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**VIA EMAIL AND U.S. MAIL**

Robert Salisbury, Senior Planner  
Santa Clara County Department of Planning and Development  
County Government Center  
East Wing, 7<sup>th</sup> Floor  
70 West Hedding Street  
San Jose, CA 95110

**Re: Stevens Creek Quarry – Response to the City of Cupertino’s Zoning Interpretation Comments**

Dear Mr. Salisbury:

As you are aware, I represent Stevens Creek Quarry, Inc. (“SCQ”) regarding SCQ’s mining operations located in Santa Clara County (“County”). On December 11, 2020, SCQ submitted a revised application for a Use Permit and Reclamation Plan Amendment, which included a request for a zoning interpretation related to importing aggregate from the adjacent Lehigh Permanente Quarry (“Permanente Quarry”). The City of Cupertino (“City”) commented on the revised application in a letter dated December 30, 2020.

I am writing in response to the City’s comments on SCQ’s request for a zoning interpretation.<sup>1</sup> As discussed further below, the City fails to correctly apply the standard for determining whether a use may be allowed under the County’s Zoning Ordinance. Further, the City prematurely raises concerns about the potential environmental impacts of processing aggregate from the Permanente Quarry.

**I. The County Zoning Ordinance Allows Substantially Similar Uses that Are Not Specifically Permitted or Prohibited by the Zoning Ordinance Table of Uses.**

The City claims that importing and processing aggregate falls within the definition of the Manufacturing/Industry – Intensive use classification, which is not specifically included as a permitted use in the Hillside zoning district as shown on the table of uses in the Zoning

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<sup>1</sup> SCQ has separately addressed the City’s other comments related to traffic and water quality impacts in SCQ’s response to the County’s comments on the revised application.

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Ordinance. This argument, however, fails to recognize that the Zoning Ordinance also does not specifically prohibit Manufacturing/Industry – Intensive uses in the Hillside zoning district. Further, the County’s Zoning Ordinance recognizes that “descriptions of the classifications do not list every use or activity that would be appropriate within the classification, but instead give a general description of the type of uses that are included.”<sup>2</sup>

When a use is not specifically prohibited or allowed, the Zoning Administrator can determine whether a particular use is “within the scope of an existing use classification.”<sup>3</sup> A use will be within the scope of an existing use classification if such use is “substantially similar in nature and intensity to at least one listed permitted use, and the use is clearly compatible with both the intent of the applicable district and the applicable land use designation of the general plan.”<sup>4</sup>

As discussed further below, the City’s comments ignore the similarities between SCQ’s proposal to process imported aggregate and the surface mining and recycling facility uses that already occur at the SCQ Quarry. Those existing uses are clearly compatible with the intent of the Hillside General Plan land use designation and zoning district, which means a similar use such as processing imported aggregate should also be a permitted use in the Hillside zoning district.

A. Processing aggregate imported from an adjacent mine is substantially similar in nature and intensity to surface mining and recycling facilities.

Contrary to the City’s assertions, the Zoning Ordinance does not prohibit industrial uses in the Hillside zoning district if those uses generate noise, odor, vibration, illumination, or particulates. Instead, the Zoning Ordinance’s table of uses expressly allows industrial uses in the Hillside zoning district such as surface mining and recycling facilities for concrete, asphalt and soil recycling.<sup>5</sup>

Both SCQ and Lehigh engage in industrial uses by extracting materials, transporting those materials via internal haul roads and processing those materials at facilities located on their respective sites. Processing of aggregate mined from the SCQ Quarry is a permitted use at the SCQ Quarry.<sup>6</sup> Processing of aggregate also occurs at the Permanente Quarry, which also

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<sup>2</sup> Santa Clara County Zoning Ordinance (“Zoning Ordinance”), §2.10.010.

<sup>3</sup> Zoning Ordinance, §2.10.010.A.1.

<sup>4</sup> Zoning Ordinance, § 2.10.020A.1, emphasis added.

<sup>5</sup> Zoning Ordinance, § 2.20.020, Table 2.20-2 (listing “surface mining” and “recycling facilities” as permitted uses in the Hillside zoning district with a use permit.).

<sup>6</sup> The Zoning Ordinance expressly authorizes incidental activities where such activities are not addressed by the Zoning Ordinance. (Zoning Ordinance, § 2.10.020B.) The Zoning Ordinance defines an incidental activity to be one that is “carried out as part of a primary use, which is not expressly identified by the Zoning Ordinance as part of the primary use classification ....” (Zoning Ordinance, § 2.10.020B.) Processing aggregate is carried out as a part of

includes parcels in the Hillside zoning district. In fact, if one company owned both the SCQ Quarry and Permanente Quarry, then processing aggregate would be a permitted use regardless of where the aggregate originated from on the combined properties and which severely undercuts the City's position on this point. This fact alone proves the point that the proposed use is consistent with the zoning. Therefore, transporting aggregate from the Permanente Quarry to the SCQ Quarry is substantially similar – if not identical – to internally transporting and processing material that has been mined from either of these adjacent sites for decades.

Importing and processing aggregate from an adjacent quarry would also be substantially similar to recycling facilities that are also a permitted use in the Hillside zoning district. The County has already determined that SCQ's existing recycling facility can be located in the Hillside zoning district and this use is compatible with surrounding land uses and will not significantly impact neighbors.<sup>7</sup> Similar to the existing recycling facility, importing aggregate from the Permanente Quarry would involve transporting material via truck for processing at a facility located in the Hillside zoning district.

The type of material being transported – aggregate instead of concrete and asphalt for recycling – does not change the nature and intensity of the use. As recognized in the County's General Plan, "[i]ncreased truck traffic resulting from the transportation of recyclable materials to the site for processing would be the primary environmental impact of recycling centers."<sup>8</sup> Here, importing aggregate from the Permanente Quarry would create fewer traffic impacts than a recycling facility because transporting aggregate from one quarry to the other would not occur on County roads.

Accordingly, the County should determine that SCQ's proposed use is substantially similar to the surface mining and recycling facilities use classifications that are permitted in the Hillside zoning district because all of these uses involve similar activities (i.e., transporting and processing materials).

B. Processing aggregate imported from an adjacent mine is clearly compatible with the intent of the Hillside zoning district.

The City inaccurately describes the purpose of the Hillside zoning district by suggesting that this district only protects the environment, watershed, ridgelines and viewshed, and surrounding

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surface mining (a permitted use in the Hillside zoning district) and is, therefore, classified as a permitted incidental activity.

<sup>7</sup> County Staff Report, July 5, 1990, regarding modification of SCQ use permit to allow a recycling facility.

<sup>8</sup> General Plan, p. O-40.

low density environment. The Zoning Ordinance actually describes the purpose of the Hillside zoning district as:

The purpose of the Hillside[s] district, also known as the HS district, is to preserve mountainous lands unplanned or unsuited for urban development primarily in open space **and to promote those uses which support and enhance a rural character, which protect and promote wise use of natural resources**, and which avoid the risks imposed by natural hazards found in these areas. These lands are watersheds and **may also provide such important resources as minerals**, forests, animal habitat, rare or locally unique plant and animal communities, historic and archeological sites, scenic beauty, grazing lands, and recreational areas.<sup>9</sup>

As demonstrated by this quoted language from the Zoning Ordinance, the purpose of the Hillside zoning district is not limited to protecting only certain natural resources such as watersheds and viewsheds. Instead, the purpose also includes promoting the development and wise use of mineral resources. The County cannot ignore this codified purpose that is expressly stated in the Zoning Ordinance.

Allowing SCQ to process aggregate mined from the Permanente Quarry is clearly compatible with this intent to promote the wise use of natural resources. SCQ's proposal would utilize aggregate material already on the Lehigh site and create another source of locally produced construction aggregate, without the need to create a new mine site elsewhere in the County.

C. The Santa Clara Valley Viewshed and Scenic Roads combining districts are not relevant to SCQ's zoning interpretation request.

The City concludes – without any evidence – that SCQ's proposed activities would somehow impact the viewsheds protected by the Santa Clara Valley Viewshed and Scenic Roads combining districts. To the contrary, there would be no change in visual impacts associated with processing imported aggregate because imported aggregate would be processed at an existing facility located at the SCQ Quarry.

Regardless, these combining districts do not describe specific use classifications that are permitted (or not) in areas subject to those combining districts. Instead, the Zoning Ordinance sets forth permitted uses for rural base districts such as the Hillside zoning district.<sup>10</sup> A

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<sup>9</sup> Zoning Ordinance, § 2.20.010C, emphasis added.

<sup>10</sup> Zoning Ordinance, § 2.20.020 (“The following tables, Tables 2.20-1 and 2.20-2, specify the allowable land uses for the rural base districts, listed by use classification as defined in Chapter 2.10.”).

combining district could overlay a parcel with a rural base district, in which case development on that parcel would require a design review to “mitigate adverse visual impacts of development and encourag[e] quality design.”<sup>11</sup> Accordingly, these combining districts only provide a process for mitigating visual impacts on a project specific basis and do not prohibit certain uses.

D. Processing local aggregate imported from an adjacent mine is compatible with the intent of the County General Plan and policies promoting the wise use of local mineral resources.

The City does not point to any County General Plan policies that would prohibit SCQ’s proposal to process imported aggregate. The City, instead, claims that processing aggregate from the Permanente Quarry has very different impacts than mineral extraction, which the General Plan specifically allows in the Hillside designation. This argument ignores that processing of aggregate already occurs at the SCQ Quarry, in compliance with the County Zoning Ordinance and General Plan. In fact, every aggregate mine in the state (hundreds of mines) includes a related aggregate processing plant. Processing aggregate imported from an adjacent mine does not change the nature of the processing activities already occurring at the SCQ Quarry and, instead, would have similar impacts as discussed above.

Further, SCQ’s proposal to process aggregate from the Permanente Quarry is clearly compatible with the intent of the General Plan policies related to mineral development in the Hillside designation. Part of the intent of the Hillside designation includes “promot[ing] wise management of natural resources,” including mineral resources.<sup>12</sup> The General Plan also allows commercial and industrial uses in the Hillside designation where such uses support the “productive use ... of the natural environment.”<sup>13</sup> Processing imported aggregate is a wise and productive use of mineral resources because this activity reduces the amount of aggregate that would otherwise remain at the Permanente Quarry as a waste material, and without this import would otherwise eventually require development of a new mine site elsewhere in the County.

Aggregate from the Permanente Quarry would also create another source of local aggregate, which the County has already recognized as an important resource to protect. For example, when previously authorizing concrete and asphalt recycling facilities as a permitted use, the County recognized that “[t]he extraction of mineral resources, specifically construction aggregate, is essential to the continued economic well being of Santa Clara County.”<sup>14</sup> The General Plan also

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<sup>11</sup> Zoning Ordinance, §§ 3.20.010 (purpose of combining districts); 3.20.030 (design review required).

<sup>12</sup> General Plan, Policies R-LU 16 and R-LU 18, p. Q-3.

<sup>13</sup> General Plan, Policy R-LU 18, p. Q-3.

<sup>14</sup> County Staff Report, March 22, 1988 re “An ordinance to amend the Zoning Ordinance of the County of Santa Clara relating to concrete, asphalt and soil recycling and reprocessing facilities.”

embodies this goal by recognizing that a local source of construction aggregate “is of fundamental importance to the economy of the county and region.”<sup>15</sup> Allowing SCQ to process aggregate from the Permanente Quarry furthers this important goal, and is consistent with the policies already adopted by the County in the General Plan to promote the development of local mineral resources. This is not surprising as virtually every County General Plan in California<sup>16</sup> contains similar language because in fact aggregate is critical to maintain and develop infrastructure including roads, freeways, bridges, hospitals, schools, offices, solar and wind facility foundations, and homes. The Apple complex in Cupertino is one recent well-known example, as are every road and highway repair or improvement project in the County.

Likewise, State law also strongly encourages local aggregate production in order to reduce VMTs and GHGs.

The Legislature further finds that the production and development of local mineral resources that help maintain a strong economy and that are necessary to build the state's infrastructure are vital to reducing transportation emissions that result from the distribution of hundreds of millions of tons of construction aggregates that are used annually in building and maintaining the state.

(See Cal. Public Resources Code § 2711(d), underline added.)

## **II. Concerns About Environmental Impacts Should Be Regulated Through the Use Permit and Environmental Review Process.**

The City raises concerns about potential environmental impacts from processing imported aggregate, but it would be premature for the County to consider environmental impacts during the zoning interpretation process. Instead, as part of the zoning interpretation process, the County “shall also determine the nature of the permitting process, based on the nature and intensity of the use and that use to which it is substantially most similar.”<sup>17</sup> Here, the appropriate permitting process would be the use permit process required for the surface mining and recycling facilities use classifications. Accordingly, the County should review potential environmental impacts from processing imported aggregate during the EIR process for SCQ’s application for a Use Permit and Reclamation Plan Amendment.<sup>18</sup>

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<sup>15</sup> General Plan, p. O-39, underline added.

<sup>16</sup> See, e.g., Amador County General Plan, p. E-28; San Diego County General Plan, p. 5-20; Los Angeles County General Plan, p. 154; Contra Costa County General Plan, Goal 8-M; Marin County General Plan, p. 8.7-4.

<sup>17</sup> Zoning Ordinance, § 2.10.020.A.1.

<sup>18</sup> See, e.g., *Wollmer v. City of Berkeley* (2009) 179 Cal.App.4th 933, 948 [city attorney’s memorandum interpreting and applying state law as giving local agencies discretion to grant a greater density bonus to residential

The City also alleges that processing imported aggregate would perpetuate serious land use conflicts with nearby urban uses but fails to recognize that it is the SCQ Quarry— and not the surrounding urbanized areas – that under the County General Plan should be protected from incompatible land uses. As stated in the General Plan, “Existing sites and access routes for regionally significant [mineral] resources should be protected from incompatible land uses and development that would preclude or unnecessarily limit resource availability.”<sup>19</sup> Further, under the General Plan, mineral resource sites “are a necessary use that must be accommodated with a minimum of disruption.”<sup>20</sup> Under these policies, the County has an obligation to protect the SCQ Quarry from incompatible urban uses. These County policies are consistent with state law on the subject.<sup>21</sup> In addition, the City’s letter appears to raise equity and environmental justice issues as the City proposes to reduce or eliminate blue-collar employment and mining in the area in order to reduce impacts on the City of Cupertino’s wealthy, white-collar citizens.

### III. Conclusion

Transporting aggregate via an internal haul road from the Permanente Quarry for processing at SCQ’s existing processing facility is substantially similar to the surface mining and recycling facilities use classifications that are permitted uses in the Hillside zoning district. This proposed use is clearly compatible with the intent of the County Hillside zoning district and the County General Plan designation by promoting the wise use of a local source of aggregate, and is obvious by decades-long mining and aggregate processing at both the Lehigh and SCQ sites. In fact, not allowing the requested import would be an unwise waste of an existing resource in an already heavily disturbed setting in violation of County General Plan policies. In addition, such aggregate material is necessary for the entire County, including the City of Cupertino, to build, maintain and repair its roads, and construct its solar arrays and tech buildings. Accordingly, the County should interpret the Zoning Ordinance as allowing SCQ’s proposal to process aggregate imported from the Permanente Quarry in the Hillside zoning district.

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developments pursuant to the California Density Bonus Law is not a “project,” as that term is defined by the California Environmental Quality Act (“CEQA”), and thus does not require environmental review pursuant to CEQA].

<sup>19</sup> General Plan, Policy C-RC 46, emphasis added.

<sup>20</sup> General Plan, p. O-42, emphasis added.

<sup>21</sup> See Cal. Pub. Res. Code § 2762 (incorporate mineral resource management policies in general plan that emphasize the conservation and development of identified mineral resources; additional review of uses that threaten extraction of minerals); see also 14 CCR § 3676 (mineral resource management policies required to restrict encroachment of incompatible land uses on identified mineral deposits and to impose conditions upon incompatible land uses to mitigate significant land use conflicts).

Sincerely yours,

MITCHELL CHADWICK LLP



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