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October 16, 2019

VIA EMAIL ONLY

Clark County Planning Commission
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Re: **CPZ2019-00033 Clark County Unified Development Code (Title 40.240.440)**
Amendments - Columbia River Gorge National Scenic Area

Dear Planning Commission:

Our office represents Judith Zimmerly, property owner of the Washougal Pit, and we are submitting the following comments regarding Clark County's ("County") proposed amendments to the Columbia River Gorge National Scenic Area Districts CCC 40.240.440(H) to correct a "scrivener's error." Staff has proposed an amendment to CCC 40.240.440(H) to amend the review procedure for the development and production of mineral and geothermal resources to a Type III (quasi-judicial) process. Currently, the development and production of mineral and geothermal resources are required to follow a Type IV (legislative) process.

As the property owner of the Washougal Pit, Judith Zimmerly is currently involved in appeal proceedings related to Amended N&O# CDE2017-Z-1069(A), and it is our client's belief that this proposed amendment to CCC 40.240.440(H) is a function of the work that has been done on-site. In addition, although this proposed amendment has been described as a mere attempt to amend a "scrivener's error," the underlying effect of such an amendment to CCC 40.240.440(H) will have a profound impact on our client's current application for a National Scenic Area Permit. Certainly, it is uncanny timing that staff has undertaken this proposed action at the same time as our client is in the process of applying for a National Scenic Area Permit.

The 2003 Amendment made in CCC 40.240.240(G) by Ord. 2003-11-01 Requiring Type IV Process for the Development and Production of Mineral and Geothermal Resources was Intentional and Not the Result of a Scrivener's Error

Foremost, it is not clear that the requirement that the development and production of mineral and geothermal resources must follow a Type IV review process was the result of a scrivener's error. See CCC 40.240.440(H). In 1996, Clark County implemented the National Scenic Area Act ("NSA") by adopting a local land use ordinance consistent with the Columbia River Gorge Commission's management plan (hereinafter "Management Plan"). See Ord. 1996-04-30 (May 6, 1996). In this ordinance, CCC 18.334A.200(g) states that the development and production of mineral and geothermal resources in the Columbia River Gorge National Scenic Area ("CRGNSA") will be

reviewed under a Type III process. *Id.* Importantly, no amendments to section 18.334A.200(g) were found between the adoption of Ordinance 1996-04-30 and its repeal by Ordinance 2003-11-01.

On November 4, 2003, Clark County adopted Ordinance 2003-11-01 which repealed Title 18, replacing Chapter 18.334A with Chapter 40.240 (the County's current scenic area ordinance). Within Ordinance 2003-11-01, an amendment was made to CCC 40.240.240(G) [subsequently renumbered to 40.240.440(H)] which established that development and production of mineral and geothermal resources in the Gorge would no longer be reviewed under a Type III process, instead requiring a Type IV legislative process.

Staff maintains this was the result of a scrivener's error, as this amendment was not indicated using an underline and strikethrough process. However, history reflects there was a significant amount of interest shown by Clark County elected officials in regulating surface mining activity in Clark County, including within the NSA. Therefore, it stands to reason that this change to CCC 40.240.240(G) was the result of the County board ensuring they retained greater control over the surface mining permitting process. Most importantly, if this was a simple scrivener's error—as maintained by County staff—why has it remained on the books for the past sixteen years?¹

The Proposed Amendment to CCC 40.240.440(H) is Directed at the Washougal Pit

During the Clark County Council meeting on September 25, 2019, it was revealed that staff had met individually and off the record with each Councilor prior to voting to approve Interim Ordinance No. 2019-09-13. This process is highly irregular for an action to correct a mere "scrivener's error." Our client believes this proposed amendment is the product of the ongoing litigation involving the Washougal Pit, discussed fully below, and not merely a coincidence in timing.

Importantly, our client is in the process of applying for a National Scenic Area Permit for the development and production of mineral and geothermal resources. The Washougal Pit is the only surface mine currently applying for a National Scenic Area Permit. To change the procedure for review of such an application at the exact time our client is submitting for such a permit clearly shows that this proposed amendment is targeted specifically at the Washougal Pit and our client. In addition to being highly inappropriate if directed at the Washougal Pit, this proposed action will further delay the permitting process, as our client will be forced to wait to submit further application documents until the final ordinance is voted on in February of 2020.

The Purported Inconsistency within CCC 40.240.440(H) is Emblematic of a Larger Theme of Inconsistency in Clark County's Scenic Area Ordinance

As evidenced by our client's ongoing litigation involving Clark County and the Columbia River Gorge Commission, this alleged "scrivener's error" is representative of a broader regulatory scheme of inconsistencies under Clark County's Scenic Area Ordinance. The Planning Commission should have full context of this proposed correction of an alleged "scrivener's error," which is so clearly directed to and initiated because of our own client's proposed permit process and ongoing litigation defending the County's own Code.

¹ No amendments to section 40.240.440(H) [other than its renumbering from 40.240.240(G)] have been found in the seventeen years between its adoption and this proposed amendment.

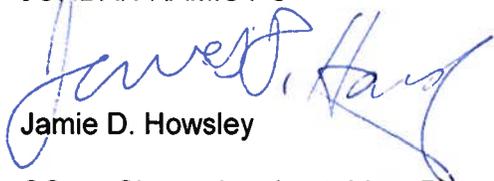
As the Planning Commission may or may not be aware, our client, along with other parties interested in the Washougal Pit, have been in extensive, and still ongoing, litigation regarding the lawful application of the County's Code, specifically with respect to the jurisdiction of the Columbia River Gorge Commission in the context of the County's code enforcement and land use review processes.² Our client is actively fighting for the lawful application of County Code provisions, specifically CCC 32.08.050(2), which provides that any final order on a Hearing Examiner's decision under a code enforcement appeal goes to superior court, and CCC 40.240.050(I), which provides that appeals under the Scenic Area Ordinance chapter proceed to the Hearing Examiner, and then again, superior court.

Yet, despite this clear, unambiguous language, an appeal of our client's matter has been brought to the Columbia River Gorge Commission. Our client and other interested parties have fought within that tribunal—and superior court—to dismiss the case for lack of jurisdiction, and we continue to do so to this date. Clark County's staff and counsel have been silent and provided no direction or argument in support of its own Code. Our client and others are leading the charge to defend the County's own Code, as drafted and applied to all citizens and property owners in Clark County.

Generally, the County should be reviewing and correcting the myriad inconsistencies and discrepancies in its own Code. Rather than approach amendments to the Code in piecemeal fashion, like this very alleged "scrivener's error" that is initiated as a reaction to our own client's property and permitting process, the Planning Commission should consider a recommendation to direct staff to take a comprehensive look at their Code. And a recommendation should not be to just enforce the Code as it is clearly written, but revise the Code as a whole under a single legislative process to allow for all parties harmed and involved to properly voice their deep concerns about this piecemeal "scrivener's error" amendment that is nothing short than pointed, reactive action directed at our client.

Very truly yours,

JORDAN RAMIS PC



Jamie D. Howsley

CC Sharon Lumbantobing, Planner II

² See Clark County Superior Court, Case No. 19-2-01896-06.

REEVES, KAHN, HENNESSY & ELKINS

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October 17, 2019

VIA EMAIL ONLY (Sharon.Lumbantobing@clark.wa.gov)

Clark County Planning Commission
c/o Sharon Lumbantobing, Planner II
Clark County Community Planning
P.O. Box 9810
Vancouver, WA 98666-9810

Re: CPZ2019-00033 - Columbia River Gorge National Scenic Area Code Update

Dear Planning Commissioners:

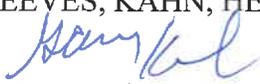
This letter is sent on behalf of Clark County citizens and landowners Jody Akers, Paul Akers, Danny Gaudren, Kathee Gaudren, Rachel Grice, Zachary Grice, Greg Misarti, Edmond Murrell, Kimberly Murrell, Richard J. Ross, Karen Streeter, Sean Streeter, and Eleanor Warren. We have reviewed and fully support the proposed code update to Clark County's National Scenic Area ordinance. We also fully support and join in the comments of Friends of the Columbia Gorge on this topic.

The objections raised by attorneys for Judith Zimmerly, Jerry Nutter, and the Nutter Corporation have no merit, and are yet another attempt to confuse and delay Clark County's proceedings for bringing the numerous violations on the Zimmerly property into compliance with the Columbia River Gorge National Scenic Area Act and implementing rules. Zimmerly and Nutter have been operating illegally on the Zimmerly property since October 2017 without the required land use permits, and are continuing to do so even today, despite being repeatedly told by Clark County and Columbia River Gorge Commission officials that their actions are unlawful and must stop. They have repeatedly lost in their legal challenges, first in appeals to the Clark County Hearing Examiner regarding the illegal rock crushing on the property, then at the Clark County Superior Court regarding the other mining activities, and most recently at the Columbia River Gorge Commission. Please reject their efforts to further delay the County's processes.

In conclusion, the County should adopt the proposed correction to the scrivener's error in the Clark County National Scenic Area ordinance, without any further delay. Thank you very much for the opportunity to comment.

Sincerely,

REEVES, KAHN, HENNESSY & ELKINS


Gary K. Kahn

GKK:blb

cc: Steve McCoy, Friends of the Columbia Gorge (steve@gorgefriends.org),
Nathan Baker, Friends of the Columbia Gorge (nathan@gorgefriends.org)
Bill Richardson, Clark County Prosecuting Attorney's Office (bill.richardson@clark.wa.gov)
Taylor Hallvik, Clark County Prosecuting Attorney's Office (taylor.hallvik@clark.wa.gov)
Sonja Wiser, Program Assistant, Clark County (sonja.wiser@clark.wa.gov)
Clients



FRIENDS OF THE COLUMBIA GORGE

Via email

October 17, 2019

Clark County Planning Commission
C/O Sharon Lumbantobing, Planner II
Clark County Community Planning
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E-mail: Sharon.Lumbantobing@clark.wa.gov

**Re: CPZ2019-00033 Clark County Unified Development Code (Title 40.240.440)
Amendments to Columbia River Gorge National Scenic Area Districts**

Dear Planning Commission:

Friends of the Columbia Gorge has reviewed and submits these comments on the above-referenced proposed ordinance. Friends is a non-profit organization with approximately 6,500 members dedicated to protecting and enhancing the resources of the Columbia River Gorge through the effective implementation of the Columbia River Gorge National Scenic Area Act. Our membership includes hundreds of citizens who reside within the Columbia River Gorge National Scenic Area.

Friends supports the changes proposed to be made permanent in Clark County Code (“CCC” or “the code”) § 40.240.440.H to correct a clear scrivener’s error. The error was temporarily corrected by the County Council on September 25, 2019 in Interim Ordinance No. 2019-09-13 and is currently in effect. The Planning Commission’s actions on the current proposal will merely make the current state of affairs permanent.

The scrivener’s error was introduced in June of 2003 when changes were made to the CCC due to a restructuring of parts of the code. The change from a Type III (quasi-judicial) review process to a Type IV (legislative) review process for “development and production of mineral and geothermal resources” was not indicated as a change to the code through strikeouts and underlining as the other changes were. *See* Exhibit 2 to Interim Ordinance No. 2019-09-13. In addition, the County sent a letter to the Gorge Commission assuring them that “[t]here was

nothing of substance changed or added except where current practice was codified” and that the “public review draft” of the changes “shows (in highlight and ~~strikeout~~) what changes were made.” See Exhibit 3 to Interim Ordinance No. 2019-09-13. Clearly a mistake was made when the review type was changed from Type III to Type IV in 2003.

In addition, in the “summary of procedures and processes” in the CCC, applications in the National Scenic Area (referred to as the Columbia River Gorge in the Table) are to be reviewed as Type II or Type III permits and not as Type IV permits. CCC § 40.500.010 (Table 40.500.010-1). This further illustrates that the change was inadvertent. The County should make the temporary correction permanent.

Under CCC § 40.240.030.A, corrections to “[s]crivener errors” in the CCC sections pertaining to the National Scenic Area “may be undertaken administratively by staff.” As this is a clear scrivener’s error, the Planning Commission should take this opportunity to memorialize its support for the changes that staff is taking to permanently fix the error. For the changes to be made permanent, there is no need under the code to wait until the comp plan annual review is completed in February of 2020.

Thank you for this opportunity to comment.

Sincerely,



Steven D. McCoy
Staff Attorney

cc: Bill Richardson, Clark County Prosecuting Attorney’s Office
Taylor Hallvik, Clark County Prosecuting Attorney’s Office
Sonja Wiser, Program Assistant, Clark County
Gary Kahn, Reeves, Kahn, Hennessy & Elkins
Peggy Hennessy, Reeves, Kahn, Hennessy & Elkins
Nathan Baker, Senior Staff Attorney, Friends of the Columbia Gorge