



Land Use Department

Courthouse Annex

2045 13th Street • 13th & Spruce Streets • Boulder, Colorado 80302 • (303) 441-3930

EXHIBIT

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October 8, 2002

Mr. John Lohr
Plant Manager
CEMEX
P.O. Box 529
Lyons, Colorado 80540

Dear Mr. Lohr:

This responds to your facsimile of September 27, 2002, in which you request a letter indicating the status of the Cemex factory building and equipment as governed by the Boulder County Land Use Code. You attached a partial "observation" from the Division of Minerals and Geology. That information notes that "DMG stated that it would like either written confirmation that the cement kiln is allowed to remain in place after reclamation is completed, or a Certificate of Designation regarding the disposal of Cement Kiln Dust."

The Boulder County Land Use Code recognizes the cement kiln and attendant equipment as a nonconforming use. Ordinarily, this use requires special use review, however, in this case, the use predates the regulations. Consequently, it is subject to Article 4-1003 Nonconforming Uses, which I have attached for your convenience. As a matter of clarification, I note that there have been various reviews involving this property. These include Special Use Review SU-88-21, which allowed tire burning, Special Use Review SU-01-08, which allowed cellular antennas for Quest, and Site Plan Review SPR-97-160, which allowed cellular antennas for US West and New Vector. Even so, these reviews did not address the nonconformity of the kiln and its attendant equipment.

Please note that from a County land-use standpoint, the kiln is a nonconforming use allowed regardless of any relationship to any mining activity reviewed and approved by the county, as there is no connection between the use of the facility and any adjacent mining areas (such as Dowe Flats, which received county special uses approval in Docket SU-94-13), or other mining sites. Therefore, it follows that the use can potentially remain in place indefinitely, if it continues to meet all of the requirements of Article 4-1003. However, please note that Article 4-1003 requires the termination of the nonconforming use if it is impermissibly enlarged or if it is abandoned (see paragraphs C., and G. in the attached regulations). Further, the right to continue a nonconforming use terminates immediately when the structure containing the use is damaged by an intentional act of the property or structure owner or their agent (see paragraph F.).

I hope this answers your questions at this time. If I can be of further service, please feel free to contact me at your convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "David Callahan", with a stylized flourish at the end.

David Callahan

Manager, Current Planning Division

Attachment: Article 4-1003, Boulder County Land Use Code

the reasonable regulation of nonconforming uses and structures to minimize their adverse impacts on current comprehensive zoning schemes and the community, this Article shall be strictly construed against the continuation or expansion of nonconformity in Boulder County. (8/20/96)

4-1002 Nonconforming Structures (9/5/96)

- A. A nonconforming structure is any existing structure which does not conform to the structure regulations of this Code for the zoning district in which such nonconforming structure is located, as a result of either (1) the adoption or amendment of this Code, or (2) a final county administrative or judicial decision precluding Boulder County from enforcing this Code specific to a structure on the basis of estoppel, laches, or waiver.
- B. A nonconforming structure may continue to be occupied, except as otherwise provided for in this Section.
- C. A nonconforming structure may not be altered, repaired, or enlarged in any way which would increase the degree of nonconformity with respect to the setback or height regulations of this Code,
 - 1. For purposes of this Section, an increase in the degree of nonconformity shall be any alteration which adds to the floor area or height of the portion of the structure which violates this Code.
 - 2. This restriction may be waived if the Building Official determines that any such alteration, repair, or enlargement is necessary to rectify a hazardous health or safety situation, or to comply with the public health or safety requirements of another governmental entity having lawful jurisdiction over the structure.
 - 3. Agricultural structures, either singly or cumulatively, legally constructed which were over 25,000 square feet (or 35,000 square feet in a community service area) as of October 18, 1994, may be altered, repaired, or enlarged provided the total square footage of the structures on a parcel is not increased.
- D. A nonconforming structure which has been damaged or destroyed by causes outside the control of the property owner or their agent, may be restored to its original location, floor area, and height, provided that such restoration complies with the current provisions of the Boulder County Building Code.
 - 1. Such restoration must be commenced within six months after the date on which the nonconforming structure was damaged or destroyed and completed within one year after the date on which the restoration was commenced.
 - 2. The provisions of this Section 4-1002 (D) shall not apply to substantial improvements to structures in the Floodplain Overlay District as provided for in Section 4-400 of this Code.
 - 3. Restoration meeting the requirements of this provision are not required to undergo a Site Plan Review. (See Article 4-803 B)(7/2/98)

4-1003 Nonconforming Uses (9/5/96)

- A. A nonconforming use is any existing use which does not conform to the use regulations of this Code for the zoning district in which such nonconforming use is located, as a result of either
 - 1. the adoption or amendment of this Code, or

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2. a final administrative or judicial decision precluding the County from enforcing this Code specific to a use on the basis of estoppel, laches, or waiver.
 - a. Uses are not considered nonconforming due to inadequate parking.
 - b. Uses which fall within Section 4-1003 (A) (2), above shall not be eligible to apply for a special use permit for a use of community significance (Section 4-506 (J)).
- B.** Except as otherwise provided in this Section, a nonconforming use may be continued and normal or routine maintenance of a structure containing a nonconforming use shall be permitted. Normal or routine maintenance shall include any maintenance or repair which does not impermissibly enlarge or alter the structure containing a nonconforming use under Section 4-1003(C), below.
- C.** Enlargement or Alteration of a Nonconforming Use
1. The right to continue a nonconforming use terminates immediately when the nonconforming use is enlarged, expanded, extended, or altered in any of the following ways, and the property owner does not successfully pursue any of the options specified in Section 4-1003 (H) within 30 calendar days after the Director provides written notification of an alleged illegal enlargement or alteration to the owner.
 - a. Addition of a new structure containing or accessory to the nonconforming use;
 - b. Enlargement or alteration of a structure containing or accessory to the nonconforming use, including but not necessarily limited to an increase in floor area, an increase in height, or any other alteration or improvement in excess of normal or routine maintenance of the structure;
 - c. Enlargement or alteration in the land area occupied by the nonconforming use, unless the basic nature of the use, at the time it became nonconforming, clearly indicated or contemplated such an increase or alteration; or
 - d. Any other enlargement or alteration of the nonconforming use which has the effect or threatened effect of creating a hazard or nuisance on or off the property, of adversely affecting the character of the neighborhood, or of intensifying the use of the land or its need for services.
 - e. Removal or replacement of any structural member in a use for which the County is precluded from enforcing this Code specific to use on the basis of estoppel, laches, or waiver.
 2. An impermissible enlargement or alteration shall not include the following:
 - a. a change of ownership of the property;
 - b. an alteration or expansion which the Building Official determines is necessary to rectify a hazardous health or safety situation or to comply with the public health or safety requirements of another governmental entity having lawful jurisdiction over the structure;
 - c. an extension of the nonconforming use within the structure containing the use, provided that such extension is not accompanied by an alteration of the structure falling within category (b), above;
 - d. the addition of a solar energy device to a structure containing a nonconforming use; or

- e. any replacement or upgrading of outmoded or worn equipment or supplies, provided that such activity does not fall within category Section 4-1003(C)(1)(d), above.
 - 3. Owners of legal building lots containing agricultural uses which have become nonconforming as a result of adoption or amendment of this Code, may restore, modify, and maintain existing conforming structures, and may construct new conforming structures, provided such structures are directly related to the agricultural use, and provided the use is not enlarged or altered in any other way.
- D. **Change of a Nonconforming Use**
 - 1. A nonconforming use may be changed only to a use which is conforming in the zoning district in which the use is located.
 - 2. Any change of a nonconforming use to any other use shall operate immediately to terminate the right to continue the nonconforming use. Thereafter, the property shall be used only in conformity with the use provisions of its zoning district.
- E. **Destruction of a Structure Containing a Nonconforming Use**
 - 1. A structure containing a nonconforming use shall be deemed destroyed when either greater than 50 percent of its floor area, or greater than 50 percent of its actual value (as determined by the Boulder County Assessor) is destroyed.
 - 2. The right to continue a nonconforming use terminates immediately when the structure containing that use is destroyed by an intentional act of the property or structure owner or their agent.
 - 3. In all other cases, when a structure containing a nonconforming use is destroyed, the structure may be restored, and the nonconforming use may be reestablished.
 - a. Restoration of the structure must be commenced within six months after the date on which the nonconforming structure was destroyed and completed within one year after the date on which the restoration was commenced.
 - b. These times may be extended for a reasonable period, if approved by the County Commissioners at a public hearing upon a showing of extraordinary circumstances by the property owner or their agent.
 - 4. The provisions of this Section 4-1003(E) shall not apply to substantial improvements to structures in the Floodplain Overlay District as provided for in Section 4-400.
- F. **Damage to a Structure Containing a Nonconforming Use**
 - 1. The right to continue a nonconforming use terminates immediately when the structure containing that use is damaged by an intentional act of the property or structure owner or their agent.
 - 2. In all other cases, when a structure containing a nonconforming use is damaged, the structure may be restored, and the nonconforming use may be reestablished.
 - a. Restoration of the structure must be commenced within six months after the date on which the nonconforming structure was damaged and completed within one year after the date on which the restoration was commenced.

with a 30 day opportunity to abate, any failure by the Director to provide a notification of a determination of termination as provided for in this Section shall in no way entitle the property owner to continue or resume a nonconforming use terminated by operation of this Section 4-1003(H).

4-1004 Recognition of Nonconforming Uses (9/4/97)

- A. A nonconforming use may be recognized as a conforming use if:
1. The use was made nonconforming pursuant to Section 4-1003(A)(1), and receives special use review approval as a use of community significance under Sections 4-506(I) and 4-602(E) of this Code, or
 2. The use is nonconforming pursuant to 4-1003(A)(2), and receives special use approval as a temporary use under Section 4-600(A). In addition to satisfying the special use criteria of Section 4-601, such a use may receive special use approval only if it meets the following requirements, to assure that these nonconforming uses are brought into conformity as quickly as justice may permit:
 - a. The use is required to totally cease, or to be changed to a conforming use, within a reasonable time certain as determined by the Board of County Commissioners through the special use review process, not to exceed 30 years.
 - b. During the time certain when the use is allowed to exist as a temporary special use, the property owner grants a conservation easement to the County to assure that no future expansion of the use or its associated structures occurs on the property beyond that approved in the special use. The conservation easement will also require that at the expiration of the temporary use period established in subsection 4-1004(A)(2)(a), the temporary special use shall cease, and the property's use and structures shall be made to conform to the zoning districts requirements and in accordance with any specific requirement of the special use review and conservation easement.
 - c. Approval of the use as a temporary special use will result in some measurable decrease in one or more of the adverse land use impacts associated in the nonconforming use (such as in traffic, noise, or adverse visual impact).
 3. The use was a legal residential use when it became nonconforming pursuant to subsection 4-1003(A)(1) and receives limited impact special review use approval under Section 4-600(A), and, in addition, the owner/applicant agrees to permanently deed restrict the approved special use as affordable housing under the adopted standards of the BOCC based upon the recommendation and policies of the Boulder County Housing Authority.
(1/15/98)
 - a. No increase in density is permitted through this approval.
 - b. Minor expansions to the use may be allowed through the limited impact special use process, so long as the proposed use results in some measurable decrease in one or more of the adverse land use impacts associated with nonconforming use (such as in traffic, noise, or adverse visual impact) and so long as current County Building Code requirements are met.
 4. The nonconforming use is changed to any other conforming use recognized under this Code.