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SENT VIA EMAIL

Dale Case, AICP
Director, Boulder County Community Planning and Permitting
2045 13th Street
Boulder, Colorado 80302
dcase@bouldercounty.org

RE: ZON-23-0003 – Good Neighbors of Lyons’ Support for Termination of CEMEX Nonconforming Use and Request for Final Determination on Remaining Outstanding Issues

Dear Director Case,

This law firm represents Good Neighbors of Lyons (“GNL”) in connection with its continued efforts to ensure that the so-called “CEMEX Longmont Lyons Cement Plant” (the “Facility”) is required to operate consistent with all local, state, and federal laws to protect the rights of neighboring landowners and the broader community.

This letter relates to Boulder County Planning File No. ZON-23-0003 and specifically addresses three issues. First, CEMEX is wrong to argue in its letter to the County dated May 9, 2024, that the County lacks the legal authority to find that CEMEX’s significant operational changes (which have resulted in a significant increase in delivery traffic) amount to an illegal alteration and enlargement of CEMEX’s historic nonconforming use. Second, while GNL agrees with the County’s April 10, 2024 determination that the substantial increase in truck traffic generated by the Facility between June 2022 and June 2023 compels a finding that CEMEX has illegally altered and expanded its historic nonconforming use, additional evidence further confirms that traffic has increased even more substantially since this heavy industrial use first became nonconforming in 1994. Third, GNL believes that the County must also make a final determination to resolve the four additional arguments that have been raised to show the other ways in which CEMEX has expanded its nonconforming use in violation of Article 4-1003(C) of the Boulder County Land Use Code. Each of these three issues is addressed in turn herein.

1. CEMEX Is Wrong to Argue that the County Lacks the Authority to Prohibit the Operational Alteration of Its Historic Nonconforming Use.

In its May 9, 2024 letter to the County, CEMEX argues that the County does not have the authority to find that the substantial increase in traffic generated by new raw material deliveries to the Facility constitutes an enlargement or alteration of the Facility under Article 4-1003(C) of the Land Use Code. CEMEX argues that an illegal expansion under Article 4-1003(C) can only be found if there has been an enlargement or alteration of the onsite operations of the Facility.

CEMEX fundamentally misunderstands the County's determination. The County has not found that the changes in offsite traffic generated by the Facility is an enlargement or an alteration of the nonconforming use. Rather, what the County found is that the Facility has undergone significant operational changes which have resulted in substantially increased offsite hazards in violation of Article 4-1003(C). The County determined that the operation of the Facility has been substantially altered as result of CEMEX's continuing shift away from sourcing raw materials for the Facility from its adjacent mining operations.¹ Because these source materials are no longer locally available to CEMEX, CEMEX has fundamentally altered the operation of the Facility to primarily rely upon raw materials that are imported to the site from distant mines by large trucks that have now clogged the surrounding roadways and created additional negative impacts for the surrounding community. The County found that the illegal alteration of the Facility is the operational change that CEMEX made to rely upon raw materials that are primarily delivered to the Facility by heavy truck traffic, which has in turn resulted in increased offsite hazards and nuisances in violation of Article 4-1003(C)(1)(d). This finding is wholly consistent with the plain meaning of the Land Use Code.

CEMEX is also wrong to suggest that the County cannot rely upon offsite impacts to find that an onsite alteration of operations has unlawfully expanded a nonconforming use. Numerous courts from around the country have recognized that onsite operational changes which result in significant changes to offsite traffic impacts can support a finding that a nonconforming use has been illegally expanded. *See, e.g., Nabe v. Sosis*, 106 N.Y.S.3d 127, 129 (App. Div. 2019); *Oakham Sand & Gravel Corp. v. Town of Oakham*, 763 N.E.2d 529, 534 (Mass. App. Ct. 2002); *Town of W. Greenwich v. A. Cardi Realty Assocs.*, Case No. KC 90-776, 1999 WL 615741, at *5 (R.I. Super. Aug. 6, 1999); *Country Sam Inc. v. Bennett*, 597 N.Y.S.2d 13, 14 (App. Div. 1993); *Powers v. Bldg. Inspector of Barnstable*, 296 N.E.2d 491, 500 (Mass. 1973); *Frost v. Lucey*, 231 A.2d 441, 443-44 (Me. 1967); *Jobert v. Morant*, 192 A.2d 553, 555 (Conn. 1963). All of these decisions are consistent with the overarching principle in Colorado that local ordinances restricting

¹ Indeed CEMEX repeatedly threatened that the closure of the Dowe Flats Mine would require it to dramatically increase the volume of truck traffic to the Facility to provide the same volume of raw materials from distant mining operations. In apparently following through on this threat, CEMEX has now altered fundamentally altered its onsite operations in a manner that has negatively impacted the surrounding community in violation of Article 4-1003(C).

nonconforming ordinances should be liberally construed and applied to ensure that nonconforming uses are “reduced to conforming uses as speedily as possible.” *Fire House Car Wash, Inc. v. Bd. of Adjustment*, 30 P.3d 762, 766 (Colo. App. 2001).

The only case cited by CEMEX in support of its argument that the County lacks the authority to consider changes in traffic impacts is plainly distinguishable. In *Keiser v. Redding Zoning Bd. of Appeals*, No. 30 62 08, 1993 WL 183471, at *1 (Conn. Super. Ct. May 25, 1993), superior court in Connecticut affirmed an administrative determination that the nonconforming use of a building as a religious facility was not unlawfully expanded simply because the number of people attending services had increased. This holding is distinguishable for at least three critical reasons. First, in *Keiser*, the parties challenging the expanded use did not argue that there had been any change in the operations of the nonconforming use—they merely argued that it had become more intense. Here, CEMEX’s onsite use has obviously changed as CEMEX has become increasingly more reliant on a significant and increasing volume of truck deliveries to provide raw materials for its nonconforming heavy industrial use. This is an operational change that goes beyond the mere “intensification” of this historic nonconforming use. Second, the neighbors challenging the underlying finding in *Keiser* that the land user had not illegally expanded its nonconforming use had the burden of proof. Here, Article 4-1003(H)(1) of the County’s Land Use Code expressly provides that CEMEX has the burden to demonstrate that it has not unlawfully altered or expanded its nonconforming use. Finally, the *Keiser* court was sitting in an appellate capacity to review the underlying administrative determination that the church had not unlawfully expanded its use. Accordingly, the *Keiser* court was required to defer to all of the municipality’s underlying factual findings and could not overturn the underlying decision unless it was deemed to be an arbitrary and capricious abuse of discretion. Here, the County is charged with making this determination in the first instance and is not required to defer to any arguments or evidence.

CEMEX’s perfunctory constitutional arguments are equally unavailing. With respect to substantive due process, CEMEX does not even attempt to argue that the County has engaged in outrageous conduct that “shocks the conscience.” *Sanders v. Bd. of Cnty. Comm’rs*, 192 F. Supp. 2d 1094, 1112-13 (D. Colo. 2001). The County also has not violated CEMEX’s right to procedural due process of law. Notwithstanding CEMEX’s unsupported claims to the contrary, the County has gone above and beyond to provide CEMEX with a full and fair “pre-deprivation” administrative review process. As it stands, CEMEX appears to be continuing to operate its illegally expanded nonconforming use while the County continues to give CEMEX every possible opportunity to be heard on these issues. *Cf. Eason v. Bd. of Cnty. Comm’rs*, 70 P.3d 600, 609 (Colo. App. 2003). Finally, CEMEX has not articulated any theory which might possibly support a regulatory takings claim. Even if the County requires CEMEX to abate its illegal expansion of its nonconforming use, this will not deprive CEMEX of all economically beneficial use of its property. Moreover, any takings claim must involve the deprivation of a vested property right. Here, CEMEX does not have any right to alter and expand its nonconforming operations in a manner that results in a significant increase in negative offsite impacts. Again, Colorado law

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provides that local governments should work to curtail and eventually phase out nonconforming uses. *See Fire House Car Wash, Inc.*, 30 P.3d at 766.

Because the County acted consistent with its authority to find that CEMEX's operational changes at the Facility constitute an illegal alteration of CEMEX's nonconforming use, the County acted appropriately in finding that CEMEX must abate this illegal expansion of its use. Accordingly, there is no basis for the County to now reverse itself and walk back this decision.

2. The Traffic Generated by Raw Material Deliveries to the Facility Has Increased Significantly Since the "Baseline" Level of Traffic Associated with the 1994 Nonconforming Use Due to CEMEX's Significant Operational Changes.

GNL wholeheartedly agrees with the County's April 10, 2024 determination that CEMEX's own traffic study from August 2023 (the "Traffic Study") confirms that CEMEX has exceeded the scope of its historic nonconforming use by increasing traffic by more than 116 percent of the levels of traffic that were associated with the Facility as recently as June 2022—*i.e.*, before the closure of the Dowe Flats Mine in September 2022 caused CEMEX to import all shale and limestone from offsite via new truck traffic to and from the Facility.² The County also correctly determined that these significant operational changes have resulted in offsite impacts that create an increased hazards for the environment and the surrounding community in violation of Article 4-1003(C) of the Land Use Code.

Notwithstanding these findings, GNL believes there is additional evidence that the County has not considered showing that even more significant alterations have resulted in an even more significant increase in truck traffic since the time that CEMEX's use first became nonconforming in 1994. As noted, the County's April 10, 2024 determination in this matter relied upon data from June 2022 contained in CEMEX's August 2023 Traffic Study to set the "baseline" for the amount of traffic that was generated by the Facility at 593 ADTs before the Dowe Flat Mine was closed

² CEMEX's claim in its May 9, 2024 letter that the Traffic Study cannot be relied upon to support this analysis because that study was allegedly prepared for a different "purpose" is wholly unconvincing. The Traffic Study is an independent traffic study that CEMEX paid to commission and then submitted to CDOT as an accurate analysis of the significant traffic changes at the Facility between 2022 and 2023. The Traffic Study expressly finds that "[t]he 2022 closure of CEMEX's Dowe Flats Quarry . . . has impacted daily traffic" and explicitly states that the purpose of the Traffic Study was to evaluate "the overall increase in truck traffic as a result of the quarry closure, and its impact to the adjacent roadway network." (Traffic Study, p. 1.1.) The Traffic Study means what it says.

CEMEX's most recent claims that traffic to and from the Facility has not markedly increased are critically undermined by CEMEX's many previous claims that the closure of the Dowe Flats Mine would require it to import more raw materials by truck and thus significantly increase truck traffic to and from the Facility.

in September 2022. However, this assumption ignores the fact that CEMEX itself has confirmed that the Facility previously underwent equally significant operational changes between 2018 and 2020 when the Dowe Flats Mine ran out of limestone such that all of the limestone needed for CEMEX's operations had to be trucked into the Facility beginning in at least 2020.

Additional evidence shows that the “baseline” level of traffic generated by the Facility before this earlier operational change (and at the time that the use first became nonconforming in 1994) was actually much lower than the June 2022 traffic count in the Traffic Study. More specifically, GNL has found the following evidence of the historic levels of traffic generated by CEMEX's nonconforming use around the time that it first became nonconforming in 1994:

- A December 1994 inspection report prepared by the Colorado Department of Health and Environment (“CDPHE”) provides that in 1993, a total of 183,653 tons of material were hauled to the Facility from the Larimer Quarry. (*See Exhibit A, p. 3.*) Given that standard haul trucks have a haul capacity of 30 tons, this means that 6,121 30-ton trucks would have been needed to supply this amount of material to the Facility in 1993, which averages out to approximately 33 total daily truck trips (separately counting trips to and from the Facility)—or a daily average of approximately 100 ADTs (using the County's standard that 1 truck trip is equal to 3 ADTs).
- A September 1995 inspection report prepared by CDPHE provides that in 1994, a total of 56,739 tons of material were hauled to the Facility from the Larimer Quarry. (*See Exhibit B, p. 5.*) Given that standard haul trucks have a haul capacity of 30 tons, this means that 1,891 30-ton trucks would have been needed to supply this amount of material to the Facility in 1993, which averages out to approximately 10.3 total daily truck trips (separately counting trips to and from the Facility)—or a daily average of approximately 31 ADTs (using the County's standard that 1 truck trip is equal to 3 ADTs).

This evidence confirms that the “baseline” for the traffic generated by raw material deliveries when the Facility first became nonconforming in 1994 was dramatically lower than the operational expansion that had already occurred prior to June 2022 (and which was then further expanded between June 2022 and June 2023). If the traffic figures from the 1994 and 1995 CDPHE reports are averaged, they show that the average amount of traffic that was generated by raw material deliveries to the Facility in 1993 and 1994 was approximately 65 ADTs. This historic volume of raw material delivery traffic was expanded by an order of magnitude long before the timeframe considered in the Traffic Study.³

³ If CEMEX disputes this, then it bears the burden of proof to show that the current volume of traffic associated with raw material deliveries is no more than the 65 ADTs that it previously

Additional evidence shows that these traffic levels continued to creep up over the years until they reached a crescendo with the most recent operational changes in 2022 following the closure of the Dowe Flats Mine:

- In 1998, CEMEX's predecessor in interest, who was operating the Facility at the time, claimed that the Facility was generating an average of less than 75 truck trips per day, but that this was potentially expected to increase to an average of 79 truck trips per day. (*See Exhibit C, p. 3.*) Although this notice does not specify whether these averages were accounting for one-way or roundtrip trips, even assuming conservatively that these averages are counting roundtrips, this is evidence that in 1998, the Facility was generating at most 158 truck trips per day or an average of 474 ADTs per day (using the County's standard that 1 truck trip is equal to 3 ADTs). Of course only a subset of this total predicted volume of 474 ADTs generated by the Facility would have been generated by raw material deliveries.
- More recently, in 2018, CEMEX acquired the Weaver Mine in Laramie, Wyoming and began trucking limestone to the Facility from that mine. An annual report for that mine shows that 441,615 tons of material were mined between February 2021 and February 2022. (*See Exhibit D, p. 5.*) Given that standard haul trucks have a haul capacity of 30 tons, this means that approximately 14,721 30-ton trucks would have been needed to supply this amount of material to the Facility between February 2021 and February 2022, which averages out to approximately 80.6 total daily truck trips (separately counting trips to and from the Facility)—or a daily average of approximately 241 ADTs (using the County's standard that 1 truck trip is equal to 3 ADTs). This evidence shows that when the Dowe Flats Mine ran out of limestone to supply the Facility, CEMEX increased the traffic associated with raw material deliveries to the Facility by approximately 241 ADTs in or around 2021. Notwithstanding its nonconforming status, this significant operational change in 2021 would have otherwise required CEMEX to seek a special use approval consistent with the County's rule that any use that generates 150 or more ADTs requires a special use review.⁴

reported in 1993 and 1994 when the Facility first became nonconforming. *See Article 4-1003(H)(1) of the Land Use Code.*

⁴ CEMEX is also wrong to argue that that the County's special use review rules for uses that generate excessive traffic impacts are not relevant to the instant inquiry. Contrary to CEMEX's claim, the County is not arguing that CEMEX could or should have obtained a special use approval. Rather, the County correctly notes that its existing rules regarding when special approval is needed for certain more intensive traffic impacts is a useful heuristic for concluding that CEMEX's dramatic operational changes have obviously resulted in a significant increase in the severity of

This additional data shows the many ways in which CEMEX's changing operations at the Facility over the years have continued to dramatically increase the traffic generated by raw material deliveries above the "baseline" that was in place when the use became nonconforming in 1994—perhaps most significantly when the Dowe Flats Mine ran out of limestone between 2018 and 2020 and then again when the Dowe Flats Mine was permanently closed in September 2022.

All of this additional evidence is further proof that the County correctly determined that the substantial physical and operational changes to the Facility since 1994 have gone far beyond the scope of the original nonconforming use. As detailed in the County's April 10, 2024 determination letter, the negative offsite impacts of these significant changes to the natural environment and surrounding land users are substantial. In light of this additional evidence, there can be no doubt that the County has correctly found that CEMEX has exceeded the scope of its nonconforming use in violation of Article 4-1003(C) of the County's Land Use Code. CEMEX certainly has not met its burden of proof to argue otherwise.

3. The County Must Resolve the Other Outstanding Challenges to CEMEX's Illegal Expansion and Alteration of Its Nonconforming Use.

In the County's April 10, 2024 determination regarding CEMEX's unlawful alteration of its nonconforming use, the County declined to resolve the merits of the four other challenges that GNL and others have raised regarding the unlawful expansion of CEMEX's nonconforming use. More specifically, members of the public previously asked the County to consider whether CEMEX had illegally expanded its nonconforming use by: (1) constructing new stockpiles of shale and other raw materials which have resulted in negative offsite visual impacts; (2) expanded the Facility through the construction of at least 19 new improvements costing millions of dollars without building permits or any other kind of review or approvals from the County; (3) increasing the production capacity of the Facility; and (4) generating a substantial increase in air pollution from operations at the Facility. Although the County's April 10, 2024 determination states that the County does not have sufficient evidence to resolve these issues, this letter does not provide any explanation as to why the significant evidence that the public provided regarding these issues was insufficient to prompt a reasoned decision by the County.

Article 4-1201(A) of the County's Land Use Code provides that anyone who is aggrieved by a decision of the Community Planning and Permitting Director may submit an appeal to the Board of Adjustment. *See also* C.R.S. § 30-28-118(1)(a) ("Appeals to the board of adjustment may be taken by any person aggrieved . . . by the decision of any administrative officer or agency based upon or made in the course of the administration or enforcement of the zoning resolution."). At present, it does not appear that the County has made any final decision on these four additional issues, such that there is presently no avenue for administrative review and potential further

offsite impacts in violation of Boulder County's rules governing the illegal alteration of nonconforming uses.

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appeals. Consistent with GNL's rights to procedural and substantive due process of law, we respectfully request that the County engaged in a formal and reasoned resolution of these additional issues. If the County believes that there is insufficient evidence to support a finding that each of these issues does not establish an illegal expansion of CEMEX's nonconforming use, the County must provide a reasoned decision explaining why this evidence is insufficient so that GNL and other members of the public can have a full and fair opportunity to potentially pursue these issues further before the County.

* * *

The County has the authority to police nonconforming uses that have undergone operational changes that have resulted in a substantially altered use with substantially different offsite impacts. Here, the evidence in the administrative record—including the newly presented evidence uncovered by GNL and discussed herein—confirms that the County correctly determined that CEMEX has exceeded in the scope of its nonconforming use in violation of Article 4-1003(C) of the Boulder County Land Use Code. However, the County must go further and formally consider and resolve all of the challenges that have been raised regarding CEMEX's substantially changed and expanded use. Unless and until the County does this, affected Boulder County residents will continue to be deprived of their right to a full and final adjudication of these issues.

On behalf of GNL, we continue to thank you and County staff for all of your careful time and attention to these critical matters. **Please include a copy of this letter in the administrative land use file for Boulder County Planning File No. ZON-23-0003.**

If you have any questions or need any additional information regarding any of the foregoing, please do not hesitate to ask. If the County is represented by an attorney in connection with this matter, please ask them to contact me directly as I am not permitted to communicate directly with represented parties.

Sincerely,



James R. Silvestro

Enclosures – Exhibits A-D