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November 5, 2010

Via Overnight Mail

Ken Yeager, President of the Board and
Members of the Board of Supervisors for Santa Clara County
Supervisors Chambers
70 West Hedding Street
San Jose, CA 95110

Re: Permanente Facility Vested Rights

Dear Mr. Yeager and Members of the Board:

INTRODUCTION

We represent Hanson Permanente Cement, Inc. and Lehigh Southwest Cement Company ("Lehigh") in connection with the Permanente Facility ("Facility") located in the County of Santa Clara. The Facility is located within a 3,510-acre landholding in the foothills west of the City of Cupertino. (Exhibit 1.) The Facility has been in continuous operation by Lehigh or its predecessors in interest, the Henry J. Kaiser companies, since 1939. According to state records, mining and processing of limestone began on the property at the turn of the century.

Recently, Lehigh has filed applications to update the reclamation plan for the Facility, which we collectively refer to as the Reclamation Plan Amendment. The purpose of the Reclamation Plan Amendment is to ensure that all mining-related disturbances are included within the bounds of the reclamation plan. In connection with the Reclamation Plan Amendment, Lehigh has also applied for a conditional use permit ("CUP Application") to extend limestone extraction activities onto three parcels which were acquired after commencement of operations on the original tract. Lehigh believes that these three parcels are outside of current vested areas.

The Board of Supervisors has been asked to confirm the vested status of the Facility in advance of its decision on the Reclamation Plan Amendment and the CUP

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Application. For over 70 years, the County has consistently acknowledged and affirmed the operating rights of the Facility. While reserving its rights, Lehigh is nonetheless pleased to consolidate and present for the Board's review the facts concerning the Facility's history and vested operating rights. Lehigh does not believe there can be any legitimate dispute that the underlying operating rights at the Facility are vested, subject only to the approval of the appropriate reclamation plan and a use permit for new extraction areas that lie outside of the vested tract.¹

This letter summarizes the facts and law which bear on the issue.²

FACTS

The operational facts at the Facility are not in dispute and are documented largely through extensive aerial photography of the site over the last seven decades.

Exhibit 2 shows the current ownership boundaries and the current area of disturbance as of 2009.

Exhibit 3 shows the extent of Lehigh³ ownership as of 1943. According to County Counsel's Office, December 29, 1947 is the date that a use permit would have first been required to establish the use. Lehigh's vested ownership was in place approximately four years prior to the vesting date.

Exhibit 4 depicts the area subject to the Reclamation Plan Amendment. The Reclamation Plan Amendment includes all areas subject to mining-related disturbance including the new "South Quarry" excavation area.⁴

¹ The notice for the Board's hearing on this matter relates to the vested status for only a portion of the Facility, the East Materials Storage Area. This letter, and Lehigh's presentation as a whole, provide the relevant facts for the entire Facility, including the East Materials Storage Area. For a vested operation, the California Supreme Court requires that the "overall business operation must be considered." (*Hansen Bros. Enterprises v. County of Nevada* (1996) 12 Cal.4th 533, 565-566.)

² Lehigh will also submit to the Clerk for the Board's use and review a binder of historical documents with a written introduction and guide. Given its volume, this will be submitted under separate cover.

³ Vested rights, once established, run with the land. (*Hansen Bros. Enterprises*, supra, 12 Cal.4th at 540, fn. 1.) Accordingly, historical references to "Lehigh" include Lehigh's predecessors in interest.

⁴ The cement plant area operates under separate permit and is not subject to reclamation requirements.

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Exhibit 5 contains a map showing the CUP Application area for the South Quarry. The CUP Application applies to three parcels that were acquired later, between 1964 and 1979. A use permit is required to extract material from these three parcels. The map also shows two parcels that were part of the mining tract prior to 1947, but have not yet been mined. These two pre-1947 parcels are referred to as the "Morris Parcel" and the "Crocker Parcel." The Morris and Crocker Parcels are included in the Reclamation Plan Amendment, but they are considered vested and no use permit is required for extraction in those areas.

Exhibit 6 contains a series of historical aerial photographs of the entire Facility. These photographs are bounded in yellow with the limits of current site disturbance. They show the progressive and continuous operation of the site from 1939 to the present. Consistent for operations of this type, these photographs show movement across the property with changes in excavation areas, changes in storage areas and changes in operational areas within the property envelope.

Exhibit 7 includes a series of aerial photographs for the area known as the "East Materials Storage Area" ("EMSA") from 1941 to 2009. These photographs show that, as of 1942, this portion of the Permanente Facility was substantially disturbed and devoted to Facility operations. They show extensive activities, including material storage, occurring very early in the Facility's history and progressing and growing through the decades. Lehigh's Reclamation Plan Amendment involves continuing placement of fill and final reclamation as a naturally vegetated buffer between the Permanente Facility and the surrounding community. (See, Exhibit 8, Map of Ultimate Reclaimed Condition for the Facility.)

DISCUSSION

The Law

Uses that are established prior to the date of a restrictive zoning ordinance are entitled to continue as a nonconforming, "vested" use. In the current context, being a "vested use" means having the right to continue operations without the need to apply for and obtain a use permit. A reclamation plan is required for all operations, including vested operations.

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The Santa Clara County Zoning Code expressly protects nonconforming, vested uses, including vested mining rights.⁵ (See County Zoning Ordinance, Ch. 4.50; County Zoning Ordinance, § 4.10.370, and County Surface Mining and Land Reclamation Standards, § 5.) This is consistent with the State Surface Mining and Reclamation Act: “No person who has obtained a vested right to conduct surface mining operations prior to January 1976, shall be required to secure a permit pursuant to this chapter so long as the vested right continues...” (Pub. Resources Code, § 2776.) In order to continue, the nonconforming use must be similar to the use existing at the time the restrictive ordinance became effective. (See *Hansen Bros. Enterprises v. County of Nevada*, supra, 12 Cal.4th 533, 553 (“*Hansen*”); *Rehfeld v. City and County of San Francisco* (1933) 218 Cal. 83; *City of Yuba City v. Cherniavsky* (1931) 117 Cal. App. 568; see also *Endara v. City of Culver City* (1956) 140 Cal.App.2d 33.) The County’s nonconforming use ordinance directly follows these general legal precedents. (See County Zoning Code, § 4.50.020.B [“A nonconforming use may be modified to a use deemed similar in nature, but lesser in intensity and impacts...”].) Concerning vested rights, “each case must stand on its own facts.” (*Hansen*, at 552, quoting *Edmonds v. County of Los Angeles* (1953) 40 Cal.2d 642, 651.)

Further, the California Supreme Court in *Hansen* has established special rules for extractive enterprises. These special protections are needed because mining-related operations move across a site and use land in a way that is much different from normal “static” land uses. (*Hansen*, at 553 [“Unlike other nonconforming uses of property which operate within an existing structure or boundary, mining uses anticipate extension of mining into areas of the property that were not being exploited at the time a zoning change caused the use to be nonconforming”].)

In recognition of this reality, the geographical scope of the vested mining area includes all land that was part of the operational property upon adoption of the restrictive ordinance provided there were “objective manifestations of intent” to progress with the business and put such areas to future use. (*Hansen*, at 555.) There is no formula for how these “objective manifestations of intent” must be shown. Relevant factors include: the magnitude and nature of the operation itself, actual disturbance over part of the land in question, progressive movement of operations, exploratory activities,

⁵ “Surface Mining” is defined under both under County rules and state law broadly: “All or any part of the process involved in the mining of minerals... by removing overburden and mining directly from the mineral deposits... Surface mining operations shall include but are not limited to: (1) In place distillation or retorting or leaching. (2) The production and disposal of mining waste. (3) Prospecting and exploratory activities.” (Pub. Resources Code, § 2735; County Surface Mining and Land Reclamation Standards, § 3(cc).)

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geologic studies, stockpiling and road construction. (See *Hansen*, at 571 [vesting established by evidence of extraction]; *Syracuse Aggregate Corp. v. Weise* (1980) 51 N.Y.2d 278, 285-286 [vesting in unmined areas established by pattern of expansion including placement of surface roads and engaging in substantial quarrying on adjacent property]; *Town of Wolfeboro v. Smith* (1989) 131 N.H. 449, 457 [tree clearing alone not sufficient evidence of intent]; *Gibbons & Reed Co. v. North Salt Lake City* (1967) 19 Utah.2d 329, 336 [vesting established by stockpiles and haul roads]; *Town of West Greenwich v. A. Cardi Realty Associates*, 786 A.2d 354 (R.I. 2001) [stockpiling dirt, tree clearing, lowering grade]; *Moore v. Bridgewater Township* (1961) 69 N.J. Super. 1, 15-16 [test drillings, surveys, tree clearing]; *County of Du Page v. Elmhurst-Chicago Stone Co.* (1960) 18 Ill.2d 479, 485 [stockpiling and construction of rail spur]; *Bainter v. Village of Algonquin*, 285 Ill.App.3d 745 (1996) [mineral exploration, construction of a tunnel, installation of conveyor equipment].)

The Court in *Hansen* went on to explain that, in determining the “use” as to which the owner is entitled to continue, the full business enterprise must be considered, not merely individual elements:

In determining the use to which the land was being put at the time the use became nonconforming, the overall business operation must be considered. One entitled to a nonconforming use has a right to...engage in uses normally incidental and auxiliary to the nonconforming use...Furthermore, open areas in connection with an improvement existing at the time of the adoption of the zoning regulations are exempt from such regulations as a nonconforming use if such open areas were in use or partially used in connection with the use existing when the regulations were adopted.

(*Hansen*, at 565-566 [internal quotations and citations omitted].)

As a corollary to this rule, the *Hansen* court pointed out that a local government may not claim that the vested use has been lost through discontinuance of a component or element of the overall use. In order to establish abandonment of a use, it must be shown that the entire enterprise has been abandoned with the actual intent to relinquish the underlying right itself. (*Hansen*, at 568-569.)

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Application to the Permanente Facility

Applying these principles to the Permanente Facility is straightforward. All property over which Lehigh claims a vested right was purchased prior to the 1947 and, with the exception of the Morris and Crocker Parcels (as discussed below), substantially or completely disturbed and put to use prior to 1947 and afterwards.

1. Areas Acquired and In Use as of 1947 and Following

Shown on Exhibit 9 is the property that formed the Facility and was substantially or fully devoted to Facility operations as of 1947.⁶ Exhibit 6 shows the progression of operations over time. These aerials, taken together, show the vested area and the growth of the business across the property. As an example, the Western Material Storage Area ("WMSA") was minimally disturbed in 1947, and was thereafter established and developed over time. Processing areas as well became established after 1947 and moved according to the needs of the business. An extensive system of roads and conveyances also was established by 1947 and shifted across the property over time. The EMSA area, in the same way, was fully integrated into the Facility by 1947. (Please refer to earlier Exhibit 7 for more detailed photographs of the EMSA area.)

There is no recognized legal theory under which these parcels, purchased prior to the vesting date and put to progressive use, would not qualify as part of the vested operation.

2. Areas Acquired Prior to 1947, but not Substantially Disturbed at Present

Two parcels fall into this category: The Morris Parcel and the Crocker Parcel. (Please refer to Exhibit 5.) "Objective manifestations of intent" to extract material from these parcels did, however, exist as of 1947. As such, under the *Hansen* rule, they are treated as part of the vested operation.

The relevant evidence for the Morris Parcel includes the following: The parcel was acquired by one of the nation's largest and most active mining and industrial companies prior to the vesting date of 1947. The Parcel is located immediately

⁶ Lehigh has located aerials from 1939 and 1948. Given the pace of operations at a facility of this size, the 1948 aerial is an accurate depiction of site characteristics at the date of vesting in December, 1947.

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adjacent to existing mineral property held by the company. The adjacent property was under active excavation at the time. At the time of the acquisition, the Kaiser companies had publically announced their plans to continue and expand operations for post-war development. (Exhibit 10.) A 1939 mineral study commissioned by Kaiser identified the area which includes the Morris Parcel as containing valuable limestone deposits. (Exhibit 11.) Additional geologic studies occurred in areas south of Permanente Creek in 1943-1945 (and continue to the present day). Lastly, prior to 1947, the northeast portion of the Morris Parcel was the location for a quarry haul road connecting the main processing area to the lower quarry area under excavation at that time. (Exhibit 12, Maps.) This road is still in use. (See Exhibit 5, Morris Parcel.) These facts, all predating the vesting date, establish the owner's "objective manifestations of intent" to use the Morris Parcel as part of site operations.

As respects the Crocker Parcel, the facts are similar to those supporting vesting of the Morris Parcel. The Crocker Parcel was acquired by a large, mining and industrial company with expansion plans and adjacent lands under excavation. The site was also part of the mineral rich land south of the creek noted in early geologic reports. The grant deed to Kaiser referenced and noted the mineral potential for the property. (Exhibit 13.) The property was in the path of exploratory drilling and drilling did occur on the northern edge of the site in 1949. (Exhibit 14.) Lastly, aerial photographs from that time show the presence of an extensive system of roads consistent with mineral exploration at the site. (Exhibit 15.) It was clearly intended as of 1947 to include the Crocker Parcel within the scope of operations at the Permanente Facility. In fact, it is difficult to imagine a contrary intent on the part of Kaiser Enterprises given the location of the property and the nature of the operations underway in 1947 on adjacent land.

3. The EMSA

Under the Reclamation Plan Amendment, the EMSA will continue to receive overburden from the operations and will function as a naturally vegetated buffer. As shown on Exhibit 7, the EMSA area was substantially disturbed and put to use prior to 1947. Unlike the cement plant, no use permit has ever been obtained or required by the County for operations at this area. It has been treated by the operators and the County as part of the overall vested operations at the Permanente Facility.

The area was part of the original Kaiser acquisition in 1939. Between 1941 and 1942, Kaiser transferred title to the area to a sister company, Kaiser Metals, for \$10. Under the Kaiser corporate umbrella, the site was devoted to integrated operations of the Permanente Facility as a whole with activities changing over time to meet the needs

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of the overall business operation. The EMSA area contained access roads for the entire operation, access routes to the upper quarry, energy supply for activities on the EMSA and the cement plant and the quarry. Office buildings, parking areas and laboratories serving the Facility were built on this area and then removed for other activities as the needs of the business required. Aluminum research and manufacture occurred on site. Cuts and fill and storage took place on the EMSA property.

The photographic record clearly shows storage commencing by the vesting date and steadily, and progressively growing on the property to the current time. This can be seen by comparing the 1948 aerial with the aerial photographs from 1950, 1955, 1974, 1980, 1991, 2005 and 2009. Storage begins in the area south of the water tank and grows progressively to the east. (See Exhibit 7.)

The continuation of storage on the EMSA area, with the required Reclamation Plan Amendment, is a continuation of well-established, integrated site operations. The movement of operations across the property for extraction, storage and processing has been ongoing in all respects since the beginning of the business and is an essential element of uses of this type.

This point is perhaps best made by a simple review of the historical aerial photographs. Another storage area on site, the WMSA, has been a main overburden storage site for many years. The series of photographs contained in Exhibit 6 show how the WMSA moved and grew over time in response to the operational needs of the Facility. Even though the WMSA was barely established as of the vesting date (please refer to Exhibit 9, 1948 aerial), at no time has the County ever asserted that its use or size must be "frozen" as of the vesting date. To do so would be contrary to the nature of the operation and the right of the vested use to continue at all. As with extraction areas, an operation of this type may not "continue" without the ability to place overburden as needed.

To Lehigh's knowledge, at no time in the last seven decades has the County ever questioned the Permanente Facility's operating rights, or taken enforcement action to require a use permit. On the contrary, the County has consistently confirmed these rights in a variety of ways and settings. The 1985 reclamation plan approval is a powerful example. The County approved the reclamation plan based on a finding that the site was vested, a fact made clear by the staff report from that action. Otherwise, the absence of a use permit would have violated state law. Further, since 2009, with the County's agreement, the operator has been allowed to continue placement of overburden in the EMSA area, pending processing and approval of the Reclamation

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Plan Amendment. The aerial photographs and facts outlined in this letter, which show that the EMSA has been an integral part of the Facility since the beginning, including serving as area for storage, leave no doubt that the County and County staff have handled the matter correctly.

CONCLUSION

Lehigh hopes that this letter will be of assistance to the Board as it discusses the scope of vested rights at the Permanente Facility. Lehigh believes that, in submitting the Reclamation Plan Amendment and the CUP Application, it has done so in conformity with the vested rights at the Facility. Lehigh has been part of the community for decades and has made enormous expenditures based upon its longstanding operating rights. It would be unfair and legally improper to attempt to change course now.

Very truly yours,

DIEPENBROCK HARRISON
A Professional Corporation

By: 
Mark D. Harrison

SKH:gjc
Enclosures

cc: Jody Hall-Esser, Planning Director
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