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Via Electronic Mail Only

Board of Supervisors
Nevada County
950 Maidu Avenue
Nevada City, California 95959
bdofsupervisors@nevadacountyca.gov

Re: Board's Consideration of the Idaho-Maryland Mine Project

Dear Board Members:

On behalf of the Community Environmental Advocates ("CEA") Foundation, we write regarding the County's ongoing consideration of Rise Grass Valley, Inc.'s ("Rise's") proposed Idaho-Maryland Mine Project ("Project"). On December 14, 2023, the Board unanimously voted to deny Rise's Idaho-Maryland Mine Vested Rights Petition ("Petition"), concluding that Rise does not hold a vested right to mine on the Project site. Previously, the County's Planning Commission had unanimously recommended (1) to deny Rise's applications for a rezone and a variance, each of which is necessary to develop the Project; and (2) to decline to certify the Final Environmental Impact Report ("EIR") prepared for the Project. The Board will consider those recommendations at a public hearing on February 15, 2024.

We commend the County for reaching the correct decisions to date regarding the Petition and the Project entitlements. On behalf of CEA Foundation, we urge the Board to adopt the Planning Commission's recommendations, which are well-reasoned and were delivered only after a thorough process that afforded Rise and the public ample opportunity to be heard. We also write in response to threats that Rise will challenge these decisions in court.[1]

[1] *See* Rise Gold Corp., *Rise Gold Reports Result of Vested Rights Hearing* 2 (Dec. 14, 2023), https://www.risegoldcorp.com/uploads/news_item/article/ARTICLE_126.pdf (quoting Rise Gold CEO Joe Mullin, who stated after the Board's decision to deny the

As set forth in this letter, any claims that Rise could bring against the County in connection with the Project are unlikely to succeed. In particular, it is doubtful that a court would second guess the Board's fact-bound, thorough, and impartial decision to deny the Petition. Additionally, Rise would have no viable claim that the County has taken its property without just compensation in violation of the state or federal constitutions. In short, the County should not be swayed by Rise's empty threats of litigation. The Board should adopt the recommendations of the Planning Commission and County staff[2] to deny certain Project entitlements, decline to certify the EIR, and put an end to Rise's misguided Project once and for all.

I. The County's decision to deny the Petition was sound and a court is unlikely to overturn it.

At the outset, it is important to emphasize that if Rise wishes to challenge the County's vested rights decision, it must pursue that claim in state court. Longstanding precedent from the U.S. Court of Appeals for the Ninth Circuit is unequivocal on this point. In *Eilrich v. Remas* (9th Cir. 1988) 839 F.2d 630, 632-33, the plaintiff attempted to bring a claim against his former city employer in federal court under 42 U.S.C. § 1983, arguing that his discharge violated his First Amendment rights. The Ninth Circuit held that the claim could not move forward, as a city administrative body had already rejected that exact argument in an adjudicatory proceeding and the plaintiff did not challenge the city's decision in state court. *Id.*; *see also Miller v. County of Santa Cruz* (9th Cir. 1994) 39 F.3d 1030, 1037-38 (reaffirming *Eilrich*). Thus, Rise could only contest the County's denial of its Petition by seeking a writ of administrative mandamus in state court. *See* Cal. Code Civ. Proc. §§ 1094.5, 1094.6; *Eilrich*, 839 F.2d at 633; *Miller*, 39 F.3d at 1038.

Any court reviewing Rise's claims must afford the County's findings a "strong presumption of correctness." *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817. The burden would fall on Rise, as the challenger, to overcome that presumption and

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Petition that he "look[ed] forward to having our rights vindicated by the courts"); *id.* at 1-2 (implying the Board's denial of the Petition was procedurally and substantively improper and suggesting that it would amount to an unconstitutional taking were the County to deny both the Petition and all necessary Project approvals).

[2] *See* Brian Foss, *Board Agenda Memorandum* 2-3 (Feb. 2, 2024), https://www.nevadacountyca.gov/DocumentCenter/View/52237/Board-of-Supervisor-Staff-Report-.

"convince the [trial] court" that the County's "decision is contrary to the weight of the evidence." *Id.*

Rise cannot possibly carry that burden. As the County explained at length at the hearing and in its written materials, there is ample evidence that any vested right to mine that may have once existed has long been abandoned. By comparison, and as the County also pointed out, there is virtually no evidence indicating that previous owners of the Project sites continuously intended to resume mining operations during the seven decades when the mine sat unused. The quality and the volume of the evidence that the County relied upon exceeds that in cases where courts have affirmed findings of abandonment. *See, e.g.*, *Hardesty v. State Mining & Geology Bd.* (2017) 219 Cal.Rptr.3d 28 (unpublished); *Stokes v. Bd. of Permit Appeals* (1997) 52 Cal.App.4th 1348. Indeed, had the County found that any vested right was *not* abandoned in spite of the clear historical record, a court likely would have overturned that decision. *See Keep the Code, Inc. v. County of Mendocino* (2018) A147544, 2018 WL 6259477 (unpublished)[3] (overturning county's determination that company had vested right to mine aggregate; included as **Attachment A**).

Taking a different tack, Rise has also vaguely alleged that the Board was biased when it unanimously voted to deny the Petition, and thus Rise was deprived of procedural due process.[4] Rise has tried this exact strategy before.[5] Its allegations of bias are no more compelling now than they were the last time Rise raised them. The County's staff reports and related materials explained in scrupulous detail the legal principles and factual context necessary to resolve Rise's Petition.[6] This included a point-by-point

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[3] Although the *Hardesty* and *Keep the Code* decisions are not published, they provide helpful guidance regarding how a court is likely to approach similar issues and facts.

[4] *See id.* at 1-2 (alleging the Board relied on a "biased" staff report and implying the Board was not an "impartial tribunal" when it considered the Petition).

[5] *See* Letter from Ben Mossman, President, Rise Grass Valley Inc., to Nevada County Board of Supervisors (June 1, 2023) (claiming Planning Commission was biased when it issued its unanimous recommendations regarding the Project entitlements and FEIR); *see also* Letter from Ellison Folk, Shute, Mihaly & Weinberger LLP, to Nevada County Board of Supervisors (June 27, 2023) (addressing Rise's previous allegations of bias).

[6] Katharine L. Elliott & Diane G. Kindermann, *Nevada County Board of Supervisors Board Agenda Memorandum* (Nov. 28, 2023), https://www.nevadacountyca.gov/DocumentCenter/View/51714/2-Staff-Report; Katharine L. Elliott et al., *Nevada County Board of Supervisors Board Agenda Memo*

analysis, supported with numerous factual exhibits, addressing the many misleading or simply incorrect statements in the Petition.[7] That these materials happened to reach different legal and factual conclusions than Rise and its counsel does not mean County staff were biased; it means they did their jobs.

As for the Board itself, it is blackletter law that a decisionmaker is not biased simply because they have some attenuated connection with a group that takes a stance on the project at issue. *See Petrovich Dev. Co., LLC v. City of Sacramento* (2020) 48 Cal.App.5th 963, 971, 974 (holding a councilmember's active membership in a neighborhood association opposed to a project on which the councilmember voted "did not establish bias" in and of itself); *see also Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 559 ("[A] councilperson has a right to state views or concerns on matters of community policy without having his voted impeached."). Rise's complaints of bias were meritless when they were levied against the Planning Commission eight months ago, and those same repurposed allegations remain meritless today.

The overall process that the County afforded Rise in connection with the Petition more than satisfied the requirements of state and federal law. Rise was able to present hundreds of pages of legal analysis and factual evidence to the Board. County staff considered those materials and disclosed their own thorough conclusions well in advance of a duly noticed public hearing. Then, over the course of that multi-day hearing, Rise and its counsel were able to present their case, rebut the conclusions of County staff, and address the Board's questions. And the specific basis on which the Board denied the Petition—abandonment—was addressed extensively in the written materials and at the hearing itself. Rise was entitled to nothing more. *See Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613, 627 (indicating procedural due process requirements are satisfied in the vested rights context where interested entities receive "reasonable notice and an opportunity to be heard in an evidentiary public adjudicatory hearing before the vested rights claim is determined"); *see also Eilrich*, 839 F.2d at 633-35 (indicating that where a

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(Dec. 13, 2023), https://www.nevadacountyca.gov/DocumentCenter/View/51825/Rise-Grass-Valley-Vested-Rights-Petition-Supplemental-Staff-Report-.

[7] Katharine L. Elliott & Diane G. Kindermann, *County's Responses to Petitioner's Facts and Evidence in the Vested Rights Petition (Including County's Exhibits 1001-1027)* (Nov. 28, 2023), https://www.nevadacountyca.gov/DocumentCenter/View/51712/4-Nevada-County-Responses-to-Facts-and-Evidence-in-the-Vested-Rights-Petition-w--County-exhibits.

state administrative proceeding has these basic characteristics, a federal court must give its decisions preclusive effect).

In sum, Rise received all the process that it was due. That process resulted in the Board reaching a decision that was not just well-reasoned, but was the only legally defensible conclusion available. A court would not second guess the County's sound determination regarding the Petition.

II. Rise would not have a viable takings claim against the County.

Rise has repeatedly asserted that if the County denies the Project, the County will have committed an uncompensated "taking" of Rise's property in violation of the state and federal constitutions.[8] This is flatly incorrect. State and federal law are unambiguous that the County's denial of the Project would not amount to a taking.[9]

Here, Rise has only two options for demonstrating that the County committed an unconstitutional taking. First, Rise could attempt to prove that the County's denial of the Project deprived it of *all* economically viable use of its property. *See Lucas v. South Carolina Coastal Council* (1992) 506 U.S. 1003, 1019. This is not a test that Rise could ever hope to pass. The parcels making up the Project site have multiple other permissible uses that are fully consistent with their existing zoning designations. Indeed, the EIR for the Project expressly acknowledges this. *See* Draft EIR pp. 6-11 through 6-13 (explaining how the Brunswick Industrial Site as currently zoned could be developed with *over half a million square feet* of new office, business, and/or industrial uses). This is more than sufficient to defeat a *Lucas* claim. *See Shea Homes Limited Partnership v. County of Alameda* (2003) 110 Cal.App.4th 1246, 1267 ("[I]f permissible uses exist, a development restriction does not deny a property holder [all] economically viable use of his property.").

Rise's only alternative would be to argue that the denial of the Project amounts to a taking under the multi-factor test set forth in *Penn Central Transportation Co. v. City of New York* (1978) 438 U.S. 104. *See* 438 U.S. at 124 (listing the relevant factors as (1) the economic impact of the government's action, (2) the extent to which the

[8] *See, e.g.*, Rise Gold Corp., *supra* note 1, at 2; Letter from G. Braiden Chadwick, Mitchell Chadwick LLP to Nevada County Planning Commission, at 4 (May 5, 2023).

[9] As relevant here, state courts have interpreted the takings clause in the California constitution "congruently" with the federal takings clause. *California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 456 n.10.

action interfered with "investment-backed expectations," and (3) the character of the action). But for much the same reason that Rise cannot bring a successful *Lucas* claim, it will not prevail under the *Penn Central* test, either.

Courts applying the *Penn Central* framework have repeatedly emphasized that a government action must deprive a property of virtually all economic value to amount to a taking. *Colony Cove Properties, LLC v. City of Carson* (9th Cir. 2018) 888 F.3d 445, 451 (emphasizing that even "diminution in property value because of governmental regulation ranging from 75% to 92.5% does not constitute a taking"). Again, that simply would not be the effect of the County's denial of the Project, given the many other permissible uses of the property. Additionally, Rise would have no "reasonable investment-backed expectation" in any additional economic value it hopes to attains from operating the reopened mine. *Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1279 (holding a "claim of loss of anticipated profits or gain is not compensable, as it demonstrate[s] no more than a possible restriction upon more economic uses of its property." (citation omitted)). In short, no matter what sort of takings claim Rise tries to assert, it will be dead on arrival in court.

III. The Board should follow the recommendations of the Planning Commission.

Any legal challenge that Rise could bring against the County is highly unlikely to succeed. However, the County would violate CEQA and State Planning and Zoning law if the Board were to reverse the recommendations of the Planning Commission and County staff by certifying the EIR and granting the Project all necessary approvals. The recommendations to deny the re-zone and the variance are clearly correct on the merits, for the reasons that the Commission, staff, and general public have explained.

Just as importantly, though, the EIR prepared for the Project is grossly inadequate. As we have discussed at length in previous letters to the County,[10] the EIR suffers from numerous fatal defects, ranging from an improper project description and environmental baseline, to a flawed analysis of Project alternatives, to inadequate analysis and mitigation of impacts to groundwater, air quality, energy, and climate change. The County cannot approve the Project unless it corrects the flaws in the EIR.

[10] *See* Letter from Ellison Folk, Shute, Mihaly & Weinberger LLP to Matt Kelley, Senior Planner, Nevada County (Mar. 20, 2023); Letter from Ellison Folk, Shute, Mihaly & Weinberger LLP to Matt Kelley, Senior Planner, Nevada County (Mar. 30, 2022); Letter from CEA Foundation to Matt Kelley, Senior Planner, Nevada County (Mar. 30, 2022).

Again, we applaud the County for its careful consideration of the Project. The Board, Planning Commission, and County staff have repeatedly reached the correct decisions by faithfully applying the law and the facts and by resisting misleading and irrelevant claims. The Board should continue that practice by voting to deny the Project and decline to certify its EIR.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

Ellison Folk

Ryan Gallagher

Attachments:

A. *Keep the Code, Inc. v. County of Mendocino* (2018) A147544, 2018 WL 6259477

cc: Julie Patterson Hunter, Clerk of the Board, clerkofboard@nevadacountyca.gov
Katharine Elliott, County Counsel, county.counsel@nevadacountyca.gov
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ATTACHMENT A

2018 WL 6259477
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Only the Westlaw citation is currently available.

Court of Appeal, First District, Division 3, California.

KEEP THE CODE, INC., Plaintiff and Respondent,
v.
COUNTY OF MENDOCINO et al., Defendants and Appellants;
Frank J. Dutra et al., Real Parties in Interest and Appellants.

A147544
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Filed 11/30/2018

(Mendocino County Super. Ct. No. SCUKCVPT1464207)

Attorneys and Law Firms

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Matthew Kiedrowski, Katharine Elliott, Office of the Medocino County Council, 501 Low Gap Road, Room 1010, Ukiah, CA 95482, for Defendants and Appellants.

Opinion

Jenkins, J.

***1** In 1972, the County of Mendocino amended its zoning ordinance to require landowners to secure a use permit to operate a commercial quarry and aggregate business on their property. Thereafter, in 2013, Northern Aggregates, Inc. (NAI) sought an exemption from the use permit requirement for its commercial quarry and aggregate business known as the Harris Quarry (quarry). The county granted NAI's request, finding that NAI had a vested right to operate its commercial quarry and aggregate business as a nonconforming use under the amended ordinance. Keep The Code, Inc. (KTC), a nonprofit organization, petitioned the trial court for a writ of mandate directing the county to set aside its vested right determination. After reviewing the administrative record and exercising its independent judgment, the court found NAI had no vested right to operate its business as a nonconforming use and set aside the county's contrary determination. We affirm.

PROCEDURAL BACKGROUND

On March 21, 2013, NAI filed an application with the county seeking a determination that it had a "vested right to conduct aggregate operations, including mining, conveying, screening, crushing, sorting, blasting, stockpiling, storing, transporting and selling aggregate on [its] 91-acre site" as a nonconforming use under the county's zoning ordinance. Following an investigation by county staff and a public hearing, the county's board of supervisors issued Resolution No. 14-068, on May 20, 2014, in which it was determined that NAI had a vested right to operate its commercial quarry and aggregate business as a nonconforming use.

KTC [1] filed a petition for a writ of mandate (Code Civ. Proc., § 1094.5) seeking to set aside Resolution No. 14-068. NAI and the county opposed the petition. Following argument by counsel, the trial court granted the petition and entered judgment in favor of KTC. A peremptory writ issued directing the county to set aside Resolution No. 14-068. NAI and the county filed timely notices of appeal.

DISCUSSION

A. Applicable Law

1. Common Law Concerning Vested Rights for Nonconforming Uses

As both the county and the trial court recognized, in *Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal.4th 533 (*Hansen*), our Supreme Court set forth the well-settled law in California governing nonconforming uses.

"A zoning ordinance or land-use regulation which operates prospectively, and denies the owner the opportunity to exploit an interest in the property that the owner believed would be available for future development, or diminishes the value of the property, is not invalid and does not

bring about a compensable taking unless all beneficial use of the property is denied. [Citations.] However, if the law effects an unreasonable, oppressive, or unwarranted interference with an existing use, or a planned use for which a substantial investment in development costs has been made, the ordinance may be invalid as applied to that property unless compensation is paid. [Citations.] Zoning ordinances and other land-use regulations customarily exempt existing uses to avoid questions as to the constitutionality of their application to those uses. 'The rights of users of property as those rights existed at the time of the adoption of a zoning ordinance are well recognized and have always been protected.' [Citation.]

***2** "Accordingly, a provision which exempts existing nonconforming uses 'is ordinarily included in zoning ordinances because of the hardship and doubtful constitutionality of compelling the immediate discontinuance of nonconforming uses.' [Citations.] The exemption may either exempt an existing use altogether or allow a limited period of continued operation adequate for amortization of the owners' investment in the particular use. [Citations.]" (*Hansen, supra*, 12 Cal.4th at pp. 551-552.)

Nonetheless, "pre-existing nonconforming uses" are not meant to be "perpetual." (*City of Los Angeles v. Gage* (1954) 127 Cal.App.2d 442, 459.) The policy of the law is for the elimination of any nonconforming use because its presence "endangers the benefits to be derived from a comprehensive zoning plan." (*Ibid.*) Accordingly, and consistent with this policy, it has been held that " 'land which has not been used ... would not create a nonconforming use' " (*Hill v. City of Manhattan Beach* (1971) 6 Cal.3d 279, 285-286 (*Hill*)), and attempts to continue nonconforming uses are barred when nonconforming uses have ceased operation (*Hansen, supra*, 12 Cal.4th at p. 568).

The *Hansen* court acknowledged that the principles applicable to nonconforming uses "[do] not apply neatly to surface mining operations." (*Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613, 623, citing *Hansen, supra*, 12 Cal.4th at pp. 553-556.) "Unlike other nonconforming uses of property which operate within an existing structure or boundary, mining uses anticipate extension of mining into areas of the property that were not being exploited at the time a zoning change caused the use to be nonconforming. The question thus arises whether this extension is a prohibited expansion of a nonconforming use into another area of the property .... [T]he answer is a qualified 'no' under the 'diminishing asset' doctrine, an exception to the rule banning expansion of a nonconforming use that is specific to mining enterprises." (*Hansen, supra*, at p. 553.) The qualification to the application of the diminishing asset doctrine is that "[a] vested right to quarry or excavate the entire area of a parcel on which the nonconforming use is recognized requires more than the use of a part of the property for that purpose when the zoning law becomes effective .... In addition there must be evidence that the owner or operator at the time the use became nonconforming had exhibited an intent to extend the use to the entire property owned at that time." (*Id.* at pp. 555-556, fn. omitted.)

2. Relevant Statutory Law Concerning Vested Rights for Surface Mining Operations in Mendocino County

Before mid-July 1972, no use permit was required for the operation of a commercial quarry and aggregate business on property in the county. Effective on July 20, 1972, the county's board of supervisors amended the county code to require a use permit to operate a commercial quarry and aggregate business on property in the county, including the Harris Quarry. (Mendocino County Ordinance No. 963, amending former ch. 20, art. II of Mendocino County Code.) Thereafter, in 1975, the state adopted the Surface Mining and Reclamation Act of 1975 (see Pub. Resources Code, § 2710 et seq., added by Stats. 1975, ch. 1131, § 11, pp. 2793-2803) (hereinafter SMARA).[2] Effective January 1, 1976, SMARA required a person to secure a use permit to conduct certain surface mining operations, which included a commercial quarry and aggregate business on property in the county. (Former § 2770, added by Stats. 1975, ch. 1131, § 11, p. 2799; see §§ 2729 [mined lands defined], 2735 [surface mining operations defined].) Of significance here, SMARA excepted from the use permit requirement surface mining operations for which a person had a "vested right" to conduct such operations before January 1, 1976. (Former § 2776, added by Stats. 1975, ch. 1131, § 11, p. 2801.) SMARA also designated the county to act as the "lead agency" to enact local legislation establishing procedures for the approval of use permits to conduct surface mining operations in the county in accord with state policy. (Former §§ 2728, 2774, added by Stats. 1975, ch. 1131, § 11, pp. 2795, 2800; see § 2734 [" '[s]tate policy' means the regulations adopted by the [State Mining and Geology Board] pursuant to Section 2755"].) Thereafter, in 1979, the county's board of supervisors amended the county code to implement regulations relative to surface mining operations in the county. (Mendocino County Code, former §

22.16.060.) Consistent with the state law, Mendocino County Code former section 22.16.060 excepted from the use permit requirement surface mining operations in the county for which a person had a "vested right" before January 1, 1976. [3]

B. Trial Court's Decision

***3** The court found that when the county amended its code on July 20, 1972, making a commercial quarry and aggregate business a nonconforming use, the property on which the quarry was situated was owned by Christ's Church of the Golden Rule (Church). The Church had acquired the property in 1963, and continued to own it until 1983. The court further found that for the entirety of the Church's ownership of the property (spanning the 1972 and 1979 amendments to the county code and the 1976 enactment of SMARA), the record was "absolutely devoid" of any credible or reliable evidence demonstrating that the Church *operated* the quarry as a commercial venture, had expended "any money in connection with quarrying activities and/or rock crushing or screening," or had incurred "any liabilities 'for work and materials necessary' " for surface mining operations. In so ruling, the court relied, in pertinent part, on written statements submitted by Tracy Livingston and Richard Tyrrell, who were members of the Church during its ownership of the property. The court found the Church members had "declared credibly and with sufficient personal knowledge" that the Church did not operate the quarry on a commercial basis and did not intend to expand quarry operations during its ownership. The court further found that the statements of Livingston and Tyrrell were more reliable than other declarations and statements of Frank Dutra, Bud Garman, and Wayne Waters, who described some rock removal activities that occurred on the site at various times preceding and shortly following July 20, 1972.

Additionally, the court found that assuming a vested right to operate a commercial quarry and aggregate business as a nonconforming use existed on July 20, 1972, there was no evidence that would allow for the substantial expansion of the quarry "without a use permit ... as a 'diminishing asset' operation" under *Hansen, supra*, 12 Cal.3d 540. In so finding, the court was mindful "that the quarry and aggregate business is seasonal and cyclical and that the court should assess the continuity of the operation in the light of the historical pattern. ([Mendocino County Code, former §] 22.16.060)." But, the court again relied on the statements of Livingston and Tyrrell, which demonstrated that during its ownership the Church had not operated the quarry on a commercial basis and did not intend to expand quarry operations. The court further found that even if it accepted the evidence offered by Dutra, Waters, and Garman, there were still substantial periods of approximately three years and four years of inactivity at the quarry site, which could not be attributed to the seasonal nature of the business, use of stockpiled material, or the use of other onsite resources. The court also rejected appellants' contention that a comparison of aerial photographs taken before and after July 1972 indicated a substantial increase in quarry activity from which the court could arguably determine the Church's intent to expand quarry operations. The court stated that, "[a]part from the fallacy of that argument, a comparison [of] the outline of the quarry boundaries as *actually delineated* on the photographs [record citations to "1965" aerial photograph and "1974 or 1981" aerial photograph] does not support that argument. Measuring each outlined area in cross-sectional directions at the widest points indicates that the outlined site on the 1974/81 aerial is no larger tha[n] the outlined site on the 1965 photo." [4]

C. Appellants' Contentions

1. Trial Court's Legal Determinations

Appellants make various arguments challenging the trial court's legal determinations, none of which requires reversal.

Appellants, throughout their briefs, complain about isolated statements made by the trial court relative to the law governing nonconforming uses. However, appellants' overarching claim of error is that NAI's right to operate its business as a legal nonconforming use was governed solely by the court's evaluation of how the property was used at the time it first became nonconforming on July 20, 1972, during the Church's ownership. According to appellants, the county's interpretation of its code allowed NAI to operate its business as a nonconforming use based on the use of the property for that purpose by *any* predecessor owner who incurred substantial liabilities *at any time*. As we now explain, we see no merit to appellants' arguments.

***4** First, as noted above, "[a] legal nonconforming use is one that existed lawfully before a zoning restriction became effective and that is not in conformity with the ordinance when it continues thereafter." (*Hansen*, *supra*, 12 Cal.4th at p. 540, fn. 1.) Thus, whether a landowner can claim a right to a nonconforming use is to be determined by the use of the land

at the time the use became nonconforming under the zoning ordinance restricting such use. (*Ibid.*) Accordingly, the trial court's finding, with which we concur, that July 20, 1972, was the appropriate date to determine the existence of a right to a nonconforming use, is consistent with the law. (*Id.* at p. 560.) In addition, the law of nonconforming uses provides that once a landowner acquires a right to use the property as a nonconforming use, the established (vested) right to continue the nonconforming use is a property right that can be transferred to a successor owner. (59 Ops.Cal.Atty.Gen. 641, 656-658 (1976).) Conversely, if at the time a zoning ordinance creates a nonconforming use the landowner is not using the land for that purpose, no vested right is created that can be transferred to a successor owner. (See *Hansen, supra*, at p. 568; *Hill, supra*, 6 Cal.3d at pp. 285-286 [" 'land which has not been used ... would not create a nonconforming use' "].) Because the trial court here found that the Church was not using the property as a commercial quarry and aggregate business on July 20, 1972, a nonconforming use did not exist that could be transferred to NAI as a successor owner.

We also conclude that appellants' arguments are "clearly at variance with" the pertinent language in the county code, as well as SMARA. Both the state law and the county code provisions under review provide, in pertinent part, "*A person* shall be deemed to have vested rights [in a nonconforming use] if ... *the person has*" (§ 2776, subd. (a), italics added) or "*he has*" (Mendocino County Code, § 22.16.150, subd. (A), italics added; see *id.*, former § 22.16.060) "diligently commenced surface mining operations and incurred substantial liabilities for work and materials necessary for the surface mining operations" before the effective dates of the law. (§ 2776, subd. (a); Mendocino County Code, § 22.16.150, subd. (A); see *id.*, former § 22.16.060.) As a codification of the common law of nonconforming uses, the pertinent statutory language "suggests that the [law] extends [a vested right] only to those persons whose reliance upon existing permits or authorization induced them to initiate substantial performance of their projects and to incur substantial liabilities in connection therewith" *at the time the use became nonconforming because of the change in the law*. (*Urban Renewal Agency v. California Coastal Zone Conservation Com.* (1975) 15 Cal.3d 577, 586 [interpreting statutory language in former § 27404, a vested rights exemption provision essentially like § 2776].) Here, as we have noted, the Church had not diligently commenced and incurred substantial liabilities for work and material necessary for the operation of a commercial quarrying and aggregate business at the time the use became nonconforming. Consequently, the Church had not acquired a vested right that could be transferred to NAI as a successor owner. Moreover, appellants' expansive view of the statutory language is in contravention of the basic tenets of statutory construction. As our Supreme Court has cautioned, we do not presume that legislatures intend, when enacting statutes, " 'to overthrow long-established principles of law unless such intention is clearly expressed or necessarily implied.' [Citations.]" (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1325.) Instead, " ' "[a] statute will be construed in light of common law decisions, unless its language ' "clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter ...." ' " ' " (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297.) Appellants here have failed to cite to any statutory language or other relevant authority that the state or county intended, when enacting SMARA and the county code provisions, to depart from the common law governing nonconforming uses. To accept appellants' broad construction of the statutory language would require us to abrogate those common law rules governing nonconforming uses, which we decline to do.

2. Trial Court's Burden of Proof and Factual Findings

***5** Appellants also make various arguments challenging the burden of proof imposed on the parties and the trial court's factual findings.

We first address appellants' assertion that the court misapplied the burden of proof in determining whether appellants acquired vested rights in the operation of the quarry. Appellants' legal argument, asserting that the court shifted the burden of proof to them, is based on a single sentence plucked from the court's decision which states: "Even allowing for the 1976-78 purchases [of aggregate] reported ..., there is no evidence of the operation of a *commercial* quarry and aggregate business during the periods of 1963-75 and 1979-82." Appellants argue this language supports their contention that the court required appellants, rather than KTC, to present "evidence" establishing the operation of a commercial quarry during the years referred to by the court.

However, our review of the record establishes that the trial court did not err in its application of the required burden of proof. In resolving the parties' dispute, the court stated that NAI, as the party asserting a right to a nonconforming use, had

the burden of proving before the county board of supervisors that, on July 20, 1972, when quarry operations first became a nonconforming use, "(1) [the] quarry operations had been diligently commenced ...; and (2) ... the owner/operator had incurred substantial liabilities in reliance on the non-conforming use status." The court also indicated that KTC, as the petitioner in the trial court, had the burden of proving that the county's finding in favor of NAI was not supported by the weight of the evidence, in order to establish an abuse of discretion justifying the issuance of the requested writ. (Code Civ. Proc., § 1094.5, subd. (c).) The court then turned to evaluate whether KTC had met its burden. In doing so, the court accorded the county's findings "a strong preference of correctness" but found that KTC had overcome any "presumption of correctness," which enabled the court to "substitute its own judgment to reject the findings" of the county board of supervisors once the court had "examined those findings under the appropriate standards." Given this record, we soundly reject appellants' argument that the court improperly shifted the burden of proof to them.

We further conclude that appellants' challenge to the trial court's factual findings fares no better than their legal challenge, discussed above. The law governing our review of the court's factual findings is well established. "In exercising its independent judgment," as in this case, "a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817 (*Fukuda*).) Nonetheless, "the presumption provides the trial court with a starting point for review—but it is only a presumption, and may be overcome. Because the trial court ultimately must exercise its own independent judgment, that court is free to substitute its own findings after first giving due respect to the agency's findings." (*Id.* at p. 818.) "[I]in exercising its independent judgment 'the trial court has the power and responsibility to weigh the evidence at the administrative hearing *and to make its own determination of the credibility of witnesses.*' [Citation.]" (*Barber v. Long Beach Civil Service Com.* (1996) 45 Cal.App.4th 652, 658.) On appeal, when an administrative adjudication is subject to the independent judgment test of review, " 'California fixes responsibility for factual determination[s] at the trial court rather than the administrative agency tier of the pyramid as a matter of public policy.' " (*Id.* at p. 659.) Consequently, "our review of the record is limited to a determination whether substantial evidence supports the trial court's conclusions and, in making that determination, *we must resolve all conflicts and indulge all reasonable inferences in favor of the party who prevailed in the trial court*. [Citations.]" (*Id.* at pp. 659-660, italics added; see *Fukuda, supra*, 20 Cal.4th at p. 824.)

***6** Appellants first contend there was "ample evidence" in the record to support the county's findings that "a person [had] 'diligently commenced surface mining operations and incurred substantial liabilities for work and materials necessary for the surface mining operations' " at the time the use became nonconforming in 1972, during the Church's ownership. Appellants fail, however, to acknowledge the standard of review we employ in reviewing the court's factual findings. Under the governing standard, we review the record to determine whether there is substantial evidence that supports the court's findings, not those of the county. Applying the correct standard, we have no trouble concluding that evidence exists to support the court's findings. Specifically, the court reasonably relied on the statements of church members Livingston and Tyrrell, who credibly asserted that the Church had not used the property as a commercial quarry and aggregate business at any time during the entirety of its ownership, which included when the use became nonconforming in 1972. While there was other evidence in the record that might have supported a contrary finding, as the court acknowledged, it was free to conclude such evidence was not sufficient to substantiate NAI's claim of a vested right to operate a commercial quarry and aggregate business as a nonconforming use.

Additionally, we see no merit to appellants' argument that the trial court erred by relying on the statements submitted by Livingston and Tyrrell, while discounting the declarations of Dutra and Waters, the statement of Bud Garman, and statements made by members of the county board of supervisors. "It is not our role as a reviewing court to reweigh the evidence or to assess witness credibility. [Citation.]" (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981 (*Thompson*).) Moreover, appellants' reliance on *San Diego Unified School Dist. v. Commission on Professional Competence* (2013) 214 Cal.App.4th 1120, 1146, does not assist them here. Unlike the trial court in *San Diego Unified School Dist.*, the trial court here explained its reasons for accepting the statements of the Church members and the basis for its rejection of the declarations and statements of other witnesses. Nor does the fact that the court did not mention certain evidence, as appellants assert, require reversal. It was the court's role to review the administrative record,

and "we presume the court performed its duty." (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1324; Evid. Code, § 664.) Implicit in its ruling, the court found the evidence cited by appellants did not demonstrate that the Church was using or intended to use the property as a commercial quarry and aggregate business at the time the use became nonconforming. Appellants insist that "[a] composite aerial photo, comparing 1974 activity with prior quarry boundaries, shows the significant expansion of the quarry floor during the Church's ownership." However, whether there was a "significant" expansion of the quarry floor, from which a reasonable inference could be drawn that the property was being used as a commercial quarry and aggregate business during the Church's ownership, was a question of fact for the court as the trier of fact. The individual aerial photographs of the quarry site are fuzzy and do not delineate to the naked eye either structures, equipment, or stockpiles on the property, or, more significantly, that the property was being used as a commercial quarry and aggregate business. The photographs are annotated with circled areas, purportedly showing "the quarry;" arrows pointed at certain areas, purportedly showing, "structure;" and "apparent stockpile or equipment." The court was not required to accept appellants' descriptions of what was visible in the aerial photographs or what was visible in the consultants' composite photograph, which was created by overlaying the consultants' interpretation of individual aerial photographs.[5] " '[A]s a general rule, "[p]rovided the trier of fact does not act arbitrarily, he may reject *in toto* the testimony of a witness, even though the witness is uncontradicted. [Citations.]" [Citation.] This rule is applied equally to expert witnesses.' [Citation.] The *exceptional* principle requiring a fact finder to accept uncontradicted expert testimony as conclusive applies *only* in professional negligence cases where the standard of care must be established by expert testimony." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 632.) Nor are we persuaded by appellants' argument that the court made two prejudicial errors in its analysis of the evidence relative to various dates and differing scales on the individual aerial photographs. If appellants believed the court's decision was improperly influenced by the various dates or differing scales on the photographs, they could have brought the purported error to the court's attention by an appropriate objection under Code of Civil Procedure section 657 (motion for a new trial) or section 663 (motion to vacate judgment). (See *Thompson, supra*, 6 Cal.App.5th at pp. 981-982.) Their failure to do so indicates they did not deem the purported errors to be prejudicial, and we too find no prejudice.

***7** We conclude our discussion by noting that appellants' "elaborate factual presentation" in their briefs, simply put, is an attempt to reargue on appeal factual issues that were decided adversely to them at the trial, which is "contrary to established precepts of appellate review," and "[a]s such, it is doomed to fail." (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 398-399.) Having determined the trial court did not err in making its factual findings or in applying the parties' respective burdens of proof, we see no merit to appellants' claims of error on these grounds.[6]

DISPOSITION

The judgment is affirmed. Respondent Keep The Code, Inc. is awarded costs on appeal.

We concur:

Pollak, Acting P. J. *

Ross, J. †

All Citations

Not Reported in Cal.Rptr., 2018 WL 6259477

Footnotes

1 In its petition, KTC describes itself as "a California non-profit corporation whose members include persons and entities who object to the unlimited expansion of and lack of sufficient environmental protection for mining activities at the Harris Quarry. Keep The Code's mission is to preserve and protect for the general public the natural environment, agriculture, and rural character of Mendocino County."

2 All further unspecified statutory references are to the Public Resources Code. While SMARA has been amended since this litigation, the amendments are not relevant to our resolution of this appeal.

3 Section 2776, subdivision (a) currently reads: "(a) No person who has obtained a vested right to conduct surface mining operations prior to January 1, 1976, shall be required to secure a permit pursuant to this chapter as long as the vested right continues and as long as no substantial changes are made in the operation except in accordance with this chapter. A person shall be deemed to have vested rights if, prior to January 1, 1976, the person has, in good faith and in reliance upon a permit or other authorization, if the permit or other authorization was required, diligently commenced surface mining operations and incurred substantial liabilities for work and materials necessary for the surface mining operations. Expenses incurred in obtaining the enactment of an ordinance in relation to a particular operation or the issuance of a permit shall not be deemed liabilities for work or materials." (Amended by Stats. 2006, ch. 538, § 560, pp. 4429-4430.)

Similarly, and using almost identical language to that used in SMARA, and as originally enacted in 1979, the vested rights ordinance in Mendocino County Code former section 22.16.060 provided, in pertinent part, as follows: "No person who has obtained a vested right to conduct surface mining operations prior to January 1, 1976, shall be required to secure a permit pursuant to the provisions of this chapter as long as such vested right continues; provided, however, that no substantial changes may be made in any such operation except in accordance with the provisions of this chapter. A person shall be deemed to have such vested rights if, prior to January 1, 1976, he has, in good faith, and in reliance upon a permit or other authorization if such permit or other authorization was required, diligently commenced surface mining operations and incurred substantial liabilities for work and materials necessary therefor. Expenses incurred in obtaining the enactment of an ordinance in relation to a particular operation or the issuance of a permit shall not be deemed liabilities for work or materials."

Mendocino County Code section 22.16.150, subdivision (A), adopted in 1999, currently provides: "No person who has obtained [a] vested right to conduct surface mining operations prior to January 1, 1976, shall be required to secure a permit pursuant to the provisions of this Chapter as long as such vested right continues and no substantial change is made in that operation. Any substantial change in a vested surface mining operation subsequent to January 1, 1976, shall require the granting of a permit pursuant to this Chapter. A person shall be deemed to have such vested rights if, prior to January 1, 1976, he has, in good faith, and in reliance upon a permit or other authorization if such permit or other authorization was required, diligently commenced surface mining operations and incurred substantial liabilities for work and materials necessary therefor. Expenses incurred in obtaining the issuance of a permit related to the surface mining operation shall not be deemed liabilities for work and materials."

4 The trial court found that, "[b]ased on the scales provided on each phot[o], the area outlined in the 1965 photo is approximately 335' x 240['']. That outlined in the 1974/81 photo is approximately 225' x 125''."

5 To the extent appellants assert that the trial court engaged in an "unauthorized private investigation" regarding the photographs and composite drawings of the quarry, we reject the assertion. The court was at liberty both to review the evidence and to determine the weight to assign to it. Thus, we conclude the court's review of the photographic evidence and its determination of the weight to assign the disparities in the composite overlaying the photographs was well within the ambit of the court's function as the trier of fact.

6 Considering our determination, the parties' remaining contentions do not need to be addressed.

* On Monday, November 26, 2018, the Commission on Judicial Appointments confirmed the Governor's appointment of Justice Pollak as the Presiding Justice of Division Four of this court.

† Judge of the San Francisco Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.