DATE: August 29, 2011

TO: Mayor Wong and Members of the City Council

FROM: Carol Korade, City Attorney

RE: Lehigh Quarry and Cement Plant

Members of Council and community residents have inquired about the City's ability to protect the quality of life of City residents from impacts created by the Lehigh Quarry and Cement Plant ("Plant"), which lies outside the City's boundaries and is subject to Santa Clara County's land use control. The operation was previously known as the Hanson facility and more recently referred to as the Lehigh Southwest Cement Plant. The first part of this memorandum explains that the Plant is under the County's jurisdiction and outlines how the City and its residents can seek to influence the County's decision making. The second part of this memorandum discusses state, federal, and local environmental laws applicable to operation of the Plant and comments on means by which the City and its residents can seek enforcement of these laws to protect the quality of life in Cupertino.

I. THE COUNTY, NOT THE CITY, HAS JURISDICTION OVER THE PLANT.

The Plant is located at 24001 Stevens Creek Boulevard, in the western hillsides of Santa Clara County, west of Cupertino. Under the California Constitution, a city may make and enforce **within its limits** all local, police, sanitary, and other ordinances and regulations not in conflict with the general law. Because the Plant is located in the County, and not within the City, the **City has no control or permitting authority over the Plant.** Without such jurisdiction, the City cannot impose any conditions on the operation of the Plant. The City can, of course, regulate truck traffic on its streets, comment on the County's environmental reviews of the Plant and could, conceivably sue if the Plant's operations violated standards established by the government agencies that do have jurisdiction. However, the City does not have jurisdiction of its own.

A. County of Santa Clara Use Permit

The Plant's operation is authorized under a use permit, first issued by the County of Santa Clara on May 8, 1939. The use permit was modified in June 1950 and May 1955 to allow an additional rotary kiln at the Plant. Further, on December 5, 1977, the County approved a use permit modification for the modernization of the Plant and, in 1980, the Plant converted from a wet-process to a more efficient dry-process kiln system

Certain operations of the Plant are continuous, such as the kiln operation which must operate at extremely high temperatures and therefore cannot be efficiently turned on and off every day because it requires substantial time and energy to reheat and to cool down.

The County use permit does not impose any conditions on the Plant's hours of operation or the number of trucks which may travel to and from the Plant or by what routes. The only noise condition of the use permit requires that noise at the property line must conform to the Noise Element of the County General Plan and the County's noise ordinances, which can be found at the following links:

http://www.sccgov.org/SCC/docs/Planning,%20Office%20of%20(DEP)/attachments/Stanford/Stanford_CP.pdf

http://library.municode.com/HTML/13790/level3/TB_DB11_CVIII.html

The County Department of Environmental Health enforces the County's noise ordinances. However, the County currently does not have a continuous noise monitoring program. During the summer of 2009, the County Planning Office contracted an outside consultant to monitor noise generated by the Plant and to determine whether the noise levels comply with County requirements. The report, completed in March 2010 concluded the noise levels were within the adopted standards of the Santa Clara County noise element of the general plan, the Santa Clara noise ordinance and the City of Cupertino's noise ordinance. The County also contracted a consultant to evaluate truck traffic. The consultant's report, which addresses noise from operations and truck traffic, is currently in draft form and will likely be finalized and released within the next few weeks. While the County is not expected to hold public hearings on the report, the information will be included in the amended Reclamation Plan, including the environmental analysis which the Plant must submit for County review and approval under California's Surface Mining and Reclamation Act.

Any complaints regarding the operations of the Plant can be reported to the County Planning Office at (408) 299-5770. Possible violations of the County's noise ordinances can be reported to the County Environmental Health Staff at (408) 918-3400.

B. Reclamation Plan Amendment

In 1975, the State adopted the Surface Mining and Reclamation Act ("SMARA"), requiring local jurisdictions to adopt ordinances to provide a regulatory framework for the conduct of mining within their boundaries. It was adopted to ensure that land was properly reclaimed to usable and aesthetically acceptable condition after the closure of a mine and that local jurisdictions did not prevent exploitation of available mineral resources. SMARA mandates that every active surface mine have a reclamation plan to reclaim the land for subsequent use upon the closure of the mine and empowers local jurisdictions, in this case, the County of Santa Clara, to review and approve such plans. On March 7, 1985, the County approved the Reclamation Plan for the Plant. This plan is valid for 25 years, and expired in March 2010.

After the County approved the existing Reclamation Plan in 1985, it was found that the Reclamation Plan did not cover the entire operation of the Plant and the County

therefore issued a Notice of Violation. Consequently, in January 2007, the Plant applied to the County for approval of amendments to the approved Reclamation Plan. The proposed amended Reclamation Plan proposed reconfiguring the mining and materials storage areas and expanding the operation to add a second mining pit. After a subsequent separate reclamation plan application in 2009 for the EMSA (discussed in C below) and a 2010 Comprehensive Plan for the Quarry, the Quarry reduced the scope of the reclamation plan amendment and, in July, 2011, submitted an amended consolidated reclamation plan application.

The 2011 Consolidated application superseded the 2009 EMSA Plan Amendment and the 2010 Comprehensive Plan. The proposed reclamation area is now approximately 811 acres and encompasses all portions of the property that have been disturbed by mining related activities, but does not propose a new mining area as in the initial application. The County is now required to approve and certify an environmental impact report ("EIR") before approving the amended Reclamation Plan and, as detailed below, that process provides opportunities for the City and its residents to comment and to suggest measures to mitigate significant environmental impacts of the proposed amended Reclamation Plan. The EIR must distinguish between the impacts of the proposed amendment from those of the existing operation, which the County has limited authority to regulate because of the Plant's vested land use right to continue the previously approved operation.

When the County determines that an EIR must be prepared, it is required to send out a Notice of Preparation to all public agencies with authority over the project to solicit advice on the scope and content of the EIR. However, for projects with regional or area wide significance, such as the Lehigh Plant, the County must also hold a public scoping meeting and provide notice to cities bordering the jurisdiction in which the project is located. Therefore, with respect to the EIR for the Consolidated Plan, the County will hold a public scoping meeting at the City of Cupertino Quinlan Center, Cupertino Room, 10185 North Stelling Road, Cupertino at 7:00pm, on August 30, 2011, to determine the scope and content of the draft EIR. A notice of this meeting has been posted on the City's website for the residents' review.

Cupertino residents can provide input by public comments on the Notice of Preparation of the EIR at the public scoping meeting and by providing written responses by September 26, 2011 to County Planner Marina Rush at marina.rush@pln.sccgov.org or County of Santa Clara Planning Office, Attention: Marina Rush, County Government Center, 70 West Hedding St., 7th Floor, East Wing, San Jose CA 95110. The City encourages residents to provide public comments to shape this additional environmental review process so that it addresses the residents' concerns.

C. The East Material Storage Area ("EMSA") and Surface Mining

In June 2008, the County issued a Notice of Violation instructing the Plant to cease depositing overburden material in an area known as the East Materials Storage

Area ("EMSA"). In April 2009, the Plant applied for a separate Reclamation Plan amendment for this area. On November 2, 2010, the County issued a notice of a public hearing of the County Board of Supervisors to consider whether and to what extent the Plant has a legal non-conforming use of the EMSA. On November 9, the Cupertino City Manager replied to the County Planning Department with a letter communicating concerns raised by Cupertino residents and encouraging public participation and environmental review. On November 10, Mayor Wang wrote a letter notifying the residents about the County hearing, the City Manager's letter, and the efforts made by the City Council to protect the quality of life in the City. On February 8, 2011, the County held a public meeting to determine whether and to what extent there was a legal nonconforming use for surface mining activities on approximately 2,656 acres of property comprising the Permanente Quarry. At the meeting, the Board of Supervisors:

1. Determined that because Permanente Road no longer functioned as a public street as of approximately 1935, the requirement for a Use Permit for quarrying activities within 1,000 feet of a public road in the 1937 County Zoning Ordinance does not apply.

2. Determined that the County Zoning Code Ordinance first required a use permit for quarrying in the "A-1" district in January 1948.

3. Determined that the area within the boundaries of the 1985 reclamation plan amendment is not relevant to determining the geographic extent of the Quarry's legal nonconforming use.

4. Determined, as amended, that the geographic extent of the Quarry's legal nonconforming use include all areas where there is evidence of mining-related disturbance as of 1948, to include parcels pre-1948: 1 through 3, parcels 5 through 9, parcel 11, and parcels 14 through 17, and no legal nonconforming use for parcels post-1948: 4, 10, 12, 13, 18 and 19, as displayed on Exhibit 45.

5. Directed the Quarry to apply for a Use Permit for all of the property within the boundaries of its reclamation plan amendments that is outside the geographic extent of its legal nonconforming use. The application shall be submitted to and accepted by the County as soon as possible for processing along with the reclamation plan amendments.

6. Directed the Quarry to apply for formal abandonment of Permanente Road.

As to item #6, on August 23, 2011, the Santa Clara County Board of Supervisors vacated Permanente Road after an application by the Quarry and a public hearing on the matter. As discussed above, the EMSA reclamation plan is now included in the 2011 Consolidated application.

D. EIR Process

The California Environmental Quality Act ("CEQA"), California Public Resources Code §§ 21000 et seq., requires that public agencies prepare an EIR when the approval of a proposed project may significantly and adversely affect the environment. CEQA and the CEQA Guidelines, 14 California Code of Regs. §§ 15000 et seq., detail the required content an EIR should contain and the process for approving it. An EIR must include sufficient analysis to allow the lead agency (here, the County) to make an informed decision on a project which accounts for its environmental consequences. An EIR must include: (1) an accurate description of the proposed project; (2) analysis of each significant environmental impact expected to result from the proposed project; (3) mitigation measures to reduce those impacts to the extent feasible; (4) a range of reasonable alternatives to the proposed project; and (5) a brief statement of the reasons for determining that the project's likely effects on the environment are not significant. Additionally, an EIR must describe any significant effects on the environment that would be unavoidable or irreversible if the project is implemented.

In this case, the Plant's application to consolidate and amend the Reclamation Plan requires the County Planning Commission to certify an EIR addressing the environmental impacts of the amended plan, before approving it. Prior to the preparation of the EIR, the County will accept comments on the NOP until September 26, 2011 at 5:00 pm. Under County zoning regulations, Planning Commission decisions may be appealed to the Board of Supervisors.

Each EIR will be prepared in two steps: (1) a draft EIR, which will be circulated to the public and affected public agencies for review and comments for at least 30 days; and (2) a final EIR, including the comments submitted and responses to significant comments, which must be certified by the County Planning Commission as to completeness and adequacy. As soon as the County completes a draft EIR, it is required to notify the public and responsible agencies of their opportunity to comment on it. The draft EIRs will be available at the following URL:

www.sccgov.org/portal/site/planning/planningchp?path=%2Fv7%2FPlanning%2C%20Office%20of%20%28DEP%29%2FPermits%20%26%20Development%2FEnvironmental%20Protection%2FActive%20Environmental%20Documents.

This website will also identify a contact person for public comments and the comment period. Before the draft EIR is released for comment, members of the public can also contact County Senior Planner Gary Rudholm at gary.rudholm@pln.sccgov.org or (408) 299-5747 to request mailed notice of the draft EIR's release. If comments are submitted, the County will respond in writing before certifying the final EIR. Responses must provide reasoned, good faith analysis regarding all significant environmental issues raised in EIR comments. Thus, to be effective, comments must identify: (1) specific environmental impacts of the proposed amendment to the Reclamation Plan (not the pre-existing Plant operation); (2) specific means to mitigate those impacts; and (3) some factual support (even if drawn from common sense and ordinary experience) for the claimed impacts and the contention that the proposed mitigation is feasible and will be

effective to mitigate the project's impacts. Submitting effective comments is important because any person who later wishes to challenge the certified final EIRs, the approval of the amended Reclamation Plan, or the approval of use of the EMSA will have to demonstrate that he or she presented objections to the County Planning Commission before it acted on the EIRs and the approvals (*i.e.*, that he or she exhausted administrative remedies before suing).

The final EIR will include: (1) the draft EIR with any revisions made following the public review; (2) comments received on the draft EIR; (3) a list of persons and entities commenting on the draft EIR; (4) the County's responses to the comments; and (5) any other information added by the County before the EIR is certified. The County Planning Commission must certify that the final EIR was completed in compliance with CEQA and that it reviewed and considered the report before acting on the project. If there is an appeal of the Commission's decision, the Board of Supervisors will be required to make similar findings.

II. OTHER ENVRIONMENTAL REGULATIONS.

A variety of state, federal and local laws authorize various public agencies to regulate aspects of the Plant's operation. The City can comment in public hearings, provide evidence, and otherwise encourage these agencies to protect the quality of life in the City and, as noted below, can enforce noise and vehicle regulations.

A. Federal Clean Air Act

As a major facility under this law, the Plant must obtain operating permits under Title V of the 1990 Clean Air Act Amendments and the Federal Operating Permit Program. A Title V Permit compiles applicable local, state, and federal air quality requirements, including emissions limits and standards, monitoring, record-keeping, and reporting requirements. The Plant first applied for a Title V Permit on June 21, 1996, which it was issued on November 5, 2003.

On March 9, 2010, the United States Environmental Protection Agency ("EPA") issued the Plant a Notice of Violation under the Clean Air Act. The Notice of Violation states that, between 1996 and 1999, the Plant underwent a series of physical modifications resulting in significant increase in emissions of nitrogen dioxide and sulfur dioxide, without applying for a Prevention of Significant Deterioration ("PSD") permit as required under the Clean Air Act. Further, the Plant failed to identify the PSD requirements in its application for the 2003 Title V Permit and therefore obtained a deficient permit. Under the Clean Air Act, the EPA has the authority to enforce the Notice of Violation by issuing an administrative penalty order or seeking an injunction or civil penalty. Initially, however, the EPA will conduct enforcement negotiations with the Plant. The negotiations will be confidential and may take several years, but if a settlement is reached, it will become public and may offer the possibility of public comment.

Title V Permits must be renewed every five years. The Plant applied to renew its Title V Permit on April 28, 2008. The Bay Area Air Quality Management District ("BAAQMD") implements state and federal air quality laws in Cupertino and has authority to issue the Title V Permit renewals under the supervision of the EPA. In 2009, BAAQMD submitted a draft Title V Permit renewal to the EPA for review, but withdrew it on January 5, 2010, due to anticipated new EPA standards. On Sept. 9, 2010 the EPA released amendments to the National Emission Standards for Hazardous Air Pollutant (NESHAP) which contained significantly more stringent standards for mercury and other toxic contaminants from cements plants. Additional amendments were issued on January 18, 2011. BAAQMD incorporated those amendments into a revised proposed Title V permit for the Plant. Before BAAQMD could resubmit the Title V Permit renewal to the EPA, it had to allow public comment on the proposed permit for at least 30 days. During that time members of the public could submit comments and request a public hearing on the proposal. The comment period opened January 21, 2011 and ended March 25, 2011. The Title V renewal was then submitted to the EPA for their review, which concluded June 23, 2011. On July 8, 2011, BAAQMD issued a renewed permit to the Plant.

1. <u>New Amendments to the National Emissions Standards for Hazardous Air Pollution for Cement Manufacturing.</u>

The Clean Air Act requires the EPA to set National Emissions Standards for Hazardous Air Pollution ("NESHAPs"), which are industry-based standards for 187 different air toxics that apply to existing and new emission sources. On August 6, 2010, the EPA issued amendments to its NESHAPs that require reduced mercury and other air toxics emissions from cement kilns.[1]

The amended NESHAPs limit emissions of mercury, total hydrocarbons, particulate matter, and hydrochloric acid from existing and new emission sources. Because "new sources" refer to kilns constructed after May 6, 2009, only the provisions relating to "existing sources" apply to the Plant. The EPA further issued new methods and criteria for emissions monitoring systems.

Existing cement kilns must comply with the new emissions limits within three years of the amendments being published by the Federal Register. The amended NESHAPs were published on August 10, 2010 and thus the compliance deadline for the Plant is August 10, 2013.

On August 10, 2010, the Plant issued a press release pledging to comply with the amended NESHAPs on or before the 2013 compliance deadline.

B. <u>*The California Air Toxics "Hot Spots" Information and Assessment Act*</u>

[1] The EPA also amended its New Source Performance Standards ("NSPS") for cement kilns, but because these only apply to cement kilns built after June 16, 2008, we do not discuss these amendments.

In 1987, the State Legislature established a formal regulatory program for site-specific air toxic emissions inventories and health risk quantifications, which is enforced by local air agencies, such as BAAQMD. Under this program, a wide variety of industrial, commercial, and public facilities must report the types and quantities of toxic substances they routinely release into the air. The program is intended to collect emissions data, identify facilities with potential for localized health impacts, ascertain health risks, notify nearby residents of risks that warrant notice, and to reduce significant risks.

BAAQMD routinely conducts or reviews Health Risk Assessments ("HRA") for new and modified sources of toxic air contaminants ("TAC"). In addition, BAAQMD periodically reviews toxic emission reports from existing facilities under the Air Toxics Hot Spots ("ATHS") Program to assess these facilities' potential to pose "significant risk" to the public. Facilities determined to pose a "significant risk" must conduct a risk reduction audit and develop a plan to implement risk reduction measures.

In 2008, BAAQMD conducted a health risk assessment for the Plant, which showed that the health risks from the Plant's operation were below the levels determined by BAAQMD to warrant either public notice or risk reduction measures. At BAAQMD's request, on March 30, 2009 the Plant submitted additional data regarding metallic toxic air contaminants in fugitive dust, emissions from the kiln's smokestack, and other sources of air pollution at the facility. BAAQMD's analysis of these data indicates that the risk levels were slightly higher than found in the previous health risk assessment, but still below the action levels of the Air Toxics Hot Spots Program.[2] BAAQMD will reevaluate the facility periodically and determine if an updated health risk assessment is necessary.

In July 2009, EPA and BAAQMD began monitoring air quality at Stevens Creek Elementary School, located approximately two miles from the Plant, to measure hexavalent chromium as part of the School Air Toxics Monitoring Initiative. No hexavalent chromium was detected in the first three samples. The first sample was intentionally taken when the cement kiln was not operating. In the fourth sample, EPA detected a very small amount of this substance – 0.0145 nanograms per cubic meter of air, which is 0.00000000000003 pounds. For comparison, EPA studies in cities across the country where no unusual levels of hexavalent chromium were expected, detected average levels of chromium of 0.05 nanograms per cubic meter of air, or about three-and-a-half times more than detected at the Stevens Creek Elementary School. Monitoring will continued September, 2009. The EPA evaluated wind patterns, Plant operations, and other pertinent information to complete its analysis. The results from the Stevens Creek Elementary School were consistent with BAAQMD's health risk assessment, which shows the hexavalent chromium emissions from the Plant do not present significant health risks. Specifically, during EPA's monitoring period, levels of hexavalent chromium in the air at the school were below levels of concern for short-term and long-term exposure. Results of this school air quality study, along with a press release and a

[2] An action level is a level of air pollution emissions at which action must be taken to protect public health and safety.

frequently asked questions document, are posted on EPA's website at http://www.epa.gov/schoolair/StevensCre.html.

C. Federal Clean Water Act

Under the federal Clean Water Act, the San Francisco Bay Regional Water Quality Control Board ("SFB RWQCB") issued a National Pollutant Discharge Elimination System ("NPDES") permit for the Plant which requires implementation of best management practices to control pollutants in stormwater runoff from the site. The Plant has filed a notice of intent for coverage under that permit, which was processed by SFB RWQCB on April 23, 1992 and is still active. Pursuant to this permit, the Plant is required to report the effectiveness of its practices to SFB RWQCB on July 1st of each year.

Also under the federal Clean Water Act, SFB RWQCB issued a Mercury Total Maximum Daily Load requirement on February 12, 2008. According to SFB RWQCB, the Plant is one of the significant local sources which result in a high mercury level in the Bay.

In 1999, SFB RWQCB issued the Plant a Cleanup and Abatement Order ("CAO 99-018") to address unauthorized construction of in-stream ponds, instability of creek banks, and the need for a long-term creek restoration plan. The Plant's predecessor, Hanson, complied with the remedial and long term measures specified in the CAO 99-018. Further, SFB RWQCB has been working with the Plant on a long-term creek restoration plan to be implemented upon the closure of the Plant.

On March 26, 2010, SFB RWQCB issued the Plant a Notice of Violation for failure to comply with stormwater protection requirements. The Notice of Violation provided that by March 15, 2010, the Plant was supposed to complete a water balance survey for all existing plumbing and drainage at the Plant to cover stormwater, process water, and waste water. Pursuant to the Notice of Violation, the Plant is required to update its site maps to clearly identify all structural control measures that affect stormwater discharges, authorized non-stormwater discharges, and run-on (which is stormwater coming from surrounding areas). Additionally, by April 15, 2010, the Plant was to implement and thereafter maintain best management practices to: (1) eliminate discharge of pollutants from Ponds 9 and 17 into Permanente Creek; (2) reduce sediment discharge into Pond 9; (3) prevent discharge of sediments from slope erosion; (4) minimize exposure of pollutants to stormwater at a vehicle and equipment shop and washing area; (5) eliminate prohibited non-stormwater discharges relating to vehicles and equipment; (6) minimize exposure of pollutants to stormwater at a concrete maintenance pad located at the Plant; and (7) prevent discharge of sediments from the unstabilized Upper Quarry Road and areas around it.

On February 18, 2011 SFB RWQCB issued the Plant a Notice of Violation for non-storm water discharges at the facility. On April 29, 2011, SFB RWQCB issued a complaint and administrative civil liability in the amount of $10,000 for unauthorized

discharge at the facility. The Complaint alleged a pipe outfall (discharge) to Permanente Creek was not disclosed to Regional Water Board staff despite a requirement to do so.

On June 10, 2011 SFB RWQCB issued a 13267 Investigative Order directing the Plant to submit technical and monitoring reports pertaining to an investigation of water quality. Water Code 13267 provides that the Water Board may require dischargers, to furnish technical or monitoring reports as the Water Board may specify to provide information to the board regarding (a) the nature and extent of discharge at the facility, (b) the nature and extent of pollution conditions in waters of the state and United States created by the dischargers, (c) the threat to public health and the environment posed by the discharges, and (d) appropriate cleanup and abatement measures. Multiple reports are sought by the Board. The due dates range from July 15, 2011 – September 30, 2011.

D. *California Porter-Cologne Water Quality Act*

Under the California Porter-Cologne Water Quality Act, the Plant is also subject to water reclamation requirements issued by SFB RWQCB in 1994. These requirements regulate treatment and disinfection of sewage for reuse. Accordingly, the Plant is required to submit quarterly self-monitoring reports to SFB RWQCB.

E. *California Vehicle Code – Truck Operations*

Because the City does not have its own police force, it contracts with the County Sheriff's Department for law enforcement services. As the City's contract police force, the Sheriff's Department enforces Vehicle Code provisions in Cupertino except as to state highways, which are patrolled by the California Highway Patrol ("CHP"). Together, the Sheriff's Department and the CHP are responsible for enforcement of the Vehicle Code on Foothill Boulevard, Stevens Canyon Road, and the other roadways which serve the Plant. CHP usually relies on the Sheriff's Department to do enforcement in this area.

Residents have expressed concern over rocks or gravel falling out of the trucks and causing damage to their vehicles. The Sheriff's Department enforces the provisions of the Vehicle Code on trucks with loads that exceed the limits provided for each roadway. It understands the concerns of Cupertino residents and works to correct any observed violations. It also provides enforcement throughout the City when the trucks use other routes to reach their destination.

Vehicle Code § 24002 states:

> (a) It is unlawful to operate any vehicle or combination of vehicles which is in an unsafe condition, or which is not safely loaded, and which presents an immediate safety hazard.

(b) It is unlawful to operate any vehicle or combination of vehicles which is not equipped as provided in this code.

Other Vehicle Code provisions pertinent to the Plant cover registration, safety and inspections, reckless driving, weight, length, tires, exhaust, and noise. If residents wish to report what they believe to be current, in-progress Vehicle Code violations to the Sheriff's Department, they should call (408) 299-2311, which is a non-emergency contact number that reaches the dispatch center. Further, if residents wish to report damage, such as from falling rocks, they should call the Sheriff's Department at (408) 868-6600 during regular business hours, Monday through Friday. Residents should be aware that the Plant contracts with various truck companies and so does not necessarily control the trucks. Therefore, if residents wish to report an incident with a truck, they should write down the license plate number and the name of the truck company, if stated on the truck.

Because vehicles necessarily move through more than one jurisdiction, the rules that apply to vehicles, other than road-specific weight limits, are generally found in State, rather than local, law. Any local regulation must be expressly authorized by the Vehicle Code. While Vehicle Code § 21100 grants the City limited authority to regulate traffic flow with traffic control officers (as in white glove service when signals are out of order) and via traffic control devices (such as traffic signals and stop signs), the City has no broader authority over commercial vehicles to protect residents from the noise and traffic they generate.

Vehicle Code § 35701 authorizes cities to prohibit the use of a street by any commercial vehicle or by any vehicle exceeding a maximum gross weight limit, provided there is an alternative route to serve each property affected by the prohibition. While the need to maintain an alternative route to the Plant makes it difficult to impose weight limits on Foothill Boulevard and Stevens Creek Boulevard, § 35701 can be used to impose weight limits on smaller residential streets to prevent trucks from cutting through residential neighborhoods. Generally, weight limits can be problematic to enforce because a scale is required to identify overweight vehicles. However, if the City limits the weight to a few thousand pounds on certain residential streets, cement and gravel trucks can be identified and cited for exceeding the weight limit without a scale. Alternatively, to avoid enforcement problems, the City can prohibit all commercial vehicles on certain residential streets. It should be noted, however, that any such restrictions will apply to all heavy or commercial vehicles and not only to truck traffic to and from the Plant.

Some residents have also inquired whether the City can prohibit truck traffic during nighttime hours based on safety or noise concerns. Some cities have relied on § 35701 to introduce a time schedule for commercial vehicles on certain streets. However, for Cupertino to prohibit truck traffic on certain streets during nighttime hours there must be an alternative non-regulated route to the Plant during such hours. Given the location of the Plant, it may be difficult to identify an alternative route that fully protects Cupertino residents from truck traffic to and from the Plant.

The City is also limited by Vehicle Code § 9400.8 which states in relevant part:

> [N]o local agency may impose a tax, permit fee, or other charge for the privilege of using its streets or highways, other than a permit fee for extra legal loads, after December 31, 1990, unless the local agency had imposed the fee prior to June 1, 1989.

Cupertino had no road impact fee prior to June 1, 1989 and, therefore, cannot adopt one now. Some mention has been made that Atherton imposes such a fee. In fact, while Atherton did adopt a vehicle impact fee several years ago, it has since rescinded that fee. Moreover, Atherton's fee was based on its power to regulate land use in its boundaries with respect to the construction truck traffic generated by the development of those new land uses. Because, the Plant is in unincorporated territory, land use impact fees must be imposed by the County rather than by the City. However, the City and its residents can and should argue for road impact mitigations during the public comment periods of the County's EIR processes. To support its request for road impact mitigations, the City can retain a consultant to estimate the City's expenses in maintaining its roads to mitigate the impacts from truck traffic to and from the Plant, as opposed to impacts from other trucks and heavy vehicles, such as gasoline tanker trucks.

F. *Other Regulations Relating to the Truck Operations*

While the City may not regulate traffic beyond the areas specified in the Vehicle Code, the trucks that serve the Plant are subject to the City's noise ordinance, which provides that a truck may not remain in one location on a public right-of-way, with the engine running for more than 3 minutes in an hour, if it produces noise above the level specified for the property zoned as follows:

Land Use at Point of Origin	Maximum Noise Level at Complaint Site of Receiving Property	
	Nighttime	Daytime
Residential	50 dBA[3]	60 dBA
Nonresidential	55 dBA	65 dBA

Because this provision relates to standing, rather than moving, trucks, it would likely not be found a regulation of traffic, which as discussed above is reserved for State legislation. The City's noise ordinance can be found in Chapter 10.48 of the Cupertino Municipal Code at:

[3] dBA refers to an A-weighted decibel, a noise-measuring system which emphasizes noises at frequencies perceptible to humans.

www.amlegal.com/nxt/gateway.dll/California/cupertino/cityofcupertinocalifornia municipalcode?f=templates$fn=default.htm$3.0$vid=amlegal:cupertino_ca.

Additionally, the County's noise ordinance provides that a motor vehicle, with a gross vehicle weight of more than 10,000 pounds or with any auxiliary equipment (*i.e.*, trailers) attached, may not operate while the vehicle is stationary for more than 15 minutes in any hour, for reasons other than traffic congestion, on a public right-of-way or public space within 150 feet of a residential area between 10:00 p.m. and 7:00 a.m. The County's noise ordinance can be found at:

http://library.municode.com/HTML/13790/level3/TB_DB11_CVIII.html.

As such, the City and County noise ordinances provide remedies for residents who are disturbed by nighttime truck traffic if such traffic produces excessive noise while idling for longer than the specified periods. To report a violation of the City's noise ordinance, residents may contact the Sheriff's Department at (408) 299-2311 or Cupertino Code Enforcement at (408) 777-3182. Violations of the County's noise ordinance can be reported to the County Environmental Health Staff at (408) 918-3400.

Residents have also requested that the City considers placing speed bumps along the truck traffic route. When the City alters the design of its roads, it exposes itself to liability for dangerous condition of public property. Traffic accidents are common, as are lawsuits arising from traffic accidents and as "deep pockets" cities are frequent targets of suits claiming that a roadway was in an unreasonably dangerous condition, contributing to the accident. Accordingly, it is never advisable to make a change in a public right of way unless that change can be defended against such claims and the best defense to such claims is based on what is called "design immunity." If speed bumps are installed on the basis of a design prepared by a licensed professional, design immunity will attach. Thus, speed bumps should only be installed if a registered traffic engineer or other licensed professional concludes that doing so is safe and consistent with the standards of his or her profession.

Accordingly, Chapter 11.34 of the Cupertino Municipal Code provides that the City Manager or his designee may authorize installation of speed bumps if all of the following are true: (1) the (local or collector) street is a neighborhood residential street as defined by the Vehicle Code or by City Council actions; (2) the street is not wider than 40 feet from curb to curb or from edge of pavement to edge of pavement; (3) the street is limited to one lane in each direction; (4) a speed limit of 25 miles per hour has been established in conformance with State law; (5) **the street is not a truck route** or a transit bus route; (6) the street has an average annual daily traffic volume of fewer than four thousand vehicles; (7) the street has a grade of five percent or less for any segment between intersections; (8) the minimum distance from an intersection or curve to the road bump is 150 feet; (9) the spacing between road bumps is between 400 and 500 feet; (10) the road is visible for a distance of 150 feet; and (11) the result of a traffic and engineering survey indicate a minimum 85% approach speed of 32 miles per hour. It

further authorizes the Director of Public Works to adjust these requirements if he finds, in his professional opinion, that such adjustments are necessary for the installation to fit the specific conditions of the residential street where it is to be installed. Accordingly, installation of speed bumps would not be feasible because, among other things, N. Foothill Boulevard and Stevens Creek Boulevard are used as truck routes, have more than one lane in each direction, and have speed limits exceeding 25 miles per hour.

While the City can amend its Municipal Code, it cannot change engineering standards which prevail in the profession of registered traffic engineers and others who design roadways. We understand that the Municipal Code provision cited above reflects those professional standards. Accordingly, speed bumps cannot be constructed to slow trucks serving the Plant without exposing the City to essentially unlimited liability – the City will be responsible for every traffic accident in the vicinity of the speed bumps if it installs them contrary to professional design standards.

G. Public and Private Nuisance Law

Another alternative to control the Plant's operation is to bring a claim alleging that the Plant's operations constitute a public or private nuisance. Under Civil Code § 3479, a nuisance is defined as anything injurious to health, interfering with the comfortable enjoyment of life or property, or unlawfully obstructing the customary use of any navigable lake, river, bay, stream, canal, basin, public park, square, street, or highway. If a nuisance affects an entire community or neighborhood, or any considerable number of persons it is considered a public nuisance. Otherwise, it is considered a private nuisance.

Under Civil Code § 3482, anything done or maintained under the express authority of a statute is deemed not to be a nuisance. Therefore, if the Plant complies with the regulations discussed in this memorandum and obtains all the permits required for its operations, that will be very persuasive evidence that the Plant's operation does not constitute a nuisance.

III. SUMMARY

In sum, these are the procedures by which the City and its residents may address the following concerns regarding the Plant's operation:

Air Quality and Fugitive Dust: Air quality impacts, including fugitive dust from operations at the Plant site and from truck traffic to and from the Plant, can be addressed in the two EIRs discussed above. In addition, state and federal air quality laws, enforced by BAAQMD, provide a means to control these impacts. Opportunities for public input in the County's EIR processes and BAAQMD's regulatory process are described above. If dust is especially problematic for a particular property owner, a private or public nuisance action might be possible.

Water Quality Impacts: Water quality impacts can be addressed in the two EIRs discussed above. In addition, state and federal water quality laws, enforced by the SFB RWQCB, provide a means to control these impacts. Opportunities for public input in the County's EIR processes and the SBF RWQCB's regulatory process are described above. Again, a public or private nuisance action might be possible if the Plant has especially egregious impacts on a particular property.

Noise Impacts: Noise impacts can be addressed in the two EIRs discussed above. In addition, the City and County noise ordinances provide means to control these impacts. Opportunities for public input in the County's EIR processes and the County's and City's processes to enforce their noise ordinances are described above. Again, a public or private nuisance action might be possible if the noise has especially egregious impacts on a particular property.

Truck Traffic: Noise, dust, and traffic impacts of truck travelling to and from the Plant can be addressed in the two EIRs discussed above. In addition, the Sheriff's Department can and does enforce Vehicle Code requirements for truck traffic. Further, the City and County noise ordinances prohibit vehicles to idle for longer than specified periods. Opportunities for public input in the County's EIR processes are described above; traffic complaints can be addressed to the Sheriff's Department.

IV. CONCLUSION

Under the Federal and the State constitutions, the Plant has a vested right to operate and the City or the County cannot force the Plant to close without paying for the value of the operation, which neither has the resources to do. However, the Plant has a duty to exercise its property rights responsibly and in compliance with local, state, and federal land use and environmental quality laws. Although the City has only limited authority to directly regulate the Plant (only as to truck traffic within its borders), it can and will participate in the County's EIR processes and the other regulatory processes described in this memorandum. Cupertino residents and property owners can also participate in those processes and the City encourages them to do so.

Contacts			
Issue	Responsible Agency	Website	Phone number
Dust & Air	Bay Area Air Quality Management District ("BAAQMD")	www.baaqmd.gov	(415) 749-5119 (to request notification of the opening of the Title V permit public comment period)
Water	San Francisco Bay Regional Water Quality Control Board ("SFBRWQCB")	http://www.swrcb.ca.gov/rwqcb2/	(510) 622-2376
Noise	County Department of Environmental Health	http://www.sccgov.org/portal/site/deh/	(408) 918-3400 (to report violations of County noise ordinances)
	County Sheriff's Department	http://www.sccgov.org/portal/site/sheriff/	(408) 299-2311 (to report violations of City noise ordinances)
	Cupertino Code Enforcement	http://www.cupertino.org/index.aspx?page=359	(408) 777-3182 (to report violations of City noise ordinances)
Truck Traffic	County Sheriff's Department	http://www.sccgov.org/portal/site/sheriff/	(408) 299-2311 (to report Vehicle Code violations) 408-868-6600 (call to report damage)
General	County Planning Office	http://www.sccvote.org/portal/site/planning/	(408) 299-5770 (to report complaints regarding Plant operations) (408) 299-5747 (to request notice of EIR public comment period)