



# Interoffice Memo

**DATE:** March 7, 2019

**FROM:** GEORGE KENLINE  
Mining/Engineering Geologist  
Land Use Services Department

**PHONE:** 909-387-4105

**TO:** HONORABLE PLANNING COMMISSION

<b>SUBJECT</b>	EL CAJON ASSOCIATES, LLC, DETERMINATION OF VESTED MINING RIGHTS BASED ON PAST AND ANTICIPATED FUTURE LAND USE, APNS: 0356-231-02, -03, 0356-241-02, -03, AND 0351-161-03, PROJECT NO. P201800609
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## I. Introduction

On February 21, 2019, the subject proposal was presented to the Planning Commission for consideration pursuant to a General Plan and Development Code Interpretation application (County Development Code Chp. 81.02, Section 85.01.030, and Table 85-1) submitted on October 27, 2018, by El Cajon Associates, LLC (“Applicant”). The goal of the Applicant was to obtain the County’s recognition of claimed vested mining rights for the approximately 430 acres of land included within the subject parcels.

At the time of the Commission’s February 21 hearing, County staff offered a 17-page Staff Report and other evidentiary material that, together, totaled 205 pages, by which Staff recommended that the applicant had not made a sufficient showing for a vested mining right to be recognized by the County. The Applicant’s representative also submitted written materials to the Commission. For approximately three hours, the Commission heard testimony from staff, from representatives of the applicant, from one public speaker, and engaged in deliberations about many aspects of the proposal.

At the conclusion, Commissioner Chavez moved: (1) an intent of the Planning Commission to recognize the vested mining right, (2) that the hearing be continued to the next Commission hearing date (March 7, 2019), and (3) that staff be directed to formulate a proposed scope of the vested mining right and findings for its recognition. The motion was seconded by Commissioner Mathews and approved by a vote of three in favor (Chavez, Mathews, and Stoffel) with two opposing (Weldy and Allard).



With only an intent having been signified by the Planning Commission, this memorandum has been prepared to identify and discuss the final actions that may be taken and provide the findings necessary for each.

With final action on the declaration of intent pending, the Planning Commission may:

1. Recognize and confirm the Applicant's vested mining rights as a legal non-conforming land use and adopt the proposed findings regarding approval;
2. Reconsider Staff's original recommendation denying the recognition and confirmation of vested mining rights and adopt the proposed findings regarding denial; or
3. Refer the decision regarding the determination of vested mining rights to the Board of Supervisors.

The three options are further discussed below.

## **II. Determine that the Applicant has a Vested Mining Right**

An action to recognize and confirm the Applicant's vested mining right would read:

**Determine that vested mining rights exist and recognize mining development as a legal conforming land use on APNs 0356-231-02, -03, 0356-241-02, -03, and 0351-161-03 located approximately four miles southeast of the community of Wrightwood, County of San Bernardino and adopt the proposed findings.**

### **Proposed Findings**

The Planning Commission FINDS, the following factual and legal determinations with respect to recognizing the existence of vested mining rights for APNs: 0356-231-02, -03, 0356-241-02, -03 and 0351-161-03 ("Properties"):

1. In the early 1920's, approximately 1926, Cajon Lime Products commenced mining operations on the Properties with commercial



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extraction and processing of dolomitic limestone products. In 1926, Cajon Lime Products obtained a patent on the Properties from the United States.

2. Roads were developed on the Properties to allow access to and transportation of equipment and materials within the various mining and processing areas.
3. On August 8, 1951, the County of San Bernardino adopted Ordinance 687 establishing land use regulations. Among these regulations was the requirement that surface mining required a County permit. By convention, existing mining uses were generally allowed to continue.
4. Mining was conducted intermittently on the Properties until 1966 when the Southern Pacific Railroad demolished the processing plant; ending the imminent sale of the Properties to the Livingstone Stone Company and Industrial Rock Company. The Hannin family, then the owners, challenged the Railroad in a lawsuit and may have obtained an injunction against the Railroad. Through the succeeding years the owners have maintained the Properties with the intent to continue mining and processing the dolomitic limestone resources.
5. In the years following the last mining conducted on the Properties, El Cajon Associates has never explicitly abandoned their mineral interests or any right to mine and process the dolomitic limestone resources.
6. Neil McCarrol, direct descendent of Michael P. Hannin and member of El Cajon Associates, LLC, attests that, "From March 5, 1931 to date and in the future, it has always been and will be the intent of El Cajon Associates, LLC and the Hannin Family to mine and process the dolomitic limestone resources on the El Cajon Properties."
7. The preponderance of the evidence contained in the record is sufficient to establish that an intent by the owners to resume mining existed on the effective date of the Surface Mining and Reclamation Act (SMARA) and the County's local mining regulations.
8. The preponderance of the evidence fails to show an intent by the owners of the Properties to abandon their right to exploit the mineral interests on the Properties.



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9. A vested mining right exists, allowing, without further County land use permitting, surface mining operations on the Properties in order to develop the dolomitic limestone resources. This vested mining right includes the following:
    - a. The right to produce material in volumes necessary to meet market demand, consistent with production principles established in California law;
    - b. The right to drill, blast and utilize all customary mobile and processing equipment as reasonable and necessary to extract, transport, crush, wash, sort, stockpile, load and otherwise manage commercial quantities of dolomitic limestone products from the Mine.
    - c. That El Cajon Associates LLC may continue surface mining operations at the Properties on the basis that the vested mining rights continue and no substantial changes have been made, subject to a County-approved and valid Reclamation Plan and adequate Financial Assurances pursuant to the Surface Mining and Reclamation Act of 1975.

This determination is final as to the County (which has no appeal rights).

### **III. Determine that the Applicant has no Vested Mining Rights**

An action to determine that the Properties do not include vested mining right would read:

**Determine that vested mining rights exist do not exist on APNs 0356-231-02, -03, 0356-241-02, -03, and 0351-161-03 located approximately four miles southeast of the community of Wrightwood, County of San Bernardino and adopt the proposed findings.**

#### **Proposed Findings**

The Planning Commission FINDS, the following factual and legal determinations with respect to



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denying the existence of vested mining rights for APNS: 0356-231-02, -03, 0356-241-02, -03 and 0351-161-03 ("Properties"):

- 1 California Public Resources Code § 2776 states, in pertinent part, that "No person who has obtained a vested right *to conduct surface mining operations prior to January 1, 1976*, shall be required to secure a permit pursuant to this chapter *as long as the vested right continues* and as long as no substantial changes are made in the operation except in accordance with this chapter. A person shall be deemed to have vested rights if, prior to January 1, 1976, the person has, in good faith and in reliance upon a permit or other authorization, if the permit or other authorization was required, *diligently commenced surface mining operations* and incurred substantial liabilities for work and materials necessary for the surface mining operation..."
- 2 In order to establish a vested mining right pursuant to California Public Resources Code § 2776 an applicant has the burden of proof to show *active* surface mining was occurring on or around the effective date of the Surface Mining and Reclamation Act (SMARA), or at the very least show objective evidence that the applicant, or its predecessors, contemplated resumption of such activities.
- 3 A use must be present at the time a new law takes effect, to be considered a vested nonconforming use.
- 4 Although the Surface Mining and Reclamation Act (SMARA) was designed to allow *existing, operating* surface mines to continue operating after its effective date without the need to obtain local permits, SMARA's grandfather provision does not extend to truly dormant mines.
- 5 As evidence of a vested mining right the Applicant relied on mining operations that occurred on the property long before 1976. Because the preponderance of the evidence establishes that mining activity on the Properties was dormant and the use non-existent for at least a decade before the enactment of SMARA and the attendant local mining regulations, coupled with the historical record provided by the Applicant via written and oral testimony, the Applicant failed to carry its burden to show that any mining was occurring or any intent to mine existed at or near the time the law changed in January 1, 1976, in order to obtain a vested mining rights on the Properties.



This determination is appealable by the applicant to the Board of Supervisors and thereafter challengeable in court.

#### **IV Referral to the Board of Supervisors**

Chapter 86.05 of the Development Code allows the Planning Commission to refer this matter to the Board of Supervisors for the Board to make a final determination of the matter. However, Section 86.05.010(b) mandates that: "Notwithstanding the provisions of Subsection A. above, the Commission shall make its recommendation to the Board or shall state the reasons why it cannot do so."

An action to refer this matter to the Board of Supervisors would read:

**Refer the determination of whether a vested mining rights exists on APNs 0356-231-02, -03, 0356-241-02, -03, and 0351-161-03 located approximately four miles southeast of the community of Wrightwood, County of San Bernardino, to the Board of Supervisors:**

**(A) With a recommendation that the Board determine that vested mining rights exist and recognize mining development as a legal conforming land use and adopt the proposed findings.**

[or]

**(B) With a recommendation that the Board determine that vested mining rights exist do not exist and adopt the proposed findings.**

[or]

**(C) With no recommendation because *[explanation why recommendation could not be made]*.**

This determination is not appealable by the Applicant although the determination by the Board of Supervisors is thereafter challengeable by the Applicant in court.