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EXEMPT FROM FILING FEES  
PURSUANT TO GOVERNMENT  
CODE SECTION 6103

9 SUPERIOR COURT OF CALIFORNIA  
10 COUNTY OF PLACER

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

Case No. SCV 22244

13 Petitioner/Plaintiff,

RESPONDENTS' OPPOSITION BRIEF

14 vs.

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

18 Respondents/Defendants,  
19 \_\_\_\_\_ /

20 CHEVREAUX AGGREGATES, INC.; and  
21 DOES 11 through 100,

22 Real Party in Interest and Defendant.  
23 \_\_\_\_\_ /

24 **I. INTRODUCTION.**

25 Respondents County of Placer and the Placer County Board of Supervisors submit this  
26 Opposition Brief. Petitioners Meadow Vista Protection ("Petitioners") challenge a determination by  
27 the Placer County Planning Director that a conditional use permit issued in 1972 which allows asphalt  
28 processing remains valid and that asphalt processing remains a currently legally permitted use. The  
well reasoned and supported determination by the Planning Director was later upheld by both the  
Planning Commission and the Board of Supervisors. It should also be upheld in this proceeding.

1           Petitioners curiously go to great efforts to attack a proposal for an expanded asphalt use which  
2 was withdrawn 4 years ago. There currently is no actual or proposed asphalt processing use on the site.

3           Petitioners also contend, notwithstanding the Planning Director’s finding of a permitted use,  
4 that the asphalt processing use on the site is prohibited by the Zoning Code. Again, Petitioners are  
5 wrong: asphalt production is a currently permitted use. Even if asphalt processing is prohibited in the  
6 applicable zoning district, Chevreux’s use is a continuing legal non-conforming use. In addition,  
7 Petitioners failed to exhaust their administrative remedies on this issue by failing to raise it before the  
8 Board of Supervisors.

9           Petitioners also ask the Court to compel the County to revoke Chevreux’s conditional use  
10 permit as non-conforming and require a new permit. These actions are clearly discretionary. As this  
11 Court already ruled, however, in a companion action, the courts cannot compel the exercise of  
12 discretion by the County. Furthermore, there is no reason for the Court to conclude that the County  
13 would not respond appropriately to a future proposed expansion or change in the asphalt use.

14           Finally, Petitioners repeat each of their meritless claims in the form of a cause of action for  
15 declaratory relief. Petitioners claims have no merit regardless of whether they are labeled as mandamus  
16 writs or requests for declaratory relief. In addition, the requisite actual or present controversy for  
17 declaratory relief does not exist.

18           Petitioners’ Petition For Writ of Mandate and Complaint For Declaratory Relief should be  
19 rejected in its entirety. Respondent County of Placer requests that the Court enter judgment in favor  
20 of the County on each of Petitioners’ causes of action.

21 **II. STATEMENT OF FACTS.**

22           Portable asphalt plants have been operated at Chevreux Aggregates’ Meadow Vista gravel  
23 plant-quarry on an intermittent, as needed basis since 1947. (86 AR 189; 140 AR 298; 664 AR 2586-  
24 2595)

25           On April 23, 1965, the County issued Special Permit for Land Development No. LD-1030  
26 (“LD-1030”) to Edward Pruss. (72 AR 151) LD-1030 permitted the development and operation of a  
27 quarry for shot rock extraction and a crushing, screening, and washing plant for grading materials on  
28 property located near Meadow Vista California. (623 AR 2478; 76 AR 155)

1 In 1970, Chevreux Aggregates purchased the subject property, and all rights and obligations  
2 associated with LD-1030 were transferred to Chevreux Aggregates upon acquisition. (623 AR 2478)  
3 Chevreux Aggregates continued intermittent asphalt processing operations at the Meadow Vista  
4 quarry. (623 AR 2477; 664 AR 2593)

5 In 1971, Chevreux Aggregates, upon the recommendation of Placer County Counsel and  
6 Planning Director, applied for and received Conditional Use Permit (“CUP”) No. LDA-691 (“LDA-  
7 691”). (86 AR 189) The purpose of LDA-691 was to establish a permanent location for an asphalt  
8 plant at the Meadow Vista quarry, in order to insure “Chevreux Aggregates’ right to move portable  
9 asphalt plants in and out [of the quarry] as needed.” (86 AR 189)

10 In 1972, Chevreux Aggregates contacted Placer County regarding relocating the portable  
11 asphalt plant from the location previously permitted by LDA-691. (623 AR 2788) The County  
12 responded that as long as the relocation site was within the two parcels subject to LDA-691, such  
13 relocation would be permitted without the approval of a new conditional use permit. However, if  
14 Chevreux Aggregates wanted to relocate the asphalt plant to the former Pruss property a new public  
15 hearing and CUP would be required to extend the asphalt plant privileges to LD-1030. (623 AR 2778)

16 Chevreux Aggregates submitted to the Placer County Zoning Administrator an application to  
17 relocate the portable asphalt plant to a more suitable location approximately 600 feet northeast on the  
18 former Pruss property. (133 AR 291) “The main reasons cited for relocating the plant were to limit  
19 pollution of the Combie reservoir, and so that the plant’s operation would not adversely affect views  
20 of the reservoir.” (623 AR 2778)

21 Shortly thereafter, Chevreux Aggregates obtained Conditional Use Permit No. LDA-786  
22 (“LDA 786”), which authorized the relocation of the portable asphalt plant from its former location  
23 approximately 600 feet northeast on the former Pruss property. (80 AR 165)

24 LDA-786 states as conditions of approval that the new site is to be a permanent location for an  
25 asphalt batch plant, and that each operation at the site must be approved by the local Air Pollution  
26 Control District and Central Valley Water Quality Control Board prior to commencement of any such  
27 operations. (81 AR 166)

28 From 1972 to 1976 Chevreux Aggregates conducted intermittent asphalt processing at the

1 Meadow Vista site. (623 AR 2477) These operations included Interstate 80, Highway 20, highway  
2 49, and several other private re-pavement contracts. During the late 1970's asphalt processing was  
3 conducted at the Meadow Vista site as part of the Foresthill Road re-pavement project. (664 AR 2593-  
4 2594.)

5 From 1980 to 1985 Chevreaux Aggregates processed asphalt at the Meadow Vista site as part  
6 of the Morrison/Knudsen Interstate 80 re-pavement project. (712 AR 2712) In 1988, Chevreaux  
7 Aggregates resumed work on the Morrison/Knudsen project which involved substantial amounts of  
8 concrete and asphalt. (623 AR 2477; 712 AR 2712; 664 AR 2594-2595) From 1988 to 1990 over  
9 13706 truck loads of asphalt were processed at the Meadow Vista site. (712 AR 2712) After the  
10 completion of the Morrison/Knudsen project in 1990, Chevreaux Aggregates continued to  
11 intermittently process asphalt at the Meadow Vista site from 1991 to 2001. (712 AR 2712)

12 On April 25, 2001, a third party contractor, Kiewit Pacific Co. ("Kiewit"), submitted Authority  
13 to Construct and Permit to Operate Application No. AC-01-51 to the Placer County Air Pollution  
14 Control District, in order to assemble and operate a portable asphalt processing plant at the Meadow  
15 Vista site. (350 AR 1538) On May 29, 2001, Kiewit received Authority and to Construct and Permit  
16 to operate No. AC-01-51 ("AC-01-51") (12 AR 15), which permitted authorized the installation of a  
17 portable asphalt plant, and the production of 110,00 tons of asphalt per calendar quarter at the Meadow  
18 Vista site. (354 AR 1556) Kiewit ceased its operation of the portable asphalt plant permitted by AC-  
19 01-51 on September 21, 2001. (12 AR 15)

20 On October 4, 2004, Chevreaux Aggregates submitted Authority to Construct and Permit to  
21 Operate Application NO. AC-04-66 to the Placer County Air Pollution Control District, in order to  
22 assemble and operate a portable asphalt processing plant at the Meadow Vista site. (353 AR 1555)  
23 On June 16, 2004 Chevreaux Aggregates received Authority to Construct / Temporary Permit to  
24 Operate No. AC-04-66 ("AC-04-66") ( 360 AR 1564), which authorized the installation of a portable  
25 asphalt plant, and the production of 52,000 tons of asphalt per calendar quarter at the Meadow Vista  
26 site. (361 AR 1565-1568) Chevreaux Aggregates did not construct or operate the portable asphalt  
27 plant that was permitted under AC-04-66 per Placer County Air Pollution Control District instructions.  
28 (109 AR 245; 377 AR 1610).

1 In January 2005, Teichert Aggregates, Inc. (“Teichert”) submitted an Authority to Construct  
2 and Permit to Operate Application to the Placer County Air Pollution Control District, in order to  
3 assemble and operate a portable asphalt processing plant at the Meadow Vista site. (363 AR 1575; 12  
4 AR 15) The project proposed by this application consisted of the production and transport of  
5 approximately 290,000 tons of asphalt concrete over two consecutive seasons (Petitioner’s Motion to  
6 Augment the Administrative Record (“Petitioner’s Motion to Augment”), Ex. 2. p. 1), and was  
7 intended to supercede the asphalt operation permitted by AC-04-66. (109 AR 245) The anticipated  
8 hours of operation of the plant would be from 7:00 p.m. to 5:30 a.m. Sunday night through Thursday  
9 night. This proposed operation included truck traffic between the hours of 7:00 p.m. to 5:30 a.m.  
10 Sunday night through Thursday night. (Petitioner’s Motion to Augment, Ex. 2. p. 2)

11 On February 25, 2005, Placer County Counsel, Anthony La Bouff wrote a memorandum to the  
12 then Placer County Planning Director, Fred Yeager regarding Teichert’s proposed project, which  
13 expressed concerns over the proposed project’s compliance with LDA-786. (732 AR 2773-2779) On  
14 March 22, 2005, Mr. La Bouff wrote a letter to Chevreaux Aggregates’ attorney, Brigit Barnes  
15 regarding Teichert’s proposed project, which expressed concerns over the proposed project’s  
16 compliance with LDA-786. (700 AR 2687-2689) Teichert withdrew it’s application on March 23,  
17 2005. (421 AR 1758)

18 On March 15, 2006, Chevreaux Aggregates submitted Authority to Construct and Permit to  
19 Operate Application NO. AC-06-31 to the Placer County Air Pollution Control District, in order to  
20 assemble and operate a portable asphalt processing plant at the Meadow Vista site. (346 AR 1530)  
21 On April 17, 2006, Chevreaux Aggregates received Authority to Construct / Temporary Permit to  
22 Operate No. AC-04-66 (“AC-06-31”), which authorized the installation of a portable asphalt plant, and  
23 the production of 48,000 tons of asphalt per calendar quarter at the Meadow Vista site. (377 AR 1610-  
24 1611) AC-06-31 explicitly states that “This Authority to Construct replaces and cancels AC-04-66.”  
25 (377 AR 1611) However, Chevreaux Aggregates did not propose any use or project related to AC-06-  
26 31. (162 AR 522:15-17)

27 On July 12, 2006 Petitioner filed a Petition for Writ of Mandate and Complaint for Declaratory  
28 Relief against Chevreaux Aggregates; the County of Placer, and the County of Placer Planning

1 Department (*Meadow Vista Protection v. Chevreaux Aggregates, et al*; Placer County Superior Court  
2 Case No. SCV 19614). (395 AR 1674-1688) Petitioner’s First Cause of Action claimed that the  
3 County of Placer and the Placer County Planning Department (“the County”) had failed to enforce the  
4 terms of LD-1030 and LDA-786 in violation of Placer County Code §17.62.120. (395 AR 1681) On  
5 October 10, 2006, the Court granted the County’s demurrer to Petitioner’s First Cause of Action with  
6 leave to amend. (426 AR 1802-1806) This ruling was based on the Court’s finding that the County’s  
7 specific enforcement authority under Placer County Code section 17.62.120 was discretionary, and  
8 therefore not enforceable through a mandamus action. (426 AR 1803) Petitioner failed to amend their  
9 First Cause of Action after the demurrer was granted and judgment was entered in favor of the County.

10 On February 28, 2007, Chevreaux’s counsel requested that the Placer County Planning Director  
11 make a determination that LDA-786 had not lapsed under Placer County Code §17.58.160 (B)(2)(b).  
12 (24 AR 34-37) On May 18, 2007, the Planning Director provided a determination that LDA-786 was  
13 an intermittent use that had not lapsed under Placer County Code §17.58.160 (B)(2)(b). (1 AR 1-3)

14 On May 25, 2007 Richard Goodwin appealed the Planning Director’s Determination to the  
15 Placer County Planning Commission. (234 AR 881) Mr. Goodwin challenged the Planning Director’s  
16 Determination that LDA-786 remained valid. (217 AR 748-749) On July 12, 2007, the Planning  
17 Commission held a special hearing at which Mr. Goodwin’s appeal was heard, and the Planning  
18 Director’s Determination was upheld. (162 AR 579-580)

19 On July 20, 2007, Mr. Goodwin appealed the Planning Commission’s affirmation of the  
20 Planning Director’s Determination that LDA-786 was an intermittent use that had not lapsed to the  
21 Placer County Board of Supervisors. (488 AR 1991) That appeal was brought on the same grounds  
22 that were asserted in Mr. Goodwin’s appeal to the Planning Commission. (489 AR 1992-1993; 217  
23 AR 748-749) On November 7, 2007, the Board of Supervisors held a hearing at which Mr. Goodwin’s  
24 appeal was heard, and the Planning Commission’s affirmation of the Planning Director’s determination  
25 was upheld. (288 AR 1286-1289)

26 In the meantime, on October 24, 2007, Chevreaux Aggregates received Permit to Operate No.  
27 CHMV-07-01 from the Placer County Air Pollution Control District, which authorized the installation  
28 of a portable asphalt plant, and the production of 48,000 tons of asphalt per calendar quarter at the

1 Meadow Vista site permitted by LDA-786. (375 AR 1598-1599) However, there is no proposed  
2 asphalt processing use at this time. (162 AR 522:15-17)

3 On January 9, 2008, Petitioner filed a Petition for Writ of Mandate and Complaint for  
4 Declaratory Relief against Chevreux Aggregates, the County of Placer, and the Placer County Board  
5 of Supervisors (*Meadow Vista Protection v. Chevreux Aggregates, et al*; Placer County Superior  
6 Court Case No. SCV 22244).

7 **III. STANDARD OF REVIEW.**

8 Petitioners incorrectly state that the standard of review applied to matters involving  
9 construction of state law, also applies to the County’s interpretation of its own zoning code. In cases  
10 interpreting state statutes, courts exercise independent judgment without deference to the agency  
11 decision or interpretation.

12 When, however, a question of an agency’s interpretation and application of its own local laws  
13 is raised, courts defer to the agency’s interpretation: “There is a strong policy reason for allowing the  
14 governmental body which passed legislation to be given a chance to interpret or clarify its intention  
15 concerning that legislation. The construction placed on a piece of legislation by the enacting body is  
16 of very persuasive significance. Also, construction of a statute by officials charged with its  
17 administration must be given great weight.” (*City of Walnut Creek v. County of Contra Costa*, 101  
18 Cal. App. 3d 1012, 1021 (1980).) Thus, courts may overturn an agency’s interpretation of its own laws  
19 only if “a reasonable person could not have reached the same conclusion.” (*No Oil, Inc. V. City of Los*  
20 *Angeles*, 196 Cal. App. 3d 223, 243 (1987).)

21 Furthermore, Code of Civil Procedure (CCP) § 1094.5 (c) provides two tests for review of the  
22 evidence in abuse of discretion cases: the independent judgment rule and the substantial evidence rule.  
23 (*City of Walnut Creek v. County of Contra Costa*, 101 Cal. App. 3d 1016, (1980).) Unless a  
24 fundamental right is involved, the substantial evidence test is to be applied. (*City of Carmel-by-the-Sea*  
25 *v. Board of Supervisors* (1977) Cal. App. 3d 84, 91.) Cases involving abuse of discretion charges in  
26 the area of land use regulation do not involve fundamental vested rights. (*Topanga Assn. For a Scenic*  
27 *Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 510.) Thus, the substantial evidence test  
28 applies.

1 Here, the Planning Director’s Determination must be upheld if it is supported by any substantial  
2 evidence. As the California Supreme Court has explained:

3 "In reviewing the evidence... all conflicts must be resolved in favor of the [agency],  
4 and all legitimate and reasonable inferences indulged in to uphold the [determination]  
5 if possible. It is an elementary, but often overlooked principle of law, that when a  
6 [determination] is attacked as being unsupported, the power of the . . . court begins and  
7 ends with a determination as to whether there is any substantial evidence, contradicted  
8 or uncontradicted, which will support the [determination]. When two or more  
9 inferences can be reasonably deduced from the facts, the reviewing court is without  
10 power to substitute its deductions for those of the [agency]." (*Western States Petroleum  
11 Ass’n v. Superior Court*, 9 Cal.4th 559, 571 (1995).)

8 **IV. THE PLANNING DIRECTOR’S DETERMINATION SHOULD BE UPHELD.**

9 Petitioners’ First Cause of Action challenges the determination by the Placer County Planning  
10 Director that the subject conditional use permit (CUP), LDA-786, remained current, valid and had not  
11 lapsed. (Petition For Writ of Mandate (“Petition”) ¶ 23-27.) Petitioners seek a writ of mandate  
12 “ordering the County (1) to set aside its determination that Chevreaux’s asphalt permit has not lapsed  
13 due to non-use pursuant to County Code . . . .” (Petition, p. 9:26-28.) Curiously, Petitioners do not  
14 argue the merits of this claim until near the end of their Opening Brief and then devote only a few  
15 pages to the subject. (Petitioners’ Opening Brief “POB”, 26-29.) As explained below, the Planning  
16 Director’s determination should be upheld.

17 The Placer County Code provides lists of permitted uses within stated zoning categories. In  
18 addition, other uses are allowed with a CUP. (Placer Code § 17.58.130, Respondents’ RJN, p. 46.)  
19 CUP’s are well recognized by the courts as a necessary and proper method to provide flexibility and  
20 alleviate hardship. (See, e.g., *Groch v. City of Berkeley*, 118 Cal.App.3d 518 (1981); *Upton v. Gray*,  
21 269 Cal.App.2d 352 (1969).) The grant of a CUP with reliance and exercise of the entitlements  
22 allowed creates a fundamental vested property right. (See, *Malibu Mountains Recreation, Inc. v.*  
23 *County of Los Angeles*, 67 Cal.App.4th 359, 367 (1998); see also *Bauer v. City of San Diego*, 75  
24 Cal.App.4th 1281, 1294 (1999).)

25 As noted in the Planning Director’s Determination, an original CUP permitting an asphalt batch  
26 plant at the Chevreaux site was issued in 1971, LDA-691. (1 AR 1) The following year, on May 25,  
27 1971, the Zoning Administrator approved LDA-786, a CUP which allowed the asphalt operation  
28 approved under LDA-691 to be moved to an adjacent property. (408 AR 1725; 409 AR 1726; 410 AR

1 1727) LDA-786 included 12 conditions of approval. (410 AR 1727)

2 The historical use of portable asphalt plants onsite is described in a July 28, 1987 letter from  
3 Joe Chevreux to to the Placer County Planning Director:

4 “I have operated or joint venture operated portable asphalt plants at my Gravel Plat-  
5 Quarry location near Meadow Vista *on an intermittent, as needed basis* since 1947.  
6 [ ] However, in 1971 County Council [sic] and Planning Director recommended that  
I apply for a permit for a permanent location for a asphalt plant as this would insure  
[sic] our right *to move portable asphalt plants in and out as needed* . . .

7 I applied for and received permit No. LDA-691 (5-27-1971) and operated at that  
8 location for approximately 1 year.

9 We then decided to move the asphalt plant approximately 600' N. E. of the Lake into  
10 a canyon where it would not be seen and [would be] more efficient. Permit No. LDA-  
11 786 (5-25-72). From this new location we supplied asphalt material to Cal Trans I-80  
12 project from Auburn to Applegate and various other State and County jobs to about  
13 1976.

14 Since 1976 I have not needed a portable asphalt plant as most highway work has been  
15 slow but now Cal Trans is bidding a major project in our area (I-80 Auburn) and  
16 Highway 49 is to be bid in 1988, both will need asphalt concrete.

17 I believe my existing permits are still in effect, however, I would appreciate verification  
18 from your dept. as soon as possible.” (86 AR 189, emphasis added)

19 Thus, the asphalt processing use on site has always been “on an intermittent, as needed basis.”  
20 Portable asphalt plants are moved in and out as needed, depending on the demand for asphalt concrete.  
21 (86 AR 189)

22 The then Planning Director, Thomas McMahan, responded promptly to Mr. Chevreux’s letter  
23 by confirming that LDA-786 remained valid for the intermittent use described by Mr. Chevreux. In  
24 a letter dated July 31, 1987, Planning Director McMahan stated as follows:

25 “This is in response to your letter of July 28th wherein you requested an opinion as to  
26 the validity of your Conditional Use Permit for asphalt plants on the Bear River. By  
27 way of our telephone conversation and your letter, it is my understanding you are most  
28 specifically interested in the validity of LDA-786 issued on May 25, 1972.

I have reviewed this matter personally and also discussed the issue with the County  
Counsel. Based on the information I have, you have complied with all of the conditions  
and exercised LDA-786. In the mean time, this Use Permit has not been revoked, nor  
has the basic zone district changed (the property was zoned R-F in 1972 and is now  
zoned R-F-MR-BX-SP). The basic zone district still permits paving and concrete batch  
plants subject to a Conditional Use Permit.

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 its issuance.* I would recommend, however, that you confer with Noel Bonderson,

1 Air Pollution Control Officer, to determine if more specific air pollution requirements,  
2 particularly those mandated by the State, need to be met.” (411 AR 1729)

3 At the time Of Mr. McMahan’s determination that the CUP remained valid, asphalt processing  
4 had not occurred on site in approximately 10 years. Yet, the Planning Director did not hesitate to find  
5 that “LDA-786 remains valid.” (411 AR 1729; 664 AR 2594.) After Mr. McMahan’s determination  
6 that the CUP remained valid, asphalt production continued on an intermittent, as needed basis. (664  
7 AR 2594-2595.)

8 On February 28, 2007, Chevreaux again requested a Planning Director’s determination that  
9 LDA-786 remained valid and had not lapsed. (24 AR 34-37) During the nearly 20 year period  
10 following the July 1987 Planning Director’s determination that LDA-787 remained valid, the  
11 production of asphalt on site remained on an intermittent, as needed basis. (664 AR 2594-2595.)

12 The Planning Director’s Determination was issued on May 18, 2007 (1 AR 1-3) After a review  
13 of the history of the asphalt use on site, as well as LDA-786 and the County Code, Planning Director  
14 Michael Johnson determined that “asphalt operations at the current Meadow Vista/Combie Chevreaux  
15 Aggregates, Inc., facility are a currently legally permitted use.” (1 AR 1-3) After describing the history  
16 surrounding the use, the Planning Director stated his determination as follows:

17 “As detailed above, asphalt activities have been occurring at the subject site at various  
18 times since 1946. The intermittent nature of the operation was repeatedly referenced  
19 in a May 25, 1972 memorandum from then-Planning Director Thomas McMahan to  
20 former District 3 Supervisor Ray Thompson. [29 AR 45] The identification of the  
21 activities of the uses at the subject site, just prior to the approval of LDA-786, reiterates  
22 that the asphalt facility was an intermittent use. As detailed in your letter to me, these  
23 uses, while generally consistent in nature, have been intermittent in duration, depending  
24 upon the need and demand for materials.

25 Under Section 17.58.160(B)(2) of the County Zoning Ordinance, a properly exercised  
26 use may lapse and the use must be discontinued until re-established in accordance with  
27 the applicable requirements. Lapse generally occurs when a use is discontinued for  
28 more than twelve (12) continuous months. *The County has on several occasions since  
the approval of LDA-786 acknowledged that this use of the site would be intermittent  
and Chevreaux’s uses of the site has been consistent with the County’s understanding  
of the use as it was originally permitted. Based upon my review of the public record,  
it is my determination that a use such as this which is approved as intermittent in  
nature cannot lapse under Section 17.58.160(B)(2) simply due to discontinuance for a  
twelve (12) month period. Further, it is my determination that asphalt operations at  
the current Meadow Vista/Combie Chevreaux Aggregates, Inc., facility are a currently  
legally permitted use.*

Please be advised that these determinations do not provide an opportunity for the  
facility to be operated in a manner inconsistent with the conditions of approval set forth

1 in LDA-786. As this continues to be an intermittent use, in the future the facility will  
2 need to be operated in a manner consistent with its previous operations. Accordingly,  
3 the analysis in this letter is based upon past use of the site and does not presuppose  
future activities nor preclude the County from reviewing future activities to determine  
their consistency with LDA-786.” (1 AR 3, emphasis added.)

4 The Placer County Code expressly gives the Planning Director the authority to interpret the  
5 Zoning Code: “The planning director is assigned the responsibility and authority to interpret the  
6 requirements of [the Zoning ] chapter.” (Placer County Code § 17.02.050, Petitioners’ RJN, EX. 1,  
7 p. 4.) Furthermore, “Whenever the planning director determines that the meaning of any of the  
8 requirements of [the Zoning Code] are unclear generally *or as applied to a specific case*, the planning  
9 director may issue an official interpretation.” (Placer Code § 17.02.050(E), Petitioners’ RJN, EX. 1,  
10 p. 5, emphasis added.) Thus, the Planning Director was acting pursuant to his official authority when  
11 he evaluated and interpreted the continued validity of LDA-786, application of the Code’s lapse  
12 provisions and the status of continued asphalt processing on site as a currently legally permitted use.  
13 (1 AR 1-3) That determination was later upheld by both the Planning Commission and the Board of  
14 Supervisors. [162 AR 579-580; 288 AR 1286-1289]

15 Petitioners incorrectly argue that “no deference is owed to” the Planning Director’s  
16 Determination. (POB, p. 11:9.) When local agencies interpret and apply their own land use policies  
17 and regulations, courts may overturn an agency's interpretation of its own laws only if "a reasonable  
18 person *could not have reached the same conclusion.*" (*No Oil, Inc. v. City of Los Angeles*, 196 Cal.  
19 App. 3d 223, 243 (1987), emphasis added.) The Planning Director’s interpretation and application of  
20 the lapse provisions of Placer Code § 17.58.160(B)(2) in this circumstance clearly are not  
21 unreasonable.

22 In addition, the Planning Director’s Determination must be upheld if it is supported by any  
23 substantial evidence. As the California Supreme Court has explained:

24 "In reviewing the evidence... all conflicts must be resolved in favor of the [agency],  
25 and all legitimate and reasonable inferences indulged in to uphold the [determination]  
26 if possible. It is an elementary, but often overlooked principle of law, that when a  
27 [determination] is attacked as being unsupported, the power of the . . . court begins and  
28 ends with a determination as to whether there is any substantial evidence, contradicted  
or uncontradicted, which will support the [determination]. When two or more  
inferences can be reasonably deduced from the facts, the reviewing court is without  
power to substitute its deductions for those of the [agency]." (*Western States Petroleum  
Ass’n v. Superior Court*, 9 Cal.4th 559, 571 (1995).)

1 As explained above and in the Planning Director’s Determination itself, there is ample evidence  
2 in the record which supports the determination here. (1 AR 1-3) Thus, the Planning Director’s  
3 Determination must be upheld by the court. (*Id.*)

4 In *Hansen Brothers Enterprises, Inc. v. Nevada County*, 12 Cal.4th 533 (1996), the California  
5 Supreme Court interpreted whether the right to maintain a non-conforming use had lapsed pursuant  
6 to provisions of the Nevada County Code. The Court discussed the determination of whether a use had  
7 been “discontinued”:

8 “The term ‘discontinued’ in a zoning regulation dealing with a nonconforming use is  
9 sometimes deemed to be synonymous with ‘abandoned.’ Cessation of use alone does  
10 not constitute abandonment. Abandonment of a nonconforming use ordinarily depends  
11 upon a concurrence of two factors: (1) *An intention to abandon*; and (2) an overt act,  
12 or failure to act, *which carries the implication the owner does not claim or retain any  
interest in the right to the nonconforming use* [citations]. *Mere cessation of use does  
not of itself amount to abandonment* although the duration of nonuse may be a factor  
in determining whether the nonconforming use has been abandoned [citations].”  
(*Hansen, supra* 12 Cal.4th at 569, emphasis added.)

13 Here, Chevreaux’s intermittent asphalt production has not manifest an intent to abandon that  
14 intermittent use. The necessary equipment is portable and can moved on and off site as needed. (86  
15 AR 189) The Planning Director’s Determination that LDA-786 was “approved as intermittent in  
16 nature” and that it therefore “cannot lapse under Section 17.58.160(B)(2)” is well supported by  
17 evidence in the record. (1 AR 3)

18 Furthermore, the rights held by Chevreaux to continued use consistent with LDA-786 are not  
19 trivial in nature. Not surprisingly, “the Office of the County Counsel determined as a matter of legal  
20 interpretation that Chevreaux Aggregates, Inc. had a vested right in LDA-786. The law is clear that  
21 once a vested right has been obtained by exercise of the entitlements allowed under the terms of the  
22 permit, that becomes a property right that cannot be revoked or limited without providing the property  
23 owner the safeguards required by due process.” (1 AR 2; 66 AR 125-126) “[W]here a permit or  
24 license has been granted and the successful applicant has thereafter acted upon the grant to his or her  
25 detriment. In such instance, the applicant has acquired a vested right. [Citations.] A CUP creates a  
26 property right which may not be revoked without constitutional rights of due process. [Citations.]  
27 Additionally, a CUP creates a which runs with the land, not to the individual permittee.” (*Malibu  
28 Mountains Recreation, Inc. v. County of Los Angeles*, 67 Cal.App.4th 359, 367 (1998).)

1 Here, the Planning Director’s Determination is based on a reasonable interpretation of LDA-  
2 786 and the County Code, as well as the history of the intermittent asphalt processing use on site. The  
3 determination is supported by substantial evidence and should be upheld.

4 **V. THERE IS NO EXISTING OR PROPOSED ASPHALT PRODUCTION ON SITE.**

5 Petitioners devote much of their argument to challenging what they describe as a proposed new  
6 expanded asphalt production use on site. (See, e.g., POB pp. 23-26.) Petitioners refer repeatedly to  
7 an expansion proposed in 2005 by Teichert Construction. (See, Petitioners’ Motion To Augment, Ex.  
8 2.)<sup>1</sup> What gets lost in Petitioners’ argument is the fact that the proposal was withdrawn 4 years ago.  
9 (421 AR 1758) There is no existing or proposed asphalt production use on the site. As the Planning  
10 Director told the Planning Commission, “There is no expansion proposed. There is no use proposed  
11 at this time.” (162 AR 522:15-17.)

12 There are no grounds upon which Petitioners can challenge a non-existent proposal. Moreover,  
13 there is no relief that can be granted against such a non-existent proposal. Petitioners are shooting the  
14 proverbial dead horse. All of the numerous references in POB to a proposed new or expanded asphalt  
15 processing use should be disregarded by the Court.

16 **VI. ASPHALT PRODUCTION IS NOT PROHIBITED BY THE ZONING.**

17 Petitioners argue that a change in the applicable zoning now acts to bar asphalt processing as  
18 a permitted use. This argument suffers from many fatal flaws. First, it is simply wrong: asphalt  
19 production is a permitted use. Second, even if Petitioners’ reading of the currently allowed uses is  
20 correct, asphalt processing is a protected and legal non-conforming use. Finally, the Court lacks  
21 jurisdiction to hear this claim because Petitioners failed to exhaust their administrative remedies by not  
22 raising the issue before the Board of Supervisors.

23 **A. Asphalt Production On The Site Is Permitted By The Existing Zoning.**

24 The existing zoning on the relevant portion of the site is “RF-BX-SP-MR.” (234 AR 881; 488  
25 AR 1991) This translates into Residential Forest (RF) with a special Mineral Reserve (-MR) combing  
26 district and 20 acres minimum lot size. The permitted uses in the Residential Forest zone are set forth  
27

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28 <sup>1</sup> Respondent does not oppose Petitioners’ Motion To Augment the record to include the two exhibits  
attached to Petitioners’ motion.

1 in Placer County Code § 17.46.010. (Petitioners’ RJN, Ex. 1, p. 52-55.) “The combining districts are  
2 used in combination with the zone districts to address special needs or characteristics of the areas of  
3 Placer County to which they are applied . . .” (Placer County Code § 17.52.010, Petitioners’ RJN, EX.  
4 1, p. 56.) “The purpose of the mineral reserve (-MR) combining district is to identify lands that may  
5 contain valuable mineral resources, protect the opportunity for the extraction and use of such resources  
6 from incompatible land uses, to provide for the extraction of mineral resources and the reclamation of  
7 lands subsequent to such extraction, so as to maintain the economic viability of mining while  
8 minimizing adverse impacts to the environment, public health, safety and welfare.” (Placer Code §  
9 17.52.110, Petitioners’ RJN, EX. 1, p. 57.)

10 If there is a conflict between zone district regulations and combining district regulations, “the  
11 combining district regulations shall control.” (Placer Code § 17.52.010, Petitioners’ RJN, EX. 1, p.  
12 56.) Thus, in the event of a conflict between the Residential Forest zone regulations and the Mineral  
13 Reserve regulations, the Mineral Reserve regulations control. Within the -MR combining district, a  
14 use “shall not be approved unless the granting authority first makes the finding that the proposed use  
15 will not impede or interfere with the establishment or continuation of mineral extraction operations on  
16 the site.” (Placer Code § 17.52.110(B)(1)(a), Petitioners’ RJN, EX. 1, p. 57.)

17 Within the RF zone, the Zoning Code permits “mining, surface and subsurface” uses with a  
18 CUP. (Placer Code §17.46.010, Petitioners’ RJN, EX. 1, p. 53.) Applicable specific standards for  
19 “mining, surface and subsurface” uses are set forth in Code §17.56.270. (Placer Code §17.46.010,  
20 Petitioners’ RJN, EX. 1, p. 53.) Similarly, the -MR combining district regulations state that  
21 “Development standards for surface mining operations shall be determined pursuant to the standards  
22 of Section 17.56.270 (Surface mining and reclamation).” (Placer Code § 17.52.110, Petitioners’ RJN,  
23 Ex. 1, p. 57.)

24 Which takes us to Placer Code § 17.56.270 - Surface mining and reclamation. (Petitioners’  
25 RJN, EX. 1, p. 58-65.) Pursuant to that section, “*The processing of materials mined on-site (e.g.,*  
26 *gravel plants, etc.) and the retail sales of such mined and processed materials from the mine site is*  
27 *permitted by this section, subject to the conditions of the conditional use permit.*” (Placer Code §  
28 17.56.270, Petitioners’ RJN, EX. 1, p. 58, emphasis added.) The materials used to process asphalt are

1 mined on site. That is why portable asphalt processing equipment is brought on and off the site as  
2 needed. (86 AR 189) In addition, LDA-786 is the applicable CUP and it expressly allows asphalt  
3 processing on site. (408 AR 1724-1725; 409 AR 1726; 410 AR 1727) Thus, the processing of asphalt  
4 is permitted on site.

5 Although the applicable zoning is not expressly discussed in the Planning Director's  
6 Determination (1 AR 1-3), finding that the processing of asphalt is a permitted use is certainly  
7 consistent with the Planning Director's conclusion that "asphalt operations at the current Meadow  
8 Vista/Combie Chevreaux Aggregates, Inc., facility are a currently legally permitted use." (1 AR 3)  
9 Petitioners argue that because processing "paving materials" is not specifically listed as a permitted  
10 use in RF zoning regulations, like it is in the Industrial zone regulations (Placer Code § 17.40.010,  
11 Petitioners' RJN, EX. 1, p. 48), processing asphalt is not allowed at the Chevreaux site. (POB, p. 16.)  
12 This narrow analysis conveniently overlooks application of the -MR combining district and the  
13 development standards for surface mining operations (Placer Code § 17.56.270, Petitioners' RJN, EX.  
14 1, p. 58).

15 As noted *supra*, the Placer County Code gives the Planning Director "the responsibility and  
16 authority to interpret" the Zoning Code. (Placer Code § 17.02.050, Petitioners' RJN, EX. 1, p. 4.)  
17 The Planning Director can also determine that uses not listed as specifically permitted are allowable  
18 if the use is consistent with the General Plan, will meet the purpose and intent of the zoning  
19 district and is consistent with surrounding uses. (Placer Code § 17.02.050, Petitioners' RJN, EX. 1,  
20 p. 4-5.) The asphalt processing use also meets the overriding requirement of the -MR combining  
21 district that a use "not impede or interfere with the establishment or continuation of mineral extraction  
22 operations on the site." (Placer Code § 17.52.110(B)(1)(a), Petitioners' RJN, EX. 1, p. 57.) Thus, the  
23 Planning Director was acting well within his authority and discretion when he determined that "asphalt  
24 operations at the current Meadow Vista/Combie Chevreaux Aggregates, Inc., facility are a currently  
25 legally permitted use." (1 AR 3)

26 **B. Asphalt Processing Is A Legal, Pre-existing Non-conforming Use.**

27 Even if the Court were to determine that asphalt processing is not a currently permitted use,  
28 Chevreaux would still be allowed to continue the use as a pre-existing non-conforming use. As

1 defined by the Placer Code, “‘Nonconforming use’ means a use of land that was lawfully established,  
2 but that is not identified as an allowable use by [the Zoning Code] (Allowable land uses and permit  
3 requirements).” (Placer Code § 17.04.030 definition of “Use, Nonconforming, Respondents’ RJN, p.  
4 42-43.)”) The Placer Code allows nonconforming uses to continue in a manner consistent with the  
5 pre-existing use:

6 “Nonconforming Uses of Land. A nonconforming use of land may be continued,  
7 transferred or sold, provided that no such use shall be enlarged or increased, nor be  
8 extended to occupy a greater area than that which it lawfully occupied before becoming  
9 a nonconforming use. Additionally, nonconforming uses shall not be enlarged,  
10 extended expanded nor increased to occupy a larger area, nor a more intensive use than  
11 that which it was characterized by in the prior twelve months.” (Placer Code §  
12 17.60.120(A), Petitioners; RJN, Ex. 1, p. 72.)

13 A nonconforming use includes a vested right to continue the use. “The rights of users of  
14 property as those rights existed at the time of the adoption of a zoning ordinance are well recognized  
15 and have always been protected.” (*Hansen, supra* 12 Cal.4th at 552.) “Accordingly, a provision  
16 which exempts existing nonconforming uses is ordinarily included in zoning ordinances because of  
17 the hardship and doubtful constitutionality of compelling the immediate discontinuance of  
18 nonconforming uses.” (*Id.*) As even Petitioners concede, asphalt processing was an expressly  
19 permitted use at the time LDA-786 was issued. (POB, p. 1:17-20.) Thus, that use, if inconsistent with  
20 the current zoning, may nevertheless continue as a legal nonconforming use.

21 The Placer Code does provide that the right to maintain a nonconforming use may lapse: “If  
22 a nonconforming use of land or a nonconforming use of a conforming building is discontinued for a  
23 continuous period of one year, it shall be presumed that the use has been abandoned.” (Placer Code  
24 § 17.60.120(G).) This harkens back to the discussion *supra* concerning the alleged lapse of LDA-786.  
25 The relevant “use” here is the “intermittent” processing of asphalt on site. (1 AR 1-3; 86 AR 189) The  
26 Planning Director has properly determined that the permitted intermittent use cannot lapse “simply due  
27 to discontinuance for a twelve (12) month period.” (1 AR 3) Similarly, the right to continue the use,  
28 if it is nonconforming, cannot be lost “simply due to discontinuance for a twelve (12) month period.”  
(1 AR 3)

29 “Cessation of use alone does not constitute abandonment.” (*Hansen, supra* 12 Cal.4th at 569.)  
30 There must also be an intent to abandon a nonconforming use. (*Id.*) The record demonstrates that

1 Chevreux has not manifest an intent to abandon the use permitted by LDA-786. Thus, even if  
2 inconsistent with the existing zoning, the asphalt processing use remains “a currently legally permitted  
3 use,” (1 AR 3)

4 **C. Petitioners Have Failed to Exhaust Their Administrative Remedies.**

5 "The requirement of exhaustion of administrative remedy is founded on the theory that the  
6 administrative tribunal is created by law to adjudicate the issue sought to be presented to the court, and  
7 the issue is within its special jurisdiction. If a court allows a suit to go forward prior to a final  
8 administrative determination, it will be interfering with the subject matter of another tribunal.  
9 [Citations.] Consequently, *the requirement of exhaustion is a jurisdictional prerequisite*, not a matter  
10 of judicial discretion. [Citations.]" (*Tahoe Vista Concerned Citizens v. County of Placer, et. al.*, 81  
11 Cal.App.4th 577, 589 (Third District 2000).) “The exhaustion doctrine operates as a defense to  
12 litigation commenced by persons who have been aggrieved by action taken in an administrative  
13 proceeding which has in fact occurred but who have failed to 'exhaust' the remedy available to them  
14 in the course of the proceeding itself.” (*Id.*) Here, Petitioners have failed to properly exhaust their  
15 claim that asphalt processing is prohibited by the existing zoning.

16 As noted above, the Planning Director’s Determination was appealed first to the Planning  
17 Commission and then to the Board of Supervisors. Both bodies upheld the Planning Director’s  
18 Determination. [162 AR 579-580; 288 AR 1286-1289] The Placer County Code limits an appeal  
19 hearing to the specific subject and grounds of the appeal:

20 “After an appeal has been scheduled for consideration by an appellate body, the  
21 appellate body shall conduct a public hearing pursuant to the provisions of Section  
22 17.60.140 (Public hearing). At the hearing (a hearing conducted “over again”), *the*  
23 *appellate body shall initiate a discussion limited to only those issues that are the*  
24 *specific subject of the appeal, and, in addition, the specific grounds for the appeal.* For  
25 example, if the permit for a project approval or denial has been appealed, the entire  
26 project will be the subject of the appeal hearing; however, if a condition of approval  
27 has been appealed, then only that condition and issues directly related to the subject of  
28 that condition will be allowed as part of the discussion by the appellate body.” (Placer  
Code §17.60.110(D)(4)(a), Respondents’ RJN, p. 48.)

26 The Court of Appeal has strictly enforced and interpreted this provision of the Placer County  
27 Code, requiring not just the filing of an appeal, but the presentation at each appeal hearing of all issues

1 to be raised in litigation. (*Tahoe Vista, supra* 81 Cal.App.4th at 591-592.)<sup>2</sup>

2 Here, Petitioners failed to properly raise their current claim that the asphalt processing use is  
3 inconsistent with the current zoning. Mr. Richard Goodwin was the sole appellant who appealed the  
4 Planning Director’s Determination to the Planning Commission and then to the Board of Supervisors.  
5 (217 AR 748-749; 489 AR 1992-1993) Neither of Mr. Goodwin’s appeal letters raise the issue of the  
6 asphalt use being inconsistent with the current zoning. (217 AR 748-749; 489 AR 1992-1993) Thus,  
7 the resulting appeal hearings were “limited to only those issues that are the specific subject of the  
8 appeal, and, in addition, the specific grounds for the appeal.” (Placer Code §17.60.110(D)(4)(a),  
9 Respondents’ RJN, p. 48; *Tahoe Vista, supra* 81 Cal.App.4th at 591-592).)

10 On November 6, 2007, the day prior to the Board of Supervisors’ hearing on the appeal of the  
11 Planning Director’s Determination, Petitioners’ counsel submitted a comment letter to the Board. (378  
12 AR 1615-1620) That letter also did not raise the issue of the asphalt processing use being inconsistent  
13 with the current zoning. (378 AR 1615-1620) In fact, Petitioners’ counsel has submitted a declaration  
14 which confirms that Petitioners failed to exhaust on this issue. As avered by Petitioners’ counsel:

15 “Following the Board’s approval of the Planning Director’s determination on the lapse  
16 issue, I was able to spend more time reviewing the issues involved in this matter.  
17 Subsequently, I sent another letter on November 29, 2007, which *raised additional*  
18 *issues, in particular the question of whether Chevreaux has a legal right to continue*  
19 *asphalt processing at the Meadow Vista site in light of the 1995 zoning change which*  
20 *had outlawed such use.” (Decl. of Michael Graff In Support of Motion to Augument*  
21 *Adminstrative Record and First Request for Judicial Notice, p. 1:14-18, emphasis*  
22 *added.)*<sup>3</sup>

23 Having failed to raise this issue before the Board of Supervisors, Petitioners are barred from  
24 raising it now. Stated differently, Petitioners have failed to meet the “jurisdictional prerequisite” of  
25 exhaustion on this issue. (*Tahoe Vista, supra* 81 Cal.App.4th at 589.) The submittal of a comment

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26 <sup>2</sup> At the time of the *Tahoe Vista* decision, the relevant Placer Code provision was codified as §  
27 25.140(D)(4)(a). (*Tahoe Vista, supra* 81 Cal.App.4th at 592. That section contained language identical  
28 to the current § 17.60.110(D)(4)(a), (Respondents’ RJN, p. 48).

<sup>3</sup> Petitioners ask the Court to take judicial notice of Mr. Graff’s November 29, 2007 letter. The letter  
does not qualify for judicial notice under Evidence Code section 452. Furthermore, having been created  
23 *after* the Board of Supervisors’ action on the appeal, the letter is not properly part of administrative  
24 record. “A fundamental rule of administrative law is that a court’s review is confined to an examination  
25 of the record before the administrative agency at the time it takes the action being challenged.” (*Evans*  
26 *v. City of San Jose*, 128 Cal.App.4th 1123, 1143-1144 (2005) (Comments rejected after they were  
27 submitted six weeks late, after the agency had completed its decision making process.)) Respondents  
28 object to Court considering Mr. Graff’s November 29, 2007 correspondence.

1 letter 23 days following the Board’s action on the appeal is not exhaustion. (*Evans v. City of San Jose*,  
2 128 Cal.App.4th 1123, 1143-1144 (2005) (Comments rejected after they were submitted six weeks  
3 late, after the agency had completed its decision making process.) ) The zoning inconsistency issue  
4 was not presented to the Board of Supervisors and, thus, cannot be presented here. (*Id.*)

5 **VII. THE COURT CANNOT COMPEL THE EXERCISE OF DISCRETION.**

6 Petitioners’ Second Cause of Action (Petition p.6-8, ¶¶ 28-37) alleges failure to regulate  
7 Chevreaux’s asphalt production as a non-conforming use and seeks a writ of mandamus compelling  
8 the County “to prohibit Chevreaux’s asphalt plant and processing activities as a non-conforming use  
9 that has not vested or has been abandoned.” (Petition, p. 10:1-2.) Similarly, Petitioners’ Third Cause  
10 of Action (Petition p. 8, ¶¶) alleges failure to regulate a substantial change in Chevreaux’s asphalt  
11 production and seeks a writ of mandamus compelling the County to prohibit expansion of the asphalt  
12 plant or to require a new permit. (Petition, p. 10:2-6.)

13 As discussed *supra*, neither of these claims has merit. Chevreaux’s asphalt production is, as  
14 the Planning Director properly determined, “a currently legally permitted use.” (1 AR 3) Furthermore,  
15 there is no substantial change to regulate. The prior Teichert proposal attacked by Petitioners was  
16 withdrawn 4 years ago. (421 AR 1758) “There is no expansion proposed. There is no use proposed  
17 at this time.” (162 AR 522:15-17.) Thus, there is no cause to regulate a substantial change.

18 This Court has already ruled that code enforcement such as that sought by Petitioners “is  
19 clearly a discretionary duty,” in a related case known as *Meadow Vista Protection v. Chevreaux*  
20 *Aggregates, County of Placer, County of Placer Planning Department, et al*; Placer County Superior  
21 Court Case No. SCV 19614 (“MVP I”). (426 AR 1803) The result should be no different here. As  
22 explained below, the Court cannot compel the exercise of a discretionary duty.

23 In the Second Cause of Action, Petitioners ask the Court to order the County to determine that  
24 the asphalt use on site is non-conforming and to “prohibit” such use. (Petition, p. 10:1-2.) In the Third  
25 Cause of Action Petitioners ask the Court to order the County to “prohibit the unlawful expansion”  
26 of the asphalt plant or, “in the alternative, to require Chevreaux to apply for and obtain a new . .  
27 permit.” As discussed extensively above, Chevreaux has a valid and existing CUP. The relief  
28 Petitioners request would thus first require revocation of that permit. (66 AR 125-126) “A CUP

1 creates a property right which may not be revoked without constitutional rights of due process.”  
2 (*Malibu Mountains Recreation, Inc., supra*, 67 Cal.App.4th at 367.)

3 The process for permit revocation is set forth in the Placer County Code §17.62.170.  
4 (Respondents’ RJN, p. 52.) That is precisely the Code section that this Court has already ruled creates  
5 a discretionary duty: “Section 17.62.170 provides that the code enforcement officer ‘may’ initiate  
6 proceedings. This is clearly a discretionary duty.” (426 AR 1803:12-13.) The result should be no  
7 different this time.

8 It is well settled that mandamus is not available to compel the exercise of discretion by a court,  
9 an administrative agency, or officer thereof. Rather, “[a] writ of mandate may be issued by any court  
10 to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the  
11 law specifically enjoins, as a duty resulting from an office, trust, or station...” (CCP §1085.)  
12 Mandamus will lie to compel action by a public body or official only if there is a clear, present and  
13 ministerial obligation to take the action. (*Sklar v. Franchise Tax Board* (1986) 185 Cal.App.3d 616,  
14 622.)

15 “A ministerial decision involves only the use of fixed standards or objective measurements,  
16 and the public official cannot use personal, subjective judgment in deciding whether or how the project  
17 should be carried out.” (*Mt. Lion Found. v. Fish & Game Com.*, 16 Cal. 4th 105, 117 (1997); see also,  
18 *Lazan v. County of Riverside*, 140 Cal.App.4th 453, 460 (2006).)

19 Placer Code Section 17.62.170 governs permit revocation and provides, in pertinent part:

20 “The code enforcement officer *may* initiate proceedings as provided by this section to  
21 revoke the approval of any land use permit issued pursuant to Articles 17.58 or 17.60  
22 of this Chapter or Chapters 5, 8, 12, 15, 16, 17 or 18 of this code, in any case *where it*  
23 *is determined* that the permit was obtained through misrepresentation, or where a use  
24 of land has been established or is conducted in a manner that violates or fails to comply  
with the provisions of this code or a condition of approval, or where the use of land is  
undertaken in violation of any local, state or federal law which affects the health,  
safety, peace, morals or general welfare of the public.” (Emphasis added,  
(Respondents’ RJN, p. 52.)

25 By its very terms, the duty which Petitioners seek to compel this Court to force upon the  
26 County under Code Section 17.62.170 is discretionary: prior to *choosing* to initiate modification or  
27 revocation proceedings, the County must first determine if the permit was obtained through  
28 misrepresentation, or, in the alternative, if the permittee's use of the land is in violation of the various

1 provisions of the Placer County Code. Thus, there are two levels of discretion: (1) the discretionary  
2 determination of a violation; and (2) the discretionary decision to initiate enforcement proceedings.<sup>4</sup>

3         Petitioners Third Cause of Action cites to Placer Code §17.56.270(D). That provision provides  
4 in pertinent part:

5             “Conditional use permit and reclamation plan approval are required for all surface mining  
6 operations in all zones where surface mining is allowed; and shall be required for the  
7 expansion or substantial change of operation of any surface mine for which such expansion or  
8 changes have not been previously approved.” (Petioners RJN, Ex. 1, p. 59.)

8         Requiring a new permit would necessarily start with the discretionary decision to revoke the  
9 existing permit. (Placer Code § 17.62.170, Respondents’ RJN, p. 52.) Prior to choosing to require the  
10 issuance of a new conditional use permit or reclamation plan, the County must first make the  
11 subjective determination of whether the proposed change in use rises to the level of an expansion or  
12 substantial change of the prior use. Thus, there are two levels of discretion: (1) the discretionary  
13 determination of whether an expansion or substantial change in an existing use has occurred or been  
14 proposed; and (2) whether such an extension or change is of such a nature as to require the issuance  
15 of a new conditional use permit or reclamation plan.

16         Petitioners’ Second and Third Causes of Action should be rejected. Petitioners seek a court  
17 order compelling the County to modify or revoke Chevreaux's Conditional Use Permit, but "mandamus  
18 cannot be applied to control discretion as to a matter lawfully entrusted to a governmental agency."  
19 (*Painting & Drywall Work Preservation Fund, Inc. v. Aubry* (1988) 206 Cal.App.3d 682, 687; see also,  
20 *State of California v. Superior Court* (1974) 12 Cal.3d 237, 247.)

21 **VIII. ANY FUTURE CHANGE OR EXPANSION IN THE ASPHALT USE WILL BE**  
22 **EVALUATED BY THE COUNTY.**

23         There is no reason to conclude that the County would not appropriately respond to an actual  
24 proposed expansion of the permitted asphalt use. As the Planning Director’s Determination noted,  
25 future use must be consistent with LDA-786 and historical past use:

---

26         <sup>4</sup> Section 17.62.170 enumerates the necessary steps for revoking a land permit, including notifying  
27 a permittee of the pending revocation hearing (Placer County Code Section 17.62.170(A)), holding a  
28 revocation hearing (Placer County Code Section 17.62.170(B)) and considering actions to take upon a  
finding of grounds for revocation (Placer County Code Section 17.62.170(C)). The permittee can appeal  
the decision of the hearing body to the Board of Supervisors. (Placer County Code Section  
17.62.170(D), Respondents’ RJN, p. 52.) Obviously, discretion is involved in each of these steps.

1  
2 “Please be advised that these determinations do not provide an opportunity for the  
3 facility to be operated in a manner inconsistent with the conditions of approval set forth  
4 in LDA-786. As this continues to be an intermittent use, *in the future the facility will*  
5 *need to be operated in a manner consistent with its previous operations.* Accordingly,  
6 the analysis in this letter is based upon past use of the site and *does not presuppose*  
7 *future activities nor preclude the County from reviewing future activities* to determine  
8 their consistency with LDA-786.” (1 AR 3, emphasis added.)

9  
10 Thus, the County has expressly stated that a change or expansion of the use would trigger  
11 further review by the County. That is exactly what happened when the Teichert proposal was made  
12 4 years ago. After the Teichert proposal was made, County Counsel prepared a lengthy analysis of the  
13 issues raised by the proposed expansion of the asphalt processing use in a February 25, 2005 memo  
14 to the then Planning Director, Fred Yeager. (422 AR 1760-1766) That analysis concluded as follows:

15  
16 “Based upon the information available for review as of this writing, it would appear  
17 that Chevreux has a vested right in the 1972 CUP in the activities permitted by LDA-  
18 786. *The scope of the proposed operation might exceed that permit. As such, the*  
19 *permit holder is entitled to due process prior to revocation of the permit, including*  
20 *notice of the basis for the revocation and the opportunity for a hearing.*” (422 AR 1765)

21  
22 On March 22, 2005, the County Counsel wrote to the attorney then representing Chevreux and  
23 expressed concerns about the Teichert proposal. (425 AR 1798-1800) First, the County Counsel  
24 questioned whether the proposed night use was consistent with the existing CUP: “There is doubt  
25 whether the intent of LDA-786 as issued was to grant the right to engage in unlimited nighttime  
26 operations.” (425 AR 1798) The County Counsel also questioned whether the intensity of the  
27 proposed use was consistent with LDA-786: “While the County acknowledges that a permittee is  
28 entitled to utilize his or her permit in a reasonable manner in light of its purpose, the Teichert proposal  
would appear to be a level and manner of production that far exceeds any previous use.” (425 AR  
1798-1799) The County Counsel also noted the restriction on location of the proposed asphalt plant:  
“The use of any other location [than permitted by LDA-786] on your client’s property for this activity  
is not permitted.” (425 AR 1799)

29  
30 The County Counsel then indicated that a revocation proceeding could result from an expanded  
31 use: “When a permit holder acts in a manner that the County believes is in excess of the permit  
32 entitlement, the mechanism for enforcement is for the County to issue a notice of violation and hold  
33 a hearing under the provisions of Placer County Zoning Ordinance 17.62.170 – Permit Revocation.”  
34 (425 AR 1799) On March 23, 2005, the day after the County Counsel’s letter, Teichert withdrew its

1 application. (421 AR 1758)

2 There is no reason for the Court to conclude that the County would be less vigilant if another  
3 future asphalt processing use were proposed which exceeds the scope of the use permitted by LDA-  
4 786.

5 **IX. DECLARATORY RELIEF SHOULD NOT BE GRANTED.**

6 Petitioners' Fourth Cause Action seeks declaratory relief on each of the issues discussed *supra*  
7 in this brief. (Petition, 8-9, ¶¶ 41-42.) For the reasons set forth above, Petitioners' claims are without  
8 merit and Petitioners' request for declaratory relief should be denied.

9 In addition, Petitioners have not pled or presented issues which qualify for declaratory relief.  
10 "The fundamental basis for declaratory relief is the existence of *an actual present controversy* over  
11 a proper subject. [Citations.] Declaratory relief is not appropriate where there is only an abstract or  
12 academic dispute." (5 Witkin, Cal. Procedure 5<sup>th</sup>, § 861, p. 276, emphasis added.) As noted above,  
13 "There is no expansion proposed. There is no use proposed at this time." (162 AR 522:15-17.) Thus,  
14 there is no actual or present controversy to resolve by declaratory relief. Where there is no actual  
15 proposed project to consider, there can only be an "abstract or academic dispute," which is not  
16 appropriate for declaratory relief. (*Id.*)

17 Significantly, the court may refuse to exercise [declaratory relief] power . . . in any case where  
18 its declaration or determination is not necessary or proper at the time under all the circumstances."  
19 (Code of Civil Procedure ("CCP") § 1061.) Under the all the circumstances presented here,  
20 declaratory relief is "not necessary or proper." (*Id.*)

21 Finally, "the jurisdictional requirement of exhaustion of administrative remedies before seeking  
22 judicial remedies [citations] is applicable to declaratory relief actions." (5 Witkin, Cal. Procedure 5<sup>th</sup>,  
23 § 875, p. 292.) As explained *supra*, Petitioners failed to properly raise their claim that the asphalt  
24 processing use is inconsistent with the current zoning before the Board of Supervisors. Accordingly,  
25 the Court is without jurisdiction to consider the claim.

26 **X. CONCLUSION.**

27 For each of the reasons explained above, Respondents respectfully request that Court reject  
28 each cause of action set forth in the Petition/Complaint.

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DATED:

LAW OFFICES OF RICHARD L. CRABTREE

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Richard L. Crabtree,  
Attorney for COUNTY OF PLACER and  
PLACER COUNTY BOARD OF SUPERVISORS

1 Proof of Service

2 I am a citizen of the United States and employed in the County of Butte; I am over the age of  
3 eighteen years and not a party to the within action. My business address is 1395 Ridgewood Drive,  
4 Suite 300, Chico, California 95973. I am readily familiar with the practice for collection and  
5 processing of correspondence/documents for mailing with the United States Postal Service and that  
6 said correspondence/documents are deposited with the United States Postal Service in the ordinary  
7 course of business on the same day.

8 On March 18, 2009 I served the within RESPONDENTS' OPPOSITION BRIEF on the parties  
9 below by placing a true copy thereof in a sealed envelope and served same on the parties/counsel,  
10 addressed as follows:

11 Michael W. Graf  
12 227 Behrens St  
13 El Cerrito CA 94530

14 Jay-Allen Eisen  
15 Jay-Allen Eisen Law Corporation  
16 2431 Capitol Ave  
17 Sacramento CA 95816

18 The following is a procedure in which service of this document was effected:

- 19  U.S. Postal Service (by placing for collection and deposit in the United States mail a  
20 copy of said document at 1395 Ridgewood Drive, Suite 300, Chico, California 95973,  
21 in a sealed envelope, with postage full prepaid).
- 22  UPS (I caused the above-described document To be served on the interested parties  
23 noted above by UPS/Overnight Mail.)
- 24  Personal Service (I caused such envelope(s) to be delivered by hand to the offices of  
25 the addressee(s).
- 26  FAX (I caused such documents to be transmitted from facsimile number (530) 566-  
27 9203 to the facsimile machine(s) of interested parties. The facsimile machine I used  
28 was in compliance with Rule 2003(3) and the transmission was reported as complete  
without error. Pursuant to Rule 2008(e), I caused a copy of the transmission report to  
be properly issued by the transmitting facsimile machine.

I declare under penalty of perjury under the laws of the State of California that the foregoing  
is true and correct. Executed on March 18, 2009 at Chico, California.

(STATE) I declare under penalty of perjury under the laws of the State of California  
that the above is true and correct.

(FEDERAL) I declare that I am employed in the office of a member of the bar of this  
court at whose direction the service was made.

\_\_\_\_\_  
June M. McLaughlin