

## **MINING USE PERMITS**

*When Can They Be Revoked or Modified?*

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**by Mark D. Harrison, Esq. and Jeffrey K. Dorso, Esq.**

It is an increasingly familiar scenario: Your mining operation, once comfortably remote from residential development, is now surrounded by new homes. These homes are occupied by people who have fled urban settings for a quiet life in the country. Although your mine operation is in plain view, some of the nearby residences were built during a downturn in mine production. Business has now picked up again and your neighbors are flooding the telephone lines of the local government officials with complaints about truck traffic, noise, dust, and the like.

You are operating under an older use permit, with no expiration date. The permit puts no limit on truck trips, production, or processing hours. Your use permit does require, however, that your operations must not be a nuisance and that dust controls be in place. If a mining permit were issued today for a similar operation, it would be subject to a long list of conditions and new legal requirements and restrictions.

The local elected body, once comprised largely of ranchers, farmers, and business people, has also changed since the permit was issued. It now reflects the influx of people with more "environmental" viewpoints. Some of its members are sympathetic to the complaints of the nearby homeowners who want the use permit revoked and the mine shut down. At a minimum, opponents to the mine want the permit modified to include new restrictions upon its use. There may be enough votes within the elected body to schedule a hearing to revoke or modify the permit. What do you do? What could you have done to avoid this situation in the first place?

### **KNOW YOUR LEGAL STATUS - VESTED PERMIT RIGHTS**

You must first understand your legal rights. When you hold an existing extraction permit, as in the scenario described above, you are in a legal position fundamentally different from a person who is seeking a new permit. You have what are known as "vested" permit rights. In most states, these rights are considered to be a property interest. In other words, a governmental agency cannot take away these rights, or unreasonably impair them, except under certain specific circumstances.

Vested mining rights are generally obtained in one of two ways. One way is through establishing the extractive use prior to any permit requirement. This type of right is generally referred to as a vested "nonconforming" use or, in non-legal terms, a "grandfathered" use. The other way to obtain vested mining rights is through reliance on a use permit (in some places known as a

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"conditional use permit"). These permits are issued by local, state, or federal government. One leading case in this area summarized the legal effect of reliance upon a validly issued permit:

It is not, nor could it be, claimed that a city council exercises unlimited discretion in the matter of revoking permits. A permit having been issued, the power of a municipality to revoke it is limited. If the permittee does nothing beyond obtaining the permit or fails to comply with reasonable terms or conditions expressed in the permit granted, the proper authorities may revoke it. If a permittee has acquired a vested property right under a permit, the permit cannot be revoked . . . . Such a permit has been declared to be more than a mere license revocable at the will of the licensor. When, in reliance thereon, work upon the building is actually commenced and liabilities are incurred for work and material, the owner acquires a vested property right to the protection of which he is entitled.

*Trans-oceanic Oil Corp. v. Santa Barbara*, 85 Cal.App.2d 776, 783-784 (1948) (internal citations omitted).

Whether the mining operation is established as a classic "grandfathered use" or through reliance on a use permit, once the use is established, the right of the local government body to restrict or terminate the use is limited. If a local agency action unreasonably interferes with the existing right, the local agency must either stop its activities or confront its obligations to compensate the permit holder for the fair market value of the property. In other words, unlike the government's broad discretion when deciding to issue a new permit, the matter of revoking or modifying an existing permit requires the government to carry a heavy burden to prove that its actions are "reasonable" in light of the terms of the permit and the facts in the case.

**WHEN CAN A USE PERMIT BE MODIFIED OR REVOKED?**

While the law in each state and each local jurisdiction will vary, across the country two basic rules have developed to govern when a use permit may be revoked or modified.

**1. Violates Condition**

Mining permits are most often conditional permits. This is to say that the government authorizes the use subject to the operator's compliance with certain conditions. These conditions are usually intended to make the use as compatible as possible with surrounding uses and land use plans. Common conditions placed on extractive uses include limitations on the length of the permit, hours of operation, limitations on truck trips, production caps, dust control, and noise mitigation. An operator's failure to comply with an express condition in the permit can provide a ground to modify or revoke the permit.

For example, in the well-known case, *Hartland Sportsman's Club v. Town of Delafield*, 827 F.Supp. 562 (1993), the plaintiff, a shooting club, had a conditional use permit ("CUP") to construct an indoor shooting facility. The town board found that the owner violated the conditions of its CUP by failing to adhere to the time limitations, the limitation on the number of club members, and the geographic area of operation specified in the permit. The town board voted to modify and restrict the permit. The federal district court, upon review, found the modification of the permit proper because "[t]he [town] reasonably concluded that several of the

specified conditions had been violated by Hartland and that modification of the permit was therefore required." *Id.* at 569.

## 2. Creates a Nuisance

A second ground for revoking or modifying a permit exists when the permitted use is being conducted in a manner creating a nuisance.

The definition of a "nuisance" is not subject to a concrete definition. One common definition is "a condition or situation (such as loud noise or foul odor) that interferes with the use or enjoyment of property." Law from around the country is relatively uniform in holding that mining operations are not normally nuisances, but changes in the mining operation or even changes in the local surroundings can lead to claims that an otherwise legal mining operation constitutes a nuisance.

The courts have established, however, that quarrying is not a nuisance per se. See *Lou Menges Org., Inc. v. North Jersey Quarry Co.*, 3 N.J. Super. 494, 498 (1949); *Ex Parte Davison*, 321 Mo. 370, 376 (1928); *City of St. Louis v. Atlantic Quarry and Construction Co.*, 244 Mo. 479 (1912). For example, in *City of St. Louis*, while discussing a stone quarry, the court said, "[w]e do not have to go to the books to ascertain that it is not a nuisance per se." *City of St. Louis*, supra, 244 Mo. at 485. A nuisance per se requires that the activity be a nuisance "at all times and under any circumstances regardless of location or surroundings." *Leatherbury v. Gaylor Fuel Corp.*, 276 Md. 367, 377 (1975) (internal citations omitted). Quarrying is a useful and necessary activity, and "its offensiveness to others depends upon the characteristics of its operations." *Lou Menges Org., Inc.*, supra, 3 N.J. Super. at 498.

With that in mind, when changes occur in a mining operation's surroundings, an otherwise legal mining operation can sometimes be deemed a nuisance. This would typically occur in situations where unacceptable land uses exist adjacent to an operation. For example, in *Benton v. Kernan*, 127 N.J. Eq. 434 (1940); 1940 N.J. Super. LEXIS 828, a quarry was built in an uninhabited wooded area that later developed into a dense residential neighborhood. The resident homeowners brought suit claiming that defendant operated its quarry in such a manner as to constitute a nuisance. The court explained that while "we appreciate that the operation of a quarry is not a nuisance per se, . . . it may easily become one when carried on in a residential district." *Id.* at 43 (internal citations omitted). In short, "a nuisance may be merely a right thing in the wrong place - like a pig in the parlor instead of the barnyard." *Id.* at 55 (internal citations omitted).

In the case of *Barrett v. Federal Crushed Stone Corp.*, 264 N.Y.S. 524 (1933), the plaintiff, a hotel owner, claimed that defendant's quarry was a nuisance since as a result of blasting, it scattered dust and rocks on plaintiff's property. *Id.* at 526. The court held that since the hotel and the quarry were located in a mostly commercial area, the quarry was not a nuisance to plaintiff. *Id.*

## **The Government Carries The Burden Of Proving The Grounds For Revocation Or Modification.**

Most importantly, mine operators must be aware that claims that a permit should be revoked or modified do not substitute for proof that sufficient facts exist to justify such a remedy. Because

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the permit has been issued and the operator has relied upon the permit, the burden shifts to the governmental agency to prove its case. Before enforcement action can be taken, the government must establish the facts of the nuisance or the permit violation and provide the operator with a hearing on the issue. One case describes the government's burden with respect to establishing a nuisance as follows: "To qualify as a nuisance, the interference with collective social interest must be both 'substantial and unreasonable.'" Substantiality requires proof of significant harm, defined as a real and appreciable invasion of the plaintiff's interests, one that is definitively offensive, seriously annoying, or intolerable. "The measure is objective. If a normal person in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one." *Gallo v. Acuna*, 14 Cal.4th 1090, 1105 (1997) (citing Rest.2d Torts, Sec. 821F, coms. c & d, pp. 105-106.).

**Even If A Basis To Revoke Or Modify Is Shown, The Remedy Must Be Limited.**

Establishing the grounds for revocation or modification of a permit does not convey unchecked authority on a local government to impose any modifications to the permit that it sees fit. The general rule in this regard is that a local government must act on the permit only to the extent necessary to remedy the harm created by the permitted activity. According to one court, "[I]n order to justify the interference with the constitutional right to carry on a lawful business it must be clear the public interests require such interference, and that the means employed are reasonably necessary to accomplish the purpose and are not unduly oppressive on individuals." *Korean American Legal Advocacy Foundation v. City of Los Angeles*, 23 Cal.App.4th 376, n.5 (1994).

In other words, the remedy must be limited to stopping only those aspects of the use that are creating the problem. For example, a local government may not first make a finding of nuisance based on high traffic volumes and then use that finding to modify a condition in the permit that would have no effect on traffic volume, such as generation of processing dust.

**WHAT OPERATORS CAN DO TO PROTECT THEIR EXISTING PERMITS.**

- First and foremost, remember that your permit is generally considered to be a property right. It cannot be revoked or modified without sufficient and substantial justification.
- Second, stay in conformity with conditions in your operating permit. Keep basic records which prove that your operation is in compliance.
- Third, address concerns of neighbors promptly and responsibly.
- Fourth, if enforcement proceedings are commenced, remember that you are entitled to a hearing and the governmental agency normally bears the burden of proof.
- Fifth, if it appears clear that a basis for modification of the permit exists, insist that the remedy be narrowly tailored to address only specific operational aspects that have created the problems.

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