



Community Planning & Permitting

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NOTICE OF TERMINATION OF NONCONFORMING STATUS

April 10, 2024

CEMEX Inc.
5134 Ute Highway
Longmont, CO 80503

1501 Belvedere Road
West Palm Beach FL 33406

CEMEX U.S. Operations
10100 Katy Fwy
Suite 300
Houston, Texas 77043

VIA U.S. Certified Mail and e-mail johnv.heffernan@cemex.com

Re: Notification of Determination Regarding Termination of Nonconforming Use
5134 Ute Highway, Longmont, CO 80503

The Director of the Boulder County Community Planning and Permitting Department (the Director) has determined that the right to continue the nonconforming cement plant use at 5134 Ute Highway, Parcel # 120328000001 (“the Property”), terminated by operation of Article 4-1003.C of the Boulder County Land Use Code (the “Land Use Code”). This approximately 866-acre Property is in the Agricultural zoning district and its principal use is a cement plant. The basis for this determination is detailed below.

Boulder County Nonconforming Use Regulations

Under Article 4-1003.B of the Land Use Code, a nonconforming use is permitted to continue and normal or routine maintenance of a structure containing a nonconforming use is permitted. Normal or routine maintenance includes any maintenance or repair which does not impermissibly enlarge or alter the structure containing a nonconforming use. Article 4-1003.C of the Land Use Code provides that the right to continue a nonconforming use terminates when the nonconforming use is enlarged, expanded, extended, or altered in any of the following ways:

- a. Addition of a new structure containing or accessory to the nonconforming use;
- b. Enlargement or alteration of a structure containing or accessory to the nonconforming use, including but not necessarily limited to an increase in floor area, an increase in height, or any other alteration or improvement in excess of normal or routine maintenance of the structure;

- c. Enlargement or alteration in the land area occupied by the nonconforming use, unless the basic nature of the use, at the time it became nonconforming, clearly indicated or contemplated such an increase or alteration; or
- d. Any other enlargement or alteration of the nonconforming use which has the effect or threatened effect of creating a hazard or nuisance on or off the property, of adversely affecting the character of the neighborhood, or of intensifying the use of the land or its need for services.
- e. Removal or replacement of any structural member in a use for which the County is precluded from enforcing this Code specific to use on the basis of estoppel, laches, or waiver.

If the Director receives evidence that the right to continue a nonconforming use has been or may have been terminated, the Director must provide a written determination to the property owner. The property owner has 30 calendar days to provide evidence demonstrating that the determination was made in error, to abate any illegal enlargement or alteration, to apply for an applicable land use approval under the Land Use Code, or to file an appeal to the Board of County Commissioners. Article 4-1003.H of the Land Use Code.

Property History

Cement Plant Use

The earliest record for the cement plant use on the Property is a 1965 building permit (BP-65-8040) for earthwork and site preparation related to the construction of a “modern cement plant.” A subsequent building permit was issued for the construction of the cement plant in 1967 (BP-67-10137). At the time, the Property was zoned General Industrial. Mining and mineral processing uses, which included a cement processing plant, were allowed by right in the General Industrial zoning district under the land use regulations in effect in 1965.

In 1994, Boulder County amended the Land Use Code to require Special Use approval for all general industrial uses in the General Industrial district. As the Property had not obtained Special Use approval, the cement plant use constituted a nonconforming use starting in 1994. On March 7, 2024, the Property was rezoned to the Agricultural district, which does not allow cement plants as a permitted use.

Mining Uses

Since 1977, two separate quarries, the Lyons Quarry and the Dowe Flats Quarry, supported the cement plant use on the Property.

The Lyons Quarry was first established in 1977 when open mining was allowed by right in the General Industrial district. Like the cement plant use, the Lyons Quarry is now a nonconforming use after Boulder County amended the Land Use Code in 1978 to require Special Use approval for open mining in the General Industrial district.

In 1994, the Boulder County Board of County Commissioners (BOCC) approved a Special Use/Site-Specific Development Plan application for an open mining use at the Dowe Flats Quarry (SU-93-14). This approval expired on September 30, 2022, and all mining operations have since ceased at the Dowe Flats Quarry.

Complaints that the Nonconforming Cement Plant Use Has Been Terminated

Following the closure of the Dowe Flats Quarry, Boulder County received multiple complaints from members of the public alleging that the nonconforming cement plant use on the Property terminated due to (1) increases in truck traffic; (2) new and/or larger stockpiles of shale and other material; (3) alterations and modifications to the facility; (4) increases in production capacity; and (5) and increases in air pollution.

As part of Boulder County's investigation into the complaints received from members of the public, Community Planning and Permitting staff analyzed the following information:

1. All materials and evidence submitted by members of the public;
2. Information provided by CEMEX in response to Boulder County requests for information;
3. Historic satellite images of the Property to determine the size and location of stockpiles;
4. Years of air pollution data (NO_x, SO₂, CO, VOCs, PM and PM₁₀);
5. Materials related to CEMEX's Clean Air Act compliance history;
6. Truck traffic counts from both CEMEX and the CEMEX Lyons Access Traffic Study along with CDOT e-mails; and
7. Evidence related to various modifications to the structure, including the kiln.

Determination

The Director has determined that the right to continue the nonconforming cement plant use has terminated as a result of an increase in truck traffic since the closing of the Dowe Flats Quarry. Specifically, as detailed below, the Director has determined that this increase in truck traffic constitutes an enlargement or alteration of the nonconforming use which has the effect of creating a hazard or nuisance off the property, adversely affects the character of the neighborhood, or intensifying the use of the land and its need for services under Article 4-1003.C.1.d of the Land Use Code.

Community Planning and Permitting staff conducted a thorough investigation of each of the complaints. At this time, the Director does not have sufficient evidence that an enlargement or alteration of the use occurred due to new and/or larger stockpiles of shale and other material, alterations and modifications to the facility, increases in production capacity, or increases in air pollution.

Increases in Truck Traffic Since the Closing of the Dowe Flats Quarry

In December of 2022, in response to complaints by members of the public, the Colorado Department of Transportation (CDOT) approached CEMEX to investigate a potential violation of its state access permit due to increases in truck traffic. CDOT required CEMEX to provide an updated traffic study to determine if a new access permit was required.

The CEMEX Lyons Access Traffic Study was prepared for CEMEX Construction Materials South LLC by Stantec Consulting Services Inc. and was finalized on August 28, 2023. The study calculated trips generated by the CEMEX cement plant in June 2022 when the Dowe Flats Quarry was operational and in June 2023 after the quarry was closed. The study used CEMEX data logs and actual traffic counts. Per State of Colorado State Highway Access Code requirements, the study reported truck counts as passenger car equivalents, converting each truck to three passenger cars.

This study demonstrates a more intensive level of truck traffic since the quarry closure. In June 2022, the nonconforming cement plant use only had 593 Average Daily Trips (ADTs). See Table 1. This number increased to 1,283 ADTs in June 2023 after the closing of the quarry. See Table 2.

Location	Daily			AM (8:15-9:15)			PM (4:00-5:00)		
	Total	Entering	Exiting	Total	Entering	Exiting	Total	Entering	Exiting
CEMEX Cement Plant	593	297	296	69	37	32	36	12	24

Table 1: Average Daily Trips to the Property when the Dowe Flats Quarry was operational in June of 2022.

Location	Daily			AM (8:15-9:15)			PM (4:00-5:00)		
	Total	Entering	Exiting	Total	Entering	Exiting	Total	Entering	Exiting
CEMEX Cement Plant	1283	642	641	147	82	65	85	28	57

Table 2: Average Daily Trips to the Property in June of 2023, nine months after Dowe Flats Quarry closed.

This is a total increase of 690 ADTs, a percentage increase of over 116%, and 540 ADTs over the 150 ADT threshold in the Land Use Code requiring Special Use Review to determine if the level of traffic is compatible with the surrounding land. The study directly links this traffic increase to the closing of the Dowe Flats Quarry noting that “[t]rucks hauling limestone and shale are the primary reason for the increase in observed traffic entering and exiting the site. The change in the number of employees entering and exiting the site, when comparing 2022 to 2023, is negligible.” Even if the study numbers were not expressed in passenger car equivalents (1 truck = 3 cars), there was an increase of 230 truck ADTs, which is also significantly over the 150 ADT Special Use Review threshold.

Given this significant increase in truck traffic, CDOT will no longer permit vehicles to turn left out of CEMEX Driveway onto State Highway 66. CDOT will likely require CEMEX to make alterations to the roadway to prevent this left turn.

Traffic as a Hazard and an Intensified Use of the Land

Boulder County has consistently treated increases in traffic as an intensified use of land that requires additional land use review. Since 1994, the Land Use Code has generally required Special Use Review for any use which generates traffic volumes in excess of 150 ADTs per lot. See Articles 4-101.F.2.a, 4-102.F.2.a, 4-103.F.2.a, 4-104.F.2.a, 4-105.F.1.A, 4-106.F.2.a, 4-107.F.1.a, 4-108.F.2.a, 4-109.F.2.a, 4-110.F.2.a, 4-111.F.2.a, 4-112.F.2.a of the Land Use Code. The 150 ADT Special Use Review threshold supports the goals of the Boulder County Comprehensive Plan, ensures that a particular use is compatible with the site and surrounding land, and safeguards the community from potential traffic hazards. Article 4-600 of the Land Use Code describes the purpose of the Special Review process as:

A land use designated as a special use in a zoning district is one that – because of its inherent nature, extent and external effects – may be allowed to establish if subject to Special Review to assure the use is located, designed, and operated in harmony with neighboring development and the surrounding area and does not adversely affect the public health, safety, and welfare. The purpose of the review process is to determine the compatibility of the use with the site and surrounding land and uses and the adequacy of services. Public review is necessary because the effect of a special use on the surrounding environment cannot be determined adequately in advance of the use being proposed for a particular location. During the review process, the county considers location, design, configuration, intensity, and impacts by comparing the proposal to the code criteria, intergovernmental agreements, established hazard areas, parcel specific conditions, site context and any other applicable regulations to assure that the use can operate in a sustainable way with minimal danger or impact to the users, the natural environment, or the developed environment.

Increased traffic is associated with several negative land use impacts, including various transportation safety issues, intensified environmental impacts, and additional strain on existing public infrastructure. Specifically, increases in traffic can create safety and congestion issues for cars and bikes both on- and off-site. Additional construction and road improvements are often needed to address these potential traffic hazards. The wider roads and additional parking areas needed to accommodate increased traffic can result in water quality issues due to increases in impervious surfaces, if paved, and air quality issues related to dust and water quality issues due to sedimentation, if unpaved. Additionally, traffic is directly associated with elevated levels of mobile source air pollution. These environmental impacts do not recognize parcel boundaries. Furthermore, traffic, especially heavy truck traffic, can significantly reduce the remaining life of existing public infrastructure. For these reasons, increases in traffic constitute an intensified use of land.

Through the Special Use Review process, Boulder County can include conditions of approval to reduce the intensity of traffic and ensure that the level of traffic associated with a particular use is appropriate for the surrounding area. For example, when Boulder County approved a Reception Hall use on N. 107th Street in 2021 (SU-20-0003), a shuttle service was required for events where 200 people or more would be on site. Similarly, the Special Use approval for Eldorado Mountain Resort (SU-19-0006) includes conditions that address traffic impacts, including free bus service to Eldora on peak days during specific hours, parking and pass requirements for single-occupancy vehicles, a communication plan to encourage carpooling and alternate modes of transportation, site signage and parking attendants to direct traffic, and a requirement to discuss additional traffic mitigation measures if the average vehicle occupancy did not reach 2.0 passengers by 2023. The Special Use approval for the Alexander Dawson School in 2013 (SU-13-0002) also contains conditions related to traffic including a maximum of 1,674 ADTs, guidelines for conducting traffic counts every two months, a requirement to submit an annual report with the previous year's enrollment numbers, traffic counts, the details of a travel reduction program, and additional steps to reduce traffic if necessary. As part of this approval, Boulder County can also reduce student enrollment numbers and/or withhold building permits if the school does not meet the traffic mitigation performance objectives.

Boulder County also frequently includes conditions of approval that require additional land use approval prior to permitting a more intense level of traffic. For example, a 2021 Special Use approval for a Marijuana Establishment on Ute Highway to increase traffic from 150 ADTs to 400 ADTs includes a condition requiring the property owner to apply for and receive approval if traffic counts ever exceed 400 ADTs.

Through the above-mentioned Special Use Review processes, Boulder County identified, reviewed, and addressed the traffic impacts related to each unique use and location. Without this type of land use review, increases in traffic could ultimately create a hazard or nuisance on both an individual property as well as the surrounding community.

Termination of Nonconforming Cement Plant Use

As noted above, the Director has determined that the increased level of traffic entering and exiting the Property constitutes an enlargement or alteration of the nonconforming cement plant use, which has the effect or threatened effect of creating a hazard or nuisance on or off the Property, of adversely affecting the character of the neighborhood, or of intensifying the use of the land or its need for services per Article 4-1003.C.1.d of the Land Use Code.

In particular, the significant increase in traffic related to the nonconforming cement plant use has created a safety hazard for vehicles exiting the Property as well as vehicles traveling along State Highway 66. CDOT has determined that it is no longer safe for traffic to turn left out of CEMEX Driveway onto State Highway 66 and will now require these vehicles to turn right out of the

Property. Under current conditions, it is impossible for CEMEX to ensure that all vehicles will avoid making left turns. As a result, without roadway alterations that would prevent this unsafe left turn, a traffic hazard exists on State Highway 66.

In addition, the increased ADTs since the closing of the Dowe Flats quarry has intensified the use of the land. Like all other land uses in the county, the traffic generated by the nonconforming cement plant use is part of the use. When CEMEX increased the ADTs associated with the nonconforming cement plant use by over 116%, it expanded the traffic by three times the 150 ADT Special Use Review threshold in the Land Use Code. An increase of 690 ADTs (or 230 truck ADTs) constitutes an enlargement of the use, which intensifies the use of the land.

The increased level of traffic has created an intensity of use that was noticeable enough for members of the public to file complaints with both Boulder County and CDOT, will require new traffic construction and infrastructure to address the traffic hazard created by the significant increase in trucks entering and existing the Property, and will require a new access permit from the State of Colorado. These factors further support the Director's conclusion that the increases in truck traffic constitute an enlargement or alteration of the nonconforming cement plant use.

For these reasons, the Director has determined that the right to continue the nonconforming cement plant use has terminated.

You have 30 days from the date of this notice to:

- (1) Provide satisfactory evidence demonstrating that this determination was made in error;
- (2) Abate the impermissible enlargement of the cement plant use; or
- (3) File an appeal of this determination to the Boulder County Board of County Commissioners.

Please contact me to discuss this matter at (720) 564-2604 or by email at dcase@bouldercounty.gov.

Sincerely,



Dale Case, AICP
Director of Community Planning and Permitting

ZON-23-0003