

From: [Graham, Jim](#)
To: [THOMAS PELTIER](#)
Cc: [Ferguson, Tracey](#)
Subject: RE: Engels Mine comments on vested rights
Date: Wednesday, February 7, 2024 10:19:56 AM

Hi Tom,

I'm forwarding your email to Tracey so that she can enter this into the record.

In the future, please send all correspondence to Tracey as all information needs to flow through her office.

Thank you,

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From: THOMAS PELTIER <runciblefish@comcast.net>
Sent: Wednesday, February 7, 2024 10:07 AM
To: Graham, Jim <JimGraham@countyofplumas.com>
Subject: Engels Mine comments on vested rights

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The County Code, Sec. 9-2.505, prohibits expansion or intensification of nonconforming uses unless the operator obtains a special use permit.

Nonconforming use of land with no structures.

(a)

Expansion. A lawful *nonconforming* use of land with no structures shall not be expanded or increased to occupy a greater land area, either on the same or adjoining property, nor shall the intensity of the existing use be increased, except that the occupation of a greater land area or an increase in intensity may be permitted upon the issuance of a special use permit.

Similar requirements apply to land with structures.

In the 1994 Court of Appeals, Third District, review of the Hansen Brothers case, the, the court states:

To avoid doubt as to constitutionality, zoning ordinances often include provisions permitting continued nonconforming use of the property by an owner already engaged in such use at the time the ordinance was adopted. (Livingston Rock, *supra*, 43 Cal.2d at p. 127, 272 P.2d 4.) This type of exception to the zoning ordinance, however, generally prohibits expansion or intensification of the nonconforming use and provides for expiration of the exception if the owner abandons the nonconforming use. (See *Sabek, Inc. v. County of Sonoma* (1987) 190 Cal.App.3d 163, 166–168, 235 Cal.Rptr. 350 and cases cited therein.)

The spirit of zoning ordinances and accompanying provisions allowing continued nonconforming uses is to restrict, not increase, the nonconforming use. (*Edmonds v. County of Los Angeles* (1953) 40 Cal.2d 642, 651, 255 P.2d 772.) Accordingly, courts generally sustain restrictions on extension or enlargement of a nonconforming use, thereby enforcing the zoning ordinance and upholding the police power. (*County of San Diego v. McClurken* (1951) 37 Cal.2d 683, 686–687, 234 P.2d 972 (*McClurken*)).

Due process does not support and common sense does not sustain an ambitious intensification of Hansen Brothers's nonconforming mining operations. Simply put, due process requires the government to allow the company to continue in its prior beneficial use of the land, no more. The zoning ordinance, an exercise of the police power, effectively freezes the right to use the land in the nonconforming way at its present level and then progressively prohibits uses that are abandoned.

The constitutional mandate and the only justification for allowing a landowner to use the land in ways prohibited by a zoning ordinance is that government, in determining appropriate land uses, cannot, in most cases, deprive the landowner of its present use. Hansen Brothers's advocacy here loses sight of the foundation of McCaslin and all other nonconforming use cases. Due process does not give license to vastly intensify a nonconforming use. Instead, the zoning ordinance, under command of due process, indulges the nonconforming use's existence while tolerating no expansion.

The State Supreme Court reviewed the Hansen Brothers case in 1996 and found, among other things that:

Nonetheless, as we explain below, because a court cannot determine on this record that Hansen Brothers is entitled to the relief it seeks, the petition for writ of mandate to compel the Board to approve a Surface Mining and Reclamation Act of 1975 (§ 2710, et seq.) reclamation plan for the Hansen Brothers' property was properly denied by the superior court. However Hansen Brothers is entitled to have the order denying approval of the plan set aside and to have its application reconsidered. We shall therefore reverse the judgment of the Court of Appeal affirming the superior court judgment denying Hansen Brothers' petition for writ of mandate, but we shall do so with directions that on setting aside its judgment the superior court conduct further proceedings. (See Code Civ.Proc., § 1094.5, subd. (e).)

The State Supreme Court did not negate the Appeals Court findings regarding the

"spirit of the zoning ordinances."

The State Supreme Court's determination also states:

When continuance of an existing use is permitted by a zoning ordinance, the continued nonconforming use must be similar to the use existing at the time the zoning ordinance became effective. (See Rehfeld v. City and County of San Francisco (1933) 218 Cal. 83, 21 P.2d 419; City of Yuba City v. Cherniavsky (1931) 117 Cal.App. 568, 4 P.2d 299.) Intensification or expansion of the existing nonconforming use, or moving the operation to another location on the property is not permitted. (County of San Diego v. McClurken, *supra*, 37 Cal.2d 683, 687-688, 234 P.2d 972.

The proposed development of a 1,000 acre open pit mine is clearly an unreasonable intensification of the mining that was being done at the time the zoning ordinance was adopted, and no reasonable person would assert that the operators are entitled to expand the mine operations in this manner.

I urge the Zoning Commissioner to do the right thing and recommend to the Board of Supervisors that the proponents of the open pit mine should be required to obtain a valid special use permit for this project.

Furthermore, County Code Section Sec. 9-2.502, (d), (3) states:

The lawful *nonconforming* use of land or structures, if discontinued for a period of one year, may be resumed only upon the issuance of a special use permit.

The current mining operation is being done under a reclamation plan for the mining of aggregate on approximately 12 acres of the former mine site. It is clear that the only actual mining operations currently being done at this site has been the removal of aggregate.

Drilling exploration, while it may be a component of an active mining operation, is not alone sufficient to support the conclusion that the mine is in operation. Such exploratory drilling may occur in any mineral rich area, and is not the same as active mining. I believe, and the existing reclamation plan for the site supports the conclusion, that the only active mining at this site is the production of aggregate. Therefore, if the operators intend to either resume or expand the mining of copper and gold at this site, they must obtain a special use permit

Respectfully submitted,
Tom Peltier