

County of Santa Clara

Department of Planning and Development

County Government Center, East Wing, 7th Floor
70 West Hedding Street
San Jose, CA 95110
Phone: (408) 299-5700
www.sccplandev.org



MEMORANDUM

DATE: December 21, 2020

TO: Honorable Board of Supervisors

FROM: ^{DS}  Jacqueline R. Onciano, Director, Dept. of Planning and Development

SUBJECT: Revised proposal regarding processing of Lehigh Permanente Quarry's Reclamation Plan Amendment Application
File No. PLN19-0106; Location: 24001 Stevens Creek Boulevard,
Cupertino, CA 95014

This memorandum provides an update to the Department of Planning and Development's ("Department") August 5, 2020 off-agenda memo to the Board of Supervisors (please refer to Attachment A) that explained the Department's proposal for the County to determine whether certain proposed mining activities at Lehigh Permanente Quarry ("Quarry") fall within the scope of Lehigh's vested rights to conduct surface mining operations.

Background

As set forth in the Department's August 5, 2020 memo, Lehigh Southwest Cement Company ("Lehigh") submitted an application to the County on May 22, 2019 to amend its 2012 Reclamation Plan for the Quarry. This 2019 Reclamation Plan Amendment contemplates a significant expansion of surface mining and related activities at the Quarry, including, among other things, hauling of unprocessed aggregate to the adjacent Stevens Creek Quarry via an internal haul road and expanded surfacing mining in a new 30-acre Rock Plant Reserve Area, south of the North Quarry Pit. These activities are proposed to take place on parcels that fall within the geographic area for which the Board conclusively determined in 2011 that Lehigh has a vested right to conduct surface mining operations.

The August 5, 2020 memo recommended that the Board hold an evidentiary hearing to determine whether the expanded surface mining activities proposed in the 2019 Reclamation Plan Amendment application are consistent with Lehigh's vested right to conduct surface mining operations at the Quarry. The Department proposed at

that time that that this evidentiary hearing occur in conjunction with the Board's hearing on the 2019 Reclamation Plan Amendment application.

The Department recommended coupling these hearings to allow the Board to evaluate the totality of the proposed actions associated with the 2019 Reclamation Plan Amendment application within one series of hearings, allowing efficient processing of Lehigh's application. The Department correspondingly prepared a scope of work for the Environmental Impact Report (EIR) associated with the Reclamation Plan Amendment application that evaluated the range of actions the Board could take concerning the vested rights consistency determination, avoiding the need to recirculate the Draft EIR and unnecessarily prolong the environmental review process.

The Department notified Lehigh of this approach to process the application on August 5, 2020 and shared with Lehigh a draft scope of work for the EIR, and on August 19, 2020, County staff met with Lehigh staff to further explain the Department's approach.

Response from Lehigh

On October 28 and November 13, 2020, Lehigh submitted letters to the Department declining to provide comments on the EIR scope of work or funds to initiate preparation of the EIR (please refer to Attachment B). Lehigh represented that the EIR scope of work did not reflect the Project submitted by Lehigh, as the EIR proposed to evaluate the environmental impacts of mining activities that would be considered by the Board at the vested rights consistency hearing. Lehigh requested the Department focus the EIR scope solely on the proposed 2019 Reclamation Plan Amendment application, thereby not evaluating the range of actions that could result from the Board's vested rights consistency determination. Without funding from Lehigh, the County cannot proceed to begin work on the EIR, which is a prerequisite to the Board's consideration of the 2019 Reclamation Plan Amendment application.

Revised Process

In consultation with the EIR consultant, the Department is working to revise the scope of work for the EIR as requested by Lehigh to allow the processing of its 2019 Reclamation Plan Amendment application to proceed. Correspondingly, the Department is modifying the proposed schedule for Board hearings on Lehigh's application and intends to immediately begin preparation for the hearing on the vested rights consistency determination to occur in the second or third quarter of 2021. The Department will concurrently initiate preparation of the EIR once funding from Lehigh is received. Under this approach, the scope of the 2019

Reclamation Plan Amendment EIR may need to be revised if the Board determines that any of the proposed activities in the Reclamation Plan do not fall within the scope of Lehigh's vested rights and that appropriate land use entitlements are required. Should that occur, Lehigh would be afforded the opportunity to review the adjusted scope and remit payment to account for the required revisions to the EIR.

The Board's consideration of the Reclamation Plan Amendment is anticipated to occur in 2022-23.

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

Attachments:

Attachment A – August 5, 2020 Off-agenda Memo to Board

Attachment B – October 28 and November 13, 2020 Communications from Lehigh

County of Santa Clara

Department of Planning and Development

County Government Center, East Wing, 7th Floor

70 West Hedding Street

San Jose, CA 95110

Phone: (408) 299-5700

www.sccplandev.org



MEMORANDUM

DATE: August 5, 2020

TO: Honorable Board of Supervisors

FROM: ^{DS}
 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

RESOLUTION NO. _____**RESOLUTION OF THE BOARD OF SUPERVISORS OF THE COUNTY OF SANTA CLARA FINDING THAT THERE IS A LEGAL NON-CONFORMING USE FOR SURFACE MINING ACTIVITIES ON CERTAIN PARCELS COMPRISING THE PERMANENTE QUARRY AND ADDRESSING RELATED MATTERS**

WHEREAS, Lehigh Southwest Cement Company operates, and Hanson Permanente Cement Inc. ("Lehigh") owns the Permanente Quarry ("Quarry"), a limestone and aggregate mining operation located two miles west of the City of Cupertino;

WHEREAS, the County of Santa Clara is the lead agency for surface mining operations within the County under California's Surface Mining and Reclamation Act (Pub. Resources Code § 2710 *et seq.* ("SMARA"));

WHEREAS, the County has land use authority over all unincorporated areas within the County, including the property on which the Quarry operates;

WHEREAS, the County approved the existing reclamation plan for the Quarry in March 1985, and Lehigh has filed with the Department of Planning and Development two applications to amend the Quarry's reclamation plan to include, respectively, an approximately 89-acre area known as the East Materials Storage Area ("EMSA"), and the remaining acreage forming the balance of mining operations within Lehigh's property over approximately the next 20 years (known collectively as the "Reclamation Plan Amendment");

WHEREAS, the County has never required a use permit for the Quarry, and has historically considered the Quarry to operate as a legal non-conforming use (also referred to as a "vested" use), although the County has not previously made a specific determination concerning the geographic extent of the Quarry's vested rights;

WHEREAS, the County has found it necessary to define the Quarry's vested rights in order to guide the Department of Planning and Development's processing of the Reclamation Plan Amendment, and therefore duly noticed a public hearing to consider the question of the geographic extent of the Quarry's vested rights, which requires examinations into the history of the use of Quarry parcels, the objective intent of the owners of parcels that the Quarry now owns with regard to the extension of mining operations to property that was not subject to mining operations prior to the vesting date when the Quarry was first subject to County land use restrictions, the adoption and amendment of the County Zoning Ordinance restricting the ability to mine property without obtaining applicable permits, and the history of Permanente Road, which formerly ran through the area that is now the Quarry;

WHEREAS, County staff, the public, and Lehigh provided documentary, photographic and historical evidence pertaining to the extent of the vested mining use at the Quarry, as well as legal authorities bearing on the analysis of vested rights;

WHEREAS, on February 8, 2011, the Board conducted a duly-noticed public hearing and considered the evidence presented on the question of vested rights, including substantial public testimony and written commentary, and all persons wishing to testify were heard and the matter was fully considered;

WHEREAS, all of the findings and conclusions made by the Board pursuant to this Resolution are based upon substantial evidence in the entire record before the Board, including all written evidence presented prior to the hearing and additional written and oral evidence presented during the hearing, and reflect the independent judgment of the Board;

NOW, THEREFORE, BE IT RESOLVED by the Board of Supervisors of the County of Santa Clara, State of California, that the Board of Supervisors finds and determines all of the following based on substantial evidence in the record:

1. That because Permanente Road no longer functioned as a public street as of approximately 1935, the requirement for a Use Permit for quarrying activities within 1,000 feet of a public road in the 1937 County Zoning Ordinance does not apply.
2. That the County Zoning Ordinance first required a use permit for quarrying in the "A-1" district in January 1948.
3. That the area within the boundaries of the 1985 reclamation plan amendment is not relevant to determining the geographic extent of the Quarry's legal nonconforming use.
4. That the Board has determined, on the basis of substantial evidence in the record and controlling legal authority, that vested rights exist over the entirety of parcels 1, 2, 3, 5, 6, 7, 8, 9, 11, 14, 15, 16, and 17, as shown on Exhibit 45 attached hereto ("Vested Parcels"), and that vested rights do not exist over parcels 4, 10, 12, 13, 18 and 19. Quarry 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.
5. That the Quarry must apply for a Use Permit for all of the property within the boundaries of its reclamation plan amendments that is outside the geographic extent of its legal nonconforming use as determined by the Board and that will be disturbed by surface mining operations, except for property utilized for cement production and subject to a separate use permit therefor.
6. That the owners of the Quarry property, Heidelberg Cement, Incorporated and Hanson Permanente Cement, Incorporated, shall apply to the County for a formal abandonment of Permanente Road.
7. That, in making the determinations set forth herein, the Board analyzed and considered all written, photographic, and other documents submitted for the record, including but not limited to the County's Final Staff Report, dated January 27, 2011, and all appendices and exhibits thereto ("Staff Report") and staff's oral and graphic presentation to the Board on

February 8, 2011; all communications submitted by Lehigh, including its submittals, with all attachments, of November 5, 2010, January 4, 2011, February 2, 2011, and February 7, 2011 and its oral and graphic presentation to the Board on February 8, 2011; all communications submitted by members of the public, including all letters submitted prior to the hearing and all oral testimony and statements made during the duly-noticed public hearing held on February 8, 2011.

8. That these determinations are supported by the following findings and evidence:

a. The legal standards governing the existence and scope of vested mining rights are articulated in the California Supreme Court case *Hansen Bros. Enterprises v. Board of Supervisors of Nevada County* (1996) 12 Cal.4th 533 ("*Hansen Bros.*") and authorities cited therein, as well as in other cases and provisions in SMARA and the County Surface Mining and Land Reclamation Standards. Under these authorities, vested mining rights exist where property was used for "surface mining operations" (as that term is defined in SMARA and County regulations) or for which the owner had objectively manifested the intent to use the property for surface mining operations prior to the vesting date.

b. According to County Staff, January 1948 is the earliest date that surface mining operations at the Permanente Quarry required a use permit under the applicable zoning regulations beyond 1,000 from a public street, which represents the "Vesting Date." Lehigh has submitted evidence and analysis that the Vesting Date should be 1960. The Board finds that the December 29, 1947 Zoning Ordinance amendment imposed the first requirement for obtaining a use permit for mining operations in the Quarry area and that January 28, 1948 was the Vesting Date for the property on which the Quarry operates today. (See Staff Report, pp. 8-11 and Exhibits 4-10.) The Board's determination as to the Vested Parcels remains the same under either a 1948 or 1960 vesting date.

c. Mining operations commenced at the Permanente Quarry in approximately 1903. By 1930, Lehigh's predecessors incorporated the core Quarry property into a 1,300-acre mining tract that supported limestone quarry operations. (See Staff Report, p. 11 and Exhibits 10, 15, 44 and 45; Lehigh's January 4, 2011 letter, p. 7, Appendix A, B-1; February 2, 2011 letter, Exhibit B.)

d. In or around 1935, no public access was allowed on Permanente Road. County records do not evidence any action by the Board to vacate Permanente Road, but show that at a public hearing in 1935, the County Surveyor advised the Board that a gate that had been erected across Permanente Road "was not across a county road." As of 1935, Permanente Road was not a "public street" as that term was defined in the County 1937 Zoning Ordinance because the road was no longer a public thoroughfare that afforded the principal means of access to abutting property. Because surface mining operations commenced on the Quarry property prior to 1937 and because the portion of Permanente Road running through the Quarry property was not a "public street" as of 1937, no part of the Quarry required a use permit under the County's 1937 Zoning Ordinance by virtue of its proximity to Permanente Road. (See Staff Report pp. 21-22; Exhibits 4, 21 and 43; Lehigh's January 4, 2011 letter, pp. 29-31, Appendix B; Lehigh's February 2, 2011 letter, Exhibit E.)

e. On July 10, 1939, the Henry J. Kaiser Company and/or affiliated entities (hereinafter "Kaiser") purchased the 1,300-acre Quarry property from the Santa Clara Holding Company. Beginning in 1941, Kaiser acquired several contiguous parcels. As shown on Exhibit 45 to the Staff Report, parcels acquired beginning in 1941 but prior to the Vesting Date include parcels 8 (1941); 2, 5, 14, 15, and 17 (1942); and 11 (1943). (See Staff Report Exhibits 44 and 45; Lehigh's November 5, 2010 letter, p. 2, Exhibit 3; Lehigh's January 4, 2011 letter, pp. 8-11, Appendix A-3; Lehigh's February 2, 2011 letter, Exhibit B; Lehigh's oral and graphic presentation at the February 8, 2011 hearing.)

f. Kaiser conducted surface mining operations, or showed the objective intent to conduct surface mining operations on the Vested Parcels. The scale of Quarry operations, ownership of the Vested Parcels prior to the Vesting Date, actual land disturbance over a portion of the Vested Parcels, evidence of progressive expansion, exploratory activities, and mineral analysis, show objective intent to use all of the Vested Parcels for surface mining operations, in their entirety. (See Staff Report, Exhibits 1, 10, 11, 12, 13, 14, 15, 16, 21, 22, 37, 38, 44, 63; Lehigh's November 5, 2010 letter, Exhibits 1-15; Lehigh's January 4, 2011 letter, Appendix A, B, C, D, E, F; Lehigh's February 2, 2011 letter, Appendix B, C, D; Lehigh's February 7, 2011 letter and attached Exhibits (declarations and letters); Lehigh's oral and graphic presentation to the Board of Supervisors at the February 8, 2011 hearing.)

g. As respects the EMSA (comprising a portion of Vested Parcels 16 and 17) the area was used for surface mining operations both before and after the Vesting Date. Evidence in the record, including photographs and expert analysis of the area from 1939 forward, show that the area was used for the main Quarry access road, internal haul and access roads, administrative facilities, and materials storage used in connection with Quarry operations prior to the Vesting Date and continuing thereafter. Parcels 16 and 17 were also used for other components of site operations, including cement production and metals production. This fact does not affect the vested status of the area. This area was integral to overall operations, including Quarry operations. Transfer of title from Kaiser Cement to Kaiser Metals did not constitute an abandonment of surface mining use or otherwise affect the vested mining rights. Such rights run with the land. (See Staff Report, Exhibits 1, 10, 11, 12, 13, 14, 15, 16, 21, 22, 37, 38, 44, 63; Lehigh's November 5, 2010 letter, Exhibits 1-15; Lehigh's January 4, 2011 letter, Appendix A,

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B, C, D, E, F; Lehigh's February 2, 2011 letter, Appendix B, C, D; Lehigh's February 7, 2011 letter and attached Exhibits (declarations and letters); Lehigh's oral and graphic presentation to the Board of Supervisors at the February 8, 2011 hearing.)

PASSED AND ADOPTED by the Board of Supervisors of the County of Santa Clara, State of California, on _____, 2011, by the following vote:

AYES:

NOES:

ABSENT:

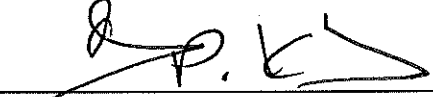
ABSTAIN:

DAVE CORTESE, President
Board of Supervisors

ATTEST:

MARIA MARINOS, Clerk of the Board of Supervisors

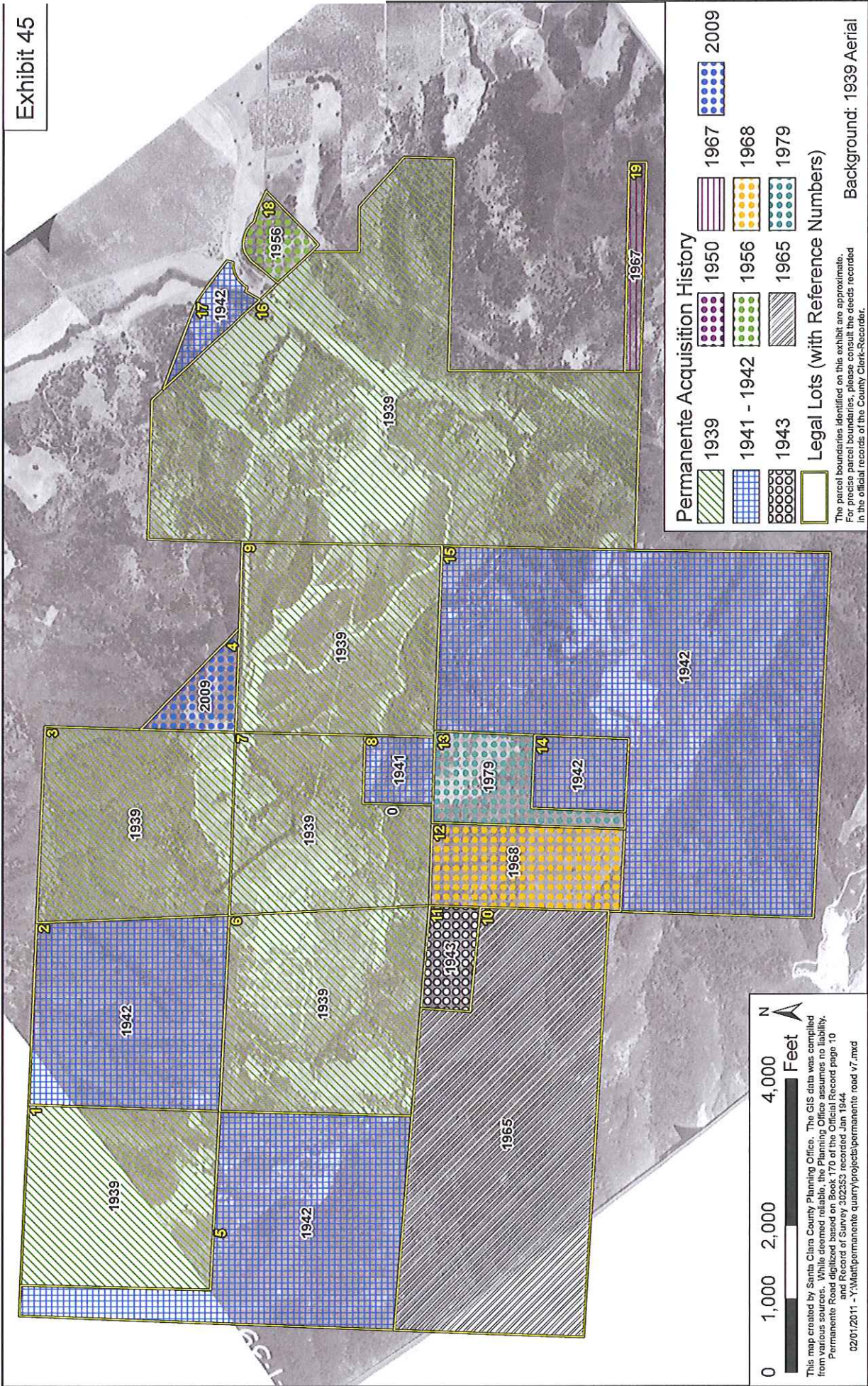
APPROVED AS TO FORM AND LEGALITY:

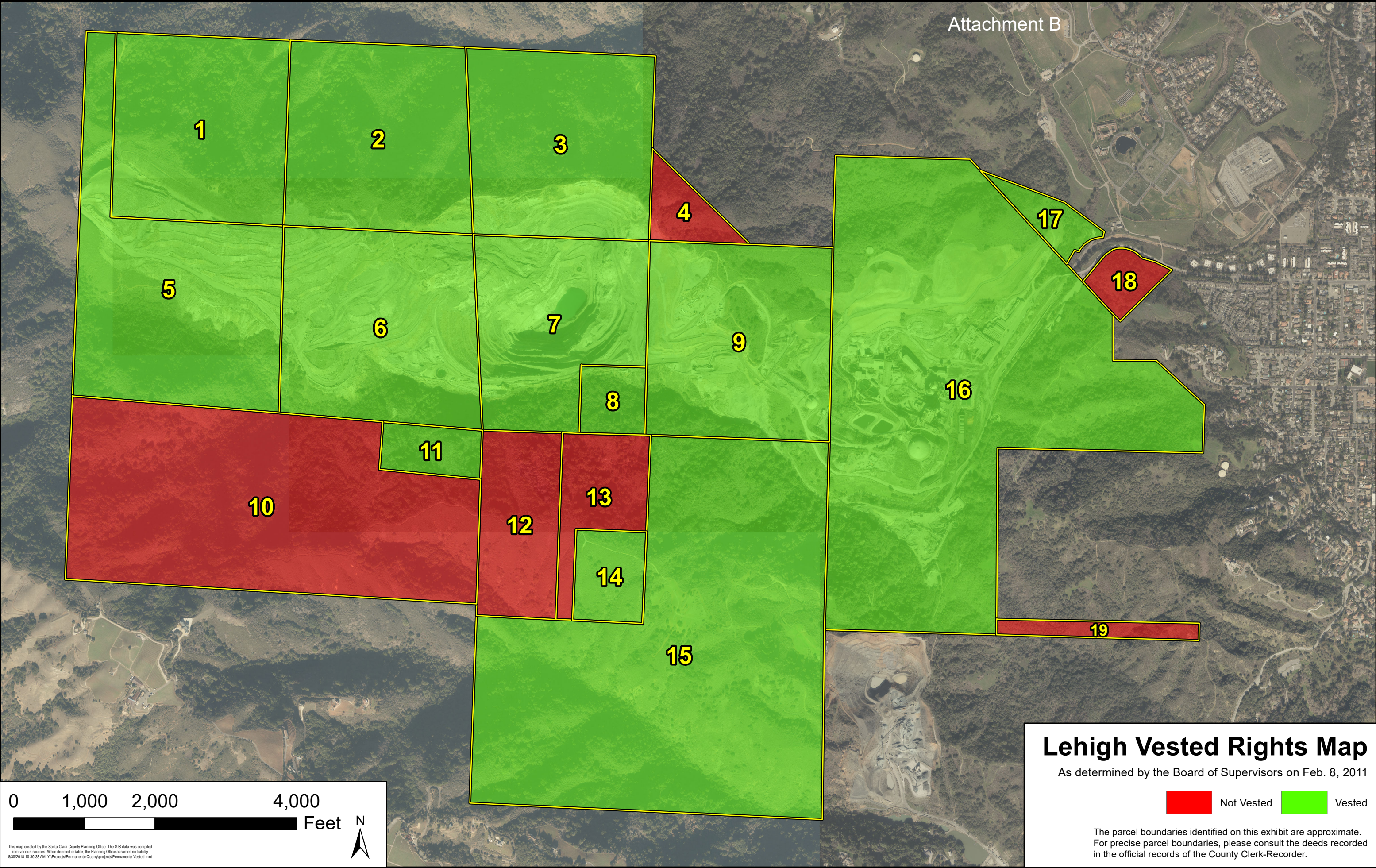


ORRY P. KORB, Assistant County Counsel

Exhibits to this Resolution:

45 – Map of Parcels



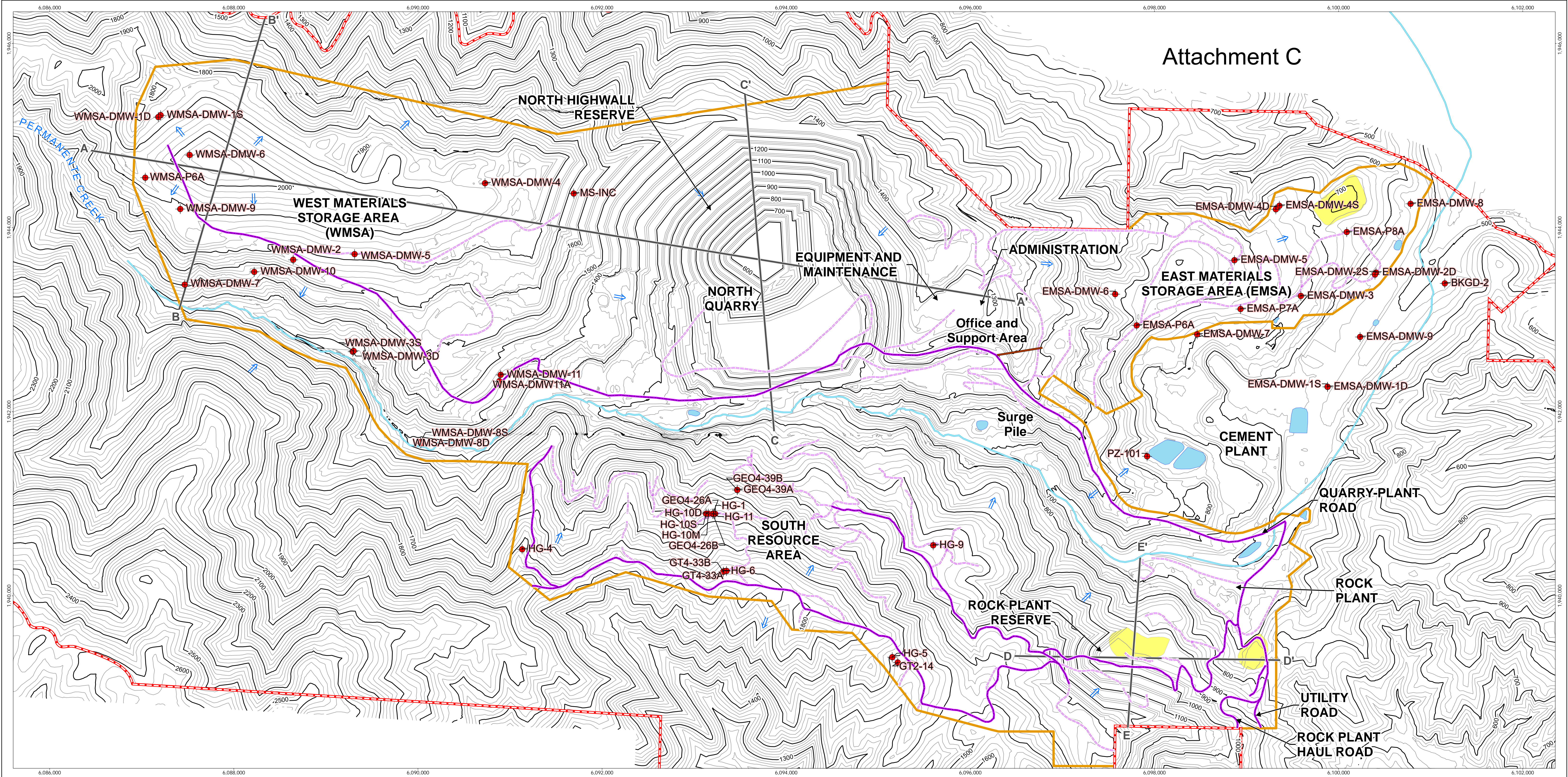


Lehigh Vested Rights Map

As determined by the Board of Supervisors on Feb. 8, 2011

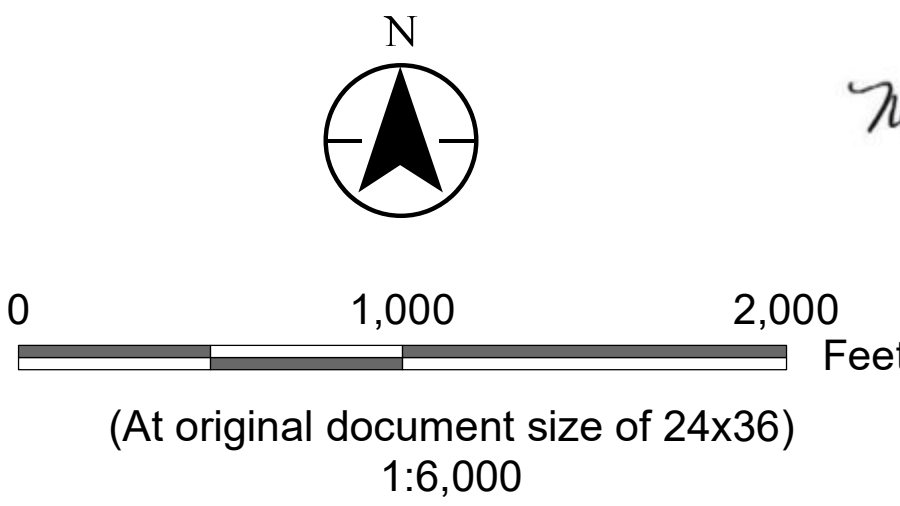
Not Vested Vested

The parcel boundaries identified on this exhibit are approximate. For precise parcel boundaries, please consult the deeds recorded in the official records of the County Clerk-Recorder.



Legend

- Well Location
- Surface Flow Drainage
- Permanente Creek
- Cross-Section
- Conveyor Tunnel
- Road (Retained)
- Road (Reclaimed)
- Stormwater Pond
- Soil Stockpile
- RPA Boundary
- Property Boundary
- Phase 3 - Extent of Mining Topography
- 100 ft Index Contour
- 20 ft Contour



- Notes**
- Coordinate System: NAD 1983 StatePlane California III FIPS 0403 Feet
 - Background: Phase 3 - Extent of Mining Topography
 - Ramps, access roads, and primary travel routes vary in location and size throughout mine progression.
 - The planned surface disturbance boundary and mining depth are shown; however, the extent of operations may or may not reach these limits. Total acreage to be disturbed and reclaimed will be within the limits of the reclamation plan boundary. Facilities and configurations within this boundary are approximate. All acreages are approximate and not intended to reflect goals for any particular surface type. Variations are subject to actual mined conditions and will not affect success of postmining land uses.
 - Active slopes may be steeper and have different bench intervals than final reclaimed cut slopes.
 - Topsoil locations may vary.



Project Location

T07S, R02W
Santa Clara County, CA

Review

Prepared by CBB on 2019-02-21
Final Review by PK on 2019-05-20

Client/Project

Lehigh Southwest Cement Company
Permanente Quarry Reclamation Plan Amendment

Figure No.

Sheet 2

Title

Mine Plan



24001 Stevens Creek Blvd.
Cupertino, CA 95014
(408) 996-4000

October 28, 2020

VIA EMAIL:

jacqueline.onciano@pln.sccgov.org

Jacqueline R. Onciano
Director of Planning and Development
County of Santa Clara Planning Office
70 West Hedding Street, 7th Floor
San Jose, CA 95110

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.

Jacqueline R. Onciano
Department of Planning and Development
October 28, 2020

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.

* * *

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.

Jacqueline R. Onciano
 Department of Planning and Development
 October 28, 2020

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

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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,

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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.

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.

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

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

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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.

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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
Environmental & Land Resources Director

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



24001 Stevens Creek Blvd.
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November 13, 2020

VIA EMAIL ONLY

Jacqueline R. Onciano
Director of Planning and Development
County of Santa Clara Planning Office
70 West Hedding Street, 7th Floor
San Jose, CA 95110

Re: Permanente Quarry – EIR Budget and Scope of Work

Dear Ms. Onciano:

On August 5, 2020, the Planning Department (“Department”) provided Lehigh Southwest Cement Company (“Lehigh”) with a proposed scope of work and budget to prepare an Environmental Impact Report (“EIR”) in order to process Lehigh’s application to amend its reclamation plan (File No. PLN 19-0106). This letter responds to the Department’s verbal request made on November 9, 2020 that Lehigh offer comments on the scope and budget.

For the reasons explained in our October 28, 2020 letter, the Department’s treatment of the application so far is fundamentally flawed. The Department is treating the application as though Lehigh applied for a use permit which Lehigh did not apply for. The Department also has incorporated this flaw into its scope and budget. Essentially, the Department is requesting that Lehigh offer comments on a different project than we applied for.

The effect of this on the scope and budget appears to be significant. The assumption that the “project” includes a use permit appears to account for much of the extraordinary large estimate of nearly \$1.1 million to prepare an EIR. The budget appears to assume that the technical studies that Lehigh filed with the application need to be redone by the Department’s consultant in order to prepare an EIR that redefines the project to require a use permit.

It would be neither wise nor productive for Lehigh, the County or any interested party to comment at this time on a scope and budget that does not match the application. If and when the Department revises the scope and budget to accurately reflect the application that was actually filed and accepted as complete, Lehigh will promptly provide its comments.

The Department should not interpret anything in this response to reflect a desire to abandon the application. To the contrary, and as we have expressed on and many occasions over the past several months, it is critical that we amend the reclamation plan in a reasonable timeframe, and we are deeply

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concerned over the lack of progress, and desire only that the Department agree to process the application in the same form as it was accepted as complete.

We look forward to the Department's response.

Sincerely,

A handwritten signature in cursive script that reads "Erika Guerra".

Erika Guerra
Environmental and Land Management Director
Lehigh Southwest Cement Company

cc: James R. Williams, Esq., Office of the County Counsel
Mark D. Harrison, Esq.