



PUBLIC WORKS DEPARTMENT

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County of Santa Clara County
Rob Eastwood – Planning Manager
Department of Planning and Development
70 West Hedding Street
San Jose, CA 95110

Re: Lehigh Permanente Quarry

Mr. Eastwood,

Lehigh Permanente Quarry (“Lehigh”) has included the export of aggregate material for processing and sale offsite in its recent Reclamation Plan Amendment (“RPA”) applications, despite the fact that these activities are not a part of its vested rights. Because Lehigh does not have a vested right to engage in this export, it must obtain a County use permit to continue this activity, or the County must make a vested rights determination that finds that this activity predates applicable zoning requirements. Lehigh bears the burden to establish that its export of aggregate for processing and sale, and related improvements, constitute a legal nonconforming use. Lehigh has failed to even attempt that showing, instead simply including these activities in its RPA applications as though they were a part of its vested activities. The County must require Lehigh to remove the export of aggregate and related improvements from its applications and to obtain a use permit for these activities. Alternatively, the County must conduct a hearing to determine whether these activities are vested rights before it processes the RPA applications.

After decades of quarrying limestone and processing concrete, Lehigh now proposes to expand its operations without undergoing the requisite use permit application process or environmental review. In its latest RPA applications, Lehigh describes plans to export aggregate to the neighboring Stevens Creek Quarry for processing. To facilitate this export, Lehigh proposes to use an internal utility road that it expanded without City or County permits, or to build an alternative haul road between the two properties. However, Lehigh’s vested rights do not extend to either the export of aggregate or the improvement of the haul routes for this activity. As a result, Lehigh requires either a vested rights determination or a use permit for these activities.

The County has recognized that it “did not . . . consider whether these proposed uses—the construction and use of haul roads to export greenstone from the Quarry—would fall within the substantive scope of Lehigh’s vested rights” because the County’s “2011 Vested Rights Determination focused on the geographic extent of Lehigh’s vested rights.” *See* Letter from County of Santa Clara Dept. of Planning and Development to E.

Guerra, File No. PLN18-2250, at 3 (Feb. 20, 2019). The County Board of Supervisors did not consider at that time whether Lehigh had carried its burden to document a history of such exports prior to the 1948 zoning ordinance that imposed a use permit requirement. *Id.* As a result, the County must now make this determination before it processes Lehigh's Major RPA application based on Lehigh's assumption of vested status.

This memo confirms the County's position that its 2011 vested rights determination did not address the export of aggregate and associated improvements. Furthermore, based on longstanding legal precedent and evidence from Lehigh's own submissions, this memo concludes that Lehigh's proposed export of aggregate is not a part of its vested rights. Therefore, the County should require that Lehigh apply for a use permit and undergo environmental review prior to any export of aggregate and related improvements to its quarry property.

I. County's 2011 Vesting Determination

In 2011, the County Board of Supervisors conducted an evidentiary hearing to determine whether Lehigh had a legal nonconforming use for its surface mining activities. The County undertook this determination in order to guide its processing of Lehigh's then-pending RPA applications and to "consider the question of the *geographic extent* of the Quarry's vested rights." Resolution No. 2011-85 at 1 ("2011 Vested Rights Determination") (emphasis added). The County did not address the nature of the operations for which Lehigh had a vested right. *Id.*

The County's Resolution, the accompanying Staff Analysis, and Lehigh's own submissions to the County all addressed Lehigh's mineral exploration, extraction, and onsite processing. *See, e.g.*, November 5, 2010 Letter from Diepenbrock-Harrison at 8, Minutes Attachment to Item No. 27, County Board of Supervisors Meeting (Feb. 8, 2011) ("extraction, storage and processing" had been ongoing at the property). As Lehigh explained, it was focused on establishing its vested rights "on two specific areas," the South Quarry and the East Materials Storage Area ("EMSA"). *See* Jan. 4, 2011 Letter from Diepenbrock-Harrison at 3, Minutes Attachment to Item No. 27, County Board of Supervisors Meeting (Feb. 8, 2011) ("Jan. 4. 2011 Letter"). The County's Resolution includes no evidence, analysis, or determinations related to Lehigh's export of aggregate for processing and sale offsite. Instead, the Resolution concludes that Lehigh had vested rights over a specific set of parcels to engage in "[q]uarry surface mining operations within the geographic area bounded by the Vested Parcels." 2011 Vested Rights Determination. at 2.

II. Lehigh's Current Reclamation Plan Amendment Applications

In March 2019, Lehigh submitted an RPA application to modify its existing reclamation plan boundary to include a utility road, an internal haul road, and several maintenance roads (the "Utility Road RPA"). Lehigh had previously widened the utility road without permits and used it to transport aggregate to neighboring Stevens Creek Quarry. The County issued a Notice of Violation in 2018 with respect to Lehigh's illegal activities on the utility road. The Utility Road RPA was Lehigh's response to that Notice of Violation. The County determined that the Utility Road RPA application was complete in August of 2019.

Lehigh claims that this RPA “will not expand the area in which mineral deposits are harvested or otherwise expand or change any aspect of the existing surface mining operations.” Utility Road RPA at 1. Lehigh also asserts that the boundary modification it sought, and the utility road, “are located entirely within the vested rights boundary and do not significantly change on-site activities.” *Id.* at 2. Both statements are incorrect. It fails to acknowledge that a portion of the road is in the City of Cupertino’s jurisdiction, and thus falls outside the territory the County previously determined—or could determine—to be vested.

In May 2019, Lehigh submitted an additional RPA application that would replace its existing reclamation plan in its entirety (the “Major RPA”). The Major RPA proposes to expand the reclamation plan boundary area; expand mining activities into a new pit; alter the North Quarry highwall and ridgeline, which is protected by a ridgeline easement; use the utility road or establish a new haul road to facilitate the export of aggregate to Stevens Creek; and backfill the North Quarry using imported surplus construction soil, rather than on-site waste material. The Major RPA includes two significant non-reclamation activities which require discretionary decisions by the County: the proposed change to the ridgeline easement and the export of aggregate for processing and sale. Lehigh does not directly address whether the export of aggregate is vested, but instead implies that it is by including this proposed activity in its Major RPA without seeking a use permit from the County. *See* Permanente Quarry Application: Project Description and Supplemental Environmental Information (“Major RPA Project Description”) at 8 (May 2019) (explaining that Lehigh is considering “providing for customer access” from Stevens Creek Quarry to haul Lehigh’s supply of aggregate)¹; *see also* Utility Road RPA at 2 (describing utility road and associated export of aggregate to Stevens Creek as within Lehigh’s vested rights). The County found the Major RPA application complete on November 8, 2019.

In February 2020, the County requested that Lehigh consolidate its two RPA applications into a single, internally consistent, and unified application for an RPA. *See* Feb. 13, 2020 Letter from R. Salisbury, Santa Clara County Dept. of Planning and Development to E. Guerra, Lehigh Hanson, Inc. (File Number PLN19-0067 and PLN19-0106). The County’s letter explained that the two applications encompass the same geographic region and include inconsistent statements about the purpose and future use of the utility road. *Id.*

III. Lehigh has not established a vested right to export aggregate for processing or sale.

Courts disfavor nonconforming uses and construe them narrowly. Under California law, a “vested right” is the right to continue an activity that “existed lawfully before a zoning restriction became effective,” even though that use is “not in conformity with the ordinance when it continues thereafter.” *Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (1996), 12 Cal.4th 533, 540, fn. 1, 541. Whether a use is vested turns on the date on which a zoning ordinance first restricted the use and on evidence of use of, or objective intent to use, the land as of that vesting date. *Id.* at 542, 560-61. A

¹ https://www.sccgov.org/sites/dpd/DocsForms/Documents/2250_2019RPA_ProjectDescription_EnvironmentallInfo.pdf

“nonconforming use must be similar to the use existing at the time the zoning ordinance became effective,” and any “[i]ntensification or expansion of the existing nonconforming use, or moving the operation to another location on the property is not permitted.” *Id.* at 552. In the context of mining rights, a quarry operator has the right to continue only the “aspects of the operation that were integral parts of the business at th[e] time” a zoning ordinance rendered the operation nonconforming. *Hansen Brothers*, 12 Cal.4th at 542.

Courts disfavor nonconforming uses and construe them narrowly. *Cnty. of San Diego v. McClurken* (1951) 37 Cal.2d 683, 687. Courts limit vested rights to continuation of the same use and “generally follow a strict policy against their extension or enlargement.” *Id.*; see also *City of Los Angeles v. Wolfe* (1971) 6 Cal.3d 326, 337 (“The policy of the law is for elimination of nonconforming uses.”). Thus, “[a]ny change in the premises which tends to give permanency to, or expands the nonconforming use would not be consistent with this purpose.” *Dienelt v. Cnty. Of Monterey* (1952) 113 Cal.App.2d 128, 131. “The burden of proof is on the party asserting a right to a nonconforming use to establish the lawful and continuing existence of the use at the time of the enactment of the ordinance.” *Hansen Brothers*, 12 Cal.4th at 564 (quoting *Melton v. City of San Pablo* (1967) 252 Cal.App.2d 794, 804); see also *Calvert v. Cnty. of Yuba* (2006) 145 Cal.App.4th 613, 629, as modified (Jan. 3, 2007) (governmental determination of a vested rights claim “implicates property deprivations significant or substantial enough to trigger procedural due process protections for landowners . . . adjacent to [the] proposed vested rights mining operation”). .

In *Paramount Rock Company v. San Diego County* (1960) 180 Cal.App.2d 217, for example, the court found that a rock-crushing plant was *not* an integral part of a pre-mix cement business that involved a sand and gravel pit, concrete premixing plant, tailings pool area, and supporting facilities before the local zoning ordinance took effect. 180 Cal.App.2d at 220-21. The company later added a rock-crushing plant and argued that it was sufficiently similar to its premixing operation to fall within the company’s existing vested right. *Id.* at 227-28. The court disagreed, finding that using the property for a rock-crushing plant was “not substantially similar to its use for a sand pit and premixing plant,” and so the rock-crushing plant was not a part of the legal nonconforming use. *Id.* at 228, 230. In reaching this conclusion, the court emphasized that the objective of zoning is to eliminate nonconforming uses, and therefore to prohibit their extension or enlargement. *Id.* at 229 (citing *McClurken*, 37 Cal.2d at 687). The court also rejected the addition because the rock-crushing plant “adds permanency to a nonconforming use which the intent of the ordinance seeks to eliminate.” *Id.* at 230-31.

Likewise, in *Point San Pedro Road Coalition v. County of Marin* (2019) 33 Cal.App.5th 1074, 1076, a quarry operator produced asphaltic concrete using only imported sand mixed with material from the quarry property at the time the operations became nonconforming. The quarry later began importing asphalt grindings, with new truckloads of material traveling to the site. *Id.* at 1078, 1080-81. The court rejected the new import operation as an impermissible extension, enlargement, or intensification of the quarry’s nonconforming use. *Id.* at 1077. The change in source material for the existing nonconforming use was not vested because the change was not “required for, or reasonably related to, the existing nonconforming processing of on-site mined material and imported sand” to produce asphaltic concrete. *Id.* at 1081. Moreover, the court found

it problematic that the import of source material would “prolong the nonconforming use rather than reducing it ‘to conformity as speedily as is consistent with proper safeguards for the interests of those affected.’” *Id.* at 1081-82 (quoting *Hansen Brothers*, 12 Cal.4th at 568).

The state laws governing surface mining operations also require that vested rights be construed narrowly. Surface mining operations are regulated according to the State Mining and Reclamation Act (“SMARA”), Public Resources Code § 2710 *et seq.*, which requires a use permit from the local permitting agency for surface mining operations. Pub. Res. Code § 2774. An entity that obtained a vested right to mine prior to 1976 is not required to obtain a permit to operate “as long as the vested right continues and as long as no substantial changes are made in the operation except in accordance with this chapter.” *Id.* § 2776(a).

SMARA is designed to encourage reclamation of land disturbed by mining operations as soon as possible, not to allow a quarry to modify its activities indefinitely to prolong operations. In particular, a reclamation plan must describe a schedule for the completion of surface mining so that “reclamation can be initiated at the earliest possible time on those portions of the mined lands that will not be subject to further disturbance by the surface mining operation.” *Id.* § 2772(c)(6). “Surface mining operations” are defined as “all, or any part of, the process involved in the mining of minerals on mined lands.” *Id.* § 2735; *see also* County Code of Ordinances § 2.10.040 (defining “surface mining” as “the process of obtaining minerals, such as sand, gravel, rock, aggregate, or similar materials by removing overburden and mining directly from mineral deposits,” consistent with SMARA). Production and disposal of mining waste and prospecting and exploratory activities are examples of “surface mining operations,” but exporting materials for processing is not. Pub. Res. Code § 2735(b), (c). Thus, SMARA recognizes that a mining operator cannot shift its operations, including by exporting waste materials for processing, in an effort to prolong operations and delay reclamation. Instead, once the surface mining operations are complete, an operator must begin reclamation.

The Santa Clara County Code is consistent with other nonconforming use laws. It protects uses that were legal when brought into existence, but that do not conform to current zoning, so long as the nonconforming use does not intensify or expand in area or volume. County Code of Ordinances § 4.50.020(A). The nonconforming use may be modified to a similar use with less intensity and impacts, and if the nonconforming use ceases for a continuous period of twelve months or more, its legal-nonconforming status terminates. *Id.* § 4.50.020(B), (C).

With respect to surface mining, the County Code incorporates SMARA by reference. *Id.* § 4.10.370(D). Any proposed expansion of an existing surface mining operation that constitutes a substantial change in the operation “by exceeding the extent of a vested right to such use” must obtain a use permit and reclamation plan. *Id.* § 4.10.370(II)(B)(1). For surface mining operations that are not vested, the County requires a use permit subject to various conditions on the operations. *Id.* § 4.10.370(II)(A).

IV. Lehigh's 2011 vested rights determination does not encompass export of aggregate.

Lehigh currently quarries limestone for processing at its onsite cement plant pursuant to the County's 2011 Vested Rights Determination. *See* Resolution 2011-85 (March 1, 2011). Lehigh had submitted one RPA application for the East Materials Storage Area ("EMSA"), which was used for disposal of mined overburden, and another comprehensive RPA for a larger portion of the site, including the EMSA. *See* Bd. of Supervisors Staff Report to Agenda Item 27 at 5-6 (Feb. 8, 2011). In this context, the County concluded that "vested rights exist" in specified parcels, and that "[q]uarry surface mining operations on the Vested Parcels are a legal non-conforming use, and do not require a County use permit for continued surface mining operations within the geographic area bounded by the Vested Parcels." Resolution 2011-85 at 2 (emphases added). This finding did not address Lehigh's currently proposed activities of exporting aggregate and improving haul roads for that purpose. Instead, the determination addressed only Lehigh's right to continued "surface mining operations," which, as noted above, is a term of art defined by SMARA that does not include the exports at issue.

The County's own analysis bolsters this conclusion. County staff explained in 2011 that anything that occurred after 1948, when the County first regulated quarrying, was irrelevant to its determination of the extent of vesting on Lehigh's property. Staff Analysis (Jan. 27, 2011) at 8; *see also id.* at 20 (noting that, consistent with *Hansen Brothers*, Lehigh's "nonconforming use includes all aspects of the operation that were integral parts of the business at the time the new regulations took effect"). Since Lehigh offered no evidence that it or its predecessors exported aggregate for processing at that time, the Board of Supervisors did not include the export of aggregate in its determination of Lehigh's vested rights. *See Paramount*, 180 Cal.App.2d at 228-30 (operation of a rock-crushing plant was not a part of the nonconforming use to which the property was put at the time the zoning ordinance was extended to it).

In fact, Lehigh expressly rejected the possibility of exporting aggregate in its 2011 Draft Environmental Impact Report ("DEIR") for the 2012 RPA. There, Lehigh claimed "a vested right to conduct surface mining activities in the Quarry pit, WMSA, EMSA, crusher/Quarry office area, surge pile, and Rock Plant," which included "the process of obtaining minerals such as rock or aggregate materials . . . ; hauling of materials using trucks and conveyors; and then processing of the materials using a primary crusher and the Rock Plant." DEIR at 2-5.² When comments on the DEIR proposed shipping overburden offsite, Lehigh rejected the possibility: "[t]oo little is . . . known about the range of possible destinations, distances, . . . and about whether some marketable or other use could be made of the materials." *Id.* at 3-17. Lehigh cannot first disavow even the possibility of exporting materials and now claim that those same exports have been integral to operations since 1948 to obtain vested status.

Lehigh's other submissions to the County in support of its 2011 application for vested rights further similarly contradict any contention that the County's vesting determination encompassed the export of aggregate. In its letters to the Board of Supervisors, Lehigh

² https://www.sccgov.org/sites/dpd/DocsForms/Documents/Lehigh_DEIR_201112_Ch2_ProjectDescription.pdf

describes the scope of activities for which it claimed a vested right in terms of extractive operations, with no mention of exports. For example, Lehigh asserted that the purpose of the Quarry's RPA was to "ensure that all *mining-related disturbances* are included within the bounds of the reclamation plan." See November 5, 2010 Letter from Diepenbrock-Harrison, Minutes Attachment to Item 27 at Board of Supervisors Meeting, at 1 (Feb. 3, 2011) (emphasis added).³ Lehigh asserted that the "movement of operations across the property for extraction, storage and processing has been ongoing in all respects since the beginning of the business and is an essential element of uses of this type." *Id.* at 8. Notably, Lehigh included processing of minerals onsite—but not export for processing and sale—in its description of the "essential elements" of its business.

In another letter to the Board, Lehigh described the "wide range of individual activities" that had been taking place onsite for decades as including "mineral extraction, cement manufacturing, material storage, and related industrial works – all integrated within a broader business enterprise," without mentioning export of aggregate. Jan. 4, 2011 Letter at 3. Lehigh argued that "a determination by the County that *the current extraction operations* are not vested" and a "County action which precludes *mining of the property* under Lehigh's vested rights," would result in economic loss to Lehigh. *Id.* at 35. Thus, Lehigh's communications to the County Board of Supervisors in relation to the 2011 Vested Rights Determination describe an extractive operation; Lehigh did not seek or obtain vested status for exports of aggregate for offsite processing or sale.

The County's recent explanation of its 2011 Vested Rights Determination confirms the limited scope of this determination: "the County did not then consider whether these proposed uses—the construction and use of haul roads to export greenstone from the Quarry—would fall within the substantive scope of Lehigh's vested rights." February 20, 2019 Draft Incomplete Letter, File No. PLN18-2250 at 3 ("2019 Draft Incomplete Letter"). As the County went on to explain, Lehigh must now submit the evidence required for the County to determine whether the proposed exports are incidental or auxiliary to the quarry's operations as they existed in 1948, and whether they would substantially change or intensify those operations. *Id.*

Likewise, and consistent with its submissions to the County in 2011, Lehigh's recent descriptions of its operations do not mention export of aggregate. According to Lehigh, the quarry produces limestone and greenstone for cement, road base, or aggregate production. Major RPA at 122. It extracts materials and hauls them for onsite processing, primarily to feed its adjacent Permanente Cement Plant. *Id.* Lehigh makes no mention of the export of aggregate.

As Lehigh's previous submissions and current descriptions of its operations reveal, and as the County's 2011 Vested Rights Determination and recent statements confirm, the export of aggregate for processing and related improvement of haul roads are not part of Lehigh's vested rights. Unlike in *Hansen Brothers*, Lehigh has rejected the possibility of exporting aggregate, rather than showing that they are part of its nonconforming use. Thus, Lehigh cannot now claim that exports are "substantially the same" or even

³ http://sccgov.iqm2.com/Citizens/Detail_Meeting.aspx?ID=1877

“normally incidental and auxiliary to” the pre-1948 use of its property. 12 Cal.4th 559, 565.

V. Lehigh must obtain either a use permit or a vesting determination before it exports aggregate.

Lehigh cannot export aggregate for processing and sale without either a use permit or a vesting determination. If Lehigh applies for a vesting determination, the County should answer the questions it set out in its 2019 Draft Incomplete Letter. In particular, the County must determine whether Lehigh’s proposed export and haul road improvements are incidental or auxiliary to the Quarry’s surface mining operations as they existed at the 1948 vesting date; whether the proposed uses would substantially change the Quarry’s surface mining operations as they existed at the 1948 vesting date; and whether the proposed uses would impermissibly intensify, expand, or add permanency to its mining operations. 2019 Draft Incomplete Letter at 3.

In the meantime, the County should not allow Lehigh to proceed with its pending RPA applications as drafted. Export of aggregate for processing, including at Stevens Creek Quarry, should not remain part of the project description, yet avoid environmental review because Lehigh asserts that these activities are vested. Instead, proper review of the Major RPA must include all proposed activities that require the County’s discretionary approval and those cumulative projects that are reasonably foreseeable. In short, it must address the impacts of Lehigh’s proposed exports.

CONCLUSION

Lehigh bears the burden of proving that its proposed export of aggregate for processing and sale offsite is a vested activity. It can only include these activities in its RPA applications if it has obtained either a use permit or a vesting determination. Here, Lehigh has applied for neither. The County should not allow Lehigh to avoid notice and review under its procedures for either use permits or vested rights determinations. Indeed, either process will allow the County to scrutinize Lehigh’s proposed activities to determine whether they will impermissibly intensify or prolong Lehigh’s legally nonconforming quarrying operations, rather than reducing them “to conformity as speedily as is consistent with proper safeguards for the interests of those affected.” *County of Marin*, 33 Cal.App.5th at 1081-82.

Sincerely,

Roger S. Lee

Roger Lee
Director of Public Works

cc: Deborah Feng