

SOLURI & EMRICK LLP

Patrick M. Soluri
650.861.7165 (direct)
patrick@soluri-emrick.com

Attorneys at Law
1822 21st Street, Suite 202
Sacramento, California 95814
www.soluri-emrick.com
916.244.7300 (fax)

Matthew L. Emrick
916.337.0361 (direct)
memrick@soluri-emrick.com

September 16, 2005

SENT VIA U.S. MAIL

Scott H. Finley, Esq.
Supervising Deputy County Counsel
County of Placer
County Administrative Center
175 Fulweier Ave.
Auburn, CA 95603-4581

**RE: Meadow Vista Protection
Our file No. 0108.001**

Dear Mr. Finley:

As you are aware, we represent Meadow Vista Protection (“MVP”), an incorporated non-profit organization comprised largely of residents of the Meadow Vista area of Placer County (“County”). We have been asked by MVP to conduct an independent analysis regarding the nature, scope and validity of various land use entitlements presently owned by Chevreux Aggregates, Inc. (“Chevreux”), for Chevreux’s quarrying and processing facilities located adjacent to Lake Combie.

We appreciate your courteous and professional assistance and that of Mr. Bill Combs of the County Planning Department in connection with our review of the Chevreux matter. We would like to continue this cooperation and are herein submitting to you our findings regarding Chevreux’s entitlements. We hope that this analysis will assist the County in addressing Chevreux’s operations going forward.

MVP is greatly concerned about the fair and uniform application of the County’s zoning ordinance that regulates the use of private property in order to promote the health, safety and welfare of the County as a whole. Allowing one business to avoid compliance with the County’s zoning regulations may harm adjacent property owners in addition to competing businesses that expend significant capital in order to fully comply with all applicable zoning restrictions.

Our factual investigation and legal analysis have identified some significant issues of concern regarding Chevreux’s surface mining and processing operations that we believe should

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be addressed in a collaborative manner. We welcome an opportunity to meet with you to discuss these findings in greater detail.

SUMMARY OF FINDINGS

The authorization to conduct surface mining operations at the Quarry is not based on nonconforming use but rather a CUP that was issued to Edward Pruss in 1965. It appears that Chevreux is presently in violation of this CUP as its quarrying activities have extended beyond the eastern boundary of the CUP. Additionally, the Quarry's present production volume is significantly greater than the scope of the surface mining operation that was approved by the County in 1965.

Chevreux's present entitlement to operate an Asphalt Plant at the Quarry is now based solely on a CUP, LDA-786, that was issued by the County in 1972. There is a question of fact whether this CUP was ever exercised within the first twelve months from its issuance as required by the County's Zoning Code. Even if exercised within the initial period, LDA-786 lapsed due to non-use.

FACTUAL SUMMARY

It appears that Chevreux has operated an in-stream sand and gravel mining and processing operation at Lake Combie (the "Gravel Operation") since approximately 1947. (Exhibit 1, Memorandum from Thomas D. McMahan to Ray Thompson, dated May 25, 1972). However, other than statements by Joe Chevreux himself, there is little public information available regarding historical operations of the Gravel Operation.

In 1963, Placer County established comprehensive zoning for the Meadow Vista area. (Exhibit 1; Exhibit 2, zoning map). A historical zoning map for the Meadow Vista area indicates that the Gravel Operation was zoned "Industrial" in the area of the processing facility and "Recreation & Forestry" in surrounding areas. (Exhibit 2).

In 1965, Edward Pruss obtained a conditional use permit ("CUP"), LD-1030, from the County to commence a surface mining and processing operation on APNs 72-020-01 and 72-030-01 (the "Quarry"), which include approximately 140 acres located on (i) the western half of the southwestern quarter of Section 30, and (ii) the western half of the northwestern quarter of Section 31. (Exhibit 3, LD-1030). The County records for LD-1030, including the minutes of the public hearing by the Zoning Administrator, give no indication that surface mining activities had occurred at the Quarry prior to the issuance of LD-1030. Moreover, there is no indication that Mr. Pruss' surface mining activities authorized by LD-1030 were a component of Chevreux's Gravel Operation. (Exhibit 3).

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Chevreaux acquired the Quarry sometime after 1965. As CUPs run with the land, all rights and obligations under LD-1030 transferred to Chevreaux upon the acquisition of the Quarry.

In 1971, Chevreaux sought and obtained a CUP (LDA-691) to “reinstall” an asphalt batch plant (“Asphalt Plant”) at the Gravel Operation. (Exhibit 4, letter from Richard Heikka to Joe Chevreaux dated April 14, 1971). Although there was apparently some initial question whether a CUP was necessary in light of alleged prior operations of an Asphalt Plant at the Gravel Operation, the County ultimately determined that a CUP was necessary.¹ (Exhibit 5, letter from Joe Chevreaux to Richard Heikka dated April 21, 1971 and Exhibit 6, letter from Richard Heikka to Joe Chevreaux dated April 30, 1971).

In 1972, Chevreaux obtained a CUP (LDA-786) that purported to authorize the permanent relocation of the Asphalt Plant from the Gravel Operation to the Quarry on APN 72-030-01. (Exhibit 7, LDA-786). There is no direct evidence that the Asphalt Plant ever operated and, if so, operated at the location authorized by LDA-786. Representatives of Chevreaux have asserted that the Asphalt Plant was operated on an “intermitted basis” since approval in 1972. No direct evidence has been produced to support such “intermitted” operations.

In 1976, the State of California enacted the Surface Mining and Reclamation Act, Public Resources Code section 2710 et seq. (“SMARA”). SMARA required operators of all active surface mining operations in the state to obtain lead-agency approval of reclamation plans. A reclamation plan, in short, is a document that describes how property that is disturbed by surface mining operations will be restored to a safe and environmentally sound condition after the termination of mining activities. By 1984 the County had adopted a SMARA ordinance and was requesting that Chevreaux submit a reclamation plan for its mining operation. (Exhibit 8, letter from County to Joe Chevreaux dated February 4, 1983).

In 1985, the County Counsel’s Office issued an opinion (Opinion No. 85-07) regarding whether Chevreaux maintained a vested right to conduct surface mining operations under SMARA.² (Exhibit 9, Opinion No. 85-07 dated June 14, 1985). The County Counsel’s Office concluded that Chevreaux had obtained a vested right under SMARA and that the vested right

¹ The County’s file for LDA-691 is missing.

² SMARA requires that all active surface mining operations in the state to obtain use permits, unless surface mining operations commenced before January 1, 1976 either under authority of a CUP or nonconforming use. Pub. Resources Code §2776. As Chevreaux never obtained a CUP for the Gravel Operation, it is possible that Chevreaux sought an opinion from County Counsel that no CUP was necessary for the Gravel Operation. This is, of course, conjecture on our part as we have not found any historical documents that explain the specific reason why County Counsel was prompted to issue Opinion No. 85-07.

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extended to “the entire holdings of Chevreaux, whether by ownership or lease.” (Exhibit 9, p. 3). It is somewhat unclear whether Opinion No. 85-07 was intended to address solely the Gravel Operation (for which no CUP appears to have been issued) or both the Gravel Operation and the Quarry (for which a CUP was issued in 1965).

The County approved a reclamation plan for Chevreaux’s two disparate surface mining operations through the CUP approval process (CUP 853). “Part A” of the reclamation plan addressed the Gravel Operation and “Part B” addressed the Quarry. Neither Part A nor Part B described – either in the text or in site plans – an existing Asphalt Plant. Although the reclamation plan included a specific paragraph intended to describe processing activities, no mention of asphalt processing is made:

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

(Exhibit 10, “Information Report for Part B Reclamation Plan Chevreaux Quarry,” p. 7).

In 1987, Chevreaux sought guidance from the County on the issue of whether Chevreaux maintained a valid CUP to operate an Asphalt Plant. (Exhibit 11, letter from Joe Chevreaux to Tom McMahan dated July 28, 1987). The County Planning Director opined that the information he had received to date indicated that a CUP remained valid, stating in relevant part:

In conclusion, based on the information received to date, it is my opinion that LDA-786 remains valid, subject to your continuing to meet all twelve (12) conditions attached to it issuance.

(Exhibit 12, letter from Thomas D. McMahan to Joe Chevreaux dated July 31, 1987).

Although Mr. McMahan’s letter qualifies his opinion as being “based on information received to date,” the letter does not describe the information that served as the basis for this opinion.

In 1988, Chevreaux sought a CUP to operate a portable concrete batch plant (CUP 1199) at the Gravel Operation. Chevreaux submitted a document entitled “Information Submitted With E.I.A.Q. for Joe Chevreaux Batch Plant next to Gravel Plant at Quarry Adjoining Combie Reservoir” dated May 3, 1989. The document plainly establishes that no Asphalt Plant had been established pursuant to LDA 786 as of that date, stating in relevant part:

Mr. Chevreaux has a Use Permit (LDA 786) to place an asphalt plant at the Quarry.

What follows is an estimate of the maximum number of trucks that might be associated with an asphalt plant if one were located at the Quarry in Meadow Vista. It is included to supply the Public Works Department with part of the information they say is needed to evaluate the concrete batch plant proposal.

(Exhibit 13, p. 36).

In 1994, Chevreaux obtained a CUP (CUP 1772) to add a concrete batch plant to the Gravel Operation.

In May 2001, Keiwit Pacific Co. obtained an "Authority to Construct Permit" (AC-01-51) from the Placer County Air Pollution Control District for the operation of an asphalt plant and rock crusher at the Quarry. Both the asphalt plant and rock crusher were shut down by October 2001.

LEGAL ANALYSIS

1. Vested rights and the diminishing asset doctrine.

A "vested right" is a valuable property right that allows a particular property to be free from subsequent changes in zoning laws that could restrict or prohibit the existing use of property. *Stokes v. Board of Permit Appeals* (1997) 52 Cal.App.4th 1348, 1353. A vested right can arise in two different situations: (i) reasonable reliance upon a validly issued CUP, and (ii) a lawful nonconforming use. This distinction is important because differing rights follow based upon whether the vested right is based upon a CUP or nonconforming use. *Id.*

A CUP is a device used by local agencies to administer zoning ordinances. Essentially, the issuance of a CUP authorizes a specific activity on a particular property that the property's zoning designation does not allow as a matter of right. *Essick v. Los Angeles* (1950) 34 Cal.2d 614, 623.

A nonconforming use, by contrast, is not a permit that is issued by the local agency under its zoning authority. It is not a "permit" at all. Instead, the "nonconforming use" – as the name implies – is a specific use of property that does not conform to the current zoning restrictions. *County of San Diego v. McClurken* (1951) 37 Cal.2d 683, 686. The nonconforming use is allowed to continue, without any permit required and in spite of its nonconformity, because the use predates the enactment of the local agency's zoning ordinance that would otherwise require immediate discontinuance of the nonconforming use. *Edmonds v. County of Los Angeles* (1953) 40 Cal.2d 642. As stated by the California Supreme Court, "The rights of users of property as those rights existed at the time of the adoption of a zoning ordinance are well recognized and have always been protected." *Id.* at 651.

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While a CUP is issued by a local agency under that agency's zoning authority, a nonconforming use constitutes a right to be free from application of the zoning authority. Thus, a CUP and a nonconforming use are fundamentally different in nature, which is manifested in several ways. One of these differences between CUP vested rights and nonconforming use vested rights for surface mining operations concerns the geographic scope of the vested right to conduct quarrying activities.

It is well settled that a vested right arising from a CUP cannot grant more rights than are conveyed in the initial CUP. *Santa Monica Pines, Ltd. v. Rent Control Bd.* (1984) 35 Cal.3d 858, 866. Thus, a surface mining operation that is authorized by a CUP is limited in scope to the geographic area permitted in that CUP. Subsequent reliance on that CUP may establish a "vested right" in that CUP, but it will never allow the operator to obtain more rights than originally granted in the CUP itself. In other words, "vested rights" in a CUP can never authorize the surface mining operation to extend beyond the boundaries authorized in the CUP. Any expansion onto adjacent property would require a new CUP or an amendment to the existing CUP.

For nonconforming use vested rights, however, the situation is different. As a nonconforming use is not based on a CUP that will identify a specific geographic area for authorized quarrying operations, a question arose regarding how to identify the boundaries of the authorized quarrying area. The California Supreme Court addressed this question in *Hansen Bros. Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal.4th 533 with the adoption of the "diminishing asset" doctrine³.

Applying the diminishing asset doctrine, the *Hansen Bros.* decision explained that a nonconforming surface mining operation may conduct quarrying activities only to the geographic boundary of the mining property as the property existed at the time the use became nonconforming. *Id.* at 557-58.⁴ This "vested right" is further limited to those areas of the mining

³ The rationale for the diminishing asset doctrine is explained by the Supreme Court of Illinois: "This is not the usual case of a business conducted within buildings, nor is the land held merely as a site or location whereon the enterprise can be conducted indefinitely within existing facilities. In a quarrying business the land itself is a material or resource. It constitutes a diminishing asset and is consumed in the very process of use. . . It is in the very nature of such business that reserve areas be maintained which are left vacant or devoted to incidental uses until they are needed. Obviously it cannot operate over an entire tract at once." *County of Du Page v. Elmherst-Chicago Stone Co.* (1960) 165 N.E.2d 310, 313.

⁴ As the diminishing asset doctrine may allow extraction activities to expand to the boundary of the legal parcel upon which the vested right attached, it is necessary to identify the geographic boundary of the legal parcel at the time that the use became nonconforming and not some later period in time.

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property where, as of the vesting date, the operator “objectively manifested”⁵ an intent to mine in the future. *Id.* at 553. As stated by the Court:

A vested right to quarry or excavate the entire area of a parcel on which the nonconforming use is recognized requires more than the use of a part of the property for that purpose when the zoning law becomes effective, however. In addition there must be evidence that the owner or operator at the time the use became nonconforming had exhibited an intent to extend the use to the entire property owned at that time.

Id. at 555-56.

Moreover, vested rights do not attach to property subsequently acquired by the mining operator after the vesting date. *Id.* at 557-558 (“a lawful nonconforming use may not be extended to adjacent property acquired after the zoning change went into effect except to the extent that the transferors of the property themselves had a vested right to engage in that nonconforming use on the transferred property”).

In summary, vested rights to conduct surface mining operations can arise based on reliance upon a validly issued CUP as well as a nonconforming use. Vested rights based on CUP are limited to the geographic scope of the CUP whereas a nonconforming use may expand to the boundaries of the mining property that existed when the use became nonconforming.

⁵ The *Hansen* court and the cases cited in it suggest various characteristics of a surface mining operation that might establish the requisite intent to quarry additional portions of the property. These characteristics include: (1) the physical nature of the entire parcel and its adaptability to additional mining; (2) whether the mining operation, which is defined broadly to include stockpiling and other non-extractive mining activities, has been continuous; (3) actions taken by the operator evidencing an intent to expand operations, such as entering contracts to provide mined materials; and (4) the location of haul roads and other facilities on the property. *Id.* at 554-57.

2. Chevreaux's right to conduct surface mining operations at the Quarry is based on a CUP and not a nonconforming use.

The available records indicate that APNs 72-020-01 and 72-030-01 were zoned R-F as of 1963. This zoning designation required a CUP in order to conduct surface mining activities. (Exhibit 14, excerpt from 1963 zoning code). Thus, in 1965 Mr. Pruss appropriately sought a CUP (LD-1030) in order to commence surface mining and processing activities at the Quarry.

There is no indication in any County records that the Quarry was used as a surface mining operation prior to 1963 or that Pruss had ever asserted vested rights as a nonconforming use. To the contrary, a declaration by Thomas McMahan, given while he was Planning Director for the County, unequivocally states, "Mineral extraction is being conducted on the aforementioned parcels pursuant to a permit issued to Edward Pruss in 1965 and assumed by Joe Chevreaux in 1971." (Exhibit 15, Declaration of Thomas D. McMahan). Additionally, Mr. Pruss' own application plainly states that he sought to "*open* a shot rock quarry . . ." (Exhibit 3, p.2 [emphasis added]). Finally, our independent investigation of historical aerial photos reveal no evidence of quarrying prior to 1965. (Exhibit 16, 1962 aerial photo of the Quarry).

In short, the right to conduct surface mining activities at the Quarry is based solely upon the issuance of LD-1030.

3. Chevreaux is likely conducting surface mining operations outside of its CUP.

While it is true that vested rights arise from reliance upon a validly issued CUP (*Avco Community Developers, Inc. v. South Coast Regional Commission* (1976) 17 Cal.3d 785, 791), it is also true that the rights that vest are no greater than those specifically granted in the CUP. *Blue Chip Properties v. Permanent Rent Control Board* (1985) 170 Cal.App.3d 648, 659-662. Here, the CUP for the Quarry (LD-1030) authorized quarrying activities in a specific geographic area, which includes (i) the western half of the southwestern quarter of Section 30, and (ii) the western half of the northwestern quarter of Section 31. (See Exhibit 3). The permitted area totals 140 areas and represents the geographic boundary to Chevreaux's quarrying operations. Operating outside of the boundaries of the CUP is grounds for revocation or modification of the CUP. See *Malibu Mountains Recreation, Inc. v. County of Los Angeles* (1998) 67 Cal. App. 4th 359, 367 (revocation of CUP proper for violation of condition); *Hartland Sportsman's Club v. Town of Delafield* (1993) 827 F. Supp. 562 (modification of CUP based on violation of conditions).

Although a definitive survey has not been completed, our investigation indicates that Chevreaux's quarrying activities have already extended well beyond the eastern border of the area permitted by LD-1030. (Exhibit 17, 1999 aerial photograph overlaid with approximate boundary lines for LD-1030). Assuming this is confirmed through a field survey, Chevreaux

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would be conducting surface mining operations on property without the necessary land use entitlement either in the form of a CUP or a lawful nonconforming use.

Chevreaux may respond to this conclusion by reference to County Counsel's Opinion No. 85-07, that addressed Chevreaux's vested rights under SMARA (the "Opinion"). (Exhibit 9). The Opinion concluded that Chevreaux did not need to obtain a CUP for quarrying activities on property that extends to "the entire holdings of Chevreaux, whether by ownership or lease." (Exhibit 9, p. 3). Chevreaux will likely argue that its "vested rights" allow it to conduct surface mining activities outside of the boundary of LD-1030. Such reliance would be misplaced.

As explained above, the diminishing asset doctrine only applies to a surface mining operation that operates as a nonconforming use. As there is no available evidence supporting the assertion that the Quarry is a nonconforming use, the diminishing asset doctrine is limited in application to the Gravel Operation. Under the diminishing asset doctrine, vested rights would attach only to property owned and/or operated by Chevreaux on the vesting date⁶, and upon which Chevreaux objectively manifested an intent to mine in the future. The nonconforming use vested rights do not extend to the Quarry (APNs 72-030-01 and 72-020-03) because (i) that property was not a part of Chevreaux's operations at the time the use became nonconforming, and (ii) the Quarry was not being used as a surface mining operation on the vesting date.

The Opinion did not incorporate these critical concepts in its analysis of the geographic area covered by vested rights. Acknowledging that it was a "difficult question," and without the benefit of subsequent clarification by California court, the Opinion incorrectly concluded that all areas under Chevreaux's control – as of June 14, 1985 – were covered by vested rights. We respectfully submit that this analysis is inconsistent with established legal principles.

Alternatively, we note that the Opinion may have been the subject to misinterpretation. The geographic scope of the Opinion was identified as "the mineral extraction operation of the Joe Chevreaux Company in Lake Combie and adjacent to the Bear River." (Exhibit 9). This description could reasonably be construed as applying only to the Gravel Operation (that or may not be a nonconforming use) and not to the Quarry (that is based on a CUP). Moreover, such interpretation would make the Opinion more closely follow established precedents discussed above regarding the geographic scope of vested rights based on CUP versus nonconforming use.

In summary, Chevreaux's present underlying land use entitlement for conducting surface mining operations at the Quarry is based on LD-1030, which provides a defined geographic area for such activities. It appears that Chevreaux's operations are in violation of LD-1030 as quarrying is occurring outside of the CUP boundary. Substantial modifications to this entitlement cannot be effected either by an internal County memorandum or approval of a

⁶ Our research indicates that the vesting date is 1963 at the latest.

reclamation plan⁷. Surface mining operations may be conducted outside of LD-1030 only upon the issuance of a new CUP or a modification of LD-1030.

4. The Quarry's present production volume was never authorized by the County.

The available public records make clear that the County never anticipated – and thus never approved – a surface mining operation at the Quarry on the scale of Chevreaux's present operation.

At the public hearing on LD-1030, the Zoning Administrator asked Mr. Pruss to describe the scope of the intended quarrying operation. According to the minutes of that public hearing:

Mr. Heikka asked for a brief description, for the record, of the proposed development.

Mr. Pruss stated that the entire rock crusher set up would be a stationary one. He would be using the particular road to the County Dump known as Combie Road. He said that there will be a shooting process. For the first year about three (3) to six (6) shots put off and in the future there will normally be one (1) shot a year put off. Everything will be electrically operated except the loader and power equipment.

...

Mr. Heikka asked what would be the estimated number of trips per day for trucking into and out of the facility.

Mr. Pruss stated that this was pretty hard to answer. The operation would be starting out slow. Actually, this business never really stabilizes. They take the material out as it is used and there will be times when this will be accelerated for a few days then drop back to normal. He added that he did not expect more than 20 truck loads per day.

(Exhibit 3, pp. 5-7).

It is undisputed that these representations by Mr. Pruss were not memorialized as express conditions in LD-1030. One could argue that the absence of an express condition regarding production volume (or truck trips) renders Mr. Pruss' statements meaningless, or at least without any legal force or effect. We submit that the opposite is true, i.e. that no express conditions were

⁷ The geographic scope of the Quarry's reclamation plan is irrelevant to the issue of the underlying CUP as the two are completely separate entitlements and serve different functions. On the distinction, and occasional confusion, between a reclamation plan and underlying land use entitlement see *City of Ukiah v. County of Mendocino* (1987) 196 Cal.App.3d 47.

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necessary because Mr. Pruss' representations at the public hearing constitute implied conditions in the CUP and estoppel.

Case law is instructive on this issue. See *Garavatti v. Fairfax Planning Commission* (1971) 22 Cal.3d 145. In *Garavatti*, the court upheld a City's modification of a CUP based on the permittee's violation of an implied condition in the CUP. The court of appeal described the relevant facts:

On July 27, 1967 appellants applied for a special use permit for the construction and operation of a food store upon their property. They represented in their application that the store would be open from 7 a.m. to 11 p.m. On September 11, 1967, the city council granted the application upon the representation made by appellants.

Pursuant to the special use permit issued, appellants constructed a food market upon said property and operated the same according to the *implied condition of the permit* between 7 a.m. and 11 p.m. Commencing November 1968, however, appellants unilaterally changed the schedule, keeping their store open 24 hours a day.

Id. at 147 (emphasis added).

As a result of the permittee's violation of the implied condition, the city "amended appellants' use permit requiring them to close their business operation between 11 p.m. and 7 a.m." *Id.* Both the trial court and the appeals court upheld the CUP modification. *Id.* at 151.

Consistent with *Garavatti*, at least one California trial court imposed production limitations on a surface mining operation in the absence of any such limit on the face of the CUP. *Clark v. County of Monterey* (2001) Super. Ct. Monterey County, No. M46377 (Exhibit 18). In *Clark*, the Environmental Impact Report ("EIR") for the surface mining CUP included estimates of quarry production. The court held that the estimates of quarry production found in the EIR should constitute an implied condition in the CUP itself.⁸

Analogous to *Garavatti* and *Clark*, the applicant for LD-1030 made specific representations regarding the production volume for the surface mining operation that would be authorized by LD-1030. Moreover, these representations were made at a public hearing in response to specific questions from the Zoning Administrator that were asked "for the record." These representations by Mr. Pruss likely constitute implied conditions in LD-1030. It is

⁸ While this trial court decision does not provide any binding legal precedent for subsequent cases, (*Schmier v. Supreme Court* (2000) 78 Cal.App.4th 703, 710), it provides some guidance on how future courts may address this issue.

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therefore appropriate for the County to commence a public hearing to determine the geographic and operational scope of Chevreaux's rights based on LD-1030 as well as whether the scope of these rights have been exceeded.

5. It is unknown whether the CUP for the Asphalt Plant was exercised.

Both LDA 691 and LDA-786 were issued subject to the following condition:

Lapse of Time: Unless otherwise specifically provided by the granting authority at the time of issuance of the permit or variance, all permits and variances granted for an indefinite term which have not been utilized by engaging in the activity or use authorized thereby within one (1) year after the date of issuance shall expire by operation of law.

(Exhibit 19, Zoning Ordinance [1968 version] §11.60(a)(1)).

As LDA-786 was issued on May 25, 1972, the County Code requires that the authorized use, i.e. the placement and operation of an Asphalt Plant at the designated site, must have been exercised by May 24, 1973. Yet there is no direct evidence of this.

In 1987, then Planning Director Thomas McMahan sent a letter to Chevreaux stating in relevant part, "[B]ased on the information I have, you have complied with all of the conditions and exercised LDA-786." (Exhibit 12). Mr. McMahan's letter did not describe the information that supported his finding. Our research does not reveal any direct evidence supporting this finding. To the contrary, the available public documents run contrary to such assertion.

In 1985, the County approved a reclamation plan for the Quarry. Part "B" of the reclamation plan covered the area where the Asphalt Plant would be located pursuant to LDA-786. Although the reclamation plan included a specific section intended to describe processing activities, no mention of an Asphalt Plant or asphalt processing is made:

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

(Exhibit 10, p. 7).

In 1988, Chevreaux submitted a document entitled "Information Submitted With E.I.A.Q. for Joe Chevreaux Batch Plant next to Gravel Plant at Quarry Adjoining Combie Reservoir" dated May 3, 1989. The document unequivocally states that no Asphalt Plant had yet been established pursuant to LDA 786:

Mr. Chevreux has a Use Permit (LDA 786) to place an asphalt plant at the Quarry.

What follows is an estimate of the maximum number of trucks that *might be associated with an asphalt plant if one were located at the Quarry* in Meadow Vista. It is included to supply the Public Works Department with part of the information they say is needed to evaluate the concrete batch plant proposal.

(Exhibit 13, p. 36 [emphasis added]).

In short, public documents prepared on behalf of Chevreux both before and after Mr. McMahan's 1987 letter provide strong evidence that LDA-786 had not been exercised. Additionally, it appears that the County has never engaged in a thorough factual inquiry on this issue. Thus, it appears appropriate to raise this question in revocation proceedings and require Chevreux to produce evidence establishing its asphalt operations from May 1972 to May 1973. It would appear particularly appropriate to initiate these proceedings in the near future while it is undisputed that there is no Asphalt Plant presently operated or even located at the Quarry.

6. Even if exercised, LDA-786 lapsed due to nonuse.

It is well established that a vested right may be voluntarily abandoned. *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal. 3d 785, 798. Consistent with this principle, many city and county zoning ordinances provide for abandonment of vested rights based on periods of nonuse. *Hansen Bros., supra*, 12 Cal.4th 533. The Placer County Zoning Code is in accord, and includes a provision that provides for the termination of a CUP based on a period of nonuse. Zoning Code § 17.58.160(B)(2). This provision provides in relevant part:

Lapse of Permit After Implementation. Once a project has been implemented as set forth in Section 17.58.140(E), the permit that authorized the use shall remain valid and in force and shall run with the land, including any conditions of approval adopted with the permit, unless one of the following occurs:

...

b. *After a use has been established and/or operated as approved*, the use (if no appurtenant structure is required for its operation) is *discontinued for more than twelve consecutive months*, or (if an appurtenant structure is required for the conditionally-permitted use) *the structure is removed from the site for more than twelve consecutive months*. If a structure associated with the operation of a conditionally permitted use is issued a certificate of occupancy and all other conditions of approval of the conditional use permit are satisfactorily completed, the entitlement remains in effect even if the structure is vacant for more than twelve consecutive months; however, no use may be reestablished in the structure

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and/or on the site unless the use is determined by the planning director to be substantially the same as the original conditionally permitted use.
c. The time limit set for the duration of the use by a condition of approval expires.

Zoning Code § 17.58.160(B)(2) (emphasis added).

Thus, the current Zoning Code provides that a CUP will expire if the authorized use is discontinued for a period of twelve consecutive months. This discontinuance provision expressly applies in cases where vested rights have already attached. *Id.*

There appears to be ample evidence of lapse. Our independent investigation supports the conclusion that LDA-786 lapsed due to nonuse. Historical aerial photographs of the Quarry were obtained for two consecutive years, 1998 and 1999. (Exhibit 20, 1998 aerial photograph; Exhibit 21, 1999 aerial photograph). Neither of these photographs reveals the existence of the Asphalt Plant at the Quarry. The nonuse revealed in these two photos alone demonstrates the requisite 12-month period to establish lapse under the County Code.

Moreover, Chevreaux's own legal counsel failed to identify any specific asphalt projects that occurred at the Quarry, stating in relevant part:

What kind of activities took place between 1987 and 2001, when the permit was issued for the Kiewit Pacific facility? Again, was there any nighttime production? What was the volume of material produced?

The Morrison/Knudsen job, which began in 1980 and continued until 1985, was the next major I-80 overhaul and involved substantial amounts of concrete as well as asphalt.

...

Occasionally, Chevreaux continued to produce asphalt from the plant from 1990 to 2001. Please keep in mind that asphalt can only be produced during relatively warm weather; therefore, at most, the plant was operational for six months a year.

Following the Morrison/Knudsen job, the next major Interstate 80 overhaul occurred in 2001 and lasted until 2002 with the Kiewit Pacific job.

(Memorandum from Brigit Barnes to Placer County Counsel dated March 9, 2005).

SOLURI & EMRICK LLP

September 16, 2005

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In sum, LDA-786 lapsed due to nonuse. We respectfully request the County to also consider this issue of lapse at the same administrative proceeding wherein it considers the failure to exercise LDA-786.

CONCLUSION

We hope that this analysis assists your efforts to address issues raised by Chevreaux's current and proposed future operations. We are very interested in meeting with you to discuss our findings and welcome any additional information you might have on any of the issues we have raised in this letter.

Very Truly Yours,

SOLURI & EMRICK LLP

By: 
Patrick M. Soluri

Enclosures