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January 4, 2011

Via Overnight Mail and
Electronic Mail

Lizanne Reynolds, Esq.
Office of County Counsel
County of Santa Clara
70 West Hedding Street
San Jose, CA 95110

Re: Permanente Facility / Statement of Facts and Law
February 8, 2011 Vested Rights Hearing

Dear Ms. Reynolds:

INTRODUCTION

This firm represents Hanson Permanente Cement, Inc. and Lehigh Southwest Cement Company (collectively, "Lehigh") regarding the Permanente Facility ("Facility"). The Facility lies on a portion of a 3,510-acre landholding located in the foothills west of Cupertino, which Lehigh uses for mining and cement manufacturing.

Lehigh currently has two applications pending to amend the existing Facility reclamation plan. The first, filed in April 2009, covers the East Material Storage Area ("EMSA") and is intended to ensure that the EMSA is in compliance with the Surface Mining and Reclamation Act (Pub. Resources Code, § 2710 *et seq.* ["SMARA"]). The second, filed in May 2010, is a comprehensive update to the reclamation plan for the entire Facility and addresses site-wide mining and reclamation. We refer to these applications collectively as the "Reclamation Plan Amendment."

Concurrently with the May 2010 application, Lehigh also applied for a conditional use permit ("CUP Application") to extend limestone extraction into three parcels which were acquired after the commencement of operations at the Facility. These three

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parcels are outside of current vested areas, and require a permit from the County before mining operations may proceed.

The Board of Supervisors has been asked to confirm the Facility's vested status in connection with the Reclamation Plan Amendment and the CUP Application. On November 5, 2010, Lehigh presented the Board with a letter summarizing the facts and law supporting its vested operating rights at the Facility. This letter supplements that letter and provides a more detailed factual background and statement of law relevant to vested rights. Both letters should be included in the County's official record with respect to any determination of vested rights by the County.

This letter begins with an executive summary with an overview of the facts and law discussed herein. We then provide a detailed statement of facts, including those occasions on which the County has acknowledged the Facility's vested rights, followed by an analysis of vested rights and other legal issues raised by the County. We conclude with a reservation of rights.

EXECUTIVE SUMMARY

We are presenting this executive summary as an overview to the matters presented below. For completeness, we have compiled key documents into a special appendix (labeled "Executive Summary" or "ES"). The documents in the "ES" appendix are also contained in other appendices referenced below.

Vested Rights

This letter, like the November 5, 2010 vested rights summary to the Board, defines vested rights according to the historical uses throughout the entire Facility. The California Supreme Court articulated clearly in *Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal.4th 533 (*Hansen*) that vested rights to engage in specific activities are defined by the uses conducted by the full business enterprise.

Mining commenced at the Facility in 1903. Henry J. Kaiser's companies acquired the Facility in 1939, and over more than 70 years since then the Facility has been used to support a wide range of individual activities – including mineral extraction, cement manufacturing, material storage, and related industrial works – all integrated within a broader business enterprise. Under *Hansen*, this entire range of activities is relevant to defining the scope of the vested use.

The County has consistently recognized the Facility's vested rights. Apart from a 1939 cement plant permit, we can find no record that the County has ever, in the last seven decades, questioned the Facility's operating rights or taken action to require a use permit for the activities conducted at the Facility, including the continuation of mineral extraction. To the contrary, the County has always affirmed the Facility and its individual components as legal uses that required no other entitlements. The evidence presented here leaves no doubt that the County's treatment of the Facility has at all times been correct.

This evidence is organized to focus on two specific areas. The first is the South Quarry, an approximately 206.5-acre tract located directly south of the current extraction area. (See ES1, Facility map.) Vested rights in the South Quarry exist with respect to two parcels, known as the Morris Parcel and Crocker Parcel. The second is the East Materials Storage Area, an 89-acre area used to store overburden (*i.e.*, rock and earth) in the northeast part of the Facility.

South Quarry / Morris and Crocker Parcels

Vested rights to the Crocker Parcel and Morris Parcel, like other parts of the Facility, depend on the timing of actions taken to incorporate such lands into the mining enterprise. (A map showing the location of both parcels and the Reclamation Plan Amendment boundary is attached at ES2.) As explained below, vested rights exist where the owner of a mining business expressed the intent, in objective terms, to devote land to the mining enterprise before the date that a use permit was required to conduct mining under the applicable zoning rules. Our review of the County zoning history indicates that May 1960 is the first time that mine excavations would clearly have required a permit. Thus, to be vested, land must have been incorporated into the mining enterprise by that date. We understand that County Counsel may be considering a different vesting date, of December 1947, and while we do not agree, we note that the use of either date produces the identical result.

Kaiser acquired the Morris and Crocker parcels in 1942 and 1943, respectively. (See ES3, Crocker and Morris deeds.) That both were acquired by such a substantial mining enterprise is, standing alone, strong evidence of vesting. In 1939, the company, directed by Henry J. Kaiser, acquired 1,300 acres and began operating the Facility on a massive scale. Kaiser initially tasked the quarry with supplying the raw material for the Shasta Dam. By the early 1940s, demands on the quarry intensified as the Facility was called on to supply military needs in World War II, then to support the post-war building boom in the bay area. By the mid-1940s, the quarry's output rivaled modern production levels, and the quarry had initiated a pattern of growth that would continue to the

present. (See ES4, aerial images, 1939-2009.) Against this backdrop, the Crocker and Morris parcels were adjacent to active mining areas and located in an area known to hold limestone. There is no doubt that, in acquiring these parcels, Kaiser intended to devote them to mining.

Kaiser's exploration activities provide further evidence of vesting. Mineral exploration and other preparatory mining activities can establish vested rights, and the evidence shows that the Morris and Crocker parcels were subject to a series of exploratory programs. In 1939, a Stanford University professor conducted a study of limestone reserves which identified limestone in the Crocker and Morris area. (See ES5, excerpts from Stanford study.) Later, from 1943 to 1945, Kaiser conducted more in depth field reconnaissance and mapping in this area. (See ES6, reference to 1943-45 study.) By 1949, the company took the next step and conducted exploratory drilling up to the edge of the Crocker Parcel. (See ES7, map of drilling.) The facts show that Kaiser knew, prior to the vesting date, of the potential value of the Morris and Crocker parcels to the mining enterprise.

Finally, no clearer evidence of vesting exists than actual mining-related use of land. In 1942, the Morris Parcel supported a major access route which linked the lower quarry to the rest of the Facility. (ES8, map of road.) Further, a 1948 aerial photograph shows an extensive road system constructed across the Crocker Parcel, constructed in the same areas of Kaiser's exploration activities in the area. (ES9, map showing access roads.) Such evidence shows clear use of the Crocker and Morris parcels prior to the date a use permit would have been required. These facts establish vested rights to these areas.

EMSA

The EMSA covers 89 acres and covers part of a 155-acre parcel known as the EMSA parcel. (See ES10, map of EMSA and parcel boundary.) This parcel formed a part of Kaiser's original 1,300-acre acquisition of the Facility property in 1939. The area has, since 1939, been developed with a range of uses the County has always regarded as legal and for which a permit has never been required. These uses are apparent in images of parcel development from 1942 through 2009. (ES11.) These images reveal that in 1941, Kaiser commenced massive grading in the EMSA parcel, including clearing of trees and vegetation, and followed by the development of structures, roads, utilities, infrastructure, and, importantly, material storage and stockpiling. (ES11.) The 1942 photographs show that the EMSA parcel was, by that time, fully devoted to Facility operations. (ES11.)

Many activities, including some material storage, are evident in the 1948 photograph. (ES11.) Storage is shown in later photographs as a progressively growing feature. By 1950, the stockpile had grown to many times its size only two years earlier. (ES11.) The 1955 and series of 1974 photographs show continued growth. (ES11.) By 1980 the stockpile is recognizable as a smaller version of the EMSA which exists today. (See ES12, comparing 1980 and 2009.) The 1991, 2005 and 2009 aerial photographs document how the stockpile continued to grow over the last 20 years to the EMSA's present configuration. (ES11.) From these images, use of the EMSA for material storage over the last seven decades is indisputable.

The evidence also demonstrates that the EMSA parcel has always been an integrated part of the Facility, notwithstanding legal ownership changes between two Kaiser entities. Vested rights run with the land and do not depend on ownership by a particular entity. Further, both entities used the parcel to support a common business enterprise. This evidence shows that Mr. Kaiser initially presided over both entities and used them to maximize the Facility's value. We also have detailed ways in which both entities jointly used the land and various facilities, were financially and operationally interdependent, and shared employees and administrative functions. These facts confirm that the shifts in parcel ownership did not affect the use of the land use as part of Kaiser's broader enterprise.

Finally, the County has never questioned vested rights to the EMSA parcel. Rather, the County has always regarded the Facility as a vested operation, including the area where the EMSA is located. Indeed, we have devoted an entire appendix to document the numerous occasions on which the County has acknowledged and affirmed the Facility's vested rights. The County's clear treatment of the Facility as a vested operation is fully supported by the facts that we are presenting here.

Equitable Estoppel

This letter also provides our views on the doctrine of equitable estoppel as applied to the County's past affirmations of vested rights. The doctrine, in summary, prevents a governmental agency from taking a position contrary to a position previously asserted, where the original assertion was relied on to another's detriment. The doctrine binds governmental agencies such as the County from reversing past land-use determinations. As noted, we have detailed below the dozens of occasions over the past seven decades on which the County has acknowledged Facility operations as vested. Any reversal on this long-held position at this time would be extremely damaging to Lehigh, and the County would be legally estopped from doing so.

Fifth Amendment Taking

Finally, we describe in this letter the implications for the County under the Fifth Amendment's Takings Clause, should the hearing result in an abridgement of Lehigh's long-established rights. A determination that Lehigh's operations are not vested would result in an immediate and substantial economic loss to Lehigh, requiring consideration of the tremendous investment made into the Facility over many decades in reliance on the County's treatment of the Facility as vested. Our comments on this matter are presented in the final section of this letter.

We turn now to discuss the facts relevant to the Board of Supervisors review of the Facility.

FACTS

Evidence referenced in this letter is attached in the appendices and organized topically for ease of reference as follows:

Appendix A	Photographs and Maps
Appendix B	Governmental Records and Reports
Appendix C	Geologic Reports and Studies
Appendix D	Corporate Records and Newsletters
Appendix E	Deeds and Land Transfers
Appendix F	1985 Reclamation Plan Approval
Appendix G	Vested Rights Affirmations
Appendix H	Compliance History

We begin by introducing general maps showing the layout of the Facility and certain land acquisitions. Numerous additional maps and photographs are referenced later in this letter as appropriate.

- Current Ownership Map: This is an aerial view of the current property boundary. (A1.) The property consists of 3,510 acres.

- Site Layout Map: This shows the main components of the Facility. (A2.)

- Parcel Acquisition Map: This shows the legal parcels comprising the property, and lists prior owners and acquisition dates. (A3.)

- Morris and Crocker Location Map: This shows the "Morris Parcel" and "Crocker Parcel" in relation to the proposed reclamation plan boundaries. (A4.)

- EMSA Overview Map: This map shows the EMSA footprint in relation to the surrounding parcel boundaries and the property line. (A5.)

Chronology

1899: An 1899 topographical map from the U.S. Geological Survey indicates the pre-mining contours of the property. (A6.) The map identifies Black Mountain, a high point topographically and a dominant feature. For reference, Lehigh's current ownership is superimposed.

1903 – 1938: Between 1903 and 1938, a series of mining entities conducted either mine operations or mineral exploration on the property. These include El Dorado Sugar Company, the Alameda Sugar Company, Santa Clara Holding Company, Granite Rock and California Portland Cement Company. (See B1; C1, map attached to 1939 Stanford report.)

The first known quarry operator was the El Dorado Sugar Company, which quarried as early as 1903, according to a 1906 report by the State Mining Bureau. The report stated:

> The limestone is hauled by wagon to Mountain View, where it is shipped by rail, at the rate of 30 to 60 tons per day during the dry season, to the sugar factory at Alviso, where it is burned into quicklime and used in the factory. The quarry has been in operation for three years.

(B1, p. 82.)

By 1920, the quarry operator was listed as the Alameda Sugar Company, according to state records. (B2, p. 185.) By 1930, the operators changed again to the Santa Clara Holding Company (B3, p. 9), and mining operations intensified. (D14, p. 5.)

In 1938, the Santa Clara Holding Company executed a three-year lease and option to purchase to the Henry J. Kaiser Company. (E1.) Henry J. Kaiser was at that time a well-known road and dam building contractor. Kaiser's company was bidding to

supply cement to build the Shasta Dam, and was evaluating the property's limestone deposits for cement-making.

1939: In 1939, Kaiser applied for a use permit to construct and operate the cement plant. (B8.) On April 28, 1939, the Planning Commission voted to grant the permit, and recommended to the Board of Supervisors to approve the action. (B9.) The Board met the same day to unanimously approve the Planning Commission's decision, and granted the permit. (B9.) The permit allowed the "erection, construction and operation of a cement mill and the storage of cement..." (B10.) The granting of the permit was met with approval from local business interests, including the Mountain View Chamber of Commerce and San Jose Chamber of Commerce, who delivered written commendations to the Board. (B11.)

The Board's action was appealed, and on June 7 and 8, 1939, the Board held a special rehearing. (B12, B13.) The Board accepted numerous exhibits and two days of testimony and cross-examination from witnesses, which included representatives of the Henry J. Kaiser Company and Mr. Kaiser himself. At the end of the hearing, the Board found that the cement plant would not be detrimental to the community, and reaffirmed its decision to grant the permit. (B13.) This permit remains in effect today.

During the same period that Kaiser was securing the cement plant permit, the company also was completing its initial survey of limestone reserves on the property. A Stanford University professor named Cyrus F. Tolman[1] conducted the exploratory work. In June 1939, Mr. Tolman issued his report, which described the Permanente limestone ore on the property as "[b]y far the largest and most important" limestone mass in the region. The report offered a detailed description of the limestone body already being mined north of Permanente Creek. The report also identified "large tonnages of high grade 'dark' limestone" south of the creek, in the area where the Morris and Crocker parcels would soon be acquired. (C1, p. 1, 4.)

On July 10, 1939, Kaiser purchased 1,300 acres from the Santa Clara Holding Company, which included the active quarry and surrounding areas. (D1, 6/28/39 entry; D2; E1; A3.) Cement plant construction began immediately. The plant was completed and produced its first sack of cement on Christmas Day in 1939, only five months after the property was acquired. (D18, p. 4-5.) For reference, we have included numerous photographs of the construction process in the appendices. (See Appendix A, Collected Photographs, 1939-2009.) In September 1939, Kaiser entered an agreement with the

[1] Professor Tolman was a prominent figure at Stanford University's School of Earth Sciences. Professor Tolman also helped the Kaiser Companies locate other rock deposits in off-site locations. (D7, p. 5.)

neighboring landowner, the Roman Catholic Archbishop of San Francisco, to operate a water tank on the Archbishop's land, and supply water to the cement plant. (D1, 9/6/39 entry.) The tank was built in what is currently the EMSA footprint.

1940 – 1949: In February 1940, Kaiser made the first of its many steps to increase mining and cement output. The company's board of directors voted to finance and construct a third cement plant kiln, adding to the two kilns already in use as part of the original plant. (D1, 2/5/40 and 2/21/40 entries.)

In February 1941, Kaiser considered whether to install a fourth cement kiln and also whether to construct a magnesium plant at the Facility. The relationship between these decisions, and the operational efficiencies gained by coupling these activities, was explained in a company newsletter:

> The cement plant requires approximately 20,000,000 cubic feet of natural gas per day to fire its kilns...engineers selected Permanente as the site of the magnesium plant and utilized natural gas instead of hydrogen for the shock chilling agent required to recovery magnesium dust...by rejecting the spent gas to the cement plant, the need for a costly purification system was eliminated and the fuel value of the kiln gas was increased by the addition of carbon monoxide picked up in the magnesium process.

(D32, p. 8-9; D20, p. 14.)

Kaiser decided to build the fourth kiln and the magnesium plant. (D1, 2/25/41 entry.) This was accompanied by several related transactions between Kaiser entities,[2]

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[2] For reference, a number of entities under the Kaiser umbrella would become connected to the operation of the Facility. The Permanente Corporation was the first. Henry J. Kaiser was elected as the company's President in June 1939. (D1, 6/22/39 entry; D2.) This company changed its name a number of times. In 1943, it was renamed to Permanente Cement Company. (D1, 2/2/43 entry; D8, p. 14). After 1956, it was renamed to Kaiser Cement & Gypsum Corporation. In 1999, the name was amended to Hanson Permanent Cement, Inc. The second of these corporations began operations under the name of Todd-California Shipbuilding Company. This company was organized in December 1940 with Henry J. Kaiser as President, and he remained President at least through 1947. (D29, p. 3; D31, p. 6.) In 1941, Todd-California Shipbuilding Company was renamed to Permanente Metals Corporation, and eventually the name was amended to Kaiser Aluminum & Chemical Corporation. To avoid confusion, we collectively refer to the Kaiser entities as the "Kaiser entities" or "Kaiser," or by their individual company names when appropriate.

including a transfer of rights to certain patents involving magnesium, an agreement with Kaiser's lender to assist the financing for the magnesium plant, and agreements to furnish natural gas and magnesium oxide for magnesium production. (D1, 2/25/41 and 3/29/41 entries; see also D7, p. 4-5; D9, p. 2-3; D15, p. 4-5; D28, p. 8-9; D35, p. 6-7.)

From April 1941 to February 1942, the Kaiser entities performed a series of internal land transfers. Three of these transfers covered lands underlying most of the current EMSA. (A42.) Each of the three transfers was for the price of ten dollars, and the deeds included various easements and reservations to permit both entities to share areas for joint operations. (E3, E5 and E7.) A separate land transfer concerned an off-site property known as the "Cassie Crow" site in San Benito County. (D1, 12/5/41 entry; D1, 4/24/42 entry; D4.) The Permanente Corporation acquired this site for the benefit of Permanente Metals' proposed magnesium operations (the site held dolomite that would serve as raw material for magnesium products). To further assist the startup for these operations, the Permanente Corporation helped Permanente Metals in obtain financing which allowed it to acquire the Natividad site in Monterey County and build processing facilities, acquire the Moss Landing facility, and build the ferro-silicon plant. (D1, 2/25/42 entry; D3.)

The rapid development at the Facility during the 1940s is evident in several images. A 1941 image shows massive grading. (A18.) A later 1941 photograph shows initial development including the construction of the magnesium plant, an administrative building, and a heavy bridge across Permanente Creek. (A19.) The image also shows new grading and access roads, as well as broad areas cleared of trees and vegetation. (A19.) The 1942 photographs from the following year show that development activities continued to advance across the EMSA parcel. (A20, A21.) These photographs show that the magnesium plant was completed, and that the company built a laboratory at the northeast corner of the parcel. Additional structures, roads and infrastructure stretched across the northeast areas. The numerous vehicles and trains located near the Facility entrance indicate the property is bustling with activity. In December 1942, the cement plant marked its 5,000,000 barrel[3] of cement, from the date the plant began operating. (D6, p. 4.)

By 1943, the number of Facility employees had grown to the point that Kaiser devoted a monthly newsletter to events, *The Permanente News*. (D6, p. 1.) We have included full copies of the January 1943, September 1943, and April 1948 newsletters in the appendices, and many excerpts from other issues. *The Permanente News* included

[3] A "barrel" is a term historically used to measure cement. A barrel was equal to four bags of cement, or 376 pounds. Most cement today is shipped by the ton (2,000 lbs).

articles on operations, war updates, the company's future plans, and events at off-site facilities, including Moss Landing and Natividad, with strong operational connections to the Facility. The newsletter also tracked the frequent employee transfers between the Kaiser entities. (See D6, p. 7, 9, 11; D15, p. 3; D16, p. 7; D23, p. 14; D24, p. 7.)

In 1943, the quarry continued to expand from the upper mining areas to lower areas next to Permanente Creek. A July 1943 newsletter reported that a new crusher was built in the lower quarry, and showed the first dynamite blasts to pioneer this area, including pictures of a new conveyor to the lower quarry. (D13, p. 8-9.)

In 1942 and 1943, Kaiser acquired the Morris Parcel and Crocker Parcel. Both were located on the steep slopes south of Permanente Creek, and adjacent to existing landholdings being actively mined. The Morris Parcel was acquired in July 1942. (E11, Deed; D1, 4/24/42 entry.) It was crossed by a major access road which linked the lower quarry to the rest of the Facility, which appeared to be the only access road to the lower quarry. (A39.) The following year, in July 1943, Kaiser added 20 acres by acquiring the Crocker Parcel. (E12, Deed.) The Crocker Parcel supported exploration activities, and held an extensive road system in areas of known limestone exposures. (C3, p. 13-15, C4.) Both the Morris and Crocker parcels were in an area that the 1939 Stanford report had identified for potential limestone reserves.

By 1943, the Facility had gained the reputation as having the world's largest cement plant. (D12, p. 6.) The Facility was the main supplier of cement to the U.S. Navy in the Pacific, distributing from Kaiser facilities in Honolulu. (D25, p. 4-5.) The Facility also supplied cement to military bases at Moffett Field, Mills Field, Fairfield and Merced. (D26, p. 3.) The magnesium plant also was considered the world's largest of its type. (D18, p. 4-5.)

In April 1943, Life magazine published an article on the "Kaiser legend." (D10.) The article described the rapid growth of the Kaiser enterprise, and how Mr. Kaiser had leveraged the wartime demands on industry to drive his companies' growth. The article made special note of the role occupied by the Facility:

> Heart of the empire is the San Francisco region, with the home office in Oakland and four shipyards on the bay. **To the south in San Jose Valley is Permanente, Kaiser's bright, new industrial center, producing cement, magnesium and the alloy metal, ferrosilicon.** [Emphasis added.]

In 1943, Kaiser began extensive mineral exploration in areas south of Permanente Creek. (C3, p. 9.) This work was directed by K.E. Grimm, a senior Kaiser geologist. (C3, p. 9.) Lehigh has been unable to locate Mr. Grimm's original reports but nonetheless has records of the results, as described in a May 1982 study report by later Kaiser geologists. (C3.) The report indicated that Grimm studied limestone deposits on the south slopes of Permanente Canyon, and on Black Mountain to the west. (C3, p. 1.) Grimm's formal program appears to have ended in 1945, although drilling continued for years after. (A41, C3, C4.)

In October 1943, inter-company transactions continued. Corporate records indicate that the Permanente Corporation loaned $360,000 to Permanente Metals. (D1, 10/13/43 entry.)

The newsletters from this period also show associations by other Kaiser companies with the Facility. For example, June 1944 and November 1947 minutes refer to dealings with the Henry J. Kaiser Company. (D1, 6/19/44 entry, 11/10/47 entry.) Another entity, Permanente Products Company, apparently sold or distributed products produced by the Facility. (D1, 11/10/47 entry.)

In 1944, the Kaiser Companies developed plans to expand cement sales and capture a greater share of the domestic market. In June, the Kaiser Companies formed a new sales unit. (D1, 6/19/44 entry.) In September of the same year, Kaiser took steps to exchange ships with the United States military in exchange for two bulk cement carriers. (D1, 9/22/44 entry.) That October, Kaiser announced the development of a "post-war program" to expand domestic cement sales, including an expansion of its sales force and dealer market. (D21, p. 7.)

A July 1947 report prepared by the California Department of Natural Resources described the status of Kaiser's "expansion program." (B15, p. 315.) The report stated that limestone was being quarried at the rate of approximately 1,500,000 tons per year, and that planned improvements to the cement plant were expected to increase capacity by 10 percent, to a total of 5,500,000 barrels of cement annually (about 1,034,000 tons of cement, which is comparable to current output). (B15, p. 315; D34, p. 4-5; see also B21, p. 358, describing certain improvements.) Limestone unsuited for manufacturing cement was used to produce aggregates, railroad ballast, paving materials and similar products. (*Id.*) The company's production reports from this period generally match the state's report. (See D24, p. 5; D27, p. 4; D22, pp. 8-9.)

By this time, Kaiser's post-war sales program had expanded to include distribution facilities in Seattle, Merced, Redwood City and Honolulu, and the company

had converted warships to cement carriers. (D34, p. 4-5.) The August 1947 newsletter summarized the Facility's status: "the cement plant is now going full blast to supply the unceasing appetite of the postwar building boom." (D34, p. 4-5.)

The extent of the Facility's development through 1947 is shown best by a 1948 aerial photograph. (A8, A22.) This image shows extensive mining and related disturbance across the Facility, and near-total disturbance in the area where the EMSA is currently located. The image also reflects material storage in the southwestern portion of the EMSA parcel, to the north of the cement plant and south of a water tank. The storage area is on the western edge of a small canyon, linked to the quarry and cement plant by an access road. This 1948 photograph shows storage activity to the south of the water tank in the EMSA parcel.

In 1948, Kaiser began aluminum research and manufacturing at the Facility. These operations used some of the same buildings that formerly housed magnesium operations. (D35, p. 3.)

In 1949, Kaiser's exploratory drilling program had reached the Crocker Parcel, having been commenced earlier to the north. (A41, C4.) This area of the Crocker and Morris parcels to the south the creek was a natural candidate for exploration, based on the 1939 Stanford report and from the visible limestone outcroppings in the area. (See C1, C3, p. 13-15.)

1950 – 1980: In July 1950, the County granted the first amendment to the cement plant permit, allowing a fifth cement kiln, allowing Kaiser to increase its capacity to process limestone into cement. (B18.) This was the first in a series of investments in the Facility to assure its long-term operation.

In April 1954, the Department of Natural Resources reported that the cement plant had achieved a rated output of 7 million barrels of cement per year and employed more than 425 people in its operation. (B21, p. 358.) This level of output represented more than a 25 percent increase over the maximum 5.5 million barrels of cement reported seven years earlier in 1947.

In 1955, the City of Cupertino was incorporated. In July of that year, the County granted Kaiser another amendment to the cement plant permit, allowing the company to increase the number of cement kilns to six. (B23.)

In August 1977, Kaiser proposed to modernize the cement plant by converting from a multi-kiln "wet" process to a single kiln "dry" process. (B33.) This change would

allow the plant to operate more efficiently with less emissions. The $100 million project represented a major commitment to mining and cement operations at the Facility. The County approved the project, and the modified plant was completed in approximately 1980. (B34, B35.)

In May 1979, Kaiser made the last property acquisition which expanded its landholdings in any significant way. (A3.) This followed other post-1948 acquisitions in 1964, 1965, 1967, 1969 and 1979. (A3.) All of the new parcels were located in the southern portion of the property. In April 1980, the Kaiser Companies made an inter-company transfer of an approximately 17 acres. This included the office, cafeteria and laboratory buildings built in 1941 and 1942. (E22.)

Between 1950 and 1980, material storage continued to expand in the EMSA parcel. By 1950, the area covered by material storage (located directly to the south of the water tank) had grown to many times its size from two years earlier in 1948. (See A23, compared to A22.) The series of images dated 1974 indicate that the dimensions of the stockpile continued to expand. (See A25, A26, A27.) By 1980, the height of the EMSA stockpile had grown significantly. (A28.) Comparing the 1980 and 2009 images shows that the stockpile has changed in size, but not location, over the last 30 years. (A43.)

1981 – Present: In May 1982, Kaiser prepared a major study of limestone reserves. (C3.) The results affirmed that "the most promising sources of limestone not currently being mined are immediately north and south of the present quarry." (C3, p. 1.) As support, the study noted the exposed limestone south of the creek: "Most of the limestone mapped in Area 2 is exposed as prominent outcrops on steep slopes immediately across Permanente Creek from the western end of the quarry." (C3, p. 13.) It also relied on K.E. Grimm's mapping of outcroppings in 1943: "Most of the bedding and attitude information in the limestone exposures immediately south of Permanente Creek was transferred from K.E. Grimm's 1943 'Geologic Map of the Permanente Quarries'..." (C3, p. 13.)

In 1988, Kaiser added a new rock processing plant next to the EMSA known as the "mineral aggregate" plant. The plant was designed to convert more overburden and waste rock into saleable products. (G11.) A 1991 image shows the location of the new plant directly to the south of, and adjacent to, the EMSA stockpile. (A30.)

In May 1995, legal title to most of the property underlying the EMSA was reconsolidated. The area transferred included 155 acres. (E23.)

Aerial photographs from 1991, 2005 and 2009 show that the EMSA stockpile continued to grow during this period to achieve the EMSA's present configuration and size. (A30, A31, A32.)

Today, the Facility provides the majority of the cement used in the San Francisco Bay Area. Cement production is 40 percent higher on average than World War II levels. Lehigh is responsible for an estimated 65 percent of the cement used in the County, 55 percent of the cement in the Bay Area, and 18 percent of the cement used in Northern California.

The foregoing history demonstrates that the Facility has supported continuous, integrated and progressively expanding operations since at least 1939. During this period, the County had many occasions to review the Facility's entitlements and confirm that it is a legal, nonconforming (*i.e.*, vested) land use. The following section provides a guide to these acknowledgements.

Prior Acknowledgements of Vesting

The County' has acknowledgement of vested rights at the Facility in many ways. Most notably, the County has never required a permit for any major operations at the Facility, other than the cement plant, despite a history of zoning regulations that would have required a permit in the absence of vested rights starting in 1960 (discussed in greater detail below). On certain other occasions, the County's has also specifically and expressly confirmed the Facility's vested status, which we present chronologically below. We do not claim this list to be exhaustive.

- On May 8, 1939, the Board of Supervisors granted Kaiser a use permit to operate the cement plant. (G1.) The Board did not require a use permit for the continued operation of the quarry, which by then had been operating for nearly 40 years, and which would supply material for the cement plant. This is strong evidence that the Board of Supervisors believed the quarry was an existing, legal operation at that time.

- In 1950 and 1955, the County granted amendments to the use permit. (G2, G3.) Again, nothing in the record of these proceedings suggests the quarry was not fully accepted as a legal, nonconforming operation.

- On August 23, 1956, the Planning Commission confirmed that Kaiser possessed the right to operate the rock plant as part of its existing use of the Facility, in response to an earlier inquiry from the company. (G4.)

- On February 22, 1971, a County staff memorandum to a Supervisor described the quarry as "a lawful nonconforming use" which "may continue to operate" in accordance with its nonconforming status. (G5.)

- On August 18, 1972, the Kaiser Companies granted a Ridgeline Protection Easement to the County. The County sought the easement in recognition of Kaiser's vested rights. As recorded by a newspaper article, County counsel stated in a public meeting that "quarrying standards...do not apply to Kaiser since the Kaiser operation is a nonconforming use dating from 1939." (G6.)

- On September 22, 1977, an internal County memorandum stated that the issue of vested rights had been researched and that "the rock quarrying operation was established on this site prior to any requirement of a use permit." (G7.)

- In August 1977, Kaiser applied to the County to modernize the cement plant. The County approved the project, without raising any issue regarding the legal right of the quarry to operate. (G8.)

- On December 15, 1980, a memorandum by Fifth District Supervisor to the Board acknowledged limits on the County's authority over quarrying operations. (G9.)

- On March 7, 1985, the County approved the reclamation plan without requiring Kaiser to obtain a use permit. The absence of a permit would not have been legal under SMARA if vested mining rights did not exist. The staff report provided by the Planning Department further stated: "The quarry has no use permit, being a legal non-conforming use." (G10.)

- On March 29, 1988, the Zoning Administrator confirmed vested rights in connection with a new line of aggregate products (known as mineral aggregates) which the company planned to process and sell. The Administrator stated that a permit was unnecessary: "Because of [the Facility's] status as a legal nonconforming use and the fact that this overburden already exists, puts this rock processing facility as a use which has been historically allowed at this site." (G11.) The mineral aggregate plant was built next to the EMSA.

- On July 25, 1991, in connection with proposed rock plant upgrades, the Zoning Administrator stated "no discretionary permits are necessary from the County for the proposed modifications and additions. The proposal is consistent with Kaiser's historical quarrying uses." (G12.)

- Since 1991, the County has reported the Facility as "vested" in annual inspection reports to the California Department of Conservation. (See G13, compilation of annual reports.) The annual reports also reflect a good compliance history; at no time until 2006 did the County note any violations.

- In a January 4, 1994 memorandum to the Fifth District Supervisor, the County's attorney described the Facility as a vested site. (G14.)

- On June 7, 2006, the County provided the State Mining and Geology Board with background information regarding the Facility and certain legal deficiencies alleged by the Department of Conservation. (G16.) The letter did not raise vested rights as an issue.

- On October 10, 2006, the County issued a notice of alleged SMARA violations at the Facility. The notice listed the known violations, but did not raise any issue of vested rights.[4] (G18.)

- On November 27, 2006, the Planning Department provided a report to the state Department of Conservation which specifically acknowledged the Facility's vested rights:

> Your letter also indicates you are interested in the zoning information regarding the Hanson Permanente Quarry and Cement Plant. Our records indicate that the quarry operation is located...[in areas] currently designated "Hillsides" by the County General Plan and Zoned "HS" under the Zoning Ordinance.
>
> It should be noted that quarry operations are allowed in Hillside areas under Section 2.20.020 of the zoning ordinance, subject to obtaining a Use Permit... **In the case of the Hanson Permanente Quarry, the operation was established before the zoning ordinance regulations were adopted and therefore has been recognized by the County for many years as a legal non-conforming use**.

(G19, p. 2 [emphasis added].)

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[4] The California Department of Conservation has not challenged the Facility's vested status either. The Department as well made a careful review of the Facility's compliance status in 2006 and never raised the need for a use permit as a potential issue.

- On May 5, 2007, the Planning Department issued a public notice regarding the CEQA process for the Facility, which stated: "the mine is a vested mine, which means there is a right to mine on the project site." (G22, p. 4.)

- On May 21, 2008, the County wrote to Lehigh to discuss the Facility's compliance status, and to update the compliance schedule for the Facility. The letter did not raise any issue of vested rights. (G24.)

- On June 20, 2008, the County issued a notice of alleged SMARA violations at the Facility with respect to the EMSA. The notice did not raise any issue of vested rights. (G25.)

- On April 14, 2009, the County entered into an agreement with Lehigh which authorized Lehigh's continued use of the EMSA without a use permit, subject to applications for a reclamation plan amendment. (G27.) At no time did the County raise or suggest that the Facility was not vested in its underlying uses. The County's actions are wholly consistent with over 70 years of the Facility's operation.[5]

LEGAL ANALYSIS

The Board of Supervisors has been asked to confirm that mining operations at the Facility are vested. This determination, while inherently factual in nature, is guided by a legal framework. For the Board's benefit, we describe this framework below to provide the appropriate legal context for the Board's analysis. This section also presents a legal framework for a number of related issues, including the estoppel effect of the County's past affirmations of vested rights, and potential implications under the Fifth Amendment.

Vested Rights

Basic Principles

Vested land-use rights, also known as legal nonconforming uses, are constitutionally-protected property rights. Vested rights protect legally-established uses against later changes in zoning regulations. Once vested rights exist, government may

[5] Of course, Lehigh has consistently maintained that it has vested rights in multiple letters to the County. (See, *e.g.*, G15, G17, p. 2, G20, p. 3, G21, p. 3, G23, G26, p. 1, G27.)

not unreasonably interfere with the use without payment of just compensation under the Fifth Amendment of the United States Constitution. (See *Hansen*, at pp. 551-552.)

The Santa Clara County Zoning Code expressly protects nonconforming uses from later zoning enactments. Section 4.50.020 of the Zoning Ordinance provides, in relevant part:

> A use that was legal when brought into existence, but does not conform to the current use limitations of the applicable zoning district (including use-specific permitting requirements and use-specific criteria) may be maintained subject to all of the following limitations:
>
> A. Expansion of Use Prohibited. A nonconforming use may not be intensified or expanded in area or volume, except as provided in Section 4.50.060.
>
> B. Modification of Use. A nonconforming use may be modified to a use deemed similar in nature, but lesser in intensity and impacts, as determined by the Planning Commission or Planning Commission secretary...
>
> C. Cessation of Use. If any nonconforming use ceases for a continuous period of not less than twelve (12) months, the legal-nonconforming status shall terminate and any future use of the building or lot shall conform to the zoning ordinance.

* * *

SMARA defines vested mining rights to include mining operations legally commenced before SMARA's effective date on January 1, 1976:

> No person who has obtained a vested right to conduct surface mining operations[6] prior to January 1, 1976, shall be

[6] "Surface Mining" is defined under both under County rules and state law broadly: "All or any part of the process involved in the mining of minerals...by removing overburden and mining directly from the mineral deposits...Surface mining operations shall include but are not limited to: (1) In place distillation or retorting or leaching. (2) The production and disposal of mining waste. (3) Prospecting and exploratory activities." (Pub. Resources Code, § 2735; County Surface Mining and Land Reclamation Standards, § 3(cc).)

> required to secure a permit pursuant to this chapter 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. A person shall be deemed to have vested rights if, prior to January 1, 1976, he or she has, in good faith and in reliance upon a permit or other authorization, if the permit or other authorization was required, diligently commenced surface mining operations and incurred substantial liabilities for work and materials necessary therefor.

(Pub. Resources Code, § 2776.)[7] The County's Surface Mining and Land Reclamation Standards contains an identical statement. (Surface Mining and Land Reclamation Standards, § 5; see also County Zoning Ordinance, § 4.10.370.)

Principles Allowing the Continuation of Nonconforming Uses

Three important principles govern the continuation of legal nonconforming uses.

First, vested rights "run with the land" and are not affected by changes in the ownership of property. (*Hansen*, at p. 540, fn. 1; *Gibbons & Reed Co. v. North Salt Lake City* (1967) 19 Utah.2d 329, 336 ["Lawful existing nonconforming uses are not eradicated by a mere change in ownership."]; *The City of University Place v. McGuire*, 144 Wn.2d 640, 651 (2001) [vested rights ran with land even after land was sold by mining company to non-mining developer] [*McGuire*].)

Second, the nonconforming use must be similar to the use in place when restrictive changes in the zoning ordinance became effective. (See *Hansen*, at p. 553; *Rehfeld v. City and County of San Francisco* (1933) 218 Cal. 83; *City of Yuba City v. Cherniavsky* (1931) 117 Cal.App. 568; see also *Endara v. City of Culver City* (1956) 140 Cal.App.2d 33.) The County's nonconforming use ordinance directly follows these general legal precedents. (See County Zoning Code, § 4.50.020.B ["A nonconforming

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[7] The statutory protection for vested uses is carried through into state regulations. Code of Regulations, Title 14, section 3505(b) provides: "The permit and reclamation plan requirements for persons with vested rights are stated in Public Resources Code Section 2776. Where a person with vested rights continues surface mining in the same area subsequent to January 1, 1976, he shall obtain an approval of a reclamation plan covering the mined lands disturbed by such subsequent surface mining. In those cases where an overlap exists (in the horizontal and/or vertical sense) between pre- and post-Act mining, the reclamation plan shall call for reclamation proportional to that disturbance caused by the mining after the effective date of the Act."

use may be modified to a use deemed similar in nature, but lesser in intensity and impacts…"].)

Third, with respect to surface mining, the California Supreme Court in *Hansen* adopted special rules for determining the scope of vested rights. These rules recognize that mining operations move across a site and use land differently from normal "static" land uses. (*Hansen*, at p. 553 ["Unlike other nonconforming uses of property which operate within an existing structure or boundary, mining uses anticipate extension of mining into areas of the property that were not being exploited at the time a zoning change caused the use to be nonconforming."])

These rules, known collectively as the "diminishing asset" doctrine, allow nonconforming mining operations to expand into unused lands even though mining activities may not have commenced there yet. (*Hansen*, at pp. 553-559.) To gain the benefit of these rules, the owner must have expressed the intent, shown by objective evidence, to include such land in the mining enterprise before the effective date of a permit requirement:

> When there is objective evidence of the owner's intent to expand a mining operation, and that intent existed at the time of the zoning change, the use may expand into the contemplated area. "The very nature and use of an extractive business contemplates the continuance of such use of the entire parcel of land as a whole, without limitation or restriction to the immediate area excavated at the time the ordinance was passed. A mineral extractive operation is susceptible of use and has value only in the place where the resources are found, and once the minerals are extracted it cannot again be used for that purpose. 'Quarry property is generally a one-use property. The rock must be quarried at the site where it exists, or not at all. An absolute prohibition, therefore, practically amounts to a taking of the property since it denies the owner the right to engage in the only business for which the land is fitted.'"

(*Id.* at p. 553, quoting *McCaslin v. City of Monterey Park* (1958) 163 Cal.App.2d 339, 349.) The principle is followed by the "overwhelming number of jurisdictions" to consider non-conforming mining operations. (*McGuire*, at p. 651).)

The Court in *Hansen* further explained that, in determining the "use" as to which the owner is entitled to continue, the full business enterprise must be considered, not merely individual elements:

> In determining the use to which the land was being put at the time the use became nonconforming, the overall business operation must be considered. One entitled to a nonconforming use has a right to...engage in uses normally incidental and auxiliary to the nonconforming use...Furthermore, open areas in connection with an improvement existing at the time of the adoption of the zoning regulations are exempt form such regulations as a nonconforming use if such open areas were in use or partially used in connection with the use existing when the regulations were adopted.

(*Hansen*, at pp. 565-566 [internal quotations and citations omitted].)

Numerous courts have considered the type of evidence needed to establish that property has been added to a mining enterprise. They hold that there is no formula for how "objective manifestations of intent" may be proven. Certain factors, however, have been found to be important, including: the magnitude and nature of the mining operation itself, the extent of mining disturbance, progressive movement and expansion of mining operations, exploration and geologic studies, material stockpiling, and the construction or use of haul roads.

In *Hansen*, quarrying began in 1946, eight years before Nevada County adopted a zoning ordinance that prohibited mining without a permit. The operator held over 60 acres and multiple parcels. Mining centered on aggregate removal from a riverbed, with a smaller volume of rock quarried from a nearby hillside. While in-stream mining was continuous, the hillside was left untouched for periods as long as three years. The County asserted that hillside quarrying was an improper expansion of a nonconforming use and that any vested rights to hillside mining were lost through nonuse. The California Supreme Court disagreed, holding that vested rights apply to "all aspects" of a mining enterprise. Thus, once a parcel or tract is incorporated into the enterprise, the area becomes vested even though operations may not occur for long periods. As to the hillside tract, the court held that because mining occurred prior to the first restrictive ordinance, there was sufficient intent to integrate the area within the ongoing mining operation. (*Id.* at p. 571.)

Where land has not been mined, vested rights also may be established by evidence of a pattern of progressive expansion. In *Syracuse Aggregate Corp. v. Weise* (1980) 51 N.Y.2d 278, a New York court explained that "not every inch" of the parcel needed to be devoted to mining, according to the *Syracuse* court. Rather, what was important was that the owner had engaged in "substantial quarrying activities on a distinct parcel of land over a long period of time [which] clearly manifest the intent to appropriate the entire parcel to the particular business of quarrying." (*Id.* at pp. 285-286; see also *Town of Wolfeboro v. Smith* (1989) 131 N.H. 449, 457 [expansion to 35 acres allowed by the court, where only eight acres were mined before a restrictive ordinance was adopted]; *Sturgis v. Winnebago County Board of Adjustment* (1987) 141 Wis.2d 149, 154 ["when a single owner has contiguous parcels on which an excavation operation is in existence, all land which constitutes an integral part of the operation is deemed 'in use,' notwithstanding the fact that a particular portion may not yet be under actual excavation"].)

Material stockpiling and the presence of haul roads demonstrated the existence of vested rights in *Gibbons & Reed Co. v. North Salt Lake City* (1967) 19 Utah.2d 329, 336. There, the operator used a leased parcel to stockpile sand and gravel excavated from owned parcels. The operator also used haul roads on the leased parcel connecting to other parcels, and contracted to supply fill from the leased parcel. These activities took place prior to the restrictive ordinance. Accordingly, the court held that the leased parcel was an integral part of the mining operation when the first restrictive ordinance was adopted, and that no "expansion" occurred through its subsequent use. (*Id.* at p. 336; see also *Torok v. Green Township Board of Trustees*, 1979 Ohio App. LEXIS 9875; *Town of West Greenwich v. A. Cardi Realty Associates*, 786 A.2d 354 (R.I. 2001) [material stockpiling and tree clearing were factors supporting a finding of vested rights].)

Other activities, including test drillings, surveys of reserves and tree clearing provided evidence of vested rights in *Moore v. Bridgewater Township* (1961) 69 N.J.Super. 1, 173 A.2d 430. There, mining operations began by 1930 on a 20-acre tract and slowly progressed. To prepare for later expansion, the owner cleared trees, test-drilled and directed surveys to better identify on-site reserves. The town adopted its first restrictive ordinance in 1937. In 1952, residents sought to restrain mining operations, which by then covered only two acres, arguing that a continuation of mining was an expansion of a non-conforming use. The court disagreed, finding sufficient "outward manifestation of intent" to establish the nonconforming use across the entire tract. (*Id.* at 15-16; see also *County of Du Page v. Elmhurst-Chicago Stone Co.* (1960) 18 Ill.2d 479, 485 [construction of a rail spur and stockpiling supported positive vested rights determination]; *Bainter v. Village of Algonquin*, 285 Ill.App.3d 745 (1996) [mineral

exploration and testing, construction of a tunnel under a road to connect different properties, and the installation of conveyor equipment were factors used to demonstrate vested rights].)

Collectively, these decisions show that vested rights can be established by a wide range of activities which do not necessarily include actual mining. A broad range of facts may be relied on to demonstrate that a parcel has been devoted to the overall mining enterprise when the first restrictive ordinance is adopted, even where property has not been actively mined.

Vesting Date for the Facility

For the purposes of determining the scope of Lehigh's vested rights, it is necessary to establish the original date upon which the County adopted a restrictive ordinance precluding mining on the property absent issuance of a use permit. Based on a comprehensive review of historic County zoning records, Lehigh has identified May 31, 1960 as the date upon which the County first adopted an ordinance requiring a use permit for mining at the Facility.[8]

Mining operations at the Facility were established prior to the County's adoption of any mining-related zoning regulations. Although the County adopted a comprehensive zoning ordinance on August 25, 1937, that ordinance did not impose a use permit requirement on the Facility. Specifically, Section 12 of Ordinance NS-1200 provided, in relevant part, that:

> (a) Uses Permitted:
>
> All uses not otherwise prohibited by law; provided, however, that none of the following uses shall be established in any "A-1" district unless and until, in any such case, a use permit, as provided in Section 35 of this Ordinance, shall first have been secured for such use:
>
> * * *

[8] We note that the County has previously asserted that December 29, 1947 is the vesting date for mining operations within the County's historic A-1 district. Lehigh disagrees with this assertion; we note, however, that our analysis of the Facility's vested rights remains the same using the County's suggested vesting date.

> 3. **Commercial excavating of natural materials within a distance of one thousand (1000) feet from any public street.**

(B7 [emphasis added].)

Section 35 of the 1937 Zoning Ordinance also contained a general provision which authorized certain "commercial excavating of natural materials used for building or construction purposes" in any of the County's zoning districts subject to the issuance of a use permit. (B7.)

On December 29, 1947, the Board of Supervisors adopted Ordinance No. 345, which made minor changes to the A-1 zone regulations, including expanding the permitted uses in the A-1 zone to include, "[a]ll uses permitted in any "H", "R' or "C" District." (B16, sec. 12.2.) In making this change, however, the County expressly maintained the zoning code provision allowing commercial extraction operations outside 1,000 feet of a public road, as well as the general mining provision allowing mining in all zoning districts subject to issuance of a use permit. (B16, sec. 35.4.)

On July 26, 1954, the Board adopted Ordinance NS-122.3, which made further changes to the zoning ordinance. These revisions had no effect on the uses permitted in the A-1 zone. The revisions did, however, modify the County's general mining provision to remove the section's reference to "for building and construction purposes." (B26, sec. 33.1.)

Finally, on May 31, 1960, the County adopted Ordinance NS-1200.21, which repealed the A-1 district originally established in 1937. (B26.) Lands previously classified in the A-1 district (including the Facility) were reclassified as A-2. Significantly, the A-2 zoning regulations no longer allowed commercial excavation without a use permit regardless of distance from a public street. Accordingly, the County's May 31, 1960 zoning code establishes the vesting date for the Facility.

Applying these zoning changes here, mining related activities began by 1903, well before the enactment of the 1937 zoning ordinance. (B1, p. 82.) Beginning in 1937, the Facility was zoned A-1, which expressly permitted commercial excavation provided that it was not located within 1,000 feet of a public street. Mining activities at the Facility were not located within 1,000 feet of a public street and, as such, were allowed by right under the 1937 ordinance. (See, B6, B8.) Given that the Facility's operations continued to be located greater than 1,000 feet from a public street, the zoning amendments to the A-1 zone in 1947, and the amendments to the general mining provision in 1954, did not

affect mining operations and those operations continued to be permitted by right. With the adoption of the comprehensive 1960 zoning ordinance, which completely eliminated the 1,000 foot provision originally established in 1937, the Facility, for the first time became subject to a use permit requirement. As such, adoption of the 1960 ordinance marks the initial vesting date for the Facility.

We now proceed with a discussion of vesting on specific parcels within Lehigh's overall ownership.

Application to Morris and Crocker Parcels

The South Quarry proposal pending before the County is described in Lehigh's May 2010 application. Lehigh requests a reclamation plan amendment and conditional use permit for a 206.5-acre area known as the South Quarry. (A2, A35.) The South Quarry area has been owned by Lehigh and its predecessors for many years, but does not support active mining at this time.

The zoning history above indicates that May 1960 is the first occasion that commercial excavation was not allowed by right, and a use permit was clearly required to conduct surface mining. Under this date, the 500-acre Morris Parcel (acquired July 30, 1942) and the 20-acre Crocker Parcel (acquired July 2, 1943) meet the vesting requirements. We note that the same result is reached if the County's alternative vesting date of December 1947 is used.

Kaiser acquired both parcels prior to the date that the County's zoning regulations first required a use permit for mine excavations. This alone is compelling evidence of vested rights, considering the scope and nature of Kaiser's operations. From 1939 and thereafter, Kaiser's mining enterprise was substantial. The quarry was tasked with supplying limestone to the world's largest cement plant, and to support Kaiser's clear plans to expand cement production in the post-war era. There can be no doubt that the company considered every viable limestone deposit in its ownership as potential future reserves. This is especially true for Morris and Crocker, which have always been directly adjacent to active mining areas.

Kaiser's exploration work provides further evidence of vesting. The decisions in *Moore v. Bridgewater Township* and *Bainter v. Village of Algonquin* relied on evidence of exploratory activities and other mining preparations to support vested rights. Similar facts exist here. In 1939 a Stanford University professor extensively investigated the limestone deposits on the property and areas to the south that would soon be acquired. Later, between 1943 and 1945 the company conducted more in-depth field exploration

and limestone mapping. Both studies revealed evidence of limestone south of Permanente Creek where the Morris and Crocker parcels were located. Further, actual drilling took place on the Crocker Parcel in 1949. Clearly, the company was aware of the Morris and Crocker parcels' mineral value.

Finally, perhaps the best evidence of an intent to devote property to mining operations is actual mining-related use prior to the vesting date. Here, the Morris Parcel was used to support a major access road which linked the lower quarry to the Facility entrance. (A38, A39.) Aerial photographs do not reveal any alternative access to the lower quarry, which underscores the road's importance. Actual use also was made of the Crocker Parcel. The 1948 aerial photograph shows an extensive road system in an area subjected to mineral exploration. (A40.)

These facts objectively demonstrate that the Morris and Crocker parcels were devoted to mining uses prior to December 1947, based on evidence that is considered persuasive by the courts under the diminishing asset doctrine. As to other areas within the South Quarry, Lehigh filed a conditional use permit application to complement its vested rights claim.

Application to EMSA

The EMSA covers 89 acres in the northeast corner of the Facility property. (A2.) The EMSA is used to store overburden (*i.e.*, unmarketable earth and rock) generated by mining. The EMSA is within a larger 155-acre area known as the EMSA parcel. (A5.) The EMSA parcel formed part of Kaiser's original 1,300 acre of the Facility property in 1939. (A42.)

Lehigh's use of the EMSA is vested, as this area has been treated by the operator and County alike as part of the overall vested Facility. This contention is amply supported by the evidence, which shows that since 1939, the area has been developed with a range of uses which the County has always considered legal, and for which a permit has never been required.

These uses are most apparent in the aerial photographs. These reveal that in 1941, Kaiser commenced massive grading in the EMSA area and began simultaneous construction of buildings and parking areas. (A18, A19.) The development continued during 1942 and later to include a magnesium plant and numerous buildings, roads, clearings of trees and vegetation, utilities and infrastructure. (A20, A21, A22.) The images demonstrate that by that time the EMSA parcel was fully devoted to the uses conducted at the Facility by 1942.

The presence of material storage is first indicated in the 1948 aerial image. (A22.) Later images show the continuing growth of this feature over time. By 1950, the area covered by storage had grown substantially compared to 1948. (A22, A23.) The series of images dated 1974 indicate that the dimensions of the stockpile continued to expand. (See A25, A26, A27.) By 1980, the height of the EMSA stockpile had grown dramatically and was recognizable as a smaller version of the modern EMSA stockpile. (See A43.) The 1991, 2005 and 2009 aerial photographs document how the stockpile continued to grow over the last 20 years to the EMSA's present configuration. (A30, A31, A32.)

The evidence also demonstrates that the EMSA parcel has always been an integrated part of the Facility, notwithstanding legal ownership changes between two Kaiser entities, which do not affect vested rights because vested rights run with the land and do not depend on ownership by a particular entity. It is clear that the entire Facility, including the EMSA area, was managed under a common corporate structure. Examples of this include the following:

- Mr. Kaiser presided over both of the corporations that together owned the Facility, the Permanente Corporation and Permanente Metals, allowing both companies to function as a single enterprise.

- Both companies distributed Kaiser products from the Facility using other Kaiser ventures. Both also shared various easements and rights-of-way facilitating their combined operations.

- The Permanente Corporation assisted Permanente Metals to finance its off-site mining operations, provided financial assistance, and made purchases of off-site lands for the benefit of its corporate relative. The $10 transfers for the land comprising the EMSA Parcel reveal a transaction between partners rather than an arms-length deal.

- Both Kaiser entities worked cooperatively to support site operations and share facilities. The cement plant and magnesium plant both increased in efficiency by recirculating natural gas fuel from one to the other. Also, water service for the Facility, including the cement plant, appears to have been provided using the water tank in the EMSA area.

- The Kaiser companies shared employees and administrative burdens. Employee transfers from one Kaiser entity to another were common, reflecting that both companies were units of a larger enterprise. Both companies also shared a

monthly newsletter known as *The Permanente News*, which detailed various employee events (holiday parties, sports teams, etc.) and other news within the broader Kaiser organization.

- Both Kaiser companies performed mining and mining-related operations. The cement plant was the end process that began with limestone mining in the adjacent quarry. The magnesium plant, similarly, processed dolomite mined from off-site Kaiser facilities including the Natividad quarry in Monterey County and was simply the last stop before mined material was processed before distribution to customers.

Today's use of the EMSA area for material storage merely continues a use which has existed for more than 60 years, and is only the latest in a range of activities to utilize this area as part of the overall Kaiser enterprise. These uses began many years prior to the vesting date. These uses have been consistently treated, by Lehigh's predecessors and the County alike, as part of the overall vested operation.

Issue of Whether Permanente Road was a Public Street

The question has recently arisen as to whether quarrying required a use permit under the County's first comprehensive zoning ordinance in 1937. The 1937 ordinance, as discussed above, classified the quarry in the "A-1" district and a use permit was required for "[c]ommercial excavating of natural materials within a distance of one thousand (1000) feet from any public street." (B7.) At that time, Permanente Road provided unpaved access along Permanente Creek which terminated within the quarry property, likely within 1,000 feet of where quarry excavations were already underway in 1937. The facts and law make clear that the quarry did not require a use permit under the 1937 zoning regulations.

First, evidence discussed above amply demonstrates that the quarry was operating long before 1937. The quarry was thus a legal nonconforming use following the County's adoption of the 1937 zoning regulations, to the extent that those regulations applied to the quarry by virtue of its proximity to Permanente Road.

Second, the facts are clear that whatever its earlier use may have been, Permanente Road was at least by 1935 a private access road to the Facility, and not a public "street" as that term was used in the 1937 zoning regulations. The 1937 zoning regulations define a "street" as:

> A public or private thoroughfare **which affords the principal means of access to abutting property**, including avenue, place, way, drive, lane, boulevard, highway, road and any other thoroughfare except an alley as defined herein.

(B7, p. 8 [emphasis added].) It is clear that by 1937 Permanente Road was not used as a public "street", but rather provided only access to the property for mining operations. This is reflected in Board of Supervisors minutes from 1935, which indicate the quarry operator had by then gated Permanente Road to restrict access to mine traffic. (B5, B6.) The Board heard and rejected public complaints, based on the opinion of the County surveyor that "the gate was not across a county road." (B6.)

Further to this point is Kaiser's 1939 permit application for the cement plant. Kaiser's application, which included the entire quarry property, stated that "[t]here are no **streets** upon the property, or in the vicinity of the proposed plant." (B8, emphasis added.) There is no indication that the information in the application was challenged at any point in the County's consideration of the use permit, and the Board of Supervisors granted the permit following extensive hearings in June 1939.

The effect of the Board's granting of the permit, as respects the issue regarding Permanente Road, is controlled by the doctrine of implied findings. This doctrine provides that a local decision-making body will be presumed to have made all factual findings necessary to support its land-use decision (1) where the local agency is not required to make express findings; and (2) where any implied findings are supported by substantial evidence in the record. (*City v. Board of Permit Appeals* (1989) 207 Cal.App.3d 1099, 1107 [*Board of Permit Appeals*]; *Broadway, Laguna, Vallejo Assn. v. Board of Permit Appeals* (1967) 66 Cal.2d 767, 773 [*Broadway*]; *Siller v. Board of Supervisors* (1962) 58 Cal.2d 479, 484 [courts generally presume that an agency's rulings rest upon the necessary findings and that such findings are supported by substantial evidence] [*Siller*]; *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 267 [*Shaw*]; *Halaco Engineering Co. v. South Central Coast Regional Com.* (1986) 42 Cal.3d 52, 78 [*Halaco*]; *Jardine v. Pasadena* (1926) 199 Cal. 64, 72 ["Every intendment is to be indulged in and all doubts resolved in favor of the validity of its action" (citations omitted)] [*Jardine*].)

Here, it would have been apparent to the Board of Supervisors in 1939 whether the quarry adjacent to the proposed cement plant, and tasked with supplying the cement plant with limestone, required a permit under the 1937 ordinance. It is, moreover, inconceivable that in the course of the multiple hearings and testimony in 1939 concerning the cement plant permit that the issue of a quarrying permit would not

have been considered by the Board. We must assume, under the doctrine of implied findings, that the Board found that a quarry permit was unnecessary. The absence of written findings on this point is perfectly acceptable, as the County's procedures under the 1937 zoning code did not require written findings other than a statement that the "establishment, maintenance and/or conducting of the use...will not...be detrimental to the health, safety, morals, comfort, convenience of welfare" of the public. (B7, sec. 35(2).)

The Board of Supervisors would have had ample evidence before it to conclude that the quarry was a legal use. The quarry had existed for more than thirty years prior to either the original 1937 zoning ordinance or Kaiser's 1939 permit application, and the road was already devoted to quarry operations. The Board, which was clearly apprised of the quarry's existence, could reasonably have concluded that either the road was not a public street, or the quarry was an existing nonconforming use which was not subject to new permit requirements. Either way, Kaiser's statement that the plant site was not in the vicinity of a public street was not challenged, and the Board's apparent acceptance of this point must be considered an implied finding within its decision to grant the cement plant permit. (See *Board of Permit Appeals*, at p. 1107; *Broadway*, at p. 773; *Siller*, at p. 484; *Shaw,* at p. 267; *Halaco*, at p. 78; *Jardine*, at p. 72.) This matter, having been decided by the Board over 70 years ago, cannot be reopened or revisited at this time.

Equitable Estoppel

Even assuming, for the sake of argument, that the County determines that mineral extraction operations at the Facility are not vested, the County would still be precluded from denying Lehigh's vested rights based on the legal doctrine of equitable estoppel.

The doctrine of equitable estoppel is, at its core, a fairness doctrine. It generally stands for the proposition that a party should be barred from asserting a position that is contradictory to a position that it has previously asserted or which has previously been legally established as true. In *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462 (*Mansell*), the California Supreme Court described the doctrine as follows:

> The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a

> change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both.

(*Mansell*, at p. 488.)

In applying the doctrine, the *Mansell* court articulated a simple four-part test: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. (*Id.* at p. 489.)

The current situation clearly satisfies the *Mansell* courts four-part test. First, the County has been apprised of facts surrounding mining operations at the Facility for over 70 years and has repeatedly acknowledged these ongoing operations at every level of County government. Starting in 1939, the County Board approved a use permit for a concrete plant to process the materials being extracted as part of the facilities ongoing mining operations. (G1.) The County again affirmed the facts surrounding the facilities operations by subsequently amending the use permit in 1950 and 1955. (G2 and G3.) Moreover, in the 1971 memorandum noted above, the County expressly acknowledged the fact that the mining operations at the Facility were existing and, more importantly, that they were vested. (G5.)

Second, the County's actions over the last 70 years have evinced the County's clear intent to treat mining operations at the Facility as vested. Moreover, Lehigh and its predecessors' clearly had a right to believe that the mining operations on the site were vested. Again, the County has repeatedly treated the mining operations as a legal, vested use of the property and issued permits for facilities necessary to support those operations as early as 1939. More recently, in 2007 the County issued a public notice, which stated: "the mine is a vested mine, which means there is a right to mine on the project site." (G22, p. 4.) In short, over the last 70 years, the County has uniformly asserted that the mining operations as vested and, as such, Lehigh has a right to rely on that assertion.

Third, at no time over the last 70 years have Lehigh or its predessors been aware of any basis for the County to claim that the current operations were not vested. Indeed, as recently as 2009, the County entered into an agreement with Lehigh which authorized Lehigh's continued use of the EMSA without a use permit, and without any indication that a permit might thereafter be required. (G27.) As such, until the present situation arose, Lehigh has been completely ignorant of any other characterization of the operations on the property other than its ongoing status as a vested use.

Fourth, Lehigh and its predecessors have relied on the County's historic characterization of the property as vested to their collective detriment. In short, Lehigh and its predecessors have invested substantial sums of money in the Facility in reliance on the current and continued understanding that mining operations at the site are vested. A contrary determination by the County would require Lehigh to cease operations at the Facility and, as a result, would cause severe economic injury to Lehigh and the hundreds of individuals that work at the Facility on a daily basis.

Importantly, the *Mansell* court also acknowledged that the doctrine of equitable estoppel is applicable to governmental entities when, "in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (*Id.* at p. 496-497.) Put another way, subsequent courts have stated that equitable estoppel can be applied to governmental entities when the precedential effect is narrow and the failure to apply estoppel will result in a "great injustice." (*Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 321; *Golden Gate Water Ski Club v. County of Contra Costa* (2008) 165 Cal.App.4th 249, 259.)

In addition to *Mansell*, the court in *Anderson v. City of La Mesa* (1981) 118 Cal.App.3d 657 (*Anderson*) estopped the City of La Mesa from refusing to issue a final occupancy permit for a new home after it was determined that the home's setback was in violation of the City's specific plan ordinance. In reaching its decision, the court noted that the City had inspected the property six times during the course of construction and failed to identify the violation.

In the present case, the County has inspected the Lehigh Facility for over 70 years and has never suggested that mineral extraction operations were not vested. To the contrary, as noted above, the County has expressly and consistently acknowledged the Facility's vested status since at least 1971. (G5.) Given that the *Anderson* court found the government's failure to issue an occupancy permit a sufficiently "great injustice" after just six inspections, it goes without question that a County determination that the Lehigh site is not vested after 70 years of treatment to the contrary would be deemed by any court to be a gross injustice that demanded the application of equitable estoppel.

Fifth Amendment Takings

Finally, the County should be advised that any abridgement of Lehigh's long-established vested rights presents constitutional questions under the Fifth Amendment's takings clause.

In the United States Supreme Court decision *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393 (*Pennsylvania Coal*), Justice Holmes recognized that the Fifth Amendment Takings Clause must have application to the government's regulation of private land use least it be free to limit private ownership until it disappears completely. (*Id.* at p. 415.) Under the modern formulation of the rule, courts have described a land use regulation that violates the Fifth Amendment takings clause as one that "does not substantially advance a legitimate state interest or denies an owner of economically viable use of his land." (*Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003, 1015 (1992).)

Courts, however, have recognized that a regulatory takings claim does not require a showing that all economically viable use of the land is lost. In the recent Supreme Court case, *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, the Court found that something less than a complete loss of all economically viable use of property may support a takings claim:

> Where a regulation places limitations on land that falls short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on . . . factors including the regulation's economic effect on the landowner, the extent to which the regulations interferes with reasonable investment-backed expectations, and the character of the government action.

(*Id.* at p. 617.)

In the mining context, courts have long found Fifth Amendment takings when governmental actions have deprived mine operators of their investment-backed expectations. As previously noted, in *Pennsylvania Coal*, the Court found that application of a statute restricting coal mining on a site resulted in a compensable taking, and observed that the right to mine was coextensive with the economic loss resulting from the deprivation of that right.

More recently, in *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990) the court held that a taking occurred when government actions deprived a mine operator from exercising its rights under a mining lease. Similarly, in *State ex rel R.T.G., Inc. v. State of Ohio* (2002) 98 Ohio.St.3d 1, 780 N.E.2d 998, an Ohio court applied the Fifth Amendment's taking clause to a government determination that 833 acres of land were unsuitable for mining due to potential impacts to the local aquifer and concluded

that the government's determination resulted in the taking of the land owners rights to mine its property.

Here, a determination by the County that the current extraction operations are not vested would result in an immediate and substantial economic loss to Lehigh based on decades of reasonable economic backed investments. In short, in light of the facts presented, any County action which precludes mining of the property under Lehigh's vested rights would result in a near total loss of economically viable use of the property, which would support immediate judicial action against the County for a taking under the Fifth Amendment.

RESERVATION OF RIGHTS

Above, and in the appendices, Lehigh has presented substantial documentation showing that the Facility is legally vested. It also is beyond any dispute that the County has over the last 70 years treated the Facility in precisely this manner. Lehigh's belief that its operating rights are settled is therefore reasonable and well-supported. The County's decision to submit the Facility to a vested rights determination at this time is a matter of serous concern. Any abridgement of Lehigh's long-established rights puts at risk the deep investment which Lehigh and its predecessors have repeatedly made in the Facility, and present constitutional questions under the Fifth Amendment's takings clause.

The County appears to rely on the decision in *Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613 (*Calvert*), as the basis for insisting on a new vested rights determination. The *Calvert* court does not support or require this. *Calvert* specifically protected existing, recognized vested uses from new hearing requirements. By requiring a vested rights determination, the County has chosen to dispense with the protections for existing operations that the *Calvert* court was careful to preserve, and placed Lehigh's rights at risk.

Calvert arose from certain vested rights claims in Yuba County. The Planning Director for the county, in response to a request made by a mining company, wrote a letter affirming the company's vested rights to mine several thousand acres. The County did not conduct a hearing and provided no advance notice or opportunity to be heard to adjacent landowners. A neighbor and others brought suit which sought, among other things, to overturn the vested rights determination based upon Yuba County's failure to provide notice to affected, nearby landowners.

The court held that vested right determinations under SMARA can be adjudicatory in nature and thus subject to procedural due process requirements of reasonable notice and an opportunity to be heard. The court also recognized, however, that its decision had limited application where vested rights already were established by "less formal" means. In this, the *Calvert* court was mindful to protect established vested uses, precisely like the Facility, that are recognized and treated as vested but have never been formally adjudicated. For these types of established uses, *Calvert* was clear that a public vested rights determination was not appropriate.

The County is following an alternative course not supported by *Calvert* by requiring Lehigh to submit its legal rights for a review and determination. Lehigh, while accommodating this proceeding, nonetheless reserves its rights to challenge its legality. Lehigh also reserves its right to assert all rights of "just compensation" under the Fifth Amendment should the County's actions result in an abridgment of Lehigh's long-established rights.

CONCLUSION

We thank you and County staff for your time and consideration. If additional information or clarification is needed, please let us know and we would be pleased to provide it.

Very truly yours,

DIEPENBROCK HARRISON
A Professional Corporation

By: Mark D. Harrison

SKH:gjc
Enclosures

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