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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **IN AND FOR THE COUNTY OF PLACER**

11 MEADOW VISTA PROTECTION, a non-
12 profit corporation,

13 Petitioner and Plaintiff,
14 vs.

15 COUNTY OF PLACER, PLACER
16 COUNTY BOARD OF SUPERVISORS
17 and DOES 1 through 10,

18 Respondents and Defendants.

19 CHEVREUX AGGREGATES, INC.; and
20 DOES 11 through 100,

21 Real Parties in Interest and
22 Defendants.

No. SCV 22244

23 **REAL PARTY INTETEREST**
24 **CHEVREUX AGGREGATES, INC.'S**
25 **POINTS AND AUTHORITIES IN**
26 **OPPOSITION TO PETITION FOR WRIT**
27 **OF MANDATE**

28 Date: April 24, 2009

Time: 1:30 p.m.

Dept: 42

Judge: Honorable Charles D. Wachob

1 **INTRODUCTION**

2 Petitioner Meadow Vista Protection (“MVP”) asks the court to overturn a decision of
3 the Placer County Board of Supervisors upholding a determination of the county’s Planning
4 Director that a use permit issued to real party in interest Chevreux Aggregates, Inc., to
5 operate an asphalt plant at its quarry near Meadow Vista. MVP contends that the use permit
6 expired when the asphalt plant was not operated for more than 12 months.

7 MVP also asks for a writ of mandate to compel the County to administer and enforce
8 zoning and use permit restrictions, which MVP claims Chevreux is violating. MVP
9 already has another action pending before this court raising many of the same issues,
10 particularly MVP’s claims that the County is failing to act on MVP’s allegations that
11 Chevreux is operating in violation of the county’s Zoning Ordinance.

12 As will be shown in the following arguments, MVP is not entitled to a writ of
13 mandate. To the extent MVP seeks administrative mandamus to review the decision of the
14 Board of Supervisors, the decision is supported by abundant evidence. To the extent that
15 MVP claims the Board’s decision is contrary to the Zoning Ordinance, the decision rests on
16 a long-standing, continuous administrative interpretation of the ordinance that the Board has
17 directly ratified.

18 MVP may not have a writ of mandate to compel the County to act on MVP’s
19 complaints about Chevreux’s alleged zoning violations. The Zoning Ordinance vests code
20 enforcement officers with discretion in administering the zoning laws, as the court has
21 already held in a judgment against MVP that is now final for all purposes.

22 And MVP is wrong in asserting that Chevreux’s use permit expired when asphalt
23 processing was “discontinued” for more than 12 months. It is widely held that mere
24 cessation of a use does not constitute discontinuance, particularly in the case of intermittent
25 uses that may operate or not depending on circumstances, such as economic conditions or
26 market demand, outside the permit-holder’s control.

27 The petition for writ of mandate should be denied.

28 **SUMMARY OF FACTS**

1 The facts are mainly summarized in the Planning Director’s memorandum report to
2 the Board of Supervisors, AR 253, pp. 1013-1020.¹

3 In 1946 or 1947, quarrying, which included asphalt operations, began at
4 Chevreaux’s site near Meadow Vista on the east shore of the Bear River at Lake Combie.
5 *Id.*, p. 1013-1014; AR 86, p. 189; Real Party’s Excerpts (“RPE”) ___, p. _____. Over the
6 past 50 years Chevreaux has continuously conducted surface mining operations. *Id.*

7 The first comprehensive zoning for the area was established in 1963 and part of the
8 property along the river was zoned Recreation & Forestry, RF, and other portions were
9 zoned Farm. *Id.* The first Zoning Ordinance, dated 1964, designates the RF zone for
10 “development and processing of natural resources including mines, quarries, . . . , rock
11 crushers, paving and concrete batch plants. . . .” AR 1914 p. 5587, RPE ___ p. ____.
12 Section 9.012 of the ordinance provided for “Accessory uses,” which could be permitted in
13 any district “where such uses . . . are incidental to and do not alter the character of the
14 premises in respect to their use for purposes permitted in the District.” AR 1914, p. 5589,
15 RPE __ p. ____.

16 In 1965, the County granted Edward Pruss a conditional use permit, LD-
17 1030, to operate a quarry for grading materials; the permit included crushing, screening and
18 washing the materials. AR 253, p. 1014. Joe Chevreaux later purchased the quarry
19 operation from Pruss. *Id.*

20 In 1969, the Zoning Administrator approve Conditional Use Permit, LDA-691, for
21 an asphalt plant at the site. *Id.* p. 1014, RPE p. _____. The permit included 11 specific
22 conditions. *Id.*

23 In 1972, a new Conditional Use Permit, LDA-786, was granted to allow moving the
24 asphalt plant to an adjacent parcel farther east from the river. *Id.* The new location
25

26 _____
27 ¹ Documents in the administrative record will be cited as AR, followed by the
28 number assigned to the document in the administrative record, then the page number
in the record, where appropriate.

1 approved under LDA-786 was also subject to the original use permit, LD-1030, for
2 quarrying grading materials. *Id.*

3 In applying for LDA786, Joe Chevreux informed the county that the asphalt plant
4 had operated since 1947 “on an intermittent, as needed basis. . . .” AR 86, p. 189.

5 In 1983, in compliance with the Surface Mining and Reclamation Act (“SMARA”),
6 Public Resources Code § 2710, et seq., which had become effective a few years earlier, the
7 Board of Supervisors placed the property in a mineral reserve zone, MRZ-2, to assure that
8 any residential development in the steep, forested surroundings would remain compatible
9 with the mining operations. AR 665, p. 189, ¶ 2, AR 672 p. 2616.

10 In 1984, the County adopted a Mineral Resource Conservation Plan as part of the
11 County’s General Plan and Final EIR. AR 32. It described mining operations on the
12 property under the three use permits, LDA-786, LDA-691, and LD-1030, as, “Quarrying,
13 processing, and asphalt concrete. . . .” AR 32, p. 58, RPE ___ p. ____.

14 In 1984, the County amended the Zoning Ordinance to add a Mineral Reserve
15 (“-MR”) combining district which embraced property Chevreux was then mining as other
16 nearby properties that Chevreux owned or leased. AR 31, p. ____, RPE __, ____

17 In 1987, Joe Chevreux sought clarification from the Planning Department of his
18 right under LDA-786, to continue operating the asphalt plant, which had been largely idle
19 between 1976 and 1980, and again since about 1985. AR 169 p. 624, AR 423, pp. 1769-
20 1770; RPE ____, p. ____, RPE ____, _____. The Planning Director confirmed his
21 understanding that an asphalt plant had operated on the property since 1947 “on an
22 intermittent basis” and found that LDA-786 “has not been revoked” and that “paving” was
23 still permitted under LDA-786. AR 77, RPE _____. Subject to the conditions attached to the
24 use permit, the Director ruled, “LDA-786 remains valid. . . .” *Id.*; *see also* AR 253, p.
25 1014, RPE ____, p. ____.

26 In 1995, the County enacted a new Zoning Ordinance, which included the
27 provision, § 17.58.160(B)(2), that gives rise to the present dispute. Under
28 § 17.58.160(B)(2), a conditional use permit remains valid and runs with the land unless,

1 after the use is established and operated as approved, the use “is discontinued for more than
2 twelve consecutive months or (if an appurtenant structure is required for the conditionally-
3 permitted use) the structure is removed from the site for more than twelve consecutive
4 months.” The 1995 ordinance provides, however, that it is prospective only, and does not
5 apply to uses legally existing when it was enacted. Section 17.02.030(C) provides: “[T]he
6 requirements of this chapter are not retroactive in their effect on a use of land that was
7 lawfully established before this chapter or any applicable amendment became effective,
8 except where an alteration, expansion or modification to an existing use is proposed,” or
9 subject to another, inapplicable, exception.

10 The following year, 1996, the County adopted the Meadow Vista Community Plan
11 as part of the final EIR. AR 33, RPE _____. The plan described activities at the site as
12 “excavation and processing of aggregates” and noted that, at the time, “[t]here is no asphalt
13 concrete plant at this location, although a permit has been obtained for such operations.”
14 *Id.*, AR 33 p. 64; RPE ____ p. ____.

15 Over the following years, in 2001, 2004 and 2006, the Air Pollution Control District
16 (APCD) issued permits to conduct asphalt operations at the quarry; each permit was issued
17 after notification to the Planning Department, which made no objection. AR 165, p. 588,
18 AR 288, p. 1220., BPE _____, BPE _____.

19 As County Counsel summarized the situation in a memorandum to the Planning
20 Director in 2005, even though the County was knew there had been periods of more than
21 12 months when no asphalt operations were conducted, the County never found that LDA-
22 786 had lapsed, but “in contrast has acted as if there has not been a lapse.” *Id.*

23 In 2007 Chevreaux requested the Planning Director to determine the status of LDA-
24 786 and Chevreaux’s right to conduct asphalt processing at the site. The Planning Director,
25 after considering the available information and relevant law, concluded that the asphalt
26 processing is a “permanent intermittent use[]” and LDA-786 did not lapse despite long
27 periods in which an asphalt plant had not operated. AR 1, p. 2, RPE _____, _____.
28

1 MVP, dissatisfied with the Director’s decision, appealed to the Planning
2 Commission, which affirmed, upholding Chevreaux’s vested rights under LDA-786 to
3 continue its intermittent operation of an asphalt plant at the site. AR 253 ____, p. 1016, RPE
4 ____, ____. The Commission concurred “that the Planning Director’s action was a fair
5 reading of the Code and a reasonable determination.” *Id.*

6 MVP then appealed to the Board of Supervisors, which denied the appeal, affirming
7 the Planning Commission and ratifying the Director’s reading of the Zoning Ordinance.
8 AR 288, p. 1286, RPE ____, ____.

9 MVP now brings the present petition for writ of mandate to overturn the Board’s
10 decision. MVP also asks for a writ of mandate to compel the County to administer and
11 enforce provisions of the Zoning Ordinance that MVP contends Chevreaux is violating.

12 **I**
13 **MVP MAY NOT HAVE A WRIT OF MANDATE**

14 **A. MVP seeks both administrative mandate and traditional mandate, but does**
15 **not distinguish facts and arguments distinctly relevant to each.**

16 MVP’s petition asks for a writ of mandate to: 1) review the determination of the
17 Board of Supervisors, made in an administrative appeal in which evidence was taken, that
18 Chevreaux’s asphalt processing use permit, LDA-786, is valid and has not lapsed from
19 non-use; 2) compel the County to prohibit Chevreaux’s from installing and using an asphalt
20 processing facility at its quarry, or from expanding or changing the location of the facility,
21 which MVP alleges would violate applicable zoning restrictions; and, 3) compel the
22 County to regulate what MVP claims to be substantial changes in the asphalt operation.
23 Petitioner’s verified petition for writ of mandate, etc., Introduction, ¶ 1; *see also* Prayer for
24 relief, pp. 9-10, ¶ 1.

25 To the extent that MVP seeks review of the Board of Supervisors’ decision after an
26 evidentiary hearing, the proper writ is the writ of administrative mandate under Code of
27 Civil Procedure § 1094.5. *County of San Luis Obispo v. Superior Court (Munari)*, 90
28 Cal.App.4th 288, 296 (2001). The court reviews the Board’s decision applying the

1 substantial evidence rule. *Desmond v. County of Contra Costa*, 21 Cal.App.4th 330, 335-
2 336 (1993).

3 To the extent that MVP seeks to compel the County to take action on what MVP
4 alleges to be Chevreaux’s violation of the Zoning Ordinance or the use permit, LDA-786,
5 the remedy is traditional mandate under Code of Civil Procedure 1085, which is available
6 to “compel the performance of an act which the law specially enjoins, as a duty resulting
7 from an office, trust, or station. . . .” In that endeavor, MVP has the burden to prove every
8 fact necessary to support its petition. *Lotus Car Ltd. v. Municipal Court*, 263 Cal.App.2d
9 264, 270 (1968).

10 MVP makes little effort to distinguish between facts and arguments relevant to each
11 type of writ. Instead, MVP offers a hodge-podge of factual and legal contentions without
12 attempting to show have to do with a writ of administrative mandate under § 1094.5, and
13 which are material to MVP’s prayer for a traditional writ of mandate under § 1085.

14 Chevreaux will endeavor to assist the court in keeping the different standards of
15 review and burdens of proof separate.

16 **B. The court has already determined in the first lawsuit that a writ of**
17 **mandate is not available to compel the county to regulate Chevreaux’s**
18 **alleged zoning code violations and that determination, which is now final,**
19 **bars MVP’s current writ petition for traditional writ of mandate**

20 The first cause of action in MVP’s prior lawsuit against Chevreaux and the County,
21 No. SCV 19614, alleged a cause of action for a writ of mandate to compel the County to
22 take action against what MVP alleged to be Chevreaux’s violations of the Zoning
23 Ordinance and Chevreaux’s use permit. Verified petition for writ of mandate, etc. in No.
24 SCV 19614, Exh. ___ to Chevreaux’s request for judicial notice, at 3-4. MVP
25 acknowledges that this court sustained the County’s demurrer to that cause of action on the
26 ground that the County’s enforcement authority under the Zoning Ordinance is
27 “discretionary and thus not enforceable through a mandamus action.” Petitioner’s opening
28 brief (errata) in present action at 9:11-15.

1 In sustaining the demurrer, the court granted leave to amend, but MVP chose to
2 stand on its original complaint. Chevreaux’s request for judicial notice, Exh. 1. As the
3 first cause of action for writ of mandate was the only cause of action MVP alleged against
4 the County, the court dismissed the action with prejudice as to the County. *Id.*

5 The judgment of dismissal in the first action constitutes a final judgment. Code
6 Civ. Proc. § 581d. MVP may not relitigate an issue that was litigated and finally
7 determined in the prior action. *Levy v. Cohen*, 19 Cal.3d 163, 171 (1977). ““Any issue””
8 decided in the first lawsuit is conclusive as to MVP. *Id.*; see *O’Hagen v. Bd. of Zoning*
9 *Adjustment*, 19 Cal.App.3d 151, 164-165 (1971) (judgment denying injunction to close
10 business operating as nuisance collaterally estopped city from revoking use permit).

11 Although the cause of action for writ of mandate in No. 19614 was against the
12 County, Chevreaux, sued here as a defendant, may invoke collateral estoppel “to prevent
13 MVP from suing “on an issue [it] litigated and lost as plaintiff in a prior action.” *Blonder-*
14 *Tongue Laboratories v. University of Illinois Fdn.*, 402 U.S. 313, 324, 91 S.Ct. 1434, 1440
15 (1971), citing *Bernhard v. Bank of America*, 19 Cal.2d 807, 813.

16 In the current lawsuit, just as in the previous action, MVP seeks a writ of mandate
17 to compel the County to take action against what MVP contends are Chevreaux’s
18 violations of the zoning ordinance and use permit conditions. In the first lawsuit, MVP
19 sought a writ of mandate with respect to Chevreaux’s cement processing plant, while the
20 present action deals with the asphalt plant. But both actions turn on the same, central issue:
21 whether the County has a mandatory duty, that it can be compelled by writ of mandate to
22 perform, to act against what MVP alleges are zoning and use permit violations.

23 “A judgment on general demurrer will be a bar . . . if, although the new complaint
24 states different facts, the demurrer to the first was sustained on a ground equally applicable
25 to the second.” 7 Witkin, *Cal. Procedure* (“Witkin Procedure”), Judgment § 377, pp.
26 1004-1005. The judgment dismissing the County from the first lawsuit with prejudice is
27 conclusive on the issue and a bar to MVP’s cause of action in the present lawsuit for a writ
28 of mandate.

1 **C. The zoning code vests discretionary authority in regulating land uses and**
2 **enforcing land use restrictions.**

3 Even if collateral estoppel does not bar MVP’s current petition for a traditional writ
4 of mandate, the Zoning Ordinance is clear that determining whether a zoning use permit
5 violation exists, and whether to enforcement proceedings should be brought to correct it,
6 are matters entrusted to the code enforcement officer’s discretion. “[W]hen [the writ of
7 mandate] is applied for, there must be a clear case to ‘compel the performance of an act
8 which the law specially enjoins as a duty resulting from an office, trust or station.’ 300
9 *DeHaro Street Investors v. Department of Housing and Community Development*, 161
10 Cal.App.4th 1240, 1255 (2008), quoting *Wenzler v. Municipal Court*, 235 Cal.App.2d 128,
11 132-133 (1965) (internal quotation marks omitted). “Mandate, of course, cannot be
12 employed to control the exercise of discretion by an administrative officer.” *Blankenship v.*
13 *Michalski*, 155 Cal.App.2d 672, 674 (1958).

14 In *Blankenship*, a city’s zoning code directed that the City Attorney “shall
15 immediately” commence proceedings to abate, remove or enjoin buildings or uses that
16 violated the code. *Id.* 155 Cal.App.2d at 675. Plaintiff, a resident of the city, made a
17 complaint that a pharmacy operating in a medical clinic violated the zoning ordinance
18 because the clinic was in a residential zone in which the zoning code prohibited drug
19 stores. The City Attorney ruled that the pharmacy was permitted as an accessory use for
20 the clinic and refused to institute proceedings to shut down the pharmacy. Plaintiff
21 petitioned for a writ of mandate to compel the city attorney to bring abatement proceedings.
22 The trial court denied the writ and the court of appeal affirmed.

23 Although the zoning code imposed a mandatory duty on the City Attorney to bring
24 abatement proceedings against zoning violations, the City Attorney had discretion to
25 determine whether a violation had occurred, and mandate could not be used to control his
26 exercise of discretion in deciding that clinic did not violate the code.

27 “Certainly, someone, in the first instance, must determine whether a
28 proposed use will violate the ordinance. This requires an analysis of the
facts and an interpretation of the ordinance. The responsibility of

1 determining this question, in the first instance, is placed on the city attorney.
2 He necessarily must have some discretion. Certainly, if he, in good faith,
3 determines that no violation has occurred, he should not be compelled to
4 institute abatement proceedings at the whim or caprice of every taxpayer
5 who disagrees with him.” *Id.*

6 Here, it is even clearer than in *Blankenship* that mandate is unavailable to compel
7 county officials to commence proceedings against Chevreaux based on plaintiffs’
8 allegations of zoning violations. In *Blankenship*, the city’s zoning ordinance said nothing
9 about the City Attorney’s discretion to determine whether a particular use violated the
10 code; the court implied that discretionary power. But Placer County’s Zoning Ordinance
11 expressly gives code enforcement officers discretion to determine if a violation exists.²

- 12 • Section 17.62.110 empowers the code enforcement officer to employ any of the
13 enforcement procedures set out in the Zoning Ordinance, “*where appropriate* to
14 correct violations of, and secure compliance with” the ordinance. (Emphasis
15 added.) The provision leaves determination of when it is appropriate to utilize
16 those procedures to the code enforcement officer.
- 17 • Section 17.62.120 sets out procedures that a code enforcement officer must
18 follow in initiating enforcement action “*in cases where he or she has determined*”
19 that real property under the County’s jurisdiction “is being used, maintained, or
20 allowed to exist in violation of the [Zoning Code].” (Emphasis added.)
- 21 • Under § 17.62.160, subdivision B, “*Upon the determination by the code*
22 *enforcement officer that a nuisance exists,*” the code enforcement officer may begin
23 enforcement. “Nuisance” is defined in subdivision A of § 17.62.160 to include
24 “[a]ny use of land, buildings, or premises established, operated, or maintained
25 contrary to the [Zoning Ordinance].”

26 There’s another important contrast between the zoning code in *Blankenship* and the
27 Placer County Zoning Ordinance. In *Blankenship* the code provided that the city attorney
28 “shall” bring abatement proceedings against zoning violations. Here, however the Zoning

29 ² Under § 17.62.030 of the Zoning Ordinance, code enforcement officers
30 include the agency director (i.e., the head of the community
31 development/resource agency per § 17.040.030), the sheriff, the chief building
32 official, the health officer and county employees any of them may designate.
33 § 17.62.030.

1 Ordinance expressly gives code enforcement officers discretion to regulate land uses and
2 bring enforcement proceedings.

3 Under § 17.02.50, subdivision A.1, when used in the Zoning Ordinance, “the word
4 ‘shall,’ is always mandatory and ‘may’ is discretionary.” Every section of the Zoning
5 Ordinance setting out procedures for abatement of zoning or use permit violations provides
6 that the officer “may” institute proceedings:

7 • § 17.62.150: “The code enforcement officer *may* work with county counsel
8 and/or the district attorney to secure injunctive relief to terminate a violation of the
9 provisions of [the Zoning Ordinance].”

10 • § 17.62.160: “The code enforcement officer *may* employ the provisions of this
11 section to secure the abatement of nuisances,” including, under subdivision A.4.,
12 zoning violations.

13 • § 17.62.160, subd. (B): “Upon the determination by the code enforcement
14 officer that a nuisance exists, a notice of nuisance *may* be prepared and copies
15 served as provided” in the code.

16 • § 17.62.170: “The code enforcement officer *may* initiate proceedings . . . to
17 revoke the approval of any land use permit issued pursuant to . . . this code. . . .”

18 It should not be forgotten that, in deciding whether to institute enforcement
19 proceedings a code enforcement officer is not merely performing a ministerial act. More is
20 at stake than just whether a particular use appears to be inconsistent with zoning
21 restrictions or use permit conditions. County resources devoted to pursuing a code
22 enforcement proceeding are resources that are unavailable to meet other needs of the
23 County and its citizens, needs that may be far more demanding of immediate attention.
24 Every taxpayer dollar, every man- or woman-hour spent in zoning code regulatory or
25 enforcement activities, is a dollar or hour that is unavailable to meet other needs that
26 County officials may consider to be more pressing. Particularly in the present economic
27 climate, where public agencies are hard-pressed to provide even minimal levels of the most
28 vital services to protect public health and safety, deciding whether to take action against a
possible zoning violation, and what action, if any, to take, involves difficult judgments
about the most appropriate use of scarce funds and human resources.

1 For decades it has been a “settled principle that the remedy of mandate is not
2 available to control the exercise of official discretion or judgment, or to alter or review
3 action taken in the proper exercise of such discretion or judgment. . . .” *Lindell Co. v.*
4 *Board of Permit Appeals*, 23 Cal.2d 303, 310 (1943); *see also Shamsian v. Dep’t of*
5 *Conservation*, 136 Cal.App.4th 621, 640 (2006), review den. The discretion that the Placer
6 County Zoning Ordinance vests in code enforcement officers is similar to the discretion
7 vested in District Attorneys in determining whether to prosecute a person suspected of
8 having committed a crime and, if so, which crime or crimes to charge. These are matters
9 within the prosecutor’s “unlimited discretion,” which the courts may not review nor
10 control by a writ of mandate. *People v. Adams*, 43 Cal.App.3d 697, 707-708 (1974).

11 Here, likewise, the County leaves it to the complete discretion of code enforcement
12 officers to determine what action, if any, to take against an alleged violation of the Zoning
13 Ordinance. A court may not second-guess the judgment of officers in whom the County
14 has vested such discretion.

15 **D. MVP has other, adequate remedies.**

16 A writ of mandate is available only “where there is not a plain, speedy and adequate
17 remedy, in the ordinary course of law.” Code Civ. Proc. § 1086. “An action at law or in
18 equity, in a competent trial court, is the ordinary remedy to protect any right. When that
19 action is available, it is presumed to be adequate and normally precludes a resort to
20 mandamus.” 8 *Witkin Procedure*, Extraordinary Writs § 122.

21 MVP’s first lawsuit, SCV 19614, alleges that Chevreaux is operating the asphalt
22 plant in violation of the zoning code and conditions of Chevreaux’s use permit. Verified
23 petition for writ of mandate, etc., ¶¶ 22-23, 27-37. Based on those allegations, MVP
24 asserts causes of action for injunction, public and private nuisance, and trespass. Verified
25 petition for writ of mandate, pp. 10-12, ¶¶ 50-63. MVP prays for an injunction that would
26 preclude Chevreaux from “maintaining or otherwise operating an asphalt plant at any site
27 on the property” where it conducts its operations, and for damages based on the nuisance
28 and trespass causes of action. *Id.*, p. 14, ¶¶ 4.b., 5 and 6.

1 To the extent that MVP is entitled to injunctive relief or damages on these causes of
2 action, a writ of mandate is unavailable.

3 **E. MVP has failed to exhaust administrative remedies.**

4 As the County points out in its opposition to MVP’s petition, under Zoning
5 Ordinance § 17.60.110(D)(4)(a), in considering MVP’s appeal, the Board of Supervisors
6 was limited to considering “only those issues that are the specific subject of the appeal and,
7 in addition, the specific grounds for the appeal.” But, the appeal proceedings before the
8 Board, MVP did not raise the issue it now asserts in the present action that Chevreaux’s
9 asphalt use is not permitted under the current zoning. MVP’s counsel concedes in his
10 declaration accompanying MVP’s request for judicial notice that he raised the issue for the
11 first time *after* the Board adopted its motion to deny MVP’s appeal.

12 To avoid needless repetition, Chevreaux incorporates the County’s argument that
13 MVP has failed to exhaust its administrative remedies, and mandate is not available, with
14 respect to this issue.

15 **II**
16 **CHEVREAUX’S ASPHALT PROCESSING OPERATION**
17 **IS CONSISTENT WITH CURRENT ZONING**

18 Assuming that the court can consider MVP’s argument that Chevreaux is violating
19 current zoning restrictions by processing asphalt at its quarry, MVP makes factual and legal
20 assertions that are simply wrong.

21 First, MVP asserts that the parcel on which the asphalt plant operates is zoned
22 “Residential Forest,” RF, a zoning designation that, MVP declares, “explicitly does not”
23 allow asphalt operations. Petitioner’s opening brief (corrected) at 1:17-21, citing
24 § 17.46.010. Wrong in several respects.

25 The RF zoning designation is defined in § 17.46.010. *See* MVP’s request for
26 judicial notice, Exh. 1, pp. 52-55. Section 17.46.010 does not “explicitly” disallow asphalt
27 operations. It provision says nothing at all about asphalt.

28 As MVP acknowledges, however, under § 17.46.010, surface mining is allowed in
RF zones. See Allowable Land Uses chart in § 17.46.010, “Agricultural, Resources and

1 Open Space Uses.” The same chart provides incorporates the specific standards for mining
2 uses in § 17.56.270. *Id.*; see MVP’s request for judicial notice, Exh. 1, pp. 58-65. Section
3 17.56.270, in turn, provides that “the *processing of materials* mined on-site (e.g., gravel
4 plants, etc.) and the retail sales of such mined and *processed* materials from the mine site is
5 permitted by this section, subject to the conditions of the conditional use permit.”
6 (Emphasis added).

7 Furthermore, as MVP concedes, the actual zoning of the Chevreaux quarry is a
8 combined Residential Forest and Mineral Reserve (“RF-MR”) district. *Id.* at 16:5-7. But
9 in describing the MR district, MVP asserts a misleading half-truth.

10 According to MVP, the MR designation establishes a district only “‘to identify
11 lands that may contain valuable mineral resources’ and ‘to provide for the extraction of
12 mineral resources and the reclamation of lands subsequent to such extraction. . . .’”
13 Petitioner’s opening brief (corrected) at 16: 9-12, quoting Zoning Ordinance § 17.52.110.
14 So, MVP claims, only “‘extracting crushed and broken stone’” is allowed on RF-MR
15 property, “but *not* asphalt production.” *Id.* at lines 13-15 (italics in original).

16 MVP selectively omits another purpose of the MR district set out in § 17.52.110,
17 the purpose directly relevant to Chevreaux’s asphalt operation: to “protect the opportunity
18 for the extraction *and use* of such [mineral] resources from other incompatible land
19 uses. . . .” *Id.*, subd. A (emphasis added). Contrary to MVP’s assertion, the Zoning
20 Ordinance does not limit the use of property in the MR district to extracting minerals.
21 “Use” of the extracted material is also expressly permitted on the land.

22 And, like the RF district, the –MR combining district also incorporates the
23 standards for surface mining set out in § 17.56.270—*i.e.*, “the processing of materials
24 mined on-site (e.g., gravel plants, etc.)”—is expressly permitted.

25 Chevreaux’s use of the asphalt plant on-site to process gravel and other material it
26 extracts in its quarrying operation is entirely consistent with the current zoning.

27 **III**
28 **CHEVREAU’S RIGHT TO USE ITS PROPERTY FOR ASPHALT
PROCESSING HAS NEVER LAPSED**

1 MVP's main argument is that Chevreaux's right to process asphalt under use permit
2 LDA-786 lapsed from non-use. The Planning Director's determination that the use permit
3 was still valid and had not lapsed was the issue that MVP appealed, first to the Planning
4 Commission, then to the Board of Supervisors, which denied the appeal and upheld the
5 Director's determination.
6

7 Review of that decision is by administrative mandate under § 1094.5 applying the
8 substantial evidence test. *Desmond*, 21 Cal.App.4th at 335-336.

9 **A. MVP has the heavy burden to show that there is “no substantial evidence
10 whatsoever” to support the Board’s decision.**

11 Under the substantial evidence test, in reviewing the County's determination that
12 LDA-786 has not lapsed, the court “must consider the evidence in the light most favorable
13 to the real parties in interest, must give them the benefit of every reasonable inference, and
14 must resolve all conflicts in the evidence in support of the [County's] decision.” *Beverly
15 Hills Fed. Sav. & Loan Ass'n v. Superior Court*, 259 Cal.App.2d 306, 318 (1968); *Perry
16 Farms, Inc. v. Agricultural Lab. Relations Bd.*, 86 Cal.App.3d 448, 464, n. 7 (1978). The
17 court does not sit as a trier of fact, but reviews the administrative decision in the same
18 manner that an appellate court reviews the decision of a trial court. *Beverly Hills Fed.*, 259
19 Cal.App.2d at 317.

20 Because it is presumed that the Board of Supervisors duly performed its official
21 duty in affirming the Planning Director and the Planning Commission, it is also presumed
22 that the administrative findings and actions are supported by substantial evidence and the
23 burden is on the party attacking the Board's decision “to show there is no substantial
24 evidence whatsoever to support the findings of the Board.” *Desmond*, 21 Cal.App.4th at
25 335-336 (affirming denial of writ of mandate to compel board of supervisors to grant land
26 use permit).

27 **B. Chevreaux acquired a vested, constitutionally-protected right to produce
28 asphalt on its property as an accessory use when permits were granted in
1965 and 1972.**

1 Use permit LDA-786, for asphalt operations on Chevreaux’s property, issued in
2 1971. AR 26, p. 41. The property was then zoned Recreation & Forestry (RF) and Farm,
3 zones which permitted excavating, quarrying and related uses. AR 29, pp. 46-47, ¶¶ 2, 5.
4 Under the 1968 Zoning Ordinance, then in effect, uses permitted in the RF zone included
5 “development and processing of natural resources including mines, quarries . . . rock
6 crushers, paving and concrete batch plants. . . .” AR 1886, p. 5490. Section 9.012 of the
7 1968 ordinance also provided for “accessory uses,” which were permitted “in any district
8 where such uses are buildings are incidental to and do not alter the character of the
9 premises in respect to their use for purposes permitted in the district.” *Id.*, p. 5491.

10 As County Counsel stated in an opinion letter to the Planning Director on February
11 25, 2005 regarding the status of Chevreaux’s asphalt production use permit,

12 There appears to be no question that an asphalt plant operated at this site for
13 several years after the initial issuance of LDA-786 in 1972 and thus the
14 permit has been exercised. Once relied upon by property owner conditional
15 use permit becomes vested right. (*O’Hagen vs. Board of Zoning Adjustment*
16 (1971) 13 Cal.App.3d 151). The permit “runs with the land.” that is, the
17 rights are transferable to another owner or operator at that location. *Anza*
18 *Parking Corporation vs. City of Burlingame* (1987) 195 Cal.App.3d 855).

19 AR 165, p. 588, RPE _____, p. _____.

20 Furthermore, the zoning designation and use permit LDA-786, which entitled
21 Chevreaux to conduct asphalt operations on the property beginning in 1971, were still in
22 effect in 1975, when the Legislature adopted SMARA, the Surface Mining and
23 Reclamation Act. At the time, Chevreaux was supplying asphalt for a number of paving
24 jobs on Highways 20 and 49, and in Penn Valley. AR 423, pp. 1769-1771, AR 664, p.
25 2594; *see also* AR 342, p. 1521.

26 LDA-786 was issued specifically to permit asphalt processing as an intermittent
27 use. In applying for the permit, Joe Chevreaux told the County he wanted it so he could
28 continue asphalt processing on site, which had been occurring “on an intermittent as
needed basis since 1947. . . .” AR 86, p. 189; *see also* AR 28, p. 44 (letter listing dates of
asphalt plant operations through 1947 to 1960). When use permit LDA-786 was approved,

1 the Planning Director acknowledged that an asphalt plant had begun operation as early as
2 1947 “on an intermittent basis.” AR 70, p. 146.

3 Thus, Chevreaux had commenced its intermittent asphalt operations and incurred
4 substantial liability for work and materials under LDA-786 years before SMARA became
5 operative on January 1, 1976. Chevreaux, consequently, had vested rights to continue the
6 use, intermittent asphalt operations, without further permit. Pub. Resources Code § 2776,
7 subd. (a); *Hansen Brothers Ent. v. Bd. of Supervisors*, 12 Cal.4th 551-533 (1996).

8 Again, to quote County Counsel,

9 [B]ecause an exercised permit is property right it may not be revoked under
10 the United States Constitution without due process which includes providing
11 the permit holder notice of the grounds for revocation and some type of
12 hearing. (*Community Development Commission vs. City of Fort Bragg*
13 (1988) 204 Cal.App.3d 1124.) (*Bauer vs. City of San Diego*, 75 Cal.App.4th
14 1281 (1999)). Thus property owner who holds permit is entitled to hearing
15 on the factual basis for the revocation of the permit before it can be revoked.

16 AR 165, p. 589.

17 MVP dos not claim that the County has ever revoked Chevreaux’s use permit, to
18 which Chevreaux has a vested right protected by the Constitution and SMARA.

19 **C. The Planning Director’s administrative interpretation of the lapse
20 ordinance—affirmed by the Planning Commission, ratified by the Board of
21 Supervisors and supported by opinions of County Counsel—is long-
22 standing, consistent and entitled to great deference.**

23 The central issue is the proper construction of the use permit lapse ordinance,
24 § 17.58.160(B)(2). The Planning Director interprets the lapse ordinance not to apply to
25 Chevreaux’s asphalt processing, which he found to be “a permanent intermittent use.” AR
26 1; *see also* AR 253, BPE ____, ____. The Director recognized that processing asphalt is, by
27 its very nature, intermittent, depending on the need for materials. *Id.* LDA-786, therefore,
28 cannot lapse simply because there are periods when asphalt is not processed on the site for
more than 12 months. *Id.* Accordingly, the Planning Director has determined “that asphalt
operations at the current Meadow Vista/Combie Chevreaux Aggregates, Inc., facility are a
currently legally permitted use.” AR1, p. 3; AR 253, p. 1014.

1 The construction given the Zoning Ordinance by the County itself is significant.
2 *Baird v. City of Fresno*, 97 Cal.App.2d 336, 341 (1950).

3 MVP contends that the Planning Director’s determination is unworthy of deference.
4 That is not the law.

5 **1. The Planning Director and the Planning Commission interpreted the**
6 **Zoning Ordinance, which they are responsible to administer.**

7 The rules and canons applied in interpreting statutes “apply with the equal force to
8 the construction of ordinances.” *Swift v. County of Placer*, 153 Cal.App.3d 209, 214
9 (1984). One fundamental canon of statutory construction is, “When an administrative
10 agency is charged with administering a statute or ordinance, the administrative agency’s
11 interpretation of the applicable law is given great deference by the reviewing court.”
12 *Robinson v. City of Yucaipa*, 28 Cal.App.4th 1506, 1516 (1994).

13 Section 17.02.050 of the Zoning Ordinance assigns the Planning Director “the
14 responsibility and authority to interpret the requirements of this chapter.” The Director’s
15 construction of the ordinance, therefore, “is entitled to great weight and will be followed
16 unless clearly erroneous.” *County Sanitation Dist. v. Superior Court*, 218 Cal.App.3d 98,
17 107 (1990); *Pallco Enterprises, Inc. v. Beam*, 132 Cal.App.4th 1482, 1492 (2005); *Atchley*
18 *v. City of Fresno*, 151 Cal.App.3d 635, 648 (1984).

19 The Planning Commission—which is also charged in § 17.02.040 with
20 responsibility to administer the Zoning Ordinance—affirmed the Director’s determination,
21 ratifying his interpretation and agreeing that his action “was a fair reading of the Code and
22 a reasonable determination.” AR 253, p. 1016. Deference to an agency’s construction of a
23 legislative enactment it is charged with enforcing, is especially appropriate because the
24 agency not only has particular expertise in the subject area, but its specialization in
25 administering the enactment gives it ““an intimate knowledge of the problems dealt with in
26 the statute and the various administrative consequences arising from particular
27 interpretations. . . .”” *Yamaha Corp. of America v. State Bd. of Equalization*, 73
28 Cal.App.4th 338, 352 (1999), reh’g den. (citation omitted) (*Yamaha II*).

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2. The Board of Supervisors, which adopted the ordinance, acquiesced in the Planning Director’s interpretation.

The Board of Supervisors adopted the Zoning Ordinance, including the lapse provision, § 17.58.160(B)(2). That the Board of Supervisors affirmed the Planning Commission, and in doing so acquiesced in the Director’s interpretation, warrants still greater deference to the Director’s construction and application of the lapse ordinance. *Van Wagner Communications, Inc. v. City of Los Angeles*, 84 Cal.App.4th 499, 509 (2000), citing *Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal.4th 1, 12 (1998) (*Yamaha I*).

3. The opinion of County Counsel adds further weight to the Director’s interpretation.

Furthermore, the Director’s interpretation is supported by the written opinion of County Counsel. AR165. Administrative practices embodied in the opinions of staff counsel are also entitled to great weight. *Yamaha I*, 19 Cal.4th at 21; *Yamaha II*, 73 Cal.App.4th at 352. The Director’s construction of the ordinance is, likewise, entitled to even greater weight as it rests upon the advice of County Counsel. *Baird v. City of Fresno*, 97 Cal.App.2d 336, 341 (1950).

MVP contends that an after-the-fact opinion of County Counsel during litigation is unworthy of deference. But the opinion of County Counsel is not a *post hoc* rationalization. It reflects a long-standing, consistent administrative interpretation.

4. The Director’s construction of the ordinance, that LDA-786 is for an intermittent use that not lapse from breaks in operation of more than 12 months, is long-standing, consistent, and acquiesced in by the Board of Supervisors.

Administrative construction of a municipal ordinance carries special weight, and is particularly entitled to deference, because it “is one that was consistently maintained and of long standing.” *Van Wagner Communication*, 84 Cal.App.4th at 509; *Yamaha I*, 19 Cal.4th at 13; *Yamaha II*, 73 Cal.App.4th at 352. For almost a quarter century, the Planning Department’s construction of the Zoning Ordinance has consistently been that Chevreaux’s

1 use permit LDA-786 remains valid, and permits the resumption of asphalt operations on the
2 site, even though the asphalt operations have been interrupted for periods of 12 months or
3 more.

4 **a. 1987: Director rules that LDA-786 remains valid despite breaks in**
5 **asphalt operations of four years or more.**

6 In July 1987, Joe Chevreaux asked the Planning Director, then Thomas McMahan,
7 for a determination that use permit LDA-786, designating a permanent location for
8 operation of an asphalt plant on the Chevreaux property, was still valid, even though there
9 had been breaks in the production of asphalt lasting several years. AR 167, p. 597. There
10 had been some occasional, small asphalt jobs between 1976 and 1980, then major asphalt
11 operations resumed under Morrison/Knudsen for the overhaul of Interstate 80, but ceased
12 in 1985. AR 423, pp. 1769-1770; *see also* AR 169 p. 624. But there had been no asphalt
13 operations for about two years before Mr. Chevreaux’s 1987 request to verify the continued
14 validity of LDA-786, and a previous break, between 1976 and 1980, of more than four
15 years. The Director confirmed the County’s understanding that an asphalt plant had
16 operated on the property since 1947 “on an intermittent basis” and, construing the zoning
17 code, found that LDA-786 “has not been revoked” and that “paving” was still permitted
18 under LDA-786. AR 77. Subject to the conditions attached to the use permit, the Director
19 ruled, “LDA-786 remains valid. . . .” *Id.*

20 **b. Director’s 1987 interpretation consistent with mineral resource plan**
21 **and 1985 County Counsel opinion.**

22 Director McMahan’s interpretation was consistent with the County’s “Mineral
23 Resource Conservation Plan,” a final EIR that the Planning Department had issued a year
24 earlier, in May 1984. It described the type of operation at the Chevreaux site under LDA-
25 786 as “Quarrying, processing, and *asphalt concrete*. . . .” AR 32, p. 58 (emphasis added).

26 McMahan’s interpretation was also supported by the 1985 opinion of County
27 Counsel, No. 85-07, in which County Counsel interpreted SMARA and the County’s
28 implementing ordinance to mean that “*any surface mining operations*” (emphasis added)
that had been undertaken prior to January 1, 1976, the effective date of SMARA, could

1 expand into other portions of the property set aside for mining “even though these areas
2 were not being mined” when SMARA or the implementing ordinances were adopted. AR
3 84, p. 174.

4 **c. 1988: Grand jury recognizes Planning Department’s view that**
5 **Chevreaux has vested right to operate and expand.**

6 In 1988, the Grand Jury acknowledged the Planning Department’s position that the
7 County ordinance implementing SMARA “provides a vested right” for the operation of
8 Chevreaux’s quarry and “expansion of the operation is also grandfathered and does not
9 require a use permit.” AR 1276, p. 4037.

10 **d. 1996 Community Plan: operations include processing aggregates**
11 **and asphalt operations permitted.**

12 In 1996, with the Planning Department as Lead Agency, the Meadow Vista
13 Community Plan final EIR was adopted. AR 33. In the plan the Department noted that
14 operations at the Chevreaux quarry included “excavation and processing of aggregates.”
15 *Id.* at p. 64. The Department went on to state, “There is no asphalt concrete plant at this
16 location, although a permit has been obtained for such operations.” *Id.*

17 Nowhere did the Department suggest that, even though no plant was then in
18 existence, the permit for intermittent use had lapsed or that it would be necessary to obtain
19 a new permit before resuming asphalt processing.

20 **e. 2001, 2004 and 2006: APCD issues permits for asphalt operation**
21 **with Planning Department’s concurrence.**

22 In May 2001, the Placer County Air Pollution Control District (“APCD”) issued a
23 permit to Kiewit Pacific to operate an asphalt plant on the site for the next year to provide
24 materials for resurfacing Interstate 80. AR 165, p. 588, AR 288, p. 1220. The Planning
25 Department raised no questions or concerns. Again, in August 2004, after contacting the
26 Planning Department, Chevreaux applied to APCD for a new permit, again without
27 objection from the Planning Department. *Id.* And in 2006, Chevreaux applied for and
28 received yet another APCD permit with Planning Department approval. *Id.*

1 **f. 2005: Planning Director and County Counsel again determine that**
2 **Chevreaux has vested right for asphalt operations under LDA-786.**

3 In February 2005, Teichert Construction proposed to restart asphalt operations on
4 the Chevreaux site. AR 363, p. 1572. The Planning Department responded that the
5 Planning Director had reviewed the files and determined that “LDA-786 appeared to have
6 established rights” for Teichert’s asphalt operations to proceed. AR 8.

7 In making that determination, the Planning Department relied in part on the 2005
8 opinion of County Counsel previously mentioned, which noted that LDA-786 could not
9 lapse unless, after notice and opportunity for a hearing, the County found that it had lapsed.
10 AR 165, p. 590. County Counsel verified that, even though the County was aware that
11 there had been periods of 12 months or more when no asphalt operations took place on the
12 site, the County had never found a lapse “and in contrast has acted as if there has not been a
13 lapse.” *Id.*

14 In fact, County Counsel noted, in 2001 and again in 2004, the Air Pollution Control
15 District, after contacting the Planning Department, granted permits to resume asphalt
16 operations on the site and the Planning Department made no objection. AR 165, p. 588.

17 Accordingly, County Counsel advised, “it would appear that Chevreaux has a
18 vested right in the 1972 CUP in the activities permitted by LDA-786.” *Id.*, p. 592.
19 Moreover, County Counsel advised, under SMARA, “the entire holdings of Chevreaux,
20 whether by ownership or lease, constitute a ‘tract of land’, and the mining operation may be
21 expanded to those areas without obtaining a use permit.” *Id.*

22 **g. The Board of Supervisors has acquiesced in the long-standing,**
23 **consistent administrative interpretation.**

24 The Planning Director’s determination, which the Board of Supervisors ratified and
25 which MVP challenges in the present case is merely the latest iteration in a long, unbroken
26 line of consistent administrative interpretations going back 24 years or more.

27 During that extended period, the Board of Supervisors re-enacted the Zoning
28 Ordinance and in the 1995 re-enactment, the Board rezoned Chevreaux’s property where

1 the asphalt plant operates to its current designation, “Residential Forest-Mineral Reserve”
2 (RF-MR). But the Board has never amended the Zoning Ordinance in a manner that would
3 modify or overturn the Planning Director’s long-standing, consistent interpretation that
4 LDA-786 has never expired, and it remains valid despite periods of a year or more when
5 there were no asphalt operations.

6 When an administrative practice under a legislative enactment is long-standing over
7 a substantial period, it is presumed that the legislative body—here, the board of
8 supervisors—has become aware of the administrative construction and, therefore, “the
9 reenactment of the statute being interpreted with no modification designed to make it clear
10 that the agency’s interpretation is wrong is a strong indication that the administrative
11 practice was, and is, consistent with underlying legislative intent.” *Yamaha II*, 73
12 Cal.App.4th at 353; *In re Dannenberg*, 34 Cal.4th 1061, 1082 (2005). After so long a
13 period, the legislative body is deemed to have acquiesced in the administrative
14 interpretation and practice. *Id.*; see also *Coca-Cola Bottling Co. v. State Bd. of*
15 *Equalization*, 25 Cal.2d 918, 921 (1945) (implied legislative acquiescence in long-standing
16 administrative practice precluded board from adopting different interpretation).

17 Here, however, it is not necessary to invoke a presumption that the Board of
18 Supervisors has been aware of the Planning Director’s long-standing construction. The
19 administrative record is clear that the Board of Supervisors was keenly aware of the
20 Planning Director’s construction of the ordinance. Alex Ferreira, a supervisor from 1971
21 through 1994, stated in a declaration under penalty of perjury that during those years there
22 were hearings addressing the mining operations at the Chevreux quarry on several
23 occasions. AR 672 at 2616-2617, ¶ 2 As a result, the entire property was classified MRZ-
24 2 under SMARA. *Id.* During those numerous proceedings, no member of the Board ever
25 “expressed an intent to limit either the hours of operation or the size of asphalt production;
26 or the scope of sales of asphalt” at the site. *Id.* at 2617.

27 Likewise, Theresa Cook, a supervisor from 1977 through 1988, then a Planning
28 Commissioner from 1993 to 1997, verified Supervisor Ferreira that, in all the hearings on

1 the quarry before the Board and the Planning Commission, Supervisor or Commissioner
2 ever suggested an intent to limit the asphalt processing operation. AR 665, p. 2597.

3 The Board, therefore, was fully aware that the Planning Department was not
4 applying the lapse provision to Chevreaux’s asphalt permit, LDA-786 when the Board
5 reenacted and amended the Zoning Ordinance in 1995 and gave the Chevreaux quarry its
6 current zoning designation. Yet, in re-enacting and amending the Zoning Ordinance, the
7 Board did not modify it to overturn or modify the administrative interpretation.

8 The Board has ratified the administrative construction, which cannot now be
9 changed unless the Board amends the ordinance. *Calif. Welfare Rights Org. v. Brian*, 11
10 Cal.3d 237, 241, 243-244 (1974).

11 **D. As a matter of law, cessation of asphalt processing for more than 12 months**
12 **due to market conditions does not, *ipso facto*, “discontinue” the use or**
13 **terminate the use permit**

14 **1. “Discontinued” is not equivalent to “ceased”; there must be a specific**
15 **intent to abandon the use.**

16 MVP’s claim that Cheveraux’s right to process asphalt at the quarry has terminated
17 from non-use is nothing more than the simplistic argument that “discontinued” in
18 § 17.58.160 (B)(2) means “stopped.” That is not the law. Ceasing a use, even for several
19 years, does not forfeit a nonconforming use or use permit unless it can be shown that the
20 holder had an intent to abandon the use altogether.

21 The California Supreme Court acknowledged the rule in *Hansen Brothers*, 12
22 Cal.4th 533, which also involved a quarry on the Bear River that, like Chevreaux’s, began
23 operating in 1946. When the property was re-zoned in 1954, the quarry became a
24 nonconforming use. At the time, plaintiff was extracting sand, gravel and rocks from the
25 bed and banks of the river, and quarrying rock from a nearby hillside. The zoning
26 ordinance provided that, if a nonconforming use was “discontinued” for 180 days or more,
27 it could not be resumed and further use had to conform to the applicable zoning. *Id.*, 12
28 Cal.4th at 541. Extraction from the river bed and banks was continuous. But because of
fluctuating demand, the hillside was quarried intermittently every two or three years and

1 there were lapses of three years or more when there was no hillside quarrying. *Id.* at 549.
2 The Board of Supervisors ruled that plaintiff had lost its vested, nonconforming use
3 because it had been discontinued more than 180 days. The Supreme Court reversed.

4 It was undisputed that plaintiff had been quarrying the hillside when the use became
5 nonconforming, and that plaintiff’s overall surface mining operations had continued
6 uninterrupted since then. *Id.* at 562-563, 565. Even if quarrying the hillside could be
7 considered a use separate and distinct from the overall mining operation, the fact that
8 quarrying had ceased for more than 180 days did not mean that the use had been
9 discontinued. The Court cited authority equating “discontinued” in a zoning regulation
10 dealing with nonconforming uses as synonymous with “abandoned.” *Id.* at 569.

11 Cessation of use alone does not constitute abandonment. “[A]bandonment of
12 a nonconforming use ordinarily depends upon a concurrence of two factors:
13 (1) An intention to abandon; and (2) an overt act, or failure to act, which
14 carries the implication the owner does not claim or retain any interest in the
15 right to the nonconforming use [citations]. Mere cessation of use does not of
16 itself amount to abandonment although the duration of nonuse may be a
17 factor in determining whether the nonconforming use has been abandoned
18 [citation].”

19 *Id.*, quoting *Union Quarries, Inc. v. Board of County Com’rs*, 206 Kan. 268, 478
20 P.2d 181, 186-187 (1970); *Pallco*, 132 Cal.App.4th at 1498 (quoting and following
21 *Hansen*); see also *Southern Equipment Co. v. Winstead*, 80 N.C.App. 526, 342 S.E.2d 524
22 (ordinance provided forfeiture of non-conforming use that “ceases” for six months; mere
23 failure to operate cement processing plant for more than six months during business
24 slowdown did not did not equate with cessation of operation).

25 That is the majority rule in the country. “Most courts, however, have merged the
26 terms ‘discontinue’ and ‘abandon’ and require proof of an intent to abandon even though
27 the zoning code speaks in terms of a discontinued use or a use discontinued for a specified
28 period of time.” *Andrew v. King County*, 21 Wash.App. 566, 586 P.2d 509 (1978). “The
courts have generally held that the word discontinuance, as used in a zoning ordinance, is
equivalent to abandonment. A discontinuance results from the concurrence of an intent to
abandon and some overt act or failure to act which carries the implication of

1 abandonment.” *Id.*, quoting *Board of Zoning Adjustment v. Boykin*, 265 Ala. 504, 92
2 So.2d 906, 909 (1957).

3 A discontinuance of a nonconforming use with intent to abandon it
4 terminates the right of use, but a discontinuance of the use for the full period
5 prescribed by the ordinance does not foreclose the right of a nonconforming
6 use if the interruption was accompanied by circumstances which suggest
7 that the user did not intend to abandon his right of a nonconforming use of
8 the premises.

9 1 *Anderson’s American Law of Zoning* § 6:65 (4th ed. 1996) (footnotes and
10 citations omitted) (“*Am. Law of Zoning*”); *see also, e.g., Borough of Saddle River ex rel.*
11 *Perrin v. Bobinski*, 108 N.J.Super. 6, 259 A.2d 727 (1969) (no loss of non-conforming use
12 of barn to stable horses even though barn unused for any purpose for 27 years).

13 **2. Cessation of a use for reasons beyond the owner or operator’s control,**
14 **such as economic conditions, is not a discontinuance.**

15 “Many cases recognize the rule that a temporary cessation of business or
16 discontinuance of a nonconforming use due to war conditions, or other causes over which
17 the owner or operator has no control, do not constitute a discontinuance or abandonment
18 within the meaning of zoning laws or ordinances. *Andrew*, 21 Wash.App. at 571, 586 P.2d
19 at 571. “An involuntary interruption of a nonconforming use seldom results in a loss of
20 use. Where the cessation of use is not the voluntary act of the user, the requisite intent to
21 abandon does not exist.” 1 *Am. Law of Zoning* § 6:66. So, even when an ordinance
22 provides that a nonconforming use terminates if discontinued for a specified period, there is
23 no discontinuance where an interruption in the use is the result of economic conditions.
24 *Andrew*, 21 Wash.App. at 571, 586 P.2d at 513; *Cleveland Builders Supply Co. v. City of*
25 *Garfield Heights*, 102 Ohio App. 69, 136 N.E.2d 105 (1956).

26 The rule has special force in the case of such intermittent uses as quarries, which
27 may curtail particular operations, or cease operating altogether, for significant times. As
28 the Oregon Supreme Court recognized, quarries and quarrying operations “are by their
nature sporadic” because the very nature of the business is that production, and the need to
conduct various aspects of quarrying, vary with demand. *Polk County v. Martin*, 292 Or.

1 69, 636 P.2d 952 (1981) (no abandonment of nonconforming use even though quarry
2 inactive more than one year after rezoning caused mineral extraction to be nonconforming).
3 Likewise, in *Andrew*, the Washington Court of Appeals affirmed a zoning appeals board’s
4 finding that “rock quarries are peculiar in operation in that they operate only when there is
5 need for material and the need is sufficient to justify quantity production, and when the
6 need is not present, quarry operations may cease for as long as a year or more.” *Id.*, 21
7 Wash.App. at 569, 586 P.2d at 512.

8 In *Andrew*, the local ordinance provided that a nonconforming use that was
9 discontinued for one year or longer could not be renewed. But, the appellate court held, the
10 county’s appeals board could properly find that the stoppage of quarrying for more than a
11 year was not a discontinuance within the meaning of the ordinance when the evidence
12 supported a finding that the owner did not intend to abandon or discontinue the use. *Id.*, 21
13 Wash.App. at 574, 586 P.2d at 515.

14 Likewise, in *Cleveland Building Supply*, plaintiff mined shale on an 81-acre tract to
15 manufacture brick. Mining operations stopped in 1930 because of the severe drop in
16 demand during the Great Depression. The property continued to remain idle during the
17 Second World War because of wartime restrictions on vital building materials. Finally, in
18 1951, plaintiff sought to resume mining operations. The local zoning ordinance provided
19 that a non-conforming use was considered abandoned after two years. Although the mine
20 had by then been dormant over 20 years, the court held that there had been no abandonment
21 of the nonconforming use. Plaintiff’s nonconforming use of the property to mine shale
22 “had not been abandoned but only temporarily suspended by circumstances far beyond its
23 control.” *Id.*, 102 Ohio App. At 72, 136 N.E.2d at 108.

24 MVP’s entire argument that Chevreaux’s right to process asphalt at its quarry has
25 lapsed rests on the fact that there have been periods of more than 12 months when asphalt
26 processing was dormant. But, as the foregoing cases acknowledge, that is a characteristic
27 feature of the quarrying business.
28

1 Chevreaux’s vested right under LDA-786, to conduct intermittent asphalt
2 processing operations in response to market conditions, has not lapsed.

3 **3. The court may not infer that Chevreaux ever intended to abandon its**
4 **rights under the intermittent use permit.**

5 As noted previously, the court reviews the administrative record by applying the
6 substantial evidence rule in the same manner that the rule is applied by appellate courts in
7 reviewing trial court decisions. *Beverly Hills Federal*, 259 Cal.App.2d at 318; *Perry*
8 *Farms*, 86 Cal.App.3d at 464, n. 7. All reasonable inferences must be drawn in favor of the
9 administrative decision. *Id.*

10 To the extent that MVP contends that the Board should have inferred Chevreaux’s
11 intent to discontinue its permanent, intermittent asphalt processing use, the record here
12 contains evidence rebutting the inference.

13 From the outset, when Mr. Chevreaux obtained the first use permit for asphalt
14 operations in 1972, he made it clear that asphalt processing had been conducted on the site
15 “on an intermittent as needed basis since 1947. . . .” AR 86, p. 189; *see also* AR 28, p. 44
16 (letter listing dates of asphalt plant operations through 1947 to 1960). When use permit
17 LDA-786 was approved, the Planning Director, McMahan, acknowledged in response to a
18 supervisor’s inquiry about the asphalt operation “that starting in 1947 an asphalt concrete
19 plant began operation on an intermittent basis.” AR 70, p. 146.

20 There were no asphalt operations between about 1976 and 1980, but in the 1984
21 Mineral Resource Conservation Plan, the Planning Department still listed LDA-786 as an
22 active permit for the property, and listed among operations on the site, “asphalt
23 concrete. . . .” AR 32, p. 58.

24 In 1987, Mr. Chevreaux sought confirmation, which the Planning Director gave,
25 that LDA-786 was still valid and asphalt processing could continue without further
26 permitting, even though asphalt operations had largely ceased after 1976. AR 86, p. .
27 Again, he made it clear that asphalt plants had operated at the quarry “on an intermittent, as
28

1 needed basis since 1947.” *Id.* That Mr. Chevreaux was seeking confirmation of his right to
2 continue asphalt operations is inconsistent with an intent to permanently abandon the use.

3 That there was no intent to permanently abandon asphalt operations under LDA-786
4 is further confirmed by 1996 the Meadow Vista Community Plan, which noted, “There is
5 no asphalt concrete plant at this location, although a permit has been obtained for such
6 operations.” AR 33, p. 64. There were applications to APCD for asphalt processing,
7 which were granted with the Planning Department’s approval, in 2001, 2005 and 2006. AR
8 165, p. 588, AR 288, p. 1220.

9 All of that is consistent with an intent not to abandon asphalt processing at the
10 Chevreaux quarry, but to continue to process asphalt intermittently as market conditions
11 and demand allowed.

12 MVP points out that the Meadow Vista Community Plan did not treat the impact of
13 asphalt plant operations or asphalt truck traffic. “The most reasonable explanation for this
14 omission,” MVP speculates, “would be the County did not consider this to be a legally
15 conforming use worthy of review.” Petitioner’s opening brief (errata) at 18, n. 17. But,
16 that is not the only available inference.

17 Another reasonable, and contrary, inference is that, by acknowledging that a permit
18 had issued for the asphalt plant, the County considered LDA-786 still valid, but did not
19 address the effect of asphalt operations because the County knew that the permit was for an
20 intermittent use and the plant was not then operating. That inference, which supports the
21 Board of Supervisors’ determination, and not the contrary inference that MVP suggests, is
22 the one this court must draw. *Beverly Hills Federal*, 259 Cal.App.2d at 318; *Perry Farms*,
23 86 Cal.App.3d at 464, n. 7.

24 Likewise, MVP cites various public records after 1976 that do not mention the
25 asphalt plant, from which MVP infers that the use permit must have lapsed. But, as already
26 discussed, there are other records since 1976—the 1984 Mineral Resource Conservation
27 Plan, the Planning Director’s determination in 1987, County Counsel’s opinion that same
28 year, the APCD permits for asphalt processing issued with Planning Department approval

1 after adoption of the 1995 lapse ordinance and rezoning of the Chevreaux quarry—
2 supporting the reasonable inference that the County has repeatedly and consistently treated
3 the use permit as continuing and valid despite long periods of dormancy. As County
4 Counsel put it, to date the County “has acted as if there has not been a lapse.” AR165, p.
5 590.

6 It cannot be said that “there is no substantial evidence whatsoever to support the
7 findings of the Board.” *Desmond v. County of Contra Costa*, 21 Cal.App.4th at 336.

8 **E. MVP’S assertions that Chevreaux is exceeding or has expanded asphalt**
9 **processing beyond the scope of the use permitted under LDA-786 are**
10 **irrelevant to the issue of discontinuance.**

11 MVP’s brief is peppered with assertions that Chevreaux’s current asphalt operations
12 exceed the scope of the use permitted under LDA-586. Even if the argument had merit, it
13 is completely extraneous to the issue now before the court.

14 The only determination that the Planning Director made, the only determination the
15 Planning Commission upheld and that the Board of Supervisors then reviewed and
16 affirmed in the administrative appeal, was that intermittent asphalt processing at the
17 Chevreaux quarry has not been discontinued and, therefore, LDA-786 has not lapsed and it
18 remains valid.

19 Even if there were any merit to MVP’s assertions that the Chevreaux has expanded
20 asphalt operations beyond the use permitted by LDA-786, that would have no bearing on
21 whether the use has been discontinued. The Third Appellate District flatly rejected the
22 argument that an enlargement or expansion of a legal, nonconforming use constitutes an
23 abandonment in *Pallco*, 132 Cal.App.4th at 1498. Increasing the use, the court held may
24 be improper, but it is not an abandonment. *Id.* Here, as in *Pallco*, MVP cites nothing to
25 support “the novel theory that an expansion of a use is an abandonment of the original use.”
26 *Id.*

27 **CONCLUSION**

28 For the foregoing reasons, real party in interest Chevreaux Aggregates, Inc., asks
that the petition for writ of mandate be denied.