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VIA EMAIL AND U.S. MAIL

Jacqueline Onciano
Director of Planning
Santa Clara County Department of Planning and Development
County Government Center
East Wing, 7th Floor
70 West Hedding Street
San Jose, CA 95110

Re: Stevens Creek Quarry -- Response to 2-15-19 Notice of Violation

Dear Ms. Onciano:

As you know, I represent Stevens Creek Quarry, Inc. ("SCQ") regarding its Stevens Creek Quarry (the "SCQ Quarry") located in Santa Clara County (the "County"), California. On Friday, February 15, 2019 at 4:35 p.m., the County issued a Notice of Violation (the "NOV") to SCQ regarding the transport of aggregate from the Lehigh Permanente Quarry (the "Lehigh Quarry") to the SCQ Quarry and the subsequent processing and reselling of that aggregate (the "Activities"). Specifically, the NOV alleges that the Activities are unpermitted, violate SCQ's 2002 Mediated Agreement and Mediated Conditions (collectively, the "Mediated Conditions"), violate the County Ordinance and Zoning Codes, and thus constitute a public nuisance.

In response to that NOV, please be advised that SCQ has not transported aggregate from the Lehigh Quarry to the SCQ site since receiving the NOV. In addition, SCQ requests that the County follow previously agreed to resolution procedures established in the 2002 Mediated Conditions. Finally, this letter discusses why no public nuisance exists.

I. History and Background of the SCQ Quarry

SCQ is a privately held family corporation located in Santa Clara County. The SCQ Quarry is an integral part of the surrounding community and has been operating for over eight decades. The Voss family has owned the the SCQ Quarry property since 1936, and the SCQ Quarry is now in its fourth generation of family-run operations. The SCQ Quarry was founded by Tony Voss in the mid-1930s and was eventually taken over by his son, David, before being passed down to his

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son. Now, Tony Voss's grandson, Rich Voss, is the President of SCQ. Tony Voss's great-grandson, Jason Voss, is the company's Operations Manager.

SCQ has worked diligently toward creating a symbiotic relationship with the County, and the family has always felt a deep personal responsibility to their neighbors, the City of Cupertino, and the County to operate safely, cooperatively, and within the confines of the law.

The aggregate materials supplied by SCQ are fundamental building blocks to modern society. Without such materials, no person nor entity could function, including Santa Clara County. SCQ is a major supplier of necessary products and services to the construction industry in Santa Clara County and the surrounding Bay Area region. SCQ has played a vital role in supplying materials to many of the most well-known projects in the region; including hospitals, roads, bridges, freeways, tech buildings, stadiums, and water treatment plants. (E.g., Santa Clara Valley Transportation Authority Improvements, San Tomas Expressway Improvements, Montague Expressway Improvements, and the San Jose Water Treatment Plant.)

SCQ's aggregates are also being used for the McClellan bike separation lanes being built from Stelling and McClellan to near Monte Vista High School as part of the City of Cupertino's Bicycle Transportation Plan to create an exceptional biking environment. In addition, SCQ is supplying materials for the new sidewalks being built as part of the Pedestrian Plan the City of Cupertino adopted last year.

In addition to supplying materials to many major infrastructure projects, the following is a partial list of the many public agencies and municipalities that rely on SCQ to provide materials they need to perform regular maintenance and to address emergency situations:

- Santa Clara County Roads and Airports Department
- Santa Clara County Parks and Recreation Department
- Santa Clara Valley Water District
- City of Santa Clara Parks and Recreation Department
- City of San Jose
- City of Sunnyvale
- California Department of Transportation
- Midpeninsula Regional Open Space District
- Palo Alto Unified School District

In addition, SCQ regularly donates material to Habitat for Humanity in Santa Clara County.

As can be seen from the above partial list, SCQ has built, and continues to build and maintain, Santa Clara County.

II. Mediated Conditions and Compliance Agreement

A. NOV Fails To Adhere To The Required Procedure Prescribed By The Mediated Conditions

The Resolution of the Board of Supervisors of the County of Santa Clara Recognizing Mediated Operating Conditions for Stevens Creek Quarry Parcel B (the “Mediated Conditions Resolution”), section 3, provides that if there is ever a dispute about whether the SCQ Quarry is adhering to the Mediated Conditions or otherwise complying with Section 1 of the Mediated Conditions Resolution, that “*the County will give the [SCQ] Quarry and the public reasonable notice and an opportunity to be heard before taking any action.*” (Emphasis added.) The County breached this Section 3 by issuing the NOV without first giving SCQ and the public reasonable notice and an opportunity to be heard regarding SCQ’s Activities.

Section 3 of the Mediated Conditions Resolution also expressly sets forth the required 3-step dispute resolution process that the County and SCQ must adhere to in the event of “any disputes involving the Mediated Conditions.” First, the County or other aggrieved person must notify SCQ in writing of the problem. (Mediated Conditions Resolution, Section 3(a).) If the problem is not resolved to the grievant’s satisfaction within a reasonable time, but in no event more than 30 days, the grievant may then contact the County Planning Office.

The second step of the required 3-step process requires that the County Planning Office investigate the grievance and work with the SCQ Quarry to try and resolve any alleged problems. (Mediated Conditions Resolution, Section 3(b).) SCQ requests that the Planning Office cooperate and work with SCQ to try and resolve the alleged violation set forth in the NOV. Section 3(b) of the Mediated Conditions Resolution also provides that if the problem is not resolved at the staff level that the matter may be referred to the County Board of Supervisors at the request of either the County Planning Office or the grievant and further requires that the Planning Office provide the Board of Supervisors with an analysis of the situation and a recommendation regarding whether the Mediated Conditions have been violated. The County has also failed to comply with any of the requirements under this Section 3(b) of the Mediated Conditions Resolution. It is SCQ’s hope that this failure has not unnecessarily tainted SCQ’s reputation in the eyes of the Supervisors or the public.

The last step of the dispute resolution process requires the County Board of Supervisors to determine at a noticed public hearing whether there has been any substantial noncompliance with Section 1 of the Mediated Conditions Resolution. (Mediated Conditions Resolution, Section 3(c).) The County Planning Department breached this provision when it unilaterally determined

that the SCQ Quarry's Activities constitute an "unpermitted, unauthorized use of Parcel B" and "constitutes a public nuisance." (See the NOV, p. 1.) The County's failure to follow any of the steps required by the mandatory dispute resolution process prior to issuing the NOV is a material breach of the Mediated Conditions Resolution and the SCQ Quarry's rights to due process thereunder.

B. Compliance Agreement

It continues to be SCQ's position that SCQ has a vested right to operate on Parcel B, as noted in the detailed memorandum which I submitted to the County one year ago on March 15, 2018. After that and pursuant to the May 2018 Compliance Agreement, SCQ, under an express reservation of rights, agreed to apply for a Conditional Use Permit ("CUP") for Parcel B. SCQ has every intention of continuing to comply with the terms of the Compliance Agreement and exceeding the County's expectations for a cooperative ongoing relationship.

III. No Public Nuisance Exists

A. The NOV Lacks Clarity

The NOV broadly, and without any specificity, alleges that the SCQ Quarry has violated County Ordinance Code §§ A1-33 *et seq.* as well as County Zoning Ordinance §§ 4.10.370 and 5.80.030. Section A1-34 of the County Ordinance Code provides that any condition, act, or omission declared by any provision of the Ordinance Code to be a public nuisance is "deemed unlawful and a public nuisance and a violation of the Code." County Zoning Ordinance § 5.80.030 further provides that conducting, operating, allowing, or maintaining any land use contrary to the provisions of the County Zoning Ordinance is considered unlawful and a public nuisance.

Presumably, Zoning Ordinance § 4.10.370(E) is the specific Ordinance section the NOV is alleging that the SCQ Quarry is violating, however, the County's failure to further cite to any specific sections or subsections of its Ordinances renders the SCQ Quarry unable to determine exactly what violation it is accused of committing. This lack of clarity is a violation of SCQ's right to procedural due process. (*City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 924-25 [it is a violation of due process to hold an owner accountable for building code violations without providing adequate notice and details of such violations].)

B. The County Improperly Failed To Consider The Social Utility Of SCQ's Conduct

In order to state a cause of action for public nuisance under California Civil Code § 3493,

[A] plaintiff must allege that a defendant created (or had active involvement in creating) a condition that was harmful to health or interfered with the comfortable enjoyment of life or property; that the

condition affected a substantial number of people at the same time; that an ordinary person would be reasonably annoyed or disturbed by the condition; ***that the seriousness of the harm outweighs the social utility of the defendants' conduct***; that the plaintiff did not consent to the conduct; that the plaintiff suffered harm that was different from the type of harm suffered by the general public; ***and*** that the defendant's conduct was a substantial factor in causing the plaintiff's harm. [Emphasis added.]

(*Simpson v. California Pizza Kitchen, Inc.* (2013) 989 F.Supp.2d 1015, 1024, quoting *Gregory Vill. Partners, L.P. v. Chevron U.S.A., Inc.* (2011) 805 F.Supp.2d 888, 901.) Further, proper consideration of all relevant circumstances in a nuisance action involves ***a balancing of the gravity of the harm to plaintiff against the utility of defendant's conduct, both to himself and to the community.*** (*Robie v. Lillis* (1972) 112 N.H. 492.) The California Supreme Court has held that “[t]he public nuisance doctrine is aimed at the protection and redress of community interests and, at least in theory, embodies a kind of collective ideal of civil life.” (*People v. McDonald* (2006) 137 Cal.App.4th 521, 534, quoting *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1103.)

Aggregate material is essential for making concrete and asphalt which are the basic building blocks of buildings and roads. There can be no question that the transportation of aggregate is integral to the continued functioning of our society in order to construct and maintain infrastructure, development projects, road building, schools, hospitals, houses, offices, etc. Given the importance of aggregate to today's society and SCQ's substantial contributions to the surrounding regions' construction industry (as detailed above), the public necessity of the SCQ Quarry's continued production of local aggregate for the 1,938,153 residents of all of Santa Clara County outweighs any allegations of public nuisance.

Additionally, under California law, an activity authorized by statute cannot be a nuisance so long as the manner in which the activity is performed is expressly authorized by the statute. (*Ileto v. Glock, Inc.* (2002) 194 F.Supp.2d 1040.) The California Vehicle Code specifically provides for the use of aggregate trucks over public highways¹ so long as any transportation of aggregate material complies with California Vehicle Code § 23114(b). The SCQ Quarry's aggregate trucks are in full compliance with this provision. Therefore, the County cannot preempt general State law by disallowing the SCQ Quarry's transportation of aggregate material over public streets. (See *Merced Dredging Co. v. Merced County* (1946) 67 F. Supp. 598.) Any attempt by the County to prohibit the SCQ Quarry's aggregate trucks from operating in a manner pursuant to the Parcel A Conditions of Approval, Parcel B Mediated Conditions, and California Vehicle

¹ California Vehicle Code § 360 defines “highway” as “a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel. Highway includes street.” The definition of a highway includes City of Cupertino streets.

Code § 23114 is thus invalid as a matter of law. (See *Merced Dredging Co.*, *supra*, at 67 F.Supp. 598.)

C. State Law And Policy Supports And Encourages Local Aggregate Sources To Reduce Vehicle Trips And To Reduce GHG Emissions

SMARA expressly provides that “*the production and development of local mineral resources* that help maintain a strong economy and that are *necessary to build the state’s infrastructure* are *vital to reducing transportation emissions* that result from the distribution of hundreds of millions of tons of construction aggregate that are used annually in building and maintaining the state” (emphasis added). (Cal. Pub. Res. Code § 2711(d).) The California Department of Conservation has also expressly stated that “[t]ransporting aggregate from distant sources results in increased...traffic congestion...” (Cal. Dept. of Conservation, Aggregate Sustainability in California (Dec. 2012).) Such would be the result if the SCQ Quarry was unable to continue processing aggregate locally. Thus, state policy supports the social utility of local aggregate mines.

Transporting aggregate shorter distances also saves money. The cost of trucking aggregates increases fifteen cents per ton for every mile hauled. Given that even one mile of a six-lane highway requires over 110,000 tons of aggregates, each mile of transport would add one-half million dollars to the base cost of the aggregates for such a project. (Aggregate Availability in California, California Geological Survey (Feb. 2007).) Such additional costs would be incurred by Caltrans and the Public Works Departments of Santa Clara County and the City of Cupertino.

IV. Conclusion

Based on the foregoing, SCQ respectfully requests a meeting with the County’s Code Enforcement Division Manager in order to discuss the violations alleged in the NOV.

If you have any questions, please do not hesitate to contact me.

Sincerely yours,

MITCHELL CHADWICK LLP



Patrick G. Mitchell

cc: Mike Wasserman, Supervisor for Santa Clara County, District 1
Cindy Chavez, Supervisor for Santa Clara County, District 2

Dave Cortese, Supervisor for Santa Clara County, District 3
Susan Ellenberg, Supervisor for Santa Clara County, District 4
S. Joseph Simitian, Supervisor for Santa Clara County, District 5
Rob Eastwood, Santa Clara County Planning Manager
Elizabeth Pianca, Santa Clara County Lead Deputy County Counsel
Michael Rossi, Santa Clara County Lead Deputy County Counsel
James Stephens, Santa Clara County Code Enforcement Division Manager
Jim Baker, Santa Clara County Geologist
Steven Scharf, Mayor of City of Cupertino
Liang-Fang "Liang" Chao, Vice Mayor of City of Cupertino
Rod G. Sinks, Councilmember for City of Cupertino
Darcy Paul, Councilmember for City of Cupertino
Jon Robert Willey, Councilmember for City of Cupertino
Rich Voss, SCQ
Jason Voss, SCQ