

# County of Santa Clara Department of Planning and Development



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PLN01 020811

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Director of Planning and Development

DATE: February 8, 2011

TO: Board of Supervisors

FROM:   
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Director of Planning and Development

**SUBJECT:** Evidentiary hearing to determine whether, and to what extent, there is a legal nonconforming use for surface mining activities on approximately 2,656 acres of property located in unincorporated County of Santa Clara comprising the Permanente Quarry, 24001 Stevens Creek Boulevard, Cupertino, 95014. Owner: Heidelberg Cement, Incorporated/Hanson Permanente Cement, Incorporated; Operator Lehigh Southwest Cement Company (collectively the "Quarry"). Assessor Parcel Numbers 351-09-011, -013, -020, -021, -022; 351-10-003, -004, -005, -006, -008, -010, -011, -012, -029, -033, -037, -038; 351-11-001, -005, -006, -007, -012; and 342-64-001.

## **RECOMMENDED ACTION**

Evidentiary hearing to determine whether, and to what extent there is a legal nonconforming use for surface mining activities on approximately 2,656 acres for property located in unincorporated County of Santa Clara comprising the Permanente Quarry, 24001 Stevens Creek Boulevard, Cupertino, 95014. Property of Heidelberg Cement, Inc./Hanson Permanente Cement, Inc.; Operator Lehigh Southwest Cement Company.

Possible action:

- a. Open public hearing and receive testimony.
- b. Close public hearing.
- c. Declare tentative intent to find that there is a legal nonconforming use to conduct

quarrying operations on some or all of the property in question, and determine the geographic extent of the legal nonconforming use, and refer the matter to County Counsel for preparation of a findings resolution.

STAFF RECOMMENDATION: ALTHOUGH THE BOARD WILL MAKE ITS OWN DETERMINATION REGARDING THE GEOGRAPHIC EXTENT OF THE QUARRY'S LEGAL NONCONFORMING USE BASED ON THE EVIDENCE PRESENTED AT THE PUBLIC HEARING, THE FOLLOWING IS STAFF'S RECOMMENDATIONS BASED ON ITS ANALYSIS OF THE INFORMATION AND DATA AVAILABLE TO DATE.

Declare intent to do the following and refer the matter to County Counsel for preparation of a findings resolution:

1. Determine 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. Determine that the County Zoning Code Ordinance first required a use permit for quarrying in the "A-1" district in January 1948.
3. Determine 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. Determine that the geographic extent of the Quarry's legal nonconforming use includes all areas where there is evidence of mining-related disturbance as of 1948, as displayed on Exhibit 54.
5. Direct the Quarry to 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. The application shall be submitted to and accepted by the County as soon as possible for processing along with the reclamation plan amendments.
6. Direct the Quarry to apply for formal abandonment of Permanente Road.

### **FISCAL IMPLICATIONS**

None.

### **CONTRACT HISTORY**

None.

### **REASONS FOR RECOMMENDATION**

Based on staff research, four key questions were identified to determine the scope of the Quarry's legal nonconforming use. A summary of staff research and the resulting answers to these questions follows. A comprehensive staff analysis and exhibits, detailing these and related issues, are included with the agenda materials.

***1. Was Permanente Road still a "public street" for purposes of applying the 1937 Zoning Ordinance as the date by when quarrying activities needed to have begun?***

Permanente Road ran through the Quarry property and was dedicated to the public in 1893. Although there is no evidence that this road was ever formally abandoned, the public has been denied access to the road since sometime in the 1930s. Therefore, staff concluded it is reasonable to determine that it no longer served as a public “street” as defined in the 1937 Zoning Ordinance. Consequently, the requirement for a use permit for quarrying within 1,000 feet of a public street does not apply to the Quarry lands except for the portion within 1,000 feet of the portion of Permanente Road that remained public. This affects the eastern portion of the proposed East Materials Storage Area.

It is also recommended that the Quarry proceed, at its expense, with a formal abandonment application for Permanente Road.

***2. When did the County Zoning Ordinance first require a use permit for quarrying on the Quarry property?***

The answer to this question required staff to review the County's historic zoning ordinances and to determine how the Quarry property's zoning designations evolved over time. Based on this review, staff determined that the Quarry property was zoned “A-1” until 1955/60. In the “A-1” district, the County Zoning Ordinance first required a use permit for quarrying in 1937 for areas within 1,000 feet of a public street, and in 1948 for all other areas. This determination is consistent with an analysis of the historic zoning ordinances prepared by County Counsel in 2002 associated with a legal nonconforming use determination for the neighboring Stevens Creek Quarry.

Therefore, except for a small portion of the property that lies within 1,000 feet of the current terminus of Permanente Road (now Stevens Creek Road), the key date for determining the extent of the Quarry's legal nonconforming use is 1948.

***3. What is the geographic extent of the Quarry's legal nonconforming use?***

The County Geologist analyzed aerial photos from the relevant time periods to identify all quarrying-related disturbance, including excavation, exploration, roads and cuts/fills. Staff was unable to locate, and the Quarry did not provide, any evidence of “intent” to conduct quarrying activities on any other land beyond the land that was actually disturbed. The areas of disturbance as of 1948 are shown on Exhibit 54, and this is staff's recommendation for the geographic extent of the Quarry's legal nonconforming use for quarrying.

Staff does not believe that there is a legal or factual basis for concluding that any quarrying-related disturbance within the boundaries of a legal parcel necessarily means that the legal nonconforming use encompasses the entire legal parcel.

With respect to the proposed East Materials Storage Area, the County Geologist did not identify any quarrying-related disturbance as of 1948. Moreover, this land was sold to a separate corporation and developed/used intensively for metals manufacturing and related activities until the 1980s. Thus, any legal nonconforming use that may have been established on the proposed EMSA land was abandoned long ago.

***4. What is the relevance of the 1985 Reclamation Plan Approval?***

When the County approved the Quarry's existing Reclamation Plan in 1985, staff concluded that no use permit was required because the Quarry had a legal nonconforming use for quarrying. However, as with other prior County conclusions regarding the Quarry's legal nonconforming use, it does not appear that any in-depth research was conducted to support this conclusion or that any effort was made to assess the geographic extent of the Quarry's legal nonconforming use. Rather, the documentation indicates that this conclusion was based simply on the fact that quarrying had begun before the County adopted its first zoning ordinance.

There does not appear to be any legal basis for the assertion that approval of the 1985 Reclamation Plan precludes the County from determining the scope of the Quarry's legal nonconforming use based on the standards set forth in case law.

## **Evidentiary Hearing**

In order to process two Reclamation Plan Amendment applications submitted by the Quarry, the Board of Supervisors (Board) is being asked to conduct an evidentiary hearing to determine whether there is a legal nonconforming use for quarrying on some or all of the property owned by Heidelberg Cement, Incorporated/Hanson Permanente Cement, Incorporated; and the geographic extent of the legal nonconforming use.

This hearing will not grant any land use authorization. It will however frame and guide the process for *future* consideration of certain land use approvals.

For the portions of the quarry property where the Board determines legal nonconforming quarrying use(s) do *not* exist and the Quarry is either engaged or proposes to engage in quarrying activities, a Use Permit(s) will be required. The property owner will be required to file and staff will process Use Permit application(s) simultaneously with pending proposals for amendments to the existing Reclamation Plan for the Permanente Quarry. For those portions of the property on which legal nonconforming uses(s) are determined by the Board of Supervisors to exist, Use Permit(s) will not be required, but Reclamation Plans must be processed and approved before the operator will have all necessary lawful approvals to extend/expand operations on site.

This evidentiary hearing focuses on 2,656 of the 3,500 acres owned by the Quarry and located in unincorporated Santa Clara County. The Quarry has acknowledged that a Use Permit would be required for the proposed new pit mine, and has submitted a Use Permit application for the proposed new pit mine to be processed simultaneously with the Quarry's Comprehensive Reclamation Plan Amendment.

Two Reclamation Plan amendments are pending: one for the East Materials Storage Area (EMSA) portion of the site and a second Comprehensive Reclamation Plan amendment for a larger portion of the site including the EMSA. The Comprehensive Reclamation Plan application includes a new pit mine and overburden storage area. Both amendments are subject to the California Environmental Quality Act (CEQA) and the preparation of Environmental Impact Reports (EIRs).

The determination of whether and to what extent there may be legal nonconforming use(s) on the Quarry site must be based on the evidence presented and the relevant legal standards. Matters of policy or preference are not pertinent.

The Quarry bears the burden of proof with respect to establishing the nature and extent of its legal nonconforming use(s). Legal counsel for the Quarry has submitted two documents for Board consideration dated November 5, 2010 and January 4, 2011, and may present additional information at the meeting. The Board should consider all the information available and presented at the evidentiary hearing, and render its decision based on substantial evidence in the record.

There is no question that quarrying began on a portion of the property in the early 1900's, and that there is a legal nonconforming use for quarrying covering at least portions of the Quarry property. The ultimate issue that the Board of Supervisors must decide is the geographic extent of the legal nonconforming use.

Staff acknowledges that Quarry representatives and others may have alternative interpretations they believe demonstrate historic and/or integral use of this site that, if accepted by the Board, may support a determination different from that of County staff. **Should this be the case, additional areas/portions of the site that the Board believes are within the scope of the Quarry's legal nonconforming use should be articulated by the Board and added to the referral to County Counsel for preparation of a findings resolution.**

## **BACKGROUND**

The Permanente Quarry is a limestone and aggregate mining operation in the Santa Clara County foothills located along a sinuous roughly east-west trending ridge in the Santa Cruz mountain range west of the City of Cupertino's jurisdictional limits. The mine has a single, very large pit where limestone and aggregate are quarried. West of the mine pit is an overburden stockpile area known as the West Materials Storage Area. Overburden is currently being placed in an area referred to as the East Materials Storage Area. In addition, there is also a cement manufacturing operation located on the Quarry property that is governed by a use permit first issued in may 1939. The cement plant is not the subject of this evidentiary hearing.

In October 2006, the County of Santa Clara issued the Notice of Violation and Order to Comply (NOV/OTC) requiring that the Reclamation Plan, on file and approved in 1985, be amended to encompass all disturbed areas related to mining operations outside the Reclamation Plan boundary. In January 2007, the operator submitted a Reclamation Plan Amendment application in accordance with the NOV/OTC. The County determined that extensive geological analysis was necessary to address the slope stability issues in the existing pit. In December 2007, the mine operator requested, and was given, 24 months to complete additional geological analyses pertinent to revise and resubmit the application. The Quarry submitted a revised application on May 28, 2010 and the application was deemed complete on September 24, 2010. This proposed Comprehensive Reclamation Plan Amendment is subject to the California Environmental Quality Act (CEQA). An EIR is in preparation. The proposed Comprehensive Reclamation Plan Amendment and related EIR are anticipated to be the subject of public hearings in fall 2011.

In June 2008, the County of Santa Clara issued a second NOV to the mine operator due to unauthorized material disposal on a portion of the Quarry property called the EMSA. Quarry representatives met with the County staff and explained that disposing the mined overburden in the EMSA was necessary for the continued operation of the quarry and that waiting for the proposed Comprehensive Reclamation Plan Amendment to be completed would severely impact operations. Following consultation with the State Office of Mine Reclamation, the County and Quarry signed an Agreement that: 1) required the mine operator to cease operations until an application to amend the existing Reclamation Plan to include the EMSA was submitted; 2) granted a three month extension of time for processing the comprehensive Reclamation Plan Amendment in order to prepare documentation for the EMSA application; 3) established fines to be imposed by the County if the EMSA application was not submitted as stipulated in the Agreement; and 4) allowed the mine operator to resume using the EMSA for disposal of materials upon receipt of the new Reclamation Plan Amendment application. The EMSA Reclamation Plan Amendment application was submitted on April 20, 2009 and is subject to the California Environmental Quality Act. An EIR is in preparation. The proposed EMSA Reclamation Plan Amendment and related EIR are anticipated to be the subject of public hearings in summer 2011.

The State Mining and Reclamation Act (SMARA), requires approval of Reclamation Plan Amendments for all surface mines/quarries. Under SMARA, the County is the lead agency for implementing the law including approving reclamation plans, amendments to reclamation plans, review and approval of financial assurances to fund land reclamation, and inspections for compliance with approved reclamation plans. The County also regulates quarries under its Zoning Ordinance.

One of the issues that arose as the County began to process the EMSA Reclamation Plan Amendment application was whether quarrying on the EMSA property was a "legal nonconforming use". County zoning regulations generally require a Use Permit for quarrying activities; however, no Use Permit is required if the quarrying in question is a legal nonconforming use (sometimes referred to as a "vested right") on the property. A Use Permit is a discretionary approval issued by the County and is often subject to compliance with conditions of approval to ensure an operation is compatible with the surrounding area and will not adversely affect the public health, safety and welfare.

A legal nonconforming use is a land use that complied with all laws and regulations when it began, but became unlawful due to subsequent adoption or changes to regulations. In California, there are special rules for determining legal nonconforming uses on quarries. These rules are discussed in detail on pages 4 through 7 of the staff analysis.

Staff originally proposed that the Board hold two separate hearings - one pertaining to the EMSA property, and a second for the remainder of the Quarry property. However, as research progressed, it became clear that there was significant overlap in the two analyses. It is also more convenient for the Board and the public to hold/attend one hearing addressing all of the Quarry's property in unincorporated Santa Clara County (excluding the cement plant which is, as noted above, subject to its own Use Permit).

To assist the Board of Supervisors in making this determination, County staff has undertaken considerable research and has prepared a staff analysis. The staff analysis is attached to this transmittal and includes sixty exhibits. This report addresses several interrelated issues:

1. An overview of the legal standards applicable to a legal nonconforming use analysis, including special rules pertaining to quarries;
2. A summary of the County's historical zoning regulations pertaining to quarries;
3. A description of the historical uses and development of the quarry property;
4. A discussion of prior County conclusions regarding the Quarry's legal nonconforming use; and
5. An analysis of the nature and extent of the Quarry's legal nonconforming use; and
6. An conclusion and identification of key decision points for determining the nature and extent of the Quarry's legal nonconforming use.

### **CONSEQUENCES OF NEGATIVE ACTION**

For any/all property the Board determines to not have vested rights to conduct surface mining, the Quarry must apply for and obtain a Use Permit(s) in addition to approval of pending Reclamation Plan Amendments. Conversely, for any or all property where a legal nonconforming use does exist, Use Permit(s) would not be required, but quarrying activities would still be subject to pending Reclamation Plan Amendments and related environmental analysis and EIR's pursuant to state law.

### **STEPS FOLLOWING APPROVAL**

County Counsel will prepare a findings resolution reflecting the Board's intent for future consideration and possible adoption by the Board of Supervisors.

### **ATTACHMENTS**

- Staff Analysis (1/27/11)
- Exhibit 1. Memorandum from J. Baker, County Geologist to J. Hall Esser, Director, Planning (1/18/11)
- Exhibit 2. Ord. No. 120 (8/25/37)

- Exhibit 3. Use Permit No. 173.23
- Exhibit 4. Ord. No. 345 (12/29/47)
- Exhibit 5. Ord. No. 733 (9/14/53)
- Exhibit 6. Ord. No. 1200-10dm (3/14/55)
- Exhibit 7. Ord. No. NS-1200.21 (5/31/60)
- Exhibit 8. Ord. No. NS-1200.11 (4/20/59)
- Exhibit 9. Deed-Book 170 O.R. 10, Permanente Road
- Exhibit 10. State Report (1906)
- Exhibit 11. State Report (1920)
- Exhibit 12. State Report (1930)
- Exhibit 13. Tolman Report (1939)
- Exhibit 14. State Report (1947)
- Exhibit 15. State Report (1954)
- Exhibit 16. Permanente News - (August 1943)
- Exhibit 17. Deed-Book 942 O.R. 290
- Exhibit 18. Deed-Book 1029 O.R. 408, Book 1041 O.R. 43
- Exhibit 19. Deed-Book 1080 O.R. 45, Book 1094 O.R. 138
- Exhibit 20. Deed-Book 1076, Page 407
- Exhibit 21. 1944 Kaiser Record of Survey, Book 6, Page 36
- Exhibit 22. The Kaiser Story, Page 39 (1968)

- Exhibit 23. Board of Supervisors Minutes (8/17/65)
- Exhibit 24. Board of Supervisors Minutes (9/20/65)
- Exhibit 25. Letter from R. Forster to Supervisor Calvo (2/18/71)
- Exhibit 26. Letter from W. Ousterman, Kaiser Cement to W. Siegel, County Counsel (10/10/66)
- Exhibit 27. Letter from W. Ousterman, Kaiser Cement to W. Siegel, County Counsel (3/24/67)
- Exhibit 28. Letter from W. Reynolds to Supervisor Calvo (2/18/71)
- Exhibit 29. Memorandum from J. Haas, SCC Zoning Administrator to Supervisor Calvo (2/22/71)
- Exhibit 30. Letter from W. Siegel, County Counsel to Supervisor Calvo (4/12/71)
- Exhibit 31. Notes of W. Siegel, County Counsel from BOS meeting (5/9/72)
- Exhibit 32. Memorandum from D. Rains, Clerk of the Board transcript of 5/10/72 Board meeting
- Exhibit 33. Newspaper article regarding Permanente Quarry (5/17/72)
- Exhibit 34. Letter from T. O'Donnell, Kaiser Attorney to S. Brown, County Counsel (6/3/80)
- Exhibit 35. Memorandum from B. Menifee, County Counsel to B. Sturdivant, Planning (6/5/80)
- Exhibit 36. Letter from R. Bratton, Planning to N. Gilbertson, Kaiser Cement (3/27/84)
- Exhibit 37. Environmental Assessment File No. 2250-13-66-84P
- Exhibit 38. Staff Report to Planning Commission, File No. 2250-13-66-84P (3/7/85)

- Exhibit 39. Letter from F. Nelson, Kaiser Cement, VP to L. Stamos, Planning (2/2/88)
- Exhibit 40. Letter from F. Nelson, Kaiser Cement, VP to L. Stamos, Planning (3/1/88)
- Exhibit 41. Letter from L. Stamos, Planning to F. Nelson, Kaiser Cement, VP (3/29/88)
- Exhibit 42. Letter from T. O'Donnell, Kaiser Attorney to L. Stamos, Planning (7/25/91)
- Exhibit 43. Board of Supervisors Minutes (9/25/35 and 9/30/35)
- Exhibit 44. Map showing ownership as of 1937
- Exhibit 45. Map showing Permanente acquisitions
- Exhibit 46. Certificate of Merger documents
- Exhibit 47. Map showing transfers to Todd Shipbuilding/Permanente Metals
- Exhibit 48. Metals Facility Site Plan, County Assessor
- Exhibit 49. Map showing Permanente Rd., 1000 ft. buffer
- Exhibit 50. Map showing Permanente Rd., 1000 ft. buffer and proposed reclamation plan amendments
- Exhibit 51. Map showing 1939 analysis and Permanente Rd.
- Exhibit 52. Map showing Permanente Rd. to bridge and 1000 ft. buffer
- Exhibit 53. Map showing 1985 reclamation plan
- Exhibit 54. Map showing 1939 and 1948 disturbance
- Exhibit 55. Map showing 1939 and 1948 disturbance plus 1985 reclamation plan
- Exhibit 56. Map showing 1939, 1948 and 1955 disturbance
- Exhibit 57. Map showing 1939, 1948 and 1955 disturbance plus 1985 reclamation plan

- Exhibit 58. Map showing 1939, 1948, 1955 and 1960 disturbance
- Exhibit 59. Map showing 1939, 1948, 1955 and 1960 disturbance plus 1985 reclamation plan
- Exhibit 60. Map showing quarry property rezoned, 1955
- Exhibit 61. Map showing 1939 disturbance plus 1985 reclamation plan and proposed RPA's
- Exhibit 62. Map showing 1939 and 1948 disturbance plus 1985 reclamation plan and RPA's
- Exhibit 63. Map showing 1939, 1948 and 1960 disturbance plus 1985 reclamation plan and RPA's
- November 5, 2010 Letter from Diepenbrock-Harrison
- January 4, 2011 Letter from Diepenbrock-Harrison
- Correspondence
- Additional Correspondence