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SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF PLACER

MEADOW VISTA PROTECTION,

Petitioners and Plaintiffs,

v.

CHEVREAUX AGGREGATES, INC.; COUNTY OF PLACER; COUNTY OF PLACER PLANNING DEPARTMENT; and DOES 1- 50, inclusive,

Respondents and Defendants.
_______________________________/

Case No. SCV 19614

CHEVREAUX AGGREGATE'S REPLY TO MEADOW VISTA PROTECTION'S OPPOSITION TO DEMURRER

DATE: October 3, 2006
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LEGAL ARGUMENT IN REPLY TO MVP'S OPPOSITION TO DEMURRER

A. A GENERAL DEMURRER FOR FAILURE TO STATE A CAUSE OF ACTION *IS* PROPER AS TO A DECLARATORY RELIEF ACTION WHEN, AS IN THIS CASE, MVP HAS UTTERLLY FAILED TO STATE FACTS TO ESTABLISH THAT THERE IS AN "ACTUAL CONTROVERSY" BETWEEN MVP AND CHEVREAUX.

MVP agrees with CHEVREAUX's demurrer to MVP's Second and Third Causes of Action for declaratory relief on one point. A plaintiff must establish that there is an "*actual controversy*" between the parties. MVP's argument that it has established the same is flawed in two respects. "'A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the *legal rights and duties of the parties under a written instrument or with respect to property and requests that the rights and duties of the parties be adjudged by the court.*'" Lockheed Martin Corp. v. Continental Ins. Co. (2005) 134 Cal.App.4th 187, 221, quoting Wellenkamp v. Bank of America (1978) 21 Cal.3d 943, 947, (emphasis added). Herein lies the fundamental problem with MVP's Second and Third Causes of Action. MVP has failed to state facts that show what written instrument, property or other legal principle contains legal rights and duties that are common to both MVP and CHEVREAUX. If there is no such instrument, then there can be no actual controversy as defined by the very cases cited by MVP in its opposition. What the Lockheed court stated is that *if* facts are set forth in a cause of action for declaratory relief "*relating to legal rights and duties of the parties under a written instrument or with respect to property*", then the requirement to show the existence of an actual controversy is satisfied. Only *if* this requirement is satisfied, "should [a court] declare the rights of the parties whether or not the facts alleged establish that the plaintiff is entitled to favorable declaration." Lockheed 134 Cal.App.4th at 219, 221 (emphasis added). If the complaint does not set forth facts showing the existence of an actual controversy, then the complaint has failed to satisfy the first rule of an adequately pled cause of action for declaratory relief and it is subject to demurrer.

MVP also fails to state facts in its complaint that establish an actual controversy between MVP and CHEVREAUX. MVP also asserts that it has "established an actual controversy with respect to LD-1030 and LDA-786 through the allegations in the complaint" (Opp., 4:16-17)

without support. In Bess v. Park (1955) 132 Cal.App.2d 49, the trial court found the existence of an actual controversy between an employment agency and an applicant based on the payment of a placement fee pursuant to a *written contract* for permanent placement, which was referred to the Labor Commissioner. Baxter Healthcare Corporation v. Denton (2004) 120 Cal.App.4th 333 also does not help MVP's argument. In Baxter, the court held that Proposition 65 does not preclude a business from bringing a declaratory relief action under CCP §1060 to determine whether the business is exempt from the initiative's warning requirement. Not even the case of Warren v. Kaiser Foundation Health Plan, Inc. (1975) 47 Cal.App.3d 678 assists MVP. Warren involved a declaratory relief action regarding "plaintiff's needs where, despite the breach [*of a written contract*] a relationship between the parties continues so that a declaration may guide their future conduct." Warren, 47 Cal.App.3d at 683.[1] No written agreement exists, and *no* such past relationship and certainly no such "continuing relationship" exists between MVP and CHEVREAUX that would permit this court to entertain MVP's requests for declaratory relief.

MVP asserts that the "actual controversy" with respect to LD-1030 and LDA-786 is based on "MVP and Chevreaux tak[ing] opposing positions as to Chevreaux's compliance with all terms and conditions of LD-1030 and the continuing validity of LDA-786." (Opp. 4:16-19.)

Attempted purification referred to in Witkin (Opp. 4:16-19) availeth MVP nothing. (see copy attached hereto) Witkin says an actual controversy between the parties must exist to establish declaratory relief. There may exists a controversy between MVP and the COUNTY, but not CHEVREAUX. MVP's complaint does not allege facts to indicate how it can claim an interest in the legal rights and duties of use permits that were issued to CHEVREAUX and which run with the real property interests owned and/or leased by CHEVREAUX. The case law on the nature of the use permit entitlement is clear: "it is widely held that a conditional use permit creates a right which runs with the land; it does not attach to the permittee." Anza Parking Corp.

[1] MVP has also misapplied the holding of Warren to this case. While Warren did hold that declaratory relief was a proper remedy instead of a complaint for breach of contract, the court concluded this "to avoid multiplicity of litigation and to construe a contract creating a continuing relationship despite the breach of the contract by respondent and that the contract may, at trial, properly be construed as one of adhesion granting to appellant the rights for which he contends." Warren, 47 Cal.App.3d 678, 680. How MVP can twist this holding to support its contention that it can seek declaratory relief for alleged "future wrongful conduct" (Opp. 6:12-13) by CHEVREAUX is unfathomable.

v. City of Burlingame (1987) 195 Cal.App.3d 855, 858. Therefore, LD-1030 and LDA-786 run with the land, none of which MVP alleges in its complaint that it owns.[2] Therefore, MVP cannot allege in its complaint that it is seeking declaratory relief on the rights and duties of parties who own or have a legal interest in the same real property. MVP does not state facts to indicate what rights and duties it and CHEVREAUX share. Why? Because none exists.

Any theoretical "controversy" MVP claims it has it now admits is with the COUNTY, *not* CHEVREAUX.[3] (Opp. 12-13.) MVP states its frustration with the COUNTY's failure to investigate CHEVREAUX's permit validity or find non-compliance (Complaint 2:24-28; 7:25-28; 8:1-4, 12-20; [MVP letter to COUNTY Counsel], 7:20-24 [MAC letter to County Board of Supervisors], 7:25-28, 8:1-4 [MVP requests to Planning Dept.]; Opp. 6:16-19; Opp. 8:11-14.) MVP concludes that the COUNTY's determination on these requests would "*be adverse to MVP's interests.*" (Opp. 8:23-28. emphasis added.) Residents of Beverly Glen, Inc. v. City of Los Angeles (1973) 34 Cal.App.3d 117 illustrates that the proper means of challenging the issuance of a use permit is to sue the governmental entities who issued it. Plaintiff filed a petition for writ of mandate and complaint for declaratory relief *against the City of Los Angeles* set aside a conditional use permit granted by City to U.S. Plywood-Champion Papers, Inc. (real party in interest).[4] Lest MVP believe that it can simply amend the second and third causes of action to name the COUNTY, it is important to note that the Beverly Glen case left the determination of whether this non-profit organization had standing to "adequately represent others" to the trial court on remand. Beverly Glen, 34 Cal.App.3d at 129. (See §I below.)

B. NO EXHAUSTION, NO DECLARATORY RELIEF.

Conclusionary allegations of exhaustion (Complaint 9: 8-9, 25-26) are insufficient to

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[2] In fact, MVP cannot allege this because LD-1030 and LDA-786 run with the land owned solely by CHEVREAUX.

[3] MVP's argument, that it is not required to name the County in the second and third causes of action because the County can intervene pursuant to CCP §398(a) (Opp. 13:13-27), does not excuse MVP from the requirement to plead adequate causes of action for declaratory relief by stating facts to establish an actual controversy. As MVP's own complaint and opposition clearly admit, if any controversy actually exists, it is between MVP and the County and as a result, MVP's refusal to name the County instead of CHEVREAUX in the Second and Third Causes of Action is just cause to sustain CHEVREAUX's demurrer to the second and third causes of action.

[4] MVP cites the Beverly Glen case for the notion that "declaratory relief is a proper mechanism for enforcing a conditional use permit. (Opp. 5:22-24.) The Beverly Glen case was *not* a case seeking the enforcement of conditions of a conditional use permit. It was a case seeking to invalidate the conditional use permit.

1 survive a demurrer. MVP's states, "the County has relinquished its jurisdiction" because the
2 COUNTY has taken a "final decision" of CHEVREAUX's permits or refuses "to take any
3 position at all" (Opp. 13:8) is factually incorrect. The fact that the COUNTY did not take action
4 on MVP's letter (Complaint 2:24-28), and the fact that the Board did not initiate public hearings
5 "to determine the validity and scope" of LDA-786 (Complaint 7:20-24) does not translate into
6 making a "final decision" on CHEVREAUX's permits or that the COUNTY refuses to "take any
7 position at all". MVP assertion complaint contradicted when it also states "the current Placer
8 County Planning Director, stated unequivocally, '[LDA-786] will never lapse.'" (Complaint 8:1-
9 4.) Pan Pacific Prop v. Santa Cruz (1978) 81 Cal.App.3d 244, 251. What is CHEVREAUX
10 supposed to do? Demand that the COUNTY give MVP a hearing?

11 MVP's claimed ignorance as to who can appeal code violations with the COUNTY, and
12 who can request a Planning Director's determination (Opp. 7:20-28, 8:1-15) are disingenuous to
13 say the least. Knowledge of administrative remedies is not a predicate. A court is without
14 jurisdiction to hear a claim until all available administrative remedies have been exhausted.
15 Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280, 293; Environmental Law Fund, Inc.
16 v. Town of Corte Madera (1975) 49 Cal.App.3d 105, 111; Morton v. Superior Court (1970) 9
17 Cal.App.3d 977, 981. If a party fails in its attempts to block a project approval by a subordinate
18 agency, the party must exhaust any right of appeal to an appellate body that oversees its
19 functioning before seeking judicial review. Sea & Sage Audubon Society, Inc. v. Planning Com.
20 (1983) 34 Cal.3d 412, 417-418 (Audubon Society failed to appeal planning commission approval
21 of subdivision to City Council and therefore could not seek review through administrative
22 mandamus); Concerned Citizens of Palm Desert, Inc. v. Board of Supervisors (1974) 38
23 Cal.App.3d 257, 266; Frisco Land & Mining Co. v. State of California (1977) 74 Cal. pp.3d 736,
24 754.

25 MVP's own statements admit that it knew how to file a code enforcement complaint.
26 MVP initiated a code violation review by COUNTY when it states that MVP made "repeated
27 requests to the County for its involvement and assistance" (Opp. 7:22; 8:12-13) which allegedly
28 resulted in the "County either refusing to take investigative action or claiming that investigative

action was taken at some point and *no violations were found*." (Opp. 8:26-27, emphasis added.)

MVP's claim of excuse from failure to exhaust administrative remedies is not supported by its cases. (Opp. 9:4-5.) In Coachella Valley Mosquito and Vector Control District v. California Public Employment Relations Board (2005) 35 Cal.4th 1072, the court held that failure to exhaust was excused because the court determined that the statute of limitation issue raised by the plaintiff affected numerous other agencies who might raise an unfair practice charge. Coachella, 35 Cal.4th at 1082. Lindeleaf v. Agricultural Labor Relations Board (1986) 41 Cal.3d 861 held that the fundamental challenges to election procedure used by the involved an important question of public policy. MVP admits that it filed code enforcement complaints, which COUNTY investigated, but COUNTY found no violations. (Opp. 8:25-27.) MVP ignores COUNTY's administrative procedures cited in MVP's demurrer opposition. MVP must follow the procedures stated in Placer County Zoning Code 17.62. The Code allows for a Planning Director Determination, an appeal to the Planning Commission, and a further appeal to the Board of Supervisors after that before filing suit. None of these steps have been taken.

C. THERE IS NO JUSTICIABLE CONTROVERSY BETWEEN MVP AND CHEVREAUX.

MVP is correct that there need only be a "justiciable controversy between the actual parties to the cause of action" (Opp. 10:26-67) but fails to establish what the "justiciable controversy" is between CHEVREAUX and MVP. As required by Maguire v. Hibernia Savings & Loan Society (1944) 23 Cal.2d 719, 729: "A complaint in an action for declaratory relief which recites in detail the dispute between the parties and prays for a declaration of *rights and other legal relations* of the parties, states facts sufficient to constitute a cause of action against a motion to dismiss for insufficiency of the complaint." (emphasis added). MVP's complaint does not cite to the existence of any rights and legal relations that exist *between* CHEVREAUX and MVP. Why? *Because there are none*. MVP does not and cannot allege in its complaint that it hold any legal or beneficial interest in CHEVREAUX's real property or these permits. Therefore, MVP cannot meet the fundamental requirement to bring declaratory relief causes of action against CHEVREAUX, because there is no actual controversy over rights and/or other

1 legal relations between CHEVREAUX and MVP. MVP's dispute is with COUNTY's decisions
2 that no violation exists. (Opp. 8:23-28.)
3 Contrary to MVP, Zetterberg v. State Dept. of Public Health (1974) 43 Cal.App.3d 657,
4 662, 663 and Potter v. City Council of the City of Port Hueneme (1951) 102 Cal.App.2d 141
5 (Opp. 11:22) *are* relevant. MVP does not like the fact that the COUNTY has concluded after
6 numerous code violation complaints, that CHEVREAUX is not in violation of the conditions of
7 LD-1030; and that LDA-786 has not lapsed. (Complaint 7:20-28, 8: 1-4). However, MVP's
8 disapproval of COUNTY's decisions does not establish a justiciable controversy, as defined in
9 the Maguire case, between MVP and CHEVREAUX.
10 MVP misreads California Water & Telephone Co. v. County of Los Angeles (1967) 253
11 Cal.App.2d 16. (Opp. 11:16-18.) In California Water, the court held that because the
12 "constitutional amenability of the public utilities to the local regulations prescribed by the Water
13 Ordinance has a continuing effect upon the conduct of respondents' business", to settle this
14 *constitutional question* any doubt about the justiciability of this particular controversy should be
15 resolved in favor of present adjudication because of the public interest in resolving this
16 constitutional question. California Water, 253 Cal.App.2d at 26. The court stated, however,
17 "[d]eclaratory relief is properly denied, for example, if the factual matrix is insufficiently set to
18 permit a useful and intelligent adjudication to be made." California Water, 253 Cal.App.2d at
19 24. There is no constitutional question here, and MVP has failed to lay out a sufficient factual
20 matrix to permit this Court to make an "intelligent adjudication" between MVP and
21 CHEVREAUX. MVP disagrees with the COUNTY's conclusions. CHEVREAUX has
22 remained neutral in this foray by continuing to do business in the manner it has been permitted to
23 do since 1971.
24 **D. MVP'S DECLARATORY RELIEF AND INJUNCTIVE CAUSES OF ACTION**
25 **ARE NOT RIPE.**
26 MVP has misread the law with respect to admission of the facts as stated in the
27 complaint. (Opp. 12:16-17.) As noted in Aubry v. Tri-City Hospital District (1992) 2 Cal.4th
962, 966-967:
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> On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation and treats the demurrer as admitting all material facts properly pleaded. The court does *not*, however, assume the truth of contentions, deductions or conclusions of law. (Emphasis added.)

The "facts" in MVP's complaint are mere conjectures on its part: "*Upon information and belief*, CHEVREAUX is currently conducting surface mining outside the boundaries authorized by that permit." [Contention.] (Complaint, 2:9-10, 5:3, emphasis added.) "This conditional use permit was either never implemented or has lapsed due to many years of nonuse, making the operation of such a plant illegal." [Contention, Conclusion of law.] (Complaint 2:19-21.) "Also on information and belief, CHEVREAUX is not complying with the conditions regarding blasting, water quality and dust mitigation." [Contention.] (Complaint 5:4-5.) "On information and belief, no asphalt plant was operated from 1976 through 2001 or from 2002 through the present." [Contention.] (Complaint 6:17-18.)

BKHN, Inc. v. Department of Health Services (1992) 3 Cal.App.4th 301, 309-310 actually argues against MVP's position that the declaratory relief causes of action are ripe. BKHN concluded that the matter in that case was "not ripe for resolution because there is no 'definitive and conclusive relief', which could be granted". The BKHN court discusses ripeness:

> The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution. Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also t o protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. BKHN, 3 Cal.App.4th at 309.

E. MVP'S CITATIONS TO CASES TO SUPPORT ITS CONTENTION THAT ITS ACTIONS FOR DECLARATORY RELIEF SUPPORT JUST THE OPPOSITE.

MVP's contention that it is not seeking to invalidate CHEVREAUX's use permits is conflated by its statement "declaratory relief is a proper procedure to *invalidate* a conditional use permit." (Opp. 4:23-24). However, MVP is way too late to do so, as it failed to challenge the issuance of these use permits within the statute of limitations set forth in Govt. Code §65009(c)(1)(E). MVP's hypothetical cannot be applied in this case. MVP paints a dire case of

pollution that goes unchecked by the COUNTY. Here, the COUNTY investigated but found no violations. (Opp. 8:25-27).

Terms or conditions of a use permit can be enforced after the 90-day period to challenge the initial issuance thereof has run. But that is not what MVP is alleging. MVP concedes as noted above that there is no active enforcement action against CHEVREAUX because no violations have occurred. Therefore, Malibu Mountains Recreation, Inc. v. County of Los Angeles (1998) 67 Cal.App.4th 359 is inapplicable. In Malibu, the county undertook and eventually revoked a use permit. In the case of Pacifica Homeowners' Association v. Wesley Palms Retirement Community (1986) 178 Cal.App.3d 1147, the court held that while a "private individual" may "enjoin a zoning violation as a nuisance", the Association could not enforce a limitation of the height of trees which did not exist as a condition of approval. Pacifica, 178 Cal.App.3d at 1152.

F. INJUNCTION FAILS FOR LACK OF SPECIFIC ALLEGATIONS TO FOURTH CAUSE OF ACTION.

CHEVREAUX has *not* "admitted the truth" of MVP's allegations (Aubry, 2 Cal.4th at 962, 966-967), and what the Court is left with in the injunctive relief cause of actionare MVP's conjectures that there might be "violations" of LD-1030 and LDA-786. (See §D.) MVP's complaint asserts a **non-existent** condition of approval was imposed on LD-1030: "LD-1030 was approved on the understanding that the number of trucks leaving and entering the site would not exceed 20 per day." (Complaint 4:26-27.) Pacifica cited by MVP fails to support MVP's claim that a discussion in the minutes of a Planning Commission hearing translates into an implied condition: (Opp.14:7)

> The fact the City has expressly addressed the height of trees in other contexts leads to the conclusion that if the City had intended a height limit on the trees in this instance, it would have so stated. Since it did not and since conditions on a conditional use permit must be expressly attached, we conclude no such height limit was intended here. Pacifica, 178 Cal.App.3d at 1156.

Similarly, if the County Planning Commission had intended to impose a condition on the number of trucks, it would have done so. The fact that it did not means that no limitation on truck trips was intended by the Planning Commission when it granted LD-1030.

1 The rules propounded in Bank of America National Trust and Savings Association v.
2 Williams (1948) 89 Cal.App.2d 21-23 have not been met.

3 Conclusions that might stand as a matter of pleading are not competent to justify
4 the issuance of an injunction. The rules are thus stated in Willis v. Lauridson, 161 Cal.106, at page 108 [118 P.530] as follows:

5 ....it may be well to state some established rules of law which must govern us in
6 determining its sufficiency as a basis for the extraordinary remedy of injunction. ...Averments which are but conclusions of law are not competent testimony, though
7 they might stand as matter of pleading. Unless the statement, in the nature of a conclusion, is supported by facts or circumstances on which it rests, it is insufficient
8 to sustain an application for injunction. If the complaint, otherwise unsupported, is open to attack on general demurrer, it is *insufficient*. (emphasis added.)

9 CHEVREAUX has shown that MVP has failed to state causes of action for declaratory relief,
10 trespass and nuisance against it; therefore, it would be improper for this Court to grant an
11 injunction. MVP's assertion that it has pled "specific, precise facts *tending* to show how the
12 permits had been violated" (Opp. 14:5-6) is incorrect, and the contentions that MVP does state
13 do not satisfy the test set forth in the Bank of America case.

14 MVP has only pled blanket statements with no facts to support them. MVP pleads on
15 "information and belief" that "Chevreaux is in violation of conditions regarding blasting,
16 protection of water quality and dust mitigation at the quarry site" (Complaint 2:12-13), yet MVP
17 cites to *no* facts to support this statement and admits COUNTY finds no violation. Similarly,
18 MVP claims that LDA-786 was "never implemented or has lapsed due to many years of nonuse,
19 making the operation of such a plant illegal" (Complaint 2:19-21), yet MVP cites no facts to
20 support this conclusion of law.

21 **G. MVP'S COMPLAINT FAILS TO MEET REPRESENTATIONAL STANDING**
22 **CRITERIA - SECOND THROUGH SEVENTH CAUSES OF ACTIONS.**

23 MVP's defect of parties affects declaratory relief, nuisance, and trespass causes of action
24 for different reasons. Each association case cited by MVP was granted standing to sue as a class
25 or representative action for reasons that do not apply to MVP.

26 MVP presents two unresolved pleading defects: (1) it asserts claims of permit invalidity
27 against CHEVREAUX, not the COUNTY, even though its supporting cases assert all claims
28 against the public agency; and (2) MVP's allegations of tort damage for members cannot be

1 litigated, because these torts affect different residents and properties differently, and MVP shows
2 no basis that it, as one entity, can represent those aggrieved individually or even how they are
3 individually aggrieved. Individual property owners, not MVP, suffer from noise, traffic, dust,
4 and litter.

5 Residents of Beverly Glen, Inc. v. City of Los Angeles (1973) 34 Cal.App.3d 117 (Opp.
6 15:10-27) rests upon considerations of paramount convenience in the use of homeowners'
7 associations as vehicles for bringing suits which ***challenge government action***. Beverly Glen,
8 34 Cal.App3d at 124-125. In Beverly Glen, a nonprofit corporation challenged an allegedly
9 ***unconstitutional ordinance*** adopted by Los Angeles under which the City had purported to grant
10 the developer a conditional use permit. MVP's Fifth through Seventh Causes of Action are
11 against CHEVREAUX (not a governmental entity) and, therefore, MVP does not have standing
12 to sue CHEVREAUX on that basis.

13 Sierra Club v. Morton (1972) 405 U.S. 727 (Opp. 15:18-24) relied upon the federal
14 Administrative Procedure Act, 5 U.S.C. § 702, which stated that, "'[a] person suffering legal
15 wrong because of ***agency action***, or adversely affected or aggrieved by ***agency action*** within the
16 meaning of a relevant statute, is entitled to judicial review thereof.'" Beverly Glen, 34
17 Cal.App.3d at 123-124, citing Sierra Club, 405 U.S. at 739. Sierra Club stands for the
18 proposition that an association which alleges that its ***members are actually injured by agency***
19 ***action*** and which represents them in the action has standing to sue that agency, not the permitee.
20 MVP is not itself injured, and

21 > [T]he two requirements that must be satisfied for a representative action are an
22 > ascertainable class with a well-defined community of interest in the questions of
> law and fact affecting the parties to be represented. County of San Luis Obispo v.
23 > The Abalone Alliance (1986) 178 Cal.App.3d 848, 854.

24 MVP's evidence of associational standing does not apply to MVP, because it consists of the
25 unascertainable class of residents and non-residents of the community in general and there is no
26 community of interest among the members because each and every one cannot possibly be
27 affected in the same manner, if at all. (Opp.15, 16, 17.)

28 The association's members were a clearly defined and an ascertainable class because they

1 all held title to property within the Twain Harte tract ***and*** the properties' community of interest
2 resulted from a common recreational easement recorded on land presently owned by the
3 respondent. Twain Harte Homeowners Association v. Patterson (1987) 193 Cal.App.3d 184,
4 186.

5 > ***[A] plaintiff generally must assert his own legal rights and interest, and cannot***
6 > ***rest his claim to relief on the legal rights or interest of third parties.*** (Warth v. Seldin (1975) 422 U.S. 490, 499.) [Emphasis added.] An association may have
7 > standing on behalf of its members (independent of any harm to itself) only if their rights are threatened as a result of a challenged [government] action. (Id. at p.
8 > 511.) The class of people whom the geographic restriction affects are *prospective* apprentices, not apprentices already enrolled in the Independent Roofers
9 > program..." Independent Roofing Contractors of California Unilateral Apprenticeship Committee v. California Apprenticeship Council (2004) 114
10 > Cal.App.4th 1330.

11 "[T]he entire membership of the Association were victims of a systematic fraud" that
12 induced the members to purchase property and, therefore, the grievances were common to all.
13 The class was self-defined as those who bought the property, ***and*** the alleged grievances were
14 common to all, both of which allegations are ***not*** asserted by MVP. Salton City Area Property
15 Owners Association v. M. Penn Phillips Co. (1977) 75 Cal.App.3d 184, 188.

16 The class was well-defined and ascertainable, the residents of Greens Nos. 2 and 3, and
17 those residents had commonality of questions of law and fact regarding CC&Rs for Greens Nos.
18 2 and 3. Property Owners of Whispering Palms, Inc. v. Newport Pacific, Inc. (2005) 132
19 Cal.App.4th 666. MVP never explains how its non-residents can assert trespass or private
20 nuisance claims.

21 Pacifica Homeowners' Association v. Wesley Palms Retirement Community (1986) 178
22 Cal.App.3d 1147 (Opp. 16:26-28, 17:1-8) is not a direct comparison case. Individuals and
23 representing community plaintiffs must have suffered an injury different or greater than the
24 general public, ***and*** be members of the community for whose welfare the ordinance was enacted.
25 Pacifica, 178 Cal.App.3d at 1152-1153. MVP is suing to expand use permit conditions granted
26 to a specific permittee 50 years ago. Arguably established to protect the public, how does MVP,
27 while alleging that it is a broad group with members outside the County, meet Pacifica's second
28 mandatory prong: injuries suffered different or greater than the general public?

H. UNCERTAINTY– FIFTH THROUGH SEVENTH CAUSES OF ACTIONS.

A plaintiff must state with clarity how or in what manner plaintiff has been damaged because the defendant is entitled to know the basis to enable it to prepare a defense. Oppenheimer v. General Cable Corp. (1956) 143 Cal.App.2d 293, 298. MVP claims CHEVREAUX is in a better position to know whether it has complied with its use permits (Opp. 18:21-23). Assertions that mining activity cause noise, ground vibrations, dust, traffic, and littering on individual properties must violate the permits. Only violations in excess of permit requirements may be challenged as nuisance. (Civil Code §3482.) COUNTY finds no violations.

MVP states that all "the obvious ***inference*** is that these violations have given rise to plaintiff's several causes of action" (Opp. 18:12-14; emphasis added). Even if CHEVREAUX's operations, while in compliance with its permits, injure residents, it cannot determine from the Complaint how and which residents are injured. When MVP states that its allegations show the ***perceived wrongfulness*** of CHEVREAUX's conduct and resulting injury (Opp. 18:27-28; 19:1), it provides only conclusionary allegations based on perceptions and not supported by facts.

MVP's causes of action for public and private nuisance match word for word. (Complaint ¶¶54 and 58.) How can those paragraphs allege special injury differ in kind from that suffered by the general public? How does this interference uniquely affect the property interest of each member of MVP when no one knows who, what or where? (Complaint 12:1-2.) Brown v. Petrolane, Inc. (1980) 102 Cal.App.3d 729 supports CHEVREAUX's demurrer as the court held that because appellants failed to allege a perceptible injury to their individual property interests apart from the community at large, they failed to state a cause of action for private nuisance. Since no special damages were alleged the injury was common to their general community and differed among individuals in that community only in degree, not kind, and thus no private nuisance.

I. REPLY TO MVP'S OPPOSITION TO DEMURRER – TRESPASS.

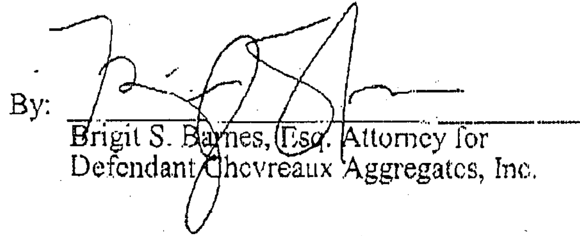
MVP states "Applicable case law also imposes liability where the entry is caused recklessly, negligently or as the result of extra-hazardous activity." (Opp. 21:4-6.) These

elements were not pleaded and no particulars are provided. Mallory v. Thomas (1893) 98 Cal. 644 (Opp. 21:8-18) is not limited to cases with "destruction of property". MVP has sought no special damages requiring because MVP pled injuries including, but not limited to, diminution in value amounting to special damages. (Complaint 12:18-21.) As such, Mallory applies:

> In Grandona v. Lovdal, 70 Cal. 161, the plaintiff alleged that the act of the defendant in allowing certain trees to grow near the boundary of his land, had caused him damage by lessening the value of the land, and by reason of their shade and the leaves falling therefrom upon his land, and it was held that the complaint was ambiguous and uncertain, because it did not state the amount of damage resulting from either the shade, the falling leaves, or the decrease in value of the land. Mallory, 98 Cal. at 647.

DATED: September 26, 2006

BRIGIT S. BARNES & ASSOCIATES, INC.,
A Law Corporation



By: ______________________
Brigit S. Barnes, Esq. Attorney for
Defendant Chevreaux Aggregates, Inc.

Matter: MEADOW VISTA PROTECTION v. CHEVREAUX AGGREGATES, INC.
Placer County Superior Court Case No. SCV 19614

PROOF OF SERVICE

I am a citizen of the United States, over the age of eighteen years, and not a party to or interested in the within entitled cause. I am an employee of Brigit S. Barnes & Associates, Inc., A Law Corporation, located at 3262 Penryn Road, Suite 200, Loomis, California, 95650. On this date, I served the following document:

CHEVREAUX AGGREGATE'S REPLY TO MEADOW VISTA PROTECTION'S OPPOSITION TO DEMURRER

X **BY U.S. MAIL [C.C.P. §1013(a)]** by enclosing one copy thereof in a sealed envelope, with postage thereon fully prepaid. I am readily familiar with this firm's practice for the collection and processing of correspondence for mailing with the United States Postal Service, and that said correspondence is deposited with the United States Postal Service at Sacramento, California, on the same day in the ordinary course of business. Said correspondence was addressed as set forth below.

X **BY FACSIMILE [C.C.P. §1013(e)]** by sending a true copy via facsimile transmission (by use of facsimile machine telephone number 916-660-9554) of the above described document(s) to the interested parties, at the facsimile numbers listed below. The facsimile machine I used complied with California Rules of Court, Rule 2004, and no error was reported by the machine. Pursuant of California Rules of Court, Rule 2006(d), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this declaration. A written confirmation between the parties exists authorizing service by facsimile, pursuant to CRC 2008(b).

PARTY(S) SERVED:
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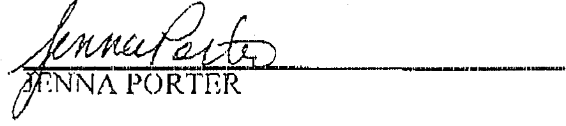
I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on August 22, 2006, at Loomis, California.



JENNA PORTER

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