

Mr. Victor Calvo
 Supervisor
 County Administration Building
 San Jose, California

April 12, 1971

W. C. Reynolds

321 - 2300

X 4023

Dear Mr. Calvo:

You have requested our comments concerning a letter written to you from W. C. Reynolds, dated March 18, 1971 concerning the Permanente Cement plant and quarry.

Mr. Reynolds suggests that our zoning ordinance with respect to nonconforming uses represents the "older view of zoning" and that it should be amended so as to allow the termination of those nonconforming uses which, after hearing thereon, are deemed to be obnoxious. Reference is made to a zoning ordinance of the City of Palo Alto in this regard. Also requested by you was an outline of procedures available to the county with respect to imposing land use controls upon the Permanente quarry. It is our understanding that you have received from the County Planning Department a detailed zoning history of the Permanente land use, and that such study indicates that the quarry use is a nonconforming use but that the cement plant is operating under a use permit.

The cement plant operation, being the subject of a use permit, is under the control of the county, since our zoning ordinance (Article 50) sets forth a procedure for the modification or revocation of use permits, assuming that conditions reasonably warrant such modification or revocation.

The quarry, being a nonconforming use, is in a different category. The quarry standards, adopted on November 27, 1961 by the Board of Supervisors as a policy standard, have been applied to quarry use permits only issued since that date.

A nonconforming use is a lawful use existing on the date of the zoning restriction and continuing since that date in nonconformance to the ordinance. As a general rule, discontinuance of a nonconforming use which is not a nuisance and of their zoning ordinance relating to nonconforming uses.

which legally existed when the ordinance was adopted is a deprivation of property without due process, although it is recognized that changes or additions to the existing use are not protected which make the use more noisesome or which enlarge it or tend to make it more permanent, it being the purpose of zoning to eliminate nonconforming uses as rapidly as is consistent with the rights of the owners (see City of Los Altos vs. Silvey (1962) 206 CA2d 606, 609).

Despite the above language from the Silvey case and the provisions of most zoning ordinances that nonconforming uses may not be enlarged or expanded (which language is in our zoning ordinance), McClassin vs. City of Montorey Park (1958) 163 CA2d 339, currently stands for the proposition that a nonconforming decomposed granite removal operation could be expanded through the entire original parcel of land, even though such additional land was not used at the time of the effective date of the passage of the zoning ordinance, although it could not be expanded to a second parcel.

Several methods of terminating or controlling nonconforming uses are in general use today:

1. Termination from natural causes. This method tolerates nonconforming uses until elimination comes through abandonment, obsolescence or destruction. The provisions of our county zoning ordinance would fall into this class. Under this method, nonconforming uses are eliminated through allowed conversions to a more conforming use, no rebuilding after destruction, or no reuse after abandonment.

2. Termination by ordinance at end of a specified time. It is still recognized that immediate abandonment of a nonconforming use which is not a nuisance and which existed when the ordinance was adopted is a deprivation of property without due process. However, there is no such deprivation where an ordinance provides for the eventual discontinuance of nonconforming uses within a prescribed reasonable amortization period commensurate with the investment involved. Whether or not the amortization period is reasonable and is commensurate with the investment involved as to a particular parcel of property and as to a particular land use are issues for individual factual determination (National Advertising Company vs. County of Monterey (1970) 1 C 3rd 875).

We have received from the City of Palo Alto the provisions of their zoning ordinance relating to nonconforming uses.

SUGGESTED PROCEDURES FOR ELIMINATION OR CONTROL OF QUARRIES

A. Establish by ordinance a method of determining, with respect to nonconforming uses, reasonable amortization periods commensurate with the investment involved after the expiration of which period the use would be deemed terminated. This procedure would involve the expenditure of much time, both in the drafting of the ordinance and the subsequent determination of what constituted a reasonable period of time, since separate classifications of nonconforming uses would need separate analysis. Probably the safest way to achieve this would be through the use of public hearings, the purpose of which would be to administratively establish reasonable time periods.

B. Establish by ordinance standards with respect to the operation of all quarries in the unincorporated area of Santa Clara County. Such an ordinance would be equally applicable to all quarries and would be based on the quarry standards adopted as a policy matter on November 27, 1961. (So far as we know, these standards have been imposed via the use permit procedure upon every quarry established since that date). Such an ordinance would provide for the issuance of a permit. Quarries established after November 27, 1961, having such standards already imposed upon them, would be deemed to possess such a permit. Quarries not having such standards (nonconforming uses) would be given a period of time in which to apply for such permit and to conform to the newly adopted (by way of ordinance) standards. Failure to comply with the provisions of the ordinance would result, after an administrative hearing thereon, in a revocation of the permit and an inability to continue to use the quarry except in compliance with the ordinance. As noted, we attach for your convenience a copy of the existing quarry standards which contain provisions relating to contouring, rehabilitation, dust, noise and similar control, hours and dates of operation, drainage and similar matters. These standards could be recast in ordinance form.

We are not suggesting that the enactment of the current quarry standards by way of ordinance would necessarily achieve the desired result of, for example, preventing a particular hillside from being leveled. It would be possible to provide in such an ordinance environmental control and scenic buffering so that a quarry operation would not become a blight on the landscape and, in this regard, the current quarry standards would furnish an excellent beginning point.

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In addition to the cessation of such uses through the more traditional discontinuance or abandonment (sec. 18.94.090 and 18.94.100), there are provisions setting forth schedules for the time within which certain nonconforming uses must be removed (sec. 18.94.120). Owners or occupiers of land containing a nonconforming use, upon the request of the building official, are required to obtain and annually renew the certificate of use and occupancy (sec. 18.94.160). No consequences appear to flow from the permit or lack of permit insofar as the nonconforming uses are concerned.

3. Termination on basis on a nuisance theory. A nonconforming land use of land or buildings can be immediately terminated if such use is judicially declared a nuisance. It has been suggested that courts would now be more willing, having become more sophisticated in the theory of zoning, to uphold a legislative or administrative determination that a use is a nuisance if there is some evidence to make such a finding (Livingston Rock & Gravel Co. vs. Los Angeles (1954) 43 C2d 121). This case upholds an administrative determination by a planning commission, under an ordinance so authorizing, that a nonconforming use was a nuisance. If there is no nuisance, immediate termination would not be permissible (City of Los Altos vs. Silvey, supra, 609). Of course, if a nuisance in fact exists, it may be judicially terminated absent any provision in the zoning ordinance.

4. Control by ordinance. In addition to the above, and also there were no California cases in point, it is a generally recognized principle that a nonconforming use is amenable to ordinances which apply to similar uses maintained in the community, whether conforming or nonconforming, as long as such controls are imposed by the ordinance are designed to legitimately regulate the use and are not an attempt to destroy the use (Anderson, American Law of Zoning, Vol. I, sec. 6.71).

Very truly yours,

WILLIAM M. SIEGEL
County Counsel

By
Selby Brown
Chief Assistant Counsel