



COUNTY OF PLACER
Community Development Resource Agency

John Marin, Agency Director

PLANNING

Michael J. Johnson, AICP
Director of Planning

MEMORANDUM

DATE: November 7, 2007

TO: Honorable Board of Supervisors

FROM: Michael Johnson, Director of Planning

SUBJECT: **Third-Party Appeal – Planning Commission Denial of an Appeal of a Planning Director’s Determination Regarding the Status of LDA-786 (Chevreux Aggregates, Inc.)**

REQUESTED ACTION

The Board of Supervisors is being asked to consider a third-party appeal of a Planning Commission denial of an appeal of the Planning Director’s determination regarding the status under the County Zoning Ordinance of legally permitted uses that are operated on an intermittent basis, and the status of an asphalt facility to be operated by Chevreux Aggregates, Inc., as a currently legally permitted use under LDA-786. Staff recommends that the Board deny the appeal and uphold the Planning Director’s determination.

BACKGROUND

Applicant’s Request

On February 28, 2007, the County received a letter from the law firm of Brigit S. Barnes and Associates, on behalf of Chevreux Aggregates, Inc., requesting a Planning Director’s determination, pursuant to Placer County Code Section 17.02.050 (Interpretation) regarding whether or not a permanent, intermittent use can lapse under Section 17.58.160(B)(2) of the Code. The letter also requested confirmation regarding the status of LDA-786, which was granted in 1972 to allow the operation of an asphalt plant, and which has been operated on an intermittent basis since that time.

Project History

Based upon County records, asphalt operations at Chevreux’s Meadow Vista site began around 1946/1947. Based upon County records, and as stated by the plant operator, the site was one of the primary sources of asphalt for roadway projects in the region. The regional roadway projects that utilized material from the project site included Placer Hills Road and Old County Road 40 from Clipper Gap to Colfax. The asphalt facility was also used to provide asphalt for the construction of highway improvements on Interstate 80 and State Route 49.

In 1963, as part of the comprehensive zoning established by the County for the project area, the property where the Chevreux plant is located was zoned Industrial. The zoning designation for the area around Lake Combie and north of the plant along the river was Recreation-Forestry, while the zoning designation for the area north of Meadow Vista was Farm. Each of these zoning designations allows for excavating, quarrying, and related uses and facilities, subject to the approval of a Conditional Use Permit.

In 1965, Edward Pruss was granted a Conditional Use Permit (LD-1030) for the operation of a shot quarry, including crushing, screening and washing for grading materials. Joseph Chevreux subsequently purchased the quarry operation from Mr. Pruss.

On May 27, 1971, the Zoning Administrator approved LDA-691, a Conditional Use Permit to establish an asphalt plant at the project site. The approval was subject to the implementation of 11 conditions of approval, and County staff in 1971/1972 concluded all conditions of approval had been complied with.

On May 25, 1972, the Zoning Administrator approved LDA-786, a Conditional Use Permit that allowed the asphalt operation approved under LDA-691 to be moved to an adjacent property approximately 600 feet northeast of the previously approved location. The location of the facility approved with LDA-786 was on a portion of the property covered by LD-1030 (discussed above).

In 1987, after concerns were raised regarding the status of LDA-786, a letter was sent from Thomas McMahan, then-Planning Director for Placer County, to Joe Chevreux, owner of the asphalt facility. As stated in the letter, dated July 31, 1987, based upon consultation with County Counsel, all conditions of approval associated with LDA-786 had been implemented/complied with, and the permit was deemed exercised. In his letter, Mr. McMahan recommended ongoing consultation with the Placer County Air Pollution Control District to assure continued compliance with air quality regulations.

Planning Director's Determination

After extensive research and analysis, the Planning Director, issued his determination on May 18, 2007. (A copy of the Planning Director's Determination is attached as Exhibit A.) The Planning Director concluded that based upon the language in Section 17.58.160(B)(2) of the Placer County Code, once exercised, a use such as the Chevreux facility approved under LDA-786 as a permanent, intermittent use, does not lapse simply due to discontinuance for a twelve month period. (A copy of Section 17.58.160 is attached as Exhibit B.) Based upon that finding, the Planning Director then determined that asphalt operations are a currently legally permitted use under LDA-786.

The Planning Director also stated that future use on the site will need to be generally consistent with the levels of operation that have occurred in the past, which have been intermittent, and with all other conditions of approval under LDA-786. To this end, while the County cannot presuppose future activities on the project site, the County is not precluded from reviewing future activities to determine whether those future activities are consistent with LDA-786.

Appeal of Planning Director's Determination / Planning Commission Consideration

On May 25, 2007, an appeal of the Planning Director's Determination regarding the status of LDA-786 was filed by Richard Goodwin. As set forth in the appeal letter, seven issues were identified, all of which are similar to the points included in his current appeal to the Board (more fully discussed in "Letter of Appeal" section, below).

The appeal was heard by the Planning Commission on July 12, 2007. After a presentation by the Planning Director, many members of the public spoke during the public hearing, the majority of who were opposed to the decision made by the Planning Director. In general, the public comments/concerns fell into the following categories:

- The Meadow Vista area has grown significantly since the asphalt plant was first approved, and the plant is no longer an appropriate use in this generally residential area.
- Since the asphalt plant was first approved, many schools have been built in the project area, and the asphalt plant has an adverse impact on the students.
- A lot has changed since 1972. Since the County has allowed for residential growth in the area, the plant is no longer considered to be consistent with the residential character of the area.
- The asphalt plant generates many pollutants that impact the air quality in the Meadow Vista area.
- The environmental impacts generated by the asphalt plant adversely impact the health of residents in the project area, especially children.
- While many agreed that an asphalt plant is needed, this is not the location for such a facility.
- Those that supported the asphalt plant stated that the use had been in its current location since 1946, and residents who moved to the area after 1946 did so knowing that an asphalt plant and quarry were approved and operating in the project area. Accordingly, it is not fair to ask the plant to relocate when it was here first.

After receiving public testimony, the Planning Commission noted that many of the issues raised by members of the public (i.e., the changes in the character of the project area since 1946, possible environmental effects associated with the operation of the asphalt plant) were not within the purview of the Planning Commission's required action. Instead, the Planning Commission's responsibility had a narrow focus on the interpretation of County Code section 17.58.160(B)(2) and the validity of LDA-786 and whether or not the project applicant had correctly and appropriately vested its rights to allow for the continued use of the site for the manufacturing of asphalt materials.

After extensive internal discussion, the Planning Commission adopted a motion (5:1, with Commissioner Forman voting no and the District 5 seat being vacant) to deny the third-party appeal

and uphold the Planning Director's Determination that LDA-786 had in fact vested its rights to operate an asphalt plant at the subject site, that the use was anticipated to be intermittent, and that the facility has been operated as an intermittent use. In reaching this decision, a majority of the Planning Commission concluded that the Planning Director's action was a fair reading of the Code and a reasonable determination.

LETTER OF APPEAL

On July 20, 2007, Richard Goodwin filed a third-party appeal challenging the Planning Commission's denial of his previous appeal of the Planning Director's Determination regarding the status of LDA-786. (A copy of the appeal is attached as Exhibit C.) The appeal, which lists the same points as were included in the appeal to the Planning Commission, raises the following issues:

1. Neither the Planning Director nor the County has jurisdiction to determine whether LDA-786 has lapsed, in light of pending litigation in *Meadow Vista Protection v. Chevreaux*. The appellant asserts that, because a judge is deliberating this very issue, the County should not be involved in such a determination.
2. The appellant asserts that the Planning Director's Determination does not mention a single legal authority relevant to the lapse, abandonment or vested rights of LDA-786.
3. The appellant states that the most recent Planning Department document cited in the determination is a 1987 letter from then-Planning Director Thomas D. McMahan. To this end, the appellant states that the word 'lapse' wasn't put into the Zoning Ordinance until 1995. As such, the 1987 letter does not have any effect on a later-adopted ordinance.
4. The appellant states that the Planning Director solicited no input from members of the community and apparently relied solely on a letter from Chevreaux's attorney. This should not be adequate grounds for an official determination.
5. The appellant states that the Planning Director's Determination repeatedly refers to an intermittent use of permit LDA-786 when 'intermittent' is a usage neither mentioned neither anywhere in the permit itself nor in the Placer County Code. To this end, the appellant asserts that it does not appear that the Planning Director consulted with County Counsel before issuing the determination, nor does it appear that the Planning Director performed his own investigation into the actual facts of the case.
6. The appellant states that, to label Chevreaux's operation of an asphalt plant as "intermittent" based upon "need" and "demand" is a Herculean exaggeration.
7. The appellant states that the Planning Director's Determination letter does not follow the rules in Section 17.02.050(E) of the Placer County Code. This section of the County Code requires the Planning Director to "quote the provisions of this chapter being interpreted, together with an explanation of their meaning or applicability in the particular or general circumstances that caused the need for interpretation". Additionally, the appellant asserts that it does not appear that a copy of the letter was provided to the "Board of Supervisors, Planning Commission,

Development Review Committee, and members of the Planning Department staff" as is required by Code.

RESPONSE TO APPEAL LETTER

The following are specific responses to each issue raised by the appellant.

Issue 1 – County Does Not Have Jurisdiction to Determine Status of LDA-786

The appellant asserts that neither the Planning Director nor the County has jurisdiction to determine whether LDA-786 has lapsed, in light of pending litigation in Meadow Vista Protection v. Chevreaux. The appellant asserts that, because a judge is deliberating this very issue, the County should not be involved in such a determination.

As set forth in Section 17.02.050 (Interpretations) of the Placer County Code, the Planning Director is assigned the responsibility and authority to interpret the requirements of the Zoning Code. The County is not a party to the lawsuit referenced by the appellant, and appellant does not cite to any order of any court that would preclude the Planning Director from proceeding to make his determination. Original jurisdiction to interpret the Zoning Ordinance is vested by ordinance in the Planning Director, and absent some type of legal injunction preventing the County from implementing its ordinance, the Planning Director has the authority to issue determinations, as he has done in the present matter.

The Planning Commission did not agree with the appellant's assertion, and concluded that it was within the jurisdiction of the Planning Director, and the Planning Commission on appeal, to determine the validity of LDA-786.

Issue 2 – No Mention of Legal Authority Relevant to Lapse

The appellant asserts that the Planning Director's Determination does not mention a single legal authority relevant to the lapse, abandonment or vested rights of LDA-786.

A Planning Director's interpretation is an interpretation of issues specific to the County's Zoning Ordinance and to planning permits issued under the County's established authority to regulate land use. The appellant has provided copies of pleadings filed in a lawsuit in which the County is not a party and believes that the Planning Director's Determinations must include legal citations. This confuses advocacy with an administrative interpretation. The Planning Director's role under Section 17.02.050 of the County Zoning Ordinance is: (1) to make reasonable judgments of the intent and purpose of the County's zoning requirements as the county official charged with overseeing their application; and (2) to interpret these zoning requirements as necessary to circumstances which may arise out of the issuance of permits under the ordinance. There is no requirement that any legal authority need be cited.

Base upon the above, the Planning Commission concluded there was no merit to the appellant's assertion that the Planning Director's Determination does not mention a single legal authority relevant to the lapse, abandonment or vested rights of LDA-786.

Issue 3 – Use of Dated Reference Materials

The appellant states that the most recent Planning Department document cited in the determination is a 1987 letter from then-Planning Director Thomas McMahan. To this end, the appellant states that the word 'lapse' wasn't put into the Zoning Ordinance until 1995. As such, the 1987 letter does not have any effect on a later-adopted ordinance.

As discussed during the hearing before the Planning Commission, if staff were to use the appellant's logic that the word "lapse" did not exist in the Zoning Ordinance prior to 1995, any entitlement prior to 1995 (including the use that is the subject of this appeal) could potentially be considered an existing, non-conforming use that still had legal status. However, staff did not use this logic, and instead evaluated the status of LDA-786 on its merits, regardless of when it was approved and regardless of when certain provisions were incorporated into the Zoning Ordinance.

As highlighted in the Planning Director's determination letter, because the asphalt use at this project site first started in the 1940s, and received subsequent approvals in the 1970s, there were references to prior documents and correspondences, many of which are more than 20 years old. This should be expected from a project file with such a lengthy history. The manner that the County treated the permit in the past is indeed relevant to its present status. The letter from then-Planning Director Thomas D. McMahan dated in 1987 was only one of the facts considered by the Planning Director in making his determinations. However, the ultimate determination was based upon the current language in the current Zoning Ordinance. Accordingly, the determination was not based upon dated materials and information, but rather on an analysis of the current text of the Placer County Code.

The Planning Commission concluded that the analysis conducted by the Planning Director was based upon the written record, and was an accurate representation of the facts.

Issue 4 – No Solicitation of Community Members

The appellant states that the Planning Director solicited no input from members of the community and apparently relied solely on a letter from Chevreaux's attorney. The appellant believes this should not be adequate grounds for an official determination.

Zoning Ordinance section 17.02.050 sets forth the process whereby a Planning Director issues an interpretation. The Zoning Ordinance does not provide for a public hearing prior to the making of the determinations as there are no new property rights being determined through the interpretation. The Zoning Ordinance does provide for an appeal process, which the appellant has followed. Additionally, while it was the property owner's attorney who originally submitted a letter requesting a determination, that letter was not the sole basis for the determination. As noted in the determination letter from the Planning Director, previous County records were reviewed, including project files for entitlements issued to the property (e.g., LD-1030, LDA-691, LDA-786, correspondences within project files).

Based upon the review presented by the Planning Director, the Planning Commission concluded the Planning Director's Determination was based upon actual facts, rather than mere opinion of the property owner. This level of analysis is consistent with the provisions and requirements of the Placer County Code, which calls for the Planning Director to "interpret the requirements of this chapter".

Issue 5 – Use of the Word “Intermittent”/Consultation with County Counsel

The appellant states that the Planning Director's Determination repeatedly refers to an intermittent use of permit LDA-786 when 'intermittent' is a usage neither mentioned neither anywhere in the permit itself nor in the Placer County Code. To this end, the appellant asserts that it does not appear that the Planning Director consulted with County Counsel before issuing the determination, nor does it appear that the Planning Director performed his own investigation into the actual facts of the case.

"Intermittent" means stopping and starting in intervals over time. While the appellant is correct that the word "intermittent" is not used in the context of this application, this word was used because it is an accurate characterization of usage of the asphalt plant according to the undisputed facts. The analysis provided in the Planning Director's determination focused on whether or not the permit had "lapsed" or was "discontinued", both words which are used in the Placer County Code.

Contrary to the appellant's belief, the Planning Director consulted County Counsel during the evaluation process prior to the preparation of the Planning Director's determination.

After hearing public testimony, the Planning Commission concluded that the use of the word 'intermittent' was appropriate, and supported the Planning Director's use of that characterization of the activity in question. In reaching this decision, the Planning Commission concluded the Planning Director's analysis of the provisions of Section 17.58.160(B)(2) of the Placer County Code was correct on this subject, and that the asphalt plant use was vested per County requirements.

Issue 6 – Use of Words “Intermittent”, “Need” and “Demand” Are An Exaggeration

The appellant states that, to label Chevreaux's operation of an asphalt plant as "intermittent" based upon "need" and "demand" is a Herculean exaggeration. The Planning Commission concluded the use of the words were not exaggerations, and were in fact appropriate within the context of the Planning Director's Determination.

Issue 7 – Provisions of County Code Were Not Followed

The appellant states that the Planning Director's determination letter does not follow the rules in Section 17.02.050(E) of the Placer County Code. This section of the County Code requires the Planning Director to "quote the provisions of this chapter being interpreted, together with an explanation of their meaning or applicability in the particular or general circumstances that caused the need for interpretation". Additionally, the appellant asserts that it does not appear that a copy of the letter was provided to the "Board of Supervisors, Planning Commission, Development Review Committee, and members of the Planning Department staff" as is required by Code.

The Planning Commission concluded that, as set forth in the second paragraph on Page Three of the Planning Director's Determination, the letter clearly cites references to Section 17.58.160(B)(2) as

the basis for reaching the determination set forth in the letter. To this end, the Planning Director's Determination clearly quotes "the provisions of this chapter being interpreted, together with an explanation of their meaning or applicability in the particular or general circumstances that caused the need for interpretation."

Consistent with the requirements of the Placer County Code, copies of the Planning Director's Determination were in fact provided to the Board of Supervisors, the Planning Commission, the Development Review Committee, and members of the Planning Department staff. The Planning Commission concluded there was no merit to this assertion by the appellant.

CONCLUSION / RECOMMENDATION

As addressed above, the Planning Commission, after receiving extensive public testimony, concluded there was no merit to any of the seven issues raised by the appellant. The Planning Commission analyzed the determination reached by the Planning Director regarding the validity of LDA-786, and the Planning Commission concluded that the determination reached by the Planning Director was reasonable and fair.

Consistent with the action taken by the Planning Commission, staff recommends that the Board of Supervisors deny the appeal and also uphold the Planning Director's Determination as set forth in the letter dated May 18, 2007.

Respectfully submitted,



MICHAEL J. JOHNSON, AICP
Director of Planning

cc: Tom Miller, County Executive Officer
Anthony LaBouff, County Counsel
Scott Finley, Deputy County Counsel
Christa Darlington, Deputy County Counsel
John Marin, Community Development Resource Agency Director
Melanie Heckel, Assistant Planning Director

Attachments:

- Exhibit A: Planning Director's Letter of Determination Regarding the Legal Status of LDA-786, dated May 18, 2007
- Exhibit B: Copy of Placer County Code section 17.58.160
- Exhibit C: Letter from Richard Goodwin, dated July 20, 2007, appealing the Planning Commission denial of a third-party appeal regarding the legal status of LDA-786.