nonconforming use terminates
26 it in all jurisdictions..., ordinances or statutes which provide that discontinuance of a nonconforming
27 use terminates it have not been uniformly construed. Some have been held to create a presumption of
28 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 **1. Chevreaux’s New Asphalt Proposals Greatly Exceed Prior Operations in**
2 **Intensity and Scope, Contrary to County Code**

3 Under County Code § 17.60.120.A, a nonconforming use of land may not be “enlarged,
4 extended, expanded nor increased to occupy a larger area, nor a more intensive use than that which
5 it was characterized by in the prior twelve months.” RJN, Ex. 1:72. The purpose of this provision is
6 to ensure that non-conforming uses are limited and phased out over time. *See Dienelt v. County of*
7 *Monterey, supra*, 113 Cal. App. 2d at 131 (“The ultimate purpose of zoning is . . . to reduce all
8 nonconforming uses within the zone to conformity as speedily as is consistent with proper safeguards
9 for the interests of those affected.”); *Paramount Rock Company, Inc. v. County of San Diego, supra*,
10 180 Cal. App. 2d at 229 (“[C]ourts throughout the country generally follow a strict policy against their
11 extension or enlargement.”)

12 **a. The Baseline of Chevreaux’s Past Operations Demonstrate Occasional**
13 **Daytime Use of Low Intensity Using Temporary Facilities**

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

18 The record also shows that the prior asphalt process that did take place was occasional and
19 of generally low intensity. AR 86, EOR 19, p. 189; AR 382, EOR 34, p. 1633; AR 89, EOR 20, p.
20 194; AR 623, EOR 40, p. 2477. The record also shows that truck travel of asphalt – and other
21 materials – was during the day and only rarely, if ever, past 7 pm at night. *See* AR 705, EOR 41, pp.
22 2695-2697; AR No. 425, EOR 36, p. 1798; AR 165, EOR 28, p. 592. The record shows that the only
23 traffic estimate of Chevreaux’s overall operation was *20 trucks a day*. AR 76, EOR 12, p. 156.

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

27 In contrast to this past use, Chevreaux’s new proposal for asphalt operations at the Meadow
28 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

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

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

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

11 **2. Chevreaux’s New Proposed Facility is in a New Location**

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

15 **D. UNDER COUNTY CODE, THE COUNTY MUST REQUIRE A NEW PERMIT FOR 16 ANY SUBSTANTIAL EXPANSION OF A SURFACE MINING OPERATION**

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

21 Placer County Code § 17.56.270(D) states:

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

28 *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

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

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

11 **E. THE COUNTY ABUSED ITS DISCRETION IN DETERMINING THAT**
12 **CHEVREAU’S 1972 ASPHALT PERMIT DID NOT LAPSE THROUGH NON-USE**

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

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

23 ^{27/}*See e.g., Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners of the City*
24 *of Oakland* (2001) 91 Cal. App. 4th 1344, 1372 (“Petitioners next contend that the EIR failed to
25 address adequately the potential disturbance to area residents resulting from increased nighttime air
26 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.)

27 ^{28/}Where the agency was initially a defendant in the underlying litigation, the proposition that the
28 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

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

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

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

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

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

21 _____
22 administrative or litigation positions. *See Citizens to Preserve Overton Park v. Volpe* (1971) 401 U.S.
23 402, 420; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 79, 86; *Village Laguna of Laguna*
24 *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.

25 ^{29/}The asphalt plant that was removed during the 1990s is an “appurtenant structure” under County
26 Code § 17.04.030. (“Structure means any artifact constructed or erected, the use of which requires
27 attachment to the ground, or over one hundred twenty (120) square feet in area or over six feet in
28 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.

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

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

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

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

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

28 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.

1 trucks a day total” with daytime use. *See* AR 76, EOR 12, p. 156. Indeed, County Counsel found that
2 “the record of the hearing in 1972 does not support an inference that Mr. Chevreux was intending
3 to preserve the right to operate throughout the night on a sustained basis.” AR No. 425, EOR 36, p.
4 1798. In contrast, here, the new proposal is nighttime operations consisting of up to 260 truck trips
5 between the hours of 7 p.m. and 5:30 a.m. Motion to Augment, Ex. 2, p. 2. Meanwhile, no agency
6 has reviewed the air pollution impacts of this level of traffic consisting of diesel trucks with open beds
7 of freshly made asphalt operating continuously on local community streets, next to residents and school
8 yards.^{31/}

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

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

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

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

26
27 ^{31/}As discussed above, the County’s Ad Hoc Air Pollution Advisory Committee made a consensus
28 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.

1 of discretion under Code of Civil Procedure § 1094.5.

2 **F. PETITIONER ALSO SEEKS DECLARATORY RELIEF ON ITS CLAIMS**

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

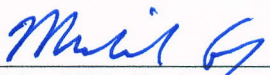
- 6 ● whether Chevreaux's asphalt permit has lapsed due to non-use pursuant to County Code
7 § 17.58.160(B)(2)(b);
- 8 ● whether the construction of an asphalt plant and processing activities is a nonconforming
9 use under County Code § 17.46.010;
- 10 ● whether the asphalt plant and processing activity at the Meadow Vista quarry is a valid
11 non-conforming use where there were no asphalt processing facilities or activities at the
12 Meadow Vista quarry occurring in the 12 months prior to the adoption of the 1995 ordinance
13 that changed the zoning on the parcel;
- 14 ● whether the asphalt plant and processing activity at the Meadow Vista quarry is a valid
15 non-conforming use under common law where such activities ceased operation between
16 approximately 1976 and 2001.
- 17 ● whether the asphalt plant and processing activity at the Meadow Vista quarry is a valid
18 non-conforming use under County Code § 17.60.120.G where such activities were
19 discontinued for a continuous period of one year, between approximately 1976 and 2001 and
20 between 2001 and 2006, and thus presumed to be abandoned;
- 21 ● whether Chevreaux's new proposal for asphalt operations at the Meadow Vista quarry
22 including increases in asphalt processing utilizing a permanent facility and requiring
23 consistent and heavy nighttime truck traffic between constitutes an unlawful expansion of a
24 non-conforming use;
- 25 ● whether Chevreaux's proposal to move the location of its non-conforming asphalt
26 processing activities is contrary to law;
- 27 ● whether, if Chevreaux's asphalt processing plant and operations are considered to be
28 "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).

29 **V. CONCLUSION**

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

32 DATED: February 9, 2009

Law Offices

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

36 P017 Petitioner's Opening Brief.wpd

PROOF OF SERVICE

1 I am employed in the County of Contra Costa, State of California. I am over the age of
2 18 and not a party to the within action; my business address is 227 Behrens Street, El Cerrito
3 California, 94530. On this date I caused the attached:

4 **PETITIONER’S OPENING BRIEF**

5 **PETITIONER’S MOTION TO AUGMENT THE ADMINISTRATIVE RECORD (EXS. 1-2)**

6 **PETITIONER’S FIRST REQUEST FOR JUDICIAL NOTICE, EXS. 1-3**

7 **DECLARATION OF MICHAEL GRAF IN SUPPORT**

8 **DECLARATION OF JOHN BLODGER IN SUPPORT**

9 **EXCERPTS OF RECORD BINDER**

10 to be served as follows:

11 x **By Overnight Mail** On the date written below, at El Cerrito, California, I placed a true
12 copy of the above written document in a sealed envelope(s) and placed it for collection
13 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
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14
15
16
17 I declare under penalty of perjury under the laws of the State of California that the
18 foregoing is true and correct, aand that this declaration is executed this February 9, 2009, Contra
19 Costa County, California.

20 
21 Michael Graf

22
23 Proof - Opening Brief Packet.wpd
24
25
26
27
28