

County of Santa Clara

Department of Planning and Development

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MEMORANDUM

DATE: August 5, 2020

TO: Honorable Board of Supervisors

FROM: Jacqueline R. Onciano, Director, Dept. of Planning and Development

SUBJECT: Proposal to evaluate the consistency of proposed surface mining activities at Lehigh Permanente Quarry with vested rights
File No. PLN19-0106;
Location: 24001 Stevens Creek Boulevard, Cupertino, CA 95014

This memo is intended to inform the Board of Supervisors of the proposed expansion in surface mining activities at Lehigh Permanente Quarry ("Quarry"), and the Department of Planning and Development's ("Department") proposal that the Board determine whether certain of these proposed activities fall within the scope of Lehigh's vested rights to conduct surface mining operations.

Project Background

Lehigh Permanente Quarry is a 3,510-acre limestone and aggregate surface mining operation located at 24001 Stevens Creek Boulevard in rural unincorporated Santa Clara County, with a portion extending inside City of Cupertino jurisdiction. The Quarry is owned and operated by Lehigh Southwest Cement Company and Hanson Permanent Cement, Inc. (collectively, "Lehigh").

On March 1, 2011, the County of Santa Clara Board of Supervisors ("Board") determined that Lehigh holds the vested right to conduct quarry surface mining operations on 13 of its parcels identified by the Board, referred to as the "Vested Parcels." The 2011 Resolution (Attachment A) adopted by the Board stated that "[q]uarry surface mining operations on the Vested Parcels are a legal non-conforming use, and do not require a County use permit for continued surface mining operations within the geographic area bounded by the Vested Parcels." The Vested Parcels, identified in Attachment B, consist of parcels that include the North Quarry Pit, two

overburden disposal areas (the West Materials Storage Area [WMSA] and East Materials Storage Area [EMSA]), and the access roads within the mine operation.

In June, 2012, the Board approved the operative amended Reclamation Plan (“2012 Reclamation Plan”) for the Quarry. The 2012 Reclamation Plan governs restoration of the Quarry over a 20-year period following the conclusion of surface mining activities, in accordance with the Surface Mining and Reclamation Act (SMARA).

On May 22, 2019, Lehigh submitted to the County an application to amend the 2012 Reclamation Plan. This Reclamation Plan Amendment (“2019 Reclamation Plan”) contemplates a significant expansion of surface mining and related activities within the Vested Parcels. Specifically, as shown in Attachment C, the 2019 Reclamation Plan contemplates the following new surface mining and related activities: (1) expanded excavation and layback of the north highwall of the North Quarry Pit; (2) expanded surface mining in the new 30-acre Rock Plant Reserve Area, south of the North Quarry Pit; (3) reactivation and use of the Quarry’s existing rock crusher; and (4) hauling of unprocessed aggregate to the adjacent Stevens Creek Quarry via an internal haul road. The expanded surface mining activities would increase total mining production by approximately 600,000 tons per year relative to the annual mining production under the 2012 Reclamation Plan. The 2019 Reclamation Plan application proposes activities to reclaim these expanded surface mining operations, including importation of 20 million cubic yards of clean fill to backfill the North Quarry Pit for reclamation and retention of overburden and mine waste stored on-site at the West Material Storage Area. Lehigh’s application also requests modification of an existing Scenic Easement held by the County that protects a ridgeline adjacent to the North Quarry pit.

Recommendation for Vested Rights Consistency Determination

Under SMARA and the County Zoning Ordinance, Lehigh must either hold a vested right or obtain a use permit to conduct surface mining operations. As discussed above, the Board’s 2011 vested rights determination conclusively determined that Lehigh holds the vested right to conduct quarry surface mining operations on the Vested Parcels. But because the 2011 vested rights determination focused on the *geographic extent* of Lehigh’s vested right, it did not delineate the *substantive scope* of that right—that is, precisely which surface mining and related activities are consistent with the vested right.

A vested right confers an entitlement to continue the overall business operation that existed prior to the vesting date (here, 1948). (*Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal.4th 533, 565-66.) A substantial change to the operation may exceed the scope of the vested right. (*Id.* at 575; County Zoning

Ordinance, § 4.10.370(II)(B)(1).) So too, while a gradual and natural increase in a lawful, nonconforming use of a property is within the scope of a vested right, a sudden intensification in use that substantially exceeds production in recent years may also exceed the scope of the vested right. (*Hansen*, 12 Cal.4th at 572-73.)

Certain of the expanded surface mining activities set forth in the 2019 Reclamation Plan application are different in nature or intensity than those occurring under the 2012 Reclamation Plan. Specifically, Lehigh's plan to sell unprocessed greenstone offsite and physically export the unprocessed commodity via an internal haul road is a departure from its current practice. In addition, the expansion of mining in the North Quarry Pit and into the new Rock Plant Reserve Area is expected to intensify production at the site. These or other activities could exceed the scope of Lehigh's Vested Right if they were determined to constitute a substantial change in its vested operation and thus require a use permit.

Process and Timing for Evaluating Vested Rights

In 2011, the Board conducted an evidentiary hearing to determine the geographic extent of legal non-conforming surface mining operations at Lehigh Permanente Quarry. Whether there is a substantial change in operations is similarly a question of fact, which should generally be determined in a noticed public hearing. While not all changes in surface mining activities will require an evidentiary hearing, a hearing is recommended for those that may constitute a significant change in operations and therefore be inconsistent with Lehigh's vested right. Because it is settled that Lehigh has a vested right to conduct surface mining on the Vested Parcels, such a hearing would focus solely on whether the proposed activities are consistent with that vested right such that they may occur without a use permit.

Although the Board may consider all proposed surface mining activities under the 2019 Reclamation Plan in such an evidentiary hearing, the Department recommends based on its review of the application that a public hearing occur solely for: (1) the proposed off-site sale of unprocessed greenstone and physical export of the commodity and (2) the proposed increase in production volume associated with the opening of the new Rock Plant Quarry Area.

The 2019 Reclamation Plan application was deemed complete by the Department on November 8, 2019, and the Department is finalizing a scope of work with a consultant to prepare an Environmental Impact Report (EIR) for the application. Once the EIR process has been completed, the Planning Commission and Board would consider the proposed 2019 Reclamation Plan application and modification of the Scenic Easement. The Department requests that the Board conduct an evidentiary hearing in conjunction

with its hearing on the 2019 Reclamation Plan application to determine if the proposed offsite sale of unprocessed aggregate and intensification in production are consistent with Lehigh's vested right to conduct surface mining operations at the Quarry. Conducting the evidentiary hearing at that time would allow the Board to evaluate the totality of the proposed actions within one series of hearings and would facilitate efficient processing of Lehigh's application.

In general, the environmental review of a reclamation plan takes into account only the proposed reclamation activities, rather than underlying mining activities. But if underlying mining activities require a use permit, the impacts of those activities will need to be analyzed as part of the California Environmental Quality Act (CEQA) review of the use permit. To allow for efficient processing and ensure that the entire project is subject to environmental review, the Department has requested that the EIR for the 2019 Reclamation Plan include an environmental impact analysis of the activities associated with the export of unprocessed greenstone and the intensification in production. This will ensure that the EIR is comprehensive and would not require recirculation, in the event that the Board were to determine at the proposed evidentiary hearing that either or both of these activities are not consistent with Lehigh's vested right and thus require a use permit. The subject EIR would then be used in the processing of this use permit.

cc: Megan Doyle, bosagenda@cob.sccgov.org

Attachments:

Attachment A - Board Resolution Regarding Vested Rights at Lehigh
Attachment B - Existing Vested Parcels
Attachment C - Proposed Reclamation Plan Amendment Map