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February 4, 2011

By Hand Delivery

Dave Cortese, President of the Board and
Members of the County of Santa Clara Board of
Supervisors
County Government Center, East Wing, 10th Fl.
70 West Hedding Street
San Jose, CA 95110

Re: Comments Concerning Lehigh Southwest Cement Company's Request for Vested Rights Determination
Hearing Date: February 8, 2011

Dear Mr. Cortese and Members of the Board:

No Toxic Air, Inc. ("No Toxic Air;" http://notoxicair.org/) is a non-profit organization comprised of residents of Santa Clara County who live in close proximity to or are otherwise affected by Lehigh Southwest Cement Company's ("Lehigh" and/or "Applicant") Permanente Facility located at 24001 Stevens Creek Boulevard, Cupertino, California (the "Facility"). No Toxic Air members are personally impacted by Applicant's ongoing operations and oppose the Applicant's request that the Board confirm the vested status of the Facility in advance of the pending decisions on Lehigh's Reclamation Plan Amendment and its Conditional Use Permit Application.

As set forth below, California law allows the Board to restrict or revoke any vested rights held by the Applicant if the Facility's operations create a threat to human health or the environment or otherwise create a public nuisance. Attached to this letter as Exhibit A is a lengthy memorandum that analyzes the facts surrounding the Facility's operations. These facts provide ample support for the Board to restrict or even revoke any vested rights the Applicant may have in connection with its operations at the Facility. No Toxic Air requests that this letter and Exhibit A be incorporated into the administrative record concerning this matter.

1. Vested Rights

The basis for determining vested rights in a mining operation is drawn from the California Public Resources Code. Specifically, a surface mining operation commenced prior to January 1, 1976 may continue to operate without obtaining the normally required land use permits, provided that certain requirements are met, including the continuous exercise of those vested rights and the absence of any substantial changes made to the mining operation. Cal. Pub. Res. Code § 2776(a).

The concept of vested rights allows landowners to continue their existing land use activities despite changed regulations that would otherwise prohibit or limit those activities. However, while California law recognizes vested rights, those rights can be limited or even revoked. The regulation of private property must balance between property owners' rights and the government's permissible exercise of its police power.

As a general rule, local governments may use their zoning power to prohibit a property owner from using the property in a specified manner, and such restrictions ordinarily will not constitute a "taking" that would entitle the property owner to "just compensation" under the Fifth Amendment. *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 125. However, to avoid challenges concerning the constitutionality of such regulations when applied to uses already ongoing when an ordinance prohibiting those uses is enacted, most zoning ordinances permit such uses to continue as "nonconforming uses." *County of San Diego v. McClurken* (1951) 37 Cal.2d 683, 686.

2. Vested Rights May Be Restricted or Revoked

Notwithstanding the common exemption for nonconforming uses, however, a property owner's right to continue such uses is "limited, narrowly construed, and subject to ultimate extinction." *Hansen Bros. Enterprises, Inc. v. Bd. of Supervisors* (1996) 12 Cal.4th 533, 586 (Kennard, J., dissenting); *see Livingston Rock and Gravel Co. v. County of Los Angeles* (1954) 43 Cal.2d 121, 127. The purpose of zoning regulations is to eliminate nonconforming uses as rapidly as is consistent with the rights of the property owners, and in light of this goal, "courts throughout the country generally follow a strict policy against their extension or enlargement." *McClurken, supra,* 37 Cal.2d 686-87; *see City of Los Altos v. Silvey* (1962) 206 Cal.App.2d 606, 609. Moreover, courts recognize that hardship results from the limitation and/or eventual termination of nonconforming uses, even when occurring within a prescribed period commensurate with the property owner's investment, "for every exercise of the police power is apt to affect adversely the property interest of somebody." *Zahn v. Bd. of Public Works* (1925) 195 Cal. 497, 512. Such incidental injury is implicit in the exercise of the government's police power and will not bar its application, provided it is exercised for the proper purposes of public health, safety, morals, and general welfare, and is not applied in an arbitrary or unreasonable manner under the particular circumstances. *Wilkins v. City of San Bernardino* (1946) 29 Cal.2d 332, 338; *Beverly Oil Co. v. City of Los Angeles* (1953) 40 Cal.2d 552, 557.

Therefore, although vested rights permit certain nonconforming uses to continue after the enactment of zoning ordinances that would otherwise prohibit them, such uses must not be a menace to the health, safety, or general welfare of the public. *See Livingston, supra,* 43 Cal.2d at 127-28 (addressing police power authority over cement plant as a nuisance). Stated differently, vested rights to perform nonconforming uses "may be impaired or revoked if the use authorized or conducted thereunder constitutes a menace to the public health and safety or a public nuisance." *Davidson v. County of San Diego* (1996) 49 Cal.App.4th 639, 649 (*quoting Highland Dev. Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 169, 186) (addressing police power authority over crematorium as a nuisance); *see Suzuki v. City of Los Angeles* (1996) 44 Cal.App.4th 263, 278 (addressing police power authority over liquor store as a nuisance).

3. Nuisance As Basis For Limiting or Revoking Vested Rights

Pursuant to California law, a nuisance is "anything which is injurious to health [. . .] or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any [. . .] public park, square, street, or highway [. . .]. Cal. Civ. Code § 3479. A "public nuisance" affects an entire community or neighborhood simultaneously, or any considerable number of people, although the extent of the damage inflicted on individuals may be unequal. *Id.* at § 3480. By contrast, "private nuisances" are defined as any nuisances that are not considered public nuisances, and are generally considered to be injuries to individual property rights, as opposed to interference with the rights of the community at large. *Id.* at § 3481; *see Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 Cal.App.3d 116, 124-25. Specifically, private nuisances involve the unreasonable or unlawful uses of property so as to interfere with the rights of others. *Wolford v. Thomas* (1987) 190 Cal.App.3d 347, 358.

Whether a particular activity or condition constitutes a nuisance depends on the specific circumstances at issue, and courts typically weigh the extent of the plaintiff's injury against the utility of the defendant's conduct. *Farmy v. College Housing, Inc.* (1975) 48 Cal.App.3d 166, 174-75; *County of San Diego v. Carlstrom* (1961) 196 Cal.App.2d 485, 489-90. For an activity to be deemed a nuisance, it must be unreasonable and cause substantial harm. *San Diego Gas and Elec. Co. v. Sup. Ct.* (1996) 13 Cal.4th 893, 938. While harm is typically considered substantial when the activity causes physical damage, activities that disturb or prevent the comfortable enjoyment of property can also be nuisances, even absent direct damage to property or complete prevention of its use. *Venuto, supra,* 22 Cal.App.3d at 126-28. When evaluating potential nuisances that cause annoyance and discomfort, but little or no direct damage, the substantiality of the harm is measured by its impact on a person of ordinary sensibilities. *Carter v. Johnson* (1962) 209 Cal.App.2d 589, 591.

In addition to the extent of injury and utility of the activity in question, courts consider various factors when assessing reasonableness and measuring the degree of harm. These factors include: Duration of nuisance activity, location, compliance with laws, good faith of the defendant and plaintiff's avoidance of harm. With respect to the location of the alleged nuisance activity, courts look at the compatibility of that activity with the surrounding properties and population in the area. *See Anderson v. Souza* (1952) 38 Cal.2d 825, 838; *McIntosh v. Brimmer* (1924) 68 Cal.App. 770, 777. Whether the defendant's activities comply with applicable regulations is also significant, although non-compliance does not automatically mean an activity is a nuisance (or vice versa). *See Venuto, supra,* 22 Cal.App.3d at 129; *Livingston, supra,* 43 Cal.2d at 129 ("Although plaintiffs admittedly did comply with smog and air pollution regulatory requirements, their plant might still be so operated 'as to be a nuisance'") (*quoting Ricciardi v. County of Los Angeles* (1953) 115 Cal.App.2d 569, 580).

4. Nuisances Resulting From Changed Conditions or Methods of Operation

Nuisances can arise where changed conditions or methods of operation have caused a nonconforming use to become a public or private nuisance. For example, a business which, when established, was entirely unobjectionable, may by the growth of the population in the vicinity become a source of danger

to the public health, morals, safety, or general welfare of those who have come to be occupants of the surrounding territory. *Dobbins v. City of Los Angeles* (1904) 195 U.S. 223, 237-38; *City of Los Angeles v. Gage* (1954) 127 Cal.App.2d 442, 451. Such preexisting nonconforming uses may constitute a public nuisance subject to abatement by injunction. *City and County of San Francisco v. Safeway Stores, Inc.* (1957) 150 Cal.App.2d 327.

5. Relevant Examples of Nuisance

Based on the broad definition of nuisance under the California Civil Code, courts have determined a wide range of conditions and activities to be nuisances, including the impacts of cement plants and other industrial activities on residential properties. The following are examples of particular relevance here:

(a) **Air pollution** – *See, e.g., Dauberman v. Grant* (1926) 198 Cal. 586, 589-90 (smoke and soot from neighbor's smokestack); *People v. Selby Smelting and Lead Co.* (1912) 163 Cal. 84, 88 (noxious gases and fumes from smelter); *Centoni v. Ingalls* (1931) 113 Cal.App. 192, 194-95 (dust from clay plant); *Markey v. Danville Warehouse & Lumber, Inc.* (1953) 119 Cal.App.2d 1 (dirt, noise and grit from cement plant);

(b) **Deposits of debris** – *See, e.g., Hulbert v. California Portland Cement Co.* (1911) 161 Cal. 239, 245-46 (deposits of cement dust from Portland cement plant); *County of Yuba v. Kate Hayes Mining Co.* (1903) 141 Cal. 360, 363 (deposits of debris from mining operation);

(c) **Excessive noise** – *See, e.g., Wilson v. Rancho Sespe* (1962) 207 Cal.App.2d 10, 17-18 (blasting of rock for use in road construction); *People v. Mason* (1981) 124 Cal.App.3d 348, 352-53 (loud noises disturbing residents of 30-40 homes); *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 Cal.3d 862, 873 (noise from low-flying airplanes);

(d) **Water pollution** – *See, e.g., People v. City of Los Angeles* (1958) 160 Cal.App.2d 494, 499-501 (discharge of sewage into bay);

(e) **Offensive odors** – *See, e.g., Fisher v. Zumwalt* (1900) 128 Cal. 493 (noxious odors and gases from creamery); *Wade v. Campbell* (1962) 200 Cal.App.2d 54, 58-9 (odors from cattle stable and hog pen);

(f) **Conditions creating risk of injury to persons or property** – *See, e.g., McIvor v. Mercer-Fraser Co.* (1946) 76 Cal.App.2d 247, 253-54 (risk of collapse due to inadequate lateral support resulting from dirt and gravel excavation operation); *City of Turlock v. Bristow* (1930) 103 Cal.App. 750, 754-55 (polluted open irrigation ditch);

(g) **Violations of land use and environmental regulations** – *See, e.g., City and County of San Francisco v. Burton* (1962) 201 Cal.App.2d 749, 757 (violation of zoning ordinance); and

(h) **Hazardous waste contamination** – *See, e.g., Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1137-38 (owner of property contaminated with hazardous waste by prior lessee could sue lessee for continuing nuisance); *Newhall Land & Farming Co. v. Sup. Ct.* (1993) 19 Cal.App.4th 334, 342-44 (owner of contaminated property could sue previous owner for private nuisance).

6. Conclusion

As set forth above, if the Facility's existing operations pose a threat to human health and the environment or constitute a public nuisance, the Board is not obligated to grant Lehigh's application for vested rights. Therefore, in the event Lehigh is entitled to an award of vested rights in connection with its operation of the Facility, the Board may impose restrictions on those operations, so as to ensure that human health and the environment are adequately protected, and to prevent the maintenance of a nuisance.

Very truly yours,

for

Todd O. Maiden
Reed Smith LLP

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Attachment (Exhibit A)