



**CITY MANAGER'S OFFICE**

CITY HALL  
10300 TORRE AVENUE • CUPERTINO, CA 95014-3255  
TELEPHONE: (408) 777-3223 • FAX: (408) 777-3366  
CUPERTINO.ORG

October 24, 2019

Robert Salisbury  
County of Santa Clara  
70 West Hedding Street  
East Wing, Seventh Floor  
San Jose, CA 95110  
[Robert.Salisbury@pln.sccgov.org](mailto:Robert.Salisbury@pln.sccgov.org)

Dear Mr. Salisbury,

This letter responds to the letter submitted to the County by Lehigh Southwest Cement Company ("Lehigh") on September 30, 2019, in which Lehigh provides supplemental information and asserts that its May 2019 application for a Major Reclamation Plan Amendment for the Permanente Quarry ("Application") is complete. The City identified several serious concerns related to Lehigh's Application in its July 3, 2019 letter to the County, which remain. I write now, in response to Lehigh's latest arguments, to further emphasize the importance of requiring that Lehigh cure existing violations of County and state law before the County analyzes or approves the Application.

In its September 30 letter, Lehigh argues, among other things, that the County must "process" its Application, despite outstanding notices of violation from both the County and other agencies. Lehigh is correct that the County Code of Ordinances both prohibits issuance of permits and allows denial of applications for permits on premises with existing violations. *See* County Code §§ C1-71 ("No permit required by this title shall be issued to any applicant . . . in connection with any premises or portion thereof upon which there exists a conflict with any County ordinance or state law."), 5.20.140 ("The decision-making body may deny an application for any permit or approval if there is a recorded notice of violation for any zoning, grading, building code, housing code, or other land use violation on the property that is the subject of the application."). The City requests that County staff recommend denial of the Application until Lehigh resolves all outstanding violations and comes into full compliance with County and state law.

This request is not a mere formality. To the contrary, it is both urgent and essential in light of Lehigh's additional argument that existing physical conditions

should provide the sole baseline for review of the Application's impact on the environment. Lehigh has given the County notice that it will assert that current physical conditions—no matter how detrimental—provide the only basis against which to measure, evaluate, and require mitigation of the impacts resulting from the new Reclamation Plan Amendment that Lehigh proposes. Applying this approach, Lehigh could point to existing, noncompliant water quality conditions that violate County and state law; propose a project that would do nothing to remedy those conditions; and then assert that the proposed project would have no impact on the environment because it simply perpetuates the violative conditions. Likewise, Lehigh should not be able to rely on the existing, illegal haul road that it expanded to ship aggregate to the adjacent Stevens Creek Quarry to justify either resumption of that export or retention of the expanded road following reclamation. Lehigh's approach to environmental review highlights the importance of your stated intent to recommend denial of the Application, without further review, unless and until Lehigh cures all violations of County and state law. The City requests that the County first require Lehigh to identify all outstanding violations asserted by any public agency with regulatory authority over the property and operations covered by its Application, and then demonstrate resolution of those violations before the County proceeds with environmental review and potential approval.

On a related point, Lehigh argues that the current height of the West Materials Storage Area ("WMSA") must serve as the baseline for environmental analysis, rather than the height required under the existing reclamation plan. Once Lehigh remedies existing violations and the County begins environmental review of the Application, the County should reject such an approach, which would be misleading and serve to minimize the change proposed in the new Reclamation Plan Amendment. Instead, the County should measure the impact of final conditions resulting from the proposed Reclamation Plan Amendment against those required under the 2012 Reclamation Plan in order to measure and consider the changed outcomes that Lehigh actually proposes. As discussed in detail in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 451–452, an agency has discretion to rely exclusively on projected future conditions as a baseline if "analysis of impacts on existing conditions . . . would detract from an EIR's effectiveness as an informational document, either because an analysis based on existing conditions would be uninformative or because it would be misleading to decision makers and the public." Here, the County established a maximum allowable final height of the WMSA in the 2012 Reclamation Plan. The City understands that the County anticipates enforcing that height limit, along with the rest of the 2012 Reclamation Plan, upon the conclusion of active mining based on the current regulatory regime. Thus, the relevant and informative inquiry is not only how much higher the Application would allow the WMSA to extend past current, temporary conditions, but how much higher the ultimate, reclaimed topography will be as a result of the proposed change. *See id.* at 453 fn. 5 (illustrating analogous circumstances in which already-adopted requirements that will reduce emissions provide an appropriate baseline based on future conditions). In addition, the County may consider "both types of baseline—existing and future conditions—in its primary analysis of the project's

significant adverse effects" if that combined information would "promote[] public participation and more informed decision-making by providing a more accurate picture of a proposed project's likely impacts." *Id.* at 453-54.

The City requests that the County enforce its own Code of Ordinances and require that Lehigh demonstrate compliance with all applicable County and state laws before moving forward with any further consideration of the Application. *See* County Code §§ C1-71, 5.20.140; *see also* Pub. Resources Code § 21080(b)(5) (CEQA does not apply to "[p]rojects which a public agency rejects or disapproves"). The City further emphasizes the need for careful scrutiny to determine the true impacts of the Reclamation Plan Amendment that Lehigh proposes, as well as a thoughtful and serious analysis of alternatives that will minimize impacts on the City and the surrounding community.

Sincerely,

A handwritten signature in black ink, appearing to read 'Deborah Feng', with a long horizontal flourish extending to the right.

Deborah Feng  
City Manager