

RESOLUTION NO. 2011-85

**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;

Adopted



**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.)

Adopted

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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Adopted

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 MAR 01, 2011, by the following vote:

AYES: ~~CORTESE, KNISS, SHIRAKAWA, WASSERMAN, YEAGER~~

NOES: NONE

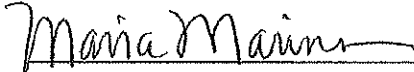
ABSENT: YEAGER

ABSTAIN: NONE



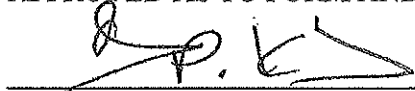
DAVE CORTESE, President  
Board of Supervisors

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

Adopted



**Permanente Acquisition History**

The parcel boundaries identified on this exhibit are approximations. For precise parcel boundaries, please consult the records retained in the official records of the County Clerk/Recorder.

Background: 1939 Aerial

0 1,000 2,000 4,000 Feet

This map created by Santa Clara County Planning Office. The GIS data were compiled from various sources. While obtained reliably, the Planning Office assumes no liability for errors. Please refer to Book 170 of the Official Records page 10. Permanente Records File # 1343. The file # 1343 is the file # for Jan 1964. 03/01/2011 - Y:\08\permanente\quarry\permanente road v7.mxd

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