

County of Santa Clara

Department of Planning and Development
Planning Office

County Government Center, East Wing, 7th Floor
70 West Hedding Street
San Jose, California 95110-1705
(408) 299-5770 FAX (408) 288-9198
www.sccplanning.org



MEMORANDUM

Date: December 14, 2010

To: **President Ken Yeager and Members of the Board of Supervisors**

Jeffrey V. Smith, County Executive
Gary Graves, Deputy County Executive
Sylvia Gallegos, Deputy County Executive

From: Gary Rudholm, Senior Planner, Planning Office *GR*
Michael M. Lopez, Planning Manager, Planning Office

Re: **Responses to comments made during the Public Comment portion of the Board of Supervisors Meeting on December 7, 2010, related to Lehigh Southwest Cement Plant and the Permanente Quarry**

During the Public Comment portion of the December 7, 2010, meeting of the Board of Supervisors six speakers made statements to the Board regarding the Lehigh Southwest Cement Plant and the reclamation plan amendments currently under review by the Planning Office for the adjacent Permanente Quarry. The six speakers included Rod Sinks, Tim Brand, Arthur Penanski, Barry Chang, Phillip Flagger, and Natalia Brinkman. Staff has prepared the following responses to their comments for your information.

SPEAKER ONE: Rod Sinks:

"Congratulations Mr. Wasserberg. My name is Rod Sinks. This is the second time I've been before you. I'm a 30 years County resident, a scout master of a troop of 120 scouts in Los Altos, I hold two engineering degrees from Stanford, and helped build two successful high tech companies. The Lehigh cement plant concerns me because in 2006 citizens pleaded with the County to stop dumping EMSA. Dumping persists in EMSA to this day despite two notices of violation from this County with no financial penalty from the County. And the County is poised now to consider granting vested rights for this use. The EPA states regulations for limiting mercury and toxic emissions can save lives, and money and health costs. The plant says it intends to comply with these, but Lehigh along with other plant operators have filed suit to block the new regulations. I ask the County to take effect action on EMSA. Thank you."

Response:

Stockpiling in the East Materials Storage Area (EMSA):

The speaker made this comment before the Board on November 23, 2010. Staff's response to those comments are repeated here:

The original complaint made to the County was that petroleum coke was being stored in this location. Following a field inspection the County determined the material that was suspected to be petroleum coke was actually overburden excavated from the mine pit. The Notice of Violation (NOV) provided the operator with two options for addressing the violation: (1) remove the material, or (2) apply for and obtain an amendment to the existing approved reclamation plan for Permanente Quarry. An approved amended reclamation plan would authorize retaining the material in the EMSA and provide for reclamation consistent with state and County mine reclamation standards. The mine operator chose to apply for the reclamation plan amendment and this application is currently under review.

The NOV also required that the mine operator cease use of the EMSA. The operator approached the County and explained that immediate use of the EMSA is necessary for operational reasons, because the approved location to permanently store the overburden is running out of room. Without using the EMSA the operator would be forced to leave the material in the pit, which would prevent the operator from excavating some of the remaining mineral reserves. Following consultation with the State Office of Mining and Reclamation, the County signed an agreement with Lehigh stipulating a rigorous schedule to complete the work necessary to submit a reclamation plan amendment application, and all other information required to complete the environmental impact review. The agreement also stipulates that the County retains its authority to impose fines against the operator, if necessary.

Vested Rights

A public hearing was tentatively scheduled to take place before the Board of Supervisors in late November, to determine whether and to what extent there is a legal non-conforming use for quarrying on approximately 89 acres located on the northeastern portion of the quarry referred to as the (EMSA). The hearing was not put on the Board's agenda, however, and was postponed to allow staff additional time to complete a thorough and detailed analysis, to provide adequate time for public comment of the analysis, and to avoid scheduling the hearing during the holiday season. Staff anticipates this item will be re-noticed and scheduled for a hearing before the Board of Supervisors in January or February 2011.

It is important to note that the purpose of the hearing, when rescheduled, will be to determine whether and to what extent, a legal non-conforming use(s) (also known as a "vested right") for surface mining exists on the parcels of land in question. This determination would not be a land use authorization. For any areas where legal non-conforming use(s) are determined by the Board to not exist, a Use Permit would be required. If a Use Permit is required, the property owner must file and staff will process a Use Permit application simultaneously with pending proposals for amendments to the Reclamation Plan of the Permanente Quarry. Two Reclamation Plan amendments are pending: one for the EMSA portion of the site to be followed by a second, Comprehensive Reclamation Plan Amendment for the entire site. Both amendments are subject to CEQA and the preparation of Environmental Impact Reports. Public hearings regarding the proposed Reclamation Plan for the EMSA are tentatively scheduled to take place in the Fall of 2011; public hearings regarding the proposed Comprehensive Reclamation Plan

Amendment are tentatively scheduled to take place in the Summer of 2012. When and if Reclamation Plan amendments and Use Permits (if required) are approved, the operator would then have all lawful approvals to extend/expand the operation on the site.

Environmental Protection Agency (EPA) Regulations:

The EPA published a rule, on September 9, 2010, that set national emissions standards for hazardous air pollutants (NESHAP) and new source performance standards for the portland cement industry (40 C.F.R. Parts 60 and 63 (75 Fed. Reg. 54,970)). The rule requires cement kilns to control emissions of mercury, total hydrocarbons, and particulate matter for both major-source cement kilns and the smaller area-source kilns.

Several lawsuits have been filed by industry groups, environmental groups, and individual companies regarding different parts of this rule. The focus of the industry’s lawsuit is on a portion of the EPA rule, focusing on the fact that the industry was not provided an opportunity to comment before the rule was adopted by the EPA.

The lawsuits are not expected to affect the Title V Permit process administered by the Bay Area Air Quality Management District (BAAQMD). BAAQMD staff indicated that, under the EPA rule, Lehigh has until 2013 to implement the new standard. The BAAQMD is incorporating the new NESHAP requirements into a revised Title V Permit for Lehigh and they expect to release it for public review in December 2010. If the permit is issued, and if the lawsuits change the requirements covered by the permit, the BAAQMD could revise the permit where required.

SPEAKER TWO: Tim Brand:

“Good morning. My name is Tim Brand. I was lucky enough to land an engineering job in this county in 1980 and I have been doing that ever since. Apparently, a few months ago—in a few months, the County will conduct a hearing to determine whether Lehigh Cement will acquire vested rights for the east materials storage area. My understanding is that until a legal proceeding is conducted to establish this vested right, the vested right does not exist. Yet, for years, they have been piling waste material on this land and at some fateful point the County quietly issued a temporary permit after the fact. I wonder what will happen if the County does not award them the vested right they’re pursuing at the hearing? Will the waste rock be removed? Will the County have the authority to require it be removed or have they already given that right away by granting the temporary permit? What does temporary even mean in this case? I think what we have is a monument. It is a monument that the to the fact that the County government illegally gave away the citizen’s rights.”

Response:

As noted above, the County will convene a public hearing in January or February 2011 to determine whether and to what extent a legal non-conforming use (also referred to as a vested right) exists on the Permanente Quarry property. This determination will establish the factual basis whether or not a “vested right” exists. The County would not grant the vested right. Such a determination will not constitute a land use authorization or approval.

The purpose of making this determination is to establish whether or not the mine operator must file for a Use Permit for portions of the land encompassed by the quarry, in addition to continuing to process the Reclamation Plan Amendments already on file with the Santa Clara County Planning Office. If the County determines that a legal non-conforming use (vested right) does not exist, then Lehigh would be required to file for a Use Permit. The Use Permit, if granted, together with an amended Reclamation Plan, would govern the nature of the land use activities allowed on the site.

As noted above, the County issued an NOV for stockpiling material in the EMSA, which was not included in the existing approved Permanent Quarry Reclamation Plan. The mine operator chose to file for a reclamation plan amendment to address the NOV. After receiving the NOV, Lehigh met with staff and explained that the EMSA is necessary for mine operation purposes, and that without access to the EMSA at this time would prevent Lehigh from accessing the mineral deposits in the mine pit.

Following consultation with County Counsel and other staff, the Director of Planning and Development entered into an agreement with Lehigh that allows access by Lehigh to the EMSA for continued mine operations, provided that Lehigh proceed to abate the 2008 NOV by processing a focused reclamation plan amendment for the EMSA and complying with rigorous requirements and time limitations. This agreement includes provisions for levying fines against Lehigh for failure to comply with the agreement. No approval of the EMSA reclamation plan amendment has been made, and no “temporary permit” has been issued.

This agreement will be voided should a use permit, if required, and/or the EMSA Reclamation Plan Amendment not be approved. Section 3 of this agreement states, “*Nothing in this agreement shall be interpreted in a manner that indicates the County will approve the EMSA Amendment or will allow the Company to continue using the EMSA if the EMSA [Reclamation Plan] Amendment application is denied or if the Company withdraws the EMSA Amendment application prior to the County taking final action on the application. Nor shall anything in this Agreement be interpreted as a waiver of the County’s legal authority, including but not limited to its enforcement authority under SMARA.*”

If the County determines that a legal non-conforming use does not exist within the EMSA area the mine operator will be required to file for a Use Permit from the County. Through the Use Permit the County may authorize use of the EMSA for continued stockpiling, and establish appropriate conditions of approval that would govern the operations of the EMSA while it is constructed. As recognized in the language of the agreement noted above, the County retains its authority to also limit the amount of material deposited in the EMSA, as well as the authority to require the material be removed. Because the County retains its land use authority, the risk for continued depositing of material in the EMSA is borne by the mine operator while the vested rights determination, preparation of the EIR, and hearings to consider the Reclamation Plan Amendment are being processed.

SPEAKER THREE: Arthur Penanski:

“My name is Arthur Penanski and I’m a resident of Santa Clara County. I’m here because last Sunday I just received this information on Lehigh letterhead, which says that Santa Clara has stated that Lehigh operates under a valid Title V permit. Now, this is very different from what EPA has said. And, I have MD degree, and PhD degree, and I’m just on the (inaudible), so could you please explain why County has a

different opinion than EPA, if it is so, and why the opinion is different, or interpretation is different. Thank you. And, I want to leave this for you. Okay. Thank you."

Response:

The BAAQMD regulates emissions from the facility through implementation of a Title V Permit. According to BAAQMD staff, Lehigh submitted an application for renewal of its Title V Permit, and have stated that while the renewal is in process, the previously approved permit remains valid and in effect.

As noted in previous memos dated August 26, 2010, and September 16, 2010, the U.S. EPA issued a Notice of Violation and Finding of Violation (NOV/FOV) to Lehigh on March 10, 2010. The NOV/FOV concerns a series of physical modifications made to the facility from 1996 through 1999, that caused an increase in production of cement and an increase in emissions of air pollutants. As a result, the NOV/FOV also states that Lehigh violated the Title V Operating Permit program, because it failed to identify Prevention of Significant Deterioration requirements in its application submitted to the BAAQMD after installing the modifications. According to the EPA Air Enforcement Office, negotiations with Lehigh remain on-going regarding the actions necessary to abate the violation. The enforcement action does not, however, invalidate the Title V permit, nor does it interfere with or prevent the BAAQMD from processing renewal of the Title V Permit, or issuing the Permit.

SPEAKER FOUR: Barry Chang:

"Good morning honorable supervisors and Ken Yeagar. My name is Barry Chang and I'm a Cupertino City Council member. And, I want to first congratulate Mike Wasserman. Your last night farewell speech was very moving. Really impressed. This is my tenth time here to please beg you to put the Lehigh's Notice of Violation on the agenda. Poisoning continue going on. We are breathing this bad air in our air. It poisons the whole entire County, not just the City of Cupertino. And I also want to mention about the County on the EMSA vested rights issue, you are violating the Freedom of Information Act. I have been requesting this information since November 5th— November 5th, November 8th, November 12th, November 16. Today is December 7th. It's way past the 10-day limit, so you are in violation of the Freedom Act, so please do something about providing the information. Okay. Thank you. "

Response:

Staff has no record of any California Public Records Act (CPRA) request on either November 5, 2010, or November 8, 2010. Mr. Chang did, however, come to the public counter on November 5, 2010, and asked questions of staff about the work underway to prepare for a determination regarding whether and to what extent a legal non-conforming use exists on the Permanente Quarry. Staff at that time provided an estimate when a staff report containing staff's analysis would be available.

Mr. Chang subsequently made three requests under the CPRA. One via email on November 9, 2010, and a second on November 12, 2010, a response to both was provided on November 15, 2010, and a third one via email on November 16, 2010, to which a response was made on November 22, 2010.

The first two requests were for a staff report regarding a legal non-conforming use determination, which at that time assumed a hearing would take place on November 23, 2010. The response explained that the hearing was postponed because staff required additional time to complete its research. For this reason no staff report was available to share with Mr. Chang or any other member of the public. (Although a draft staff report had been prepared, the report was incomplete and did not contain a recommendation. This report was/is not a public record subject to disclosure.)

The third request was for access to documents used by the staff in its research related to the forthcoming legal non-conforming use determination. Staff wrote back to Mr. Chang explaining the documents would be available by Tuesday, November 23, 2010. Those documents were made available, and remain available for review by the general public, both in hard copy at the Planning Office and electronically on the Planning Office web page. Mr. Chang replied via email that he would visit the Planning Office to review the documents on November 23. There is no record that he has visited the office, reviewed the materials, or requested copies of the documents as of the writing of this report.

SPEAKER FIVE: Phillip Flagger:

“My name is Phillip Flagger. I’m a long time resident of the Santa Clara County and I’m here to plead to the Board to deny Lehigh Cement Company the right to open a new 200-acre open pit mine on their land in the land above Cupertino. When they opened the original mine 70 years ago, the residents of the County was very slight. There weren’t too many people living here. They’re intending to open another 200-acre open pit mine which they will exhaust in 20 years so that the material processed and the amount of pollution produced will be over 20 years instead of 70 years, and will have an impact on the health and welfare on the of the citizens of this valley. And I’m pleading that you deny them that right.”

Response:

The speaker’s comments are a reiteration of comments made before the Board of Supervisors on November 23, 2010. Staff’s response is reprinted, below:

The existing open mine pit was constructed at a time when the valley had a comparatively low population. The mine operation began operation in the early 20th century. As of 1900, the total population of Santa Clara County was 60,216. The population of the County was 100,676 in 1920, 174,949 in 1940, 642,315 in 1960, 1,295,071 in 1980, and 1,682,585 in 2010, according to U.S. Census figures. The State of California Department of Finance estimated that as of January 1, 2010, the total population for Santa Clara County was 1,880,876.

Two Reclamation Plan amendments are pending related to the Permanente Quarry: one for the East Materials Storage Area, which is a portion of the site, to be followed by a second comprehensive Reclamation Plan amendment for the entire site, including a proposed second pit. Both amendments are subject to the California Environmental Quality Act (CEQA) and the preparation of Environmental Impact Reports. These reports are being prepared and will identify potential environmental impacts and associated mitigation measures to reduce or eliminate impacts, many of which relate to the health and welfare of the residents, as well as the surrounding natural environment.

Based on the current status of preparing the CEQA documents, a public hearings are estimated to take place regarding the Draft Environmental Impact Report (EIR) in April 2011, the Final EIR and proposed EMSA Reclamation Plan Amendment (RPA) in July 2011. We also currently estimate that public

hearings regarding the Draft EIR of the proposed Comprehensive RPA and Use Permit will take place in the Fall 2011, and public hearings regarding the Final EIR and the RPA/Use Permit in the Spring or Summer 2012. Please note that until and unless the Comprehensive Reclamation Plan Amendment and Use Permit are approved the operator may not expand the quarry to a new pit.

SPEAKER SIX: Natalia Brinkman:

“Good morning. My name is Natalia Brinkman. I’m a resident in Cupertino and I’m a teacher in Palo Alto. I’m very concerned about the Mercury as well as the other toxic elements that are being emitted by the Lehigh Cement Factory. My understanding is that Lehigh has violated a number of regulations, but the EPA has not been able to enforce those regulations. I’m begging you to consider the health of Santa Clara residents.”

Response:

As previously reported, the EPA issued a Notice of Violation/Finding of Violation against Lehigh on March 10, 2010. The NOV/FOV concerns a series of physical modifications made to the Facility from 1996 through 1999, that caused an increase in production of cement and an increase in emissions of air pollutants. As a result, the NOV/FOV also states that Lehigh violated the Title V Operating Permit program, because it failed to identify Prevention of Significant Deterioration requirements in its application submitted to the BAAQMD after installing the modifications. According to the EPA Air Enforcement Office negotiations with Lehigh remain on-going regarding the necessary follow up actions to abate the violation.

As also noted above, the County will be reviewing the potential environmental impacts from the proposed EMSA Reclamation Plan Amendment as required under CEQA. The same analysis will be repeated for the entire site as part of the proposed Comprehensive RPA. These Environmental Impact Reports will identify potential environmental impacts and associated mitigation measures to reduce or eliminate impacts, many of which relate to the health and welfare of the residents, as well as the surrounding natural environment. Both reports will be subject to public review and public hearings, which are anticipated to take place in 2011 and 2012, respectively.

ATTACHMENTS:

Correspondence to dated December 13, 2010, to Barry Chang, Council Member, City of Cupertino, from Jody Hall Esser, Director, Department of Planning & Development, Santa Clara County.

cc:

- Colleen Valles, District One
- Gustavo Caraveo, District Two
- Mike Donohoe, District Three
- Tony Filice, District Four
- Scott Strickland, District Five

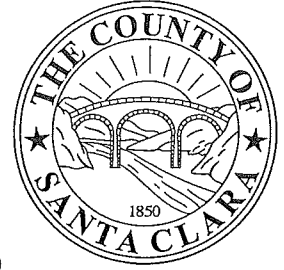
Jody Hall Esser, Director, Department of Planning & Development
Rob Eastwood, Senior Planner
Marina Rush, Associate Planner

Miguel Márquez, County Counsel
Orry Korb, Assistant County Counsel
Lizanne Reynolds, Deputy County Counsel

County of Santa Clara

Department of Planning and Development

County Government Center, East Wing
70 West Hedding Street, 7th Floor
San Jose, California 95110



	Administration	Development Services	Fire Marshal	Planning
Phone:	(408) 299-6740	(408) 299-5700	(408) 299-5760	(408) 299-5770
Fax:	(408) 299-6757	(408) 279-8537	(408) 287-9308	(408) 288-9198

December 13, 2010

Mr. Barry Chang, Council Member
City of Cupertino – Cupertino City Hall
10300 Torre Avenue
Cupertino, California 95014

Dear Mr. Chang,

At the Board of Supervisors meeting on November 7, 2010, you addressed the Board Members during "Public Comment" for items not on the formal agenda. You stated, in part, that you have been requesting information about the "EMSA vested rights issue" since November 5, 2010, specifically, that you had requested information on, November 5, November 8, November 12, and November 16, 2010. You went on to say that given that the date that day was December 7, 2010, "It is way past the 10-day limit, so [the County is] in violation of the Freedom Act, so please do something about providing the information."

Please accept this correspondence as formal notice, in addition to the emailed text of this letter sent on December 10, 2010, that I have consulted with County Counsel and looked into your allegations.

As a result, I have concluded the following:

- There is no record that you made requests for documents under the California Public Records Act on either November 5 or November 8, 2010.
- Our files do note that you came to the public counter on Nov. 5, 2010; that you and Mr. Craig Lee had a conversation with Gary Rudholm, Senior Planner, who responded to questions he posed regarding, among other things, a legal non-conforming use (or "vested rights") determination process for the Permanent Quarry East Materials Storage Area. At that time, Mr. Rudholm provided an estimate of when a staff report would be available for public review. We have no record of any document request having been made.
- Our files note that you again came to the public counter on Nov. 9, 2010, and met with Mr. Rudholm, and separately with Marina Rush, Planner III. Mr. Rudholm again provided an estimate of when the vested rights staff report would be available for public review. Later that afternoon, Ms. Rush emailed you a letter, dated November 5, 2010, sent to Ken Yeager, President of the Board of Supervisors, regarding vested rights at Permanente Quarry. She believed, based your earlier conversation, this would be of interest to you. In response you emailed to Ms. Rush the first request for documents. You requested staff "... email [you their] recommendation and pertinent information..." regarding the vested rights issue.
- Our files note that you made a Public Records Act request via email on November 12, 2010. The November 12, 2010 formal Public Records request (similar to the request made on November 9, 2010) was for staff's

recommendation regarding the legal non-conforming use determination for which a public hearing was anticipated to take place in late November. On November 15, 2010, within six days of the November 9th request and three days following the November 12th request, staff responded, also by email, explaining that the hearing was in fact not scheduled because staff required additional time to complete its research and prepare staff report and recommendation, and that there was no staff report/recommendation to share with you or any member of the public. It is true that portions of the staff report had been drafted by November 15th, but the report was incomplete, did not include a recommendation, and in preliminary draft form was/is not a public record subject to disclosure. A final/complete staff report and recommendation is still pending.

- On November 16, 2010, you made a request for copies of, "... all information regarding Lehigh's East Material Storage Area (EMSA) "vested rights" that you have in hand." On November 22, 2010, within six days of your November 16th request, Mr. Rudholm emailed you advising that the documents you requested would be available by Tuesday, November 23, 2010. Those documents were made, and remain, available for review by any member of the public.

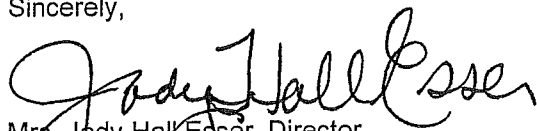
You replied via email that you would visit the Planning Office to review the documents on November 23, 2010, at 9:20 AM. There is no record that you have visited the office and reviewed the documents assembled for public review. Since that date, additional documents have been added to the public documents file. Staff would be happy to assist you with copies once you identify the documents desired.

Perhaps you are unaware that the ten-day response to a Public Records Act request does not necessarily mean that documents can/will be produced in ten days. Rather, within ten-days of the initial request, the governmental agency/staff member must "respond" by at least advising when the documents requested will be ready, or seek clarification if there is a question about what the requestor is actually asking for versus what information does exist that is available to the requestor; or, as with the case of the November 12th request, advise that the document(s) requested do not exist.

In conclusion, based on my file review and discussions with staff and County Counsel, it is my determination that we have complied with all Public Records Act requests to date. If you have other requests, please feel free to present them to staff. Written requests, which provide as much specificity as possible, are recommended.

I would like to take this opportunity to also advise that in addition to viewing EMSA related documents at the public counter, these documents are also available on the Planning Office website: www.sccplanning.org. In addition, transcriptions of all public comments to the Board of Supervisors regarding the Permanente Quarry, and responses from staff to the Board, are also available on this website.

Sincerely,



Mrs. Jody Hall Esser, Director
Department of Planning and Development

Cc: President Yeager and members of the Board of Supervisors
Jeff Smith, County Executive
Sylvia Gallegos, Deputy County Executive
Miguel Marquez, County Counsel
Lizanne Reynolds, Deputy County Counsel
Mike Lopez, Planning Manager
Gary Rudholm, Senior Planner
Marnia Rush, Planner III