MEMORANDUM
FROM THE OFFICE
OF COUNTY COUNSEL

TO: Fred Yeager, Planning Director

FROM: Anthony J. La Bouff, County Counsel

DATE: February 25, 2005

RE: Validity of LDA-786

Introduction

As a result of the recent proposal by Teichert Construction to operate an asphalt batch plant on certain property in Meadow Vista, this office has examined issues surrounding the validity of a conditional use permit issued to Chevreaux in 1972. The conclusions herein are based upon a review of the facts as disclosed in the records of the County Planning Department, information that has been received from interested members of the public, as well as subsequent follow-up investigation.

The applicability of CEQA to the issuance of a permit by the Air Pollution Control District is not addressed in this opinion, as the District is independent from the County.

Chronology

Beginning in 1947, an asphalt plant began operations on the site of the present Chevreaux gravel and quarrying operations in Meadow Vista. The operations took place on an intermittent basis. (Memorandum of Tom McMahan of May 25, 1972, not attached). In response to a request from the County, Chevreaux applied for a conditional use permit for an asphalt plant operation on the site, and the first permit for an asphalt batch plant was issued on May 27, 1971 (LDA-691). Approximately one year later, on May 25, 1972, the permit currently in question, LDA-786, was issued. The purpose of LDA-786 was to allow the operation permitted by LDA-691 to be moved to a different location within the same property. It appears the approval was done without consideration under the California Environmental Quality Act (CEQA). The plant was being used for work on Interstate 80.

A copy of LDA-786 is attached. The permit is subject to twelve (12) conditions. Condition No. 1 states: "This is to be a permanent location for an asphalt batch plant."

(Emphasis added.) Other conditions concern compliance with the requirements of the Air Pollution Control District, restrictions on discharges into the Bear River, and maintenance of the designated off-site haul road routes. There is no condition that explicitly restricts either the quantities of material to be produced on the site from the operations or the hours of operation. The permit does not have an expiration date. In theory, the operation could be 24 hours per day, 7 days per week, 52 weeks per year.

A complete history of the nature of the activity that has taken place under LDA-786 has not yet been compiled, but it appears that no other County permit for an asphalt batch plant operation has been sought or been issued for this location. However, at least one other application for a concrete batch plant has occurred. (CUP 1199). In 1987, Chevreaux made written inquiry about the status of the permit, and after reviewing the status of the permit, the Planning Director verified that the permit was still valid at that time. (A copy of the opinion of the Planning Director is attached.) Importantly, the Planning Director's letter is premised on compliance with the existing conditions of the permit and makes no particular finding as to that compliance.

In May of 2001, the Placer County Air Pollution Control District (APCD) issued AC-01-51 for the operation of a plant at the site by Kiewit Pacific producing approximately 100,000 tons per quarter. This plant was providing material for use on a project involving Interstate 80. We are not aware of any questions raised during that permitting process about the continued validity of LDA-786. In August of 2004, a representative of Chevreaux contacted the County Planning Department regarding the permit. Chevreaux thereafter applied to APCD for a new permit without objection from the Planning Department. On November 11, 2004, APCD issued AC-04-66 allowing production of 52,000 tons per quarter. Most recently, Teichert Construction filed an application with APCD on January 10, 2005, for a permit for a larger and different operation than was permitted by A-04-66. This operation proposes a considerably higher tonnage than was approved under AC-04-66, and will involve routine nighttime transportation, something we understand has never occurred before.

Legal Principles and Discussion

1. Vested Rights

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

However, a subsequent user has no greater rights in the uses allowed under the permit than the owner obtained at the time the permit was issued. (*Sounhein vs. City of San Dimas* (1998) 47 Cal.App.4th 1181.)

Thus, while the holder of a conditional use permit that has been exercised obtains some level of protected property interest to continue the activities allowed under the permit, those activities must comply with any conditions of approval and be within the scope of the permit as approved. If not, the permit is subject to revocation. (See County ordinance 17.62.170) However, because an exercised permit is a property right, it may not be revoked under the United States Constitution without due process, which includes providing the permit holder notice of the grounds for revocation and some type of hearing. (*Community Development Commission vs. City of Fort Bragg* (1988) 204 Cal.App.3d 1124.) (*Bauer vs. City of San Diego,* 75 Cal.App.4th 1281 (1999)). Thus, a property owner who holds a permit is entitled to a hearing on the factual basis for the revocation of the permit before it can be revoked.

2. Compliance with Permit—Conditions of Approval and Scope

It is our understanding little information has been provided to your department as to the nature of the proposed activity. As mentioned above, every permit must be used in compliance with the conditions of its approval and within its scope. Otherwise, the permit is subject to revocation for violation of the conditions of approval. These are ultimately factual determinations. In order to make any ultimate determination as to whether the activity proposed by Teichert Construction is allowed under LDA-786, we suggest obtaining in formal manner documentation from the permit holder as to how they intend to comply with the existing conditions. The following types of additional information would be necessary:

1) What was the nature of the operation that was occurring on the site when the first permit was approved in 1971? Did it include nighttime production and offsite hauling? What was the nature of the operations prior to 1971?

2) What kind of activities took place between 1972 and 1987, when the Planning Director affirmed the validity of LDA-786? Was there ever any nighttime production? What was the production volume?

3) 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?

4) Conditions No. 3 and 4 require approval from the Air Pollution Control District for the equipment operating at the site. If operations occurred prior to 2001 (when APCD

issued AC-01-51), what kinds of approvals were issued by APCD?

5) Conditions No. 5 and 6 concern the effects of the operations on the Bear River. Have these conditions been complied with?

6) The conditions of approval of a County permit may require the permittee to comply with the requirements of other agencies with regulatory jurisdiction over the activities being conducted. Condition No. 7 requires approval by the State Water Quality Control Board, Central Valley Region, of any discharges. This site is reportedly subject to Waste Discharge Requirements Order No. R5-2003-0176. Information provided to this office by officials at Central Valley Regional Board suggests there has not been compliance. This needs to be formally verified. The order apparently requires information regarding the operation of an asphalt plant on the site to be provided to the Regional Water Quality Control Board, Central Valley Region at least 180 days prior to the placement of the plant. We have been informed it has not occurred.

3. Lapse

Interested members of the public have raised the issue as to whether the permit may have lapsed. (See Section 17.58.160(B)(2).) A permit may lapse if the permitted use is discontinued for a period of more than twelve consecutive months. The Zoning Ordinance makes a distinction between uses that require "appurtenant structures" and uses that do not. Whether a lapse has occurred is also a fact-driven determination. Regardless of the language of our ordinance, use permits do not automatically terminate. They would lapse only after appropriate notice is given and an opportunity to be heard has occurred. (See, *Bauer* and *Fort Bragg* cited above). To date, the County has made no such finding and in contrast has acted as if there has not been a lapse. It could be argued that the permit holder could reasonably rely upon such actions of the County in exercising its business judgments. In order to make any ultimate determination as to whether the permit has lapsed and whether the activity proposed by Teichert Construction requires a new conditional use permit, the following type of additional information is necessary:

1) How frequently, and for what lengths of time, was an asphalt batch plant in operation on the site from 1946 through 1971?

2) How frequently, and for what lengths of time, was an asphalt batch plant in operation on the site from 1972 through 1987?

3) How frequently, and for what lengths of time, was an asphalt batch plant in operation on the site from 1987 through 2001?

4) Has each plant been placed on the site as needed and then removed after the production is over or are there any appurtenant structures that are associated with the operation of an asphalt batch plant on the site?

Although not exactly on point, the State Supreme Court has addressed similar questions regarding the non-conforming land use of a quarry operation in Nevada County. (*Hansen Brothers Enterprises, Inc., vs. Board of Supervisors* (1996) 12 Cal.4th 533.) The court found discontinued of some uses alone is insufficient grounds for the permit to lapse. The total operation needs to discontinue. Fluctuation in level of activity and location is to be expected as normal business market demand ebbs and flows. To determine if there is an expansion of the use requires a factual finding that the purpose and character of the operation has changed. Here, it does not appear the purpose has ever changed, i.e., the periodic, intermittent processing of asphalt. The current proposed use in volume and hours of operation might be considered a change in character however.

4. California Environmental Quality Act

Questions have been raised as to the role of the California Environmental Quality Act ("CEQA"—Public Resources Code section 21000 et seq.) in permitting the most recent activities. CEQA applies when a public agency is undertaking a discretionary approval of a project. Discretion involves the exercise of judgment or deliberation, as opposed to determining whether there has been compliance with applicable regulations and standards. (CEQA Guidelines section 15357.) (See generally Remy, et al., Guide to the California Environmental Quality Act, Pages 68-74).

The continuance of activity under a previously approved permit is not a new project for CEQA purposes. (CEQA Guidelines section 15301.) The monitoring of that activity by the County to assure compliance with the conditions of approval is an enforcement activity and is exempt. (CEQA Guidelines section 15321.) Whether the review of any proposed use for compliance with the condition is a ministerial act or discretionary can be a difficult legal judgment at times. (See, *Friends of Westwood, Inc. vs. City of Los Angeles* (1987) 191 Cal.App.3d 259). However, in this circumstance the conditions are few and appear very straightforward and may lack the judgment element discussed in *Friends of Westwood*.

Because this property is also an already permitted gravel and quarrying operation, subsidiary activities such as grading of the site for the plant are covered by the existing entitlements. Thus, there is no new discretionary permit or a grading permit called for. It does not appear that any new discretionary approvals need be obtained from the County for an asphalt plant to be operated on the site under the existing permit.

As indicated this is a permit that is more than 30 years old and has apparently never faced scrutiny under CEQA. While we have concluded that the permit is valid, we also conclude there are questions about the limits of its scope and nature. The original permit called for a "permanent location." The practice exercised by the permit holder however, was not to create a permanent asphalt plant but rather intermittent temporary plants. This practice requires County staff with each new exercise of the permit to renew investigations of compliance with the existing conditions. It appears the practice of the permit holder at times has allowed long breaks without the activity being exercised (in the nature of 10 plus years) before they renew their activity. Again, without review under CEQA.

From the limited information provided to us however, the operations appear to have been substantially smaller in volume historically and exercised during daylight hours generally. At the 1972 Zoning Administration hearing a proposed condition on hours of operation was expressly rejected after the owner offered to follow a policy regarding hours of operation except in emergencies. Over the course of 30 years the practice of Caltrans for highway renovation have shifted to nighttime operations. One can assume this is because of business reasons of the State including the management of traffic congestion at construction sites and the availability of technology to work at night. This change in practice and pattern of the State results in contracts being let for nighttime operations. It does not appear to this office that the existing permit is broad enough to include routine lengthy nighttime operations without CEQA review. However, such a determination can only be done formally consistent with the due process principles discussed in this memorandum and County ordinances.

Teichert may be required to obtain additional permits from other regulatory agencies. To the extent the issuance of those permits require the exercise of discretion, that agency may be required to comply with CEQA. Such a determination must be made by that other permitting agency after examination of the type of permit required (i.e., discretionary vs. ministerial) and the type of activity being permitted. That agency's review of the environmental consequences of the activity are usually limited to impacts arising out of type of permit being sought, and may not cover the entirety of the operations.

<u>Summary</u>

1) Based upon the information available for review as of this writing, it would appear that Chevreaux has a vested right in the 1972 CUP in the activities permitted by LDA-786. The scope of the proposed operation might exceed that permit. As such, the permit holder is entitled to due process prior to revocation of the permit, including notice of the basis for the revocation and the opportunity for a hearing.

2) Operations being pursued in accordance with LDA-786 must comply with all conditions of approval. The determination of whether a violation of the conditions has occurred is a factual question and requires a detailed review of all of the factors surrounding the issuance and usage of the permit as well as a hearing. This office expresses no opinion on this issue at this time, but recommends a complete factual investigation be undertaken.

3) A question has been raised as to whether the permit has lapsed. The determination of lapse is a factual question and requires a detailed review of all of the factors surrounding the issuance and usage of the permit. Pursuant to case law the permit cannot lapse until some due process has been extended the permit holder, therefore at this point the permit has not lapsed. Consistent with the direction laid out in *Hansen* such a hearing could occur. It does not appear on the limited facts provided to us at this time that such a hearing would likely be successful. However, this office expresses no final opinion on this issue at this time, but recommends a complete factual investigation be undertaken.

4) The California Environmental Quality Act applies only to discretionary decisions. LDA-786 is an existing and valid permit. There is no additional discretionary review for the County if Chevreaux's utilization of the property is already allowed by existing permits. To the extent other permits are required from other regulatory agencies, the scope of that agency's authority and review will determine the applicability of CEQA. However, if staff is required to exercise judgment to determine compliance with existing conditions, CEQA might be triggered. Any expansion of the permit would trigger CEQA review.

I recommend obtaining information from the permit holder discussed above.

AJL/dkp
Cc: Valerie Flood, Counsel for APCD
Attachments: Planning Director Opinion, dated July 31, 1987
Copy of LDA-786, dated May 25, 1972