



November 7, 2024

Dale Case, AICP
Director of Community Planning and Permitting
Courthouse Annex
2045 13th Street
Boulder, CO 80306

VIA HAND DELIVERY
AND VIA EMAIL TO: dcase@bouldercounty.gov

Supplemental Response to Notice of Termination of Nonconforming Status

Dear Mr. Case:

This letter is the supplemental response of CEMEX, Inc. ("Cemex"), to the April 10, 2024, Notification of Determination Regarding Termination of Nonconforming Use (the "Determination") issued by the Boulder County Community Planning and Permitting Department (the "Department"). Cemex provides this supplemental response in support of its May 9, 2024, Preliminary Response to Notice of Termination of Nonconforming Status letter, attached as **Exhibit A** ("Preliminary Response"). For the reasons set forth in the Preliminary Response and this letter, the Department should reconsider its decision and withdraw the Determination.

According to the Department, the Determination was made solely in reliance upon complaints from citizens of Boulder County and the September 25, 2023, traffic report requested by the Colorado Department of Transportation ("CDOT") and prepared by Stantec Consulting Services, Inc. ("Stantec"), entitled, "CEMEX Lyons Access Traffic Study" (the "Stantec Report"). If this is not correct, we again request that the Department provide Cemex with a copy of any other information and data upon which the Department relied. To date, the Department has not identified any other supporting sources of information for the Determination.

Items provided in response to our Colorado Open Records Act ("CORA") requests to Boulder County, the Town of Lyons, and the Colorado Department of Transportation make clear that a few Boulder County citizens want the Cemex cement plant ("Plant") to cease operation by any means for their own benefit. A draft letter revoking the nonconforming use status of the Plant was even provided to the County to issue. A number of these items are attached as **Exhibit B**. Complaining about a purported traffic increase was simply a pretextual justification (one of many offered) to accomplish the few individuals' mission of getting the Department to shut the Plant down. And while these individuals claimed to be motivated by environmental concerns, the CORA documents reveal that these purported activists include "a highly successful serial entrepreneur" hoping to "transform[] the Cemex property into a world-class eco-village."

Attempting to use State and County agencies to achieve goals and benefits that the complainants believe would be obtained following a shutdown of the Plant is disappointing. This

has resulted in Cemex being “singled out,” “suffocating” it with regulatory treatment “to make sure [it] could never succeed.” *Sherman v. Town of Chester*, 752 F.3d 554, 565 (2d Cir. 2014). This further confirms that the Determination constitutes a regulatory taking without just compensation or sufficient procedural due process. *See, e.g., Bridge Aina Le 'a, LLC v. Haw. Land Use Comm 'n*, 2018 U.S. Dist. LEXIS 107583, at *66-68 (D. Haw. June 27, 2018) (government regulation was a targeted action against the plaintiff); *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 639-41 (Minn. 2007) (regulatory-takings test character inquiry favored plaintiff where city targeted a single property owner). Cemex was entitled to notice and an opportunity to be heard at a pre-deprivation hearing before the Department issued the Determination. *Eason v. Board of County Commissioners*, 70 P.3d 600, 609 (Colo. App. 2003) (“Providing pre-deprivation notice and hearing would not be unduly burdensome for the County, and any resulting expense or delay would be minimal in comparison to the injury occasioned by an erroneous deprivation,” rejecting the County’s argument that a post-deprivation appeal and hearing process was sufficient in lieu of pre-deprivation process and concluding that “due process required a pre-deprivation hearing before the County could change Eason’s legal use to an illegal one”).

As we set forth in our Preliminary Response and supplement in this letter, the Determination is not supported by either the facts or applicable Colorado law. Because the Plant’s use has always been and continues to be the production of cement, Cemex’s nonconforming use has not been enlarged or altered. That the volume of trucks supplying the Plant or transporting its products fluctuate in number, whether up or down, does not enlarge or alter the use of the property itself. Where Cemex gets its raw materials or how it transports them to the Plant has no impact on Cemex’s nonconforming use. Throughout the period of Plant operations, materials have been sourced from a variety of locations and at variable rates, always with some portion delivered by trucks.

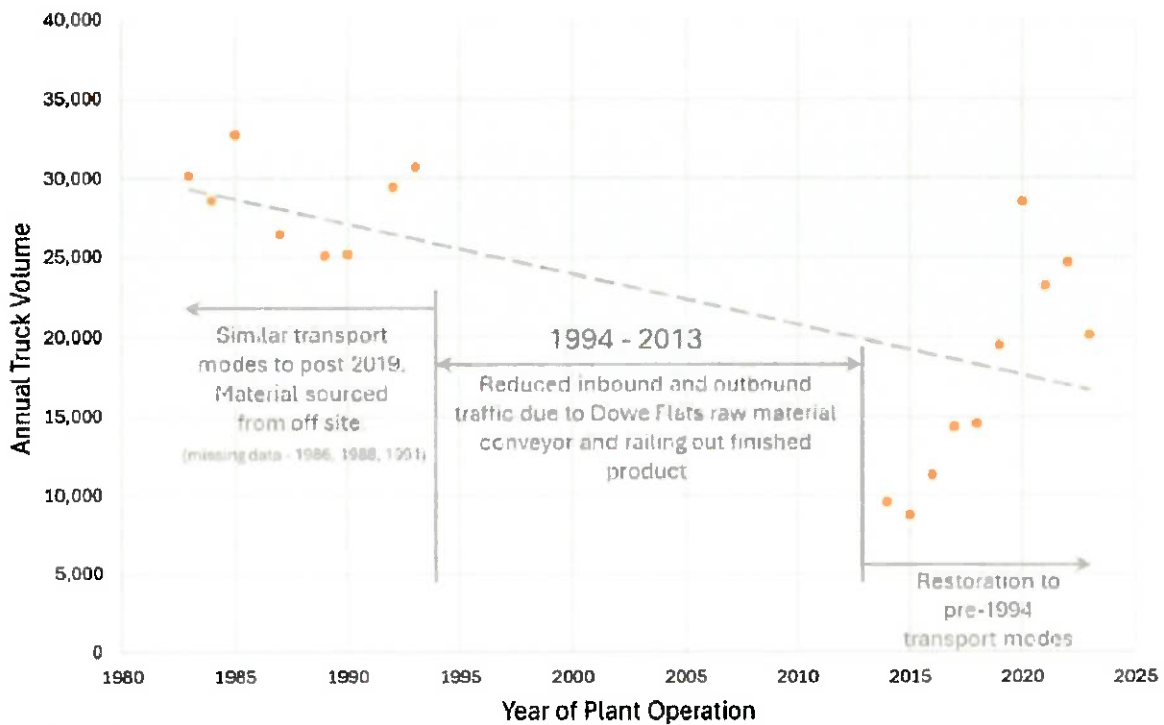
Even if offsite truck traffic could legally constitute an enlargement, which it cannot, the only relevant comparison would be between current truck traffic volumes and those existing at the time the use became nonconforming by the County’s changes to its land use code (the “Land Use Code”) in 1994. The Department has not provided any truck traffic counts to and from the Plant in 1994 and, therefore, does not have any evidence that truck traffic has, in fact, increased from historical volumes. The limited dataset utilized by Stantec – one day selected from only three days of data from only two recent years - is entirely insufficient to support the Department’s conclusion of increased truck traffic as compared to historical operations. The Department’s reliance on only one random day of data from the five decades the Plant has been in operation is arbitrary and capricious, especially when viewed in light of the contrary conclusions reached after a more thorough historical evaluation by Landis Evans, as discussed below.

Stantec itself has made clear, as set forth in the attached **Exhibit C**, that the Department misunderstood the purpose and nature of the Stantec Report, aptly named the “CEMEX Lyons Access Traffic Study,” and improperly relied on Stantec’s data and findings in issuing the Determination. Following the issuance of the Determination, Stantec reviewed additional data from Cemex showing Cemex-related truck trips for 2006 through 2022. Stantec found that this data illustrated a peak in truck trips in 2020, which then decreased through 2022.

During the additional time to respond, which we appreciate the Department providing, Cemex retained Landis Evans & Partners (“Landis Evans”), a civil-engineering firm that operates nationwide and specializes in, among other things, traffic impact studies and safety studies. Landis Evans assessed (i) how current traffic conditions at the Plant compare to historical traffic volumes, (ii) the purported factual basis for the Determination, and (iii) the traffic-related safety conditions at the Plant. Landis Evans’ report is attached as **Exhibit D** (the “Landis Report”).

Because no traffic count data exists for most of the Plant’s history, Landis Evans analyzed truck traffic volumes at the Plant using historical plant production and operational records to correlate truck traffic and determine a reliable method to provide time-consistent calculations of annual truck traffic at the Plant prior to 1994. Using this data, Landis Evans was then able to compare calculated annual truck volumes for 1983 to 1993 with Cemex-reported truck volumes for 2014 to 2022.¹ The results of this analysis provide clear confirmation that annual truck volumes entering and exiting the Plant are *lower* in recent years compared to the 1990s, and 1994 in particular, when Cemex’s use became nonconforming:

**Annual Truck Volume by Year
(1983 - 2023)**

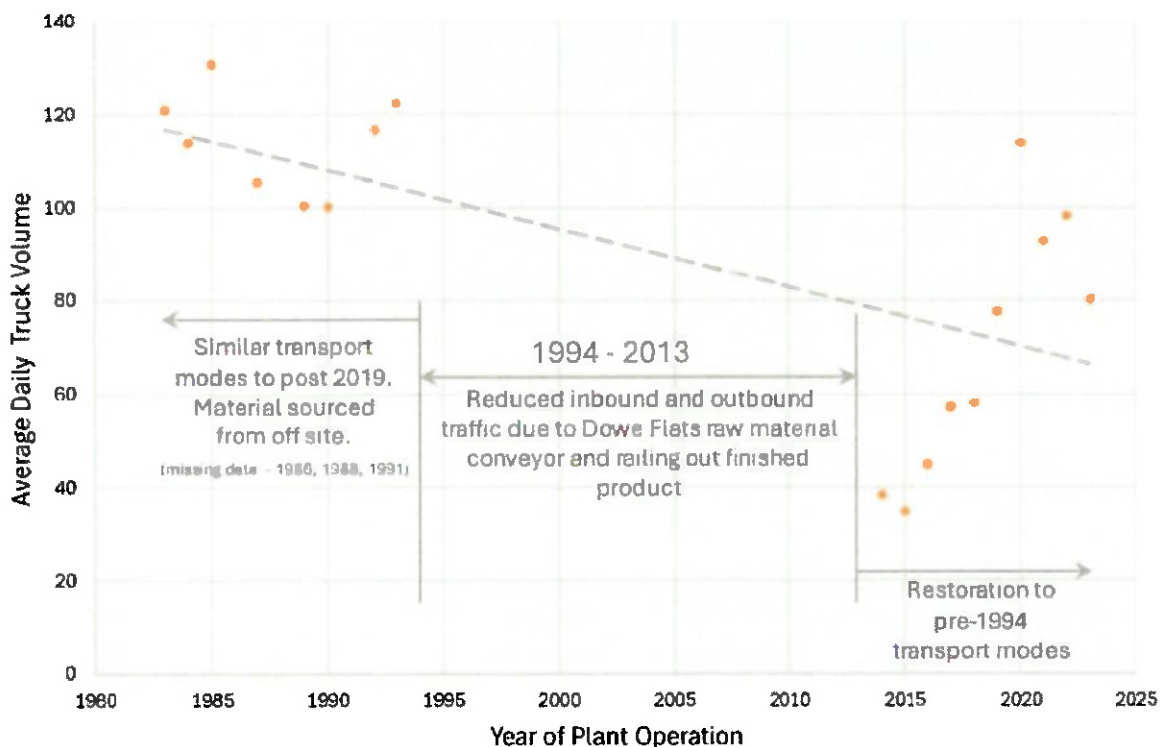


Ex. D at 6-10, fig.2.

Similarly, the average daily truck traffic for the last ten years has been markedly lower than in the years prior to 1994 when Cemex’s nonconforming use was established:

¹ The period from 1994 to 2014 was not evaluated due to largely differing modes of raw material and product transport employed in Plant operations.

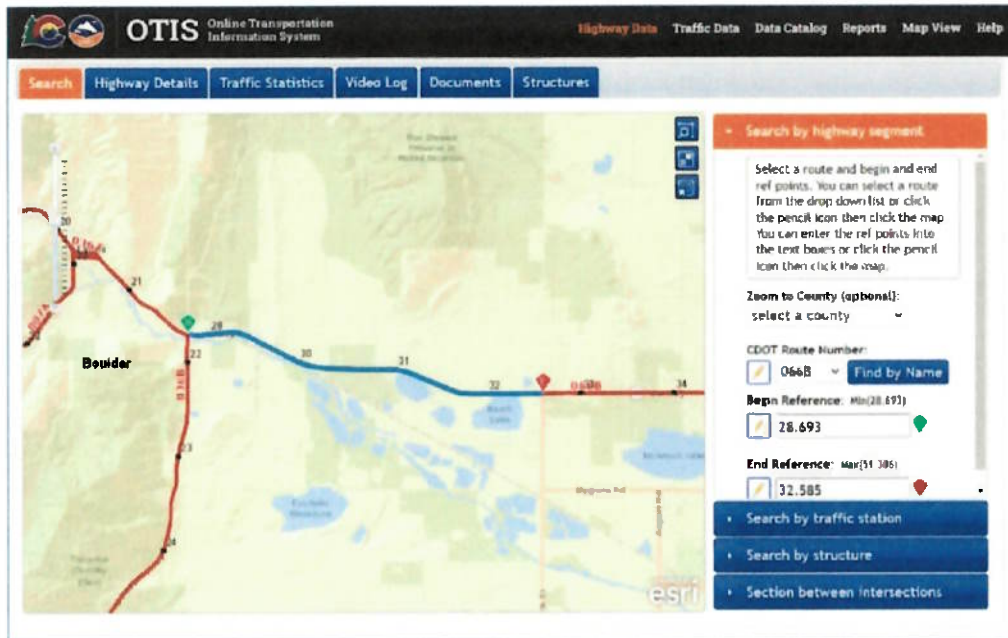
Average Daily Truck Volume by Year
(1983 - 2023)



Id. at 11, fig.3.

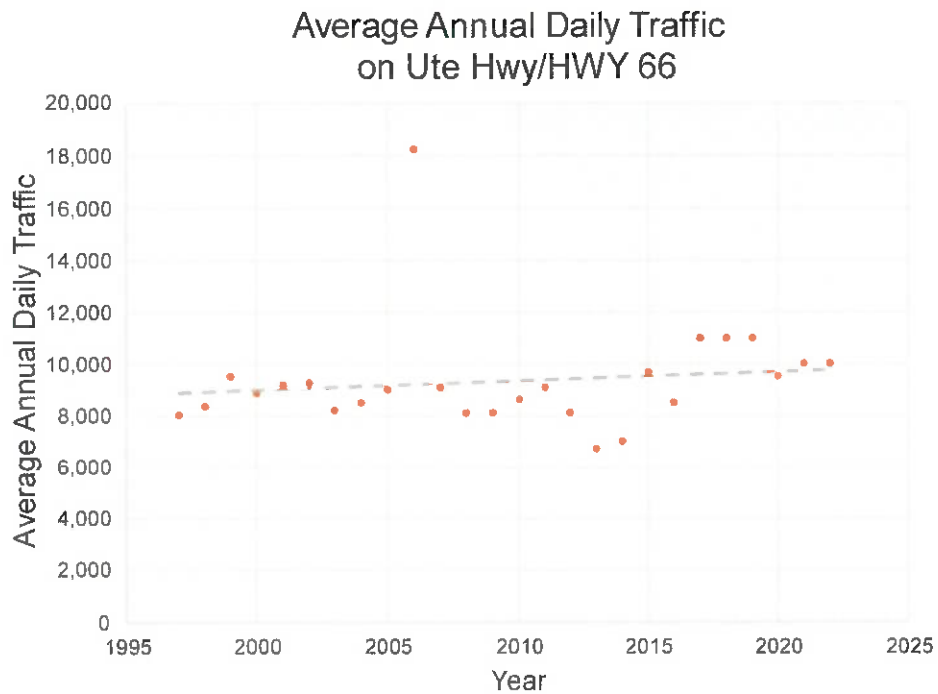
Also, notably, the calculated traffic volume for 2023 is lower than for 2022, and the 2022 number upon which the Department relied is lower than 2020. *Id.* at 8. Collectively, these findings directly refute the Department’s premise that truck traffic to and from the Plant has recently increased over historical levels.

Landis Evans also examined the volume of trucks entering and leaving the Plant and the overall number of trucks on the section of Highway 66 fronting the Plant, using data from CDOT’s Online Traffic Information System (“OTIS”). This information was available from 1997-2022, and Landis compiled the data for the segment shown in blue below:



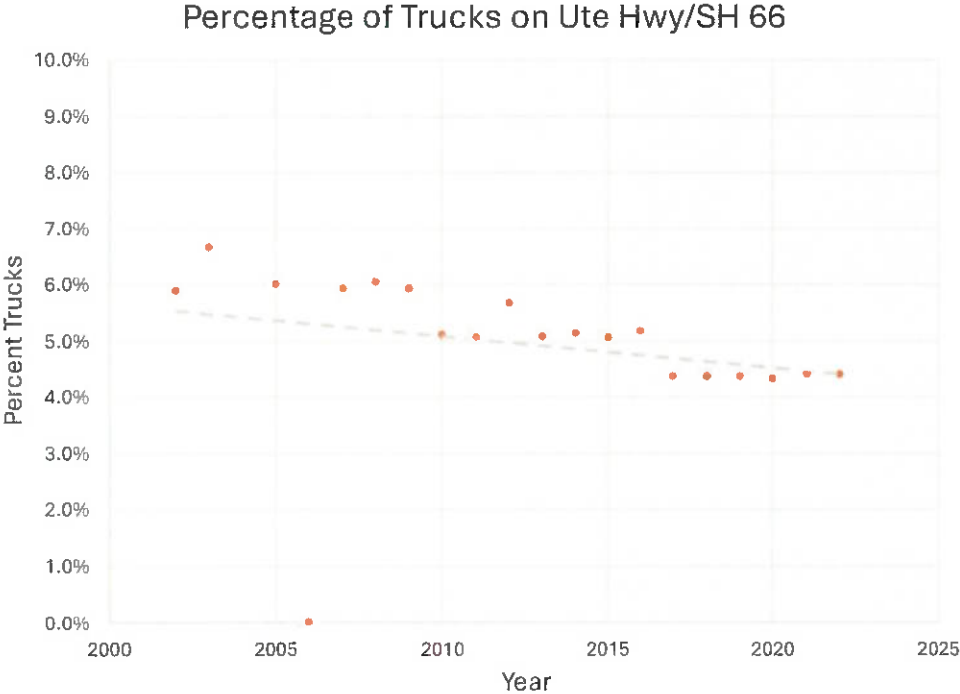
Id. at 15, fig.5.

This data included Average Annual Daily Traffic (all types of vehicle traffic), and the percentage of the traffic volume comprised of trucks. As plotted below, the overall traffic volumes from the OTIS data on Highway 66 have generally been increasing since 1997:



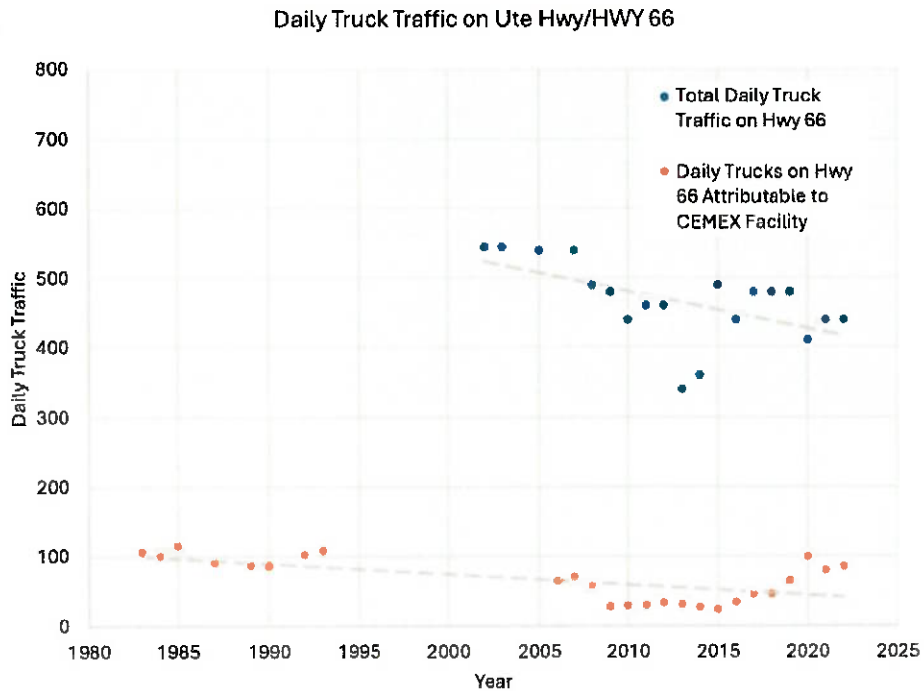
Id. at 17, fig.6.

But, as the chart below shows, the percentage of that overall traffic stream that is comprised of trucks has decreased according to CDOT data:



Id. at 18, fig.7.

Landis Evans identified the daily truck volumes on Highway 66 (available only back to 2002), plotting the overall truck volumes from the OTIS data (blue dots) versus the trucks attributable to the Plant (orange dots):



Id. at 19, fig.8.

Thus, while the overall general traffic volume on the roadway has risen since 1994, truck traffic volumes on the highway have decreased and are generally trending downward, with the volume of trucks attributable to the Plant relatively stable or trending downward over the 40-year period spanning from 1983 to 2023.

The fact is that there has been no overall increase in Plant truck traffic creating or resulting in hazardous or nuisance conditions.

Landis Evans obtained CDOT crash data from 2007 through 2023 for the area within one mile of the Plant’s entrance. This data revealed only three accidents involving heavy trucks in the entire 16-year period reviewed. Each of these accidents occurred prior to closure of the Dowe Flats quarry in 2022. The most recent occurred nearly five years ago and the only one involving a personal injury occurred 17 years ago. There is no evidence that truck-related accidents are significant or have been increasing since the closure of Dowe Flats.

To the extent the Stantec Report recommended a left-turning restriction at the Plant’s entrance, that recommendation was (i) consistent with CDOT’s March 2020 Access Control Plan, and (ii) a prophylactic recommendation, not a determination that there was a hazard caused by truck traffic volumes in the area.

The Determination did not contain any support for the assertion of “an increase in truck traffic since the closing of the Dowe Flats Quarry . . . constitut[ing] an enlargement or alteration of the nonconforming use which has the effect of creating a hazard or nuisance off the property” (Determination at 3), and the Landis Report refutes such an assertion.

Stantec has rejected any reliance on its report for the conclusion that traffic associated with the Plant has created hazardous conditions or safety concerns. Stantec specifically asked CDOT whether there were any traffic-related safety concerns in the vicinity of the Plant, and CDOT stated that there were no such concerns. Stantec likewise did not identify any hazardous conditions. Stantec's recommendation to eliminate left turns out of the Plant was not to mitigate hazardous conditions but rather a commonly used engineering practice and recommended safety measure in any operational scenario. CDOT's 2020 SH 66 Access Control Plan, on which Stantec's recommendation was based, predated Dowe Flats' closure, therefore having no connection to the closure of the quarry, any ensuing change in traffic volume or any resulting safety concerns.

Stantec used surrogates for the pre-quarry closure condition (based upon monthly rates) and selective traffic counts, focusing on only one day out of three days of data in the month of June 2023, for the post-quarry closure traffic volume, and it did nothing to confirm any correlation between its three-day actual traffic count data and the average daily data for an entire week, month or year. This made it impossible to conclude that the June 2023 counts represented true increases in average overall truck traffic from the Plant site as compared to all pre-2023 traffic. Given the limited purpose and scope of the Stantec Report, and the much more comprehensive inquiry and differing results identified in the Landis Report, there simply is no competent evidence supporting the conclusions drawn in the Determination.

The Determination is also based on the flawed legal premise that a purported change in off-site traffic can constitute an enlargement or alteration of Cemex's use of its property. That premise is contrary to (A) prior positions the Department has taken with respect to Cemex and the Plant, (B) the Boulder County Land Use Code and Colorado state law, and (C) nationwide consensus as to the permissible bounds of a nonconforming use.

The Determination purported to terminate Cemex's land-use rights based on section 4-1003(C) of the Land Use Code, which governs the termination of a nonconforming use. However, because there has been no enlargement or alteration of Cemex's use of the "cement kiln or attendant equipment," there has been no enlargement or alteration of the nonconforming use. The plain language of the Land Use Code as well as Colorado state law confirm that a nonconforming use refers to the physical use of the property on-site, not off-site activities. Thus, a change in off-site traffic is not an alteration or enlargement of a nonconforming use.

Cemex's nonconforming use was established following changes to Boulder County zoning regulations in the 1990s. In 2002, the Department sent Cemex a letter, attached as **Exhibit E**, "indicating the status of the Cemex factory building and equipment as governed by the Boulder County Land Use Code." The letter stated, "The Boulder County Land Use Code recognizes the cement kiln and attendant equipment as a nonconforming use" that "predates the regulations." The 2002 letter assured Cemex that "from a County land-use standpoint, the kiln is a nonconforming use allowed regardless of any relationship to any mining activity reviewed and approved by the county, as there is no connection between the use of the facility and any adjacent mining areas (such as Dowe Flats, which received county special uses [*sic*] approval in Docket SU-94-13), or other mining sites." The Department concluded: "Therefore, it follows that the use can potentially remain in place indefinitely, if it continues to meet all of the requirements of Article 4-1003."

The Department—and the County—are bound by its 2002 representations and assurances, which Cemex has relied upon to its detriment in continuing to operate and invest in the Plant. The Department is thus estopped from taking a contrary position now and cannot claim that the closure of Dowe Flats and the factually incorrect allegation of a resulting increase in truck traffic constituted an enlargement or alteration of Cemex’s nonconforming use.

Applying Colorado law interpreting zoning ordinances to Land Use Code section 4-1003(C)(1), the meaning of “any other enlargement or alteration of the nonconforming use” in section 4-1003(C)(1)(d) is limited to the types of on-site physical enlargements or alterations described in subsections 4-1003(C)(1)(a), (b), (c) and (e). *Capital One v. Colo. Dep’t of Revenue*, 509 P.3d 1078, 1081 (Colo. App. 2022) (“[W]hen a general term follows a list of specific things, the general term applies only to things of the same general class as those specifically mentioned.”) These other subsections all share a similar focus: structural additions, removals, replacements, enlargements, or alterations; or enlargements or alterations in the occupied land area. Land Use Code § 4-1003(C)(1)(a) (“[a]ddition of a new structure”); §§(b) (“[e]nlargement or alteration of a structure”); §§(c) (“[e]nlargement or alteration in the land area occupied”); §§(e) (“[r]emoval or replacement of any structural member”). Accordingly, section 4-1003(C)(1)(d)’s reference to “any other enlargement or alteration of the nonconforming use” is limited to enlargements or alterations that share the same characteristics as those described in the other subsections, which relate to on-site physical changes to the structure or land area of the nonconforming use. An increase in off-site traffic is not like any of those things, and the Department’s reading of subsection (d) would vastly expand the County’s authority to terminate protected nonconforming uses, even where, as here, there have been no physical expansions to on-site structures or to the land area upon which the non-conforming use exists.

The Department’s position that a portion of the use at the Plant takes place on State Highway 66 is also inconsistent with Colorado’s highway statutes. Colorado’s highway statutes provide a comprehensive regulatory scheme for state highways and place such highways within the jurisdiction of CDOT. There are specific provisions governing the division of authority between CDOT and local governments, but no similar provisions addressing any shared authority with counties over state highways within their unincorporated areas. The lack of such provisions clearly indicates that the legislature did not intend for counties to share any regulatory authority over state highways, meaning that a use under the Land Use Code may not be defined to include a portion of a state highway.

Our Preliminary Response noted how other jurisdictions nationwide have confirmed that a mere increase in business, production volume or resulting traffic is not an enlargement or alteration of a nonconforming business use. Further support is also contained in the following decisions: *Helicopter Assocs., Inc v. Stamford*, 519 A.2d 49, 57 (Conn. 1986) (“[A] mere increase in the amount of business done pursuant to a nonconforming use is not an illegal expansion of the original use.”); *Piesco v. Hollihan*, 849 N.Y.S.2d 671, 674 (N.Y. App. Div. 2008) (“An increase in volume or intensity of the same nonconforming use as has occurred on the property for decades is not an expansion of that nonconforming use”); and *Worthington v. Everson*, 226 N.E.2d 570, 571-72 (Ohio Ct. App. 1967) (“In the present instance, the land use is not being changed in nature. There is an increase in the amount of business, but such increase does not constitute a change in use which existed at the time of the adoption of the zoning resolution. It is generally held that an increase in business done on a parcel of land

comprising a nonconforming use is not an extension of use.”) If a property owner continues to operate a business on site and remain engaged in the same business operations in which it engaged when the nonconforming use was created, mere growth in the business does not constitute an enlargement or alteration of the nonconforming use. *See, e.g., Central City v. Knowlton*, 265 N.W.2d 749, 753-54 (Iowa 1978).

Cemex hereby renews its request that the Department reverse and withdraw its Determination. Cemex also renews its request made in the Preliminary Response for a hearing before the Board of County Commissioners (“BOCC”) in the event the Department declines to reverse the Determination. Cemex reserves the right to supplement its submittals with additional information and argument in support of Cemex’s position that the Determination was in error, either prior to the Department’s final determination or in any subsequent proceedings before the BOCC. Cemex continues to reserve the right to pursue abatement, consistent with historical traffic volumes at the Plant, pursuant to section 4-1003(H) of the Land Use Code, at any time prior to the conclusion of the proceedings before the Department, any subsequent BOCC proceedings, and any resulting judicial appeals.

If the Department declines to reverse the Determination, Cemex requests that the County explain why each business operating as a nonconforming use and experiencing an increase in traffic at their operations since 2022, which could be determined, among other methods, by the levels of sales tax paid, has not enlarged or altered its nonconforming use for which a notice of termination should have been issued.

Sincerely,

CEMEX, Inc.

By: 
John Heffernan
Assistant Secretary

cc: Board of County Commissioners
(via email: commissioners@bouldercounty.gov)

List of Exhibits:

- Exhibit A** – Cemex Preliminary Response
- Exhibit B** – Selected CORA Response Documents
- Exhibit C** – Stantec Supplemental Statement
- Exhibit D** – Landis Evans Cemex Lyons Plant Traffic Study
- Exhibit E** – Letter dated October 8, 2002, from the Boulder County Land Use Department