5/31/2012

Supplemental Packet
Item # 3

ENDORSED
FILED

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Attorney for Petitioner No Toxic Air, Inc.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

NO TOXIC AIR, INC., a California nonprofit corporation, Petitioner and Plaintiff vs. SANTA CLARA COUNTY, a Division of the State of California; SANTA CLARA COUNTY BOARD OF SUPERVISORS; and DOES 1-20 inclusive, Respondents and Defendants LEHIGH SOUTHWEST CEMENT COMPANY, a California Corporation; HANSON PERMANENTE CEMENT, INC., an Arizona Corporation; and DOES 21-40 inclusive, Real Parties In Interest	No. 111CV201900 VERIFIED PETITION FOR PEREMPTORY WRIT OF WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF [C.C.P. §§ 1060; 1094.5]

Petitioner and Plaintiff NO TOXIC AIR, INC. (hereinafter "PETITIONER") hereby alleges as follows:

1. This action challenges the actions of Respondents and Defendants SANTA CLARA COUNTY and SANTA CLARA COUNTY BOARD OF SUPERVISORS (hereinafter referred to collectively as "RESPONDENTS") in granting legal nonconforming use ("LNCU") status to large portions of the Permanente Quarry, specifically all of Parcels 1, 2, 3, 5, 6, 7, 8, ,9, 11, 14, 15, 16, and 17 (hereinafter "PROJECT"), in unincorporated Santa Clara County and adopting findings purporting to support said approval.

West Valley Citizens Air Watch
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2. PETITIONER alleges that the grant of LNCU status violated provisions of the Santa Clara County zoning ordinance and of the California Surface Mining and Reclamation Act of 1975 (Public Resources Code §§2710 *et seq.*, hereinafter referred to as "SMARA") in that the PROJECT, as approved, did not satisfy the requirements for granting LNCU status and the decision to grant LNCU status was not supported by substantial evidence in the record before RESPONDENTS.

3. PETITIONER further alleges that RESPONDENTS' action in adopting findings in support of the aforementioned grant of LNCU status was improper and that the adopted findings were invalid in that they did not support RESPONDENTS' approval and were not supported by substantial evidence in the record before RESPONDENTS.

4. PETITIONER seeks this Court's peremptory writ of mandate ordering RESPONDENTS to rescind their improper and illegal approval for the PROJECT and its supporting findings and requiring them to use proper criteria in any reconsideration of their approval. PETITIONER also seeks this Court's declaration that specified portions of the PROJECT do not qualify for LNCU status, that the finding supporting said approval were also improper, and of the proper criteria to be applied in considering a grant of LNCU status and supporting findings. PETITIONER further seeks this Court's Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction against RESPONDENTS as well as Real Parties in Interest LEHIGH SOUTHWEST CEMENT COMPANY and HANSON PERMANENTE CEMENT, INC. (the aforementioned hereinafter collectively referred to as "REAL PARTIES") restraining them, their agents, servants and employees from taking any action based on RESPONDENTS' approvals that would result in irreparable harm to PETITIONER, its members and/or the public, and in particular any mining or mining-related operations that would result in the release of toxic or harmful air or water pollutants into the air or water surrounding the Project or cause damage to animal or plant habitat or other land. PETITIONER also asks that it be granted its reasonable attorneys' fees under Code of Civil Procedure §1021.5 or other applicable basis.

PARTIES

5. Petitioner and Plaintiff NO TOXIC AIR, INC. ("NTA" or "PETITIONER") is a California nonprofit corporation incorporated and existing under the laws of the State of California. NTA's purposes include protecting its members, other residents, employees, visitors, and the environment of Santa Clara County from toxic and/or damaging pollutants, and specifically mercury, within Santa Clara County. Members of NTA live and work in and around the Santa Clara County, including areas in close proximity to the PROJECT. These members have a particular interest in the protection and preservation of Santa Clara County and its natural resources from harmful and/or toxic pollutants, including specifically mercury.

6. PETITIONER and its members have a direct and beneficial interest in the proper enforcement of the SANTA CLARA COUNTY's zoning ordinance and compliance by RESPONDENTS with the requirements of SMARA. These interests will be directly and adversely affected by the approvals at issue in this action in that RESPONDENTS' approvals for the PROJECT violate provisions of law as set forth in this Petition and would cause significant and avoidable harm to PETITIONER, its members, and other inhabitants of Santa Clara County.

7. PETITIONER brings this action on its own behalf, on behalf of its members who are citizens, residents, and taxpayers of Santa Clara County and the State of California, as well as on behalf of the citizens of Santa Clara County, all of whom will be harmed by RESPONDENTS' improper actions as complained of herein.

8. PETITIONER, acting either directly or through its members and authorized representatives, submitted written and oral comments to RESPONDENTS objecting to the actions complained of herein, and specifically to RESPONDENTS' improper granting of LNCU status to the PROJECT as set forth herein.

9. This action is for the purpose of enforcing important public rights and policies of the State of California. It is brought to ensure that the approvals granted by RESPONDENTS are made in conformance with the Santa Clara County zoning ordinance and those of SMARA. The prosecution of this action will confer a substantial benefit on members of the public, and specifically on citizens of Santa Clara County and surrounding areas by enforcing the policies

contained in the Santa Clara County zoning ordinance and SMARA that are intended to protect the public and the environment.

10. Neither PETITIONER nor its members will receive any special financial benefit from the successful prosecution of this action, although PETITIONER is assuming a significant financial burden in prosecuting the action. In this action, PETITIONER is acting as a private attorney general to protect these public rights and policies and prevent such harms. As such, PETITIONER is entitled to recover its reasonable attorneys' fees under C.C.P. §1021.5.

11. Respondent SANTA CLARA COUNTY (hereinafter "COUNTY") is a legal subdivision of the State of California established and operating under its laws and the laws of the State of California. COUNTY is responsible for adopting and enforcing a zoning ordinance governing uses in the unincorporated areas the County. COUNTY is further responsible, under SMARA, for ensuring that all approvals for surface mining and reclamation activities within Santa Clara County fully comply with the provisions of SMARA.

12. Respondent SANTA CLARA COUNTY BOARD OF SUPERVISORS (hereinafter, "BOARD") is the duly elected legislative and governing body for the COUNTY. BOARD is responsible for enacting and maintaining the Santa Clara County zoning ordinance and for ensuring that all land use approvals that it gives are made in accordance with that ordinance. BOARD is also responsible for administering and enforcing the provisions of SMARA within Santa Clara County.

13. The true names and capacities of DOES 1-20 are unknown to PETITIONER at this time; however PETITIONER alleges, based on information and belief, that each party named as DOE is responsible for the acts and omissions of each of the other respondents and defendants. Therefore PETITIONER sues such Parties by such fictitious names, and will ask leave of the Court to amend this Petition by inserting the true names and capacities of said Does when ascertained.

14. PETITIONER is informed and believes, and on that basis alleges that: 1) Real Party in Interest LEHIGH SOUTHWEST CEMENT COMPANY (hereinafter "LEHIGH") is a for-profit corporation, established and operating under the laws of the State of California; 2) LEHIGH is a

wholly-owned subsidiary of the Lehigh Cement Company, a Pennsylvania corporation, which, in turn, is a subsidiary of Heidelburg Cement, a German corporation; 3) LEHIGH operates the Permanente Quarry in unincorporated Santa Clara County and is the applicant for the approvals granted by RESPONDENTS.

15. PETITIONER is informed and believes, and on that basis alleges that: 1) HANSON PERMANENTE CEMENT, INC. ("HANSON") is an Arizona for-profit corporation; 2) HANSON is the owner of the Permanente Quarry, and agreed to, supported, and cooperated with LEHIGH in the application to RESPONDENTS for LNCU status for the PROJECT.

16. The true names and capacities of DOES 21-40 are unknown to PETITIONER at this time; however PETITIONER alleges, based on information and belief, that each such party named as DOE has some interest in the subject matter of this action. Therefore PETITIONER sues such Parties by such fictitious names, and will ask leave of the Court to amend this Petition by inserting the true names and capacities of said Does when ascertained.

STATEMENT OF FACTS

I. PROJECT LOCATION AND CHARACTERISTICS

17. The Permanente Quarry[1] ("Quarry") is an approximately 3,510 acre property located in unincorporated Santa Clara County, just west of the western boundary of the City of Cupertino. The Quarry has long been recognized as containing significant mineral resources, including deposits of limestone, used in the manufacture of cement. The limestone contained in Permanente Quarry has, as its major component, Calcium Carbonate. As such, it has been mined from some portions of the Quarry since the early part of the 20th Century. It also includes smaller amounts of various toxic impurities, including Chromium and Mercury. Portions of the Quarry have also been used for numerous other uses and activities, including manufacturing, materials storage, mining waste disposal, and offices uses. Some of these uses may have been related to the use of the site as a mining location, but none of the non-mining uses were or are so

[1] The designation of this group of parcels as "Permanente Quarry" simply conforms to the common designation of the overall Project site, and does not indicate acceptance that any specific portions of the site are used for or are legally authorized for use as a quarry.

necessarily related to the mining uses as to be integral to the site's use as a mine and to necessitate their location on the Quarry site.

II. HISTORY OF USE OF PERMANENTE QUARRY

18. As noted in Paragraph 17, *supra*, mining began in parts of the Quarry early in the 20th Century, in or about 1903[1]. At that time, only a very limited portion of the Quarry was in active use for mining. Over time, the portion of the site involved in mining gradually expanded. As of 1930, mining was occurring in portions of two sections, each containing a total of 640 acres. During the period from 1903 to 1930, there were also intermittent periods when no mining occurred, including periods prior to 1921 and periods around 1930. During most of the 1930s, the active quarry was owned and operated by the Santa Clara Holding Company.

19. In or about 1939, the active quarry area was purchased by the Permanente Corporation ("Permanente"). The total land purchased at that time was approximately 1,500 acres.

20. From 1939 to 1948, additional parcels were purchased by Permanente.

21. The parcels were used by Permanente for a variety of uses. In particular, in or about 1939, Permanente applied for and received a use permit to build and operate a cement factory on portions of its Quarry property. The cement factory was a separate and distinct activity from the mining operation, although both were carried out by the same company. In or about 1943, Permanente changed its name to Permanente Cement Company.

22 Beginning shortly after the initial acquisition of portions of the Quarry by Permanente, it began transferring title to some portions of the Quarry to Todd California Shipbuilding Company, which, in or about 1941, became Permanente Metals Corporation. Over the course of time, Permanente Metals Company acquired more property, both from Permanente and from other nearby property owners. Initially, Permanente Metals Corporation constructed magnesium manufacturing facilities on its property. Later, it shifted its focus to aluminum manufacturing, and in or about 1949 it changes its name to Kaiser Aluminum and Chemical Corporation ("Kaiser Aluminum") and shifted its manufacturing activities to production of aluminum foil,

[1] At that time, it was known as the El Dorado Sugar Company Quarry.

including facilities on its land within the Quarry. Kaiser Aluminum continued using its quarry land for aluminum-related manufacturing, research, and development until at least the 1980s.

23. In or about 1986, the Hanson Building Materials Company, America ("Hanson America") acquired Permanente Cement Company, including its holdings at the Quarry. In or about 1995, Hanson America acquired Kaiser Aluminum's holdings at the Quarry. Then, in or about 2006, Hanson America, along with other parts of its parent company, Hanson, PLC, was acquired by Heidelberg Cement Company.

III. THE COUNTY'S REGULATION OF SURFACE MINING

24. Up until 1937, the COUNTY did not regulate surface mining.

25. On August 25, 1937, the COUNTY adopted a zoning ordinance ("1937 Zoning") that, in Section 12(a)(3), required a use permit for commercially excavating natural materials within one thousand (1000) feet of any public street in the A-1 zoning district.

26. The 1937 Zoning also required a use permit for any mining operation in the A-2 (suburban agriculture) zoning district.

27. The 1937 Zoning designated the entire Quarry area as being in the A-1 zoning district.

28. Permanente Road, a street that passes through the Quarry area, was dedicated to the public in 1893.

29. Although Permanente Road was apparently blocked to full public access beginning in 1935, the COUNTY never took the required formal action to vacate or abandon any segment of Permanente Road in the vicinity of the Quarry.

30. In 1947, the COUNTY adopted zoning ordinance amendments ("1947 Zoning Amendments") that revised the allowed uses in the A-1 zoning district. The 1947 Zoning Amendments provides that the A-1 zoning district allowed by right, "All uses permitted [by right] in any "H", "R" or "C" District." It also allowed, "All uses not otherwise prohibited by law, including the following, upon the securing of a use permit in each case."

31. Under the 1947 Zoning Amendments, none of the "H", "R" or "C" districts allowed surface mining except with a use permit.

32. As of 1948, when the 1947 Zoning Amendments took effect, large portions of the Quarry remained untouched by mining operations, with no objectively manifest intent shown by Permanente Cement Company, the owner and operator of mining operations at the Quarry, that it intended to expand its mining operations into those areas.

33. In 1955, the central portion of the Quarry property was rezoned to "A-2" (Suburban Agricultural). As of that date, the A-2 zoning district required, and has continued to require up through the present date, a use permit for mining operations.

34. In 1960, the COUNTY revised its zoning ordinance to eliminate the A-1 zoning district. All properties then zoned A-1 were, by default, rezoned to A-2.

35. From 1960 through the present, all areas of the Quarry have been in zoning districts requiring a use permit for mining operations.

36. At all relevant times subsequent to the COUNTY's adoption of the 1937 Zoning, the requirements for issuance of a use permit under COUNTY's zoning ordinance have included that, in granting a use permit, the COUNTY adopt findings that the proposed use, as conditioned, would not be detrimental to the health, safety, or welfare of persons working or residing in the vicinity of the proposed use, or to the public welfare.

37. At no time from the initiation of mining operations at the Quarry to the present has any of the owners or operators of the Quarry applied for and received a use permit for mining operations in any portion of the Quarry.

IV. RECLAMATION PLANS FOR THE QUARRY,

38. In 1985, pursuant to SMARA, the COUNTY, through its planning commission, adopted reclamation plan #2250-13-66-84P for portions of the Quarry. The reclamation plan covered 330 acres of the Quarry. In conjunction with the approval of the reclamation plan, COUNTY staff made clear that the approval was only for plans to reclaim the site once mining had ceased, and did not address the operation of the mine while active.

39. Between 1987 and 2001, there were a series of landslides within the Quarry in areas involved in mining. Because of these problems, HANSON, in 2002, proposed to the state Office of Mining and Reclamation ("OMR") that it (HANSON) conduct emergency repairs at the

Quarry. In response, the COUNTY determined that an amendment to the reclamation plan was required.

40. In September 2006, based on site inspections, OMR issued a Notice of Violation against LEHIGH. That was followed, in October 2006, by a Notice of Violation issued by the COUNTY. Among other things, the Notice of Violation identified areas outside of the area covered by the approved reclamation plan where mining was apparently occurring.

41. While LEHIGH has submitted a revised reclamation plan to the County, and the Notice of Violation was rescinded in 2008, LEHIGH has not yet achieved full compliance with SMARA or OMR's orders, and the Environmental Impact Report for the COUNTY's consideration of the revised reclamation plan is still in preparation, contrary to the schedule that OMR issued in 2008.

42. OMR also issued a separate Notice of Violation against LEHIGH in June of 2008 regarding the dumping of mining waste materials in the East Material Storage Area ("EMSA"). LEHIGH's proposed reclamation plan for that area is also still undergoing administrative review and has not been approved by either OMR or the COUNTY.

V. THE COUNTY'S ADMINISTRATIVE PROCEEDINGS FOR DETERMINING THAT LEHIGH'S MINING OPERATIONS IN THE QUARRY QUALIFIED AS A LNCU.

43. On or about November 25, 2010, LEHIGH sent a letter to the COUNTY requesting that COUNTY grant LNCU status to the entirety of LEHIGH's ongoing operations in the Quarry, and specifically for all mining operations involving Lots 1, 2, 3, 5, 6, 7, 8, ,9, 11, 14, 15, 16, and 17. LEHIGH included with that letter documents which it asserted supported its request.

44. On or about February 8, 2011, Respondent BOARD held a noticed public hearing on whether and to what extent LEHIGH's operation of mining operations in the Quarry qualified as a LNCU under the COUNTY's zoning ordinance and hence as a vested use under SMARA.

45. Prior to and at that hearing, PETITIONER, its members, COUNTY staff, other public agencies, and members of the public submitted oral and written testimony and evidence on the legal and factual issues involved in the BOARD'S determination. In particular, PETITIONER, through its members and authorized representatives, submitted oral and written evidence in

opposition to RESPONDENTS granting LNCU status to the vast majority of LEHIGH's mining operation in the Quarry, and specifically to LEHIGH's request for LNCU status for mining operations on Lots 11, 14, 15, 16, 17, as well as those portions of Lots 1, 2, 3, 5, 6, 7, 8 and 9 that lie within 1000 feet of Permanente Road. COUNTY staff also submitted oral and written testimony and evidence indicating that large portions of the area for which LEHIGH had requested LNCU status did not qualify for that status. COUNTY staff, in its staff report prepared for the hearing, recommended, based on the available evidence, that the BOARD deny LNCU status for large portions of the area for which LEHIGH had requested LNCU status.

46. After closing the public hearing, the BOARD gave preliminary approval to granting LNCU status for all of the areas that LEHIGH had requested, including specifically Lots 1, 2, 3, 5, 6, 7, 8, ,9, 11, 14, 15, 16, and 17. The BOARD directed COUNTY staff to return on March 1, 2011 with detailed finding in support of this approval.

47. On or about March 1, 2011, COUNTY staff, in accordance with the BOARD'S direction, presented a set of findings purporting to provide evidentiary and legal support for approving LNCU status to the parcels listed in Paragraph 46, *supra*. The BOARD then gave final approval to its determination of LNCU status for all those lots, along with the supporting findings.

PRELIMINARY ALLEGATIONS

48. PETITIONER has exhausted any and all available administrative remedies to the extent required by law. PETITIONER has raised its concerns and objections through both oral and written testimony throughout the administrative process. Copies of letters submitted on behalf of PETITIONER are attached hereto as Exhibit A and are incorporated herein by this reference.

49. PETITIONER has no plain, speedy or adequate remedy in the ordinary course of law unless the Court grants the requested writ of mandate and, if necessary, injunctive relief requiring RESPONDENTS to rescind their improper and illegal approval for the PROJECT. In the absence of such relief, PETITIONER, its members, and the public will suffer irreparable harm from the continued illegal operation of the PROJECT, and from acts undertaken in furtherance thereof. The harms involved include any and/or all of the following: a) the continued operation of the PROJECT under conditions that involve the release into the

environment of substances that are toxic and/or harmful to people, plants, animals, and/or the environment, and specifically mercury and mercury-containing materials; b) the continued operation of the PROJECT indefinitely into the future without the COUNTY's consideration or granting of a use permit, including the protections for the health, safety, and welfare of nearby residents, workers, the public, and the environment provided under such a use permit and the required accompanying conditions and findings; c) that the PROJECT's operations would not be subject to regulation under SMARA, including specifically the requirements that it operate under an approved reclamation plan with the protections to the public and the environment that would be provided thereby; d) that the COUNTY would have little legal recourse, and no legal obligation, to abate injuries to the public consequent from the continued operation of the PROJECT as a legal nonconforming use.

50. PETITIONERS have complied with C.C.P. §388 by providing notice and a copy of this petition to the California Attorney General. A copy of said notice, with proof of service, is attached hereto as Exhibit B.

51. Pursuant to Code of Civil Procedure §1094.5(a), PETITIONER is submitting herewith the portions of the Administrative Record of Proceedings before RESPONDENTS in this matter that have been made available to PETITIONER by RESPONDENTS. PETITIONER reserves the right to supplement this Record of Proceedings with additional materials that may be made available by RESPONDENTS or otherwise become available to PETITIONER after the filing of this action.

CHARGING ALLEGATIONS

FIRST CAUSE OF ACTION

(Improper determination that REAL PARTIES' mining uses in the Quarry qualified as a LNCU under the COUNTY's zoning ordinance.)

52. PETITIONER hereby realleges and incorporates by reference the allegations contained in paragraphs 1 through 51, inclusive.

53. Under the current Santa Clara County Zoning Ordinance, commercial surface mining operations in any part of the county, if allowed at all, are only allowed pursuant to a conditional

use permit, except if the mining operation is exempted from this requirement as a vested legal nonconforming use.

54. In order to qualify as a vested legal nonconforming use in an area, a commercial surface mining operation would need to either have been in operation in that area, with no continuous cessation of use of twelve months or more, since prior to the COUNTY's regulation of surface mining in the area, or to have objectively manifested an intent to expand the mining operation into the area prior to the COUNTY's regulation of surface mining in the area.

55. In determining that REAL PARTIES' mining operations on the totality of Lots 1, 2, 3, 5, 6, 7, 8, 9, 11, 14, 15, 16, and 17 of the Quarry qualified as a vested LNCU, RESPONDENTS abused their discretion in that the determination was not supported by substantial evidence in the record before RESPONDENTS. In fact, the only substantial evidence before RESPONDENTS demonstrated, under the COUNTY's zoning ordinance, that large portions of the PROJECT, including portions for which RESPONDENTS granted LNCU status to REAL PARTIES' surface mining activities, did not qualify for allowing surface mining as a vested LNCU.

SECOND CAUSE OF ACTION

(Violation of zoning ordinance - Inadequate Findings.)

56. PETITIONER hereby realleges and incorporates by reference the allegations contained in paragraphs 1 through 55, inclusive.

57. In determining that REAL PARTIES' mining operations on the totality of Lots 1, 2, 3, 5, 6, 7, 8, 9, 11, 14, 15, 16, and 17 of the Quarry qualified as LNCU, the BOARD adopted a set of findings of fact and conclusions of law purporting to support that determination.

58. The findings of fact adopted by RESPONDENTS were invalid because they did not support RESPONDENTS approval of the grant of LNCU status and/or they were not supported by substantial evidence in the record before RESPONDENTS.

59. The conclusions of law adopted by RESPONDENTS were invalid because they were not correct or accurate statements of the governing law.

60. For all the above reasons, RESPONDENTS' action in adopting findings purporting to support RESPONDENTS' approval of REAL PARTIES' uses within the Quarry, as described above, as a vested LNCU was invalid and an abuse of discretion, and therefore must be set aside.

THIRD CAUSE OF ACTION

(Violation of SMARA – RESPONDENTS' determination that LEHIGH's current mining operations qualified as a vested use was an abuse of discretion)

61. PETITIONERS hereby reallege and incorporate by reference the allegations contained in paragraphs 1 through 60, inclusive.

62. Under §§2770 and 2776 of SMARA, surface mining operations may not be undertaken without first obtaining a permit for such operations from the lead agency under SMARA, unless the mining operations qualified as a vested right as of January 1, 1976.

63. Under SMARA, the COUNTY is the lead agency for issuance of permits and approval of reclamation plans for mining operations within Santa Clara County.

64. In order to have a vested right for mining operations within Santa Clara County, a mining operator would need to either possess a valid use permit from the COUNTY for such operations under the COUNTY's zoning ordinance or to qualify as a LNCU under the zoning ordinance.

65. RESPONDENTS' action in determining that the totality of Lots 1, 2, 3, 5, 6, 7, 8, 9, 11, 14, 15, 16, and 17 of the Quarry had vested mining rights under SMARA was improper and a violation of SMARA because it was contrary to the requirements of COUNTY's zoning ordinance and was not supported by substantial evidence in the administrative record.

FOURTH CAUSE OF ACTION

(Declaratory Relief.)

66. PETITIONER hereby realleges and incorporates by reference the allegations contained in paragraphs 1 through 65, inclusive.

67. An actual controversy and dispute exists between PETITIONER on the one hand and RESPONDENTS and REAL PARTIES on the other hand regarding the propriety of RESPONDENTS' approval of legal nonconforming use status for the entirety of the PROJECT.

68. PETITIONER alleges that RESPONDENTS' approval of LNCU status for all portions of the PROJECT requested by LEHIGH was improper and invalid, while PETITIONER is

informed and believes, and on that basis alleges, that RESPONDENTS and REAL PARTIES believe that the PROJECT approval was fully legal and valid.

69. PETITIONER seeks a judicial declaration that approval of LNCU status for the entirety of the PROJECT was improper and invalid. PETITIONER further seeks a judicial declaration of the proper criteria for determining what areas, if any, would qualify for LNCU status.

70. An actual controversy and dispute exists between PETITIONER on the one hand and RESPONDENTS and REAL PARTIES on the other hand regarding the validity of the findings adopted by RESPONDENTS in support of their approval of LNCU status for the PROJECT.

71. PETITIONER alleges that the findings adopted in support of RESPONDENT's approval of LNCU status for the PROJECT were legally inadequate, while PETITIONER is informed and believes, and on that basis alleges, that RESPONDENTS and REAL PARTIES believe that the findings were legally adequate.

72. PETITIONER seeks a judicial declaration that the findings adopted by RESPONDENTS in support of their grant of legal nonconforming use status to the PROJECT are inadequate and legally invalid. PETITIONER further seeks a judicial declaration of the proper criteria for findings to support the granting of LNCU status to surface mining operations within Santa Clara County.

73. An actual controversy and dispute exists between PETITIONER on the one hand and RESPONDENTS and REAL PARTIES on the other hand regarding RESPONDENTS' determination that the entirety of REAL PARTIES' surface mining activities at the Permanente Quarry qualify as a vested right under SMARA.

74. PETITIONER alleges that the entirety of REAL PARTIES' surface mining activities at the Permanente Quarry do not qualify as a vested right under SMARA, while PETITIONER is informed and believes, and on that basis alleges, that RESPONDENTS and REAL PARTIES believes that the entirety of REAL PARTIES' surface mining activities at the Permanente Quarry qualify as a vested right under SMARA.

75. PETITIONER seeks a judicial declaration that not all of REAL PARTIES' surface mining activities at the Permanente Quarry qualify as a vested right under SMARA.

PETITIONER further seeks a judicial declaration of the requirements for surface mining activities at the Permanente Quarry to qualify as vested rights under SMARA.

PRAYER FOR RELIEF

WHEREFORE, PETITIONER prays for relief as follows:

1. For this Court's peremptory writ of mandate directing RESPONDENTS to set aside and vacate their granting of legal nonconforming use status to the PROJECT;

2. For this Court's peremptory writ of mandate directing RESPONDENTS to, in taking any further actions to consider said project, use proper legal criteria and substantial evidence in the record before them in making any determination of whether REAL PARTIES' surface mining operations over portions of the Project qualify as a vested legal nonconforming use;

3. For this Court's declaration:

   a. that the PROJECT approval, and its supporting findings were improper and invalid;

   b. of the proper criteria for determining what areas, if any, would qualify for LNCU status;

   c. that the findings adopted by RESPONDENTS in support of their grant of legal nonconforming use status to the PROJECT were inadequate and legally invalid;

   d. of the proper criteria for findings to support the granting of LNCU status to surface mining operations within Santa Clara County;

   e. that REAL PARTIES' surface mining activities at the Permanente Quarry do not generally qualify as a vested right under SMARA;

   f. of the requirements for surface mining activities at the Permanente Quarry to qualify as vested rights under SMARA.

4. For this Court's temporary restraining order, preliminary and permanent injunctions restraining RESPONDENTS and REAL PARTIES, their agents, employees, servants, officers, assigns any those acting in concert with them from undertaking any further mining activities, issuing any approvals or permits, or taking any other action in reliance upon RESPONDENTS' approvals at issue herein, pending this Court's final determination and the entry of a final judgment in this case.

4. For an award of reasonable attorney's fees under Code of Civil Procedure section 1021.5 or as otherwise authorized by law;

5. For costs of suit incurred herein; and

6. For such other and further equitable or legal relief as the Court deems just and proper.

Dated: May 27, 2011

Stuart M. Flashman
Attorney for Petitioner No Toxic Air

VERIFICATION

I am the attorney for No Toxic air, Inc., which is the petitioner and plaintiff in this action and has authorized me to sign this verification on its behalf. None of the officers of No Toxic Air, Inc. are located within Alameda County, where I have my offices. They are therefore unavailable to sign this declaration. I have read the foregoing Petition and Complaint and am familiar with the matters alleged therein. I am informed and believe that the matters therein are true and on that ground allege that the matters stated therein are true. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Verification was executed on May 27, 2011 at Oakland, California.

Stuart M. Flashman

Exhibit A

SHUTE, MIHALY
& WEINBERGER LLP

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FRAN M. LAYTON
Attorney
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February 4, 2011

Via Electronic Mail

Honorable Chair and Members of the
Santa Clara County Board of Supervisors
70 West Hedding Street
10th Floor, East Wing
San Jose, CA 95110

Dear Members of the Board of Supervisors:

Re: February 8, 2011 Hearing to Consider Permanente Quarry/Lehigh Southwest Cement Company's Vested Rights Claim

This firm represents No Toxic Air in regard to Santa Clara County's determination of the nature and extent of vested rights at the Permanente Quarry owned by Hanson Permanente Cement, Inc. and operated by Lehigh Southwest Cement Company (collectively, "Lehigh"). As detailed below, Lehigh's claim regarding the extent of its legal nonconforming use ("vested rights") is legally deficient. Lehigh bears the burden of proof to demonstrate that it has a vested right to mine the vast areas at issue in this proceeding, a burden Lehigh plainly fails to satisfy. Accordingly, the County's vested rights determination must be strictly limited to only those areas of the quarry where Lehigh can unequivocally demonstrate that it has a right to mine without complying with the myriad of zoning ordinances enacted to protect public health and safety.

I. Background

Lehigh has submitted applications for two Reclamation Plan Amendments pursuant to the state Surface Mining and Reclamation Act ("SMARA"), Pub. Res. Code § 2710 *et seq*. As part of its review, the Santa Clara County Board of Supervisors ("the Board") must determine whether Lehigh has a vested right to mine within the area encompassed by the Reclamation Plan Amendments. This vested rights determination

turns on the extent to which Lehigh's operations constitute a legal nonconforming use of its property.[1]

A legal nonconforming use is established if the use complied with all zoning requirements in existence at the time the use began, and the use has continued subsequent to the enactment of zoning regulations prohibiting the use. *See Hansen Brothers Enterprises, Inc v. Board of Supervisors of Nevada County* (1996) 12 Cal.4th 533, 579. Generally, landowners acquire vested rights to continue their legal nonconforming uses only to the extent that they engage in those uses continuously after a restrictive zoning ordinance takes effect. Because zoning laws are intended to eliminate nonconforming uses, courts "generally follow a strict policy against [the] extension or enlargement" of nonconforming uses. *County of San Diego v. McClurken* (1951) 37 Cal.2d 683, 687; *see also City of Los Angeles v. Wolfe* (1971) 6 Cal.3d 326, 337 ("The policy of the law is for elimination of nonconforming uses . . . .").

Lehigh asserts a vested right to mine Lots 14 and 15 ("the 1942 Morris parcels"); Lot 11 ("the 1943 Crocker parcel"); and the East Materials Storage Area ("EMSA"), which encompasses parts of Lots 16 and 17. It admits that it has not used three parcels—Lot 10 purchased from Hart and Scully in 1965, Lot 12 purchased from Campell in 1968, and Lot 13 purchased from Barnard in 1979—for mining and that it must obtain a Conditional Use Permit ("CUP") from the County for any such use in the future. Letter from Mark D. Harrison to Lizanne Reynolds, dated Jan. 4, 2011 ("January 4 Letter") at 1. Lehigh provides no details about the historic and geographic extent of mining activities on other parcels that fall within its Reclamation Plan Amendment applications, including Lots 1, 3, 4, 6, 7, and 9.

II. The Decision in *Hansen Brothers v. Nevada County* Does Not Support the Finding of a Vested Right to Mine the Morris, Crocker, or EMSA Parcels.

In *Hansen Brothers v. Nevada County*, the California Supreme Court recognized the diminishing assets doctrine with respect to vested rights to mine property. Before a party may obtain a vested right to mine a property, it bears the burden of proving that it was engaged in mining operations at the time that regulations restricting the ability to mine went into effect. *Hansen*, 12 Cal.4th at 564. That vested right extends

[1] All references to Lehigh's property refer to its current, 3,510-acre holding. *See* Letter from Mark D. Harrison to Lizanne Reynolds, dated Jan. 4, 2011 at 1.

"to those other areas of the property. . . into which the owners had then objectively manifested an intent to mine in the future." *Id.* at 542. If the property was under other ownership on the vesting date, the party seeking the vested right must demonstrate the then-owner's use or intent on the vesting date. *Id.* at 564. In addition, only a use that "constitutes an integral part of the operation" can be part of the legal nonconforming use. *Id.* at 555.

The determination of vested rights turns on the date on which a zoning ordinance first restricted the use at issue and on evidence of use, or objective intent to use, as of that vesting date. As detailed below, Lehigh has shown neither use nor intent as of the vesting date for the Morris parcels, the Crocker parcel, the EMSA area, or, indeed, many other parts of the property for which it asserts a vested right.

A. Vesting Dates

In 1937, County zoning law first restricted mining within 1,000 feet or less of a public road. In 1948, the County required a use permit to mine in any zoning district where mining is a permitted use. As detailed below, No Toxic Air disagrees with Lehigh's—and a portion of County Staff's—contentions regarding the vesting dates governing this proceeding.

Lehigh contends that no County zoning ordinance required a use permit for mining operations on the property until 1960, although it also states that its analysis would not change for a vesting date of 1948. January 4 Letter at 24. County Staff recommends that the 1948 vesting date apply to the entire property, based on its conclusion that Permanente Road no longer functioned as a public street as of approximately 1935. Board of Supervisors' Agenda, Feb. 8, 2011, Item 27. As set forth below, this misconstrues California law regarding abandonment of public roads. Permanente Road remained legally—even if not physically—open to the public for purposes of the 1937 zoning ordinance.

1. <u>The 1937 Zoning Ordinance</u>

Santa Clara County's first zoning ordinance took effect on September 24, 1937. This ordinance prohibited "[c]ommercial excavating of natural materials within a distance of one thousand (1000) feet from any public street" in the A-1 district, which included the current Lehigh property. Ord. No. 120 § 12, Ex. A. It defined 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." *Id.* § 11. Accordingly, to the extent that Lehigh asserts a vested right to mine within 1,000 feet of a road that was public in 1937, it must show that the owner of the relevant parcel used that land, or exhibited the objective intent to use it, for mining purposes on or before September 24, 1937.

Lehigh contends that Permanente Road was not a public street in 1937, and, as a result, the 1937 zoning ordinance did not prohibit its mining activities within 1,000 feet of the road. Permanente Road was dedicated to public use in 1893 and the County has never disclaimed or otherwise abandoned it. "Consent, dedication and grant for Permanente Road" from Alice H. Swain et al to Santa Clara County (May 19, 1893), County Recorder, 170 O.R. 10, Ex. B. Once dedicated to the County as a public right of way, a road continues to be public until abandoned. *See People ex rel. Dept. Pub. Wks. v. Volz* (1972) 25 Cal.App.3d 480, 489 ("When a street or road easement has been created by dedication or deed, it does not die through disuse . . . . In order to guard against street closures favoring private interests a general rule requires the city or county to resort to statutory abandonment formalities . . . ." (citations omitted)). California law provides for only three ways in which a county may abandon a public road: by order of the county board of supervisors, by judgment of a court of competent jurisdiction, or "by operation of law." Cal. Sts. & Hy. Code § 901. Neither the Board of Supervisors nor a court has ever directed that the road be abandoned. County of Santa Clara Department of Planning and Development, Permanente Quarry Legal Nonconforming Use Analysis dated January 27, 2011 ("County Staff Report") at 21.

Abandonment "by operation of law" requires, at a minimum, that the local legislative body intend to abandon the roadway. In *Humboldt County v. Van Duzer* (1920) 48 Cal. App. 640, 644-46, the court found that the actions of a private ferry operator who stopped using and then fenced off a public city street were insufficient to terminate the public right of way, since there had been no acts by the city authority that could constitute abandonment: "To effect an abandonment of an easement or public use of property acquired by grant to the public authorities, the intention to abandon must be clearly manifest. Mere nonuser of an easement acquired by grant does not amount to an abandonment." The California Supreme Court went even further in *San Diego County. v. California Water & Telephone Co*mpany, (1947) 30 Cal. 2d 817, 822-24, and found that a county could abandon a public road only through the affirmative action of its board of supervisors. And as noted more recently in another mining case, "[t]he general rule is: Once a highway, always a highway. Therefore, the burden of proof is on the party contending a highway no longer exists." *Western Aggregates, Inc. v. County of Yuba*

(2002) 101 Cal.App.4th 278, 304-05 (quotation and citation omitted). Accordingly, Lehigh must, at a bare minimum, provide evidence of the County's intent to abandon Permanente Road if it is to argue that the 1937 zoning ordinance does not apply to its property. It has proffered no such evidence.

County Staff conducted an "exhaustive" investigation of records regarding Permanente Road and found no evidence of any action or intent by the County to abandon it, even though "the County regularly accepted and abandoned public roads during this time period." County Staff Report at 21 n.98. Staff also asked Lehigh to provide any such evidence, which it failed to do. *Id.* Lehigh contends that Permanente Road functioned as a private access road prior to enactment of the 1937 zoning ordinance. It bases this argument in part on minutes from a pair of 1935 meetings of the Board of Supervisors, which note protests regarding a gate across an unspecified stretch of Permanente Road and a statement by the county surveyor that the protested gate "was not across a county road." Minutes of September 15 and 21, 1935 Board of Supervisors Meetings, Ex. C. Lehigh also relies on the County's consideration of Kaiser's 1939 permit application for the cement plant that stated that "[t]here are no streets upon the property . . . ." January 4 letter at 30. Even if some portion of Permanente Road was closed to public access in 1935, however, it remained a legally public road deeded to the County. Despite extensive research, neither Lehigh nor the County has uncovered any evidence that the County intended to abandon the road, and so the road remained public for purposes of the 1937 zoning ordinance.

In addition, and as County Staff has noted, the eastern portion of EMSA lies within 1,000 feet of a portion of Permanente Road that remains open to the public and is now named Stevens Creek Road. *See* County Staff Report at 22; Ex. D.

2. The 1948 Zoning Ordinance

The County amended its zoning ordinance on December 29, 1947 to require a use permit for "[c]ommercial excavating of natural materials used for building or construction purposes, in any district."[2] Ord. No. 345 § 35.4, Ex. E. The 1948 zoning ordinance also amended regulations governing the property's A-1 district to allow "[a]ll

[2] This ordinance took effect 30 days after passage, or on January 28, 1948. *See* Ord. No. 345 (Dec. 29, 1947), Ex. E. Accordingly, this memorandum refers to "the 1948 zoning ordinance."

uses permitted in any 'H', 'R' or 'C' District" as of right. *Id.* § 12.2. The H, R, and C districts do not allow excavation, quarrying, or mining absent a conditional use permit. *See* Ord. No. 120 §§ 14-21 (Aug. 25, 1937), Ex. A. Even the C-2 district, which allowed "[a]ll uses not otherwise prohibited by law," made "[c]ommercial excavating of building or construction materials, subject to the securing of a user permit in each case . . . ." *Id.* §§21(a)(3), 22(a). Thus, the 1948 zoning ordinance required a use permit for all quarrying and mining operations in the Quarry property's A-1 designation. As a result, Lehigh must demonstrate use or objective intent to use all property for which it asserts vested rights on or before January 28, 1948.

B. Analysis of Vested Rights

Both County Staff and Lehigh focus their analyses on vested rights to mine the Morris and Crocker parcels and EMSA. However, Lehigh bears the same burden of proof for the entire area for which it asserts a vested right. The state Supreme Court highlighted the extent of this burden in *Hansen*:

> A vested right to quarry or excavate the entire area of a parcel on which the nonconforming use is recognized requires more than the use of a *part* of the property for that purpose when the zoning law becomes effective, however. In addition there must be evidence that the owner or operator at the time the use became nonconforming had exhibited an intent to extend the use to the *entire* property owned at that time.

Hansen, 12 Cal. 4th at 555-56 (emphasis added). Accordingly, the County's analysis must extend to the entire area for which Lehigh asserts vested rights.

Neither Lehigh nor the County provides detailed information about ownership or use of the property prior to 1939. By January 1948, Kaiser owned: the land it originally purchased from the Santa Clara Holding Company in 1939 (Lots 1, 3, 6, 7, 9, and parts of 16);[3] the 1942 Morris parcels (Lots 14 and 15); the 1943 Crocker parcel (Lot 11); and

[3] Kaiser transferred portions of these parcels to the Permanente Metals Corporation and Todd-California Shipbuilding Corporation in 1941 and 1942. Because any vested right runs with the land, this analysis considers use of EMSA by its then-owner during the relevant time periods, whether that owner was Kaiser, Permanente Metals, or another entity. *See Hansen*, 12 Cal. 4th at 561 (finding that quarry owner (footnote continued)

several parcels that it purchased from the Roman Catholic Archbishop of San Francisco in 1941 and 1942 (Lots 2, 5, 8, and 17). Different portions of these parcels have different vesting dates depending on their proximity to Permanente and Stevens Creek Roads. Each also has its own history of mining-related exploration and use, if any.

1. Land within 1,000 feet of a public road

Lehigh asserts a vested right to mine land within 1,000 feet of a road that was public in 1937, including portions of each of Lots 5 through 9, 11, and 15 through 17. *See* Ex. F. Nonetheless, it provides no evidence of the location or geographic extent of mining operations prior to Henry J. Kaiser Company's 1939 purchase. The County cannot grant Lehigh a vested right to mine unless and until Lehigh provides the required evidence. In *Hansen*, the court rejected a quarry's assertion of vested rights across the majority of its property based on a similarly thin record:

> The record does not confirm that all of the parcels, over which Hansen Brothers claimed vested mining rights in its SMARA application, were part of the Bear's Elbow Mine in 1946 or 1954. The record is also devoid of evidence that the owners of those parcels themselves held vested mining rights in the transferred property at the time they were deeded to Hansen Brothers.

Hansen, 12 Cal. 4th at 561. Here, both the County and Lehigh provide reports from the State Mining Bureau dating to 1906, 1921, and 1930. These reports describe mining on or near the property in general terms. *See, e.g.*, Cal. State Mining Bureau, The Structural and Industrial Materials of California, Bulletin No. 38, p. 82 (Jan. 1906), Ex. G ("The stone has been quarried in several places. The present workings on the east side of the cañon near the base of the mountain have a face of about 35 or 36 feet . . . ."). These general references, however, are wholly insufficient to carry Lehigh's burden of demonstrating activity within 1,000 feet of Permanente Road or intent to mine there as of September 24, 1937.

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failed to show mining use of or intent to mine property under other ownership on vesting date). Regardless of ownership, Lehigh bears the same heavy burden of demonstrating actual use or objective intent to use all land for which it asserts a vested right to mine on or before January 28, 1948.

Lehigh also cites a 1939 report in support of its assertion of a vested right to mine near Permanente Road. See January 4 Letter at 8. However, this report, dated June 18, 1939, postdates the relevant zoning regulation by two years and provides no evidence regarding use by the previous owner. Similarly, arguments that Kaiser purchased much of the current property in 1939 with an intent to expand its operations are irrelevant to the pre-1939 analysis, as the legal nonconforming use runs with the land and must be established with respect to the owner at the time the regulation took effect. *Hansen*, 12 Cal. 4th at 564. Accordingly, Lehigh has not met its burden of demonstrating a vested right to mine any land that lies within 1,000 feet of a road that was public in 1937, including Permanente Road. Consistent with the California Supreme Court's refusal to find a vested right favoring Hansen Brothers and its remand of the case for further evidentiary hearings, the Board should not grant a vested right to mine these areas absent the required showing.

The same analysis applies to the eastern portion of EMSA that lies 1,000 feet or less from Stevens Creek Road. *See* Ex. D. The County Geologist found no evidence of mining-related disturbance in this portion of the EMSA area at any time, much less in 1937. Memorandum from James Baker, County Geologist, to Jody Hall Esser, Director, Department of Planning and Development dated Jan. 26, 2011 at 3, Table B ("County Geologist's Report"), Ex. H. Even Lehigh makes no contention and offers no evidence that this area was used for mining or mining-related activities in 1937. Lehigh's meritless assertion that grading of EMSA for buildings and parking areas associated with the magnesium plant that Kaiser constructed on the parcel dates to 1941 at the earliest, and thus reinforces the conclusion that no entity had shown any intent to use EMSA for mining-related purposes in 1937. *Id.* at 27. Thus, the Board must deny Lehigh's claim that it has a vested right to use the eastern end of EMSA for mining operations.

2. The 1942 Morris Parcels

Kaiser purchased the two Morris parcels (Lots 14 and 15) in 1942, at which time Lot 14 showed no sign of mining-related disturbance and Lot 15 included a single light-use road. These same conditions remained unchanged in 1948, and indeed, throughout the period assessed by the County Geologist. County Geologist's Report at 3-4, Tables B-E. Thus, the record is devoid of any evidence of change in use of the Morris parcels, much less the progression of mining-related use required to establish a vested right pursuant to the diminishing assets doctrine. *See Hansen*, 12 Cal. 4th at 553. Lehigh states that Kaiser used the road cited in its January 4 letter and mapped by the County Geologist prior to the vesting date of 1948. *See* January 4 Letter at 27; *see also* Ex. I. It

has shown no use of either Lot 14 or 15 outside that road, however. Lehigh thus lacks any basis for asserting a vested right to use those parcels except to continue its existing use of the road. The Board should find no vested right to use the 1942 Morris parcels beyond the access road documented by the County Geologist.

3. The 1943 Crocker Parcel

Kaiser purchased the Crocker parcel (Lot 11) in 1943. Lehigh asserts that the mere fact of Kaiser's acquisition of the property constitutes evidence of its intent to mine the parcel. It also contends that the parcel's proximity to existing mining activities, along with Kaiser's exploration work, provides additional grounds for a finding of vested rights. January 4 Letter at 26.

Kaiser's subjective intent to extend its mining operations to the Crocker parcel is insufficient to constitute the manifestation of objective intent required by the Supreme Court's decision in *Hansen*. *Hansen*, 12 Cal. 4th at 556 (A party seeking the determination of vested rights "*must prove that the area that he desires to excavate was clearly intended to be excavated, as measured by objective manifestations and not by subjective intent . . . .*" (quotation and citation omitted, emphasis in original)). "The mere intention or hope on the part of the landowner to extend the use over the entire tract is insufficient; the intent must be objectively manifested by the present operations." *Id.* at 557 (quotation and citation omitted). Thus, Kaiser's purported intent to mine the Crocker parcel has no bearing on the County's determination of whether Kaiser manifested such intent *objectively*.

Courts considering similar facts have found that even long-standing plans to expand quarrying activities to neighboring parcels provide an insufficient basis for a vested rights determination. In *R.K. Kibblehouse Quarries v. Marlborough Township Zoning Hearing Board* (Pa. Commw. Ct. 1993) 157 Pa.Cmwlth. 630, the court found that a property owner had no vested right to mine the south side of a parcel, which was separated from existing mining activity by a creek and road. The court found "little evidence" of the owner's intent to quarry the separate parcel on the relevant vesting date, even though the south side contained excellent geology for quarrying and "natural growth of the business would logically expand the operation" to that side of the property, which was "always devoted to the future expansion." *Id.* at 644. Here, Lehigh acknowledges that no sampling took place on the Crocker parcel until 1949—one year after the vesting date—and simply relies on Kaiser's alleged, but unmanifested intent. January 4 Letter at 27. Accordingly, Lehigh has not proffered any objective evidence of Kaiser's alleged intent to mine the Crocker parcel as of January 28, 1948, as required by the *Hansen*

analysis, and therefore the Board should deny any vested right to mine the parcel in the future.

4. The East Materials Storage Area

Most of EMSA falls within Kaiser's original 1939 purchase (Lot 16), although the eastern end encompasses land purchased from the Archbishop of San Francisco in 1942 (Lot 17). Lehigh asserts a vested right to use the entire extent of EMSA outlined in its application for a Reclamation Plan Amendment based primarily on pre-1948 activity related to the construction of a magnesium plant on the parcel. January 4 Letter at 27. This activity included substantial clearing and grading. *Id.* However, none of these activities were part of mining operations. *See* County Staff Report at 23, n.101 ("Although there was significant disturbance of the EMSA property by the early-1940s, that disturbance was due to the construction and operation of a metals manufacturing plant and related facilities." (citing County Geologist's Report)).

Lehigh's assertion that "the EMSA parcel has always been an integrated part of the Facility" fundamentally misconstrues *Hansen*'s requirement that only "aspects of the operation that were integral parts of the business" were part of the nonconforming use for purposes of a vesting determination. *Hansen*, 12 Cal. 4th at 542. Addressing this exact question, the *Hansen* court relied on *Paramount Rock Company v. County of San Diego* (1960) 180 Cal. App. 2d 217, which surveyed an array of California cases that considered the comparative costs, extent of equipment use, area covered, water and power consumed, and the nature of operations in determining if two uses were so closely related as to fall within the same nonconforming use. Applying these factors, the *Paramount* court found that a rock crushing plant was not an integral part of the preexisting concrete ready-mix business.[4] *Id.* at 230.

Here, Lehigh argues that a magnesium plant that was under separate corporate ownership and that processed minerals brought in from elsewhere in the state was part of the same "overall vested Facility." January 4 Letter at 27. Not unlike the court's conclusion in *Paramount*, these facts do not support a finding that the magnesium

[4] Courts considering extractive operations in other jurisdictions have reached similar conclusions. *See, e.g., First Crestwood Corp. v. Building Inspector of Middleton* (Mass. App. Ct. 1975) 3 Mass.App.Ct. 234, 236 (stone crushing operation was an impermissible extension of the existing quarrying operation).

plant was an integral component of any mining activity that took place on the property prior to the vesting date in 1948.

Lehigh also contends that use of EMSA to store overburden dates to 1948 and provides additional support for its claim that it has a vested right to continue storing overburden in this area. As an initial matter, the County Geologist found that, while some "fill for construction" occurred on both Lots 16 and 17 between 1939 and 1948, aerial photographs and historic reports provided no evidence of any exploration or mineral extraction. County Geologist's Report at Table C.

Lehigh alleges that the alleged storage of overburden on EMSA "is first indicated in the 1948 aerial image." January 4 Letter at 28; Ex. J. Lehigh's claim is problematic. First, Lehigh provides no precise date for the cited image, and yet proffers it as evidence that the storage it allegedly depicts predated an ordinance that took effect in January of the same year. Notably, the aerial image on which the County Geologist relies is dated September 26, 1948, almost nine months after the effective date of the ordinance. Particularly in light of Lehigh's own admission that this image depicts the "first indicat[ion]" of any disposal, it cannot carry Lehigh's burden of proving nonconforming use that predates the January 1948 zoning ordinance.

Furthermore, the 1948 image on which Lehigh relies is far from conclusive. *See* Ex. J. Lehigh never even claims that the alleged "material storage" on EMSA was mining waste at all, nor does it point to any evidence to this effect. It provides no expert testimony or other basis for its bald conclusion that the photograph somehow documents mining-related activity. This omission is particularly stark in light of the County Geologist's contrary conclusion that aerial imagery indicates no mining-related use of EMSA in 1948. *See* County Geologist's Report at Table C.

In sum, Lehigh offers no proof whatsoever that Kaiser or any other entity used EMSA for mining-related activity prior to January 28, 1948, or that any party exhibited an objective intent to do so. Accordingly, the Board should find that Lehigh does not have a vested right to use EMSA for these purposes.

III. Lehigh's Legal Arguments Lack Merit.

Lehigh proffers several additional legal arguments as to why the County purportedly lacks the authority to deny its asserted vested rights, each of which lacks merit.

From the outset, Lehigh claims that "the County's decision to submit the Facility to a vested rights determination at this time is a matter of serious concern" for which the County lacks authority. January 4 Letter at 35. It cites *Calvert v. County of Yuba* (2006) 145 Cal. App. 4th 613, 630-31 for the proposition that "existing, recognized vested uses [are protected] from new hearing requirements." This both mischaracterizes the decision in *Calvert*, and ignores the fact that the Surface Mining Reclamation Act requires a determination of vested rights if Lehigh is to avoid that statute's permitting requirement. Pub. Res. Code § 2770(a). In *Calvert*, the court found that neighboring property owners have the right to notice of a vested rights determination and the opportunity to be heard by virtue of their protected property interest. 145 Cal. App. 4th at 631. It also noted in determining whether to give its decision retroactive effect that these procedural rights might not apply in some cases in which "property rights may have been founded and deemed vested in accordance with a less formal vested rights determination under SMARA, which does not specify a procedure for this determination." *Id.* at 630-31. In no way does this acknowledgement of the possibility of less formal determinations of vested rights "protect" Lehigh from the County's evaluation of whether Lehigh's current and proposed land uses constitute legal nonconforming uses. In fact, *Calvert* holds the opposite, that such determinations, as a general matter, do require formal procedures and due process protections.

Lehigh also contends that the County is bound by prior statements that acknowledge a vested right to mine the property, that the County's past actions estop it from requiring a permit for mining activities, and that any denial of vested rights will constitute an unconstitutional taking of its property.

A. The County Has Reached No Binding Conclusions Regarding Lehigh's Vested Status.

Lehigh contends that the County has long recognized its mining operations as a legal nonconforming use and that the County is now bound by these "admissions" and "implied findings." January 4 Letter at 15-18, 29-31. But California law is very clear that a local government cannot consent to zoning violations, even if it makes statements to the contrary. *Hansen*, 12 Cal.4th at 564 ("[T]he county lacks the power to waive or consent to violation of the zoning law." (citing cases)). While the *Hansen* court did find that the county in that action bound itself by an admission, that admission was made in a court filing—the county's response to the petition for a writ of mandate. *Hansen*, 12 Cal. 4th at 561-62. This court filing is entirely different—and carries different legal weight—than statements made by county staff or members of the board of supervisors. [Furthermore, the *Hansen* court carefully limited even that legal admission

to a discrete question of fact and rejected the petitioner's further assertions of estoppels on this basis. *Id.* at 563-64.

Lehigh also asserts that the County Board of Supervisors' decision to grant Kaiser's 1939 application for a use permit for its cement kiln necessarily included the "implied finding[]" that the quarry required no use permit in 1939. January 4 Letter at 30-31. This argument relies on the general rule that courts imply factual findings necessary to support a judgment. *Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58. However, courts have explicitly rejected extension of this doctrine to implied findings of nonconforming use by a county. *See City and County of San Francisco v. Board of Permit Appeals*, 207 Cal.App.3d 1099, 1107 (1989). Although Lehigh cites it for the opposite proposition, this case was crystal clear regarding the obligation of a local government versus that of the proponent of the nonconforming use: "The city did not have to disprove the pre-1921 existence of the unit. Rather, the burden is always on the party seeking to establish the nonconforming use to show that the use *did* preexist." *Id.* (emphasis in original)). Accordingly, the County has not bound itself by any prior statement or implication that mining on the property constitutes a legal nonconforming use.

B. The County is Not Estopped from Finding a Zoning Violation.

Lehigh also argues that the County's previous positions regarding the legal nonconforming or vested status of mining on the property estop the County from determining the legality of that use now. January 4 Letter at 31-33. As County Staff noted, however, California courts overwhelmingly reject property owners' attempts to prevent local governments from enforcing their zoning regulations based on the theory of equitable estoppel. County Staff Report at 18 (citing cases). In particular, the *Hansen* court rejected this exact argument, finding that Nevada County's failure to challenge continued use of that property for quarrying did not preclude it from revisiting the question as part of its vested rights determination. *Hansen*, 12 Cal. 4th at 563. In addition to finding no detrimental reliance by the property owner on the County's failure to act, the court directed that "estoppel will not be recognized when to do so would nullify a strong rule of policy adopted for the benefit of the public" such as a zoning ordinance. *Id.* at 564 (quotation and citation omitted). As one court noted in rejecting an equitable estoppel claim, :

> in the absence of exceptional circumstances, the doctrine of equitable estoppel will not be applied to allow a landowner to circumvent land use restrictions even when the landowner

> relies on the public entity's express representation that the landowner's plans comply with the entity's land use requirements, and certainly not when the public entity simply fails to take early action to warn the landowner the plans violate the land use requirements.

Golden Gate Water Ski Club v. County of Contra Costa (2008) 165 Cal.App.4th 249, 262 (sustaining a county board of supervisors' order to demolish and remove all structures on an island). Particularly in light of the strong public policy against prolonging nonconforming uses, Lehigh's argument that it was "completely ignorant" of the possibility that it might not have a vested right to mine the full extent of the property is far short of establishing the elements of equitable estoppel. January 4 Letter at 32.

C. A Denial of Vested Rights Will Not Constitute a Fifth Amendment Taking.

Lehigh also threatens that any limits placed on its alleged vested rights will violate the takings clause of the Fifth Amendment to the U.S. Constitution. January 4 Letter at 33-34. Local governments' exercise of their zoning power to prohibit specific property uses will not generally result in a taking for which the Fifth Amendment requires just compensation. *Penn Central Transp. Co. v. City of New York* (1978) 438 U.S. 104, 125. Judicial takings tests, including the *Penn Central* test,

> aim[] to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.

Lingle v. Chevron U.S.A., Inc. (2005) 544 U.S. 528, 539. "Functional equivalence" to direct condemnation requires that the regulation cause a severe diminution in the market value of real property, not just the possible loss of profits. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency* (2002) 535 U.S. 302, 332, 338. Indeed, the U.S. Supreme Court has rejected a takings claim when "there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question." *Goldblatt v. Town of Hempstead, N. Y.* (1962) 369 U.S. 590, 594. Lehigh has proffered no evidence of a drastic loss in the value of its property, or of economic harm of any variety, should the County find that Lehigh lacks a

vested right to mine the full area encompassed by its Reclamation Plan Amendment applications. Accordingly, Lehigh cannot state a claim for a violation of the Fifth Amendment.

IV. Conclusion

Lehigh has utterly failed to establish the extent of use, if any, of the vast majority of land for which it seeks a vested rights determination. It also has not provided evidence that the owners of the properties at issue manifested any objective intent to use the land for mining operations prior to 1937 and 1948. Accordingly, the County should not grant Lehigh a vested right to use the 1942 Morris parcels, the 1943 Crocker parcel, or EMSA for mining, and it should expressly limit any vested right to those areas for which Lehigh has met its substantial burden of proof.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

Fran M. Layton
Sarah H. Sigman

cc: Rod Sinks, No Toxic Air
Encl.: Exhibits A - J

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February 7, 2011

Santa Clara County Board of
Supervisors
c/o Office of the Clerk - Board of
Supervisors
70 West Hedding Street
10th Floor, East Wing
San Jose, CA 95110

RE: Nonconforming use determination for Lehigh (Permanente) Quarry.

Dear Supervisors,

I am writing on behalf of my client, Cupertino City Council Member Barry Chang, in regard to the above-referenced agenda item for your board meeting of February 8, 2011. In that agenda item, the board will be considering what, if any, portions of the quarrying activity in the Lehigh (Permanente) Quarry qualify as a legal nonconforming use.

To begin with, my client must ask that Supervisor Kniss recuse herself from these deliberations on the basis of having prejudged the issue. "The contention that a fair hearing requires a neutral and unbiased decision maker is a fundamental component of a fair adjudication ... " (*State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 840.) In order for prejudice to be shown, requiring recusal, "[T]here must be . . . a commitment to a result (albeit, perhaps, even a tentative commitment), before the process will be found violative of due process." (*Id.*)

In this case, the evidence is clear that Supervisor Kniss has, even if only tentatively, firmly committed herself to finding that the quarry operations qualify as a legal nonconforming use. In 2009, she was directly quoted in an article in the Los Altos Town Crier as follows: "'*There's no question they can operate – they're grandfathered in*,' which refers to old businesses that can continue to operate because they existed before new laws that would have restricted their operations. 'The question,' Kniss said, 'is (the final outcome of) the reclamation plan.'" [emphasis added.] This statement, made long before any evidence had been presented in the proceeding or the public had been given any chance to comment, shows blatant prejudice that is inconsistent with the requirement of a neutral and unbiased decisionmaker.

While Supervisor Kniss is only one vote on the Board of Supervisors, a single vote can often make a difference. (*Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 484 fn.8. [evidence of prejudice on the part of one planning commissioner was sufficient to require reversal of decision]) Further, as the sitting supervisor representing the area where the quarry (and its surrounding community) is located, her comments would likely be given extra weight by the other board members. For this reason, impartiality is all the more important. Given her obvious bias on this issue, Mr. Chang must respectfully request that Supervisor Kniss step aside from participating in the discussion and decision on this issue.

Moving on to the substance of the agenda item, as the staff analysis for that agenda item points out, to qualify as a legal nonconforming use, the used must have been in continuous operation and must have been a legal use at the time it was initiated. In the case of quarrying, while there is an existing use permit, issued in 1939,

for the cement manufacturing plant on the site, there are currently no county use permits for quarrying activity. My client agrees with the staff analysis that the portions of the site used for manufacture of cement or other non-quarrying use do not qualify as allowing quarrying as a legal nonconforming use. (See, staff analysis at p. 23.)

According to the staff analysis, the County first began regulating quarrying under its zoning ordinance starting in August 1937. At that time, again according to the staff analysis, the Permanente Quarry was designated in the A-1 zoning classification. Under the zoning adopted in 1937, while quarrying was generally permitted in the A-1 zone, Subsection 12(a)3 specified that among the uses requiring issuance of a use permit was; "Commercial excavating of natural materials within a distance of one thousand (1000) feet from any public road."

It is uncontested that Permanente Road runs through the quarry site, and that it was dedicated as a public road in 1893. According to the staff analysis, " Although there is no evidence that this road was ever formally abandoned, the public has been denied access to the road since sometime in the 1930s." While a gate apparently was placed across the road in 1935, gating of a public road is not legal[1], and so any restriction of public use due to its being gated should not be considered in determining whether the road had been abandoned for public use.

Large portions of the current quarrying area are within 1000 feet of the roadway. For those portions, it appears that mining was undertaken without obtaining a use permit, and therefore does not qualify as a legal nonconforming use[2].

Nevertheless, Lehigh Quarry's current owners take the position that, while Permanente Road was never abandoned as a public street, the fact that the roadway no longer had public use beginning in 1935 means that the zoning ordinance's requirement for a use permit does not apply to the quarrying operations near the road.

Staff, in its recommendations to the board, proposes that the Board should determine whether, as of the adoption of the 1937 zoning ordinance, the non-use of Permanente Road by the public, due to its having been illegally blocked, "eliminated the "public' nature of the Road from a practical standpoint and, therefore, did not trigger the provision in the 1937 Zoning Ordinance requiring a use permit for quarrying within 1,000 feet of a public street."

In interpreting the meaning of an ordinance or statute, it is a long-standing rule that, "If the plain language of the statute is clear and unambiguous,… … the Legislature is presumed to have meant what it said, and the plain meaning of the statute governs. (*Stephens v. County of Tulare* (2006) 38 Cal.4th 793, 802.) The prohibition against allowing quarrying within 1000 feet of a public road is clear and simply written. While it could easily have been written to apply only to an "operating" public road or to a road "in public use", the board of supervisors, in enacting the zoning ordinance, did not choose to do so. Instead, it used the straightforward term, "any public road." The current Board is not free to reinterpret that clear language to mean anything other than what it says. "What the City cannot do is wave the magic wand and declare a public street not to be a public street." (*Zacks, supra,* 165 Cal.App.4th at 1184.)

Since Permanente Road was, without question, still a public street at the time the 1937 zoning ordinance took effect, regardless of whether access to it had been illegally blocked, any quarrying initiated after that date within 1000 feet of Permanente Road

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[1] See, e.g., *Phillips v. Pasadena* (1945) 27 Cal.2d 104 [placing a gate on a public roadway constituted a continuing nuisance]; *see also*, *Zacks, Inc. v. City of Sausalito* (2008) 165 Cal.App.4th 1163, 1184 [city may not vacate a public street except in accordance with specific procedures set by state law].

[2] There is no evidence to show that quarrying near the road began prior to 1937and has continued without break since then. Given the preference against granting legal nonconforming use status (*Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal.4th 533, 568), the burden is on the quarry's owners to provide evidence to support their claim.

without the issuance of a use permit was unauthorized and therefore cannot give rise to a legal nonconforming use.

The quarry's owners also assert that the County's approval of the 1985 reclamation plan accepted quarrying as a legal nonconforming use in all portions of the quarry site covered by that plan. Not so. The quarry's owners confuse necessary conditions with sufficient conditions. An approved reclamation plan is a necessary condition for quarrying to occur. However the approval of the 1985 reclamation permit did not and could not supersede the requirement for a use permit, or any other requirements for conducting quarrying.

The existence of one regulation does not, unless explicitly stated, act to supersede another regulation, especially when the purposes of the regulations are different. The reclamation plan's purpose is to assure that any areas that are quarried will be returned to a usable state once quarrying ceases. The use permit requirement under the zoning ordinance, however, is quite different. Its purpose is to assure that the quarrying activities are done in a way that is conducive to maintaining the public health, safety, and welfare. These are not either/or requirements; both an approved reclamation plan and an approved use permit or other analogous legal authorization (e.g., a determination of legal nonconforming use) are required for quarrying to occur.

In addition to the arguments in this letter, Mr. Chang also joins in the arguments made by No Toxic Air in the letter submitted by its attorney on February 4th.

Most sincerely,

Stuart M. Flashman

Stuart M. Flashman

Exhibit B

Stuart M. Flashman (SBN 148396)
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Attorney for Petitioner No Toxic Air, Inc.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

No Toxic Air, Inc., Petitioner and Plaintiff vs. SANTA CLARA COUNTY, a Division of the State of California; SANTA CLARA COUNTY BOARD OF SUPERVISORS; and DOES 1-20 inclusive, Respondents and Defendants LEHIGH SOUTHWEST CEMENT COMPANY, a California Corporation; HANSON PERMANENTE CEMENT, INC., an Arizona Corporation; and DOES 21-40 inclusive, Real Parties In Interest	No. NOTICE OF FILING OF LEGAL ACTION [C.C.P. § 388]

TO THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA:

PLEASE TAKE NOTICE under Code of Civil Procedure §388 that, on May 27, 2011, Petitioners and Plaintiffs NO TOXIC AIR, INC. will be filing a petition for writ of mandate and complaint for declaratory and injunctive relief against Respondents and Defendants SANTA CLARA COUNTY and SANTA CLARA COUNTY BOARD OF SUPERVISORS ("Respondents") in Santa Clara County Superior Court. The petition alleges that Respondents violated provisions of the Santa Clara County Zoning Ordinance and the California Surface Mining and Reclamation Act in approving vested legal nonconforming use status for the entirety

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of the portions of the Permanente Quarry that had been requested by its operator, Real Party in Interest LEHIGH SOUTHWEST CEMENT COMANY. A copy of the petition is enclosed herewith for your reference. Please provide a letter acknowledging receipt of this notice.

DATE: May 26, 2011

Stuart M. Flashman

STUART M. FLASHMAN
Attorneys for Petitioner and Plaintiff

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of Alameda County. I am over the age of eighteen years and not a party to the within above titled action. My business address is 5626 Ocean View Drive, Oakland, CA 94618-1533.

On May 26, 2011, I served the within NOTICE OF LEGAL ACTION on the party listed below by placing a true copy thereof enclosed in a sealed envelope with priority mail postage thereon fully prepaid, in a United States Postal Service mailbox at Oakland, California, addressed as follows:

Office of the Attorney General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550

I, Stuart M. Flashman, hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Oakland, California on May 26, 2011.

Stuart M. Flashman

Stuart M. Flashman

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