



January 31, 2018

Dale Case, Land Use Director
Sent VIA E-Mail: dcase@bouldercounty.org

RE: Opinion of Special Use Permit SU-96-18

Dear Mr. Case,

The County of Boulder, State of Colorado, retained me to provide written evaluation to the Land Use Director regarding the status of SU-96-18 ("**Permit**"), as approved by Resolution 98-32 and the applicability of Boulder County Land Use Code ("**Code**") **4-605.C**. Specifically, I have been retained to provide a legal opinion as to whether the Permit has expired due to inactivity under Code **4-605.C**.

Statement of Facts and Summary of Documents:

- Jan. 1, 1998:** Concept Mining Plan stamped "APPROVED 1-22-98 By Board of County Commissioners".
- Jan. 6, 1998:** Boulder County Staff Recommendation regarding Docket SU-96-18/SE-96-18.
- Aug. 20, 1998:** Boulder County Resolution 98-32 approving SU-96-18 on August 20, 1998 and approving a Development Agreement Governing Developer's Obligations In "Western Mobile Boulder Open Mining Special Use Review" ("**Development Agreement**") between Boulder County and Western Mobile, Inc. (now Martin Marietta Materials LLC and referred to as "**Developer**").
- Oct. 17, 2006:** An administrative approval was granted by David Callahan, AICP, Senior Planner, by letter, dated October 17, 2006, which eliminated Phase I of the mining plan approved in the Permit ("**Callahan Letter**").
- Aug. 30, 2016:** Letter from Abby Shannon, AICP, Boulder County on-call planner, dated August 30, 2016, documenting approval of the modification application and Site Plan, Landscape Plan, and Lighting Plan approval for SU-96-18.
- Jan. 3, 2017:** Boulder County Commissioner record of Site Plan and Landscape Plan application for SU-96-18. (Note date on the BOCC Business Meeting Agenda Item stated January 3, 2016, which is typo).

- Jan. 24, 2017:** Letter from Abby Shannon, AICP, Boulder County, dated January 24, 2017, documenting the approval of the site plan for the Rockin' WP North parcel on January 3, 2017.
- Jul. 12, 2017:** Letter from Mark Mathews, Brownstein Hyatt, representing Martin Marietta, regarding "Activity on Parcels Preventing Lapse", including Appendices A and B ("**Mathews Letter**").
- Aug. 11, 2017:** Save Our St. Vrain Valley letter responding to July 12, 2017 letter from Mark Mathews.

The Mathews Letter lists activities associated with the Permit. Some of the stated activities are specific to compliance with the conditions of the Permit, including activities related to Conditions 4, 19 and 29. I have not received documents or evidence of the stated activities. For the purposes of this legal opinion letter, I assume that the stated activities have occurred. The nature of the stated activities should be easily verifiable.

It is my understanding from discussions with Boulder County staff that after the Special Use approval by Resolution 98-32, the only staff evaluation of whether "no activity under the Special Use approval occurred for any portion of the Permit for a continuous period of five years" or of whether the Permit was subject to lapse under **4-604.C**, was in the Callahan Letter dated October 17, 2006. The Callahan Letter provided an administrative interpretation that the Permit has not lapsed under **4-604.C**., stating in part, "While we do not have information that such a lapse has occurred, it could occur in the future." As recently as 2016 and early 2017, the Boulder County Commissioners, through the administrative processing of a staff planner, received, processed and acted upon an application from the Developer for a site plan and landscape plan as required by Condition #12 of the Permit without addressing the issue of whether the Permit had lapsed under 4-604.C.

ANALYSIS:

Boulder County Land Use Code ("Code"):

4-604 Limitation of Uses by Special Review

4-604 B. states in part, "Any approved use by Special Use that does not significantly commence operation or construction . . . within five calendar years after the Board has approved the use, shall lapse . . ." The Callahan Letter provides an interpretation that commencement of operations within five calendar years has occurred, which is discussed below.

4-604 C. states, "Any approved use by Special Use which commences operation or construction as required under Subsection (B), immediately above, shall lapse, and shall be of no further force and effect, if the use is inactive for any continuous five-year period or such shorter time as may be prescribed elsewhere in this code (sic) or in a condition of a specific docket's approval. If this period of inactivity occurs, the use may not be recommenced without a new discretionary approval granted under this Code. An approved special use shall be deemed inactive under this Subsection (c) (sic) if there has been no activity under any portion of the special use permit for a continuous period of five years or more as a result of causes within the control of the special use permittee or agent."

Last sentence of **4-604 C.** defines the specific elements required for a determination that a Special Review use has lapsed. The phrase, “. . . no activity under any portion of the special use permit for a continuous period of five years or more . . .” requires a finding of three elements for a determination that the Special Use permit has lapsed: (1) no activity has occurred, (2) under any portion of the permit subject to the Special Use permit, (3) for a continuous period of five years or more.

Therefore, if **any** activity has occurred on **any** portion of the Permit, at **any** time during any particular continuous period of five years, then the required elements do not exist to find that Special Use permit has lapsed under **4.604 C.**

4-604 B. uses the phrase “. . . does not significantly commence operation or construction. . .” to determine if an approved Special Use permit lapses initially while **4-604 C.** uses the phrase, “An approved special use shall be deemed inactive under this Subsection (c) if there has been no activity under any portion of the special use permit for a continuous period of five years . . .” The phrasing in **4-604 C.** is broader than the words “operation” or “construction”.

The approved Special Use “use” is defined in the special use approval, which in this case is Resolution 98-32 and the accompanying Development Agreement. Resolution 98-32 references the submission of a standard development agreement and incorporates the standard development agreement in the special use application “Docket” in the last WHEREAS recital. The first recital of the Development Agreement defines the Development as the, “Land Use Docket # SU-96-18 (“the Docket”), as set forth in County Resolution #98-32, adopted August 20, 1998, which is attached to and incorporated into this Agreement as Exhibit A (collectively, “the Development”). The last sentence of paragraph 1 of the Development Agreement states, “The Development shall comply and be consistent with the terms, conditions, and commitments of record for the Docket, as set forth in Exhibit A.” Exhibit A to the Development Agreement is Resolution 98-32. Therefore, Resolution 98-32 and the Development Agreement, including all listed conditions, are all part of the Permit.

Other sections of the Code provide authorization for the Land Use Director to interpret and administer but do not provide more specific guidance on the definition of the terms, “activity”, “construction”, “operation” or “use”. “Activity” is not defined in **Article 18-Definitions**. “Construction” is not defined. “Construction activity” is defined (**18-128A**); however, the definition is limited to interpreting and applying **Article 7-904**, which concerns Stormwater Quality Management Permit Requirements and is not relevant to interpreting “construction” as relates to the Permit. “Operation” is not defined. “Use” is also not defined.

1-900 Interpretation contains a series of principles for interpreting the Code. The principles provide general guidance that the Code provisions are the minimum requirements, that the Code shall not conflict with or annul other regulations, and a statement that more restrictive provision shall apply. **1-900 Interpretation** does not provide specific guidance for interpreting **4-604.C.**

1-1000 Rules of Construction of Language provides some guidance. **1-1000.A.1.** states, “Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.”

There is no past practice or prior interpretation by Boulder County concerning the interpretation of the phrase, “. . . if the use is inactive . . .” Furthermore, there is no legislative or industry definition for this phrase. Therefore, the word “inactive” and the phrase “. . . no activity under any portion of the special use permit for a continuous period of five years or more . . .” would be interpreted based on rules of grammar and common usage.

2-300 Land Use Department Director, B.1. states in part that, “The Director is authorized . . . to administer and enforce all provisions of the Land Use Code . . .” which necessarily includes interpreting and applying Code provisions.

Case Law Analysis: Case law provides some guidance on interpretation and application of local codes. It is recognized that Colorado courts have previously considered Boulder County Land Use Code **Article 4-604**, sub-sections **B.** and **C.** of the Code in *Sierra Club v. Billingsley*, 166 P.3d 309 (Colo.App. 2007).

“Courts interpret the ordinances of local governments, including zoning ordinances, as they would any other form of legislation. As such, zoning ordinances are subject to the general canons of statutory interpretation.

When construing a statute or ordinance, courts must ascertain and give effect to the intent of the legislative body. Moreover, courts must refrain from rendering judgments that are inconsistent with that intent. To determine legislative intent, we therefore look first to the plain language of the ordinance. If courts can give effect to the ordinary meaning of words used by the legislature, the ordinance should be construed as written, being mindful of the principle that courts presume that the legislative body meant what it clearly said. Finally, if the statutory language is clear and unambiguous, the language should not be subjected to a strained or forced interpretation.”

Sierra Club, id.; *City of Colorado Springs v. Securcare SelfStorage, Inc.*, 10 P.3d 1244 (Colo.2000); *International Pager Co. v. Cohen*, 126 P.3d 222 (Colo.App. 2005); *Steamboat Springs Rental & Leasing, Inc., v. City and County of Denver*, 15 P.3d 785 (Colo.App.2000);

The Colorado Appellate Court in *Sierra Club, id.*, addressed the specific issue of whether **Article 4-604** could be applied to a Special Use permit approved in 1990, prior to the adoption of **Article 4-604** in 1996. The *Sierra Club* Court held that it was reasonable for the Board of Adjustments to interpret **Article 4-604** as not applying to permits approved prior to 1996. The ruling in *Sierra Club* does not provide any specific guidance on interpreting the phrase of “activity under any portion of the special use permit” other than citing general rules for interpretation of local ordinances.

Case law guidance on the interpretation of local codes supports an interpretation that the Permit has not lapsed under **4-604(c)** because there has been activity under portions of the Permit during any particular continuous five year period since approval of the Permit in 1998.

Discontinuance of Nonconforming Use: Research for specific cases ruling on interpreting “inactivity” and determining a “lapse of a special use permit” did not produce any results. However, there are cases on abandonment, or discontinuance, of nonconforming uses which can provide guidance on interpretation by analogy.

The Developer has presented evidence and cited activities that can be interpreted as indicating that the Developer did not intend to abandon the Special Use, or did not intend to allow the Permit to lapse. However, proof of intent to abandon a use is not a required finding. See *Hartley v. Colorado Springs*, 764 P.2d 1216 (Colo.1988), *Wyatt v. Board of Adjustment-Zoning*, 622 P.2d 85 (Colo.App. 1980), stating, "A nonconforming use may be terminated by ordinance after the lapse of a reasonable period of time regardless of whether the property owner intends to abandon that use."

Article 4-604 does not require consideration or a finding as to whether the Developer intended to allow the Special Use to lapse. Although there is a line of cases and legal authorities which hold that both intent to abandon and actual abandonment is necessary (at least for abandonment of nonconforming uses), Colorado law holds that intent to abandon a use is not a required finding or consideration unless expressly stated in the local ordinance. Therefore, a determination of whether the Permit has lapsed under **4-604.C** should focus on an absence of evidence of any actual activity related to any portion of Permit during any particular continuous five year period. Mathews' Letter cites some actions in Appendix B which may demonstrate an intent not to abandon the Permit, (i.e. not to allow the Permit to lapse), but which may not be direct evidence of activity related to a portion of the Permit.

CONCLUSION ON INTERPRETING SECTION 4-604(c):

In the absence of specific definitions of "activity" or "inactivity" in the Code, absence of state statutes or defined terms generally adopted by the planning industry, the plain and ordinary meaning of the language in **4-604.C** should be applied. The SOSvv e-mail suggests that the "approved use" is "gravel mining" and therefore, any continuous five year period of inactive "gravel mining" should result in a lapse of the Permit. However, **4-604.C** expressly defines "inactivity" as ". . . no activity under any portion of the permit . . ." Therefore, in plain, ordinary language and grammar, any activity under any portion the Permit would result in the failure to meet the definition of "inactivity" under **4-604.C**. Those actions listed in Appendix B of the Mathews' Letter which describe activities that are performed as required by specific conditions of the Permit constitute "activity under a portion of the special use permit."

OTHER CONSIDERATION:

Boulder County has treated the Permit as in effect and not to have lapsed under **4-604.C** through its actions and review, including the most recent actions by the Boulder County Land Use department and County Commissioners of Boulder County to approve a site plan for SU-96-18 on January 3, 2017. Any attempted interpretation that the Permit has lapsed under **4-604.C** at this point would be subject to equitable considerations including the Developer's understanding of, and reliance upon, the County's interpretation that SU-96-18 has not lapsed due to inactivity. See *Hargreaves v. Skrbina*, 662 P.2d 1078 (Colo. 1983).

Furthermore, Courts, ". . . give great deference to an agency's interpretation of a rule it is charged with enforcing, and its interpretation will be accepted if it has a reasonable basis in law and is warranted by the record." *Sierra Club, id.*; *Quaker Court LLC v. BOCC of County of Jefferson*, 109 P.3d 1027 (Colo.App. 2004) ruling that, "The [Board of Adjustment's] determination is accorded a presumption of validity, and, as a result, the burden is on developer to overcome the presumption."

Deference to an agency's interpretation is only applicable if a Court first finds that the regulatory language is ambiguous. In this case, the language of **4-604(c)** does not appear ambiguous; rather the plain, ordinary meaning, usage and grammar of the phrase, ". . . no activity under any portion of the special use permit . . ." would require consideration of any activity under any portion of the Permit. If a Court were to find that this language is somehow ambiguous, then prior case law holds that there is a presumption in the validity of the governmental agency's interpretation of the regulation and it would be the burden of a challenger to overcome the presumption of validity.

Based on the foregoing, it is my opinion that the Permit has not lapsed under **4-604.C**.

Please let me know if you have any questions concerning this opinion letter or if I can be of further assistance on this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Eric J. Heil". The signature is stylized and cursive.

Eric J. Heil, Esq., A.I.C.P.