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December 20, 2024

SENT VIA EMAIL

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

RE: File No. ZON-23-0003 – Save Our Saint Vrain Valley, Inc. and Good Neighbors of Lyons' Continued Support for Termination of CEMEX's Nonconforming Use

Dear Director Case,

This law firm represents Save Our Saint Vrain Valley, Inc. ("SOSVV") and Good Neighbors of Lyons ("GNL") in connection with their 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 is intended to supplement the letter that we previously sent to you on behalf of GNL on July 9, 2024, and specifically responds to the new issues raised in Cemex's November 7, 2024 letter regarding the Facility (the "Cemex Letter").

Because the Cemex Letter fails to provide any new evidence or arguments regarding Cemex's undisputed and significant expansion of the Facility's operations (in the form of a significant increase in heavy truck deliveries of raw materials) following the closure of the Dowe Flats Mine, there is no basis for the County to reverse your April 10, 2024 determination that the Facility has unlawfully expanded beyond its preexisting nonconforming use. More specifically:

(1) The Cemex Letter is wrong to claim that the County's nonconforming use determination amounts to a regulatory taking because Cemex has received considerable pre-deprivation due process and because—by definition—Cemex never had a right to expand its operations beyond its legal nonconforming status;

(2) Irrespective of the intended purpose of the Stantec Report, Cemex cannot deny that it shows a significant increase in heavy truck deliveries of raw materials, which is

also confirmed by the partial trip count data that was collected by Cemex (through April 2023) before Cemex intentionally inexplicably stopped collecting such data;

(3) Cemex's recently commissioned Landis Evans study is flawed in that it seeks to unreasonably extrapolate from very limited data while ignoring actual data, which shows a significant increase of heavy truck traffic as adjacent sources of raw materials were drawn down and the Facility came to exclusively on raw material deliveries by heavy trucks;

(4) Cemex's reliance on background traffic data does not prove anything with respect to the Facility's change of operations beyond Cemex's legal nonconforming status;

(5) Cemex is wrong to claim that the County previously determined that the Facility had not been expanded such that the County is now estopped from making this determination; and

(6) Cemex continues to willfully misconstrue the reasoning underlying the County's determination, which has nothing to do with offsite changes or expanded production—Cemex has altered its nonconforming use by changing the method by which it receives raw materials which has in turn significantly increased the impact of the Facility on all surrounding landowners and Boulder County residents in violation of Section 4-1003 of the Boulder County Land Use Code (the "L.U.C.").

Each of these six issues is addressed in turn herein.

1. The County's Determination Is Not a Regulatory Taking.

Cemex's letter begins by claiming that if the County does not reverse its determination that Cemex has unlawfully expanded its nonconforming use that this would somehow give rise to a regulatory takings claim. Cemex argues without evidence that the County's determination is a mere pretext to shut down Cemex's operations because surrounding residents as well as the County are unhappy with the significant volume of pollution that is generated by the Facility. (*See* Cemex Letter, pp. 1-2.) Notwithstanding the fact that Cemex does not have any evidence to support its allegation that it has been "singled out" for "suffocating' enforcement, Cemex nevertheless misstates the relevant law such that there is no basis for Cemex to allege a regulatory taking.

In Colorado and under the U.S. Constitution, a claim for a "regulatory taking" requires a showing that a new regulation significantly interferes with a landowner's reasonable investment-backed expectations for the use of their property. *G & A Land, LLC v. Brighton*, 233 P.3d 701, 706 (Colo. App. 2010) (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001)). Here, however, Boulder County is not looking to enforce a new regulation that was adopted to restrict the Facility's operations. Rather, the Facility has been in legal nonconforming status since

1994 when the Facility was otherwise deemed to be illegal in light of zoning changes to the L.U.C. What's changed here is not the County's laws—it's Cemex's decision to begin importing significant quantities of raw materials using heavy trucks rather than relying on adjacent mining operations. Accordingly, the County has not adopted any new regulation which might possibly support a claim for a regulatory taking.

Cemex is also wrong to suggest that its right to due process of law has somehow been harmed by an alleged failure to provide Cemex with notice and a "pre-deprivation hearing." (Cemex Letter, p. 2.) As it stands, the County has now given Cemex nearly two years to come up with some evidence as to why its unlawful expansion of its nonconforming use should not be shut down. All the while, Cemex has continued to operate its expanded Facility without any interference by the County. Cemex has unquestionably received notice of the County's position and has been granted a full opportunity to be heard on the matter. Accordingly, there is likewise no basis for Cemex to threaten a claim for damages under *Eason v. Bd. of Cnty. Comm'rs*, 70 P.3d 600 (Colo. App. 2003).

2. The Stantec Report Confirms that Cemex Has Unlawfully Altered and Expanded the Scope of Its Non-Conforming Use by Replacing Its Onsite Raw Material Supply with a Significant Increase in Heavy Truck Traffic.

Both the Cemex Letter and the letter that Cemex commissioned from Stantec to undercut Stantec's prior findings plainly ignore that Cemex's operations necessarily changed as a result of the Dowe Flats closure. (*See* Cemex Letter, pp. 2, 8.) Indeed, throughout the process by which the County considered Cemex's request to renew the Dowe Flats special use permit, Cemex continually threatened that denial of the Dowe Flats mining approval would create more dangerous conditions for Boulder County residents by significantly increasing the frequency of heavy truck traffic to backfill raw materials through vehicle deliveries rather than mining the adjacent site.

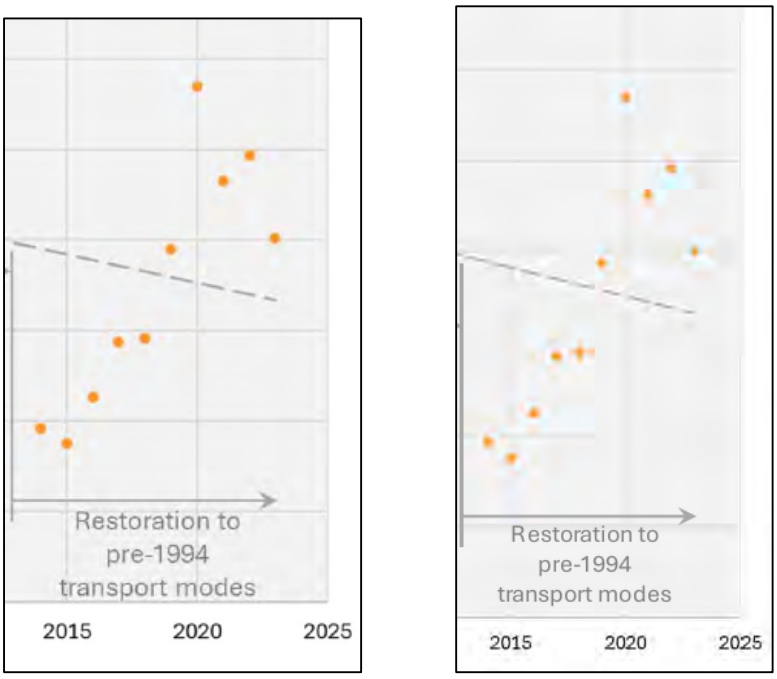
The fact that Stantec now says that the County should not rely on the traffic count determinations set forth in the study that Stantec certified and provided to CDOT is wholly unconvincing. Did Stantec certify unreliable data to CDOT or is it merely now wishing that this study did not say exactly what it says? Moreover, if—as Stantec and Cemex now claim—the "snapshot" of traffic counts included in the Stantec traffic study are not representative of the operations of the Facility following the closure of Dowe Flats, then Cemex should bring forth actual other data of observed traffic counts. Cemex cannot do this because Cemex inexplicably stopped tracking truck traffic in mid-2023. Curiously, Cemex apparently stopped tracking traffic counts at the exact same time that the County first requested this data in May 2023.

Ultimately, if Cemex wants the County to disregard the Stantec traffic study that Cemex itself commissioned and submitted to CDOT, Cemex now has the burden to provide actual evidence to disprove its prior threats that the Dowe Flats closure would cause heavy truck traffic to explode. As explained herein, Cemex still has not done this. But at a minimum, the County

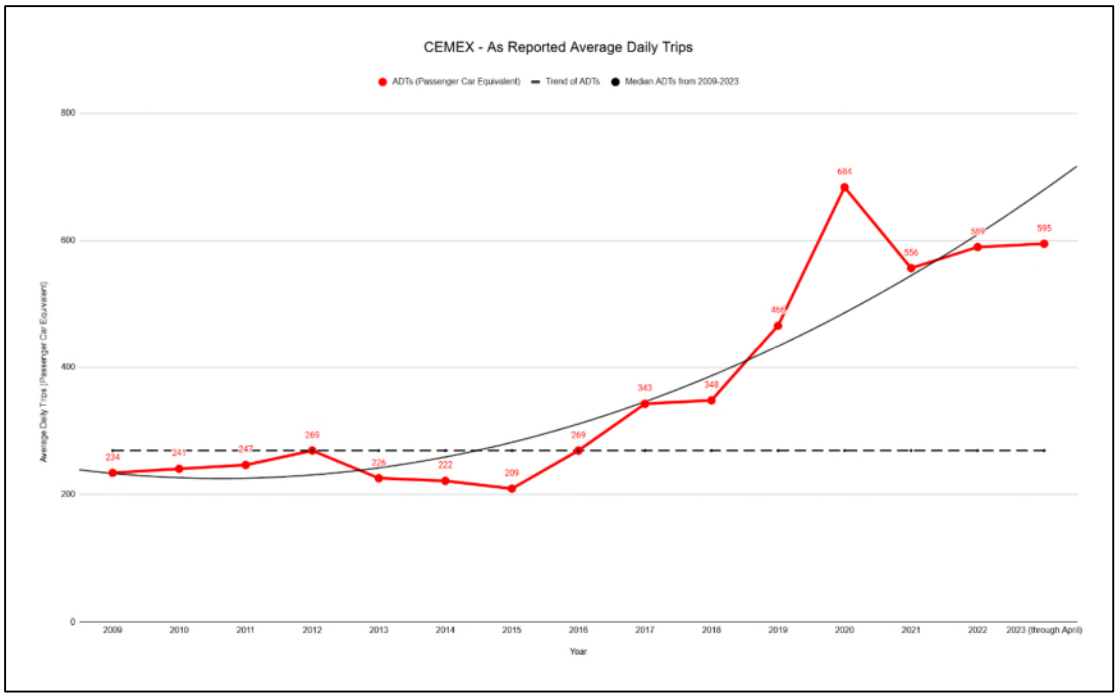
cannot simply disregard the Stantec traffic study because Cemex and Stantec now find that study to be inconvenient.

3. The Landis Evans Report Ignores Data from 2023 and Still Shows a Significant Increase in Heavy Truck Traffic as the Dowe Flats Mine Was Phased Out and Then Permanently Closed.

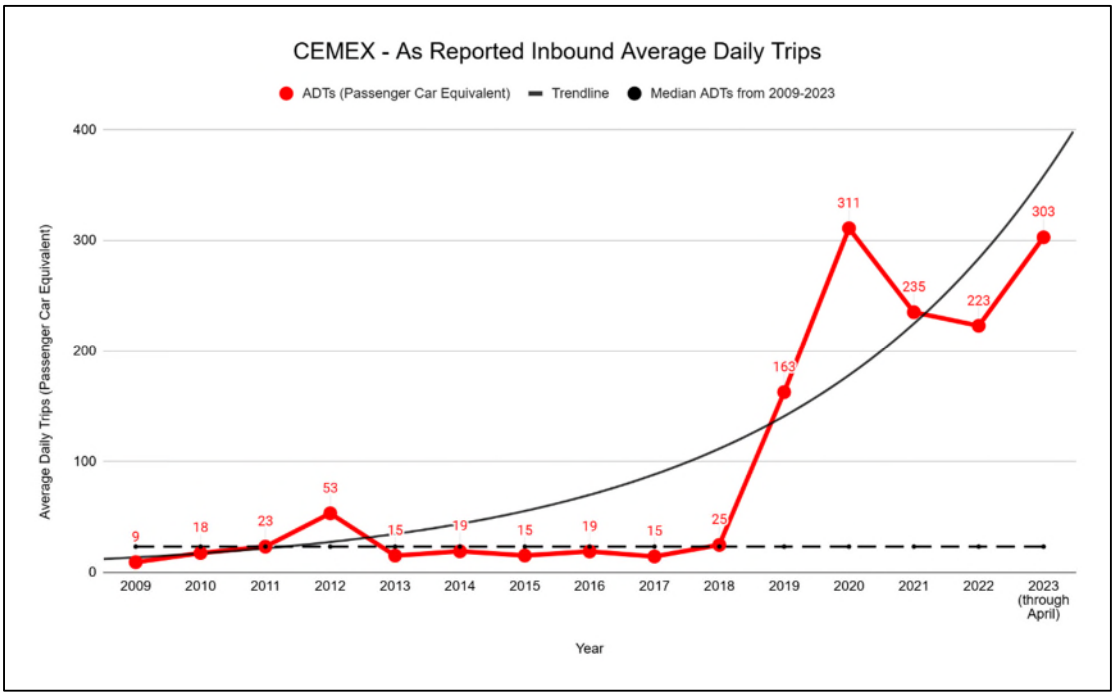
The Landis Evans Report uses incomplete data and a flawed methodology to argue that traffic counts in recent years are lower than the "baseline" period of 1983 to 1994. While there are many basic math and statistical errors in the Landis Evans, the most glaring issue is that Landis Evans' *own* analysis confirms that heavy truck traffic to and from the Facility has been dramatically increasing for the past decade. Both Figure 2 and Figure 3 in the Landis Evans Report confirm that average annual and daily truck traffic have both increased significantly over the past decade as operations at the Dowe Flats Mine were winding down and the Facility became increasingly reliant on offsite sources of raw materials:



Although the Landis Evans Report inexplicably cuts off this depiction of heavy truck traffic in 2014, plotting all of the traffic counts that are included in Appendix A to the Landis Evans Report confirms that the true increase in total traffic over the past decade represents a dramatic increase from the much lower and stable traffic volumes from the earlier period:



Even more significantly, when just the ***inbound*** traffic volumes listed in Appendix A to the Landis Evans Report are plotted, the reality that almost all of this additional traffic has resulted from Cemex's operational change to become more reliant on heavy truck deliveries of raw materials is indisputable:



The sharp upward trend in inbound truck traffic volumes as documented in Appendix A to the Landis Evans Report is conclusive evidence in support of the County's determination that recent, significant alterations to the Facility's operations have necessarily voided Cemex's preexisting legal nonconforming status.

In its report, Landis Evans ignores this reality by suggesting that the County somehow misconstrued its own Land Use Code by not seeking to compare current truck counts to the unknown levels of truck traffic that existed when the Facility first became a nonconforming use in 1994. This argument ignores the basic structure of L.U.C. § 4-1003, which provides in subsection G that the right to engage in a nonconforming use terminates when a landowner discontinues the nonconforming use for an uninterrupted period of six months.

The Landis Evans Report labels this period from 1994 to 2013 as a time when there was "[r]educed inbound and outbound traffic due to Dowe Flats raw material conveyor and railing out finished product." This established nonconforming use *with minimal reliance on raw material trucks deliveries* remained relatively unchanged until the mid-2010's when Cemex exhausted all of the limestone deposits from Dowe Flats and began importing all limestone via heavy trucks. At that point, offsite deliveries and corresponding traffic began to shoot up and then increased ever higher with the full closure of the Dowe Flats Mine at the end of 2022.[1] The "baseline" for determining whether Cemex has unlawfully altered or expanded its operation is not 1994—it's the point at which Cemex dramatically expanded the scope of its nonconforming operations with respect to heavy truck traffic beginning in at least 2014 as confirmed by the Landis Evans Report.

Even assuming *arguendo* that 1994 is the appropriate "baseline" for comparing relative changes in traffic volumes, the method that Landis Evans uses to estimate past traffic volumes based off clinker production volumes is unreliable. First, it makes no sense to use only clinker volumes to estimate truck volumes. While clinker volumes may serve as a rough proxy for the ultimate volume of finished material, the amount of clinker produced does not provide any evidence of where the raw materials came from—i.e., whether they were mined on site or trucked in from distant mines, which thereby generates more heavy truck traffic for material deliveries.

In developing a linear regression for comparing clinker production rates to truck volumes, the Landis Evans Report inexplicably uses only four years of available data (from 2019 to 2022)—or far less than half of the available data. If Landis Evans had instead used all of the clinker production and traffic data that is available from recent years (i.e., the 16 years from 2006 to 2022 as shown in Table 2 and Appendix A to the Landis Evans Report), it's readily apparent that there is no obvious correlation between clinker production and truck traffic volumes. Without this

[1] Cemex cannot now claim that it was somehow surprised or otherwise unfairly prejudiced by the closure of the Dowe Flats Mine. When that mine was first approved in 1994, it was approved by Boulder County for 25 years of operations. In other words, without some other approval or intervention, the plan was always for the Dowe Flats Mine to close when it did.

correlation, there is no way for Landis Evans to credibly estimate the traffic volumes that existed in 1994 and earlier based solely off clinker production data.

Moreover, the data presented in the Landis Evans Report confirms that when the Dowe Flats Mine was approved in 1994, the scope of Cemex's nonconforming use was significantly altered and became much less reliant on offsite materials and the associated high volumes of heavy truck traffic. This is because the Dowe Flats special use permit was approved in June 1994—nearly four months before the L.U.C. was amended in October 1994, which caused the Facility to become a nonconforming use. As part of the Dowe Flats approval, Cemex's predecessor in interest specifically stressed that by allowing for mining at this adjacent parcel, it could significantly reduce the traffic volume generated by the Facility. (*See generally* May 1993 Traffic Impact Analysis Dowe Flats Project (attached hereto as **Exhibit A**).) Boulder County even took this one step further when it finally approved the Dowe Flats special use permit in June 1994 and required Cemex's predecessor in interest to construct an enclosed conveyor over SH-66 to allow for raw materials to travel from the Dowe Flats site to the Facility without generating any heavy truck traffic on the public roadway. Accordingly, as of the time that the Facility became a nonconforming use in 1994, the volume of traffic generated by the Facility (compared to prior years) had already been significantly reduced.

Perhaps the most telling point in the Landis Evans Report —and all of Cemex's arguments—is that Cemex cannot provide any evidence of actual traffic counts from any time after April 2023. Coincidentally, that is the same month that the County first asked Cemex to provide the County with traffic data for the Facility. Given that Cemex has now taken willful steps to frustrate the County's efforts to determine whether Cemex has impermissibly expanded and altered the operations of the Facility, Cemex should not be entitled to any benefit of the doubt. Rather, the County can and should rely upon the information that Cemex reported to the State of Colorado through the Stantec traffic study.

4. Background Traffic Counts Do Nothing to Rebut the Fact that Cemex Is Now Generating Far More Heavy Truck Traffic for Raw Material Deliveries.

Cemex's arguments regarding background traffic counts and accident history along Hwy 66 are equally unavailing. (*See* Cemex Letter, pp. 4-7.) Nothing in the County's April 10, 2024 determination that Cemex has unlawfully altered its nonconforming use through its substantially changed operations turned in any part on surrounding traffic conditions—and nor should it. The fact that different surrounding land uses and traffic volumes have ebbed and flowed over time has no bearing on whether Cemex's nonconforming use has been substantially altered in a manner that negatively affects all surrounding land users.

Once again, it was Cemex who repeatedly stated that if the Dowe Flats Mine was closed, traffic from the Facility would significantly increase to the detriment of all surrounding land owners and residents. Now, the County has found—based on Cemex's own reported traffic data—

that this has in fact happened and that as a result, Cemex has unlawfully expanded its nonconforming use. Unrelated changes to surrounding land uses have no bearing on this issue and cannot justify a refusal of the County's April 10, 2024 determination. If Cemex genuinely believes that the circumstances surrounding the Facility are such that this heavy intensive use is otherwise compatible with all existing surrounding uses, then Cemex can and should file an application for the appropriate land use approval(s) and ask the County to review this use as it now exists without any adjacent sources of raw materials.

5. The County Is Not Collaterally Estopped from Finding that Cemex's Recent Dramatic Expansion of Truck Deliveries Violates Its Legal Non-Conforming Status.

Cemex is also wrong to suggest that a 2002 letter from the County Building Department now prevents the County from enforcing the requirements of L.U.C. § 4-1003. (Cemex Letter, pp. 8-9.) As Cemex acknowledges (but nevertheless ignores), this 2002 letter provided that "the [Facility] can potentially remain in place indefinitely, if it continues to meet all of the requirements of Article 4-1003." The County's April 10, 2024 determination explicitly found that the Facility is no longer meeting all of these requirements. More specifically, Cemex has unlawfully altered its operations beyond its preexisting nonconforming use as confirmed by the substantial increase in raw material deliveries by heavy truck. There is nothing inconsistent between the 2002 letter and the County's more recent determination regarding the loss of the Facility's nonconforming status due to Cemex's significant operational changes.

However, even if there allegedly were some inconsistent between these two statements, Cemex cannot show that the County is now constrained by a statement that was issued more than two decades. Although Colorado law does recognize the concept of equitable estoppel within the context of a local government's land use decisions, "estoppel may not be invoked as freely against a municipal corporation as against an individual." *Colo. Health Consultants v. City & Cnty. of Denver*, 429 P.3d 115, 125-26 (Colo. App. 2018). In order to successfully invoke equitable estoppel against a government authority, a party must show three things: (1) that it "changed a position, to [its] detriment, in justifiable reliance on the [government's] conduct"; (2) that the government "intended that its representation be acted on so that the other party was justified in relying on the represented facts"; and (3) that it was "ignorant of the actual facts and must have reasonably relied, to its own detriment, on the [government's] conduct or misrepresentation." *Id.* (internal citations omitted). "The burden of establishing an estoppel falls on the party asserting it, and all elements of equitable estoppel must be shown." *Continental Western Ins. Co. v. Jim's Hardwood Floor Co., Inc.*, 12 P.3d 824, 828 (Colo. App. 2000).

Here, Cemex cannot meet its burden to show that the 2002 letter satisfies any of the three essential elements of estoppel. First, Cemex has not claimed that it changed any of its operations in reliance on the 2002 letter. Rather, Cemex changed its operations to primarily rely on heavy truck deliveries of raw materials because Cemex exhausted all onsite sources at the Lyons Quarry

and then the Dowe Flats Mine was closed consistent with its approved 25-year lifespan. Second, nothing in the 2002 letter indicates that the County intended for Cemex to rely on it as carte blanche for the Facility to remain open forever notwithstanding any changes that Cemex might later made. Indeed, as noted above, the 2002 letter pointed Cemex to the requirements of L.U.C. § 4-1003, which provides that legal nonconforming status may be lost whenever a use is altered. Finally, and for this same reason, Cemex was obviously not ignorant of L.U.C. § 4-1003 and what needed to happen to preserve its legal nonconforming status.

The Cemex Letter makes no effort to show that Cemex can meet is burden to support a claim for collateral estoppel. Because Cemex cannot meet this burden, there is no basis for the County to reverse its April 10, 2024 determination.

6. The County Correctly Determined that Cemex's Operational Changes Have Resulted in an Illegal Intensification of the Non-Conforming Use.

Cemex's final argument merely restates Cemex's previous claim that operational changes at the Facility cannot support a loss of legal nonconforming status. (*See* Cemex Letter, p. 9.) Just as it has tried to do previously, Cemex's argument here seeks to recast the County's decision by claiming that it is wrongfully based on changed circumstances that have occurred offsite from the Facility. Once again though, this ignores the reality that it is the Facility's onsite operational changes—and specifically, the decision to source raw materials from distant locations by heavy truck—that have fundamentally altered the Facility's operations and resulted in significantly increased externalities which were not present when the Facility first became nonconforming in October 1994.

Cemex is wrong to argue 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 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).

Cemex's argument regarding the statutory interpretation of L.U.C. § 4-1003(C) is equally unavailing. (Cemex Letter, p. 9.) Cemex claims that because L.U.C. § 4-1003(C)(1) provides that

structural changes might amount to an impermissible alteration of a nonconforming use that this necessarily means that non-structural changes are insufficient to result in an illegal alteration. This argument ignores the plain text of L.U.C. § 4-1003(C)(1)(d), which says nothing about structural changes but expressly states that legal nonconforming status may be lost by "[a]ny 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." (Emphasis added). This subsection stands apart from the other subsections of L.U.C. § 4-1003(C)(1) precisely because it grants the County additional authority to police expanded nonconforming operations even in the absence of any structural/building modifications. Because this subsection is specifically couched in terms of the "use" and not any specific physical construction or structural improvement, it necessarily follows that a significant change in operations can and should void the changed use's legal nonconforming status.

Finally, Cemex is wrong to argue that the County's determination was impermissibly based on a finding that production at the Facility has increased. (Cemex Letter, pp. 9-10.) Nothing in the County's April 10, 2024 determination was based off of any finding that production at the Facility has changed.[2] Rather, the County's determination was based solely on the fact that Cemex's operations at the Facility have changed, which has resulted in a further intensification of this nonconforming land use in violation of L.U.C. § 4-1003. Accordingly, all of the case law that Cemex cites regarding "increased production" is inapplicable.

* * *

Ultimately, the Cemex Letter does not provide any new evidence or arguments that might possibly justify a reversal of the County's determination that the Facility is operating beyond its legal nonconforming status. Accordingly, the determination set forth in your April 10, 2024 letter should be affirmed, and the County should immediately order Cemex to stop its expanded unlawful operations.

At the same time and as further explained in GNL's July 10, 2024 letter to you regarding the Facility, the County can and should also consider and resolve all of the other 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

[2] Because the County's determination did not rely in any way on a finding that the Facility has increased production, the County can safely ignore Cemex's absurd suggestion that the County must now pull the sales tax records from every nonconforming land user in the County. Of course, if the County is aware that other legal nonconforming land users have altered or expanded their operations in a manner that negatively affects the surrounding community in violation of L.U.C. § 4-1003(C)(1)(d), the County can and should police such illegal land uses.

to a full and final adjudication of these issues. Accordingly, both GNL and SOSVV renew this request for the County to consider and resolve all of these other issues.

On behalf of GNL and SOSVV, 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