

County of Santa Clara

Department of Planning and Development

County Government Center, East Wing, 7th Floor

70 West Hedding Street

San Jose, CA 95110

Phone: (408) 299-5700

www.sccplandev.org



MEMORANDUM

DATE: August 5, 2020

TO: Honorable Board of Supervisors

FROM: ^{DS}
 Jacqueline R. Onciano, Director, Dept. of Planning and Development

SUBJECT: Proposal to evaluate the consistency of proposed surface mining activities at Lehigh Permanente Quarry with vested rights
File No. PLN19-0106;
Location: 24001 Stevens Creek Boulevard, Cupertino, CA 95014

This memo is intended to inform the Board of Supervisors of the proposed expansion in surface mining activities at Lehigh Permanente Quarry ("Quarry"), and the Department of Planning and Development's ("Department") proposal that the Board determine whether certain of these proposed activities fall within the scope of Lehigh's vested rights to conduct surface mining operations.

Project Background

Lehigh Permanente Quarry is a 3,510-acre limestone and aggregate surface mining operation located at 24001 Stevens Creek Boulevard in rural unincorporated Santa Clara County, with a portion extending inside City of Cupertino jurisdiction. The Quarry is owned and operated by Lehigh Southwest Cement Company and Hanson Permanent Cement, Inc. (collectively, "Lehigh").

On March 1, 2011, the County of Santa Clara Board of Supervisors ("Board") determined that Lehigh holds the vested right to conduct quarry surface mining operations on 13 of its parcels identified by the Board, referred to as the "Vested Parcels." The 2011 Resolution (Attachment A) adopted by the Board stated that "[q]uarry surface mining operations on the Vested Parcels are a legal non-conforming use, and do not require a County use permit for continued surface mining operations within the geographic area bounded by the Vested Parcels." The Vested Parcels, identified in Attachment B, consist of parcels that include the North Quarry Pit, two

overburden disposal areas (the West Materials Storage Area [WMSA] and East Materials Storage Area [EMSA]), and the access roads within the mine operation.

In June, 2012, the Board approved the operative amended Reclamation Plan (“2012 Reclamation Plan”) for the Quarry. The 2012 Reclamation Plan governs restoration of the Quarry over a 20-year period following the conclusion of surface mining activities, in accordance with the Surface Mining and Reclamation Act (SMARA).

On May 22, 2019, Lehigh submitted to the County an application to amend the 2012 Reclamation Plan. This Reclamation Plan Amendment (“2019 Reclamation Plan”) contemplates a significant expansion of surface mining and related activities within the Vested Parcels. Specifically, as shown in Attachment C, the 2019 Reclamation Plan contemplates the following new surface mining and related activities: (1) expanded excavation and layback of the north highwall of the North Quarry Pit; (2) expanded surface mining in the new 30-acre Rock Plant Reserve Area, south of the North Quarry Pit; (3) reactivation and use of the Quarry’s existing rock crusher; and (4) hauling of unprocessed aggregate to the adjacent Stevens Creek Quarry via an internal haul road. The expanded surface mining activities would increase total mining production by approximately 600,000 tons per year relative to the annual mining production under the 2012 Reclamation Plan. The 2019 Reclamation Plan application proposes activities to reclaim these expanded surface mining operations, including importation of 20 million cubic yards of clean fill to backfill the North Quarry Pit for reclamation and retention of overburden and mine waste stored on-site at the West Material Storage Area. Lehigh’s application also requests modification of an existing Scenic Easement held by the County that protects a ridgeline adjacent to the North Quarry pit.

Recommendation for Vested Rights Consistency Determination

Under SMARA and the County Zoning Ordinance, Lehigh must either hold a vested right or obtain a use permit to conduct surface mining operations. As discussed above, the Board’s 2011 vested rights determination conclusively determined that Lehigh holds the vested right to conduct quarry surface mining operations on the Vested Parcels. But because the 2011 vested rights determination focused on the *geographic extent* of Lehigh’s vested right, it did not delineate the *substantive scope* of that right—that is, precisely which surface mining and related activities are consistent with the vested right.

A vested right confers an entitlement to continue the overall business operation that existed prior to the vesting date (here, 1948). (*Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal.4th 533, 565-66.) A substantial change to the operation may exceed the scope of the vested right. (*Id.* at 575; County Zoning

Ordinance, § 4.10.370(II)(B)(1).) So too, while a gradual and natural increase in a lawful, nonconforming use of a property is within the scope of a vested right, a sudden intensification in use that substantially exceeds production in recent years may also exceed the scope of the vested right. (*Hansen*, 12 Cal.4th at 572-73.)

Certain of the expanded surface mining activities set forth in the 2019 Reclamation Plan application are different in nature or intensity than those occurring under the 2012 Reclamation Plan. Specifically, Lehigh's plan to sell unprocessed greenstone offsite and physically export the unprocessed commodity via an internal haul road is a departure from its current practice. In addition, the expansion of mining in the North Quarry Pit and into the new Rock Plant Reserve Area is expected to intensify production at the site. These or other activities could exceed the scope of Lehigh's Vested Right if they were determined to constitute a substantial change in its vested operation and thus require a use permit.

Process and Timing for Evaluating Vested Rights

In 2011, the Board conducted an evidentiary hearing to determine the geographic extent of legal non-conforming surface mining operations at Lehigh Permanente Quarry. Whether there is a substantial change in operations is similarly a question of fact, which should generally be determined in a noticed public hearing. While not all changes in surface mining activities will require an evidentiary hearing, a hearing is recommended for those that may constitute a significant change in operations and therefore be inconsistent with Lehigh's vested right. Because it is settled that Lehigh has a vested right to conduct surface mining on the Vested Parcels, such a hearing would focus solely on whether the proposed activities are consistent with that vested right such that they may occur without a use permit.

Although the Board may consider all proposed surface mining activities under the 2019 Reclamation Plan in such an evidentiary hearing, the Department recommends based on its review of the application that a public hearing occur solely for: (1) the proposed off-site sale of unprocessed greenstone and physical export of the commodity and (2) the proposed increase in production volume associated with the opening of the new Rock Plant Quarry Area.

The 2019 Reclamation Plan application was deemed complete by the Department on November 8, 2019, and the Department is finalizing a scope of work with a consultant to prepare an Environmental Impact Report (EIR) for the application. Once the EIR process has been completed, the Planning Commission and Board would consider the proposed 2019 Reclamation Plan application and modification of the Scenic Easement. The Department requests that the Board conduct an evidentiary hearing in conjunction

with its hearing on the 2019 Reclamation Plan application to determine if the proposed offsite sale of unprocessed aggregate and intensification in production are consistent with Lehigh's vested right to conduct surface mining operations at the Quarry. Conducting the evidentiary hearing at that time would allow the Board to evaluate the totality of the proposed actions within one series of hearings and would facilitate efficient processing of Lehigh's application.

In general, the environmental review of a reclamation plan takes into account only the proposed reclamation activities, rather than underlying mining activities. But if underlying mining activities require a use permit, the impacts of those activities will need to be analyzed as part of the California Environmental Quality Act (CEQA) review of the use permit. To allow for efficient processing and ensure that the entire project is subject to environmental review, the Department has requested that the EIR for the 2019 Reclamation Plan include an environmental impact analysis of the activities associated with the export of unprocessed greenstone and the intensification in production. This will ensure that the EIR is comprehensive and would not require recirculation, in the event that the Board were to determine at the proposed evidentiary hearing that either or both of these activities are not consistent with Lehigh's vested right and thus require a use permit. The subject EIR would then be used in the processing of this use permit.

cc: Megan Doyle, bosagenda@cob.sccgov.org

Attachments:

Attachment A - Board Resolution Regarding Vested Rights at Lehigh
Attachment B - Existing Vested Parcels
Attachment C - Proposed Reclamation Plan Amendment Map

RESOLUTION NO. _____

RESOLUTION OF THE BOARD OF SUPERVISORS OF THE COUNTY OF SANTA CLARA FINDING THAT THERE IS A LEGAL NON-CONFORMING USE FOR SURFACE MINING ACTIVITIES ON CERTAIN PARCELS COMPRISING THE PERMANENTE QUARRY AND ADDRESSING RELATED MATTERS

WHEREAS, Lehigh Southwest Cement Company operates, and Hanson Permanente Cement Inc. ("Lehigh") owns the Permanente Quarry ("Quarry"), a limestone and aggregate mining operation located two miles west of the City of Cupertino;

WHEREAS, the County of Santa Clara is the lead agency for surface mining operations within the County under California's Surface Mining and Reclamation Act (Pub. Resources Code § 2710 *et seq.* ("SMARA"));

WHEREAS, the County has land use authority over all unincorporated areas within the County, including the property on which the Quarry operates;

WHEREAS, the County approved the existing reclamation plan for the Quarry in March 1985, and Lehigh has filed with the Department of Planning and Development two applications to amend the Quarry's reclamation plan to include, respectively, an approximately 89-acre area known as the East Materials Storage Area ("EMSA"), and the remaining acreage forming the balance of mining operations within Lehigh's property over approximately the next 20 years (known collectively as the "Reclamation Plan Amendment");

WHEREAS, the County has never required a use permit for the Quarry, and has historically considered the Quarry to operate as a legal non-conforming use (also referred to as a "vested" use), although the County has not previously made a specific determination concerning the geographic extent of the Quarry's vested rights;

WHEREAS, the County has found it necessary to define the Quarry's vested rights in order to guide the Department of Planning and Development's processing of the Reclamation Plan Amendment, and therefore duly noticed a public hearing to consider the question of the geographic extent of the Quarry's vested rights, which requires examinations into the history of the use of Quarry parcels, the objective intent of the owners of parcels that the Quarry now owns with regard to the extension of mining operations to property that was not subject to mining operations prior to the vesting date when the Quarry was first subject to County land use restrictions, the adoption and amendment of the County Zoning Ordinance restricting the ability to mine property without obtaining applicable permits, and the history of Permanente Road, which formerly ran through the area that is now the Quarry;

WHEREAS, County staff, the public, and Lehigh provided documentary, photographic and historical evidence pertaining to the extent of the vested mining use at the Quarry, as well as legal authorities bearing on the analysis of vested rights;

WHEREAS, on February 8, 2011, the Board conducted a duly-noticed public hearing and considered the evidence presented on the question of vested rights, including substantial public testimony and written commentary, and all persons wishing to testify were heard and the matter was fully considered;

WHEREAS, all of the findings and conclusions made by the Board pursuant to this Resolution are based upon substantial evidence in the entire record before the Board, including all written evidence presented prior to the hearing and additional written and oral evidence presented during the hearing, and reflect the independent judgment of the Board;

NOW, THEREFORE, BE IT RESOLVED by the Board of Supervisors of the County of Santa Clara, State of California, that the Board of Supervisors finds and determines all of the following based on substantial evidence in the record:

1. That because Permanente Road no longer functioned as a public street as of approximately 1935, the requirement for a Use Permit for quarrying activities within 1,000 feet of a public road in the 1937 County Zoning Ordinance does not apply.
2. That the County Zoning Ordinance first required a use permit for quarrying in the "A-1" district in January 1948.
3. That the area within the boundaries of the 1985 reclamation plan amendment is not relevant to determining the geographic extent of the Quarry's legal nonconforming use.
4. That the Board has determined, on the basis of substantial evidence in the record and controlling legal authority, that vested rights exist over the entirety of parcels 1, 2, 3, 5, 6, 7, 8, 9, 11, 14, 15, 16, and 17, as shown on Exhibit 45 attached hereto ("Vested Parcels"), and that vested rights do not exist over parcels 4, 10, 12, 13, 18 and 19. Quarry surface mining operations on the Vested Parcels are a legal non-conforming use, and do not require a County use permit for continued surface mining operations within the geographic area bounded by the Vested Parcels.
5. That the Quarry must apply for a Use Permit for all of the property within the boundaries of its reclamation plan amendments that is outside the geographic extent of its legal nonconforming use as determined by the Board and that will be disturbed by surface mining operations, except for property utilized for cement production and subject to a separate use permit therefor.
6. That the owners of the Quarry property, Heidelberg Cement, Incorporated and Hanson Permanente Cement, Incorporated, shall apply to the County for a formal abandonment of Permanente Road.
7. That, in making the determinations set forth herein, the Board analyzed and considered all written, photographic, and other documents submitted for the record, including but not limited to the County's Final Staff Report, dated January 27, 2011, and all appendices and exhibits thereto ("Staff Report") and staff's oral and graphic presentation to the Board on

February 8, 2011; all communications submitted by Lehigh, including its submittals, with all attachments, of November 5, 2010, January 4, 2011, February 2, 2011, and February 7, 2011 and its oral and graphic presentation to the Board on February 8, 2011; all communications submitted by members of the public, including all letters submitted prior to the hearing and all oral testimony and statements made during the duly-noticed public hearing held on February 8, 2011.

8. That these determinations are supported by the following findings and evidence:

a. The legal standards governing the existence and scope of vested mining rights are articulated in the California Supreme Court case *Hansen Bros. Enterprises v. Board of Supervisors of Nevada County* (1996) 12 Cal.4th 533 ("*Hansen Bros.*") and authorities cited therein, as well as in other cases and provisions in SMARA and the County Surface Mining and Land Reclamation Standards. Under these authorities, vested mining rights exist where property was used for "surface mining operations" (as that term is defined in SMARA and County regulations) or for which the owner had objectively manifested the intent to use the property for surface mining operations prior to the vesting date.

b. According to County Staff, January 1948 is the earliest date that surface mining operations at the Permanente Quarry required a use permit under the applicable zoning regulations beyond 1,000 from a public street, which represents the "Vesting Date." Lehigh has submitted evidence and analysis that the Vesting Date should be 1960. The Board finds that the December 29, 1947 Zoning Ordinance amendment imposed the first requirement for obtaining a use permit for mining operations in the Quarry area and that January 28, 1948 was the Vesting Date for the property on which the Quarry operates today. (See Staff Report, pp. 8-11 and Exhibits 4-10.) The Board's determination as to the Vested Parcels remains the same under either a 1948 or 1960 vesting date.

c. Mining operations commenced at the Permanente Quarry in approximately 1903. By 1930, Lehigh's predecessors incorporated the core Quarry property into a 1,300-acre mining tract that supported limestone quarry operations. (See Staff Report, p. 11 and Exhibits 10, 15, 44 and 45; Lehigh's January 4, 2011 letter, p. 7, Appendix A, B-1; February 2, 2011 letter, Exhibit B.)

d. In or around 1935, no public access was allowed on Permanente Road. County records do not evidence any action by the Board to vacate Permanente Road, but show that at a public hearing in 1935, the County Surveyor advised the Board that a gate that had been erected across Permanente Road "was not across a county road." As of 1935, Permanente Road was not a "public street" as that term was defined in the County 1937 Zoning Ordinance because the road was no longer a public thoroughfare that afforded the principal means of access to abutting property. Because surface mining operations commenced on the Quarry property prior to 1937 and because the portion of Permanente Road running through the Quarry property was not a "public street" as of 1937, no part of the Quarry required a use permit under the County's 1937 Zoning Ordinance by virtue of its proximity to Permanente Road. (See Staff Report pp. 21-22; Exhibits 4, 21 and 43; Lehigh's January 4, 2011 letter, pp. 29-31, Appendix B; Lehigh's February 2, 2011 letter, Exhibit E.)

e. On July 10, 1939, the Henry J. Kaiser Company and/or affiliated entities (hereinafter "Kaiser") purchased the 1,300-acre Quarry property from the Santa Clara Holding Company. Beginning in 1941, Kaiser acquired several contiguous parcels. As shown on Exhibit 45 to the Staff Report, parcels acquired beginning in 1941 but prior to the Vesting Date include parcels 8 (1941); 2, 5, 14, 15, and 17 (1942); and 11 (1943). (See Staff Report Exhibits 44 and 45; Lehigh's November 5, 2010 letter, p. 2, Exhibit 3; Lehigh's January 4, 2011 letter, pp. 8-11, Appendix A-3; Lehigh's February 2, 2011 letter, Exhibit B; Lehigh's oral and graphic presentation at the February 8, 2011 hearing.)

f. Kaiser conducted surface mining operations, or showed the objective intent to conduct surface mining operations on the Vested Parcels. The scale of Quarry operations, ownership of the Vested Parcels prior to the Vesting Date, actual land disturbance over a portion of the Vested Parcels, evidence of progressive expansion, exploratory activities, and mineral analysis, show objective intent to use all of the Vested Parcels for surface mining operations, in their entirety. (See Staff Report, Exhibits 1, 10, 11, 12, 13, 14, 15, 16, 21, 22, 37, 38, 44, 63; Lehigh's November 5, 2010 letter, Exhibits 1-15; Lehigh's January 4, 2011 letter, Appendix A, B, C, D, E, F; Lehigh's February 2, 2011 letter, Appendix B, C, D; Lehigh's February 7, 2011 letter and attached Exhibits (declarations and letters); Lehigh's oral and graphic presentation to the Board of Supervisors at the February 8, 2011 hearing.)

g. As respects the EMSA (comprising a portion of Vested Parcels 16 and 17) the area was used for surface mining operations both before and after the Vesting Date. Evidence in the record, including photographs and expert analysis of the area from 1939 forward, show that the area was used for the main Quarry access road, internal haul and access roads, administrative facilities, and materials storage used in connection with Quarry operations prior to the Vesting Date and continuing thereafter. Parcels 16 and 17 were also used for other components of site operations, including cement production and metals production. This fact does not affect the vested status of the area. This area was integral to overall operations, including Quarry operations. Transfer of title from Kaiser Cement to Kaiser Metals did not constitute an abandonment of surface mining use or otherwise affect the vested mining rights. Such rights run with the land. (See Staff Report, Exhibits 1, 10, 11, 12, 13, 14, 15, 16, 21, 22, 37, 38, 44, 63; Lehigh's November 5, 2010 letter, Exhibits 1-15; Lehigh's January 4, 2011 letter, Appendix A,

//

//

//

//

//

//

//

B, C, D, E, F; Lehigh's February 2, 2011 letter, Appendix B, C, D; Lehigh's February 7, 2011 letter and attached Exhibits (declarations and letters); Lehigh's oral and graphic presentation to the Board of Supervisors at the February 8, 2011 hearing.)

PASSED AND ADOPTED by the Board of Supervisors of the County of Santa Clara, State of California, on _____, 2011, by the following vote:

AYES:

NOES:

ABSENT:

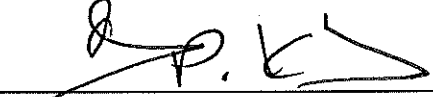
ABSTAIN:

DAVE CORTESE, President
Board of Supervisors

ATTEST:

MARIA MARINOS, Clerk of the Board of Supervisors

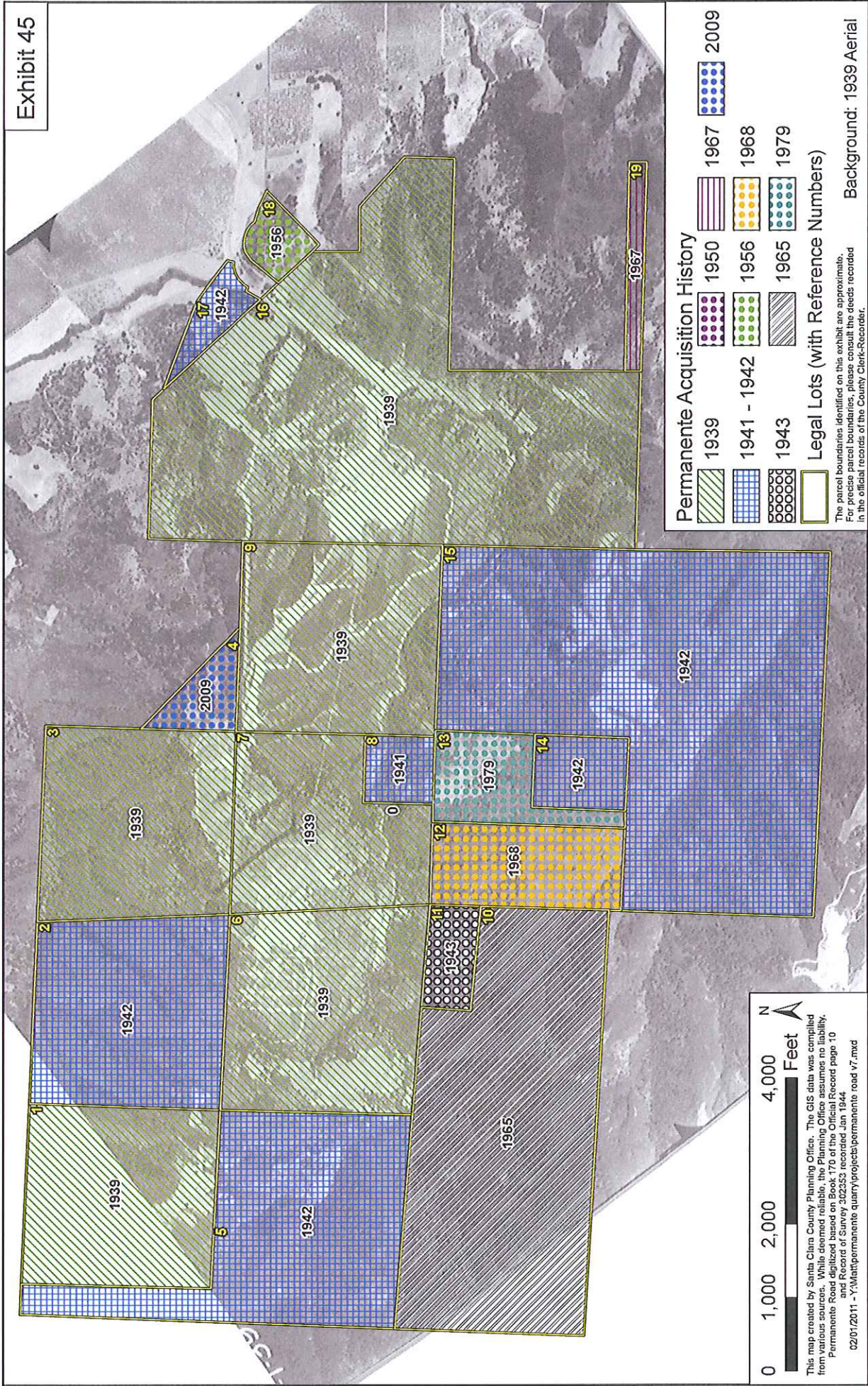
APPROVED AS TO FORM AND LEGALITY:

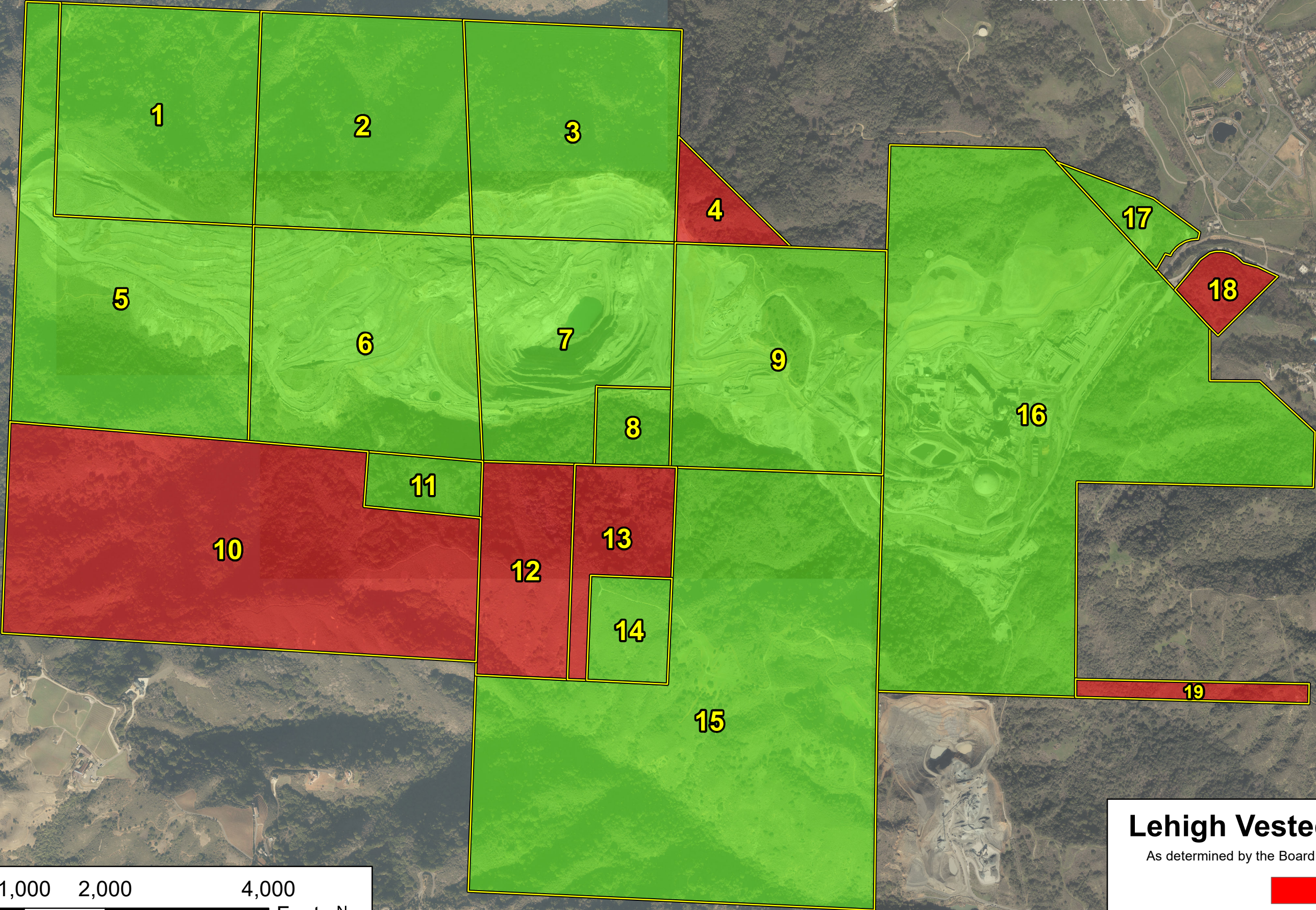


ORRY P. KORB, Assistant County Counsel

Exhibits to this Resolution:

45 – Map of Parcels





Lehigh Vested Rights Map

As determined by the Board of Supervisors on Feb. 8, 2011

Not Vested Vested

The parcel boundaries identified on this exhibit are approximate. For precise parcel boundaries, please consult the deeds recorded in the official records of the County Clerk-Recorder.

0 1,000 2,000 4,000 Feet

This map created by the Santa Clara County Planning Office. The GIS data was compiled from various sources. While deemed reliable, the Planning Office assumes no liability. 8/30/2016 10:30:38 AM Y:\Projects\Permanent Quarry\projects\Permanent Vested.mxd

