SUPERIOR COURT OF CALIFORNIA

COUNTY OF MARIN

POINT SAN PEDRO ROAD COALITION , Petitioner, v. MARIN COUNTY, ET. AL., Respondents SAN RAFAEL ROCK QUARRY, INC. Real Party in Interest	Case No.: CIV 1504430 **DECISION**

The Petition of Point San Pedro Road Coalition ("Coalition") for a writ of administrative mandate came on for hearing in the above-entitled court, Department E, on September 16, 2016 before Paul M. Haakenson. John Edgcomb and Mary Wilke appeared for Petitioner. Edward Kiernan appeared for Respondents. Michael Zischke, James Purvis and Derek Cole appeared for Real Party in Interest. After consideration of the pleadings, Administrative Record, and all relevant documents, including two documents judicially noticed at the hearing, the court rules as follows:

The petition of Point San Pedro Road Coalition ("Coalition") for a writ of administrative mandate is granted. The court directs respondents Marin County and Marin County Board of Supervisors (collectively, "County") to vacate the board's September 15, 2015 approval of Resolution No.2015-108. (Code Civ. Procedure, §1094.5.)

Under section 1094.5, the court's inquiry extends "to the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." (See §1094.5, subd.(b).) "Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Id.)

As noted in the joint opposition memorandum of County and real party in interest San Rafael Rock Quarry, Inc. ("SRRQ"), this court must evaluate: 1)whether the board of supervisors "employed the correct legal test"; and 2)whether substantial evidence supports the board's determination. (Memorandum, p.12:23-24.)

The court finds that the board did not apply the correct legal test. The doctrines of collateral estoppel and judicial estoppel preclude a determination inconsistent with the 2004 decision of Judge John A. Sutro, Jr., that SRRQ has no vested right to import asphalt for recycling. In any event, the record and case law fully support Coalition's position that SRRQ's planned recycling operation is outside the scope of its legal nonconforming use. The facts of this case are far more comparable to Paramount Rock Co. v. San Diego County (1960) 180 Cal.App.2d 217, 220-234, than Endara v. City of Culver City (1956) 140 Cal.App.2d 33.

In order to support agency action, "[f]indings must be *legally relevant* as well as supported by the evidence." (City and County of San Francisco v. Board of Permit Appeals (1989) 207 Cal.App.3d 1099, 1109.) As the board of supervisors applied the wrong standard, Resolution No.2015-108 is not supported by the findings.

Further, the court finds that the board's decision to approve Resolution No.2015-108 is not supported by substantial evidence in light of the whole record. (Code Civ. Procedure §1094.5, subd.(c).) Coalition showed "there is no substantial evidence whatsoever to support the findings of the Board." (See, generally, Desmond v. County of Contra Costa (1993) 21 Cal.App.4th 330, 335-336.)

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Judicial notice

The court grants Coalition's unopposed request for judicial notice of a specific part of the transcript of the July 17, 2003 proceedings in *Point San Pedro Road Coalition* v. *San Rafael Rock Quarry* (Marin Superior Court Case No.014584). The court also grants Coalition's unopposed request for judicial notice of the face of SRRQ's trial exhibit "0553," a 1992 Planning Department letter, in Case No.014584. (See RJN Exhs.1, 2, and Ev. Code §452, subd.(d).)

The court takes notice of the content of the transcript and exhibit to the extent necessary to understand County's references to the letter in the staff report on Resolution No.2015-108. (Record, Vol.3, tab 8, AR00414, AR00476.) The court does not take notice of the truth of any statements in the letter. County and SRRQ concede that the 1992 letter was one of the bases cited by County in approving Resolution No.2015-108. (Opposition memorandum, p.12:3-5.) The transcript helps to explain Judge Sutro's reasoned opinion that the scope of SRRQ's vested right does not depend on the scope of the 1972 permit.

Facts and procedural history

In 2001, various plaintiffs—including the State, County, Coalition and Amanda Metcalf—sued SRRQ for illegal expansion of its nonconforming land use. This became consolidated Case No.014584. In its post-trial closing brief, SRRQ argued that various operations--e.g., washing and sand importation--were within the scope of its vested right. However, SRRQ expressly conceded:

> There is no evidence of the importation of materials to be recycled in the 1971-1982 timeframe. Therefore, such an activity should not be viewed as being within the scope of the Quarry's vested right. [Vol.2, tab 7, AR00189, AR00211.]

Judge Sutro determined that SRRQ had exceeded the permissible scope of its nonconforming use and substantially deviated from the 1982 reclamation plan. (Vol.2, tab 7, AR00269, AR 00271-272.) In his April 2004 post-trial statement of decision ("SOD"), Judge Sutro noted:

> E. Importation of Materials.
>
> Defendant established that as of 1982, Basalt imported sand for use in the production of asphaltic concrete. It concedes, however, that there is no evidence of the importation of gravel

and materials for recycling as of November 1982, nor is there any evidence of the importation of dredged materials as of that time. [Vol.2, tab 7, AR00232, AR00246.]

Judge Sutro found that SRRQ should be enjoined from conducting *any* further mining operations on the property. At the same time, he emphasized the importance of related administrative proceedings. Therefore, he went on to order that "the *foregoing* injunction shall not be effective for a period of six months or such further time as the Court may approve upon motion and good cause shown by the party or parties requesting such additional time." (Vol.2, tab 7, AR00265 (emphasis added).) The SOD continued:

> Pending the operative effect of the foregoing injunction, and as set forth more fully in the Order issued herewith, defendant is *forthwith* enjoined from engaging in any of the following acts:
> 1...
> 2...
> 3. the importation of gravel, materials for recycling and dredged materials. [Vol.2, tab 7, AR00265 (emphasis added).]

Accordingly, the court-ordered stay did not apply to the injunction prohibiting "importation of gravel, materials for recycling and dredged materials," or other specifically listed activities of SRRQ.

Judge Sutro's April 19, 2004 order consistently prohibited SRRQ from conducting *any* further mining operations, but stayed *that* order "to give defendant SRRQ time to seek to remedy its aforesaid violations of law and for the County and other interested agencies to act upon any amended reclamation plan that SRRQ may submit." (Vol.2, tab 7, AR00269, AR00272.) The order then enjoined SRRQ from engaging in various activities. As to those specific activities, the order included no stay. The immediately effective provisions included:

> 9. Defendant SRRQ is enjoined from importing onto the quarry property the following materials: i) gravel; ii) used asphaltic concrete or concrete for recycling; and iii) dredged non-sand materials. [Vol.2, tab 7, AR00272-273.]

The court repeatedly extended the stay while the administrative process continued.

In 2010, County issued an amended Mining Permit to SRRQ. Amendment #1 added a long list of operating conditions to SRRQ's original permit. (See Vol.2, tab 7, AR00279-328, and Vol.3, tab 8, AR00417-AR00418 (staff report summarizing history).) Within the "General Quarry

Operations" section, Amendment #1 authorized SRRQ to process materials obtained from on site. (Vol.2, tab 7, AR00280-281.) Paralleling Judge Sutro's April 19, 2004 order, the amended permit added:

> 3. The Permittee shall not import onto the Quarry property gravel, used asphalt concrete or concrete for recycling, or dredged non-sand material. (Vol.2, tab 7, AR00281.)

All conditions of the permit were to "remain in effect until the Reclamation Plan is deemed 'complete' by the County or the State, even though the operational aspects of mining have been terminated...." (Vol.2, tab 7, AR00288.)

SRRQ, County and other parties stipulated to dissolve the injunction "set forth and suspended in this Court's April 12, 2004 Statement of Decision and April 19, 2004 Order." Coalition did not object. In August 2011, the court granted SRRQ's motion to dissolve the injunction. (Vol.1, tab 4, AR00061-64.) The order noted that the court had suspended the injunction "to allow for the County of Marin's administrative review and approval of the SRRQ operating conditions and amended reclamation plan," and that the board of supervisors' approval of Resolution No.2010-93 "complet[ed] the County's administrative review of SRRQ operating conditions and amended reclamation plan." (AR00064.)

Less than two years later, in Resolution No.2013-52, the board of supervisors approved Amendment #2 to the mining permit. Amendment #2 altered paragraph 3 under the heading, "General Quarry Operations," to entirely eliminate the prohibition against SRRQ's importing of used asphalt concrete. Paragraph 3 now reads:

> The Permittee shall not import onto the Quarry property gravel, or concrete for recycling, or dredged non-sand material.

The amendment also gave SRRQ specific authorization for the on-site processing of "off-site asphalt concrete grindings from only Marin County construction projects." (Amendment #2, General Quarry Operations, ¶1(b), (d), ¶3; Vol.2, tab 7, AR00329-334; Vol.3, tab 8, AR00423-00424.)

In Marin County Case No.1304187, Coalition challenged Resolution No.2013-52. (Vol.2, tab 7, AR00336-406.) In April 2014, Judge Mark Talamantes granted respondents' motion for judgment

on the pleadings, on the ground of failure to exhaust administrative remedies. (Vol.2, tab 7, AR00408-411.) Coalition's appeal of that judgment is pending.

Meanwhile, Amendment #2 was due to expire on October 1, 2015. (Vol.2, tab 7, AR00329-330; Vol.3, tab.8, AR00413 (staff report for Resolution No.2015-108.) SRRQ sought an extension to December 31, 2023. (Vol.3, tab 13, AR00517-518.) It urged that the extension "would allow Dutra to continue to accept grindings from paving projects in Marin County for re-use as recycled asphalt pavement (RAP) in hot mix asphalt." (Vol.1, tab 1, AR00001.) Staff recommended grant of a minimum two-year extension. The extension would be for four years if the Court of Appeal upheld "the trial court's decision allowing the Quarry to continue grindings importation," and the director of public works found SRRQ was "in good standing" with its permit. (Vol.3, tab 8, AR00413-419.)

In September 2015, the board of supervisors adopted Resolution No.2015-108. It extended Amendment #2's expiration date to October 1, 2017, with the staff-recommended provision for a possible further extension to October 1, 2019. (Vol.3, tab 11, AR00513-514.)

In this case, Coalition challenges Resolution No.2015-108.

Collateral estoppel

As to Judge Sutro's statement of decision and order, the SRRQ/County memorandum argues:

> The Court...entered an injunction *prescribing the activities that SRRQ could lawfully conduct while the County conducted a full environmental review* of quarry operations and the associated reclamation plan. (Record, tab 7, pp.AR00265, AR00272.) Among other things, SRRQ was prohibited from using recycled asphalt *during this time*. (Record, tab 7, pp.AR00265, AR00272.)[See opposition memorandum, p.3:17-20 (emphasis added).]

With these words, County and SRRQ suggest that Judge Sutro prohibited SRRQ from importing used asphalt only during the time of County's review. That is not the case. Judge Sutro found a complete lack of evidence that SRRQ had imported gravel and materials for recycling as of November 1982. Without such evidence, the importing of used asphalt for recycling was outside the scope of SRRQ's legal nonconforming use. This was not a determination that County's administrative process could change. Either SRRQ imported gravel and materials for recycling as of November 1982, or it did not. In 2004, Judge Sutro found that it did not. He also found that SRRQ should be

enjoined from importing "used asphaltic concrete...for recycling." (Vol.2, tab 7, AR00273; see also AR0271 (order, p.3:20-25).)

In this proceeding, County and SRRQ point to the concluding language in Judge Sutro's order: "This order is not a final judgment for purposes of appeal." (Vol.2, tab 7, AR00275.)

Even if the order was not a "final judgment," it was subject to appeal. (Code Civ. Procedure, §904.1. See also, generally, Weil & Brown, Cal. Practice Guide, Civ. Procedure Before Trial, §9:549, 9:551, 9:667.)

In arguing a "finality" requirement, County and SRRQ ignore an important difference between res judicata (claim preclusion) and collateral estoppel (issue preclusion). As one respected treatise points out:

> The Second Restatement of Judgments (§ 13), after stating the general rule that res judicata applies only when a final judgment is rendered, adds the following: "However, for purposes of issue preclusion (as distinguished from merger and bar), 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." [See 7 Witkin, Cal. Procedure (5th ed.2008), Judgment, §369.]

In *Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538, the court explained:

> A prior adjudication of an issue in another action may be deemed "sufficiently firm" to be accorded preclusive effect based on the following factors: (1) whether the decision was not avowedly tentative; (2) whether the parties were fully heard; (3) whether the court supported its decision with a reasoned opinion; and (4) whether the decision was subject to an appeal. [Id. at 1565, citing *Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932, 936.]

These factors support a finding that Judge Sutro's determination—placing import of used asphalt outside the scope of SRRQ's legal nonconforming use—was "sufficiently firm to be accorded conclusive effect." (7 Witkin, Cal. Procedure, *supra*, Judgment, §369.) As explained above, Judge Sutro's decision "was not avowedly tentative." SRRQ expressly conceded that the importing of materials for recycling "should not be viewed as being within the scope of the Quarry's vested right." (Vol.2, tab 7, AR00211; see also AR00246.) The board of supervisors implicitly incorporated Judge Sutro's order in the 2010 amended mining permit, providing: "The Permittee shall not import onto the Quarry property gravel, used asphalt concrete or concrete for recycling, or dredged non-sand material." (Vol.2, tab 7, AR00281.) Following approval of that permit, the court dissolved the previously

suspended portions of the injunction in Case No.014584 without petitioners' objection. The court and parties did not treat the specific orders of injunctive relief as "tentative" in any way.

The record shows that the parties were fully heard. The court supported its decision with a reasoned opinion. The decision was *subject to* an appeal.

The doctrine of collateral estoppel bars County and SRRQ from asserting that the importing of asphalt grindings for recycling is within the scope of SRRQ's legal nonconforming use.

Judicial estoppel

In its reply memorandum, Coalition alternatively argues the doctrine of judicial estoppel. It did not mention the doctrine in its supporting memorandum. If County and SRRQ believe the hearing on this petition will not provide an adequate opportunity to respond to Coalition's alternative argument, they may request a short period for further briefing.

"Judicial estoppel...prevents inconsistent positions whether or not they have been the subject of a final judgment." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 182.) The discretionary doctrine "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986-987.) Its dual goals are "to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies." (Id.)

As further explained by the *Aguilar* court:

> The doctrine applies when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183, 70 Cal.Rptr.2d 96; *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 943, 134 Cal.Rptr.2d 101.)[Id. at 986-987.]

In *Jackson v. County of Los Angeles, supra,* 60 Cal.App.4th at 181, the court observed:

> Judicial estoppel is intended to protect against a litigant playing fast and loose with the courts." [Citation.] "It seems patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite." [Citation.]

Here, SRRQ took clearly inconsistent positions in two different judicial proceedings. In the first proceeding, Judge Sutro adopted SRRQ's position and accepted it as true. Nothing in the record suggests SRRQ was misled into taking its initial position. Nothing in the record suggests SRRQ's reasonable mistake—e.g., that after 2011, SRRQ discovered evidence that its predecessor had imported materials to be recycled in the 1971-1982 timeframe.

Some opinions suggest that the doctrine should be narrowly applied in "egregious circumstances." (See, e.g., *Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 449.) However, such circumstances are not a required element. Appellate courts have upheld findings of "judicial estoppel" without reference to "egregious circumstances." (See, e.g., *California Coastal Com. v. Tahmassebi* (1998) 69 Cal.App.4th 255 (after first accepting commission's jurisdiction, defendant landowner asserted the commission's lack of jurisdiction).) The *Tahmassebi* court focused on whether the change had prejudiced the other party. (Id. at 259. See also *Minish, supra,* at 449 (indicating that circumstances may be "egregious" when "a party's inconsistent behavior will otherwise result in a miscarriage of justice").)

In *Law Offices of Ian Herzog v. Law Offices of Joseph M. Fredrics* (1998) 61 Cal.App.4th 672, defendant ("Fredrics") initially stipulated to binding arbitration with plaintiff ("Herzog"); later, he opposed confirmation of an arbitration award favoring plaintiff ("Herzog") on jurisdictional grounds. Affirming a judgment for Herzog, the appellate court emphasized the consideration of prejudice:

> Fredrics's argument squarely contradicts his stipulation. To grant [him] the relief he seeks would work a great injustice on Herzog, who relied on the stipulation to his detriment by going through with the arbitration in the belief it would be binding.

(See 61 Cal.App.4th at 679.)

Here, acceptance of SRRQ's and County's new position would undoubtedly prejudice Coalition. Following the concessions in SRRQ's closing brief, Judge Sutro accepted those concessions and expressly barred SRRQ from importing certain materials—including "used asphaltic concrete"—for recycling. For the next six years, Judge Sutro's order provided guidance to the parties in the administrative process. In September 2010, County approved an amended mining permit implicitly incorporating Judge Sutro's bar against import of "used asphaltic concrete" for recycling.

County and SRRQ point out that parties to the consolidated action consented to the dissolution of the injunction in 2011. (Vol.1, tab 4, AR0009-10, AR00061-64.) For two reasons, the dissolution does not defeat Coalition's "estoppel" claims.

First, County and SRRQ incorrectly argue that the dissolution extended to the entire injunction. In granting SRRQ's motion for an order "dissolving injunction," Marin County Superior Court Judge Faye D'Opal specifically referenced the injunction which was "set forth *and suspended* in this Court's April 12, 2004 Statement of Decision and April 19, 2004 Order...." (Vol.1, tab 4, AR00062-64 (emphasis added).) As explained above, the court-ordered stay never applied to the injunction prohibiting "importation of gravel, materials for recycling and dredged materials," or other specifically listed activities of SRRQ. It only applied to the injunction prohibiting SRRQ from conducting *any* further mining operations on the property. That was the "suspended" injunction. The court takes judicial notice of SRRQ's motion "to dissolve injunction" filed on December 22, 2010. (Ev. Code §452, subd.(d).) SRRQ noticed a motion to dissolve the injunction which was "suspended by the Court to allow for the County of Marin's....administrative review...." (SRRQ notice of motion, p.1:8-16.) SRRQ asserted that good cause could be found in "the completion of the administrative review proceedings" and "the Supervisors' unanimous approval of Resolution No.2010-93," among other reasons. (P.2:12-15.) At the time of the administrative review, Judge Sutro already had decided that import of materials for recycling did not fall within SRRQ's vested right. Technically, the August 8, 2011 order did not dissolve the injunction prohibiting importing of asphalt for recycling.

Second, even if Judge D'Opal's order applied to the entire injunction, SRRQ's complete reversal of its position as to the import of materials would prejudice Coalition and undermine the interests of justice.

In her August 2011 order "dissolving injunction," Marin County Superior Court Judge Faye D'Opal noted that Coalition did not oppose the dissolution. The order explained: "The Marin County Board of Supervisors unanimously approved Resolution No.2010-93, on September 28, 2010, completing the County's administrative review of SRRQ operating conditions and the amended reclamation plan." (Vol.1, tab 4, AR00062-64.) Clearly, the dissolution was linked to the BOS' adoption of Resolution No.2010-93, including the prohibition against importing of asphalt concrete for

recycling. The record shows no reason Coalition could have anticipated SRRQ's reversal of its position that: "[T]he importation of materials to be recycled...*should not be viewed as being within the scope of the Quarry's vested right.*" (Vol.2, tab 7, AR00211 (emphasis added).)

In consolidated Case No.014584, County's position aligned with Coalition's. The record reveals no reason Judge D'Opal, Coalition or other parties might have anticipated County's switch of sides in the litigation.

The 2010 amended permit came about through almost a decade of litigation and administrative proceedings. As SRRQ argued in its motion for dissolution of injunction: "The Supervisors' unanimous approval of Resolution No.2010-93 was the culmination of nearly six years of environmental review proceedings since SRRQ submitted its applications for administrative review...in October 2004." (Memorandum supporting motion for dissolution filed in Case No.014584 on December 22, 2010, p.2:7-13.) It is inconceivable that Coalition would have consented to the dissolution had it known that SRRQ and County would consider Judge Sutro's scholarly and well-reasoned opinion to have absolutely no continuing effect.

SRRQ and County's present position would leave the matter of conditions for Quarry's operation entirely open to continuing rounds of litigation.

The reach of SRRQ and County's present position potentially extends beyond the subject of asphalt recycling. For example, at the 2003 trial in Case No.014584, SRRQ acknowledged in its closing brief:

> There is no evidence of the importation of gravel to be used in conjunction with the processing of mined materials in the 1971-1982 timeframe. Therefore, such an activity should not be viewed as being within the scope of the Quarry's vested right. [Record, Vol.2, tab 7, AR00189, AR00211.]

This paralleled SRRQ's acknowledgment that: "There is no evidence of the importation of materials to be recycled in the 1971-1982 timeframe."

As a result, Judge Sutro's order included: "Defendant SRRQ is enjoined from importing onto the quarry property the following materials: i)gravel; ii)used asphaltic concrete or concrete for recycling; and iii)dredged non-sand materials. (Vol.2, tab 7, AR00273.) Consistently, the 2010 amended mining permit prohibited SRRQ from importing gravel as well as "used asphalt concrete or

concrete for recycling...." (Vol.2, tab 7, AR00281.) Amendment #2 deletes the phrase, "used asphalt concrete," but not the reference to gravel. (Vol.3, tab 8, AR00420, AR00424.) If the court were to accept County and SRRQ's position here, no prior order would prevent SRRQ from requesting and County from adopting another amendment to allow importation of gravel. If SRRQ and County elected to take such a step, litigation would predictably follow.

Judge Sutro's SOD and order provide the SRRQ, County and Quarry-area residents with considerable guidance as to the scope of SRRQ's vested right. Although the judicial estoppel doctrine must be "applied with caution," the evidence in the record satisfies all elements here. Without the doctrine, SRRQ's "inconsistent behavior will...result in a miscarriage of justice." (*Minish v. Hanuman Fellowship, supra,* 214 Cal.App.4th at 449.)

The scope of SRRQ's vested right

Even if the doctrines of collateral estoppel and judicial estoppel did not apply, the record shows that the board of supervisors findings are not legally relevant. (*City and County of San Francisco v. Board of Permit Appeals, supra,* 207 Cal.App.3d at 1109.) The findings appear to be based on an incorrect legal analysis.

In itself, Resolution No.2015-108 contains no actual "findings." (Vol.3, tab 11, AR00513-514.) It cross-references the "(1)information, data and technical reports provided by the [SRRQ] for the...Permit amendment"; (2)the staff report; (3)California Environmental Quality Act (CEQA) and the Notice of Exemption; and (4)all oral and public testimony received and the administrative record." (AR00513.) Contrary to the suggestion in the opposition memorandum (p.11:6-8), Resolution 2015-108 includes no express finding that "the use of recycled asphalt will not exceed the scope of SRRQ's nonconforming use under section 22.112.020A." Resolution 2015-108 never refers to section 22.112.020A. Resolution No.2013-52 had like wording. (Vol.2, tab 7, AR00329.)[1]

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[1] Coalition argues in reply that Resolution 2015-108 includes no "findings" which would "bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514-515.) Coalition's petition alleges that the board of supervisors prejudicially abused its discretion when it "arbitrarily and illegally allowed the SRRQ to increase and intensify its legal, nonconforming use," and that the evidence does not support its decision. (Petition, ¶48.) Coalition's supporting memorandum does not cite

Specifically pertaining to the matter of "legal nonconforming use," the staff report for Resolution No.2015-108 offered the following information:

> In 1992 the Marin County Planning Department Director determined that processing recycled concrete and asphalt concrete are within the provisions of the 1972 Quarry Permit (attached). [Vol.3, tab 8, AR00414.]

However, in determining the scope of the legal nonconforming use, the court looks to the *use* of Basalt's predecessor at the time of the rezoning—i.e., in 1982. (See SOD, Vol.2, tab 7, AR00240, AR00242.) According to SRRQ's closing brief in Case No.014584, "[t]here is no evidence of the importation of materials to be recycled in the 1971-1982 timeframe." (Vol.2, tab 7, AR00211.)

In their present opposition memorandum, County and SRRQ do not argue that the 1992 Planning Department opinion was correct. They simply urge that "the 1992 letter and the fact of compliance with existing permit conditions are only two of the many bases cited by the County—and as listed above, there were many other factual bases." (Opposition memorandum, p.12:3-5.)

As the "many other factual bases," County and SRRQ first point to evidence that the project site was used for the production of asphaltic concrete in 1982. (Vol.2, tab 7, AR00242-243.) This evidence does not support County and SRRQ's position. The question is not whether *production* occurred on site, but whether production occurred with materials from off-site. The *import* of materials is the subject of Coalition's challenge. The 2010 amended mining permit unequivocally allowed the operation of an asphalt concrete batch plant "using on-site aggregate materials," and on site processing of aggregate materials "obtained from on site." (Vol.2, tab 7, AR00280-281.) Coalition objects to the *added* provisions for use of "*off*-site Marin County sourced asphalt grindings." (Vol.2, tab 8, AR00424 (emphasis added).) The 1982 use of the property for the "production" of asphaltic concrete brings the "production" of asphaltic concrete within the scope of SRRQ's vested right. But it does not bring the use of "off-site Marin County sourced asphalt grindings" within the scope of that right.

Topanga. Because Coalition belatedly raised the issue of the board's compliance with *Topanga*'s "bridge" requirement, this court's order will include no specific ruling on that issue. In any event, it is unnecessary to the decision.

County and SRRQ further argue that "the use of recycled asphalt can be accomplished with virtually no change to SRRQ's existing operations...." (Opposition memorandum, p.11:18-20.) They contend that the test for determining the scope of a legal nonconforming use is not "inflexible," and that case law allows nonconforming land uses "to employ more modern methods without finding that this results in an unlawful expansion of a nonconforming use." (Opposition memorandum, p.7:27-8:6.)

The law is not nearly so "flexible" as County and SRRQ's brief might indicate. The intent of the local Development Code is to "*discourage the expansion of nonconformities*, but to permit them to continue to exist and to be maintained and enhanced to protect public safety and property values." (Marin County Code §22.112.010 (emphasis added).) Section 22.112.020 allows nonconforming uses and structures to continue, subject to various provisions. Those provisions include 22.112.020A:

> Nonconforming uses of land. A nonconforming *use* of land may be continued, transferred or sold, provided that the *use* shall not be enlarged, increased, or intensified (e.g., longer hours of operation, more employees, etc.), nor be extended to occupy a greater area than it lawfully occupied prior to becoming a nonconforming use. The nonconforming *use* may not be relocated to another location on the lot, or moved from the inside to an outside location....(Emphasis added.)

Citing *Endara* v. *City of Culver City, supra,* 140 Cal.App.2d at 33, County and SRRQ argue that the import of asphalt grindings does not enlarge, increase or intensify SRRQ's use, but is simply a modernization of previous methods. The evidence does not show it to be a mere "modernization."

Endara concerned expansion of a nonconforming use from one lot to a similar use on an adjacent second lot. On one lot (4031 Elenda Street), corporate plaintiffs used the buildings primarily for laminating resin sheets. As to the second lot (4037 Elenda Street), the city council had granted a variance for use of the premises to manufacture tile and ceramics. In 1954, plaintiff/lessee sought a variance which would allow it to use the premises at 4037 Elenda to laminate resin sheets. This was the same as the use at 4031 Elenda. The buildings remained the same. Still, the planning commission recommended denial of the variance. Defendant City denied plaintiff/lessee's appeal, and served notice to plaintiffs to discontinue the use of the premises at 4037 for storage and manufacturing purposes. The trial court enjoined the city's action. Affirming the judgment, the appellate court found that "[n]o error has been specified in such findings and they are presumed to be true." (Id. at

38.) It noted that the city's ordinance broadly defined the term "use" to mean: "The purpose for which land or building is designed, arranged or intended, or for which either is or may be occupied or maintained." The court reasoned:

> A nonconforming use is not restricted to the identical particular use which was in existence at the time of the enactment of the zoning ordinance but embraces any use substantially the same or similar. The adoption of more modern instrumentalities, suitable in carrying on a business should not, in legal contemplation, work a change of use. [Id. at 38.]

Endara involved the replacement of an existing industrial use (tile and ceramics manufacturing) with another industrial use (laminating of resin sheets). It did not actually deal with "modernization" of equipment. The appellate court emphasized that a zoning ordinance "cannot unfairly discriminate against a particular parcel of land." (Id. at 39.) Its opinion noted:

> The trial court heard the testimony and observed the property and the plant in operation and found that the building was designed and intended for manufacturing and storage purposes; that the premises had been substantially continuously used for such purposes; that there had not been any increase or enlargement of the space devoted to industrial and storage use; that there had been no abandonment of the nonconforming use and that the present use is substantially the same as before the adoption of the ordinances. (Id. at 38.)

The court also emphasized the industrial character of the neighborhood. It wrote:

> In the case here plaintiffs' property is immediately adjacent to an industrial zone. In the immediate future there will be a large industrial establishment in the zone all along the west and rear adjoining the property. If the ordinance were construed to deny the plaintiffs the right to continue the present use of their property it would, in our opinion, be arbitrary and unreasonable. (Id. at 40-41.)

The present facts are not analogous. Even if this case concerned an ordinance comparable to the one in *Endara,* SRRQ does not seek to replace one industrial use with another industrial use (already in existence on a neighboring lot), in an industrial neighborhood.

With Resolution No.2015-108, County did not merely authorize SRRQ to replace outmoded equipment. It extended, for a minimum of another two years, its authorization for SRRQ to conduct a new and additional operation—recycling of asphalt grindings obtained from off site—on property not presently zoned for industrial use.

This case is more like *Paramount Rock Co. v. San Diego County, supra,* 180 Cal.App.2d at 217. Distinguishing *Endara,* the *Paramount* court cited the *Endara* court's focus on "the issue of

hardship resulting from the elimination of a nonconforming use existent at the time the zoning ordinance was adopted." (Id. at 233.)

In *Paramount,* the trial court concluded that petitioners' rock-crushing operation was not part of the nonconforming use of the property at the time of the relevant zoning ordinance. Affirming the trial court's denial of the injunction, the appellate court wrote:

> Petitioners operated a concrete ready-mix business without a rock crusher on the site at the time the property became subject to the ordinance. Other concrete ready-mix businesses in the vicinity operated under similar conditions. The addition of a rock crushing plant brings to this agriculturally zoned area a type of business distortive of the zoning plans and adds permanency to a nonconforming use which the intent of the ordinance seeks to eliminate. (Id. at 230-231.)

The court also commented:

> The activity of the owner in the use of his property at the time it becomes subject to a zoning ordinance and not his plans regarding the future use of that property determines the scope of the nonconforming use excepted from the restrictions imposed by the ordinance. (Id. at 232.)

Finding no hardship, the court reasoned that petitioners could continue to operate their premixing plant as they had in the past. If petitioners experienced hardship "attributable to restrictions which prohibit the expansion of their nonconforming use by the addition of a rock crushing plant," it was "a hardship incidental to a lawful exercise of the police power." (Id. at 233.) The court noted the express finding that: "[T]he operation of a rock crushing plant on the site of a premixing plant or even the operation of a rock crushing plant at another site, is not an integral part of a concrete ready-mix business." (Id. at 228.)

SRRQ and County misread *Paramount.* They argue that "there had not been *any* processing of sand, gravel, or rock on the site prior to construction of the rock crushing plant." (Opposition memorandum, p.10:5-7.) In *Paramount*, the property became agriculturally zoned in December 1956. (Id. at 221.) Beginning in *January* 1956, "sand was obtained from the site, transported by truck to a sand washing and processing plant located on nearby property of another owner, washed and processed, *and then returned by truck to the site and placed in a hopper; gravel and crushed rock were purchased from rock crushers located outside of and transported by truck to the site and placed in a hopper; bulk cement likewise was purchased from outside sources, transported by truck to the site, and*

placed in a hopper; and thereafter, by proper equipment, these ingredients were taken from the various hoppers, delivered to the premixing plant, mixed together and placed in transit-mix trucks. (Id. at 221 (emphasis added).) While some of the operations took place on another site, some processing of sand, gravel or rock occurred on the site prior to construction of the rock crushing plant. Thus, the factual distinction argued by County and SRRQ is non-existent.

In the present record, no evidence shows that a recycling operation is an integral part of the quarry's business. Quarrying operations on the property began in the 1870s. Hard rock quarrying began in 1939. (Vol.3, tab 8, AR00414.) Yet, no evidence shows the importation of asphalt grindings prior to Resolution 2013-52. SRRQ admitted the absence of such importation at the time of the 1982 zoning change. (Vol.2, tab 7, AR00211.)

As Judge Sutro's statement of decision explained, this court must evaluate the extent of SRRQ's vested right by determining the extent of the quarry operator's *activity* in 1982. (Vol.2, tab 7, AR00211, AR00246. See also AR00237-238, quoting *Hansen Brothers Enterprises, Inc.* v. *Bd. of Supervisors* (1996) 12 Cal.4th 533.)

County and SRRQ mischaracterize the holding of *Hansen Brothers, supra,* 12 Cal.4th at 573, when they argue:

> [A]n activity generally will be found to have exceeded the permissible scope of a nonconforming use only when it has served to change the character or purpose of the use." (Opposition memorandum, p.8:25-27.)

In its listing of cases dealing with "intensified" uses, the *Hansen* court actually wrote:

> In *Town of Wolfeboro (Planning Bd.)* v. *Smith*, *supra*, 556 A.2d at page 759, the court held that while an increase in intensity of a nonconforming use is not necessarily a change or expansion, "an increase in intensity which serves to change the character or purpose of the nonconforming use will be considered to have changed the use."

(See 12 Cal.4th at 573.)

In other words, *Hansen Brothers* did not suggest that courts generally find improper expansion of a nonconforming use *only* when the expansion changed the "character" or "purpose" of the nonconforming use. In fact, *Hansen Brother's* listing included a Pennsylvania case holding that while a quarry business may reasonably and naturally expand, "an increase from an occasional truckload of

sand and gravel leaving the property each day to as many as 30 a day was not reasonable." (See 12 Cal.4th at 572-573, citing *Frank Casilio & Sons* v. *Zoning Hearing Bd., etc.* (1976) 364 A.2d 969, 970.) There, the character and purpose of the nonconforming use remained the same. Judge Sutro's statement of decision also quoted *Hansen Brothers* at 568:

> "The ultimate purpose of zoning is ... to reduce all nonconforming uses within the zone to conformity as speedily as is consistent with proper safeguards for the interests of those affected." {Citation.] We have recognized that, given this purpose, courts should follow a strict policy against extension or expansion of those uses. [See Vol.2, tab 7, AR00241.]

(See also, e.g., *San Diego County v. McClurken* (1951) 37 Cal.2d 683, 687-688 (while the nonconforming use encompassed tanks for "the storage of fuels to be consumed in supplying power as an incident to the industrial use," it did not extend to larger tanks permanently installed on a concrete base, as incident to the property's use as a service station).).

Like the property owner in *McClurken, supra,* SRRQ did not merely replace outmoded equipment with more modern equipment.

The opposition brief conveys the impression that SRRQ would only be substituting one ingredient for another. (See memorandum, p.5:18-20 (suggesting that the new process "simply replaces about 15-25% of the virgin rock and 1% of virgin asphaltic oil used in SRRQ's existing asphaltic concrete operations with recycled materials").)

In itself, such replacement is problematic. To the extent the recycling operation would allow SRRQ to conserve its on-site supply, it would prolong the nonconforming use rather than reducing it "to conformity as speedily as is consistent with proper safeguards for the interests of those affected." (*Hanson Brothers, supra,* 12 Cal.4th at 568. See also, e.g., *Sabek, Inc.* v. *County of Sonoma* (1987) 190 Cal.App.3d 163, 168 (noting the doctrine's "general purpose" to "eventually end all nonconforming uses and to permit no improvements or rebuilding which would *extend the normal life* of nonconforming structures").)

The case law shows that any need for "modernization" must be weighed against this "general purpose." For example, in *Sabek*, the court said the conversion of a gas station to a gas station/mini-mart was outside the scope of the legal nonconforming use—even though the change was intended to

make the station profitable. The change to the property "tended to add *permanency* to its 'legal nonconforming use.'" (Id. at 168.)

Moreover, the record shows that the recycling would require substantial new equipment. (See Vol.1, tab 1, AR00002 (SRRQ representative's letter to the county public works department, noting: "The stockpile of grindings would be located near the asphalt plant....Once grindings have been processed into RAP, the rap would be introduced into our asphalt plant by way of feed hopper and conveyor"); and Vol.2, tab 8, AR00415 (staff analysis for Resolution 2015-108, explaining: "Once at the Quarry site; it would be unloaded, stockpiled, and then screened prior to reuse as raw feed material in making new asphalt concrete at the existing Quarry asphalt batch plant. Depending on grinding particle size and asphalt mix design, grindings also may be processed through existing on-site crushing equipment. A feed hopper and conveyor (*similar to* existing on-site equipment) will be used to deliver the grindings to the asphalt batch plant")(emphasis added).) The estimated cost of the new equipment is "somewhere near $350,000." (Vol.3, tab 13, AR00520-521.)

SRRQ's addition of the new equipment to recycle asphalt grindings is comparable to a concrete-mixing company's addition of new equipment so that it can crush rocks on-site. County and SRRQ show no material distinction from *Paramount, supra.*

In September 2015, SRRQ's attorney argued to the board of supervisors that "the proposed permit amendment would constitute no more than a natural or gradual change in the Quarry nonconforming use." (Vol.1, tab 4, AR00011.) The benefits to the public from the recycling of asphalt pavement do not make the change to importing of asphalt grindings either "natural" or "gradual."

SRRQ and County staff acknowledged that the grindings would be unloaded, stockpiled and screened before being fed into a feed hopper and conveyor system. Even so, the opposition memorandum argues that the change will not "result in any new visible or otherwise perceptible impacts on the quarry's surroundings." (Memorandum, p.5:16-18.) On that point, it cites the September 2015 letter of SRRQ's attorney, Derek Cole, to the board of supervisors. (Vol.1, tab 4, AR00011.) The letter fails to support County/SRRQ's description. Cole cited: 1)the lack of any increase in production capacity; 2)the lack of additional truck traffic; and 3)existing dust-abatement

and mitigation measures for stockpiling. From those three points, Cole's conclusion is illogical. The lack of a production capacity increase, additional truck traffic or removal of dust-abatement measures would not necessarily equate with lack of any visual impact. Cole does not explain how additional equipment, such as a feed hopper and conveyor (not replacing existing equipment), would have no "visible or otherwise perceptible impacts." The presence of large and imposing equipment is itself a "new visible or otherwise perceptible impact[]."

Even if the number of truck trips doesn't increase, SRRQ's trucks will no longer travel empty one way and full the other. "Trucks importing grindings would leave the quarry with Hot Mix Asphalt and return to the quarry loaded with grindings." (Vol.1, tab 1, AR00002 (SRRQ request for extension of Amendment #2).) Judge Sutro's order defined a "truck trip" as "each trip by a truck with a capacity of approximately 25 tons, empty or loaded...." (Vol.2, tab 7, AR00273.) Even if the fully loaded trucks have no greater *visual* impact, surely they could affect noise or dust levels. The opposition brief cites no evidence that a full truck would have no greater impact than an empty truck. And regardless of whether they are subject to dust-abatement and mitigation measures, stockpiles would necessarily have a visual impact. The stockpiles are up to 38,200 tons. (Vol.1, tab 1, AR00011.)

The staff report incorporated SRRQ's request for extension of Amendment #2. Authored by SRRQ representative Aaron Johnson, the extension request also departs from "vested rights" analysis by focusing on the general benefits of recycling. (Vol.3, tab 8, AR00471-472.) At the same time, Johnson acknowledged that SRRQ's grindings stockpile then amounted to 20,000 tons. He confirmed that the operation would require new equipment, including a feed hopper and conveyor. Presumably, such equipment would make some noise. And while Johnson indicated that the maximum number of trips would be unchanged, he did not address the possibility of additional noise and dust from loaded incoming trucks. He also did not address the resulting additional wear and tear on Point San Pedro Road.

In maintaining that the recycling would not increase production "capacity," County and SRRQ cite Derek Cole's September 2015 letter to the board of supervisors. (Vol.1, tab 4, AR00011.) The letter cross-references SRRQ's letter requesting the extension. SRRQ's application contains the

following conclusory statement: "The introduction of RAP to the asphalt plant does not change the annual permitted throughput or permitted truck trips." (Vol.1, tab 1, AR00002.) This evidence concerns SRRQ's *permitted* activity, which is not the benchmark. More specific than SRRQ's application or the Cole letter, the staff report observes that "total daily asphalt concrete production is limited to approximately 3,125 tons." (Vol.3, tab 8, AR00415-416.) It does not explain that figure. At any rate, if the report references what SRRQ's permit would *allow*, the figure is not dispositive. The record allows no comparison of the potential daily asphalt concrete production under Resolution 2015-108, and *actual existing conditions*. (See also Vol.2, tab 7, AR00137, AR00143.)

Exhibits to the staff report seriously undermine opposing parties' suggestion that SRRQ would simply stockpile the imported grindings and feed them into existing equipment. From Exhibit 5 to the staff report, the only reasonable conclusion is that the recycling of asphalt is an operation in itself—with special considerations for crushing, blending, mixing, screening and the like. (See Vol.1, tab 4, AR00071-124.) The photographs and other content confirm the likelihood of visual impacts and the possible breadth of the proposed new operation. (See AR00080, AR00097, AR00099, AR00100, AR00101, AR00104, AR00110, AR00111. See also, e.g., AR00109-110 ("Plant Considerations").) Exhibit 4 to the staff report notes:

> Recycled aggregate is produced by crushing concrete and asphalt according to strict manufacturing standards.....(Vol.1, tab 4, AR00067.)

The document incorporated into the staff report continues:

> Heavy crushing equipment is required to break up the chunks into aggregate....A crushing plant may include a hopper to receive the material, a jaw to break it into more manageable pieces, a cone or impact crusher to further reduce its size, a vibrating screen to sort to the required specification, and a conveyor belt with a rotating magnet to remove metal contamination such as rebar. (AR00067-68.)

(See also SRRQ's request for extension of Resolution 2013-52, Vol.1, tab 1, AR0002 ("*Once grindings have been processed into RAP*, the rap would be introduced into our asphalt plant by way of feed hopper and conveyor")(emphasis added); and staff analysis, Vol.3, tab 8, AR00415 (outlining steps in this distinct process).)

A flaw in SRRQ/County's position shows up in the comments of SRRQ's attorney, Derek Cole, at the September 2015 board of supervisors hearing. Cole said:

> I think your staff has laid out all the benefits, the advantages of importing recyclable material. And so the Quarry is simply using modern technology to do that. (Vol.3, tab 13, AR00527.)

If SRRQ had a vested right to import recyclable material, it would have a sound argument that it can substitute "modern technology" for its outmoded recycling equipment. However, the record shows that SRRQ did not have a vested right to import recyclable material. This court concurs with Judge Sutro's focus on the *activity* of SRRQ at the time of the 1982 rezoning.

SRRQ's proposed recycling must be viewed as a distinct and new operation, not a logical extension of its activities in 1982. It would enlarge, increase and intensify SRRQ's legal nonconforming use. County did not apply the correct legal standard.

In oral argument, Respondent and Real Party in Interested focused the court's attention on the distinction between a vested right and a permitted right.

Focusing on the issue pertinent to a permitted right, the analysis above necessitates the same decision. Regardless of whether there exists any vested right, a permit may be amended provided such amendment does not amount to an impermissible expansion of the use. As discussed in detail herein, the amendment here is shown to be an impermissible expansion of the use, just as Judge Sutro previously found.

Lack of substantial evidence to support the findings

In mandamus proceedings, "substantial evidence has been defined in two ways." (*Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 335.) First, the law defines it as "evidence of ponderable legal significance ... reasonable in nature, credible, and of solid value." (*Desmond, supra,* at 335-36 (citations and internal quotation marks omitted).) Second, it is described as "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." (Id.)

Under both tests, Coalition met its burden of showing that "there is no substantial evidence whatsoever to support the findings of the Board." (See, generally, *Desmond, supra,* at 336.)

As explained above, *no* evidence in the entire record supports the board of supervisors' implied finding that the recycling of asphalt grindings "will not exceed the scope of SRRQ's nonconforming use under Marin County Code section 22.112.020A." (Opposition memorandum, p.11:6-8.)

Looking to the record as a whole, the only reasonable conclusion is that the recycling process is a "new process and an expansion and intensification of the SRRQ's existing, nonconforming industrial use of its property, which is zoned for commercial/residential use only, thereby undermining the fundamental purpose of MMC §22.112.020 and related California common law, which expressly prohibits the expansion or intensification of all nonconforming uses." (Petition, ¶1.)

Conclusion

The court will order judgment in favor of petitioner Coalition, and against respondents SRRQ and County. Petitioner is directed to prepare the proposed Judgment.

The court will issue a writ of administrative mandate ordering County, acting through the Marin County Board of Supervisors, to immediately vacate its approval of Resolution No.2015-108.

The court awards Coalition its costs. To seek attorney's fees under Government Code section 800 or Code of Civil Procedure section 1021.5, Coalition must make a separate motion for fees.

Dated September 19, 2016

PAUL M. HAAKENSON
Judge of the Superior Court

MARIN COUNTY SUPERIOR COURT
3501 Civic Center Drive
P.O. Box 4988
San Rafael, CA 94913-4988

POINT SAN PEDRO ROAD COALITION **VS.** **MARIN COUNTY, ET AL**	**CASE NO. CV1504430** **PROOF OF SERVICE BY FIRST CLASS MAIL** ***Code of Civil Procedure Sections 1013a and 2015.5***

I am an employee of the Marin County Superior Court. I am over the age of 18 years and not a party to this action. My business address is 3501 Civic Center Drive, Hall of Justice, San Rafael, California.

On September 19, 2016, I served the following document(s)**: DECISION** in said action to all interested parties, by placing the envelope for collection and mailing on the date shown thereon, so as to cause it to be mailed on that date following standard court practices. I am readily familiar with the court's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Rafael, California

JAMES M. KIM
Court Executive Officer

By: _____
M. Murphy, *DEPUTY*