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5 POINT SAN PEDRO ROAD COALITION

6
7 SUPERIOR COURT OF CALIFORNIA
8 COUNTY OF MARIN

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10 POINT SAN PEDRO ROAD COALITION, a
California Corporation, JONATHAN
11 FRIEMAN, JAN BRICE, and MARIO
DIPALMA, Individually, and on Behalf of All
12 Those Similarly Situated,

13 Plaintiffs,

14 v.

15 SAN RAFAEL ROCK QUARRY, INC., and
16 DOES 1 - 500,

17 Defendants.

Case No. CV014584
(Consolidated with No. CV 014610, No
CV014602 and No. CV014618)

STATEMENT OF DECISION

Hearing Date: January 21, 2004
Time: 10:00 a.m.
Dept. H
Judge: Hon. John A. Sutro, Jr.

18 AND RELATED COORDINATED ACTIONS

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20 This is the Court's Statement of Decision arising from the trial of the first set of bifurcated
21 issues in these consolidated actions that was held on July 17, 18, 21, 24 and 25, 2003. The
22 parties participating in the trial included plaintiffs State of California, County of Marin, the Point
23 San Pedro Road Coalition, Amanda Metcalf and defendant San Rafael Rock Quarry.

24 1. Factual Chronology-Operation of the Quarry.
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1 In the 1890s, the McNear family acquired property along Point San Pedro Road in San
2 Rafael, California and started operating a brickyard. In the 1920s, quarrying of hard rock
3 commenced. In 1939, Basalt Rock Company, Inc. ("Basalt") acquired a lease to operate on part
4 of the McNear property. In 1941, the McNear property was zoned M-2, A-2, heavy industrial,
5 limited agricultural, pursuant to which mining was a legal use permitted as a matter of right.

6 In 1971, the County of Marin added Chapter 23.06, "Regulation and Control of Surface
7 Mining and Quarrying Operations," to Title 23, the Natural Resources section of the Marin
8 County Code. Section 23.06.030 required a permit to operate a mine. Section 23.06.010,
9 however, exempted existing mines from the permit requirement, but did not exempt them from
10 the requirement of obtaining approval of a Reclamation Plan. In 1971, Dillingham Corporation,
11 which was then the parent company of Basalt Rock Products Company, acquired the property
12 from the McNears, consisting of approximately 285 acres of land and 411 acres of tidelots (the
13 "quarry property"). Pursuant to Marin County Code Section 23.06.100, on February 23, 1972,
14 Basalt, who was, at that time, operating a quarry on the McNear property, applied for an
15 exemption as an existing operator. Its application included a photo map showing the portion of
16 the McNear property within the scope of the application. On April 10, 1972, the County acted
17 on the application made by Basalt. It approved the application, finding the map to be reasonable
18 and "allow[ing] the existing quarry to continue as a legal use."
19

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21 On January 1, 1976, the Surface Mining and Reclamation Act ("SMARA"), Public
22 Resources Code, Division 2, Chapter 9, Section 2710 et seq., took effect. As a result, Basalt was
23 required to and did submit a Reclamation Plan in December, 1976, with respect to which the
24 County took no action. In December 1980, the City of San Rafael adopted the Peacock Gap
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1 Neighborhood Plan which included the quarry property, even though it was in an unincorporated
2 area subject to County jurisdiction.

3 In August, 1981, the County adopted the Peacock Gap Neighborhood Plan into the
4 County General Plan to govern land use on unincorporated areas within the Plan which, of
5 course, included the quarry property. On February 1, 1982, Basalt submitted an Amended
6 Reclamation Plan that included the 1976 Reclamation Plan with modifications. On November 9,
7 1982, the County rezoned a series of parcels owned by Basalt, including the parcel upon which
8 the quarry is located, from M-2, heavy industrial, to residential commercial multiple planned.
9 The rezoning was necessary to allow the eventual implementation of Basalt's Amended
10 Reclamation Plan. As a result of the rezoning, quarrying was no longer a permitted use and
11 became a legal non-conforming use on the quarry property.
12

13 On December 6, 1982, the County approved Basalt's Amended Reclamation Plan with
14 conditions. While defendant San Rafael Rock Quarry provided the December 6, 1982 minutes of
15 the County Planning Commission, which reflected a motion to approve the plan, it only provided
16 the first page. The first page ended with a motion to approve the plan, "with the following
17 conditions:" and that is where it left off. However, there is some evidence, at least of
18 proposed conditions in the record, which tie in with the obligations that both the County of
19 Marin and Basalt had under SMARA and the Marin County Code.
20

21 In a letter dated December 1, 1982, Mike Sadjadi, who was an Assistant Land
22 Development Engineer for the County Department of Public Works, wrote to the Planning
23 Commission as follows, with respect to the submission of the 1982 Amended Reclamation Plan
24 for consideration by the Planning Commission:
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1 "In recognition of the obvious interests of the City of San Rafael, the amended
2 Reclamation Plan has enjoyed extensive review by the City's Planning Department staff
3 and has been presented to both the Planning Commission and the City Council. As a
4 result of these reviews, the City has made the following recommendations: 'C. The
5 County condition its approval of the Reclamation Plan to require ongoing monitoring of
6 quarry operations for conformity to said plan and to require future specifications for
7 leaving the land in an economically feasible reclaimable condition prior to completion of
8 quarrying operations.' As a result of our own reviews and subsequent discussions with
9 both City staff and the applicants, we recommend the following actions by your
10 Commission: 2. Approve the amended Reclamation Plan with the following conditions:
11 A. The applicant shall annually provide a topographic map and accompanying
12 report to the Department of Public Works for monitoring operation conformance
13 with the proposed Reclamation Plan.
14 B. "Three years prior to completion of quarrying operations, specific cleanup
15 measures to be undertaken prior to completion of mining shall be defined by the
16 applicant, County, and the City of San Rafael staff. Measures shall include a
17 detailed landscape plan, with procedures and specifications for revegetation of
18 selected areas, submitted by the Department of Public Works.
19 C. The Reclamation Plan shall, as agreed to by the operator, incorporate all
20 mitigation measures listed in the environmental assessment."
21

22 In 1986, defendant, San Rafael Rock Quarry, acquired the quarry property from Basalt.

23 2. The Issues to be Determined at this Time.

24 Plaintiffs State of California, the County of Marin, the Point San Pedro Road Coalition
25 and Amanda Metcalf have filed complaints in this matter alleging that defendant is operating
26 beyond the scope of its use of the property as of November 9, 1982 when the quarry property
was rezoned and the use became non-conforming, and that its operations are creating a nuisance
that should be abated. They seek injunctive relief and damages. Defendant San Rafael Rock
Quarry asserts that it has a vested right to carry on its business and that it is operating within the
scope of that right and denies that plaintiffs are entitled to the relief they seek.

Upon stipulation of the aforementioned parties, the Court ordered bifurcation of the trial
in this matter with the "scope of use" issues to be tried before the nuisance issues. Trial on the
scope of use issues took place in July 2003, and that part of the matter is the subject of this

1 Statement of Decision. The issues to be decided are as follows: 1) what was the scope of
2 defendant's use of the properties as of November 9, 1982; and 2) is defendant operating beyond
3 the scope of that use.

4 Before turning to a review of the evidence adduced at trial on these issues, it is helpful
5 first to review the legal context in which this matter must be considered. As earlier stated,
6 quarrying became a non-conforming use on the quarry property on November 9, 1982. "A non-
7 conforming use is one that existed lawfully before a zoning restriction became effective and that
8 is not in conformity with the ordinance when it continues thereafter." Hansen Brothers
9 Enterprises, Inc., vs. Board of Supervisors (1996) 12 Cal.4th 533, 540, fn. 1.

11 Marin County Code Section 22.78.010 provides that "no nonconforming use shall be
12 enlarged or increased, nor shall any nonconforming use be extended to occupy a greater area of
13 land than that occupied by the use at the time of the adoption of this title, nor shall any
14 nonconforming use be moved in whole or in part to any other portion of the lot or parcel of land
15 occupied by the nonconforming use at the time of the adoption of the ordinance codified in this
16 title." This ordinance is very similar to those enacted in numerous other local jurisdictions here
17 in California and throughout the country. Were it to be applied literally to a mining-quarrying
18 operation, such an operation could not continue in business as a non-conforming use because the
19 land is the asset that is being consumed and not just the place upon which the business is located.
20 To deny the owner the right to continue to operate would likely constitute a taking of property
21 for which compensation would have to be paid. Accordingly, the courts developed an exception
22 to the rule against enlarged or increased use in the form of what is called the Diminishing Asset
23 Doctrine.
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1 In the Hansen Brothers case, the California Supreme Court held that the Diminishing
2 Asset Doctrine applied to a mining operation that is carried on as a legal non-conforming use
3 under a zoning ordinance that excludes mining as a permissible use of the property. The Hansen
4 Brothers case provides the framework within which the facts that I find here must be applied.

5 "The lower courts and the parties all recognize the constitutional principles under which
6 Hansen Brothers claims a vested right to mine the hillside areas of its property. Adoption
7 of a zoning ordinance which is not arbitrary and does not unduly restrict the use of
8 private property is a permissible exercise of the police power and does not violate the
9 taking clause of the Fifth Amendment of the United States Constitution and comparable
10 provisions of the California Constitution, even when the law restricts an existing use of
11 the affected property. A zoning ordinance or land-use regulation which operates
12 prospectively, and denies the owner the opportunity to exploit an interest in the property
13 that the owner believed would be available for future development, or diminishes the
14 value of the property, is not invalid and does not bring about a compensable taking unless
15 all beneficial use of the property is denied. However, if the law effects an unreasonable,
16 oppressive or unwarranted interference with an existing use or a planned use for which a
17 substantial investment in development costs has been made, the ordinance may be invalid
18 as applied to that property unless compensation is paid. Zoning ordinances and other
19 land-use regulations customarily exempt existing uses to avoid questions as to the
20 constitutionality of their application to those uses. 'The rights of users of property as
21 those rights existed at the time of the adoption of the zoning ordinance are well
22 recognized and have always been protected. Accordingly, a provision which exempts
23 existing non-conforming uses 'is ordinarily included in zoning ordinances because of the
24 hardship and doubtful constitutionality of the discontinuation of non-conforming uses.'
25 The exemption may either exempt an existing use altogether or allow a limited period of
26 continued operation adequate for amortization of the owners' investment in the particular
use. When continuance of an existing use is permitted by a zoning ordinance, the
continued nonconforming use must be similar to the use existing at the time the zoning
ordinance became effective. Intensification or expansion of the existing nonconforming
use, or moving the operation to another location on the property is not permitted. In
determining whether the nonconforming use was the same before and after the passing of
a zoning ordinance, each case must stand on its own facts." Hansen Brothers, supra, at
551-552.

"In general, the state has the same power to prohibit the extraction or removal of natural
products from the land as it does to prohibit other uses." Id. at 553.

"Unlike other nonconforming uses of the property which operate within an existing
structure or boundary, mining uses anticipate extension of mining into other areas of the
property that were not being exploited at the time the zoning change caused the use to be
nonconforming. The question thus arises whether this extension is a prohibited

1 expansion of a nonconforming use into another area of the property. In those
2 jurisdictions which have considered the question, the answer is a qualified 'no' under the
3 'diminishing asset' doctrine, an exception to the rule banning expansion of a
4 nonconforming use that is specific to mining enterprises. When a mining or quarrying
5 operation is a lawful nonconforming use, progression of the mining or quarrying activity
6 into other areas of the property is not necessarily a prohibited expansion or change of
7 location if the nonconforming use. When there is objective evidence of the owner's intent
8 to expand a mining operation, and that intent existed at the time of the zoning change, the
9 use may expand into the contemplated area." Id.

10 It is because of the unique realities of gravel mining that most courts which have
11 addressed the particular issue involved herein have recognized that quarrying constitutes
12 the use of land as a 'diminishing asset.' Consequently, these courts have been nearly
13 unanimous as holding that quarrying, a nonconforming use, cannot be limited to the land
14 actually excavated at the time of the enactment of the restrictive ordinance because to do
15 so would, in effect, deprive the landowner of the use of the property as a quarry." Id. at
16 554.

17 "The New Hampshire Supreme Court recognized that application of the normal
18 restriction on expansion of a nonconforming use to a gravel pit would be a problem
19 'because such use consumes the land and can only continue if allowed to expand', but
20 held that restriction of future expansion to a specified percentage of the area and to a
21 depth no greater than that already excavated was reasonable." Id. at 555.

22 In Town of Wolfeboro Planning Board v. Smith, (1989) 131 N.H. 449, construing the
23 statute that permitted continuance of excavation as a nonconforming use, the court held
24 that the 'land area which was used' for that purpose had to have been 'clearly designated
25 as an area for future excavation by an objective manifestation of the intent of the
26 excavator to continue an operation onto that particular land area.' The court summarized
the applicable rule as follows: 'In conclusion, we hold that a party who desires to
continue excavation operations ... must meet a three-pronged test: First, he must prove
that the excavation activities were actively being pursued when the law became effective;
second, he must prove that the area that he desires to excavate was clearly intended to be
excavated, as measured by objective manifestations and not by subjective intent; and
third, he must prove that the continued operations do not, and/or will not, have a
substantially different and adverse impact on the neighborhood.'" Id. at 556.

While there are other issues concerning increase and intensification of use in this matter,
the principal issues with regard to the application of the Diminishing Asset Doctrine in this case
involve the dimensions of the perimeter, or footprint, of the main quarry pit and the depth to
which that pit may be quarried and the duration of quarrying operations on the property.

1 In brief, plaintiffs contend, based upon statements by defendant's predecessor in interest,
2 Basalt Rock Products Company, that Basalt objectively manifested an intent in the 1982
3 Amended Reclamation Plan approved by Marin County on November 9, 1982, to limit quarrying
4 operations to 200 feet below mean sea level, to quarry within a certain footprint and to cease
5 quarry operations by 1993 or thereabout. Defendant contends that Basalt objectively manifested
6 intent to quarry the resource to depletion, however long that might take, and that it has a vested
7 right to do so. Defendant asserts three legal theories in support of its case that may be disposed
8 of in short order.
9

10 First, defendant argues that the diminishing asset doctrine applies only to lateral
11 expansion of mining operations and not to depth or duration thereof. There is no legal support
12 for this argument. In fact, the court in Flanagan v. Town of Hollis, (1972) 112 N.H. 222 [293
13 A.2d 328, 329], a case from New Hampshire, limited depth. In Flanagan, which was cited in
14 Hansen Brothers, the Court upheld the town's imposition of a limit on future quarrying
15 operations to "an increase in area of 25 percent and to an increase in depth throughout the whole
16 area to the deepest point of excavation at the time of the ordinance." The Flanagan court also
17 stated "[G]iven a reasonable public purpose, a town may require a non-conforming use to be
18 discontinued within a reasonable time and that there is no absolute right to continue a non-
19 conforming use to eternity."
20

21 In Fred McDowell Inc. v. Board of Adjustment of the Township of Wall, (2000) 334 N.J.
22 Super. 201, the court stated,
23

24 "[I]n setting limits to the expansion of a prior non-conforming use to extract a
25 diminishing asset, thereby balancing the inherent tension between the rule and the
26 exception and between the legitimate interests of the municipality and those of the
property owner, we deem it reasonable for a zoning board to consider, without limitation,
such factors as the size of the lot or tract for which the prior non-conforming use is

1 claimed; the rate of extraction, as well as the rate of expansion, as of the date the
2 ordinance was enacted; the projected exhaustion of the asset at the present rate of
3 extraction; evidence that the owner manifested its intention to expand before the zoning
4 change; and the nature of the development of surrounding properties and the community
5 since the enactment of the zoning ordinance that rendered the prior use non-conforming.
6 Several states have resolved the conflicting interest of the municipality and the property
7 owner by amortization of the prior non-conforming use. Either by statutes or case law,
8 those states have permitted municipalities to limit the future life of a prior non-
9 conforming use, so long as the permitted life is rationally related to the property owner's
10 investment expectations."

11 Second, defendant argues that the scope of its vested right to quarry should be determined
12 as of 1971, because that is when quarrying first became illegal. Defendant goes on to argue that
13 its right was "frozen" as of that time, so that any evidence of Basalt's intent expressed subsequent
14 thereto is irrelevant and should not be considered by the Court. There is no merit to this
15 argument. Contrary to defendant's assertion, the use permit issued in 1972 did not reflect Marin
16 County's determination that the quarry was a non-conforming use; in fact, it expressly allowed
17 the quarry to continue as a legal use under Marin County Code Section 23.06.100. It was not
18 until the November 9, 1982, rezoning of the property that quarrying became a non-conforming
19 use, a rezoning that occurred with Basalt's approval and to its benefit in the long-term. To
20 subscribe to defendant's argument would be to negate Marin County's constitutionally valid
21 exercise of its police powers under the zoning laws.

22 Third, defendant argues that intent must be determined by the so-called "physical factors
23 comparison approach" rather than the "intent based upon statements approach" they allege is
24 taken by the plaintiffs. According to defendant, courts have universally relied exclusively upon
25 tangible physical factors in determining the scope of vested rights. They do not look to intent,
26 either subjective or objective, but to what was actually, physically occurring as of what
defendant calls the "establishment date," that is, the date the use became illegal. The advantage

1 of such an approach, according to defendant, is that it focuses on that which is objective and
2 verifiable, as opposed to elusive indications of intent. This argument is not supported by the
3 cases or common sense and the Court rejects it. For example, in Town of West Greenwich vs.
4 A. Cardi Realty Associates, (R.I. 2000) 786 A.2d 354, the court said, "[S]ignificantly, the
5 landowner's intention at the time the zoning ordinance was enacted, to devote all or a portion of a
6 parcel to earth removal, is the controlling factor, and is not measured by the amount of activity at
7 that precise moment."
8

9 I want to make one more final comment with regard to the legal context in which the
10 Court must consider the evidence and that concerns the policy of zoning laws to eliminate non-
11 conforming uses. In Hansen Brothers, the California Supreme Court said "The ultimate purpose
12 of zoning is ... to reduce all non-conforming uses within the zone to conformity as speedily as is
13 consistent with proper safeguards for the interests of those affected. We have recognized that,
14 given this purpose, courts should follow a strict policy against extension or expansion of those
15 uses." Hansen Brothers, *supra*, 12 Cal.4th at 568. In Township of Fairfield vs. Likanchuk's, Inc.,
16 (N.J. App. 1994) 644 A.2d 121, the Court said:
17

18 "It is settled that use of land lawfully existing prior to the enactment of a zoning
19 ordinance may be continued even though it does not comply with the use requirements of
20 the new enactment. However, because non-conforming uses are inconsistent with the
21 objectives of uniform zoning, the policy of the law is to restrict, rather than to expand,
22 such uses. Accordingly, courts have generally required that non-conforming uses should
23 be reduced to conformity as quickly as is compatible with justice. Courts have uniformly
24 held that, because non-conforming uses were generally discordant to their surroundings,
25 it was the fervent hope that they would in time wither and die and be replaced by
26 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."

1 3. The Issue of the Scope of Use of the Property as of November 9, 1982.

2 A. Quarrying.

3 For purposes of determining the scope of Basalt's use as of November 1982, the quarry
4 property may be divided into quadrants. With regard to quarrying, the evidence is clear that
5 quarrying was confined to the southeast and southwest quadrants and that there was no objective
6 manifestation of intent by Basalt to mine on any other part of the quarry property. See 1982
7 Amended Reclamation Plan, Fig. 1 (depicting the four quadrants). The Amended Reclamation
8 Plan submitted by Basalt in 1982 and approved by the County in December 1982 stated:

9
10 "In the period since 1976, quarrying and brick-making operations have continued on the
11 site at approximately the same rate and level of magnitude as in previous years.
12 Throughout, Basalt Products has continued to work toward the final contours reflected in
13 the Reclamation Plan submitted in 1976, with the majority of their quarrying operation
14 being concentrated in the southeast quadrant of the property." 1982 Amended
15 Reclamation Plan ("ARP") at page 2.

16 The southeast quadrant is the area in which the main pit is located. The Amended Reclamation
17 Plan goes on to state:

18 "The information regarding the history of the operation, the acreage and confines of the
19 property, the Use Permit under which quarrying continues, the present day uses on the
20 property, and the topography of the property which was submitted in the original
21 Reclamation Plan is still correct and would apply to the amended proposal presented
22 here." Id.

23 The original Reclamation Plan submitted by Basalt in 1976 stated:

24 "History: McNears Quarry has been operated since before World War II (almost 40
25 years) for the purpose of producing bank protection stone (riprap), crushed rock products
26 and asphaltic concrete." 1976 Reclamation Plan ("RP") at page 1. Present day uses: The
locations of ongoing uses of the property are shown on the attached 'Existing Use Areas'
map. The main land mass is divided into the following sectors: The Main Quarry
consists of two areas:

 a. The main quarry bowl from which rock has been mined for the past 40 years.
Along the southerly rim of the main quarry bowl are situated the stock piles, conveyers
and crushing and screening plants that serve the operation, the asphaltic concrete plants,

1 and the deepwater loading facility used for loading riprap and rock products onto barges
2 for long distance shipment.

3 b. The South Hill Resource Area under which lies the major hard rock resource to
4 serve future demand. The South Hill has been heavily prospected and excavated in the
5 past. It is Basalt Rock Company's intent to continue mining on the South Hill Resource
6 Area, though certain areas will be left intact to preserve the natural features and scenic
7 qualities of the property as described in the Reclamation Plan section of this report."
8 Reclamation Plan at page 2.

9 Regarding plants serving the quarry operation, which was limited to those two areas in
10 the southeast and southwest quadrants of the quarry property, Horace David McGee, who was
11 Financial Vice-President of Basalt from 1976 to 1984, testified that, as of 1982, in addition to the
12 plants to which reference has just been made, Basalt had committed to building a plant for the
13 Southwest Ocean Outfall Project ("SWOOP"). The SWOOP plant was initially built to produce
14 three or four types of specified rock that the old rock crushing plant could not produce to the
15 required specifications or in the quantities needed. It cost \$2 million to construct, so that Basalt
16 did not plan to build it for one project and then shut it down. It was a long-term capital
17 investment, and once SWOOP was over, they could use the plant to produce different kinds of
18 rock. With respect to the volume of rock produced by the quarry and truck traffic related thereto,
19 which was an important issue in this matter, the evidence shows that between 692,000 and
20 1,473,000 tons of aggregate and asphaltic concrete were produced in the years 1979 through
21 1982, and that further, those two amounts were broken down into 557,000 tons of aggregate and
22 135,000 tons of asphaltic concrete for the 692,000 figure; and as to the 1,473,000 ton figure:
23 1,399,000 tons of aggregate and 74,000 tons of asphaltic concrete.

24 B. Truck Trips.

25 The mined mineral was transported out of the quarry by barge and truck. The amount
26 transported by truck is significant because of the impact of truck traffic on the residential

1 neighborhoods adjacent to the quarry. In an addendum to the 1982 Amended Reclamation Plan,
2 Norman Gilroy, who prepared both the 1976 and 1982 Reclamation Plans, stated: "The vast
3 majority of the material quarried at the property is shipped out by deepwater barge thereby
4 minimizing the kind of truck traffic which might normally be associated with an operation of this
5 size" and that "while minor fluctuations will occur, depending on local construction activity, the
6 average level of truck traffic flowing from McNears property along San Pedro Road is expected
7 to remain the same as it is now. No increase in truck traffic is expected." Plaintiffs Exhibit 10,
8 May 12, 1982 letter from Mr. Gilroy to Marin County.
9

10 At trial, Mr. Gilroy testified that the amount of product transported by truck could have
11 been as little as 25 percent. He noted, however, that the high volume shipped by barge in the
12 1980s was due to a project that required barge shipping for a five-mile underwater pipeline, the
13 SWOOP project, and during those years, there was a high volume of levee repair work that also
14 required shipping by barge. His testimony in that regard, however, is contradicted by
15 information in a Merrill Lynch report prepared for Basalt that indicated SWOOP shipments did
16 not begin until May 1984. Gilroy also testified that levee rebuilding was a major activity in the
17 1970s and 1980s, and not, therefore, just in 1982.
18

19 In estimating the amount of truck traffic in and out of the quarry as of 1982, a Marin
20 County Planning Commission Staff Report prepared in 2000 utilized an average truck load of 20
21 tons and a total of 240 working days a year. Defendant's Ex. QQQQ. Applying these
22 assumptions, the amount of trips per day in and out of the quarry in 1982 was between 153 and
23 307, 153 trips if truck traffic represented 25 percent of the shipments out, and 307 trips if one
24 assumes that truck traffic represented 50 percent of the shipments out of the quarry.
25

26 C. Rock Washing Operations.

1 Mr. Gilroy testified that Basalt always had wash plants. There were two
2 processing plants on the property as of 1982 and washing is a part of the process, not a separate
3 plant. Mr. McGee testified that as of 1982, the quarry conducted washing operations and also
4 that it is a standard part of the operation for certain specifications.

5 The washing machine was part of the secondary crushing plant. That plant handles rocks
6 that had been crushed down to smaller sizes. It was not necessary to wash large rock that was
7 used for riprap and that type of thing. There is evidence that in 2002 defendant built a
8 "new" wash plant, however, in answers to the Coalition's interrogatories, defendant stated that
9 the so-called new plant was mostly a reconfiguration of the original SWOOP plant. The
10 evidence also showed that as of 1982, Basalt was not selling the following washed products that
11 defendant now sells: One inch by four inch concrete aggregate; number four by number eight;
12 C33 sand; number 4A ballast; and Linatex fines.
13

14 D. Blasting and Other Impacts.

15 As to the question of blasting and other noise associated with quarrying operations, and
16 lights and dust, a quarrying business cannot be conducted without a certain amount of blasting,
17 the operation of noisy equipment, the use of lights and the creation of dust. The level of these
18 annoyances to neighbors of the quarry depends upon the level of the activity in the quarry.
19 The greater the output and hours of the operation, the greater the impact will be upon the
20 neighbors.
21

22 While these are perhaps more properly characterized as nuisance rather than scope of use
23 issues, increase of or intensification of the non-conforming use is a "scope of use" issue.
24 As the Supreme Court said in Hansen Brothers, quoting the third prong of the Wolfeboro test, the
25 quarry operator, "must prove that the continuing operations do not, and/or will not, have a
26

1 substantially different and adverse impact on the neighborhood." Hansen Brothers at 556. The
2 evidence shows that Basalt received sporadic complaints about blasting when it was operating
3 the quarry. Other than that, blasting does not appear particularly to have been a problem for
4 Basalt.

5 On the other hand, the trial testimony of Ms. Metcalf in particular indicates that blasting
6 is now a major problem for neighbors of the quarry. There is nothing in the evidence to show
7 that significantly more blasting is occurring on the property now as opposed to what was being
8 done in 1982. Thus, blasting is principally a nuisance issue, which is left for later in the case.
9 To the extent that current problems with blasting result from a substantial increase in quarry
10 output, the problem is a scope-of-use issue that may be resolved by limiting output to 1982
11 levels.
12

13 E. Importation of Materials.

14 Defendant established that as of 1982, Basalt imported sand for use in the production of
15 asphaltic concrete. It concedes, however, that there is no evidence of the importation of gravel
16 and materials for recycling as of November 1982, nor is there any evidence of the importation of
17 dredged materials as of that time.
18

19 F. Office Buildings.

20 While there were office buildings and employee housing units on the property as
21 of 1982, defendant admits that it has placed new buildings and other structures on the property
22 since then and has offered, in a letter to Marin County to remove some of them. See Defendant's
23 Ex. WWWW. There has been an objection by the Coalition to the admission of that evidence.
24 That objection is overruled and I am admitting Exhibit WWWW in evidence for purposes of this
25 decision. According to that letter, the square footage of the buildings that defendant seeks to
26

1 retain on the property exceeds that of the buildings that were located on the property as of
2 November 1982, and my recollection is that it is by about 4,000 square feet. And defendant
3 claims that the space is needed for current operations and does not represent a substantial change
4 in the business from that in 1982.

5 G. Northwest Quadrant or Brick Plant Lease Area.

6 As stated in the 1976 Reclamation Plan at page 2:

7
8 "The Brick Plant Lease Area is located on the westerly side of the main land mass of the
9 property, and has on it the brick manufacturing facilities of the McNears Brick Company
10 and the block manufacturing and marketing facilities of McNears Block Company and
11 Marin Expanded Aggregate Company. Facilities include kilns and operating yards,
12 storage and stockpiling facilities, wash ponds, and offices and a number of houses for
13 personnel."

14 That area of the property also includes the marsh area, which "comprises approximately
15 35 acres at the northwesterly corner of the main land mass." "[T]he marsh area retains
16 some of its potential as a natural resource area. It is not scheduled for other uses at
17 present and is designated as an area to be preserved in the attached Reclamation Plan."
18 1976 AR at page 3.

19 H. Northeast Quadrant or Brick Resource Area.

20 Finally, the northeast quadrant of the property contains the Brick Resource Area according to the
21 1976 Reclamation Plan:

22 "The Brick Resource Area is in the area in the northeasterly corner of the property from
23 which the clay and shale materials necessary to the brick manufacturing operation are
24 mined. Suitable materials are prospected as the need arises and the material is then
25 allowed to air-slack before being transported by truck along the east-west haul road at the
26 center of the property for use as a raw material in the brick making process." Id.

This area is of significance in the present proceeding because of its current use as a dumping
ground by defendant for large amounts of overburden and other waste. Defendant admitted in
answers to interrogatories that this area was not used for the disposal of overburden or other
waste material until well into the 1990s. Mr. Gilroy's testimony at trial supports this admission.

1 This summary concludes the Court's discussion with respect to the scope of the use of the
2 property as of November 9, 1982. The Court now turns to the issues raised by statements of
3 intent made by Basalt in the 1976 and 1982 Reclamation Plans, which are critical issues in the
4 proceeding at this time because plaintiffs base their contentions that defendant is operating
5 beyond the scope of its non-conforming use on statements made by Basalt representatives in and
6 concerning the 1976 Reclamation Plan and 1982 Amended Reclamation Plan about the extent
7 and duration of quarrying activities on the property.
8

9 Plaintiffs contend that these statements constitute objective manifestations of Basalt's
10 intent that it would not quarry the main pit deeper than 200 feet below mean sea level or beyond
11 the perimeters or footprint of the main pit set forth in the 1982 Amended Reclamation Plan and
12 that quarrying operations would be completed by the mid 1990s. There can be no dispute on the
13 evidence in this case that the quarry continues to operate now in 2004, years beyond the dates
14 estimated in the 1982 Amended Reclamation Plan for cessation of quarry activities on the
15 property, that the depth of the quarry is now at least 253 feet below mean sea level and that the
16 parameters or footprint set forth in the 1982 Amended Reclamation Plan have been exceeded.
17 There is also evidence that defendant has failed to adhere to the bench pattern set forth in the
18 1982 Amended Reclamation Plan and that the manner in which defendant has quarried the pit
19 raises serious slope stability concerns.
20

21 The statements of Basalt's intent upon which plaintiffs rely cannot properly be evaluated
22 without considering the context in which they were made. This requires in turn a review of the
23 provisions of the Surface Mining and Reclamation Act, or SMARA, and an understanding of the
24 nature of the mining business.
25
26

1 First, as to the provisions of SMARA, Section 2770(a) of the Public Resources Code,
2 provides: "No person shall conduct surface mining operations unless a permit is obtained
3 from, a Reclamation Plan has been submitted to and approved by and financial assurances for
4 reclamation have been approved by, the lead agency for operation pursuant to this article."

5 Section 2770(b) provides: "Any person with an existing surface mining operation who has
6 vested rights pursuant to Section 2776 and who does not have an approved reclamation plan,
7 shall submit a reclamation plan to the lead agency." And the lead agency, as defined by
8 SMARA, would be the County of Marin or whatever authority within the County as designated
9 by the Board of Supervisors to be responsible for implementing SMARA.
10

11 SMARA Section 2772(a) and (c)(3) and (4) provide as follows: "(a) The reclamation
12 plan shall be filed with the lead agency, on a form provided by the lead agency, by any person
13 who owns...any mined lands and who plans to conduct surface mining operations on the
14 lands....(c) The reclamation plan shall include all of the following information and
15 documents:...

16
17 (3) the proposed dates for the initiation and termination of surface mining operation.

18 (4) the maximum anticipated depth of the surface mining operation."

19 SMARA Section 2777 provides that: "Amendments to an approved reclamation plan may
20 be submitted detailing proposed changes from the original plan. Substantial deviations from the
21 original plan shall not be undertaken until such amendment has been filed with, and approved by,
22 the lead agency."
23

24 Thus, Basalt was required by SMARA to file with the County a reclamation plan which
25 included a "proposed" date for termination of the mining operation and the maximum anticipated
26 depth of the operation. It could also submit amendments to an approved plan, which, together

1 with the modifiers "proposed" and "anticipated," implies that statements as to duration and depth
2 of mining operations set forth in a prior approved plan do not necessarily irrevocably bind the
3 mining operator if there should be some change in circumstances.

4 The appropriateness of such construction of SMARA is substantiated by the testimony
5 adduced at trial concerning the nature of the mining business. In that regard, the testimony of
6 Messrs. Gilroy and McGee reveals that quarrying is an evolutionary process. In order to develop
7 a mine plan, the operator needs to know the extent of the resource available. Thus, Basalt had
8 geologic studies conducted in 1970, the basis for the 1976 Reclamation Plan, and in 1980, the
9 basis for the 1982 Amended Reclamation Plan. As Mr. Gilroy explained at trial:
10

11 "The deeper you drill, the more expensive it is, drill for exploration. So what most
12 mining companies will do is drill and explore the rock resource to a reasonable depth,
13 which will last them for a few years, 10, 15 years. They'll then proceed to mine that, then
14 when it gets to a certain point where particularly a point where the grades are being taken
15 down and you're getting down and you're getting closer to what would be the ultimate
16 point of that work, you drill again and you go down another 100 feet or another 150 feet,
17 and you find out what's there, and then you plan accordingly and you plan your sales and
18 you plan your known resource, if you take a on a big job you know, that you can support
19 it and you do that in increments. And each time you do that, each time you do that, you
20 will amend the quarry plan in such a way that you take that you gain access to that
21 resource."

18 And further:

19 "SMARA required a Reclamation Plan to show how the property would be reclaimed
20 once the activities was complete. And so that became -- that was different. I mean,
21 clearly, you need to have contours to show the -- to demonstrate how the land would be
22 finished and what kinds of contouring it would have and that kind of thing, which would
23 be at the end of quarrying, but we didn't see it as in some way being necessary. First of
24 all, there was no limit on time in the permit, and nothing that SMARA imposed created a
25 limit on the time. So there was no reason for us to be specifying times of termination,
26 continuing, that was one of the words you used. It was not appropriate to a vested right
activity, except as an informational item. Now, all we could do at that time was talk to
what we knew about, which was what has been drilled at that time. That's why in [1976]
you see the 100 foot number, minus 100 feet used. And [1982] you see the minus 200
feet used..."

1 Mr. McGee testified that Basalt explored for resources on their properties to the extent
2 they needed to do so. He was aware of both Woodward/Clyde studies. Those are the geologic
3 studies. You do not survey the entire property at one time to find out what your reserves are
4 because it costs money. They were interested in making sure they had enough reserves for 10,
5 15-year periods, which is why there was one study in 1970 and another one in 1981. They were
6 comfortable knowing what they had for ten years. They did not want to go beyond that because
7 they didn't want to spend money too soon much on exploration that could be used instead for
8 plant repair, maintenance, and capital expenditures. The deeper you go, the more a geologic
9 study costs. They just were not interested in getting any more information than they needed, and
10 what they needed was 10 or 15 years out. Thus, there was no need to incur the expense of
11 drilling deeper than minus 200 feet in 1981 because they had enough proved reserves to last a
12 long time. It is cheaper to drill to minus 300 feet from minus 175 feet than it is from minus 50
13 feet.
14

15 Mr. McGee was generally familiar with the Reclamation Plan. He was unaware of any
16 discussions that the plan would require closure of the quarry by a certain date or limit mining to a
17 certain depth. From Basalt's standpoint, they had a deposit and a valid use permit, and then they
18 had a Reclamation Plan "that had established a parameter" within which they had to operate.

19 This understanding is reflected in the following statements made in the 1976 and 1982
20 reclamation plans.
21

22 "Quarry studies indicate that in excess of 7,200,000 gross cubic yards of rock products of
23 all types (not including raw brick materials) are available from the McNears quarry,
24 which indicates a conservative quarry life of 15 to 20 years (i.e., through 1991 to 1996)
25 based upon present day estimates of likely market demand. This assumes a deep pit
26 operation in the Main Quarry Bowl to a depth of approximately 100 feet below sea level,
but only limited excavation of the South Hill consistent with preservation of the visual
and environmental qualities of the properties." 1976 Reclamation Plan at p. 3.

1 “The attached ‘Quarrying Study’ illustrates the contours that will result from Basalts
2 quarrying program overlain on the existing contours of the property. The plan anticipates
3 continued quarrying in the Main Quarry Bowl, working within the confines of the blue
4 rock resource defined by the Woodward Lundgren study. Quarrying will extend in a
5 series of phases to a depth of 100’ below sea level. Quarrying of the main bowl area is
6 expected to proceed relatively continuously from the present day to completion.” 1976
7 Reclamation Plan at p. 4.

8 “Quarrying of the South Hill has been designed to preserve the essential visual quality of
9 the center ridge of the property of which it is a part and to maintain the eucalyptus grove
10 on the north side of the South Hill intact.” Id.

11 “The quarrying plan selected for the South Hill represents a considerable voluntary
12 concession on Basalt's part, in that it leaves in place a major portion of the blue rock
13 resource under the hill (and under the grove of trees) for the purpose of preserving the
14 eucalyptus grove and profile of the hill and of maintaining visual screening of the
15 quarrying operation from the adjacent developed areas to the north, including Peacock
16 Gap.” Id.

17 “Mining for shales and clays for brick making is expected to continue in the Brick
18 Resource Area for the remaining period of the McNears lease (i.e., 15 years). Tentative
19 quarrying contours for that area are shown on the Quarrying Study, though the nature of
20 the operation is such that excavation takes place where the resource is found (the quality
21 of materials from place to place being uneven) with the result that both the final contours
22 and the appearance of the land in the interim are uncertain at this time.” Id.

23 “‘It is anticipated that quarrying operations will continue in all parts of the quarry and in
24 the industrial sectors of the property throughout the anticipated 15 to 20 year life of the
25 quarry, and no areas are expected to reach a sufficient stage of completion to warrant
26 revegetation or reclamation until the end of that time period.’” 1976 Reclamation Plan at
page 5.

 The 1982 Amended Reclamation Plan shows that the original Reclamation Plan was filed
on December 2, 1976, in response to a February 1976 request from the Marin County
Department of Public Works. The Department, however, took no formal action on the plan until
late September 1981, when the County indicated an intent to process the plan because of
SMARA requirements and a request by the City of San Rafael, which had taken an interest in the

1 quarry as part of the Peacock Gap Neighborhood Planning Area. The 1982 Amended
2 Reclamation Plan provided further that:

3 "In the period since 1976, quarrying and brick-making operations have continued on the
4 site at approximately the same rate and level of magnitude as in previous years.
5 Throughout, Basalt Products has continued to work toward the final contours reflected in
6 the Reclamation Plan submitted in 1976, with the majority of their quarrying operation
7 being concentrated in the southeast quadrant of the property. The floor of the quarry has
8 been lowered to approximately 60' below sea level, and it remains a dry pit operation
9 with no seepage from the adjacent San Francisco Bay." 1982 Amended Reclamation
10 Plan at p. 2.

11 By 1982, the knowledge and assumptions drawn therefrom upon which the 1976 Reclamation
12 Plan was based had changed, as pointed out in the 1982 Amended Reclamation Plan, which
13 refers to new conditions reflected in the 1982 Amended Reclamation Plan:

14 "The Reclamation Plan submitted in 1976 reflected Basalt's understanding at that time of
15 the geologic conditions which underlie the McNears property. Basalt's estimation of the
16 northerly limit of the rock resource to the north of the quarry bowl were based upon
17 explorations undertaken as a part of the ongoing quarry operation, and it was thought at
18 that time that quarrying had reached the extent of the resource to the north and that the
19 interface between rock and shale sloped in a southerly direction from the top of the
20 existing cut. More detailed geographic exploration undertaken by Woodward-Clyde in
21 1981 demonstrate clearly that the shale/rock interface does not slope to the south as
22 originally anticipated, but to the north, reaching under the shale resource now being
23 excavated for brick-making purposes by the McNears Brick Company. Deep drillings
24 have confirmed this new information and identify a previously unknown and quite major,
25 resource of very high quality blue rock in this area. It is now Basalt Product's intention
26 to quarry a major portion of the newly discovered resource. That process will modify the
final contours to which the property will be quarried which in turn requires an
amendment to the Reclamation Plan for the quarry to reflect the manner in which the
property will be reclaimed when the quarrying process is complete. The expected life of
the mining activity on the property is expected to remain much as predicted in the
original Reclamation Plan, i.e., approximately 17 years from the original submittal date in
1976." 1982 Amended Reclamation Plan at p. 4.

27 The various statements upon which plaintiffs rely to show that Basalt intended to mine no
28 deeper than 200 feet below mean sea level and to terminate quarry activities by no later than
29 1993 or 1996, must be interpreted within the context of SMARA, pursuant to which they were

1 made. In so doing, the statements do not, as plaintiffs contend, clearly manifest any intent to
2 relinquish valuable mining rights, but only to comply with the requirements or provisions of
3 SMARA that required Basalt to make estimates as to depth and duration of mining in connection
4 with a reclamation plan.

5 Plaintiffs submit that the following statements by Basalt objectively manifest intent to
6 mine no deeper than 200 feet below mean sea level and cease operations in the mid-1990s in
7 addition to the ones referenced above. The first is Plaintiffs' Exhibit 2, which is a letter dated
8 April 8, 1980, from Jack Streblow, who at the time was President of Basalt Rock Products
9 Company, to Anne Moore, who was the Acting Director of the Planning Department of the City
10 of San Rafael, in which he said "[A]s we have explained in previous presentations on the same
11 subject, it is our expectation that Parcel 8 will remain in use as a quarry, brick yard, and
12 manufacturing and light industrial property for the next 12 to 15 years." Besides being an
13 expectation, rather than a statement of fact, the statement is also taken out of context, which is
14 made clear by reading from other parts of the letter.
15
16

17 "It is most difficult to predict with any degree of accuracy the financial and
18 developmental climate of Marin County over a decade from now. We believe that long
19 range planning for the property should therefore be conceptual rather than precise,
20 concentrating on principles and objectives for the long-term future. It should be clear
21 that it is our intent to quarry both on the southerly side of the South Hill area
22 and in the quarry pit area and the southeast quadrant of the property. The McNear Brick
23 Co. intends to continue excavation of shale materials for its brick making activities in the
24 northeast quadrant of the property. It should also be clear that a Reclamation Plan
25 reflecting these intentions was submitted to the County of Marin (in accordance with the
26 State Mining and Reclamation Act of 1975) on December 2nd of 1976. County action is
still pending, but we, as owners and operators of McNear's Quarry, have fulfilled our
responsibilities under State and County laws, and have claimed a 'vested right' to
continue to operate for the remaining economic life of the quarry and its resource."
Plaintiffs' Exhibit 2 at pp. 1-2.

1 Plaintiffs' Exhibit 3 is a letter dated October 20, 1980, from George Stein, who was Vice-
2 President of Administration of Basalt, to members of the San Rafael City Council. Plaintiffs
3 quote the following statement in this exhibit: "we are in agreement with the Neighborhood Plan
4 approved by the Planning Commission as that plan relates to our property," referring to the
5 Peacock Gap Neighborhood Plan. "We understand that no development will be allowed until the
6 rock resource has been depleted. We estimate that time to be 10 to 11 years based on estimated
7 reserves and projected demand for the product." However, Mr. Stein goes on to state:

8
9 "In general, we are in agreement with the neighborhood plan approved by the Planning
10 Commission as that plan relates to our property. Because there was a great deal of time
11 spent in the Planning Commission hearings with speakers speculating about what might
12 happen to the Dillingham property in the future, we would like to reiterate our position
13 which has been on record with the Planning Department for some time. Basalt has
14 operated the McNears Quarry since the mid-1930's, first as a tenant of the McNear's
15 family and more recently as the owner. It is our intention to continue to operate the
16 quarry until the resource is depleted. We are operating the quarry in accordance with the
17 Reclamation Plan which was submitted to the County of Marin in 1976 as required by the
18 California State Mining and Reclamation Act." Plaintiffs' Exhibit 3.

19
20 Next, Plaintiffs' Exhibit 7 is a letter dated November 30, 1981, from Norman Gilroy to
21 Jack Baker, who is a Civil Engineer with the Land Developmental Division of the Marin County
22 Department of Public Works. Plaintiffs quote the following:

23 "Basalt Products Company has undertaken an extensive geologic exploration of the North
24 Hill segment of the site. McNears Brick Company has also completed a geologic
25 investigation of their Brick Resource Area in the northwesterly corner of the property.
26 These investigations have put a different light on the work involved in completing the
design work necessary to finish the Reclamation Plan to be submitted to the County of
Marin for consideration under SMARA. This requires a complete reevaluation of the
final contours to which the back face of the quarry will be shaped over time. The
quarrying plans for both operations must be carefully designed and phased if both are to
coexist and continue to work productively over the 10 to 12 years of the anticipated life
of the resource."

27 There is also other evidence that plaintiffs contend support their position that Basalt
28 manifested an intention not to mine any deeper than 200 feet below sea level, to mine within a

1 certain footprint, and to terminate operations by 1993. For example, in letters that Basalt sent to
2 tenants of its property, as it was required to do, advising them of the anticipated cessation of
3 mining activities in 1993.

4 There is one other piece of evidence in this regard, though, which is interesting and that is
5 that one person, at least, did not consider Basalt's statements about the duration of mining
6 activities on the property to be anything more than estimates, rather than statements of fact, and
7 grossly inaccurate estimates at that. That person was Peter Hunt, who was an attorney for one of
8 the potential developers in the Peacock Gap area. He made the following statements to the
9 Mayor and City Council members of the City of San Rafael in a letter he sent to them dated
10 December 15, 1980. Plaintiffs' Ex. 5.

12 "The only basis upon which Mr. Roberto, the staff, the Commission of NY-Cal, as far as
13 that goes, can form a judgment as to when Parcel 8 will be available for housing
14 development is the unsupported and undocumented statement of 'twelve to fifteen' years
15 given to the Council by Basalt itself. Relying upon this limited 'evidence' from an owner
16 that is eager to sell is like accepting without question, as an example, the wolf's estimate
17 of the sheep's remaining useful life. Our present information is that the twelve to fifteen
18 year estimate, to quote Gershwin, ain't necessarily so. The quarry has already been
operating 'for over a hundred years.' The hill is as high now (although slightly narrower)
as it was 25 years ago. Aerial photographs disclose that the south face is pure, rich blue
sandstone. 'It is important that land use policies hinder premature cessation of mining
activities when the affected geologic resource is of such regional importance.'"

19 He is quoting from a draft of the Peacock Gap Neighborhood Plan. Continuing, Peter Hunt
20 stated that:

21 "Most important is the time element. The Council does not know when Parcel 8 will
22 come onstream for housing development. As it happens, Ray Murphy has done some
23 homework in the County records and in the Coast Guards records. Known and official
24 quantities yield the conclusion that the twelve to fifteen year 'estimate' is a gross
25 understatement. Mr. Murphy's quantified report (a copy of which will be sent to you)
26 based upon recorded and objectively verifiable data will disclose that 50 years is closer to
reality than 15 years. There is some evidence generated by Parcel 8's owner itself that
tends to support Mr. Murphy's findings. Admittedly, only inferences can be drawn from
these figures and the inferences may be wrong. The annual report raises more questions

1 than it answers, but the hard geology found by Mr. Murphy in the Marin County records
2 tells an unhappy story: Basalt has been misleading us all. That quarry is going to be
3 operative and operating for decades after 1995. I am saying that Dillingham's marketing
4 people have not read their geology in giving the twelve to fifteen year 'estimate'.
5 Significantly, Basalt's 'sales brochure' specifically reserves full quarrying rights in
6 Basalt. No big company that enjoys a 14 % depletion allowance is going to quit until the
7 resources run out."

8 The California Supreme Court implicitly indicated in Hansen Brothers supra, 12 Cal.4th
9 at 574, in referring to an intensification of use as against matters of depth or duration, that a
10 SMARA application and statements made in conjunction therewith are not alone an adequate
11 basis for deciding the question of impermissible expansion of use. "More importantly, however,
12 the SMARA application form is not designed for, and alone is not an adequate basis upon which
13 to decide, the question of impermissible intensification. The application form does not establish
14 the actual amount of material that is to be mined in any given year or time, and offers only
15 estimates in broad ranges of the possible annual mining volume and of the total amount of
16 material that may be removed over a 100-year period." Id.

17 Based upon the foregoing, the Court concludes that the statements made by Basalt in and
18 with reference to the 1976 and 1982 Reclamation Plans do not constitute objective
19 manifestations of intent to mine the main pit no deeper than 200 feet below sea level or to cease
20 quarry operations as of the mid-1990s and the defendant is not, in that respect only, presently
21 operating beyond the scope of its permissible use.

22 What the evidence does show is intent to quarry the main pit as long as doing so is
23 profitable. The evidence also shows as to South Hill, however, that Basalt voluntarily
24 relinquished its vested right to quarry that part of the property beyond certain areas that will be
25 left intact to preserve the natural features and scenic qualities of the property as described in the
26

1 1976 and 1982 Amended Reclamation Plans. As previously quoted from the 1976 Reclamation

2 Plan:

3 "Quarrying of the South Hill has been designed to preserve the essential visual quality of
4 the center ridge of the property of which it is a part and to maintain the eucalyptus grove
5 on the north side of the South Hill intact. The quarrying plan selected for the South Hill
6 represents a considerable voluntary concession on Basalt's part, in that it leaves in place a
7 major portion of the blue rock resource under the hill (and under the grove of trees) for
8 the purpose of preserving the eucalyptus grove and profile of the hill and of maintaining
9 visual screenings of the quarrying operation from the adjacent developed areas to the
10 north, including Peacock Gap." 1976 RP at page 4.

11 Also relevant is Plaintiffs' Exhibit 10, a May 12, 1982, letter from Mr. Gilroy to Mike
12 Sadjadi, of the Department of Public Works in Marin County. The letter is an addendum to the
13 Amended Reclamation Plan. "Preservation of the Eucalyptus Groves - We can confirm that it is
14 Basalt's intention to preserve the Eucalyptus Grove along San Pedro Road and the woodland area
15 of the South Hill in accordance with the provisions of the Peacock Gap Neighborhood Plan and
16 Basalt's previous Reclamation Plan for the area."

17 Mr. Gilroy testified that the neighbors were very concerned about the final surface
18 contours of the property in terms of what they would be looking at, what kind of neighbors they
19 would have and traffic. South Hill was a significant topic of discussion because of its
20 importance as a visual buffer. The neighbors' concerns in this regard were addressed in both the
21 1976 and 1982 plans. The question of mining South Hill was one of the big conflicts between
22 the mining people and the reclamation people at Basalt, as Mr. Gilroy testified.

23 "The mining guys would have taken it down to the flat plain and maybe dug deeper, I
24 don't know, but the decision that was made was that it made good sense to Basalt
25 intelligently to have a series of benches overlooking the Bay at that location. The rock
26 resource was narrow at that point."

Mr. Gilroy also testified that Basalt made a management decision not to quarry South
Hill and that the same profiling of South Hill carried through in the 1982 plan.

1 The determination that Basalt did not objectively manifest intent to limit the depth and
2 duration of mining the main pit, does not end this matter. Defendant's right to continue
3 quarrying the property, as at least Basalt well knew, is subject to its complying with the
4 requirements imposed by SMARA and Chapter 23.06 of the Marin County Code and also in
5 conformity with the Peacock Gap Neighborhood Plan. In this latter regard, the 1982 Amended
6 Reclamation Plan states in referring to the Peacock Gap Neighborhood Plan:

7
8 "During the past two years, the city of San Rafael has been very active in processing its
9 Peacock Gap Neighborhood Plan which includes the McNears property as land within
10 San Rafael's sphere of interest. Basalt has participated actively in the large number of
11 public meetings and hearings that have taken place on the plan and has agreed that the
12 ultimate uses to which the McNears property will be converted will be in compliance
13 with the terms of the Neighborhood Plan adopted by the City of San Rafael on December
14 15, 1980 (and in fact, the plan incorporates the Basalt's Reclamation Plan on file with
15 Marin County at that time). The Peacock Gap Neighborhood Plan was subsequently
16 adopted into the Marin County General Plan and Basalt similarly accepts its terms as they
17 would apply under the jurisdiction of Marin County." 1982 Amended Reclamation Plan
18 at p. 4.

19 The Peacock Gap Neighborhood Plan itself states:

20 "The Neighborhood Plan designates the Dillingham property as a mineral resource area
21 for 10 to 12 years. Development unrelated to mineral extraction activities would not be
22 allowed during that 10 to 12 year period. That designation is consistent with statements
23 that Dillingham Corporation representatives that the life expectancy of the quarry is 10 to
24 12 years and that quarry operations will extract minerals consistent with an approved
25 reclamation plan during that time frame. Pursuant to the California Surface Mining Act
26 of 1975, quarry operations at the Dillingham property must be consistent with a
reclamation plan approved by the County. For that reason and to provide a long range
planning context for the Dillingham property, the Neighborhood Plan includes policy for
the property after expiration of the mineral resource area designation." Peacock Gap
Neighborhood Plan at p. 29.

27 Mr. Gilroy, in referring to the submission of the 1982 Amended Reclamation Plan in a
28 letter previously referenced above, dated November 30, 1981, to the County Department of
29 Public Works provides: "Always in the picture, of course, is the need to arrive at final contours
30 that are compatible with the expectations of the local neighborhood and that lend themselves to

1 reclamation and appropriate second uses at the time when the quarry operation is phased out."

2 Plaintiffs' Exhibit 7.

3 The importance of defendant's compliance with SMARA is emphasized by the following
4 legislative findings and statement of intent made concerning that statute, which may be found in
5 Sections 2711(a) and (b) and Sections 2712(a), (b) and (c) of the Public Resources Code.

6 Section 2711(a) provides: "The legislative hereby finds and declares that the extraction of
7 minerals is essential to the continued economic well-being of the state and to the needs of the
8 society, and that the reclamation of mined lands is necessary to prevent or minimize adverse
9 effects on the environment and to protect the public health and safety."

10 Section 2711 (b) provides that "The Legislature further finds that the reclamation of
11 mined lands as provided in this chapter will permit the continued mining of minerals and will
12 provide for the protection and subsequent beneficial use of the mined and reclaimed land."

13 Section 2712(a), (b) and (c) state that: "It is the intent of the Legislature to create and
14 maintain an effective and comprehensive surface mining and reclamation policy with regulation
15 of surface mining operations so as to assure that: (a) adverse environmental effects are prevented
16 or minimized and that mined lands are reclaimed to a usable condition which is readily adaptable
17 for alternate land uses; (b) the production and conservation of minerals are encouraged, while
18 giving consideration to values relating to recreation, watershed, wildlife, range and forage, and
19 aesthetic enjoyment; (c) residual hazards to the public health and safety are eliminated."

20 In a addition to requiring the submission of a reclamation plan, Section 2207 of SMARA
21 and Marin County Code Section 23.06.100 also require a mine operator to submit annual reports
22 to the local agency here in Marin County, or to the lead agency, and to the director of Bureau of
23 Mines as to mining operations for the obvious purpose of assuring that the mine is being
24
25
26

1 operated in conformance with an approved reclamation plan. Section 2774 (b) requires that the
2 County adopt ordinances that establish procedures for the review and approval of reclamation
3 plans and that it "shall conduct an inspection of a surface mining operation within six months of
4 receipt by the lead agency of the surface mining operation's report submitted pursuant to Section
5 2207, solely to determine whether the surface mining operation is in compliance with this
6 chapter. In no event shall a lead agency inspect a surface mining operation less than once in any
7 calendar year."
8

9 Section 23.06.090 of the County Code implements this requirement of SMARA. Basalt
10 knew that when the 1980 geologic study revealed a new resource that it wished to mine, that
11 operation would change the final contours to which the property would be quarried, which in
12 turn required an amendment to the Reclamation Plan.

13 In fact, Section 2777 of SMARA prohibited Basalt from undertaking any substantial
14 deviation from an approved plan until such an amendment was filed with and approved by the
15 lead agency. Basalt also realized the impact that any change in its mine plan could have on its
16 neighbors and on the long range zoning plans of the city of San Rafael and the County of Marin.
17 Basalt agreed these to these zoning plans, including the rezoning of its property from heavy
18 industrial to residential commercial multiple plan district. In fact, the rezoning was beneficial to
19 Basalt because as Jack Streblov stated in Plaintiffs' Exhibit 1, it was necessary "to maximize the
20 value of the property over the long term."
21

22 Basalt knew that what the operator of the quarry did on that property had a significant
23 impact upon its neighbors and endeavored to meet its responsibilities in that regard in conducting
24 its mining operations there, not only in terms of complying with its obligation under SMARA,
25 the Marin County Code and the Peacock Gap Neighborhood Plan, but also in terms of mitigating
26

1 problems caused by mining operations, such as blasting and truck traffic. Defendant should have
2 known all these things as well. In contrast, however, to the manner in which Basalt conducted
3 mining operations on the property, the evidence in this case shows that defendant has not met
4 its obligations under SMARA, Chapter 23.06 of the Marin County Code or the Peacock Gap
5 Neighborhood Plan. Moreover, the evidence further shows that defendant has changed its
6 mining operations since 1982 so as to make life near the quarry unbearable and unhealthy for a
7 number of its neighbors through increased truck traffic and increased hours of operation that
8 have in turn generated increases in noise, nighttime lighting and dust. Pertinent in this regard are
9 the following statements by the court in the Wolfeboro case earlier quoted in this decision.
10

11 "In general, courts have held that although an increase in the intensity of a
12 nonconforming use does not usually amount to a 'change' or 'expansion' of that use, an
13 increase in intensity which serves to change the character or purpose of the
14 nonconforming use will be considered to have changed the use. A great increase in the
15 size or scope of a use has also been considered to be a factor in determining whether the
16 character of the use has been changed, so that the use is no longer a continuing one. In
17 order to determine whether a use should be considered a 'continuation' of a prior use or a
18 'change' in use, courts have considered whether the use has a substantially different
19 effect on the neighborhood. In conclusion, we hold that a party who desires to continue
20 excavation operations ... must meet a three-pronged test: First, he must prove that
21 excavation activities were actively being pursued when the law became effective; second,
22 he must prove that the area he desires to excavate was clearly intended to be excavated,
23 as measured by objective manifestations and not by subjective intent; and third, he must
24 prove that the continued operations do not, and/or will not, have a substantially different
25 and adverse impact on the neighborhood." Wolfeboro at 456-7.

20 And mind you, this is language that was quoted by our own California Supreme Court in the
21 Hansen Brothers case.

22 Since 1982, mining operations on the property were supposed to have been conducted in
23 conformance with the 1982 Amended Reclamation Plan. It is questionable, at this time, whether
24 defendant's mining operations are being conducted within the parameters of that plan as they
25 should have been and must be. Mining has gone well beyond 1982 estimates as to depth and
26

1 duration. And, as just stated, the continued operation of the mine appears to be having a
2 markedly more adverse impact upon the neighborhood than it did when Basalt operated the
3 quarry. Because defendant has not submitted an Amended Reclamation Plan to the County, it is
4 not possible to tell what impact current mining operations may have upon a suitable reclamation
5 plan for the property.

6 On the one hand, defendant has been utterly neglectful in failing, since it acquired
7 ownership of the quarry property in February 1986, to submit an amended reclamation plan to
8 reflect its current mining plans and appears clearly to be in violation of SMARA Section 2777, if
9 not other provisions of that act. On the other, a serious question arises as to just where Marin
10 County has been for the past 21 years.

12 SMARA Section 2774.1(f) provides that "The lead agency has primary responsibility for
13 enforcing this chapter and section 2207." How can a mine operator continue to operate well
14 beyond the estimates of a severely outdated reclamation plan without some action being taken by
15 Marin County, particularly considering the annual reporting and inspection requirements of
16 SMARA and the Marin County Code?
17

18 If it is so clear, as plaintiffs contend herein, that mining operations on the property were
19 supposed to have ended over 10 years ago, why has it taken until now for someone to try to do
20 something about it?

21 The argument is made that the quarry should be shut down because since the Peacock
22 Gap Neighborhood Plan was approved in 1980, eight residential developments have been
23 approved and completed involving about 300 residential units in the Peacock Gap area in
24 reliance upon Basalt's statement that mining activities would cease in the mid 1990's. In the first
25 place, as indicated by the Court's ruling regarding those statements, that reliance was
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1 unreasonable; in the second place, if there was such a reliance, no attempt has been made to
2 enforce it for at least 10 years.

3 Which brings me to the final matter in this proceeding, and that is the relief to be granted
4 based on the forgoing. This is not an easy matter because of the many intertwined and
5 conflicting interests at stake insofar as whatever action this Court might take. According to the
6 Marin County Planning Commission, the quarry property has been designated by the California
7 State Department of Conservation, Division of Mines and Geology, as a deposit site for
8 regionally significant mineral resources for the North Bay Area, and classified under a Mineral
9 Resources Zone, Class 2, the highest category for known mineral resource deposits.
10

11 Careful consideration must be given, therefore, to the adverse effects that may be
12 suffered were the quarry to be shut down. Marin County has yet to review and consider, let
13 alone approve, defendant's present intentions as to mining the property and whether defendant
14 can submit a satisfactory amended reclamation plan with regard thereto. The interests of the city
15 of San Rafael and all the people in the Peacock Gap area must also be considered regarding any
16 future mining operations that defendant wishes to conduct on the property.
17

18 This Court is really not the proper forum within which to resolve those issues. They are
19 matters that should have been resolved in legislative-type hearings conducted by local
20 jurisdictions. The problem, at this time, is that there has been no local jurisdiction action that the
21 Court can review. It is one thing for the Court to review action that a local agency has taken, and
22 quite another to take that action in the first place. While the Court is averse to taking heavy-
23 handed action based upon the limited record that a trial develops, the Court is extremely
24 concerned about the prolonged lack of action by responsible local agencies to assure that
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1 defendant is complying with its obligations under SMARA and the Marin County Code and the
2 adverse impact that this failure to act has had upon homeowners in the Peacock Gap area.

3 By operating in violation of SMARA and local ordinances, defendant is operating beyond
4 the scope of its nonconforming use. This, in turn, constitutes an unlawful business activity in
5 violation of Business and Professions Code Section 17200 that the Court has the power to enjoin.

6 Accordingly, it is ordered that the defendant is enjoined from conducting any further
7 mining operations on the property in question. The specific provisions for effectuating this order
8 shall be worked out by the parties for review and approval by the Court.
9

10 It is further ordered that the foregoing injunction shall not be effective for a period of six
11 months or such further time as the Court may approve upon motion and good cause shown by the
12 party or parties requesting such additional time.

13 The Court is suspending the operative effect of the injunction to give defendant time to
14 correct its aforesaid violations of law and for the County and other interested agencies to act
15 upon any amended reclamation plan that defendant may submit.
16

17 Pending the operative effect of the foregoing injunction, defendant is forthwith enjoined
18 from engaging in any of the following acts:

19 1. depositing any overburden, tailings, dredged material or other waste materials in Brick
20 Resource Area.

21 2. allowing more than 250 truck trips in or and out of the property per day and allowing
22 any truck trips in or out of the quarry other than between the hours of 7:00 a.m. and 5:00 p.m.

23 3. the importation of gravel, materials for recycling and dredged materials.
24

25 There are other violations of local ordinances and possibly Marin County Code Section
26 22.78.010 that the Court is not addressing at this time, notably the question of the volume of rock

1 production and the office buildings that defendant has placed on the property in violation of local
2 building codes, and also that may constitute an unlawful expanded use of the property. The
3 Court believes that these matters may more appropriately be resolved at this time by local
4 agencies.

5 I encourage the parties to work with me with regard to the order to be made on this
6 decision. While it may be appropriate for the Court to review the matter of whether the quarry
7 should continue to be operated and, if so, how, after it has been fleshed out much more
8 thoroughly in administrative hearings, the Court should not have to make such decisions based
9 solely on the record of a five-day trial.
10

11 What I wish to make clear by the contemplated form of order is that, if the people who
12 are supposed to be policing operations of the quarry do not do so, and the quarry operator
13 continues to operate beyond the law, this court will shut down the quarry, regardless of its being
14 a regionally significant mineral resource for the North Bay Area.
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16 DATED: _____
17 SUPERIOR COURT JUDGE
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