

ORDINANCE NO. 25
(Series of 1994)

AN ORDINANCE AMENDING ARTICLE V OF CHAPTER 7 OF THE ASPEN MUNICIPAL CODE OF THE CITY OF ASPEN, COLORADO, RELATING TO THE MUNICIPAL BUILDING CODE BY ADDING REGULATIONS AND PERMITTING PROCEDURES FOR EXCAVATIONS AND DEVELOPMENT IN THE SMUGGLER MOUNTAIN SUPERFUND SITE.

WHEREAS, the United States Environmental Protection Agency ("EPA") has identified and designated an area within the municipal limits of the City of Aspen known as the Smuggler Mountain Superfund Site ("Site") as being contaminated with mining wastes containing high concentrations of lead and cadmium and has consequently placed such Site on the EPA's National Priorities List for cleanup and remediation under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9601, et seq.; and

WHEREAS, the currently defined Smuggler Mountain Superfund Site is approximately ninety (90) percent developed as a residential area and includes two large condominium complexes, several smaller condominium developments and approximately 160 individual homes; and

WHEREAS, the EPA has determined that the concentrations of lead and cadmium on the Site pose a potential health risk to humans, especially small children and pregnant women; and

WHEREAS, on or about June 25, 1985, the Environmental Protection Agency issued an Administrative Order, Docket No. CERCLA VIII-85-05, pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, directing that

certain parties and persons refrain and be prohibited from moving, treating, sampling, or disturbing any soil in excess of one cubic yard within the Site absent advance notice to and permission of the EPA, and further requiring such persons to provide information identifying the nature of the material to be moved or disturbed, the plans for handling, storing or removing such materials, and any proposed or planned storage site for same; and

WHEREAS, in order to implement and ensure compliance with its Administrative Order Docket No. CERCLA VIII-85-05, the EPA has become involved in the review, issuance and monitoring of excavation and building permits for routine construction activities within the Site associated with home construction and remodeling; and

WHEREAS, the review and issuance of excavation and building permits for construction activities within the Site can be and should be administered cooperatively between the City of Aspen and EPA at the local level given adequate and appropriate standards and regulations applicable thereto; and

WHEREAS, the EPA has advised the City that the demand upon its personnel and resources in the review and issuance of local excavation and building permits is burdensome, results in inefficiencies and time delays, and is unnecessary in the face of the City's willingness and expertise to undertake the permitting process at the local level; and

WHEREAS, the EPA has consulted with the City of Aspen in regard to the review, issuance and monitoring of excavation and building permits within the Site; and

WHEREAS, the implementation and enforcement of institutional controls by the City of Aspen regulating excavation and building activities within the Site could minimize the disturbance, transfer, inhalation, and ingestion of contaminated soils, thus, lessening the risks posed by the Site to the public health and safety; and

WHEREAS, the Environmental Protection Agency and the City of Aspen have conferred and agreed that the adoption and enforcement of this ordinance will provide the appropriate mechanism by which the review and permitting of excavation and building activities within the Site can be efficiently and appropriately carried out at the local level; and

WHEREAS, the City of Aspen would not engage in or attempt to assume regulatory authority over matters reserved to the EPA by and through Federal law, regulation or order absent the request and advice of the EPA; and

WHEREAS, the City Council has determined that this ordinance is necessary to further the public health, safety and welfare.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF ASPEN, COLORADO, AS FOLLOWS:

Section 1

That the Municipal Code of the City of Aspen, Colorado, is hereby amended by adding new Section 7-143, "SPECIAL REGULATIONS - SMUGGLER MOUNTAIN SUPERFUND SITE", to Article V of Chapter 7, which section shall read as follows:

SECTION 7-143. SPECIAL REGULATIONS - SMUGGLER MOUNTAIN SUPERFUND SITE.

(1) APPLICABILITY.

- (a) These regulations shall apply to and govern any development or other activity which may cause or contribute to the movement or disturbance of contaminated soil or other solid waste within the boundaries of the Smuggler Mountain Superfund Site as those boundaries are identified and designated by the United States Environmental Protection Agency. An official map prepared by the Environmental Protection Agency depicting the current boundaries of the Site shall be maintained in the office of the Chief Building Inspector for the City of Aspen. Additional maps of the Site shall be maintained in the offices of the City Clerk, City Engineer, the Aspen/Pitkin Planning Office and the Aspen/Pitkin Environmental Health Department. All maps shall be available to the public during regular business hours.
- (b) The standards and regulations as contained in this section may be amended from time to time so as to address changes at the Site and/or the federal laws and regulations applicable thereto.
- (c) Nothing contained in this section is intended or shall be construed to supersede or limit the legal power and authority vested in the Environmental Protection Agency under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9601, et seq., or any other Federal law, rule or regulation.

(2) DEFINITIONS. As used in this Section, the following terms shall have the meaning specified unless the context requires otherwise:

- (a) "Activity" means any action occurring on, above or below the surface of the ground within the boun-

daries of the Site which results or may result in a disturbance of one (1) cubic yard of soil within the Site.

- (b) "CERCLA" means the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9601, et seq., as amended.
- (c) "Contaminated soil or material" means soil or material containing lead concentrations of 1000 parts per million (ppm) or greater.
- (d) "Development" means any construction or man-made change in the use or character of land including, but not limited to, building, grading, excavating, digging, paving, drilling, planting or landscaping.
- (e) "Director" means the Chief Building Inspector of the Aspen/Pitkin Regional Building Department.
- (f) "EPA" means the United States Environmental Protection Agency.
- (g) "Hard surface cover" means a non-permeable or semi-permeable barrier overlaying the ground surface such as paving, asphalt, concrete, stone or wood, and including buildings and other permanent structures.
- (h) "Person" means an individual, partnership, corporation, association, company, landowner, tenant, occupant, contractor, subcontractor or any public body or political subdivision.
- (i) "Site" means those areas within the City of Aspen that are within the boundaries of the Smuggler Mountain Superfund Site as designated by the United States Environmental Protection Agency (EPA) pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9601, et seq., as amended, and as depicted on the official map maintained by the Aspen/Pitkin Regional Building Department and signed by an official of the EPA.
- (j) "Solid waste" means contaminated soil or other material disturbed as the result of excavation or construction within the Site.

(k) "Vegetative cover" means plant life, including but not limited to grass, trees, shrubs, vines and sod, planted or installed in such a manner so as to prevent or minimize the exposure of ground soil.

(3) PROHIBITED ACTIVITY -- EXCEPTION FOR UNITED STATES GOVERNMENT. No person shall undertake or conduct or cause to undertake or conduct any activity or development within the Site without first complying with the procedures and performance standards as provided in this section, except that, in accordance with Section 9621(e) of Title 42 of the United States Code, nothing contained in this section shall require or be construed to require the obtaining of a permit by any agency, employee or contractor of the United States for activities conducted entirely within the Smuggler Mountain Superfund Site carried out in compliance with the provisions of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9601, et seq.

(4) PERMITS REQUIRED. No person shall undertake or conduct any activities or development within the Site involving the excavation or exposure of more than one (1) cubic yard of soil without first obtaining a permit from the Director. Activities or development involving excavation of less than one (1) cubic yard of soil shall not require a permit, but shall be subject to the requirements as set forth in subsection (6) of this Section 7-143.

(5) PERMIT PROCEDURES.

(a) Application. All permits shall be applied for on forms provided by the Director. A fee shall be assessed in accordance with the building permit fee schedule as adopted in Chapter 7 of the Municipal Code. Each applicant for a permit shall, at a minimum, provide the following information:

(i) The location and nature of the proposed activity or development.

(ii) The depth of any proposed excavation and volume of soil or material to be excavated or disturbed.

(iii) The dimensions of all surface areas to be disturbed.

- (iv) The volume of soil or other material to be backfilled on site.
- (v) The volume of soil or other material proposed to be disposed of off the excavation site.
- (vi) The identification of any facility outside the Site to which contaminated soil or other solid waste are to be transported for storage or disposal.
- (vii) The duration of any exposure of soil or material excavated.
- (viii) The applicant's plans for identification and segregation of clean fill or material from contaminated soil and material during the period of activity or development.
- (ix) The applicant's plans for backfilling contaminated soil or material.
- (x) The applicant's plans for insuring compliance with the performance standards as set forth in subsection (6) of this Section 7-143.
- (xi) Such additional information as determined by the Director or the Aspen/Pitkin Environmental Health Department to be reasonable and necessary to evaluate the safety and appropriateness of the proposed activity or development.

(b) No permit shall be issued without it first having been reviewed and approved by the Aspen/Pitkin Environmental Health Department utilizing the performance standards as set forth in subsection (6) below.

(6) PERFORMANCE STANDARDS. The following performance standards shall be adhered to and applied to all activity or development within the Site.

(a) Excavation and construction. Any disturbed soil or material that is to be stored above ground shall be securely contained on and covered with a durable non-permeable tarp or other protective barrier approved by the Aspen/Pitkin Environmental Health Department so as to prevent the leaching of contaminated material onto or into the surface

soil. Disturbed soil or material need not be removed if the Aspen/Pitkin Environmental Health Department finds that: (1) the excavated material contains less than 1,000 parts per million (ppm) of total lead, or (2) that there exists a satisfactory method of disposal at the excavation site. Disturbed soil and solid waste may be disposed of outside of the Site upon acceptance of the material at a duly licensed and authorized receiving facility.

- (b) Non-removal of contaminated material. No contaminated soil or solid waste shall be removed, placed, stored, transported or disposed of outside the boundaries of the Site without having first obtained any and all necessary state and/or federal transportation and disposal permits.
- (c) Dust suppression. All activity or development shall be accompanied by dust suppression measures such as the application of water or other soil surfactant to minimize the creation and release of dust and other particulates into the air. The Aspen/Pitkin Environmental Health Department may require air monitoring to insure the effectiveness of dust suppression measures.
- (d) Vegetable and flower gardening or cultivation. No vegetables or flowers shall be planted or cultivated within the boundaries of the Site except in garden beds consisting of not less than twelve (12) inches of soil containing no more than 999 parts per million (ppm) lead.
- (e) Landscaping. The planting of trees and shrubs and the creation or installation of landscaping features requiring the dislocation or disturbance of more than one (1) cubic yard of soil shall require a permit as provided in Section 7-143(4) above.

(7) SOILS TESTING. The Director or the Aspen/Pitkin Environmental Health Department may require any person undertaking to conduct activity or development within the Site to test any soil or material to establish its total lead (Pb) content for purposes of determining the application of any of the provisions of this Section 7-143. All testing shall utilize and adhere to protocols established or approved by the United States Environmental Protection Agency.

(8) INSPECTION AND MAINTENANCE. In addition to all other requirements as set forth in this Section 7-143, the following additional requirements shall apply to the use and maintenance of all lands within the Site, including but not limited to lawns, play areas and parking lots.

(a) All areas within the Site shall be subject to inspection by the Aspen/Pitkin Environmental Health Department in order to enforce the provisions of this Section 7-143. Inspections shall be done with the consent of the property owner or occupant. If consent is denied, inspection shall be obtained pursuant to court order.

(b) All areas within the Site shall be maintained with a permanent vegetative or hard surface cover. Except as allowed pursuant to a duly obtained permit issued under this section, no person shall alter any part of a permanent vegetative or hard surface cover absent prior notice to the Aspen/Pitkin Environmental Health Department.

(c) All areas within the Site shall be maintained in a manner to minimize erosion, including adequate provision for drainage and surface water run-off so as to prevent the formation of standing pools, ditches or gullies.

(d) No new outdoor playing field, playground, or other recreational area shall be established or constructed within the Site, nor shall existing playing fields, playgrounds or recreational areas be expanded, without the prior review and approval of the Director and the Aspen/Pitkin Environmental Health Department.

(9) APPEALS. Any person adversely affected or aggrieved by a decision of the Director or the Aspen/Pitkin Environmental Health Department made pursuant to this Section 7-143 may appeal such decision to the Board of Appeals and Examiners pursuant to the procedures as set forth in Division 2 of Article II of Chapter 7 of the Municipal Code.

Section 2

The City Clerk is directed to file and have recorded a true and accurate copy of this ordinance, along with a true copy of

the official map depicting the boundaries of the Smuggler Mountain Superfund Site, in the office of the Pitkin County Clerk and Recorder.

Section 3

This ordinance shall be effective five (5) days following the date of the filing of an approved consent decree by the Court in the case entitled United States of America v. Smuggler Durant Mining Corporation, et al., 89-C-1802 (U.S. District Court for the District of Colorado).

Section 4

This ordinance shall not have any effect on existing litigation and shall not operate as an abatement of any action or proceeding now pending under or by virtue of the ordinances repealed or amended as herein provided, and the same shall be construed and concluded under such prior ordinances.

Section 5

If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional in a court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and shall not affect the validity of the remaining portions thereof.

Section 6

A public hearing on the ordinance shall be held on the 13
day of June, 1994, in the City Council
Chambers, Aspen City Hall, Aspen, Colorado.

INTRODUCED, READ AND ORDERED PUBLISHED as provided by law by
the City Council of the City of Aspen on the 23 day of
May, 1994.

John S. Bennett
John S. Bennett, Mayor

ATTEST:

Kathryn S. Koch
Kathryn S. Koch, City Clerk

FINALLY adopted, passed and approved this 11th day of
July, 1994.

John S. Bennett
John S. Bennett, Mayor

ATTEST:

Kathryn S. Koch
Kathryn S. Koch, City Clerk