LAW OFFICE OF MARC CHYTILO, APC

ENVIRONMENTAL LAW

May 4, 2018

Santa Barbara Board of Supervisors
c/o Clerk of the Board
105 E. Anapamu Street
Santa Barbara, California 93101

By Hand and Electronic Delivery:
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RE: Sepulveda Building Materials Appeal of Request for Vesting Determination
Item # 5, May 8, 2018

Honorable Members of the Board of Supervisors:

This office represents Pierre LaBarge IV, owner of a winery located at 2380 Sweeney Road, immediately across the Santa Ynez River from the Lompoc Stone Mine.

Sepulveda Building Materials Company proposes to expand its non-conforming rock quarry just outside of the City of Lompoc on and above the banks of the Santa Ynez River. The County properly found in 1998 that Sepulveda had a vested right to mine 96.5 acres based on evidence that that portion of the site was mined prior to 1958 when the County's Ordinance 971 was enacted and required a Conditional Use Permit. Aerial photographic evidence submitted in the instant proceeding confirms there was mining in the 96.5 acre area, validating the 1998 vested rights determination for that area. This evidence also demonstrates there was no mining activity in the 28.5 acre area that is sought for the instant vested rights determination request. The County can process an application to mine the proposed expansion area with a Conditional Use Permit, but under the applicable authority and the evidence in this record, cannot support a finding that Sepulveda has a vested right to expand into the 28.5 additional acres.

Summary of Argument

State law and County code **prohibit the expansion of non-conforming uses without permits**. Mines are allowable in this area, but **require a Conditional Use Permit** (CUP) to define allowable hours of operation, protections for visual, biological and cultural resources, truck traffic, etc. The **expansion can be allowable without permits only if the operator can prove with evidence that they were mining in the expansion areas prior to September 29, 1959**, under the Vested Rights doctrine. The **Applicant's evidence is flimsy**, and aerial photography from 1958 and 1961 demonstrates conclusively **there was no mining in the expansion areas before the cutoff date**, and so **the Board must deny the claim of vested rights**. The Applicant can apply for a CUP for this expansion.

Summary of Issues

VESTED RIGHTS: The County may recognize a vested right to expand the non-conforming

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mining operation to **only those areas** where the applicant has **proven by objective evidence** that the then-owners, in 1958, intended to expand the mining operation. Courts have A very important 1958 high resolution aerial photo was not presented by the applicant's to your Commission at the January 2017 hearing, even though it was mentioned several times. This office has located that photo which clearly establishes there was no mining on parcel -009 six weeks prior to the September 29, 1958 effective date of the County's ordinance 971. The record contains ample evidence that the scope of use in 1958 was limited to small scale "rock pickers" and that the intensified and expanded production methods did not begin until much later, particularly when the current operator, Sepulveda Stone, began their operations on the site in 1985. There is no pre-9/29/1958 evidence supporting a vested right and the applicant has not satisfied their burden of proof to establish that right.

CEQA: Your Commission cannot adopt the MND and must direct the preparation of an EIR. The Project will substantially degrade public and private views from Sweeney Road, in addition to impacting Scenic Highway Route 1 and Santa Rosa Road and violate Lompoc Area Land Use Goals, constituting a significant impact. Air quality and cultural resource impacts are potentially significant. The cumulative impact analysis is flawed throughout. CEQA requires preparation of an EIR.

I. VESTED RIGHTS ISSUES

1. Non-Conforming Uses Ordinarily May Not Be Enlarged

The general rule of law is that land use activities that become non-conforming as a result of new laws (such as the 1958 Ordinance 871 and the subsequent zoning ordinance) may be allowed to continue operations for a time that provides for their eventual elimination. Santa Barbara County LUDC § 35.101.010.B. **Nonconforming uses are not to be enlarged, extended or expanded**. The exceptions provided for vested rights under California's diminishing asset doctrine are narrow and disfavored, and may only be granted when there is competent tangible evidence of use from **prior to** September 29, 1958, when County Ordinance 871 first required a CUP for mining operations.

2. The Vesting Determination Must Be Denied

a. Applicable Law – Vested Rights and the Diminishing Asset Doctrine

i. SMARA Limits Vested Rights To Only The Areas Being Mined Or For Which There Is Physical Objective Evidence Of An Intent To Expand To A New Area

Under SMARA, a mine owner only possesses a vested right to expand a pre-1975 non-conforming surface mining operation under the "diminishing asset" doctrine if the claimant

produces evidence that they clearly intended to expand into such areas prior to adoption of SMARA. This same analysis and standards apply for the County's Ordinance 871/971 and zoning ordinance. SMARA Regulations define the required showing for claimants seeking determinations of vested rights to expanded mining areas:

> As to any land for which Claimant asserts a vested right for expansion of operations, **Claimant shall produce evidence demonstrating that the Claimant clearly intended to expand into such areas. Such evidence shall be measured by objective manifestations, and not subjective intent at the time of passage of the law**, or laws, affecting Claimant's right to continue surface mining operations without a permit.

(SMARA Regulations, §3963).

"Under that [diminishing asset] doctrine, a vested right to surface mine into an expanded area requires the mining owner to show (1) **part of the same area was being surface mined when the land use law became effective**, and (2) **the area the owner desires to surface mine was clearly intended to be mined when the land use law became effective, as measured by objective manifestations and not by subjective intent**." *Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal. 4th 533, 555-556 (emphasis added).

In other words, "the right is limited to the area over which the owners objectively manifested an intent to quarry in [1958]." Id., at 543.

"The burden of proof is on the party asserting a right to a nonconforming use to establish the *lawful* and continuing existence of the use at the time of the enactment of the ordinance." *Hanson, supra,* 12 Cal.4th at 564, citing *Melton v. City of San Pablo* (1967) 252 Cal.App.2d 794, 804 (emphasis in original). Your Board may not rely on inferences or assumptions, but must have tangible, objective evidence that the specific area upon which expansion is proposed was being mined prior to the date of the ordinance, September 29, 1958.

ii. County Ordinance 971 Has The Same Legal Standards

The same SMARA legal theory and standards apply to the claim of vested rights to evade County's Ordinance 971.

b. Only the **specific area** that was mined prior to September 1958 may benefit from a Vested Right

The Courts have routinely narrowed the scope of a vested right to only the portion of a parcel used when the ordinance was adopted, and not the entire parcel. "**The right to expand mining or quarrying operations on the property is limited by the extent that the particular material is being excavated when the zoning law became effective**." *Hansen, supra,* 12 Cal. 4th at 557 (emphasis added). "Even where multiple parcels are under the same ownership at the

time a zoning law renders mining use non-conforming, extension of that use onto parcels not being used at that time is allowed only if the parcels had been part of the mining operation." Hansen, 12 Cal 4th at 558 (citations omitted).

Vested rights to defeat the County's CUP jurisdiction is controlled by SMARA vested rights jurisprudence. A 1976 Attorney General's Opinion addressed the question "Are vested rights mentioned in [SMARA] limited in application to a particular parcel of land?" The Attorney General confirmed that "t**he area within which the vested right may be** exercised is confined to "mined lands" (§ 2729) **on which "surface mining operations**" (§ 2735) **were being conducted prior** to [the SMARA or CUP effective date]. **Any substantial change in or expansion of such operations to a new area or to a new claim may be made only upon obtaining a permit from the lead agency**." 59 Ops. Cal. Atty. Gen. 641, 646 (emphasis added).

i. Specific Evidence is Required

"The mere intention or hope on the part of the landowner to extend the use over the entire tract is insufficient: the intent must be objectively manifested by present intentions." Hanson, supra, 12 Cal.4th at 557 (citing *Stephen & Sons v. Municipality of Anchorage* (Alaska, 1984) 685 P. 2d 98, 101-102).

In this case, there is no evidence concerning the chain of title for these parcels. It is unknown whether they were in common ownership in 1958, and there is no evidence of that owner's intent. **The intention and activities of subsequent owners, including the Acins who took title in 1971, and Sepulveda Stone, who began operations sometime between 1985 and 1990** (the evidence is muddled), **is irrelevant**.

As evaluated in the January 2017 Planning Commission Staff Report ("Attachment A" to Staff's Board Packet), the cursory materials offered by the applicant fail utterly to meet this burden of proof as to the 28.5 acres of land at issue.

c. <u>The Applicant has Provided No Competent Evidence of Vested **Rights as of September 1958**</u>

The January 2017 Planning Commission Staff Report ably reviews the applicant's evidence, and concludes there is insufficient evidence to support findings of a vested right under the diminishing right doctrine.

Mr. Lee's declaration fails to establish anything of relevance to the intention of the operation, except that he recalls "the first rock that [he] split" as a youngster in 1956 at his father's quarrying operation. There is no other reference to the nature of the operation, whether he or his father contemplated or took steps to plan expansions of the operation into the 28.5 acres in question, or where the activities were conducted on the property. Much of his testimony is unintelligible due to a lack of a foundation. For example, he references loading stone into a

truck when he was 14-15, but fails to identify his birthyear so there is no date associated with these activities. Neither does Mr. Lee identify the specific area that was worked or would be worked. He does not specify whether his father worked full time for years at the site, or only sporadically. Mr. Lee's testimony is somewhat contradicted by Frank Acin, who testifies that Buster Lee "came in and worked the site" during the 1971-1972 period to 1974, much later than 1958.

Frank Acin's 1990 declaration establishes that a succession of different "rock diggers" worked the site for short periods of time. Mr. Acin's written testimony establishes that there was no one owner, operator or other claimant during the period from 1971 to 1985 that had any intention to expand into the 28.5 acre area in question. Acin states Sepulveda came to the site in 1985, whereas Lee claims to have "started work" with Sepulveda in 1982 (without saying where) then he was "transferred" to run the Lompoc operation in 1984.

Since Sepulveda's first involvement with the site began in the 1980's (either 1985, 1984, or 1982), any intent it may claim to have had was after both the 1976 SMARA and the County's 1958 CUP requirement.

Larry Acin's 2007 letter further contradicts the others by stating Sepulveda "took over" in 1990. Since the Acin ownership began in 1971 and Sepulveda came in much later, any objective intentions they might claim to mine the 28.5 acres in question was too late to qualify under the diminishing assets doctrine.

Mr. Acin's letter lacks the dignity or decorum of a sworn statement, and is not as probative or credible as his father's sworn declaration.

All of the declarations and narrative testimony is irrelevant, as they do not address the intent of the 1958 owner, who is still unidentified. The Acin's purchased the ranch in 1971, and possess only what vested rights as might have been created by evidence and activities in 1958.

In total, the supplied evidence fails to offer any objective manifestation of intent before 1958 (for Ordinance 871) or before 1976 (for SMARA) to expand into the 28.5 acre area in question, and the staff's recommendation must be upheld.

d. <u>The Historical Analysis Supplied by LaBarge Conclusively Demonstrates there was No Mining Activity or Other Physical Manifestation of Intent to Mine in Any of the Four Proposed Expansion Areas Until After September 1958</u>

LaBarge has developed and submitted a comprehensive pictorial Historic Mining Investigation, with details from period maps and aerial photos. This report is the product of exhaustive research by a seasoned researcher with considerable historic and archaeological forensic research experience, including a decade of service with the FBI. As detailed therein, **mining activities leave a series of characteristic signatures** that are evident through the

disciplined study of higher quality aerial photos.

The photos of each of the four areas establish that there is **no objective evidence whatsoever of any mining activity on parcel -009 until after September 1958**. The USGS Maps only show a pickaxe icon on parcel -015 beginning in 1960; the applicant has conflated the Acin Ranch with the diatomaceous Earth mine across Highway 1.

e. Responses to Specific Sepulveda Claims

The appeal in this case did not provide any substantive explanation of the basis of their claims. In previous submittals, the Appellant has advanced a wide range of disparate claims in a futile attempt to achieve vesting. In the absence of a reasoned explanation of Appellant's claims, LaBarge is constrained in his ability to reposne to specific theories.

The Courts have recognized that surface mining operations like Sepulveda's Stone's proposed expansion and extension have a cognizable adverse impact on the property rights of surrounding landowners, who are entitled to due process. *Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613. LaBarge, as a neighboring landowner in plain sight of the proposed expansion area, is entitled to due process, including a fair evidentiary hearing with an opportunity to respond to the claimed evidence and theories supporting vested rights. On May 2, 2018, the applicant's engineer submitted to the county a one page bullet point list of contentions with a single 1991 County letter and a photoshopped image of the area mined under the 1998 reclamation plan and grant of vested rights. The Applicant appears to threaten that if the vesting determination were not granted, they would remine areas subject to the 1998 Reclamation Plan to create greater visual impacts in that area (and then claims to be an "honorable mine operator".

Many of the bullet points restate points Goldstein and Wullbrant made to the Planning Commission, so we will respond to those issues in expectation they will be repeated to your Board.

Applicant Claim A: "Vesting applies to the entire parcel on which the resource exists." (Goldstein PC Letter, p. 2) "An entire tract is generally regarded as within the exemption of an existing nonconforming use, although the entire tract is not so used at the time of the passage or effective date of the zoning law." (Wulbrant Letter to Planning Commission, 2/20/18, p. 2, citing *Hansen Bros. v. Board of Supervisors* (1996) 12 Cal.4th 533, 554.)

This claim is a misrepresentation of the applicable law. *Hansen* is indeed the authoritative case on vested rights to quarry or mine rock material. However, quoting the above sentence from *Hansen* (which is actually a quotation from another case included in the court's discussion of general principles), without acknowledging the subsequent discussion and holding of *Hansen,* misrepresents the law. Specifically, *Hansen* goes on to state:

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

(*Hansen*, 12 Cal.4th at 555-556.) Accordingly, the Certificate of Compliance (COC) stating that APNs -015 and -009 are part of the same legal parcel coupled with evidence of pre-1958 mining of part of -015 is not sufficient to establish an intent to extend the use onto -009 and in the specific areas requested for vesting. Similarly, the County's prior determination that a 3-acre portion of the 28.5-acre area is vested does not establish that the entire 28.5 acre are is vested (see further discussion below).

Applicant Claim B: "The current vesting issue was already resolved at the Planning Commission hearing of June 10, 1998". (Wulbrant Letter to Planning Commission, 2/20/18, p. 2)

This statement incorrectly assumes that a vested right extends over the entire parcel. Discussed above, *Hansen* is clear that the mine operator *also* must provide evidence manifesting an objective intent to excavate the entire area prior to 1958. (*Hansen*, 12 Cal.4th at 556-558.) The Planning Commission's June 10, 1998 hearing only resolved the vesting question as to the 3 acres they determined to be vested, not to the 28.5 acre area subject to the present vesting determination request.

Applicant Claim C: Staff maintains that the Certificate of Compliance will "provide the Project with the bullet-roof protection it needs". (Wulbrant Letter to Planning Commission, 2/20/18, p. 2.)

Not only does the Wulbrant Letter misrepresent the applicable law, it also misrepresents Staff's position. The above statement was excerpted from an email thread between the applicant's team and County staff dated April 16, 2015. This office submitted a Public Records Act Request for all communications regarding this issue, which provided the full context and resolution of the issues raised in the April 16, 2015 email. Specifically, in a subsequent email dated August 3, 2015 from the same staff member follows up on the COC issue, and states the following:

> We understand that the operator would like to keep the project on hold until the results from the COC process are known.
>
> County staff has recently been able to dig a little deeper into the vesting issue, including some case law, and with that we've learned, don't believe that the COC outcome will be a determining factor in a future vesting determination. Even if the mining operation is located on a single legal lot, the applicant's supporting evidence for vesting is limited and may not stand up to legal challenge.

(Exhibit 2 to LOMC response to PC 2/18/18, Briggs Email to Wulbrant (emphasis added).)

Applicant Claim D: "the Final MND went beyond the necessary scope of review by reviewing both the impacts of the mining operation *and* the reclamation plan, when the reclamation plan is the only activity that should have been subject to review." (Wulbrant Letter to Planning Commission, 2/20/18, pp. 2-3.)

Here again, the Wulbrant Letter misstates the law. *Calvert v. County of Yuba* (2006) 145 Cal. App. 4th 613, is the authoritative case on the notice and hearing requirements at the local agency level applicable to vesting determinations under SMARA. While Petitioners in *Calvert* did not challenge the vested rights determination on CEQA grounds, the court discussed CEQA's applicability to the vesting determination as follows:

> County filed a notice that its vested rights determination as to Western – a ministerial determination, County maintained - was exempt from CEQA. However, Petitioners do not challenge the vested rights determination on CEQA grounds . . . In any event, as we shall see later, the vested rights determination here is not a ministerial determination under CEQA.

(*Calvert*, 145 Cal.App.4th at p. 621.) In the later discussion referred to in the above quote, the court draws parallels from CEQA case law to support its conclusion that the determination that whether or not a mine operator has a vested right to mine under SMARA involves the exercise of discretion and is not a ministerial determination. (Id., pp. 625-626.) Accordingly, the MND properly evaluated the vesting determination as well as the reclamation plan.

Applicant Claim E: "[b]ecause reclamation activities will occur in multiple steps on small portions of the subject property, all but eliminates any environmental effects whatsoever, visual or otherwise." (Wulbrant Letter to Planning Commission, 2/20/18, p. 3.)

Contrary to this assertion, the record contains substantial evidence that the Project, including the reclamation plan, may cause significant adverse environmental effects. In particular, the visual impact of the phased reclamation activity is well documented by the visual simulations, and described in the letter from Mr. LaBarge explaining how the Project will impact views from his property and nearby public roads. Moreover, while the visual simulations demonstrate that the Project will be visible from State Scenic Highway 1, Highway 246, Santa Rosa Road and Sweeney Road, it fails to disclose that the Project will also be visible from other important public recreation and historical areas including City's River Park and La Purisima Mission State Historical Park, and indeed from much of south-eastern Lompoc.

Applicant Claim F: The 1959 USGS Map that shows a "Quarry" on the property and was considered in the 1998 vesting determination for a different area somehow applies to this different area of the property as well. (Goldstein Bullet Point, 5/2/18).

Submitted as Attachment 2 to this letter is a response to a letter from Mr. Campbell of the GeoSolve that refutes reliance on the USGS map for this particular point. Counsel for LaBarge contacted the USGS Staff and confirmed the location of the symbol did not reflect a field determination in 1959 that mining was occurring in the 28.5 acre area in question.

II. CEQA ISSUES

1. CEQA Bars Use of a MND When a Fair Argument of a significant impact is supported by substantial evidence, including an expert's opinion or, for visual resources, lay opinion

"The foremost principle under CEQA is that the Legislature intended the act 'to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.'" *The Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 926. "The EIR requirement is the heart of CEQA." Cal. Code Regs., tit. 14[1], § 15003 (a). An EIR identifies the significant effects a Project will have on the environment, identifies alternatives to the project, and indicates the manner in which the significant effects can be mitigated or avoided. Public Resources Code § 21002.1(a). Its purpose is to "inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made", protecting the environment as well as informed self-government. *Citizens for Goleta Valley v. Board of Supervisors of Santa Barbara County* (1990) 52 Cal. 3d 553, 564.

CEQA "creates a low threshold requirement for initial preparation of an EIR and reflects a preference for resolving doubts in favor of environmental review when the question is whether any such review is warranted." *League for Protection of Oakland's Architectural and Historic Resources v. City of Oakland* (1997) 52 Cal. App. 4th 896, 904-905; Public Resources Code § 21151. A public agency must prepare an EIR where it exercises discretion in modifying or conditioning a project that *may* have a significant effect on the environment. Public Resources Code §§ 21080 and 21100(a); CEQA Guidelines § 15357; *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas et al.* (1994) 29 Cal.App.4th 1597, 1601; *Friends of Westwood, Inc. v. City of Los* Angeles (1987) 191 Cal. App. 3d 259, 269 ("'ministerial' is limited to those approvals which can be legally compelled without substantial modification or change.")

Significant effect on the environment' means a substantial, or potentially substantial, adverse change in the environment." Public Resources Code § 21068. Under CEQA, there is a "rebuttable presumption [that] any substantial, negative aesthetic effect is to be considered a significant environmental impact for CEQA purposes." *Quail Botanical,* 29 Cal.App.4th at 1604. Further "it is inherent in the meaning of the word 'aesthetic' that any substantial, negative effect of a project on view and other features of beauty could constitute a 'significant' environmental

[1] This code section referred to hereafter as the "CEQA Guidelines" or "Guidelines."

impact under CEQA." *Quail Botanical,* 29 Cal.App.4th at 1604. Impacts to private as well as public views may be significant under CEQA. *Ocean View Estates Homeowners Ass'n Inc. v. Montecito Water District* (2004) 116 Cal. App. 4th 396, 402.

A court reviews a public agency's compliance with CEQA for prejudicial abuse of discretion. Code of Civil Procedure § 1094.5(b); Pub. Resources Code, §§ 21168, 21168.5. Abuse of discretion is established where the agency fails to proceed in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence. Code of Civil Procedure § 1094.5(b). Judicial review of whether the agency has employed the correct procedures is determined de novo and the court must "scrupulously enforce all legislatively mandated CEQA requirements." *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.App.4th, 412, 435 (quoting *Citizens for Goleta Valley v. Board of Supervisors of Santa Barbara County* (1990) 52 Cal. 3d 553, 564). The agency's failure to comply with mandatory procedures is presumptively prejudicial and the decision must be set aside. *Schoen v. Department of Forestry & Fire Protection* (1997) 58 Cal.App.4th 556, 565.

Whether an agency abused its discretion in adopting a negative declaration is reviewed under the "fair argument" test. *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151. Pursuant to this test, an agency is required to prepare an EIR instead of a negative declaration if the record contains substantial evidence supporting a fair argument that the project *may* have a significant effect on the environment. *League for Protection,* 52 Cal. App. 4th at 904. This test does not require that the evidence received by the agency affirmatively prove that significant environmental impacts *will* occur, only that there is a *reasonably possibility* that they will occur. *Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 309. Moreover, "[i]f there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration." *Sundstrom,* 202 Cal. App. 3d at 310 (quoting *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002).

The "fair argument" test derives from Public Resources Code section 21151, which "creates a low threshold requirement for initial preparation of an EIR and reflects a preference for resolving doubts in favor of environmental review when the question is whether any such review is warranted." *League for Protection,* 52 Cal. App. 4th at 904-905. Whether the evidence in the record supports a fair argument of significant effects is a question of law and the Court does not defer to the agency's decision. *Sierra Club v. County of Sonoma* (1992) 6 Cal. App. 4th 1307, 1318 ("deference to the agency's determination is not appropriate and its decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.")

"Substantial evidence . . . means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." CEQA Guidelines, § 15384 (a). "Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion

supported by facts." *Id.* at subd. (b); Pub. Resources Code § 21080 (e)(1)-(2). The fact based opinions of agency staff and decisionmakers, stemming from experience in their respective fields, are considered substantial evidence for a fair argument. *Pocket Protectors,* 124 Cal.App.4th at 932; *Stanislaus Audubon Society,* 33 Cal. App. 4th at 155 (probable impacts recognized by the planning department and at least one member of the planning commission, based on professional opinion and consideration of other development projects, constituted substantial evidence supporting a fair argument that the project would have significant growth inducing impacts). Additionally, "[r]elevant personal observations of area residents on nontechnical subjects may qualify as substantial evidence for a fair argument." *Pocket Protectors,* 124 Cal. App. 4th at 928; *Ocean View Estates,* 116 Cal.App.4th at 402. Argument, speculation, unsubstantiated opinion or narrative, and clearly inaccurate or erroneous evidence does not constitute substantial evidence. Pub. Resources Code § 21080 (e)(1)-(2).

Additionally, "if substantial evidence supports a fair argument that the proposed project conflicts with policies [adopted for the purpose of avoiding or mitigating an environmental effect] this constitutes grounds for requiring an EIR." *Pocket Protectors,* 124 Cal.App.4th at 930; CEQA Guidelines, App. G, § IX (b).

Where a court determines that there is substantial evidence in the record that the project may have a significant effect on the environment, the agency's adoption of a negative declaration must be set aside because the agency abused its discretion in failing to proceed in the manner required by law. *League for Protection,* 52 Cal. App. 4th at 905; *Quail Botanical,* 29 Cal.App.4th at 1602. Moreover, while the absence of evidence in the record on a particular issue does not automatically give rise to a fair argument that a project may have a significant effect on the environment, an agency "should not be allowed to hide behind its own failure to gather relevant data" and "[d]eficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences." *Sundstrom,* 202 Cal. App. 3d at 311.

The Final MND includes numerous instances where the impact analysis was substantially modified but not recirculated, so the public has not had opportunity to comment. This applies not only to various direct impact areas (e.g., Cultural, Aesthetic) but to virtually all the cumulative impact sections. The draft MND contended improperly that the absence of significant project impacts allowed the conclusion that there could be no cumulative impacts. The Final MND added substantial text to each impact area to attempt to address cumulative impacts. None of the cumulative impact analysis has been subjected to public review.

A. The Record Contains Substantial Evidence Of A Fair Argument That Visual Impacts Are Potentially Significant and Applies an Incorrect Legal Standard Excluding Private Views When Public Views Are Also Impacted

The Final MND visual simulations demonstrate the Project's massive visual impacts from many public and private viewing locations. The final MND admits it only considers public views, despite the *Ocean View Estates* case, 116 Cal.App.4th at 402, that mandates the County to

consider private views when public views are also impacted by a project. In *Ocean View Estates*, the Ortega reservoir cover would be visible from a uphill hiking areas as well as homes in the area. The Montecito Water District's refusal to consider the private views in conjunction with public views as part of its visual impact assessment was legal error.

The Project will impact State scenic highway 1, the visually valuable Santa Rosa Road, State highway 246, Sweeney Road, and a number of residences on Sweeney Road, including the LaBarge property. The visual simulations demonstrate that the impact will be very negative (exposing, at a minimum, visually prominent white soils) and very prominent. It is well established that "[a]ny substantial negative effect of a project on view and other features of beauty could constitute a significant environmental impact under CEQA." *Ocean View Estates*, *supra*, 116 Cal.App.4th at 401, citing *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas, (*1994) 29 Cal.App.4th 1597, 1604. A rolling series of prominent visual scars on a scenic and widely visible ridge will clearly have a significant impact.

Appendix G to the CEQA Guidelines (Cal. Code Regs., tit. 14, § 15000 et seq.) recommends that the lead agency consider the following questions:

"... Would the project:

"a) Have a substantial adverse effect on a scenic vista?

"b) Substantially damage scenic resources, including, but not limited to, trees, rock outcroppings, and historic buildings within a state scenic highway?

"c) Substantially degrade the existing visual character or quality of the site and its surroundings?

In each case, the answer is yes. The substantial adverse effect on a scenic vista is evident from the visual simulations. Damage to rock outcroppings visible from a designated scenic highway is functionally a purpose of the project. The visual simulations demonstrate substantial degradation of the visual character and visual quality of the site and its surrounding. Although the visual simulations leave much to be desired, even their simple white swaths conclusively demonstrate the Project's significant impact to scenic resources.

The mitigation measure proposed in the MND is sequencing the project, which is essentially what is shown in the obviously impactful visual simulations. The mitigation measure purports to limit scar size to a rolling six acres for nearly 30 years and contends there is no potentially significant impact, which is simply untenable.

Mr. LaBarge and others previously submitted testimony concerning the Project's visual impacts to Sweeney Road residences to the 2014 MND, and again in a comment letter to the Planning Commission, that are part of the record before your Board.

B. The Record Contains Substantial Evidence Supporting a Fair Argument that the Project Is Inconsistent with the General Plan, and Accordingly Will Result In Significant Land Use Impacts

"[I]f substantial evidence supports a fair argument that the proposed project conflicts with policies [adopted for the purpose of avoiding or mitigating an environmental effect] this constitutes grounds for requiring an EIR." *Pocket Protectors,* 124 Cal.App.4th at 930; CEQA Guidelines, App. G, § IX (b). In *Pocket Protectors,* a case with significant factual parallels to the case at bar, comments by a City planner, the Planning Commission, two City Council members and an architect that the project did not comply with applicable policies constituted substantial evidence requiring an EIR. *Id.* at 931-932.

The Land Use Element of the County's General Plan articulates land use goals specific to the Lompoc Area that the Project clearly conflicts with. Specifically,

> "The natural backdrop of the area should be preserved through strict controls on hillside development."
>
> "The unique character of the area should be protected and enhanced with particular emphasis on protection of agricultural lands, grazing lands, and natural ameneties."
>
> "Changes in natural or re-established topography, vegetation, biological communities should be minimized in an attempt to avoid the destruction of natural habitats."
>
> "Development, construction, and roads cut in steep areas should be limited to ensure safety and protection of the terrain, as well as environmental and scenic values."

Land Use Element, Lompoc Area, pp. 93-94. The extensive alteration of the topography, including a ridgeline that forms the natural backdrop for much of south-eastern Lompoc including scenic vistas from important public recreation and historical areas including City's River Park and La Purisima Mission State Historical Park.

At the Planning Commission, Commissioner Brown – a long-standing member of the Commission with extensive experience with land use policy – could not find that the Project is consistent with these goals, and accordingly voted to deny the Project. The clear inconsistencies between the Project and these Lompoc-specific land use policy goals, supported by statements by Commissioner Brown, constitutes substantial evidence supporting a fair argument that the Project may significantly impact the environment, and accordingly an EIR must be prepared., *Pocket Protectors,* 124 Cal.App.4th at 930; CEQA Guidelines, App. G, § IX (b).

Additionally, the extensive grading involved with the Project result in inconsistencies with General Plan Hillside and Watershed Protection Policy 2, which provides:

> All developments shall be designed to fit the site topography, soils, geology, hydrology, and any other existing conditions and be oriented so that grading and other site preparation is kept to an absolute minimum. Natural features, landforms, and native vegetation, such as trees, shall be preserved to the maximum extent feasible. Areas of the site which are not suited to development because of known soil, geologic, flood, erosion or other hazards shall remain in open space.

The extensive grading and alteration of the natural features including prominent landforms proposed render the Project inconsistent with this General Plan policy, providing additional substantial evidence supporting a fair argument that the Project may significantly impact the environment. These inconsistencies further affect the Board's ability to make the required findings that the Project is consistent with the General Plan.

C. The Record Contains Substantial Evidence Of A Fair Argument That Direct and Cumulative Impacts to Cultural Resources Are Potentially Significant, In Part From Inadequate Site Investigation

The MND makes limited reference to the fact that the stone valued by the applicant was also historically and culturally significant to the Chumash, who used the area as a tool fabrication site. The MND inexplicably identifies it only as a habitat site. As noted by Dr. Johnson, the history of tool-making elevates the site's significance, both culturally and archaeologically.

Tragically, the cultural site has been destroyed. The record contains no information as to the date of the destruction other than "years ago." The wanton destruction of a site of substantial historical and cultural significance underscores the need for narrow exemptions from CUP and CEQA requirements from Vesting. It also represents a de facto significant cumulative project impact.

The MND's analysis remains inadequate. The MND admits that, due to the proximity of the cultural site destroyed by previous mining operations, "there is an increased likelihood of additional undiscovered sites and isolated artifacts being present in the surrounding area, simply because there was increased human activity." MND page 47. This establishes a need to conduct a comprehensive investigation of the entire parcel. However the MND continues: " However, such sites would likely be smaller, less complex, and less significant than the recorded prehistoric quarry site CA-SB-2066." Id. This analysis attempts to demean the significance of the undiscovered sites by comparison to the significance of the site that the operators already destroyed. It is conjecture that the potential associated sites are of less significance - the area has experienced limited cultural resources assessment in general, and the region is known to have been an area of relatively intense pre-historic population. The failure to conduct a comprehensive survey of the entire property for other sites, including phase 2 evaluations where warranted, relies on the absence of investigation as a basis to avoid further study, for the obvious fear that if resources are found, additional review is required. The lack of analysis of other cultural resources on site widens the scope of the fair argument of a significant project impact. *Sundstrom,* 202 Cal. App. 3d at 311.

This theme also displays the inadequacy of the supposed mitigation measure, which calls for no Chumash monitor or qualified archaeological oversight during earth movement, yet expects the heavy equipment operator to somehow identify culturally significant materials among topsoil and excavated rock, and to stop work. That is utterly ineffective and unrealistic as a mitigation measure. The site operator has already wantonly destroyed a known and mapped cultural site, it is ludicrous to expect the untrained equipment operators will notice cultural materials, recognize its potential significance, much less stop work when another site or other tool-making relics or other cultural materials are encountered.

C. Air Quality Impact Analysis Is Incorrect

The Final MND revised the air quality impact assessment through revisions to Table 5 in a nonsensical manner. While increased daily $PM_{2.5}$ emissions are projected to increase by 0.02 lbs/day from diesel exhaust, the total annual $PM_{2.5}$ emissions increase by 17.69 tons, or nearly 100 lbs/day assuming 365 day/yr operation or over 175 lbs/day at 200 days/yr operations. Table 5c. Conversely, PM_{10} from on-site fugitive dust increases by 45.75 lbs/day, which would total at least 8 tons/yr at 365 days/year, or 4.5 tons at 200 days/year of operations.[2] Table 5 reports 3.55 tons of increased emissions. The numbers do not appear to add up.

It appears, without explanation, that some of the air pollution emissions may be associated with "construction" of the project, and others with its operation. This distinction is unexplained and, if in fact used, is artificial as there is no structural construction from the project or other emissions-generating construction activities that are distinguishable or severable from the operational emissions associated with the removal of overburden and extraction of quarried rock. The Project Description does not refer to a construction or development period, however the Conditions require specific dust control activities during "construction" and "development" which appear to have no relevancy to the project.

It is significant that a potentially significant impact identified in the Draft MND from nuisance dust Is reclassified without explanation to an insignificant impact. P. 31. As noted, the dust control requirements appear to be haphazardly applied in the Conditions and there is a lack of clear symmetry between the Project Description, the environmental analysis, and the Conditions concerning air pollution control. While the MND states that the Reclamation Plan requires revegetation of recontoured areas within a week of grading, MM AQ 4 requires seeding within 4 weeks of grading. Other portions of the Project Description requires site cleanup and revegetation up to 3 years after operations cease.

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[2] The Project Description remains elusive and thus these calculations require conjecture. The number of days of operation per year is not specified. Neither does the Project Description in the MND specify the number of year the operator expects to operate the expanded mine if approved. The visual simulations infer the expanded mining would be completed by 2045, however that end date is not part of the Project Description.

D. Cumulative Impacts Are Not Adequately Addressed

The final MND includes extensive revisions to each cumulative impact assessment topic. In some cases, repeating the Draft MND mistake by asserting the absence of a direct project impact establishes the absence of a cumulative impact (cultural, biological, geological, land use, noise, traffic, water resources). In other cases, a whole new impact analysis is added (aesthetics, agriculture, hazardous materials) For air quality, it is recognized (for the first time) that the Project's emissions could be cumulatively considerable, but contends that the inclusion of negative growth factors in the emissions inventory in the 2013 Ozone Plan somehow avoids a cumulative impact. This ignores the reality that the 2013 Ozone Plan has proven to be inadequate to protect local air quality and the County now exceeds and violates the state ozone standard. It is improper to rely on such a defective plan as the sole means to avoid recognizing a cumulative project impact to regional air quality.

The cumulative cultural resources analysis is also deeply flawed. It assumes that "[s]ince the project would not significantly impact cultural resources onsite, it would not have a cumulatively considerable effect on the County's cultural resources." In fact, the MND itself admitted that there may be other cultural sites present, although they are expected to be less significant than CA-SB-2066. the remnants of CA-SB-2066 remain in and on the redistributed soils in and around the project site, leading to a high probability of further disturbance to these resources. The cumulative impact assessment fails in its fundamental purpose in assessing other "closely-related past, present and reasonably foreseeable probable future projects". Guidelines § 15355(b). Since it was an earlier phase of this very same project that caused the undeniably significant impact of the destruction of the site, the re-impacting of the distributed remains of that site would undeniably cause cumulative impacts.

The tool-making site has obvious historical significance as a historical landscape, yet the MND contends summarily no historical structures are involved and conducts no further analysis.

The MND fails to fully assess the ongoing impacts of the mining operation in conjunction with the impacts of the reclamation plan, even though the cumulative impacts of the two phases of the project are patently related and suitable for a cumulative impact analysis.

For these reasons, the MND is inadequate and should not be adopted. An EIR is required.

The project analysis documents lack symmetry in other respects. For example, while Condition 2 requires PDD review and approval of all Tree Protection Plans, Condition 10 requires only that the tree protection and replacement requirements be printed on project plans. A simple 3 year establishment period is all that is required, with no review of success and continuing obligations. This condition is ineffective at mitigating impacts to oak trees.

We therefore urge the Board to deny the requested Vesting Determination and adopt the findings for denial. Otherwise, a full EIR is needed before any further consideration could proceed.

Sincerely,

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