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Via Electronic Mail

Honorable Chair and Members of the
Santa Clara County Board of Supervisors
70 West Hedding Street
10th Floor, East Wing
San Jose, CA 95110

Dear Members of the Board of Supervisors:

Re: February 8, 2011 Hearing to Consider Permanente Quarry/Lehigh Southwest Cement Company's Vested Rights Claim

This firm represents No Toxic Air in regard to Santa Clara County's determination of the nature and extent of vested rights at the Permanente Quarry owned by Hanson Permanente Cement, Inc. and operated by Lehigh Southwest Cement Company (collectively, "Lehigh"). As detailed below, Lehigh's claim regarding the extent of its legal nonconforming use ("vested rights") is legally deficient. Lehigh bears the burden of proof to demonstrate that it has a vested right to mine the vast areas at issue in this proceeding, a burden Lehigh plainly fails to satisfy. Accordingly, the County's vested rights determination must be strictly limited to only those areas of the quarry where Lehigh can unequivocally demonstrate that it has a right to mine without complying with the myriad of zoning ordinances enacted to protect public health and safety.

I. Background

Lehigh has submitted applications for two Reclamation Plan Amendments pursuant to the state Surface Mining and Reclamation Act ("SMARA"), Pub. Res. Code § 2710 *et seq*. As part of its review, the Santa Clara County Board of Supervisors ("the Board") must determine whether Lehigh has a vested right to mine within the area encompassed by the Reclamation Plan Amendments. This vested rights determination

turns on the extent to which Lehigh's operations constitute a legal nonconforming use of its property.[1]

A legal nonconforming use is established if the use complied with all zoning requirements in existence at the time the use began, and the use has continued subsequent to the enactment of zoning regulations prohibiting the use. *See Hansen Brothers Enterprises, Inc v. Board of Supervisors of Nevada County* (1996) 12 Cal.4th 533, 579. Generally, landowners acquire vested rights to continue their legal nonconforming uses only to the extent that they engage in those uses continuously after a restrictive zoning ordinance takes effect. Because zoning laws are intended to eliminate nonconforming uses, courts "generally follow a strict policy against [the] extension or enlargement" of nonconforming uses. *County of San Diego v. McClurken* (1951) 37 Cal.2d 683, 687; *see also City of Los Angeles v. Wolfe* (1971) 6 Cal.3d 326, 337 ("The policy of the law is for elimination of nonconforming uses . . . .").

Lehigh asserts a vested right to mine Lots 14 and 15 ("the 1942 Morris parcels"); Lot 11 ("the 1943 Crocker parcel"); and the East Materials Storage Area ("EMSA"), which encompasses parts of Lots 16 and 17. It admits that it has not used three parcels—Lot 10 purchased from Hart and Scully in 1965, Lot 12 purchased from Campell in 1968, and Lot 13 purchased from Barnard in 1979—for mining and that it must obtain a Conditional Use Permit ("CUP") from the County for any such use in the future. Letter from Mark D. Harrison to Lizanne Reynolds, dated Jan. 4, 2011 ("January 4 Letter") at 1. Lehigh provides no details about the historic and geographic extent of mining activities on other parcels that fall within its Reclamation Plan Amendment applications, including Lots 1, 3, 4, 6, 7, and 9.

II. The Decision in *Hansen Brothers v. Nevada County* Does Not Support the Finding of a Vested Right to Mine the Morris, Crocker, or EMSA Parcels.

In *Hansen Brothers v. Nevada County*, the California Supreme Court recognized the diminishing assets doctrine with respect to vested rights to mine property. Before a party may obtain a vested right to mine a property, it bears the burden of proving that it was engaged in mining operations at the time that regulations restricting the ability to mine went into effect. *Hansen*, 12 Cal.4th at 564. That vested right extends

[1] All references to Lehigh's property refer to its current, 3,510-acre holding. *See* Letter from Mark D. Harrison to Lizanne Reynolds, dated Jan. 4, 2011 at 1.

"to those other areas of the property. . . into which the owners had then objectively manifested an intent to mine in the future." *Id.* at 542. If the property was under other ownership on the vesting date, the party seeking the vested right must demonstrate the then-owner's use or intent on the vesting date. *Id.* at 564. In addition, only a use that "constitutes an integral part of the operation" can be part of the legal nonconforming use. *Id.* at 555.

The determination of vested rights turns on the date on which a zoning ordinance first restricted the use at issue and on evidence of use, or objective intent to use, as of that vesting date. As detailed below, Lehigh has shown neither use nor intent as of the vesting date for the Morris parcels, the Crocker parcel, the EMSA area, or, indeed, many other parts of the property for which it asserts a vested right.

A. Vesting Dates

In 1937, County zoning law first restricted mining within 1,000 feet or less of a public road. In 1948, the County required a use permit to mine in any zoning district where mining is a permitted use. As detailed below, No Toxic Air disagrees with Lehigh's—and a portion of County Staff's—contentions regarding the vesting dates governing this proceeding.

Lehigh contends that no County zoning ordinance required a use permit for mining operations on the property until 1960, although it also states that its analysis would not change for a vesting date of 1948. January 4 Letter at 24. County Staff recommends that the 1948 vesting date apply to the entire property, based on its conclusion that Permanente Road no longer functioned as a public street as of approximately 1935. Board of Supervisors' Agenda, Feb. 8, 2011, Item 27. As set forth below, this misconstrues California law regarding abandonment of public roads. Permanente Road remained legally—even if not physically—open to the public for purposes of the 1937 zoning ordinance.

1. <u>The 1937 Zoning Ordinance</u>

Santa Clara County's first zoning ordinance took effect on September 24, 1937. This ordinance prohibited "[c]ommercial excavating of natural materials within a distance of one thousand (1000) feet from any public street" in the A-1 district, which included the current Lehigh property. Ord. No. 120 § 12, Ex. A. It defined a "street" as 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." *Id.* § 11. Accordingly, to the extent that Lehigh asserts a vested right to mine within 1,000 feet of a road that was public in 1937, it must show that the owner of the relevant parcel used that land, or exhibited the objective intent to use it, for mining purposes on or before September 24, 1937.

Lehigh contends that Permanente Road was not a public street in 1937, and, as a result, the 1937 zoning ordinance did not prohibit its mining activities within 1,000 feet of the road. Permanente Road was dedicated to public use in 1893 and the County has never disclaimed or otherwise abandoned it. "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. B. Once dedicated to the County as a public right of way, a road continues to be public until abandoned. *See People ex rel. Dept. Pub. Wks. v. Volz* (1972) 25 Cal.App.3d 480, 489 ("When a street or road easement has been created by dedication or deed, it does not die through disuse . . . . In order to guard against street closures favoring private interests a general rule requires the city or county to resort to statutory abandonment formalities . . . ." (citations omitted)). California law provides for only three ways in which a county may abandon a public road: by order of the county board of supervisors, by judgment of a court of competent jurisdiction, or "by operation of law." Cal. Sts. & Hy. Code § 901. Neither the Board of Supervisors nor a court has ever directed that the road be abandoned. County of Santa Clara Department of Planning and Development, Permanente Quarry Legal Nonconforming Use Analysis dated January 27, 2011 ("County Staff Report") at 21.

Abandonment "by operation of law" requires, at a minimum, that the local legislative body intend to abandon the roadway. In *Humboldt County v. Van Duzer* (1920) 48 Cal. App. 640, 644-46, the court found that the actions of a private ferry operator who stopped using and then fenced off a public city street were insufficient to terminate the public right of way, since there had been no acts by the city authority that could constitute abandonment: "To effect an abandonment of an easement or public use of property acquired by grant to the public authorities, the intention to abandon must be clearly manifest. Mere nonuser of an easement acquired by grant does not amount to an abandonment." The California Supreme Court went even further in *San Diego County. v. California Water & Telephone Co*mpany, (1947) 30 Cal. 2d 817, 822-24, and found that a county could abandon a public road only through the affirmative action of its board of supervisors. And as noted more recently in another mining case, "[t]he general rule is: Once a highway, always a highway. Therefore, the burden of proof is on the party contending a highway no longer exists." *Western Aggregates, Inc. v. County of Yuba*

(2002) 101 Cal.App.4th 278, 304-05 (quotation and citation omitted). Accordingly, Lehigh must, at a bare minimum, provide evidence of the County's intent to abandon Permanente Road if it is to argue that the 1937 zoning ordinance does not apply to its property. It has proffered no such evidence.

County Staff conducted an "exhaustive" investigation of records regarding Permanente Road and found no evidence of any action or intent by the County to abandon it, even though "the County regularly accepted and abandoned public roads during this time period." County Staff Report at 21 n.98. Staff also asked Lehigh to provide any such evidence, which it failed to do. *Id.* Lehigh contends that Permanente Road functioned as a private access road prior to enactment of the 1937 zoning ordinance. It bases this argument in part on minutes from a pair of 1935 meetings of the Board of Supervisors, which note protests regarding a gate across an unspecified stretch of Permanente Road and a statement by the county surveyor that the protested gate "was not across a county road." Minutes of September 15 and 21, 1935 Board of Supervisors Meetings, Ex. C. Lehigh also relies on the County's consideration of Kaiser's 1939 permit application for the cement plant that stated that "[t]here are no streets upon the property . . . ." January 4 letter at 30. Even if some portion of Permanente Road was closed to public access in 1935, however, it remained a legally public road deeded to the County. Despite extensive research, neither Lehigh nor the County has uncovered any evidence that the County intended to abandon the road, and so the road remained public for purposes of the 1937 zoning ordinance.

In addition, and as County Staff has noted, the eastern portion of EMSA lies within 1,000 feet of a portion of Permanente Road that remains open to the public and is now named Stevens Creek Road. *See* County Staff Report at 22; Ex. D.

2. The 1948 Zoning Ordinance

The County amended its zoning ordinance on December 29, 1947 to require a use permit for "[c]ommercial excavating of natural materials used for building or construction purposes, in any district."[2] Ord. No. 345 § 35.4, Ex. E. The 1948 zoning ordinance also amended regulations governing the property's A-1 district to allow "[a]ll

[2] This ordinance took effect 30 days after passage, or on January 28, 1948. *See* Ord. No. 345 (Dec. 29, 1947), Ex. E. Accordingly, this memorandum refers to "the 1948 zoning ordinance."

uses permitted in any 'H', 'R' or 'C' District" as of right. *Id.* § 12.2. The H, R, and C districts do not allow excavation, quarrying, or mining absent a conditional use permit. *See* Ord. No. 120 §§ 14-21 (Aug. 25, 1937), Ex. A. Even the C-2 district, which allowed "[a]ll uses not otherwise prohibited by law," made "[c]ommercial excavating of building or construction materials, subject to the securing of a user permit in each case . . . ." *Id.* §§21(a)(3), 22(a). Thus, the 1948 zoning ordinance required a use permit for all quarrying and mining operations in the Quarry property's A-1 designation. As a result, Lehigh must demonstrate use or objective intent to use all property for which it asserts vested rights on or before January 28, 1948.

B. Analysis of Vested Rights

Both County Staff and Lehigh focus their analyses on vested rights to mine the Morris and Crocker parcels and EMSA. However, Lehigh bears the same burden of proof for the entire area for which it asserts a vested right. The state Supreme Court highlighted the extent of this burden in *Hansen*:

> A vested right to quarry or excavate the entire area of a parcel on which the nonconforming use is recognized requires more than the use of a *part* of the property for that purpose when the zoning law becomes effective, however. In addition there must be evidence that the owner or operator at the time the use became nonconforming had exhibited an intent to extend the use to the *entire* property owned at that time.

Hansen, 12 Cal. 4th at 555-56 (emphasis added). Accordingly, the County's analysis must extend to the entire area for which Lehigh asserts vested rights.

Neither Lehigh nor the County provides detailed information about ownership or use of the property prior to 1939. By January 1948, Kaiser owned: the land it originally purchased from the Santa Clara Holding Company in 1939 (Lots 1, 3, 6, 7, 9, and parts of 16);[3] the 1942 Morris parcels (Lots 14 and 15); the 1943 Crocker parcel (Lot 11); and

[3] Kaiser transferred portions of these parcels to the Permanente Metals Corporation and Todd-California Shipbuilding Corporation in 1941 and 1942. Because any vested right runs with the land, this analysis considers use of EMSA by its then-owner during the relevant time periods, whether that owner was Kaiser, Permanente Metals, or another entity. *See Hansen*, 12 Cal. 4th at 561 (finding that quarry owner (footnote continued)

several parcels that it purchased from the Roman Catholic Archbishop of San Francisco in 1941 and 1942 (Lots 2, 5, 8, and 17). Different portions of these parcels have different vesting dates depending on their proximity to Permanente and Stevens Creek Roads. Each also has its own history of mining-related exploration and use, if any.

1. Land within 1,000 feet of a public road

Lehigh asserts a vested right to mine land within 1,000 feet of a road that was public in 1937, including portions of each of Lots 5 through 9, 11, and 15 through 17. *See* Ex. F. Nonetheless, it provides no evidence of the location or geographic extent of mining operations prior to Henry J. Kaiser Company's 1939 purchase. The County cannot grant Lehigh a vested right to mine unless and until Lehigh provides the required evidence. In *Hansen*, the court rejected a quarry's assertion of vested rights across the majority of its property based on a similarly thin record:

> The record does not confirm that all of the parcels, over which Hansen Brothers claimed vested mining rights in its SMARA application, were part of the Bear's Elbow Mine in 1946 or 1954. The record is also devoid of evidence that the owners of those parcels themselves held vested mining rights in the transferred property at the time they were deeded to Hansen Brothers.

Hansen, 12 Cal. 4th at 561. Here, both the County and Lehigh provide reports from the State Mining Bureau dating to 1906, 1921, and 1930. These reports describe mining on or near the property in general terms. *See, e.g.*, Cal. State Mining Bureau, The Structural and Industrial Materials of California, Bulletin No. 38, p. 82 (Jan. 1906), Ex. G ("The stone has been quarried in several places. The present workings on the east side of the cañon near the base of the mountain have a face of about 35 or 36 feet . . . ."). These general references, however, are wholly insufficient to carry Lehigh's burden of demonstrating activity within 1,000 feet of Permanente Road or intent to mine there as of September 24, 1937.

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failed to show mining use of or intent to mine property under other ownership on vesting date). Regardless of ownership, Lehigh bears the same heavy burden of demonstrating actual use or objective intent to use all land for which it asserts a vested right to mine on or before January 28, 1948.

Lehigh also cites a 1939 report in support of its assertion of a vested right to mine near Permanente Road. See January 4 Letter at 8. However, this report, dated June 18, 1939, postdates the relevant zoning regulation by two years and provides no evidence regarding use by the previous owner. Similarly, arguments that Kaiser purchased much of the current property in 1939 with an intent to expand its operations are irrelevant to the pre-1939 analysis, as the legal nonconforming use runs with the land and must be established with respect to the owner at the time the regulation took effect. *Hansen*, 12 Cal. 4th at 564. Accordingly, Lehigh has not met its burden of demonstrating a vested right to mine any land that lies within 1,000 feet of a road that was public in 1937, including Permanente Road. Consistent with the California Supreme Court's refusal to find a vested right favoring Hansen Brothers and its remand of the case for further evidentiary hearings, the Board should not grant a vested right to mine these areas absent the required showing.

The same analysis applies to the eastern portion of EMSA that lies 1,000 feet or less from Stevens Creek Road. *See* Ex. D. The County Geologist found no evidence of mining-related disturbance in this portion of the EMSA area at any time, much less in 1937. Memorandum from James Baker, County Geologist, to Jody Hall Esser, Director, Department of Planning and Development dated Jan. 26, 2011 at 3, Table B ("County Geologist's Report"), Ex. H. Even Lehigh makes no contention and offers no evidence that this area was used for mining or mining-related activities in 1937. Lehigh's meritless assertion that grading of EMSA for buildings and parking areas associated with the magnesium plant that Kaiser constructed on the parcel dates to 1941 at the earliest, and thus reinforces the conclusion that no entity had shown any intent to use EMSA for mining-related purposes in 1937. *Id.* at 27. Thus, the Board must deny Lehigh's claim that it has a vested right to use the eastern end of EMSA for mining operations.

2. The 1942 Morris Parcels

Kaiser purchased the two Morris parcels (Lots 14 and 15) in 1942, at which time Lot 14 showed no sign of mining-related disturbance and Lot 15 included a single light-use road. These same conditions remained unchanged in 1948, and indeed, throughout the period assessed by the County Geologist. County Geologist's Report at 3-4, Tables B-E. Thus, the record is devoid of any evidence of change in use of the Morris parcels, much less the progression of mining-related use required to establish a vested right pursuant to the diminishing assets doctrine. *See Hansen*, 12 Cal. 4th at 553. Lehigh states that Kaiser used the road cited in its January 4 letter and mapped by the County Geologist prior to the vesting date of 1948. *See* January 4 Letter at 27; *see also* Ex. I. It

has shown no use of either Lot 14 or 15 outside that road, however. Lehigh thus lacks any basis for asserting a vested right to use those parcels except to continue its existing use of the road. The Board should find no vested right to use the 1942 Morris parcels beyond the access road documented by the County Geologist.

3. The 1943 Crocker Parcel

Kaiser purchased the Crocker parcel (Lot 11) in 1943. Lehigh asserts that the mere fact of Kaiser's acquisition of the property constitutes evidence of its intent to mine the parcel. It also contends that the parcel's proximity to existing mining activities, along with Kaiser's exploration work, provides additional grounds for a finding of vested rights. January 4 Letter at 26.

Kaiser's subjective intent to extend its mining operations to the Crocker parcel is insufficient to constitute the manifestation of objective intent required by the Supreme Court's decision in *Hansen*. *Hansen*, 12 Cal. 4th at 556 (A party seeking the determination of vested rights "*must prove that the area that he desires to excavate was clearly intended to be excavated, as measured by objective manifestations and not by subjective intent . . . .*" (quotation and citation omitted, emphasis in original)). "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." *Id.* at 557 (quotation and citation omitted). Thus, Kaiser's purported intent to mine the Crocker parcel has no bearing on the County's determination of whether Kaiser manifested such intent *objectively*.

Courts considering similar facts have found that even long-standing plans to expand quarrying activities to neighboring parcels provide an insufficient basis for a vested rights determination. In *R.K. Kibblehouse Quarries v. Marlborough Township Zoning Hearing Board* (Pa. Commw. Ct. 1993) 157 Pa.Cmwlth. 630, the court found that a property owner had no vested right to mine the south side of a parcel, which was separated from existing mining activity by a creek and road. The court found "little evidence" of the owner's intent to quarry the separate parcel on the relevant vesting date, even though the south side contained excellent geology for quarrying and "natural growth of the business would logically expand the operation" to that side of the property, which was "always devoted to the future expansion." *Id.* at 644. Here, Lehigh acknowledges that no sampling took place on the Crocker parcel until 1949—one year after the vesting date—and simply relies on Kaiser's alleged, but unmanifested intent. January 4 Letter at 27. Accordingly, Lehigh has not proffered any objective evidence of Kaiser's alleged intent to mine the Crocker parcel as of January 28, 1948, as required by the *Hansen*

analysis, and therefore the Board should deny any vested right to mine the parcel in the future.

4. The East Materials Storage Area

Most of EMSA falls within Kaiser's original 1939 purchase (Lot 16), although the eastern end encompasses land purchased from the Archbishop of San Francisco in 1942 (Lot 17). Lehigh asserts a vested right to use the entire extent of EMSA outlined in its application for a Reclamation Plan Amendment based primarily on pre-1948 activity related to the construction of a magnesium plant on the parcel. January 4 Letter at 27. This activity included substantial clearing and grading. *Id.* However, none of these activities were part of mining operations. *See* County Staff Report at 23, n.101 ("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." (citing County Geologist's Report)).

Lehigh's assertion that "the EMSA parcel has always been an integrated part of the Facility" fundamentally misconstrues *Hansen*'s requirement that only "aspects of the operation that were integral parts of the business" were part of the nonconforming use for purposes of a vesting determination. *Hansen*, 12 Cal. 4th at 542. Addressing this exact question, the *Hansen* court relied on *Paramount Rock Company v. County of San Diego* (1960) 180 Cal. App. 2d 217, which surveyed an array of California cases that considered the comparative costs, extent of equipment use, area covered, water and power consumed, and the nature of operations in determining if two uses were so closely related as to fall within the same nonconforming use. Applying these factors, the *Paramount* court found that a rock crushing plant was not an integral part of the preexisting concrete ready-mix business.[4] *Id.* at 230.

Here, Lehigh argues that a magnesium plant that was under separate corporate ownership and that processed minerals brought in from elsewhere in the state was part of the same "overall vested Facility." January 4 Letter at 27. Not unlike the court's conclusion in *Paramount*, these facts do not support a finding that the magnesium

[4] Courts considering extractive operations in other jurisdictions have reached similar conclusions. *See, e.g., First Crestwood Corp. v. Building Inspector of Middleton* (Mass. App. Ct. 1975) 3 Mass.App.Ct. 234, 236 (stone crushing operation was an impermissible extension of the existing quarrying operation).

plant was an integral component of any mining activity that took place on the property prior to the vesting date in 1948.

Lehigh also contends that use of EMSA to store overburden dates to 1948 and provides additional support for its claim that it has a vested right to continue storing overburden in this area. As an initial matter, the County Geologist found that, while some "fill for construction" occurred on both Lots 16 and 17 between 1939 and 1948, aerial photographs and historic reports provided no evidence of any exploration or mineral extraction. County Geologist's Report at Table C.

Lehigh alleges that the alleged storage of overburden on EMSA "is first indicated in the 1948 aerial image." January 4 Letter at 28; Ex. J. Lehigh's claim is problematic. First, Lehigh provides no precise date for the cited image, and yet proffers it as evidence that the storage it allegedly depicts predated an ordinance that took effect in January of the same year. Notably, the aerial image on which the County Geologist relies is dated September 26, 1948, almost nine months after the effective date of the ordinance. Particularly in light of Lehigh's own admission that this image depicts the "first indicat[ion]" of any disposal, it cannot carry Lehigh's burden of proving nonconforming use that predates the January 1948 zoning ordinance.

Furthermore, the 1948 image on which Lehigh relies is far from conclusive. *See* Ex. J. Lehigh never even claims that the alleged "material storage" on EMSA was mining waste at all, nor does it point to any evidence to this effect. It provides no expert testimony or other basis for its bald conclusion that the photograph somehow documents mining-related activity. This omission is particularly stark in light of the County Geologist's contrary conclusion that aerial imagery indicates no mining-related use of EMSA in 1948. *See* County Geologist's Report at Table C.

In sum, Lehigh offers no proof whatsoever that Kaiser or any other entity used EMSA for mining-related activity prior to January 28, 1948, or that any party exhibited an objective intent to do so. Accordingly, the Board should find that Lehigh does not have a vested right to use EMSA for these purposes.

III. Lehigh's Legal Arguments Lack Merit.

Lehigh proffers several additional legal arguments as to why the County purportedly lacks the authority to deny its asserted vested rights, each of which lacks merit.

From the outset, Lehigh claims that "the County's decision to submit the Facility to a vested rights determination at this time is a matter of serious concern" for which the County lacks authority. January 4 Letter at 35. It cites *Calvert v. County of Yuba* (2006) 145 Cal. App. 4th 613, 630-31 for the proposition that "existing, recognized vested uses [are protected] from new hearing requirements." This both mischaracterizes the decision in *Calvert*, and ignores the fact that the Surface Mining Reclamation Act requires a determination of vested rights if Lehigh is to avoid that statute's permitting requirement. Pub. Res. Code § 2770(a). In *Calvert*, the court found that neighboring property owners have the right to notice of a vested rights determination and the opportunity to be heard by virtue of their protected property interest. 145 Cal. App. 4th at 631. It also noted in determining whether to give its decision retroactive effect that these procedural rights might not apply in some cases in which "property rights may have been founded and deemed vested in accordance with a less formal vested rights determination under SMARA, which does not specify a procedure for this determination." *Id.* at 630-31. In no way does this acknowledgement of the possibility of less formal determinations of vested rights "protect" Lehigh from the County's evaluation of whether Lehigh's current and proposed land uses constitute legal nonconforming uses. In fact, *Calvert* holds the opposite, that such determinations, as a general matter, do require formal procedures and due process protections.

Lehigh also contends that the County is bound by prior statements that acknowledge a vested right to mine the property, that the County's past actions estop it from requiring a permit for mining activities, and that any denial of vested rights will constitute an unconstitutional taking of its property.

A. The County Has Reached No Binding Conclusions Regarding Lehigh's Vested Status.

Lehigh contends that the County has long recognized its mining operations as a legal nonconforming use and that the County is now bound by these "admissions" and "implied findings." January 4 Letter at 15-18, 29-31. But California law is very clear that a local government cannot consent to zoning violations, even if it makes statements to the contrary. *Hansen*, 12 Cal.4th at 564 ("[T]he county lacks the power to waive or consent to violation of the zoning law." (citing cases)). While the *Hansen* court did find that the county in that action bound itself by an admission, that admission was made in a court filing—the county's response to the petition for a writ of mandate. *Hansen*, 12 Cal. 4th at 561-62. This court filing is entirely different—and carries different legal weight—than statements made by county staff or members of the board of supervisors. [Furthermore, the *Hansen* court carefully limited even that legal admission

to a discrete question of fact and rejected the petitioner's further assertions of estoppels on this basis. *Id.* at 563-64.

Lehigh also asserts that the County Board of Supervisors' decision to grant Kaiser's 1939 application for a use permit for its cement kiln necessarily included the "implied finding[]" that the quarry required no use permit in 1939. January 4 Letter at 30-31. This argument relies on the general rule that courts imply factual findings necessary to support a judgment. *Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58. However, courts have explicitly rejected extension of this doctrine to implied findings of nonconforming use by a county. *See City and County of San Francisco v. Board of Permit Appeals*, 207 Cal.App.3d 1099, 1107 (1989). Although Lehigh cites it for the opposite proposition, this case was crystal clear regarding the obligation of a local government versus that of the proponent of the nonconforming use: "The city did not have to disprove the pre-1921 existence of the unit. Rather, the burden is always on the party seeking to establish the nonconforming use to show that the use *did* preexist." *Id.* (emphasis in original)). Accordingly, the County has not bound itself by any prior statement or implication that mining on the property constitutes a legal nonconforming use.

B. The County is Not Estopped from Finding a Zoning Violation.

Lehigh also argues that the County's previous positions regarding the legal nonconforming or vested status of mining on the property estop the County from determining the legality of that use now. January 4 Letter at 31-33. As County Staff noted, however, California courts overwhelmingly reject property owners' attempts to prevent local governments from enforcing their zoning regulations based on the theory of equitable estoppel. County Staff Report at 18 (citing cases). In particular, the *Hansen* court rejected this exact argument, finding that Nevada County's failure to challenge continued use of that property for quarrying did not preclude it from revisiting the question as part of its vested rights determination. *Hansen*, 12 Cal. 4th at 563. In addition to finding no detrimental reliance by the property owner on the County's failure to act, the court directed that "estoppel will not be recognized when to do so would nullify a strong rule of policy adopted for the benefit of the public" such as a zoning ordinance. *Id.* at 564 (quotation and citation omitted). As one court noted in rejecting an equitable estoppel claim, :

> in the absence of exceptional circumstances, the doctrine of equitable estoppel will not be applied to allow a landowner to circumvent land use restrictions even when the landowner

> relies on the public entity's express representation that the landowner's plans comply with the entity's land use requirements, and certainly not when the public entity simply fails to take early action to warn the landowner the plans violate the land use requirements.

Golden Gate Water Ski Club v. County of Contra Costa (2008) 165 Cal.App.4th 249, 262 (sustaining a county board of supervisors' order to demolish and remove all structures on an island). Particularly in light of the strong public policy against prolonging nonconforming uses, Lehigh's argument that it was "completely ignorant" of the possibility that it might not have a vested right to mine the full extent of the property is far short of establishing the elements of equitable estoppel. January 4 Letter at 32.

C. A Denial of Vested Rights Will Not Constitute a Fifth Amendment Taking.

Lehigh also threatens that any limits placed on its alleged vested rights will violate the takings clause of the Fifth Amendment to the U.S. Constitution. January 4 Letter at 33-34. Local governments' exercise of their zoning power to prohibit specific property uses will not generally result in a taking for which the Fifth Amendment requires just compensation. *Penn Central Transp. Co. v. City of New York* (1978) 438 U.S. 104, 125. Judicial takings tests, including the *Penn Central* test,

> aim[] to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.

Lingle v. Chevron U.S.A., Inc. (2005) 544 U.S. 528, 539. "Functional equivalence" to direct condemnation requires that the regulation cause a severe diminution in the market value of real property, not just the possible loss of profits. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency* (2002) 535 U.S. 302, 332, 338. Indeed, the U.S. Supreme Court has rejected a takings claim when "there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question." *Goldblatt v. Town of Hempstead, N. Y.* (1962) 369 U.S. 590, 594. Lehigh has proffered no evidence of a drastic loss in the value of its property, or of economic harm of any variety, should the County find that Lehigh lacks a

vested right to mine the full area encompassed by its Reclamation Plan Amendment applications. Accordingly, Lehigh cannot state a claim for a violation of the Fifth Amendment.

IV. Conclusion

Lehigh has utterly failed to establish the extent of use, if any, of the vast majority of land for which it seeks a vested rights determination. It also has not provided evidence that the owners of the properties at issue manifested any objective intent to use the land for mining operations prior to 1937 and 1948. Accordingly, the County should not grant Lehigh a vested right to use the 1942 Morris parcels, the 1943 Crocker parcel, or EMSA for mining, and it should expressly limit any vested right to those areas for which Lehigh has met its substantial burden of proof.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

Fran M. Layton
Sarah H. Sigman

cc: Rod Sinks, No Toxic Air
Encl.: Exhibits A - J