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VIA EMAIL:
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Jacqueline R. Onciano
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County of Santa Clara Planning Office
70 West Hedding Street, 7th Floor
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Re: Permanente Quarry – Response to August 5, 2020 Letter

Dear Ms. Onciano:

This letter presents the response of Hanson Permanente Cement, Inc. and Lehigh Southwest Cement Company (collectively, "Lehigh") to the Planning Department's ("Department") August 5, 2020 letter and its accompanying memorandum to the Board of Supervisors concerning Lehigh's Permanente Quarry ("Quarry").

INTRODUCTION

In May 2019, Lehigh filed an application with the Department to amend the Quarry's reclamation plan (the "Application"). On November 8, 2019, the Department accepted the Application as "complete," but has not started to process it. Based upon the Department's August 5, 2020 letter, we understand that the Department has delayed in an effort to subject the Quarry to a hearing to reevaluate the scope of the Quarry's vested mining rights.

The Department is raising questions resolved nearly ten years ago in February 2011, when the Board of Supervisors ("Board") formally decided the scope of the Quarry's rights after a public hearing. That determination was challenged in court, upheld, and is long since final.

Lehigh has carefully considered the Department's letter, along with the information that Department staff shared in an August 19, 2020 call, and the supporting materials which the Department made available on September 18, 2020. The Department has not provided a valid legal or factual basis for a second vested rights hearing. Further, we believe that the Department has misunderstood key aspects of our Application that relate to mining "intensity."

We take this opportunity to respectfully respond to the Department's position, and to again ask the Department to process our Application without further delay.

THE DEPARTMENT'S POSITION

We begin by framing the Department's position.

In its August 5, 2020 memorandum, the Department contended that the Application may expand mining in ways that are not authorized by the Quarry's recognized vested rights:

> [T]he 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.
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> 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 [to Stevens Creek Quarry] 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.

The Department would schedule a vested right hearing *after* the Department fully processes the Application (likely years in the future) "to evaluate the totality of the proposed actions." In the interim, the Department will prepare an Environmental Impact Report ("EIR") without a defined baseline and that analyzes alternative project scenarios in which: (1) certain mining operations not part of the baseline and require a discretionary use permit; and (2) all mining operations are part of the baseline and vested.[1]

The Department's position was a surprise to Lehigh because the Department had already accepted Lehigh's Application as complete, in November 2019, without raising any question of vested rights consistency. In an August 19, 2020 conference call, the Department also stated that its position was final, and that it was not seeking Lehigh's input.

The Department did, however, agree to provide Lehigh with the documents on which the Department relied to prepare the memorandum, including the statement that production will increase by 600,000 tons per year relative to the annual mining production under the 2012 Reclamation Plan. On September 18, 2020, the Department made certain documents available to Lehigh. None of the

[1] The memorandum attached a budget from ESA Associates, the County's environmental consultant, of almost $1.1 million to prepare the CEQA environmental review. The unusually large budget is based in part on plans to fund new technical studies that analyze the impacts of mining.

documents, however, explained the basis for the Department's position that future mining will exceed the scope of the vested rights, or how the Department calculated that the Quarry will increase production compared to the 2012 reclamation plan by 600,000 tons per year.

DEPARTMENT'S ERRORS

The Department's letter and memorandum, while ambiguous in some respects, makes certain distinct claims to justify its approach to vested rights. We address each of these claims below.

1. Sale of Unprocessed Greenstone

The Department suggests that the Quarry has no vested right to sell "unprocessed" aggregate. This claim is contrary to the Board's vested rights determination in 2011.

In 2011, the Board recognized the Quarry as a vested "limestone and aggregate" mining operation, based on evidence that the Quarry produced and sold aggregate rock products (in addition to limestone used to make cement) at least as early as 1947. The right to sell aggregates was, thus, part of the recognized vested rights. Further, the record reflected sales of crusher run aggregate in 1977, 1988 and 1991, showing that the Quarry sold these types of aggregates for years. This evidence was before the Board and the right to sell this material was part of the Board's findings.

The Department relies upon an artificial distinction without a difference between "unprocessed" and "processed" aggregate products. The nature of any quarry is to sell earth and rock; the degree of processing is simply a matter of customer preference. Unprocessed or "crusher run" rock has been through a primary crusher. Customers may choose to buy aggregate in that form instead of a more processed form that has passed through additional crushers and screens. Crusher-run rock may even have environmental benefits because it requires less resources to produce. Regardless of the degree of processing or rock type, these are all aggregate products which the Quarry has a vested right to sell.

2. "Intensifying" Production

The Department puts a great deal of emphasis on its statement that the Application would increase production by 600,000 tons per year compared to the 2012 reclamation plan. Indeed, much of the Department's position is entwined with this assumption. The assumption, however, is incorrect and appears based on a misunderstanding of the Application.

The 2012 reclamation plan estimated that limestone and aggregate production would total 4.7 million tons per year, *exclusive of* overburden. In contrast, the Application estimates production of 3.8 million tons of limestone, aggregate *and* overburden per year. Thus, the Application will result in a sizeable *decrease* in annual production. This disparity widens if overburden volumes are removed from consideration. The 2012 reclamation plan estimated overburden production up to 4.4 million tons per year, for a combined production of 9.1 million tons of limestone, aggregate and overburden annually. The Application estimates 3.8 million tons annually of all of these materials combined. Thus, the Department's belief that the Application will increase production is simply incorrect.

Further, the Department's approach conflicts with *Hansen Bros. Enterprises v. Board of Supervisors* (1996) 12 Cal.4th 533. In *Hansen,* the California Supreme Court made clear that a vested quarry is entitled to raise production to meet demand, and that because production naturally fluctuates, a reclamation plan offers only an estimate of future production. Thus, issues of impermissible

intensification are "more appropriately addressed" if an increase actually materializes. But if an agency nonetheless raises the issue at the time of reclamation plan approval, *Hansen* held that no impermissible intensification can occur unless the operator proposes to "immediately remove" rock in amounts that "substantially exceed" past years. Here, the Application estimates an annual production level that is *less than* either historical levels or the 2012 reclamation plan estimate.

Thus, as a matter of fact and law, the Department cannot proceed on the basis that Lehigh will impermissibly intensify its production.

3. Scope of 2011 Determination

The Department asserts that it is not bound by the vested rights determination in 2011. The Department claims that the Board's decision in 2011 was limited to the geographic scope of those rights and does not bind the County in any other respect.

This exceedingly narrow interpretation ignores critical elements of the Board's 2011 decision. A careful analysis shows that the Board expressly considered the scale of the Quarry's operations when it recognized the Quarry's vested rights, and necessarily decided the vested level of intensity of the Quarry's operations.

We direct the Department to the following facts:

First, at the time of the vested rights hearing, Lehigh had filed two applications that were pending before the County, including the May 2010 South Quarry application, which sought to increase production to 4.7 million tons of limestone and aggregate per year. Thus, the Board knew that Lehigh planned to mine limestone and aggregate at an intensity that was consistent with historical production levels.

Second, the administrative record makes clear that the County intended the hearing to be a comprehensive determination of vested rights. The hearing was noticed "to determine whether, **and to what extent** there is a legal nonconforming use." It was universally understood that the issue of intensity was a key element of a vested rights determination under *Hansen* and the County's nonconforming use ordinance, and the 4,000-page administrative record contained extensive historical production data. Thus, as a legal and factual matter, the Board had every reason to, and the ability to, decide the issue of intensity.

Third, the Board based its vested rights determination expressly upon "[t]he scale of Quarry operations," and cited to portions of the record that detailed the Quarry's growth and expansion in terms of land acquisition, progressive disturbance and annual production. The record expressly relied upon by the Board showed that historical production of limestone and aggregate had exceeded four million tons of limestone and aggregate per year. Indeed, the Quarry's original reclamation plan, which the County approved in 1985, quoted a production level of four million tons per year of these materials.

Fourth, the Board did not state that any relevant aspect of those rights remained for later determination. Instead, the Board stated that the outcome of the hearing should guide the Department's review of future reclamation plans and constituted a "final determination" of the Quarry's vested rights. The Department's subsequent report to the State Mining and Geology Board underscored the comprehensive nature of the decision:

> The Permanente Quarry has been in operation for more than 100 years. Because of this history and the County's need to determine what, if any,

> local land use and zoning approvals were needed for the proposed reclamation plan amendments, a determination was necessary regarding whether and to what extent quarrying activities were a legal nonconforming use on the Permanente Quarry property. Having this determination made before finishing the CEQA analysis of [the reclamation plan amendments] was important because it potentially affected the land use approvals required for the mine that must be part of that analysis.
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> The County staff completed work on extensive data collection, research, and analysis for the legal non-conforming use, or "vested rights" determination. Staff submitted its report, a staff analysis, and 63 exhibits with various documents, reports, graphics, and maps used in the report preparation. Planning Office staff posted all the information on the Planning Office web page. The Board of Supervisors convened a public hearing in the afternoon of February 8, 2011.
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> After a public hearing that lasted nearly five hours, the Board considered all the evidence presented, deliberated, and declared its intent to make several determinations related to the extent of vested rights that exist at the Permanente Quarry. The determination identified the parcels that are vested, including the East Materials Storage Area ….
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> The Board subsequently approved a resolution on March 1, 2011, that formally documented the final determination regarding vested rights at the Permanente Quarry. The resolution prepared by County Counsel and a staff report are posted on the County's website. This milestone completed the vested rights phase of [the reclamation plan amendment] proposals… The research, analysis, and report preparation were very time consuming and staff resource intensive from November 2010 through the end of February 2011. Consequently, much of the CEQA review by County staff was on hold during this time frame.

Fifth, in the following year, the Board approved the 2012 reclamation plan, which estimated levels of production – 4.7 million tons per year of limestone and aggregate – consistent with historical production levels. Indeed, the 2012 reclamation plan proposed to *immediately* produce at those levels as part of Phase 1 of that plan. The Board expressly found, when it approved the 2012 reclamation plan, that these mining operations were vested and did not require a use permit.

In sum, in making its vested rights determination, the Board expressly relied on the "scale" of the Quarry's operations, and in rendering those findings the Board expressly considered evidence of the volumetric character and intensity of the operation. The Board then proceeded to approve the 2012 reclamation plan, which planned immediate future production at levels that were consistent with the historical levels considered and relied on by the Board. The Board found that the mining operations described in the 2012 reclamation plan were consistent with the Quarry's vested rights.

The doctrines of administrative finality and collateral estoppel prevent parties from relitigating issues that were previously decided in administrative proceedings or in court. The doctrines necessarily prevent the Department from challenging the intensity of the mining operations described in the current Application – 3.8 million tons per year – because it is a reduction in intensity compared to the historical

levels of production expressly considered by the Board in the 2011 hearing, and the levels of production described in the approved 2012 reclamation plan.

4. Stevens Creek Quarry Road

The Department suggests that Lehigh has no vested right to haul aggregate in the southern portion of its property if the material is destined for a customer, the Stevens Creek Quarry. This directly contradicts the determination in 2011 which found that the Quarry was vested to conduct surface mining operations in this parcel.[2] Use of a haul road to transport mined material is a basic feature of any mining operation (see Public Resources Code section 2729, defining roads as part of a surface mining operation) and one that is plainly encompassed by the Quarry's recognized vested rights.

As a related matter, at the moment, Lehigh takes no position on the scope of Stevens Creek Quarry's legal entitlements, but we note that the Stevens Creek Quarry recently filed a proposed reclamation plan with the Department which anticipates mining on approximately 85 acres of Lehigh's adjoining property. Lehigh has not, to date, entered into any agreement allowing the Stevens Creek Quarry to mine this or any other area.

5. CEQA Defects

Finally, the Department's approach to processing the Application would violate CEQA in several ways:

- Nothing in CEQA permits a lead agency to unilaterally modify a "project." Lehigh's Application requests approval of an amended reclamation plan, not discretionary approval to engage in mining operations. CEQA does not unilaterally authorize the County to reshape a private project.

- Conducting a vested right hearing *after* the Department certifies the EIR would violate CEQA's rule against segmentation, which requires the entire project to be analyzed at once. By leaving the question of whether a use permit is needed until the future, the County also leaves the CEQA review of such a permit to the future.

- The EIR cannot present a clear and cogent project description if the entitlements necessary to carry out the project turn on future decisions. When the EIR leaves open whether mining activities are vested "baseline" or discretionary "project" elements, the EIR cannot present a legal project description and will inevitably cause confusion.

- An EIR that analyzes certain mining activities as part of the project can be expected to generate mitigation measures that will prove unenforceable if those activities are ultimately deemed vested.

- Finally, the Department accepted the Application as "complete" nearly one year ago. An EIR must be prepared within one year of the date that an agency deems an application complete. (Pub. Resources Code, § 21151.5; Code of Regs., tit. 14, § 15108.) Rather than process the

[2] The Department determined in its August 17, 2018 notice of violation that transporting mined material over roads in this area is part of Lehigh's mining operation, and that the filing of a reclamation plan amendment met all of the Department's requirements for use of this road.

Application in a timely manner, as required by CEQA, the Department has unduly delayed processing the Application by making a legally and factually untenable challenge to vested rights nine months after the Application was deemed complete.

CONCLUSION

Lehigh has enjoyed a respectful and positive relationship with the Department for many years, and genuinely hopes to continue to have such a relationship with the Department in the future. At this juncture, however, Lehigh's priorities are its employees and the industries, that are part of the greater Bay Area community that depend on Lehigh's cement and aggregate production. It is unacceptable for the Department to create a process that violates CEQA and previously-established vested rights, and creates unnecessary and lengthy delays. We ask that the Department immediately confirm that it will process the Application as submitted, and on the basis that ongoing mining operations are vested, or Lehigh will be forced to consider other options.

We look forward to the Department's prompt response.

Sincerely,

Erika Guerra

Erika Guerra
Environmental & Land Resources Director

cc: James R. Williams, Esq., Office of the County Counsel
Mark Harrison, Esq., Harrison, Temblador, Hungerford & Johnson LLP