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1-27-11

STAFF ANALYSIS

Permanente Quarry Legal Nonconforming Use Analysis

I. Setting

The Permanente Quarry is owned by Hanson Permanente Cement, Inc. and operated by Lehigh Southwest Cement Company (collectively, the "Quarry"). It 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 that was first issued in May 1939 (County File No. 173.023).

II. Background & Summary

The Quarry has submitted applications for two reclamation plan amendments – a reclamation plan amendment for the East Materials Storage Area ("EMSA"), and a comprehensive reclamation plan amendment for all areas used in the quarrying operation. These reclamation plan amendments are required by state law, the Surface Mining and Reclamation Act ("SMARA").[1] Both amendments are also subject to the California Environmental Quality Act ("CEQA"),[2] and Environmental Impact Reports (EIRs) are being prepared for both. However, the County also regulates quarries under its Zoning Ordinance.

The Zoning Ordinance requires a use permit for quarrying unless quarrying was established as a legal nonconforming use on the property before a use permit was first required. Therefore, in order to process the Quarry's reclamation plan amendment applications, it is necessary to determine whether the Quarry must also obtain a use permit for quarrying all or part of its property. The Quarry has already acknowledged that it needs a use permit for a proposed new pit mine, and has submitted a use permit application that the County is processing in conjunction

[1] Pub. Res. Code § 2710 et seq.
[2] Pub. Res. Code § 21000 et seq.

with the Quarry's comprehensive reclamation plan amendment.[3] In addition, a use permit is in effect for the cement plant on the Quarry property.

The decision regarding what is and is not vested is important because it determines which of the Quarry's lands and operations are subject to a use permit, and which are not. A use permit is a discretionary approval issued by the County, and often is subject to compliance with several conditions of approval to ensure that the operation is compatible with the surrounding area and will not adversely affect the public health, safety or general welfare.[4]

The determination regarding the nature and extent of the Quarry's legal nonconforming use must be based on the evidence presented and the relevant legal standards. Matters of policy or preference are not relevant. The Quarry bears the burden of proof with respect to establishing the nature and extent of its legal nonconforming use. The Board's decision must be based on substantial evidence in the record.

Staff knew that the County had, on more than one occasion in the past, determined that quarrying was a legal nonconforming use on at least some portions of the property, but did not know the basis for these decisions. In other words, what data/information these statements and decisions were based on, or which portions of the Quarry property it applied to. A review of historical documents has confirmed that the County's prior conclusions were based on the fact that quarrying operations were commenced before 1937 when the first County Zoning Ordinance was adopted; this appears to have been the extent of the prior analyses.

There is little, if any, additional detail on file supporting the County's prior conclusions. Thus, in light of the apparent limited nature of the County's prior legal nonconforming use analyses, the importance of this matter to the public, and case law suggesting that the public is entitled to due process (i.e., notice and hearing) with respect to these types of determinations, staff determined that the Board of Supervisors should hold a public hearing and make a formal determination regarding the nature and extent of the Quarry's legal nonconforming use before taking final action on the proposed reclamation plan amendments.[5]

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[3] The Quarry asserts that, if the Board determines that it needs a use permit for other areas of the property, this will result in "an immediate and substantial economic loss" to Lehigh and, thus form the basis of a "takings" claim against the County. (Jan. 4, 2011 Letter from Mark Harrison to Lizanne Reynolds, p. 35.) Staff disagrees with this assertion. The County's standard practice is to allow a use to continue operating while a use permit application is pending. Therefore, the Quarry would not have a ripe takings claim unless and until it applied for a use permit and the County took final action to deny the application. (See, e.g., Suitum v. Tahoe Regional Planning Agency (1997) 520 U.S. 725, 733-734; League to Save Lake Tahoe (9th Cir. 1982) 685 F.2d 1142, 1146; United States v. Byrd (7th Cir. 1972) 609 F.2d 1204, 1211; Igna v. City of Baldwin Park (1970) 9 Cal.App.3d 909, 915.)

[4] County Zoning Ordinance, Chapter 5.65.

[5] The County does not have a codified process for making determinations regarding the existence of legal nonconforming uses. Over the years, these determinations have been handled in a variety of ways. The most common process was for Planning Department staff to do an analysis and reach a conclusion, sometimes with assistance from County Counsel. However, there have been exceptions. For example, the determination of whether a nearby quarry, Stevens Creek Quarry, had a legal nonconforming use for quarrying a particular portion of its property was considered by the Board of Supervisors in 2002.

A recent case held that a county's determination regarding a mining company's vested rights claim under SMARA triggered procedural due process protections of notice and hearing for adjacent landowners. Calvert v. County of Yuba (2006) 145 Cal.App.4th 613. Although a vested rights determination under SMARA is somewhat different

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 much more convenient for the Board and the public to hold one hearing addressing all of the Quarry's unincorporated property. Although Lehigh owns approximately 3,500 acres, this analysis only addresses 2,656 acres, which is the portion located in unincorporated Santa Clara County.

The purpose of this hearing is to determine whether, and to what extent, the Quarry has a legal nonconforming use for quarrying operations. To aid the Board members in their deliberations, this memorandum provides information regarding the critical components of this analysis:

- an overview of the legal standards applicable to a legal nonconforming use analysis, including special rules applicable to quarrying;
- a summary of the County's historical zoning regulations pertaining to quarries;
- a description of the historical uses and development of the Quarry property;
- a discussion of the prior County conclusions regarding the Quarry's legal nonconforming use;
- an analysis of the nature and extent of the Quarry's legal nonconforming use; and
- a conclusion and identification of key decision points for the Board of Supervisors.

Summary of Staff Analysis:

- When determining the extent of a quarry's legal nonconforming use, California applies a special rule called the "diminishing asset doctrine." Under this rule, a legal nonconforming use for quarrying includes those lands that had been mined as well as those lands, including open areas, on which activities that were that were an integral (vs. independent) part of the quarrying operation were occurring as of the relevant dates. The legal nonconforming use also includes those areas that were owned by the mine operator and for which the operator objectively manifested the intent to expand its mining operations into those areas as of the relevant dates.
- The relevant dates for establishing a legal nonconforming use for quarrying on the property are:

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from a legal nonconforming use determination under local land use and zoning laws, the public's rights and interests in the determination are quite similar.

- September 24, 1937 for portions of the property within 1,000 feet of a public street; and
- January 28, 1948 for other portions of the property; or
- May 20, 1959 for portions of the property rezoned "A-2" in 1955; and July 1, 1960 for portions of the property rezoned "A-2" in 1960.

- 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.

- Quarrying began on a portion of the property in the early-1900s. As of the relevant dates (1937 and 1948), the evidence indicates that quarrying activities had been established on some, but not all, of the property owned or subsequently acquired by the Quarry.

- The County Geologist analyzed aerial photos from 1939, 1948, 1955 and 1960 to determine the areas of mining-related disturbance as of the relevant dates.[6] These areas of disturbance are described in his memorandum and the exhibits attached thereto.[7]

- With respect to the part of the property where the EMSA is proposed to be located (parcel 17 and northern portion of parcel 16, as shown on Ex. 42), the research conducted by staff and evidence presented by the Quarry to date does not indicate that quarrying activities had been established as of the relevant dates. This property was also held in separate ownership for over 50 years and intensely developed/used for metals manufacturing and related purposes.

Any historical analysis is dependent on the information that is available from the relevant time periods. Although staff has reviewed numerous documents, reports and maps, there may be additional historical documents that could further inform this analysis. The public may also be able to provide additional relevant information.

III. Legal Standards Related to Legal Nonconforming Uses

A. General Rules

A legal nonconforming use is a land use that complied with all laws and regulations when it began, but became unlawful due to the subsequent adoption of regulation or change in regulation. For example, a use that began when it was allowed "by right" (i.e., without any permits), but the zoning ordinance was later amended to prohibit the use in that location or to require a certain type of permit.

[6] There was no aerial photo available from 1938, so the analysis was performed using a 1939 aerial photo, which was the earliest available aerial photo. There also was no aerial photo from 1959, so the analysis was performed using a 1960 aerial photo.

[7] Jan. 18, 2011 Memorandum from James Baker, County Geologist, to Jody HallEsser, Director, Department of Planning and Development. (Ex. 1.)

Local zoning ordinances ordinarily exempt or "grandfather" legal nonconforming land uses to avoid questions concerning the constitutionality of any unreasonable interference with those uses. Under the general rules for legal nonconforming uses, a landowner acquires a vested right to continue a legal nonconforming use if the landowner has been continuously engaged in that use when the more restrictive regulations are adopted. But the use may not be expanded beyond its preexisting level or to another part of the property. Because the purpose of zoning is to eliminate nonconforming uses, "courts should follow a strict policy against extension or expansion of those uses."[8]

When evaluating how land was being used when it became nonconforming, the overall business operation must be considered. This includes uses that are normally incidental and auxiliary to the nonconforming use, and may include open areas used in connection with the operation if those areas were being used in connection with the business when the zoning regulations were adopted.[9]

Abandonment of a legal nonconforming use terminates any vested right to engage in the use.[10] What constitutes abandonment depends on the circumstances and the local zoning ordinance. The California Supreme Court has explained that abandonment usually entails more than mere cessation of the use, and involves two factors: (1) the intent to abandon; and (2) an overt act, or failure to act, which implies that the owner does not claim or retain any interest in the use.[11]

The property owner bears the burden of proving that a legal nonconforming use exists.[12] The decision must be supported by substantial evidence in the record.[13]

B. Special Rules for Surface Mining/Quarrying

The California Supreme Court has adopted a special rule called the "diminishing asset" doctrine for evaluating whether an existing rock quarry may expand to other parts of a property that were not being excavated when the more restrictive regulations were enacted.[14] In the Hansen Bros. case, the Court concluded that the quarry's nonconforming use included all aspects of the operation that were integral parts of the business at the time the new regulations took effect, and that this nonconforming use "includes extending the rock quarry aspect of the business to those other areas of the property owned [when the more restrictive regulations took effect] into which the owners had then objectively manifested an intent to mine in the future."[15] The Court provided the following rationale for this special rule:

[8] Hansen Brothers Enterprises, Inc v. Board of Supervisors of Nevada County (1996) 12 Cal.4th 533, 568.
[9] Id. at pp. 565-566.
[10] Id. at p. 552.
[11] Id. at p. 569.
[12] Id. at p. 564.
[13] Id. at p. 559.
[14] Id. at p. 542.
[15] Id. at p. 542 (emphasis added).

> "The rationale for the 'diminishing asset' doctrine is that the very nature of an excavating business is the continuing use of the land, and that this use is what is endorsed by the nonconforming use concept. Thus, the doctrine holds that 'an owner of a nonconforming use may sometimes be found to have a vested right to use an entire tract even though only a portion of the tract was used when the restrictive ordinance was enacted.' . . . The determining factor is 'whether the nature of the initial nonconforming use, in the light of the character and adaptability to such use of the entire parcel, manifestly implies that the entire property was appropriated to such use prior to adoption of the restrictive zoning ordinance.' . . . The mere intention or hope on the part of the landowner to extend the use over the entire tract is insufficient; the intent must be objectively manifested by the present operations."[16]

Thus, even if a legal nonconforming use for quarrying was established on *a portion* of a legal parcel, this does not necessarily mean that it extends to the entire parcel.

With regard to expanding legal nonconforming uses to *other* parcels, the Supreme Court noted that mere ownership of contiguous property when the new regulations took effect is *not* enough to establish the right to extend a legal nonconforming quarrying use to those parcels. Extension of the mining is *only* allowed if the parcels were part of the mining operation on the date the operation became nonconforming.

For property acquired *after* the zoning regulations took effect, the operation cannot be extended to that property *unless* the prior owners of that property *also* had a legal nonconforming use for the particular activity.[17] The reasoning for this is as follows:

> "Were the rule otherwise, zoning laws could be easily avoided by acquiring property abutting a tract on which the nonconforming use operated and expanding into the new property, even though the original owners of the newly acquired property had no vested right to such use of the property."[18]

Although the Court noted that a legal nonconforming use includes the overall business operation, the definition of a "business operation" is not without limitation. Rather, it is limited to those activities that were an integral (vs. independent) part of the quarrying operation when the use became nonconforming.[19]

The Court also did not address whether the diminishing asset doctrine applies to allow ancillary non-excavation activities associated with quarrying (e.g., material storage, sales, rock crushing) to expand to other parts of the property. Thus, there is some ambiguity about whether the non-extractive aspects of a quarrying operation are governed by the general rule, under which there is a strict policy against expansion or extension of legal nonconforming uses, or the "diminishing asset" doctrine. For example, the Court expressly declined to address whether the diminishing

[16] Id. at p. 557, citing a case from Alaska.
[17] Id. at pp. 557-558, 560-564.
[18] Id. at p. 558.
[19] Id. at p. 566.

asset doctrine applied to the mining of renewable/replenished resources such as riverbed rock or gravel.[20] The Court also distinguished a prior case in which the appellate court declined to apply the diminishing asset doctrine to a rock crushing operation on the basis that the case did not involve extractive uses.[21]

It is possible that a court would apply the diminishing asset doctrine to those aspects of a quarrying operation that necessarily must move across the land. But even this is not clear-cut. For example, one could argue that mining waste (overburden) could be hauled off-site instead of being stored on-site. Therefore, it is unclear whether a quarry operator has a vested right to place overburden anywhere on-site. How a court would rule on these questions would likely depend on the particular facts of the case.

C. County Zoning Ordinance Provisions for Legal Nonconforming Uses

The current County Zoning Ordinance is consistent with the general nonconforming use rules explained in Part III.A of this analysis. It prohibits the expansion of a legal nonconforming use (in area or volume). It allows the modification of a legal nonconforming use, but only if the County determines that the new use would be similar in nature and lesser in intensity and impacts. Any use that is nonconforming simply because it does not possess the permits that are currently required by the Zoning Ordinance for that use may be legalized by obtaining those permits. A legal nonconforming use is automatically terminated if it ceases for a continuous period of at least 12 months.[22]

The County's nonconforming use provision in effect from 1937 through 2003 provided as follows:

> Except as otherwise provided in this section, the lawful use of land existing at the time of the adoption of this ordinance, although such use does not conform to the regulations specified by this ordinance for the district in which such land is located, may be continued; provided, however, that no such nonconforming use shall be enlarged or increased, nor shall any such non-conforming use be extended to occupy a greater area of land than that occupied by such use at the time of the adoption of this ordinance; provided, further, that if any such non-conforming use ceases, any subsequent use of such land shall be in conformity to the regulations specified by this ordinance for the district in which such land is located.[23]

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[20] Id. at p. 542, fn. 6.
[21] Id. at p. 559, distinguishing Paramount Rock Co. v. County of San Diego (1960) 180 Cal.App.2d 217).
[22] County Zoning Ord., § 4.50.020.
[23] Ord. No. 120, § 30 (Aug. 25, 1937), renumbered to § 38-1 by Ord. No. NS-1200.36 (Jan. 7, 1963). (Ex. 2.) From 1937 to 2003, the County Zoning Ordinance also provided that existing uses for which the Zoning Ordinance subsequently required a use permit were deemed "conforming" uses without the need to apply for and obtain a use permit. (Ord. No. 120, § 30, renumbered to § 38-7 by Ord. No. NS-1200.36 (Jan. 7, 1963).) In 2003, this was replaced with a provision that allows any use that is nonconforming solely because it does not have the required permits to become conforming by applying for and obtaining the appropriate permits. (County Zoning Ord., § 4.50.020(G).)

According to this provision, if a nonconforming use ceased, all rights to it were terminated. However, as discussed above, the courts usually interpret such ordinances as requiring an *intent* to abandon the use as well as an overt act, or failure to act, implying that the owner no longer claims any interest in the nonconforming use.[24]

Neither the current or prior Zoning Ordinance contain special rules for nonconforming quarrying operations.

IV. County Regulation of Quarries

Determining the date(s) upon which the County first regulated quarrying is critical to this legal nonconforming use determination. This is because these are the relevant dates by which the legal nonconforming use must have been established. Anything that occurred after these dates is irrelevant, with the exception of evidence showing that a legal nonconforming use that had been established was subsequently abandoned.

To establish a legal nonconforming use, quarrying had to have begun on the property before the date(s) upon which the County Zoning Ordinance first required a use permit for quarrying in the relevant zoning district. Under the diminishing asset rule, the Quarry's legal nonconforming use may include not only those areas of the property that were actively being mined, but also those areas for which the owner objectively manifested an intent to mine in the future as of the relevant dates.

The first County Zoning Ordinance was adopted in 1937.[25] It was substantially revised in 1947, and amended several times during the 1950s. According to an historical review of the County's zoning ordinances on file with the Clerk of the Board of Supervisors, all of the Quarry property was zoned "A-1" (General Use) in 1937.[26] In 1955, the central part of the property was rezoned to "A-2" (Suburban Agriculture).[27] In 1960, the peripheral portions were rezoned to "A-2" .[28] A more detailed discussion of the pertinent zoning provisions follows.

A. 1937 – First County Zoning Ordinance

The 1937 Zoning Ordinance took effect on September 24, 1937. It provided as follows for the "A-1" zoning district:

> (a) Uses Permitted:
> All uses not otherwise prohibited by law; provided, however, that none of the following uses shall be established in any "A-1" district unless and until . . . a use permit . . . shall first have been secured for such use:

[24] Hansen Bros., 12 Cal.4th at p. 569.
[25] Ord. No. 120, § 12. (Ex. 2.)
[26] The A-1 (General Use) zoning designation was one of the County's first zoning designations, and was the default designation applied to unincorporated lands until the County could develop more specific zoning designations for the various parts of the County. (Ord. No. 120, § 4.) (Ex. 2.)
[27] Ord. No. 1200-dm (Mar. 14, 1955) (Ex. 6).
[28] Ord. No. NS-1200.21 (May 31, 1960) (Ex. 7).

> 3. Commercial excavating of natural materials within a distance of one thousand (1000) feet from any public street. . . .[29]

Therefore, any mining activities that took place within 1,000 feet of a public street after September 24, 1937 required a use permit, unless a legal nonconforming use for those activities was established before that date.

B. 1947 Zoning Ordinance Amendments

The 1947 Zoning Ordinance generally provided that a use permit could be issued for quarrying in any zoning district if the Planning Commission made certain findings (e.g., not detrimental to public health, safety or welfare).[30] For property zoned "A-1," the 1947 Zoning Ordinance provided as follows:

> 12.2 Uses Permitted: All uses permitted in any "H", "R" or "C" District.
>
> 12.3 All uses not otherwise prohibited by law, including the following, upon the securing of a use permit in each case, . . .
>
> . . . .
>
> 12.3.2 Commercial excavating of natural materials within a distance of one thousand (1000) feet from any public street. . . .[31]

This amendment restricted the uses allowed by right in the "A-1" district to those allowed in the "H" (Limited Highway Frontage), "R" (Residential), and "C" (Commercial) zoning districts. All other uses required a use permit.[32] The intent of section 12.2 is subject to interpretation.

The first interpretation is that it was intended to allow uses *by right* that were not expressly listed as allowed within the H, R and C districts. Under this interpretation, the pertinent question is what uses were expressly allowed *by right* in the H, R, and C districts. The following is a summary of what was allowed by right in those districts:

- "H," "R," and "C-1" (Retail Business) districts – quarrying not allowed by right[33]
- "C-2" district (General Commercial) – quarrying not expressly allowed by right; however, "all uses not otherwise prohibited by law" were allowed by right except for

[29] Ord. No. 120, § 12. (Ex. 2.) The term "street" was defined as follows:

> A public or private thoroughfare which affords the principal means of access to abutting property, including avenue, place, way, drive, lane, boulevard, highway, road and any other thoroughfare except an alley as defined herein. (Ord. No. 120, § 11.)

[30] Ord. No. 345, § 35 (Dec. 29, 1947). (Ex. 4.)
[31] Ord. No. 345, § 12. (Ex. 4.)
[32] The 1947 Zoning Ordinance allowed "commercial excavating of natural materials used for building or construction purposes, in any district" if a use permit was obtained. (Ord. No. 345, § 35.4,) (Ex. 4.)
[33] Ord. No. 120, §§ 14-20. (Ex. 2.)

certain identified uses. These identified uses included "all uses excluded from 'M-1' districts by the terms of this ordinance."[34]

- "M-1" (Light Industrial) district – quarrying not allowed by right.[35]

Because the Zoning Ordinance deemed the "C-2" district to be more restrictive than the "M-1" district,[36] a logical interpretation is that, because quarrying was only allowed in the "M-1" district with a use permit, a use permit was also required for quarrying in the "C-2" district. And, therefore, a use permit was also required for quarrying in the "A-1" district. Under this interpretation of the Zoning Ordinance, and unlike the 1937 Zoning Ordinance, any mining activities that occurred *more* than 1,000 feet from a public street after January 28, 1948 (the effective date of the 1947 ordinance) required a use permit, *unless* a legal nonconforming use for those activities was established before that date.

Another interpretation of section 12.2 is that all uses allowed in any "H", "R" or "C" district were allowed *by right* in the "A-1" district, regardless of whether the use was only allowed with a use permit in the enumerated districts. Under this interpretation of section 12.2, quarrying more than 1,000 feet from a public street was allowed in the "A-1" district without a use permit.

In staff's opinion, the first interpretation is the most logical interpretation of the Zoning Ordinance.

C. 1955 Property Rezoning

In 1955, the central portion of the Quarry property was rezoned to "A-2" (Suburban Agricultural)..[37] The property that was rezoned is shown on Exhibit 60. Thus, under the second interpretation of 12.2 discussed in Part IV.B above, a use permit was first required for quarryingin the "A-2" district in 1959.[38]

D. 1960 Property Rezoning

In 1960, the County eliminated the "A-1" district.[39] Any property that was zoned "A-1" was automatically rezoned to "A-2." Therefore, the peripheral portions of the Quarry property were rezoned "A-2" as of July 1, 1960. Therefore, under the second interpretation of 12.2 discussed in Part IV.B above, a use permit was first required for quarrying on these portions of the Quarry property in 1960.

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[34] Ord. No. 120, § 21(a). (Ex. 2.)
[35] Ord. No. 120, § 22. (Ex. 2.)
[36] Ord. No. 120, § 11 (Ex. 2) provided:

> In the following list each district shall be deemed to be more restricted than the districts succeeding it and each district shall be deemed to be less restricted than the districts preceding it: "R-1", "R-2", "R-3", "C-1", "C-2", "M-1", and "M-2".

[37] Ord. No. 1200-dm (Mar. 14, 1955) (Ex. 6).
[38] Ord. No. NS-1200.11 (April 20, 1959). (Ex. 8.)
[39] Ord. No. NS-1200.21 (May 31, 1960). (Ex. 7).

E. Current Property Zoning

Today, the Quarry property has a variety of zoning designations, including "A1" (General Use), "A-d1" (Exclusive Agriculture, design review overlay), "HS-d1" (Hillsides, design review overlay), and A1-20-d1 (General Use, 20-acre minimum, design review overlay). The County Zoning Ordinance allows quarrying (surface mining) in all of these zones if a use permit is obtained from the County.[40]

V. Permanente Quarry Property History

The following is a summary of the Quarry's ownership and use history. This information is relevant to the analysis because it provides information that is needed to determine what portions of the property were owned by the Quarry operator as of the relevant dates; and what types of quarrying activities, if any, were occurring on the various portions of the Quarry property as of the relevant dates.

A. Early Quarrying Activities

An extensive review of historical documents indicates that quarrying began in the vicinity of Permanente Creek around 1902[41] or 1903.[42] This area was referred to as Black Mountain, and it was well known for its limestone deposits. Access to the limestone deposits was provided via Permanente Road, which was an historic wagon trail dedicated to the public in 1893.[43] The limestone was hauled by wagon to Mountain View, where it was shipped by rail for use in the production of sugar in a factory in Alviso.[44]

There is quite a bit of information about limestone mining being conducted in the vicinity of Black Mountain/Permanente Creek prior to 1937. The 1906 State Report refers to limestone deposits in Section 18, and states that "[t]he stone has been quarried in several places.[45] A 1921 State Report states that "[t]he Black Mountain deposits outcrop over a considerable area.[46] A 1930 State Report refers to the quarry being limited to certain areas identified as "sections 17 and 18."[47] However, each section consists of 640 acres, and there is limited information in the reports regarding precisely where within these sections the early mining activities took place.

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[40] Zoning Ordinance §§ 2.50.020, 2.20.020.
[41] Cal. Division of Mines, California Journal of Mines and Geology, Vol. 50, No. 2, p. 365 (April 1954) ("1954 State Report"). (Ex. 15.)
[42] Cal. State Mining Bureau, The Structural and Industrial Materials of California, Bulletin No. 38, p. 82 (Jan. 1906) ("1906 State Report"). (Ex. 10.)
[43] 1906 State Report, p. 82 (Ex. 10); Cal. State Mining Bureau, Report XVII of the State Mineralogist: Mining in California During 1920, p. 185 (Jan. 1921) ("1921 State Report") (Ex. 11); "Consent, dedication and grant for Permanente Road" from Alice H. Swain et al to Santa Clara County (May 19, 1893), County Recorder, 170 O.R. 10. (Ex. 9).
[44] 1906 State Report, p. 82. (Ex. 10.)
[45] 1906 State Report, p. 82. (Ex. 10.)
[46] 1921 State Report, p. 185. (Ex. 11.)
[47] Cal. Division of Mines, Chapter of Report XXVI of the State Mineralogist Covering Activities of the Division of Mines Including the Geologic Branch, Vol. 26, No. 1, p. 9 (Jan. 1930) ("1930 State Report"). (Ex. 12.) The section reference pertains to Township 7 S., Range 2 W. (Cal. Dept. of Natural Resources, Division of Mines, California Journal of Mines and Geology, Vol. 43, No. 3, p. 313 (July 1947) ("1947 State Report").) (Ex. 14.))

A report prepared by a Stanford geologist in 1939 refers to an aerial photo showing "the limestone body from Permanente Creek to the top of Bald Peak" and "the old lower and upper quarries."[48] This report also contains a map depicting the "Present Upper Quarry," which coincides with the northern boundary of the Quarry's current pit mine.[49] Staff was able to obtain an aerial photo from 1939. Although this photo was taken 1½ years after the first County Ordinance was adopted, it is the earliest aerial photo of the Quarry property staff could obtain.

The early State reports also discuss periods where quarrying activities had ceased. Three reports from the California State Mineralogist describe periods of idleness at the Quarry. A 1921 report states that "[t]his quarry has been idle for the past few years."[50] A 1930 report states that the Quarry "has been idle for some time."[51] A 1954 report states that the Quarry operated intermittently until 1934, then resumed in 1939.[52] However, an article in a Permanente company newsletter from 1943 describes the story of employee Joe Peabody, who started working at the Quarry in August 1933.[53] Mr. Peabody reported that he worked for the prior property owner, Santa Clara Holding Company, from 1933 through 1939 breaking "sugar rock" (limestone) with sledges and hauling it to where it was loaded into trucks. He became an employee of Henry Kaiser in 1939 when Kaiser took over the operation to develop a cement plant.[54]

County Geologist James Baker reviewed the historic reports and other available information, and analyzed aerial photos from 1939 (earliest available), 1948 and 1955. He identified and categorized areas of disturbance in the photos to determine where mining-related activities had occurred as of the relevant dates, and mapped the areas of disturbance on each of the photos. His analysis is in Exhibit 1.

B. Property Ownership History

Property ownership information is relevant to this analysis because a legal nonconforming use may not extend beyond the boundaries of the property that was owned by the Quarry operator as of the relevant dates. The only exception to this is if the owner(s) of property that the Quarry later acquired had established a legal nonconforming use for quarrying before the relevant dates.

As of 1937, when the County's first zoning ordinance was enacted, the various parcels that are now under the Quarry's ownership were owned by several different persons and entities. The 1937 ownership status of the various portions of the Quarry property is depicted on Exhibit 44.

In 1939, the Permanente Corporation acquired 1,500 acres.[55] Over the next several years, it acquired additional properties. This acquisition history is shown on Exhibit 45.

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[48] C.F. Tolman, Report on Tonnage and Composition of Limestone Available in Proposed Quarries A and B, Permanente Corporation, and Superficial Residuary Clay on the Property of the Permanente Corporation, Santa Clara County, California, cover letter, p. 2 (Stanford University, June 18, 1939) ("1939 Tolman Report"). (Ex. 13.)
[49] 1939 Tolman Report, Sample Map of Proposed Quarries A and B. (Ex. 13.)
[50] 1921 State Report, p. 184. (Ex. 11.)
[51] 1930 State Report, p. 9. (Ex. 12.)
[52] Cal. Division of Mines, California Journal of Mines and Geology, Vol. 50, No. 2, p. 365 (April 1954) ("1954 State Report"). (Ex. 15.)
[53] The Permanente News, Vol. 2, No. 8, p. 5 (Aug. 1943). (Ex. 16.)
[54] Id., p. 5. (Ex. 16.)
[55] Book 942 O.R. 290, County of Santa Clara official records. (Ex. 17.)

C. Cement Manufacturing

Shortly after the Permanente Corporation acquired the property in 1939, it applied for and obtained a use permit for cement manufacturing.[56] The plant was constructed and produced its first batch of cement in December 1939. Because the cement plant is a separate use that is regulated by a use permit, it is not part of the Quarry's legal nonconforming use for quarrying.

In 1943, the Permanente Corporation changed its name to Permanente Cement Company. This resulted in several parcels, including those containing the quarry pit and cement plant, being owned by Permanente Cement Company. These parcels are shown on Exhibit 46.

D. Metals Manufacturing

Shortly after the Permanente Corporation acquired the property, it transferred approximately 50 acres in what is now the northeastern portion of the Quarry's property to Todd California Shipbuilding Corporation.[57] Todd California Shipbuilding became the Permanente Metals Corporation in 1941.[58] Additional property was transferred to the Permanente Metals Corporation in 1942.[59] The Permanente Metals Corporation also acquired additional property directly from the Roman Catholic Archbishop in 1942.[60] The lands transferred to Permanente Metals Corp. are depicted on Exhibit 47.

In 1941, the Permanente Metals Corp. property was developed and used for magnesium manufacturing and related facilities.[61] A letter from a former Quarry attorney stated: "In 1941 Aluminum contacted the County for necessary governmental building and use permits and was advised by the then District Attorney that no use permit was necessary for the magnesium plant under the then existing County ordinances."[62] Although the County Zoning Ordinance required a use permit for certain types of manufacturing in 1941, magnesium production was not among the listed types of manufacturing requiring a use permit.[63] Therefore, the magnesium manufacturing operation was a separate legal nonconforming use.

In 1948, the Permanente Metals Corporation ceased producing magnesium and began manufacturing aluminum foil. In 1949, the Permanente Metals Corporation changed its name to Kaiser Aluminum and Chemical Corporation.[64] The record indicates that the County initially instructed the Corporation to apply for a use permit, but it does not appear that a use permit was ever issued.

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[56] Use Permit No. 173.23 (March, 1939). (Ex. 3.)
[57] Book 1029 O.R. 408, Book 1041, O.R. 43, County of Santa Clara official records. (Ex. 18.)
[58] June 3, 1980 Letter from Thomas P. O'Donnell, Kaiser attorney, to Selby Brown, County Counsel, p. 1. (Ex. 34.)
[59] Book 1080 O.R. 45, Book 1094 O.R. 138, County of Santa Clara official records. (Ex. 19.)
[60] Book 1076 O.R. 407, County of Santa Clara official records. (Ex. 20.)
[61] See Metals facility site plan from County Assessor. (Ex. 48.)
[62] June 3, 1980 Letter from attorney Thomas P. O'Donnell to Selby Brown, County Counsel, p. 1. (Ex. 34.)
[63] See Ord. No. 120, §§ 12(a)(1), 23. (Ex. 2.)
[64] Kaiser Industries Corporation, The Kaiser Story, p. 39 (1968) (Ex. 22); June 3, 1980 Letter from Thomas P. O'Donnell, Kaiser attorney, to Selby Brown, County Counsel, pp. 1-2 (Ex. 34.)

Correspondence from 1980 indicates that the County Planning Department viewed the aluminum manufacturing as a legal nonconforming use of the property.[65] As of that time, Kaiser Aluminum and Chemical Corporation was still using its property for aluminum production and research and development.[66] A 1980 letter from the company's attorney to the Santa Clara County Counsel's Office stated as follows:

> [Kaiser] Aluminum presently owns at Permanente approximately 155 acres adjoining a much larger tract of land, approximately 3,300 acres, owned by the Kaiser Cement Corporation. Although [Kaiser] Cement and [Kaiser] Aluminum each have the Kaiser name, any historical connection is now gone, and they are separate and distinct, publicly traded companies having different ownership and management."[67]

Hanson Corporation acquired Kaiser Cement in 1986. Ownership of the metals manufacturing lands was reconsolidated with the Kaiser Cement lands in 1995.

Metals production ceased several years ago and most of the structures have been demolished. Therefore, any legal nonconforming use that may have existed for metals manufacturing has been abandoned.

VI. Prior Conclusions Regarding Legal Nonconforming Uses on Quarry Property

This part of the analysis discusses how the County has previously dealt with legal nonconforming use issues regarding the Quarry property. A review of historical documents revealed that questions regarding the Quarry's legal nonconforming use for quarrying have been raised over the decades, usually in conjunction with requests from the public for greater County oversight and regulation of Quarry activities due to dust, noise and visual impacts from lowering of the ridgeline, or when the Quarry wanted to alter or expand its operations.

The Quarry asserts that these prior conclusions are dispositive of the issue and the County may not revisit the issue. However, the documentation shows that the County's prior conclusions were based solely on the fact that quarrying operations were commenced before 1937 when the first County Zoning Ordinance was adopted. It is unclear which portions of the property were evaluated. Moreover, although there are still some legal ambiguities, the law has developed to provide further guidance regarding the legal standards applicable to legal nonconforming use determinations for quarries.

A. 1971 Analysis of Quarrying Legal Nonconforming Use

From the mid-1960s to the early-1970s, there was considerable public concern about dust, noise, and visual impacts from lowering the ridgeline, which caused the public to request greater

[65] June 3, 1980 Letter from attorney Thomas P. O'Donnell to Selby Brown, County Counsel, p. 2 (Ex. 34); see also June 5, 1980 memo from Bob Menifee, Dep. County Counsel, to Bob Sturdivant, County Planning. (Ex. 35.)
[66] June 3, 1980 Letter from attorney Thomas P. O'Donnell to Selby Brown, County Counsel, p. 2. (Ex. 34.)
[67] Id. at p. 1. (Ex. 34.)

County oversight and regulation of Quarry activities.[68] County Supervisor Victor Calvo asked the Planning Department and County Counsel to provide information in response to Stanford Professor William C. Reynolds' suggestion that the County adopt a more "modern" legal nonconforming use ordinance to allow for termination of nonconforming uses deemed "obnoxious."[69]

The Planning Department responded that, because a quarrying operation was commenced before 1937 when the County adopted its first Zoning Ordinance, the quarry was a lawful nonconforming use.[70] The correspondence does not indicate what, if any, analysis was done with respect to which parcels this legal nonconforming use extended to or what activities it encompassed.

County Counsel opined that, although nonconforming uses generally may not be enlarged or expanded, a California appellate case provided that nonconforming-quarrying operations could expand throughout the entire original parcel of land, but could not expand to a second parcel.[71] It is unclear which "original parcel" County Counsel was referring to, or whether he was simply using the terminology from the appellate case. However, County Counsel identified several methods of terminating or controlling nonconforming uses, including:

(i) Terminating the use after a reasonable amortization period commensurate with the investment involved;
(ii) Establishing equally-applicable regulatory standards for all quarries and requiring nonconforming quarries to obtain a permit within a certain time period; and/or
(iii) Terminating the use based on a nuisance theory, if sufficient evidence existed.[72]

There is no evidence that the County Board of Supervisors directed any of these methods to be undertaken.

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[68] See, e.g., Aug. 17, 1965 Board of Supervisors meeting minutes (Book 41, pp. 429-430) (Ex. 23); Sept. 20, 1965 Board of Supervisors meeting minutes (Book 41, p. 567) (Ex. 24); Feb. 18, 1971 Letter from Richard Forster to Supervisor Victor Calvo (Ex. 25); Oct. 10, 1966 Letter from W.E. Ousterman, Kaiser Cement & Gypsum Corp. General Production Manager, to William Siegel, County Counsel (Ex. 26); March 24, 1967 Letter from W.E. Ousterman, Kaiser Cement & Gypsum Corp. General Production Manager, to William Siegel, County Counsel (Ex. 27); Feb. 18, 1971 Letter from William C. Reynolds to Supervisor Victor Calvo (Ex. 28); Feb. 22, 1971 Memorandum from John S. Haas, County Zoning Administrator, to Supervisor Victor Calvo (Ex. 29); April 12, 1971 Letter from William Siegel, County Counsel, to Supervisor Victor Calvo (Ex. 30); May 9, 1972 Notes of William Siegel, County Counsel, from Board of Supervisors meeting (Ex. 31); May 12, 1972 Memo from Donald M. Rains, Clerk of the Board, to County Counsel, containing transcript of May 10, 1972 Board Meeting (Ex. 32); Portion of May 17, 1972 newspaper article re Kaiser Permanente Quarry (Ex. 33).

[69] April 12, 1971 Letter from William Siegel, County Counsel, to Supervisor Victor Calvo. (Ex. 30.)

[70] Feb. 22, 1971 Memorandum from John S. Haas, County Zoning Administrator, to Supervisor Victor Calvo. (Ex. 29.)

[71] April 12, 1971 Letter from William Siegel, County Counsel, to Supervisor Victor Calvo, pp. 1-2 (citing McCaslin v. City of Monterey Park (1958) 163 Cal.App.2d 339). (Ex. 30.)

[72] Id. at pp. 3-5 (Ex. 30); see also May 9, 1972 Notes of William Siegel, County Counsel, from Board of Supervisors meeting (Ex. 31); portion of May 17, 1972 newspaper article re Kaiser Permanente Quarry (Ex. 33).

B. 1985 Reclamation Plan

The Surface Mining and Reclamation Act was adopted in 1975. Its purpose is to ensure that mined lands are adequately reclaimed.[73] The County Planning Commission approved a reclamation plan for the Quarry pursuant to SMARA in 1985.[74] The approved reclamation plan covered approximately 330 acres of the Quarry's property.[75] The boundaries of the approved reclamation plan are shown on Exhibit 53.

The Quarry asserts that, when the 1985 reclamation plan was approved, the County must have impliedly determined that the quarrying legal nonconforming use included all of the land encompassed by the reclamation plan boundary. There is some validity to this assertion. Correspondence from the Planning Department stated:

> "We have reviewed County records concerning specific surface mines relative to applicable State and County regulations. These indicate that the Kaiser quarry has been continuously operated since 1932 and the property is exempt from the requirements for a use permit but does need to file for a reclamation plan."[76]

The "Background" section of the staff report also stated:

> "State records indicate that limestone quarrying along Permanent[e] Creek in the subject area began as early as 1906. Kaiser Corp. acquired the site in [the] 1930's and began quarrying and cement processing in 1939. The quarrying activity has been continuous since that time."[77]

However, this conclusion suffers from the same problems as the other County conclusions – it does not indicate what, if any, analysis was done with respect to which parcels this legal nonconforming use extended to or what activities it encompassed.

There are also significant legal distinctions between a reclamation plan, which implements a requirement of state law, and County actions related to its police power to regulate the Quarry's operations through zoning and other regulations.[78] The following statement in the staff report for the reclamation plan highlighted this distinction:

> "It should be noted by the Commission that this approval is for reclamation aspects of the quarry area and not the operational activity nor does it include the area of the cement plant. Consequently, the plans and recommended conditions of approval are limited the reclamation aspects of the quarry site as spelled out by the State Mining and Geology Act and County surface mining regulations."[79]

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[73] Pub. Res. Code §§ 2711-2712.
[74] March 7, 1985 Staff Report to Planning Commission, File No. 2250-13-66-84P, p. 1. (Ex. 38.)
[75] March 1, 1985 Environmental Assessment, File No. 2250-13-66-84P, p. 1. (Ex. 37.)
[76] March 27, 1984 Letter from Ransom Bratton, Associate Planner, to Norm Gilbertson, Kaiser Cement Plant Manager. (Ex.36.)
[77] March 7, 1985 Staff Report, p. 2. (Ex. 38.)
[78] Pub. Res. Code § 2715.
[79] March 7, 1985 Staff Report, p. 1. (Ex. 38.)

C. Other Actions

Over the years, the County Planning Department made various conclusions that the Quarry could modify its operations and engage in new activities without obtaining a use permit:

- In 1988, Kaiser Cement proposed to install a portable sand and gravel plant to crush excess rock and produce aggregate for sale. Correspondence between the Quarry and the County discusses whether this activity was within the scope of the Quarry's legal nonconforming use, and the County Planning Department ultimately determined that it was.[80] Staff has been unable to locate any documentation specifically detailing the basis of this conclusion.

- In 1991, a letter from Kaiser Cement's attorney asserted that a rock plant modernization was exempt from a County grading permit because, among other reasons, "Kaiser's entitlement to quarry as a legal nonconforming use under §38-7 of the County's Ordinances covers the entirety of the relevant Permanente property."[81] Staff has been unable to locate any documentation indicating how the County responded to this letter.

VII. Analysis

Determining the nature and extent of the Quarry's legal nonconforming use(s) is complex and entails answering certain questions, each of which is addressed below.

1. *May the County reconsider issues that arguably were addressed in the past?*

As a threshold issue, the Board of Supervisors should determine whether it wishes to reconsider issues that arguably were addressed in the past. The Quarry asserts that the County took final action to determine the nature and extent of its legal nonconforming use decades ago, and that the County is prohibited from reconsidering those issues. This necessarily raises the question of what the prior County conclusions entailed.

a. Equitable Estoppel

As a preliminary matter, the Quarry asserts that the County is estopped from considering (or reconsidering) the Quarry's legal nonconforming use. However, equitable estoppel does not apply where the result would be contrary to a strong rule of public policy adopted for the public benefit.[82] In the Hansen Bros. case, the quarry made similar arguments that the county was estopped from determining that part of its property was not part of its legal nonconforming use on the basis that the county had allowed it to continue using the property since the zoning

[80] Feb. 2, 1988 Letter from F.A. Nelson, Kaiser Cement Corp. Vice President and General Manager, to Lucas Stamos, County Planning Dept. (Ex. 39); March 1, 1988 Letter from F.A. Nelson to Lucas Stamos (Ex. 40); March 29, 1988 Letter from Lucas Stamos to F.A. Nelson (Ex. 41).
[81] July 25, 1991 Letter from Thomas P. O'Donnell, Kaiser attorney, to Luke Stamos. (Ex. 42.)
[82] State of California v. Superior Court of Placer County (1981) 29 Cal.3d 240, 244.

ordinance was adopted and had failed to contest the quarry's right to continue the use.[83] The California Supreme Court rejected these arguments on the following grounds:

> Even were there an equitable basis for claiming an estoppel to assert the applicability of a zoning ordinance to property in some circumstances [citation], no basis for doing so appears in this case as there is no evidence of detrimental reliance on the Board's failure to note the dates of acquisition of the three parcels Hansen Brothers now claims are all part of the Bear's Elbow Mine. "[T]he owner of property or one proposing to acquire it cannot justify his ignorance of the true state of the facts and the law affecting it by pointing to similar ignorance in government bodies. Negligence which may be less than culpable in a government body, charged with the administration and regulation of vast amounts of land under diverse ownership, cannot be so easily excused in one whose interest is focused on a particular piece of property." [citation] Moreover, estoppel will not be recognized "when to do so would nullify 'a strong rule of policy adopted for the benefit of the public . . . .' " [citations][84]

The California courts have long rejected attempts by property owners to prevent local jurisdictions from enforcing their zoning regulations based on the theory of equitable estoppel.[85] Although the doctrine of equitable estoppel is not absolutely barred in land use cases, the courts have severely limited its application:

> A party "faces daunting odds in establishing estoppel against a governmental entity in a land use case. Courts have severely limited the application of estoppel in this context by expressly balancing the injustice done to the private person with the public policy that would be supervened by invoking estoppel to grant development rights outside of the normal planning and review process. [Citation] The overriding concern 'is that public policy may be adversely affected by the creation of precedent where estoppel can too easily replace the legally established substantive and procedural requirements for obtaining permits.' [Citation] Accordingly, estoppel can be invoked in the land use context in only 'the most extraordinary case where the injustice is great and the precedent set by the estoppel is narrow.' [Citation]"[86]

Nor does the County's failure to conduct a thorough determination regarding the nature and extent of the Quarry's legal nonconforming use in the past preclude the County from doing so now. A local jurisdiction does not have the power to waive or consent to violations of its zoning regulations.[87]

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[83] Hansen Bros., 12 Cal.4th at p. 563.
[84] Id. at p. 564.
[85] See, e.g., Feduniak v. California Coastal Commission (2007) 148 Cal.App.4th 1346, 1373-1381; Smith v. County of Santa Barbara (1992) 7 Cal.App.4th 770, 776; County of Sonoma v. Rex (1991) 231 Cal.App.3d 1289, 1295; Pettitt v. City of Fresno (1973) 34 Cal.App.3d 813, 822-823.)
[86] Golden Gate Water Ski Club v. County of Contra Costa (2008)165 Cal.App.4th 249, quoting Toigo v. Town of Ross (1998), 70 Cal.App.4th 309, 321.
[87] Hansen Bros., 12 Cal.4th at p. 564.

Even if the Quarry could overcome this hurdle, it would have great difficulty establishing the four required elements of equitable estoppel. For example, it would have to prove that the County knew information that the Quarry did not know, and induced the Quarry to rely on that information.[88]

b. Nature and Extent of Prior Conclusions

As discussed above, the documentation indicates that County staff concluded on several prior occasions that there was a legal nonconforming use for quarrying on the Quarry property. These conclusions appear to be based simply on the fact that quarrying began before 1937. With respect to the geographical extent of the legal nonconforming use, the 1971 County Counsel opinion stated that the nonconforming quarrying operations could expand throughout the entire "original parcel" of land, but could not expand to a "second parcel."[89] But what the terms "original parcel" and "second parcel" were intended to refer to is unclear. County staff also determined that the rock crushing and aggregate sales were within the scope of the Quarry's legal nonconforming use for quarrying.[90]

The Quarry asserts that the County's 1985 approval of the Quarry's reclamation plan amendment implicitly involved a determination that the legal nonconforming use extended to the reclamation plan boundaries. But there is no evidence of what, if any, analysis was conducted to support this conclusion. Rather, the staff report simply states that, because quarrying began before 1937, there is a legal nonconforming use for quarrying on the property.

In addition, the County's prior determinations that the cement plant was subject to a use permit and that the lands used for metals manufacturing for several decades were a separate legal nonconforming use is strong evidence that the lands used for these activities were not part of the legal nonconforming use for quarrying.

As discussed, nothing in the historical documentation shows that the County ever made a determination that the legal nonconforming use for quarrying encompassed all of the property owned by the Quarry. The 1971 analysis stated that quarrying could be expanded throughout the entire original parcel of land, but could not be expanded to a second parcel.[91] With respect to the EMSA property, most of that land was owned by a separate corporation and operated for completely different purposes until at least the 1980s.

If the Board of Supervisors decides not to revisit the prior County conclusions, it would still need to address the extent (e.g., geographic scope) of the Quarry's legal nonconforming use.

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[88] Feduniak, 148 Cal.App.4th at p. 1359.

[89] April 12, 1971 Letter from William Siegel, County Counsel, to Supervisor Victor Calvo, pp. 1-2. (Ex. 30.) This conclusion was based on McCaslin v. City of Monterey Park (1958) 163 Cal.App.2d 339.

[90] Feb. 2, 1988 Letter from F.A. Nelson, Kaiser Cement Corp. Vice President and General Manager, to Lucas Stamos, County Planning Dept. (Ex. 39); March 1, 1988 Letter from F.A. Nelson to Lucas Stamos (Ex. 40); March 29, 1988 Letter from Lucas Stamos to F.A. Nelson (Ex. 41).

[91] April 12, 1971 Letter from William Siegel, County Counsel, to Supervisor Victor Calvo. (Ex. 30.)

2. *What did the owner/operator actually mine, or objectively manifest the intent to mine, as of the relevant dates?*

Based on the analysis of the prior County Zoning Ordinances in Section III, there are four potential dates for determining whether a legal nonconforming use was established on the Quarry property:

1. September 24, 1937 for portions of the property within 1,000 feet of a public street; and

2. January 28, 1948 for other portions of the property; or

3. May 20, 1959 for portions of the property rezoned "A-2" in 1955; and July 1, 1960 for other portions of the property rezoned "A-2" in 1960.

Under the legal standard articulated by the California Supreme Court in the Hanson Bros. case, the Quarry's nonconforming use includes all aspects of the operation that were integral parts of the business at the time the new regulations took effect. The nonconforming use includes those areas where mining was taking place, and may also encompass those lands, including open areas, where activities that were an integral (vs. independent) part of the quarrying operation were taking place as of the relevant dates. The excavation part of the business may also be extended to other lands owned by the Quarry and for which the owners had then objectively manifested an intent to mine in the future as of the relevant dates. [92] With respect to areas that were not actively mined by the relevant dates, mere ownership of the property is not enough, however; nor does the property owner's *subjective* intent suffice. The property owner must produce evidence objectively demonstrating the intent to actually mine the area.[93]

A quarry's nonconforming use does not extend to lands acquired after the relevant dates unless the prior owner(s) of those lands had established a legal nonconforming use for quarrying before the relevant dates. The Quarry's land acquisition history is shown on Exhibit 45. The Quarry did not acquire the following parcels until 1965 or later: 10, 12, 13 and 19. So there is no legal nonconforming use for quarrying on these properties unless the prior owners of those properties had established a legal nonconforming use for quarrying on those lands before the relevant dates.

It should be noted that the analysis provided by the Quarry takes a very different approach. Rather than evaluating what activities were being conducted as of the relevant dates, it focuses on the "entire business operation" as it progressed across the property from 1939 to today. However, the Hansen Bros. case is clear that, with respect to lands that were not an integral part of the quarrying operations as of the relevant dates, the owners must have objectively manifested the intent to mine those lands *as of 1937, 1947, 1955 or 1959*. "The mere intention or hope on

[92] Based on the "diminishing asset doctrine" from the Hansen Brothers case, the Quarry's legal nonconforming use "includes extending *the rock quarry aspect* of the business to those other areas of the property owned [when the more restrictive regulations took effect] into which the owners had then objectively manifested an intent to mine in the future." But the law is unclear about whether non-extractive uses (e.g., overburden storage, administration buildings) may be expanded to other parts of the property. (Hansen Bros.,12 Cal.4th at p. 542 (emphasis added).)
[93] Hansen Bros., 12 Cal.4th at pp. 557-558, 560-564.

the part of the landowner to extend the use over the entire tract is insufficient; the intent must be objectively manifested by the present operations."[94]

a. September 24, 1937 – property within 1,000 feet of a public street

Beginning in 1937, a use permit was required for quarrying property within 1,000 feet of a public street. Therefore, the property must have either been mined, or the owner/operator must have objectively manifested an intent to mine those areas, before September 24, 1937 when the County's first Zoning Ordinance took effect.

The 1937 date is relevant because Permanente Road, which runs through the Quarry property, was dedicated to the public in 1893. Staff conducted exhaustive research to determine whether the County ever abandoned Permanente Road and could not find any such documentation.[95] The Quarry was also asked to provide any documentation they might have regarding abandonment of Permanente Road; none was provided.

Nevertheless, it appears that at some point the public was denied access to Permanente Road through the Quarry property, thereby terminating public access to the road from a practical, if not legal, standpoint. Minutes from a 1935 Board meeting reflect public concern about a gate that was placed across Permanente Road, but it is unclear whether this gate was on or near the Quarry's property.[96] A record of survey prepared for the Quarry and recorded with the County Recorder in 1944 notes that Permanente Road was abandoned beyond a bridge that crosses the railroad tracks just east of the Quarry property.[97] However, a property owner may not unilaterally abandon a public road; abandonment requires some affirmative act by the County.[98]

A map of the historic Permanente Road and a 1,000 foot buffer is shown on Exhibit 49. This map shows that the current Quarry pit is more than 1,000 feet from the Road. Therefore, a use permit for quarrying in the current pit was not required until at least 1947. However, other portions of the quarrying operation that are the subject of the comprehensive reclamation plan amendment and the EMSA reclamation plan amendment are within 1,000 feet of the historic Permanente Road. These areas are shown on Exhibit 50.

There is no question that quarrying on some portion of the Quarry property began by 1937. The question is, for those areas of the Quarry property within 1,000 feet of Permanente Road, where had the Quarry established a legal nonconforming use by 1937. In other words, for any property

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[94] Id. at p. 557, citing a case from Alaska.

[95] This research was conducted by Planning Office staff, Roads Department staff, the County Surveyor, and First American Title Company. Roads Department staff reviewed all of the Department's documentation regarding Permanente Road and Stevens Creek Road, and all deeds identified by First American Title Company. Planning Office staff reviewed all official records on file with the Clerk of the Board of Supervisors, including all Board action journals from 1929 through 1945. The County Surveyor searched all map files for any references, and also searched newspaper articles for historical accounts.

[96] Sept. 25, 1935 and Sept. 30, 1935 Board of Supervisors minutes. (Ex. 43.)

[97] Book 6, Page 36, County of Santa Clara official records. (Ex. 21); see also Ex. 52 (showing bridge location).

[98] See, e.g., San Diego County v. California Water & Tel. Co. (1947) 30 Cal. 2d 817, 822-824. A review of the Board of Supervisors' action journals from 1929 through 1945 indicates that the County regularly accepted and abandoned public roads during this time period. The abandonment process involved the Board's adoption of a resolution and the recording of a road abandonment document with the County Recorder.

within 1,000 feet of Permanente Road, the Quarry must have established a legal nonconforming use for quarrying by 1937.

Exhibit 51 contains the County Geologist's analysis of disturbance by 1939 in relation to Permanente Road and the 1,000-foot buffer.

The Quarry asserts that, even if Permanente Road was not formally abandoned as a public road, it no longer functioned as a public street as defined by the 1937 Zoning Ordinance.[99] Therefore, the 1,000-foot criterion in the 1937 Zoning Ordinance is not applicable, and no use permit was required for quarrying within 1,000 of the portion of Permanente Road past the entrance to Kaiser's property.[100] This is one of the issues that the Board will need to determine.

Regardless of whether the Board determines that the portion of Permanente Road that was closed to public access does not constitute a "public street" for purposes of the 1937 Zoning Ordinance, other portions of Permanente Road indisputably remained public. Portions of the proposed EMSA are within 1,000 feet of the portion of Permanente Road (now known as Stevens Creek Road) that is still publicly-accessible and maintained by the County. These portions of the property are shown on Exhibit 52. As previously discussed, the EMSA property was owned by a separate corporation and used for metals manufacturing until the 1980s. In addition, the County Geologist did not find evidence of mining-related disturbance in the EMSA area.

b. <u>January 28, 1948 – All Areas</u>

The County Geologist's analysis of the disturbed areas related to quarrying by 1948 is depicted on figures attached to Exhibit 1. Exhibit 54 depicts these disturbed areas from 1939 and 1948 encompassed by a line.

c. <u>May 20, 1959 for portions of the property rezoned "A-2" in 1955</u>

The County Geologist's analysis of the disturbed areas related to quarrying by 1959 is depicted on the figures attached to Exhibit 1. As previously explained, this analysis uses an aerial photo from 1960. Exhibit 58 depicts the disturbed areas from 1939, 1948, 1955 and 1960 encompassed by a line.

d. <u>July 1, 1960 for portions of the property rezoned "A-2" in 1960</u>

The County Geologist's analysis of the disturbed areas related to quarrying by 1960 is depicted on the figures attached to Exhibit 1. Exhibit 58 depicts the disturbed areas from 1939, 1948, 1955 and 1960 encompassed by a line.

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[99] Ord. No. 120, § 11. (Ex. 2.)

[100] The 1937 ordinance defined "street" as follows:

> A public or private thoroughfare which affords the principal means of access to abutting property, including avenue, place, way, drive, lane, boulevard, highway, road and any other thoroughfare except an alley as defined herein. Ord. No. 120, § 11. (Ex. 2.)

3. *Does the legal nonconforming use for quarrying include the property transferred to The Permanente Metals Corporation and owned by Kaiser Aluminum until 1986?*

With respect to the property owned by The Permanente Metals Corporation, the 1939 aerial photos show no evidence of quarrying activity on any part of the EMSA property, and some of the EMSA property is within 1,000 feet of the portion of Permanente Road that was and still is unquestionably public. (See Exhibit 52.) Although there was significant disturbance of the EMSA property by the early-1940s, that disturbance was due to the construction and operation of a metals manufacturing plant and related facilities.[101]

The Quarry asserts that the historical aerial photos show Henry Kaiser's intent to conduct comprehensive quarrying operations on all of the property he acquired, including the lands transferred to the Permanente Metals Corporation shortly thereafter. The Quarry asserts that the fact that the EMSA property was transferred to The Permanente Metals Corporation is irrelevant, because they were all part of Henry Kaiser's operations, and points to areas of disturbance on the 1939 and 1948 maps as evidence of either actual mining or general intent to mine this area.

However, even if a legal nonconforming use for quarrying was initially established on the Permanente Metals Corporation lands, the evidence indicates that it was subsequently abandoned. As discussed in Section V.D, the property was transferred to a separate corporation and was developed for metals manufacturing and other purposes. The County considered this operation a separate legal nonconforming use. A letter from Kaiser's attorney explains that the metals and cement operations were separate and independent. And the property ownership was not reconsolidated until 1995.

The Quarry has not provided any objective evidence that this property was simply held in reserve for future quarrying use. Rather, it was extensively developed and used for other purposes by a separate legal entity. "The mere intention or hope on the part of the landowner to extend the use over the entire tract is insufficient; the intent must be objectively manifested by the present operations."[102]

VI. Conclusions and Related Board Decision Points

There is no question that quarrying began on a portion of the property in the early-1900s and that there is a legal nonconforming use for quarrying covering at least some portions of the Quarry property. The ultimate question that the Board of Supervisors needs to decide is the geographic extent of this legal nonconforming use. In order to answer this ultimate question, the Board will need to answer several interim questions. The Board of Supervisors should consider all of the evidence presented when answering the following questions.

[101] Memorandum from James Baker to Jody HallEsser, Ex. 1; Metals facility site plan from County Assessor. (Ex. 48.)
[102] Hansen Bros., 12 Cal.4th at p. 557.

Decision Point One: Was Permanente Road a "public street" for purposes of the 1937 County Zoning Ordinance?

The determination of the relevant date(s) by which the Quarry would need to have established a legal nonconforming use for quarrying on various parts of the property includes evaluating whether Permanente Road continued to be a "public street" for purposes of the 1937 County Zoning Ordinance, or whether the closure of the Road to the public essentially eliminated the "public" nature of the Road as of that time.

Therefore, it is recommended that the Board of Supervisors consider all of the evidence presented and determine whether closure of Permanente Road to the public eliminated the "public" nature of the Road from a practical standpoint and, therefore, did not trigger the provision in the 1937 Zoning Ordinance requiring a use permit for quarrying within 1,000 feet of a public street.

It is also recommended that the Board direct the Quarry to pursue a formal abandonment of the Road with the County, at the Quarry's expense.

Decision Point Two: When did the County Zoning Ordinance first require a use permit for quarrying on the Quarry property?

Depending on the Board's conclusion regarding Permanente Road in *"Decision Point One"* above, there are three choices for determining the dates upon which the County Zoning Ordinance first required a use permit for quarrying:

- September 24, 1937 for portions of the property within 1,000 feet of Permanente Road, and January 28, 1948 for other portions of the property; or
- January 28, 1948 for all of the property; or
- May 20, 1959 for portions of the property rezoned "A-2" in 1955; and July 1, 1960 for portions of the property rezoned "A-2" in 1960.

The Board's decision regarding this issue will establish when the Quarry must have established a legal nonconforming use for quarrying on the various parts of its property.

Based on the text of the old County Zoning Ordinances, the Board should determine when a use permit was first required for quarrying on various parts of the Quarry property.

Decision Point Three: What is the geographic extent of the Quarry's legal nonconforming use?

The County Geologist reviewed aerial photos and other documentation associated with the potential relevant dates identified under "*Decision Point Two*" to identify all disturbances related to quarrying as of those dates. Under either scenario, the available evidence indicates that quarrying activities had been established on some, but not all, of the property owned by the Quarry by the relevant dates. Figures depicting these areas are attached to the County Geologist's analysis in Exhibit 1.

Based on its determination regarding the relevant date(s) under "Decision Point Two," the Board of Supervisors should determine the geographic extent of quarrying activities by the relevant date(s).

Decision Point Four: What is the relevance of the 1985 reclamation plan approval?

In addition to the historical disturbance, the Quarry asserts that the County's approval of its 1985 reclamation plan implicitly involved a determination that the geographic extent of its legal nonconforming use included the property covered by the reclamation plan. Exhibits 55, 57 and 59 show all areas of disturbance for the relevant date options, plus the 1985 reclamation plan boundaries.

The Board of Supervisors should determine whether the Quarry's legal nonconforming use also includes property within the boundaries of the approved 1985 reclamation plan amendment.

Permanente Quarry Legal Nonconforming Use Analysis

List of Exhibits

Exhibit Number	Description
1.	Jan. 18, 2011 Memorandum from James Baker, County Geologist, to Jody Hall Esser, Director, Department of Planning and Development
2.	Ord. No. 120 (Aug. 25, 1937)
3.	Use Permit No. 173.23 (March, 1939)
4.	Ord. No. 345 (Dec. 29, 1947)
5.	Ord. No. 733 (Sept. 14, 1953)
6.	Ord. No. 1200-dm (Mar. 14, 1955)
7.	Ord. No. NS-1200.21 (May 31, 1960)
8.	Ord. No. NS-1200.11 (April 20, 1959)
9.	"Consent, dedication and grant for Permanente Road" from Alice H. Swain et al to Santa Clara County (May 19, 1893), County Recorder, 170 O.R. 10.
10.	Cal. State Mining Bureau, The Structural and Industrial Materials of California, Bulletin No. 38, p. 82 (Jan. 1906) ("1906 State Report")
11.	Cal. State Mining Bureau, Report XVII of the State Mineralogist: Mining in California During 1920, p. 185 (Jan. 1921) ("1921 State Report") (Ex. 11)
12.	Cal. Division of Mines, Chapter of Report XXVI of the State Mineralogist Covering Activities of the Division of Mines Including the Geologic Branch, Vol. 26, No. 1, p. 9 (Jan. 1930) ("1930 State Report")
13.	C.F. Tolman, Report on Tonnage and Composition of Limestone Available in Proposed Quarries A and B, Permanente Corporation, and Superficial Residuary Clay on the Property of the Permanente Corporation, Santa Clara County, California, cover letter, p. 2 (Stanford University, June 18, 1939) ("1939 Tolman Report").
14.	Cal. Dept. of Natural Resources, Division of Mines, California Journal of Mines and Geology, Vol. 43, No. 3, p. 313 (July 1947) ("1947 State Report").
15.	Cal. Division of Mines, California Journal of Mines and Geology, Vol. 50, No. 2, p. 365 (April 1954) ("1954 State Report")
16.	The Permanente News, Vol. 2, No. 8, p. 5 (Aug. 1943)
17.	Book 942 O.R. 290, County of Santa Clara official records [Permanente Corp. initial purchase of land from Santa Clara Holding Co.]
18.	Book 1029 O.R. 408, Book 1041 O.R. 43, County of Santa Clara official records [Initial transfer of 50 acres from Permanente Corp. to Todd Cal. Shipbuilding Corp.]
19.	Book 1080 O.R. 45, Book 1094 O.R. 138, County of Santa Clara official records [1942 Transfers of additional property from Permanente Corp. to Permanente Metals Corp.]
20.	Book 1076, Page 407 of County of Santa Clara official records [1942 acquisition of land by Permanente Metals Corp. from Roman Catholic Archbishop]
21.	Book 6, Page 36 of County of Santa Clara official records [1944 Kaiser Record of Survey]
22.	Kaiser Industries Corporation, The Kaiser Story, p. 39 (1968)

23.	Aug. 17, 1965 Board of Supervisors meeting minutes (Book 41, pp. 429-430)
24.	Sept. 20, 1965 Board of Supervisors meeting minutes (Book 41, p. 567)
25.	Feb. 18, 1971 Letter from Richard Forster to Supervisor Victor Calvo
26.	Oct. 10, 1966 Letter from W.E. Ousterman, Kaiser Cement & Gypsum Corp. General Production Manager, to William Siegel, County Counsel
27.	March 24, 1967 Letter from W.E. Ousterman, Kaiser Cement & Gypsum Corp. General Production Manager, to William Siegel, County Counsel
28.	Feb. 18, 1971 Letter from William C. Reynolds to Supervisor Victor Calvo
29.	Feb. 22, 1971 Memorandum from John S. Haas, County Zoning Administrator, to Supervisor Victor Calvo
30.	April 12, 1971 Letter from William Siegel, County Counsel, to Supervisor Victor Calvo
31.	May 9, 1972 Notes of William Siegel, County Counsel, from Board of Supervisors meeting
32.	May 12, 1972 Memo from Donald M. Rains, Clerk of the Board, to County Counsel, containing transcript of May 10, 1972 Board Meeting
33.	Portion of May 17, 1972 newspaper article re Kaiser Permanente Quarry
34.	June 3, 1980 Letter from Thomas P. O'Donnell, Kaiser attorney, to Selby Brown, County Counsel
35.	June 5, 1980 memo from Bob Menifee, Dep. County Counsel, to Bob Sturdivant, County Planning
36.	March 27, 1984 Letter from Ransom Bratton, Associate Planner, to Norm Gilbertson, Kaiser Cement Plant Manager
37.	March 1, 1985 Environmental Assessment, File No. 2250-13-66-84P
38.	March 7, 1985 Staff Report to Planning Commission, File No. 2250-13-66-84P
39.	Feb. 2, 1988 Letter from F.A. Nelson, Kaiser Cement Corp. Vice President and General Manager, to Lucas Stamos, County Planning Dept.
40.	March 1, 1988 Letter from F.A. Nelson to Lucas Stamos
41.	March 29, 1988 Letter from Lucas Stamos to F.A. Nelson
42.	July 25, 1991 Letter from Thomas P. O'Donnell, Kaiser attorney, to Luke Stamos
43.	Sept. 25, 1935 and Sept. 30, 1935 Board of Supervisors minutes
44.	Map showing ownership as of 1937
45.	Map showing all Permanente acquisitions over time (incl. Metals Corp.)
46.	Certificate of Merger, Doc. Nos. 19490603, 19490604, County of Santa Clara official records
47.	Map showing Permanente transfers to Todd Cal. Shipbuilding/Permanente Metals Corp. plus other acquisitions by Metals Corp.
48.	Metals facility site plan from County Assessor
49.	Map showing all of dedicated Permanente Road, 1000' buffer
50.	Map showing all of dedicated Permanente Road, 1000' buffer, and boundaries of proposed reclamation plan amendments
51.	Map showing County Geologist's analysis of 1939 aerial photo with all of dedicated Permanente Road and 1000' buffer
52.	Map showing portion of Permanente Road up to bridge and 1000' buffer
53.	Map showing 1985 reclamation plan boundaries
54.	Map showing County Geologist analysis of 1939 and 1948 disturbance with line

	encompassing disturbed areas
55.	Exhibit 54 plus 1985 reclamation plan boundaries
56.	Map showing County Geologist analysis of 1939, 1948 and 1955 disturbance, with line encompassing disturbed areas
57.	Exhibit 56 plus 1985 reclamation plan boundaries
58.	Map showing County Geologist analysis of 1939, 1948, 1955 and 1960 disturbance, with line encompassing disturbed areas
59.	Exhibit 58 plus 1985 reclamation plan boundaries
60.	Map showing portion of Quarry property rezoned in 1955
61.	Map showing County Geologist analysis of 1939 disturbance with line encompassing disturbed areas, the 1985 Reclamation Plan boundaries, and the proposed Reclamation Plan Boundaries (EMSA and Comprehensive)
62.	Map showing County Geologist analysis of 1939 and 1948 disturbance with line encompassing disturbed areas, the 1985 Reclamation Plan boundaries, and the proposed Reclamation Plan Boundaries (EMSA and Comprehensive)
63.	Map showing County Geologist analysis of 1939, 1948 and 1960 disturbance with line encompassing disturbed areas, the 1985 Reclamation Plan boundaries, and the proposed Reclamation Plan Boundaries (EMSA and Comprehensive)