

February 5, 2019

VIA ELECTRONIC MAIL ONLY

Rob Eastwood
Principal Planner
County of Santa Clara
70 West Hedding Street,
San Jose, California 95110
rob.eastwood@pln.sccgov.org

Re: Permanente Quarry; Response to City of Cupertino's January 31, 2019 Letter

Dear Mr. Eastwood:

On behalf of Lehigh Southwest Cement Company ("Lehigh"), the Permanente Quarry operator, this responds to the City of Cupertino's January 31, 2019 letter.

In its letter, the City contends, as respects the Permanente Quarry, that Lehigh acted beyond its mining rights by selling aggregate material to a customer, Stevens Creek Quarry, and planning a mining haul road on its vested property. In making these assertions, the City fundamentally misapprehends the scope of Lehigh's vested rights, and vested mining rights in general. The City also has failed to accurately portray the relationship between the two businesses.

This letter serves to clarify, and to remind all concerned, that Lehigh's vested mining rights include the right to engage in aggregate production and sales. The right to engage in "surface mining operations" necessarily includes the right to construct a mining haul road on vested land. We also take the opportunity to briefly address the City's other claims as they relate to Lehigh's operations. Other aspects of the City's letter are best addressed by Stevens Creek Quarry or Santa Clara County.

Vested rights

The City suggests that Lehigh's vested right to conduct surface mining operations does not permit Lehigh to produce or sell aggregate materials. The suggestion ignores the Permanente Quarry's history, and the binding and final administrative determinations made by the County. On February 8, 2011, the County's Board of Supervisors found, based on a detailed and voluminous record, that Lehigh held a vested right to engage in "surface mining operations" on designated parcels. The findings were upheld against legal challenges at both the trial court and appellate levels.

The right to produce and to sell aggregate was unquestionably encompassed by the County's vested rights determination. "Surface mining operations" as defined by law broadly include the mining, processing and production of minerals. (Pub. Resources Code § 2735; S.C.C. Ord. § 2.10.040.) Further, the County recognized vested rights based on a factual record which showed that the Permanente Quarry had produced and sold aggregates at virtually every stage in its history and at production levels reaching millions of tons yearly. The Board's determination did not qualify, nor could it have qualified, Lehigh's right to continue these aggregate sales in any way. Thus, the City's claim that Lehigh's vested rights to sell aggregate are limited has no factual or legal foundation.

The City also suggests that the vested right to conduct "surface mining operations" does not include the right to construct a mining haul road on vested lands. This also is inaccurate. Mining haul roads are surface mining operations and are essential to the operation of a business of this type. Indeed, the County's August 2018 Notice of Violation recognized that a haul road on vested land was part of the surface mining operation, and for that reason the County required Lehigh to submit a reclamation plan amendment, which Lehigh has done.

Finally, on these points, it should be clear to all concerned that any abridgment of Lehigh's confirmed vested rights would present takings and due process questions under the United States and California constitutions. (See *United Nuclear Corp. v. United States* (Fed. Cir. 1990) 912 F.2d 1432; *Hardesty v. Sacramento Metropolitan Air Quality Management District* (E.D. Cal. 2018) 2018 U.S. Dist. LEXIS 56616.)

Other Assertions

The City makes five additional claims that we briefly address here.

First, the City contends that trucks used by Stevens Creek Quarry to obtain aggregates from the Permanente Quarry "creat[e] nuisance conditions against which the City must consider legal action if the County does not enforce the existing legal restrictions." To be precise, the City does not state that traffic circulating between the Permanente Quarry and Interstate 280 is a nuisance. Rather, the City asserts that a nuisance exists as to traffic between Stevens Creek Quarry and the Permanente Quarry. Although this claim relates mainly to Stevens Creek Quarry's operations, rather than Lehigh's operations, we note that the County Sheriff's Department has stated publicly that it is not aware of major traffic issues associated with the transportation of aggregates between the quarries. The existing configuration and signalization at the intersection of Foothill Boulevard and Stevens Creek Boulevard have, according to the Sheriff, been adequate to accommodate traffic without significant delays or safety issues.

Second, the City asserts that the only basis for Lehigh selling aggregate materials to Stevens Creek Quarry is that Lehigh sought to take advantage of "less stringent environmental controls" at Stevens Creek Quarry. Lehigh has absolutely no need for alternative processing locations for its rock material in order to achieve compliance with environmental requirements. As acknowledged by the City in its letter, Lehigh has designed and implemented controls that are "expensive and unusual" to meet stringent water quality standards and other requirements of regulatory agencies, like the San Francisco Regional Water Quality Control Board. (See City Letter at pg. 6.) Lehigh's unique success in this regard was documented well before Lehigh began selling rock to Stevens Creek Quarry. The allegation that Lehigh had any type of subversive, anti-environmental motive for the sale of its mined

rock is distasteful, deliberately provokes public fear, and spreads misinformation. Stevens Creek Quarry is merely a customer, and it uses aggregate purchased from Lehigh for its own purposes.

Third, the City suggests that Lehigh’s aggregate material is contaminated. This claim is inaccurate. Lehigh possesses data demonstrating that the material sold to Stevens Creek Quarry does not pose an environmental threat (and further confirms that no ulterior motive exists for the sale). Previous and current analysis of Lehigh’s aggregate (made up primarily of greywacke and greenstone) indicates that it has a very low potential to leach metals like selenium at levels above water quality standards established by the U.S. EPA and the San Francisco Regional Water Quality Control Board (“RWQCB”). This data has already been publicly vetted as part of the 2012 Reclamation Plan EIR¹, and is confirmed by more recent material characterization analyses undertaken as part of Lehigh’s good faith efforts to comply with regulatory orders and approved waste discharge requirements issued by the RWQCB. Its aggregate materials do not have any characteristics making them hazardous or unfit for sale, and indeed the quarry has sold this material for decades without issue.

Fourth, the City’s letter attempts to draw a distinction between unprocessed and processed aggregate. The distinction is artificial. “Aggregate” commonly includes sand, gravel, and crushed rock. Such material remains aggregate no matter what level of crushing, sorting or washing (i.e. “processing”) it undergoes. There is no separate legal distinction between processed and unprocessed aggregates that exists either in the law or in industry parlance. Further, to the extent that Lehigh’s aggregate materials may sometimes be referred to as “waste,” this simply refers to the fact that they are a by-product of the cement-grade limestone mining process.

Fifth and finally, with respect to CEQA, the City contends the County must perform a CEQA review of Lehigh’s vested mining operations in order to approve a reclamation plan amendment, or else the County would engage in piecemealing. This ignores settled law. If a vested quarry applies for a new or amended reclamation plan, the longstanding rule is that CEQA review is limited to the effects of reclamation, not mining. (See *El Dorado Taxpayers for Qual. Growth v. County of El Dorado* (2004) 122 Cal.App.4th 1591, 1598; *City of Ukiah v. County of Mendocino* (1987) 196 Cal.App.3d 47, 53-54; see also *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 275.) The City’s claim regarding CEQA’s categorical exemptions has the same flaw. When this project is correctly limited to the effects of reclaiming a road – not building it – then this project fits squarely within CEQA’s categorical exemptions for minor alterations.

Conclusion

The Permanente Quarry has been a part of the community for a century. Lehigh values its relationship with its neighbors and believes in balancing its rights with efforts that soften the effect of its activities on the community. Lehigh’s January 3, 2019 letter listed voluntary steps adopted by Lehigh to accomplish this and proposed other voluntary actions to address the recent concerns concerning traffic to and from the Stevens Creek Quarry. It should not be lost in this exchange of letters that Lehigh remains committed to these actions and to doing its best to address the community’s needs.

¹ The 2012 Final EIR explained that greenstone aggregate has low selenium leachability (p. 4.10-9, 15) and the Final EIR advocated using greenstone as a final cover material and to construct water-quality BMPs such as check dams and ditches (p. 4.10-45, 46).

Mr. Rob Eastwood
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We appreciate the County's attention to this matter. If you have any question or concerns, please contact me by telephone at (916) 706-2575 or by email at mharrison@hthjlaw.com.

Best Regards,
HARRISON, TEMBLADOR, HUNGERFORD & JOHNSON

By 
Mark D. Harrison, Esq.

cc: Jacqueline Onciano, Planning Director, Santa Clara County
Elizabeth Pianca, Esq., Lead Deputy County Counsel
Timm Borden, Interim City Manager, City of Cupertino
Ana Damonte, Esq., Lehigh Southwest Cement Company
Erika Guerra, Lehigh Southwest Cement Company