

July 1, 2013

**BY EMAIL AND U.S. MAIL**

Eric Steger  
Senior Civil Engineer  
County of Marin  
Department of Public Works  
P.O. Box 4186  
San Rafael, CA 94903

Re: The San Rafael Rock Quarry's Request for Modification to Marin County Surface Mining  
and Quarrying Permit #Q-72-03

Dear Eric:

We write on behalf of the Point San Pedro Road Coalition ("PSPRC"). We have reviewed the San Rafael Rock Quarry's ("SRRQ") request to amend its Surfacing Mining and Quarrying Permit ("Permit") to allow the importation of asphalt grindings, which is currently expressly prohibited in that Permit. For the following reasons, the requested amendment must be rejected.

Moreover, we note that the County entertains SRRQ's request after a more than 10 year battle waged by the County, the Coalition, the California Attorney General and area residents to obtain meaningful use permit conditions on the SRRQ's non-conforming quarrying operations in the midst of densely residential neighborhoods. The Quarry now seeks permission to engage in an activity to which the Coalition previously objected and that was expressly found to be illegal by Judge Sutro, whose injunction against this activity was expressly included by the County in SRRQ's Permit. Accordingly, the County should not now be unwinding these protections achieved through hard-fought litigation and a long and drawn out administrative process. It is particularly egregious that the County would even consider approving SRRQ's request with no environmental analysis under CEQA. To the contrary, the County should aggressively enforce the conditions of the Permit (some of which SRRQ has yet to comply with) for the protection of the residential neighbors of SRRQ.

Expansion of a Non-Conforming Use

**The County Cannot Legally Approve SRRQ's Requested Operating Permit Amendment Allowing Importation of Asphalt Grindings Since Such Activity Has Already Been Found To Be An Illegal Expansion of the Quarry's Non-Conforming Use and Enjoined by the Marin Superior Court.**

On November 9, 1982, the County of Marin ("County") re-zoned what is now SRRQ property from M-2 (industrial) to RMPC (commercial/residential), making the ongoing quarrying use nonconforming. This re-zoning occurred at the request of the City of San Rafael ("City") in its 1980 Peacock Gap Neighborhood Plan ("PGNP"). The SRRQ's predecessor actively participated in the PGNP process, representing that it would complete quarrying in the early 1990s and approving language in the PGNP indicating that 350 residential units were "designated" for the quarry property on its redevelopment. SRRQ's predecessor did not object to the County's re-zoning of the property in 1982.

The 1982 re-zoning triggered application of Marin County Code ("MCC") § 22.78.010 (now § 22.112.020A) and its prohibition against any non-conforming use being "enlarged, increased, or intensified." This exercise by the County of its police powers, at the City's request, promoted the protection of the health and welfare of the residents of the residential developments around the quarry, especially including those approved by the City in the 1980 PGNP and subsequently constructed adjacent to and nearby SRRQ's property.

Since the quarrying operation was being conducted on property zoned M-2 prior to November 9, 1982, it was a conforming use before that date. However, quarrying operations may not be conducted on RMPC zoning districts in the County. (Marin County Code §§ 22.47.020, 22.47.040 and 22.47.080). A "legal non-conforming use is one that existed lawfully before a zoning restriction became effective and that is not in conformity with the ordinance when it continues thereafter." Hansen Brothers Enterprises, Inc. v. Bd. of Supervisors (1996) 12 Cal. 4<sup>th</sup> 533, 540 n.1. Since the quarrying use being conducted on the property in 1982 was in conformance with the pre-1982 M-2 zoning of the property, but was not in conformity with the BFC-RMPC zoning adopted by the County on November 9, 1982, that use became non-conforming on that date.

Lawful, non-conforming uses existing on properties that are re-zoned may be continued after the zoning change, provided, however, that they are not enlarged or increased, nor extended to occupy a greater area of land than that occupied by the use at the time of the rezoning. (MCC § 22.112.020A.) While continuation of a non-conforming use is generally permitted, expansion or relocation is not. *See County of San Diego v. McClurken* (1951) 37 Cal. 2d 683, 687-88. A nonconforming use "endangers the benefits to be derived from a comprehensive zoning plan." *City of Los Angeles v. Gage* (1954) 127 Cal. App. 2d 442, 459. "The policy of the law is for elimination of nonconforming uses." *City of Los Angeles v. Wolfe* (1971) 6 Cal. 3d 326, 337. "The ultimate purpose of zoning is to reduce all non-conforming uses within the zone to conformity as speedily as is consistent with proper safeguards for the interests of those affected." Hansen Bros. Enterprises, supra, 12 Cal. 4th at 568 (internal quotations and citations omitted).

Based on MCC § 22.112.020A and these well-accepted legal principles regarding the limitations on non-conforming uses, in its earlier lawsuit against SRRQ, in which the County was a co-plaintiff, the Coalition challenged a variety of expanded uses in which SRRQ engaged on the quarry property after purchasing it in 1996 as illegal expansions or intensifications of SRRQ's non-conforming use. The Coalition sought a permanent injunction enjoining, among other activities, the importation of concrete and asphalt for recycling, which was not an existing use in 1982, when the property was re-zoned and its use became non-conforming. SRRQ's importation of these materials after 1982 illegally expanded its non-conforming mining use of the property. After the 2003 trial, SRRQ conceded that there was no baseline amount of asphalt that was being imported to the quarry for recycling in 1982. SRRQ's Closing Brief at 16:21-24. Accordingly, the Court enjoined SRRQ from any further importation of asphalt to be recycled to the quarry as an illegal expansion of a non-conforming use. *See* 4/19/04 Order, Hon. J. Sutro ("Defendant SRRQ is enjoined from importing onto the Quarry property the following materials: 1) gravel; 2) used asphaltic concrete or concrete for recycling; and 3) dredged non-sand materials."). Judge Sutro's Order was based in part on the following legal principles:

"I want to make one more final comment, at this point, with regard to the legal context in which the Court must consider the evidence and that concerns the policy of zoning laws to eliminate non-conforming uses. In the *Hansen* case, the California Supreme Court said, 12 Cal.4th at p. 568, and I quote, "The ultimate purpose of zoning is ... to reduce all non-conforming uses within the zone to conformity as speedily as is consistent with proper safeguards for the interests of those affected. We have recognized that, given this purpose, courts should follow a strict policy against extension or expansion of those uses". In *Township of Fairfield vs. Likanchuk's, Inc.*, a New Jersey case, the Court said, and I quote, "It is settled that use of land lawfully existing prior to the enactment of a zoning ordinance may be continued even though it does not comply with the use requirements of the new enactment." "However, because non-conforming uses are inconsistent with the objectives of uniform zoning, the policy of the law is to restrict, rather than to expand, such uses." "Accordingly, courts have generally required that non-conforming uses should be reduced to conformity as quickly as is compatible with justice. Courts have uniformly held that, because non-conforming uses were generally discordant to their surroundings, it was the fervent hope that they would in time wither and die and be replaced by conforming uses." "It follows that expansion of non-conforming uses is not favored." "Because of the expressed aversion toward expansion of non-conforming uses, the diminishing asset theory must be applied with caution. Public concern toward wholesale excavation and its attendant dangers are well founded." "Also, neighboring property may be developed for residential or other uses which are incompatible with the mining use in reliance on the perceived dormancy or limitation of the excavation activity at the time it became a non-conforming use." (Reporter's Transcript of Tentative Decision, Judge Sutro, 1/20/04)(emphasis added).

The express prohibition against the importation of used asphaltic concrete or concrete for recycling, required by MCC § 22.112.020 and mandated by Judge Sutro's Order, was imported directly into SRRQ's Permit by the County, with the support and approval of the Coalition, and without any objection from SRRQ. (*See* SRRQ Operating Permit, "3. The Permittee shall not

import onto the Quarry property gravel, used asphalt concrete or concrete for recycling, or dredged non-sand material.”)

The County is legally bound to continue to enforce the prohibition against the expansion of SRRQ’s non-conforming use in MCC § 22.112.020 and Judge Sutro’s Order. It cannot legally agree to strike this prohibition against the importation of asphalt grindings for recycling, as SRRQ requests. There is no gray area here. If SRRQ wants to expand its current non-conforming industrial use, its only option is to seek a rezoning of the quarry property to industrial use, and then seek the Permit amendment. The requested Permit amendment must be denied as an illegal expansion of a non-conforming use.

### CEQA Non-Compliance

Even if the County could legally approve SRRQ’s request to expand its non-conforming use and amend its Permit, the County has failed to comply with CEQA. The County has indicated that it considers SRRQ’s Permit amendment request to fall under CEQA’s Class I Categorical Exemption (“Class 1 Exemption”) and therefore no environmental review is required. We disagree. A Class I Exemption is defined by the CEQA Guidelines as consisting of:

“the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination. The types of "existing facilities" itemized below are not intended to be all-inclusive of the types of projects which might fall within Class 1. The key consideration is whether the project involves negligible or no expansion of an existing use.” CEQA Guidelines § 15301 (emphasis added).

The importation of asphalt grindings and production of recycled asphalt pavement (“RAP”) which has never before been produced at SRRQ is clearly a proposed expansion of SRRQ’s existing use of its facility. It involves the importation by truck of a material not currently imported into the quarry, the establishment of a large new pile of that material onsite, the creation of visual and dust impacts, the purchase and set up of substantial new material handling equipment, with additional visual, noise and dust impacts, and will result in greater asphalt production levels. At an informal meeting held on May 16, 2013, with representatives of the Quarry, the Coalition and the County, the Quarry estimated that, if the “modification” is granted, asphalt production would double. It should be noted that since the proposal contains no cap on production, the actual production could potentially be more than doubled. These increases in production will bring concomitant increases in toxic air emissions and noise, and increased truck traffic to accommodate the greater volume of asphalt production facilitated by the importation of the grindings, among other impacts. Cumulatively, these impacts or potential impacts disqualify this permit amendment from the Class 1 CEQA categorical exemption.

Accordingly, even if this requested Permit amendment were not illegal for the reasons set forth above, it would have to undergo appropriate CEQA review before it could be approved, which the County has failed to perform.

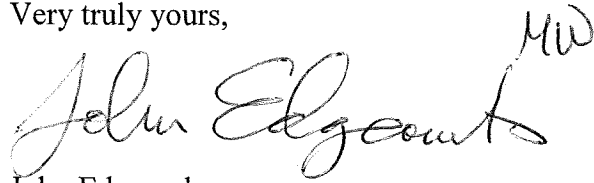
Courts apply the substantial evidence test to an agency's factual determination that a project is subject to a categorical exemption. Committee to Save the Hollywoodland Specific Plan v. City of Los Angeles, 161 Cal. App.4th 1168, 1187 (2008). Thus, the County has the burden of presenting substantial evidence demonstrating this project falls within the Class 1 categorical exemption. Magan v. County of Kings, 105 Cal.App.4th 468, 474 (2002). Neither the County nor the Quarry have provided any analysis suggesting that SRRQ's request for modification of its Permit does not expand its current use of its facility. To the contrary, the "modification" to allow asphalt recycling is, in fact, an expansion of the use, as was already determined by Judge Sutro in a decision that was never appealed by the Quarry.

Furthermore, even without increased emissions from asphalt recycling, the EIR concluded that the Quarry emissions presented a substantial health risk. Residential neighbors of the quarry, students attending local schools, workers employed at McNears Beach Park and visitors of the park alike are at risk from the significant health risks created by Quarry operations. During lengthy hearings in 2010, the Quarry provided evidence that, due to the unique location of the quarry at the water's edge, it was essential that the SRRQ be granted its amended permit in order to provide, for example, rock to the delta area by barge. A staff report recommended the Board of Supervisors conclude that economic considerations, relating to the public's need for rock accessible by barge, outweigh the health of the community. There was no discussion, let alone a finding, that there was a public need for recycled asphalt at this location that would outweigh the health of the community. The SRRQ has a convenient location at which it already recycles asphalt in an industrial location - Richmond. The Richmond facility, which is not in close proximity to homes and adjacent to a popular park, can continue to serve Marin.

The County presently has produced no public record that might serve as a basis for granting SRRQ's request. The public itself has no information whatsoever, beyond mere informal statements of those interested in the outcome, on which to conclude that granting SRRQ's request would not illegally expand its use nor create further avoidable environmental burdens on the neighborhood.

In conclusion, the County cannot legally grant the SRRQ's request to modify its Permit to allow the importation and processing of asphalt grindings since it violates the Marin County Code prohibition against the expansion of non-conforming uses and related California law. Even if the County could consider granting the permit amendment (which it cannot), the County would first have to comply with CEQA and conduct an initial study to determine whether the project may have a significant effect on the environment, which it surely will.

Very truly yours,

The signature is written in cursive and includes the initials "MW" at the top right.

John Edgcomb

cc: Marin County Board of Supervisors: Susan Adams; Katie Rice; Kathrin Sears; Steve Kinsey  
and Judy Arnold.