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MEMORANDUM

To: Clark County Planning Commission

cc: Jamie Howsley

From: Stephen W. Horenstein

Subject: Interim Ordinance 20119-09-13/CPC 2019-00033

Date: November 21, 2019

Let me first thank you for continuing this hearing to this date in order to allow us to receive information pursuant to a public records request filed with Clark County to assist us in determining whether the "scriveners error" narrative put forth by the County for your consideration is supported by the historical record addressing the code provision at issue.

We would also advise that tonight's proceeding on the "scriveners' error" narrative is at best pro forma. The Board of County Councilors has now twice adopted the interim ordinance before you. The most recent vote was 4-1 in favor. There is no reason to expect that the Board will not adopt this ordinance on a permanent basis.

The continuance of this hearing did allow us to review most of those records we have received to date. These records do not provide any information that would provide the County with a basis to determine that the change being proposed was a "scriveners error".

Given the lack of written legislative history on the issue, we spoke with former County Commissioner Betty Sue Morris who was in office at that time and who we recalled played a lead role in the surface mining issues of the day. Betty Sue recalled clearly that the Board of County Commissioners decided as a matter of policy to carve out a role for the Board of County Commissioners in permitting surface mining given the need for further and enhanced public involvement in this permitting process and the interest of the public on the impacts thereof. That was to be done in 2003 as a Type IV process.

Admittedly, a Type IV process was different in 2003 than it is today. However, the salient point is that in our experience with the Washougal Pit issues, there needs to be a balance between the need for the material provided from that pit to build roads and other projects and the regulation and permitting of the activity necessary to access that material.

Since June of 2018, we have tried repeatedly to get the County to take a broader look at the permitting issues involved and to update the code for current mining practices in a way that is consistent with the

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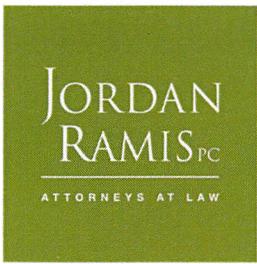
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Columbia Gorge Commission rules and regulations as promulgated by Chapter 40.240 and 40.250 of the Clark County Code. Only when the owner of the Washougal Pit advised County staff that he intended out of desperation and to limit litigation costs to submit a permit for mining activity under protest did the County rush to adopt an emergency ordinance without even providing notice and opportunity for the Washougal Pit owner and operator to be heard. Why, after being in the code for 16 years, was this change to the code changing a Type IV process to a Type III process so urgent? We can only conclude that this was done to give the Community Development Department control over the permitting process for the Washougal Pit without involvement by the Board of County Councilors on the policy issues involved. In contrast, County staff appears only interested in the regulation side of things without regard for needed code changes to reflect industry practices as they exist today and did not exist in 2003. If the County had an interest in bringing the surface mining regulations current, that process would have started almost 2 years ago when we asked for this to occur and put suggestions and ideas for doing so before the County. The response we received to those suggestions was to issue a Notice an Order for code enforcement that has resulted to date in four different administrative hearings, appeals and civil litigation with at least two more legal proceedings in the offing. More of this will follow as there continues to be far more interest on the County's part in halting mining activity than balance the need for material against proper regulation so that material to build roads and other projects is available. There are many options for updating the code to accommodate new and less intrusive mining practices.

It has been our hope that the Board of County Counselors would be willing to play a role in balancing the need for material against regulation. That is not being undertaken at this point as far as we know.

The Growth Management Act (GMA) requires that counties provide for mineral resources as part of an overall approach to land-use planning. These resources are rapidly diminishing in Clark County. We are finding it necessary to engage in both appellate and civil litigation to enforce this mandate and make material available. How many lawsuits will be necessary for the County to finally get on board in the need for balance as described above?

Regardless of the action you take this evening on the ordinance before you. Please encourage the Board of County Councilors to find a way to revisit the policies around permitting surface mining activity to ensure that material for roads and other projects is available with the cost of importing such material from elsewhere. Failure to maintain locally sourced materials not only may be a GMA violation, but it may result in unnecessarily higher expenses for public works projects such as roads, schools and other critical infrastructure.



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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. We reiterate our client's position that the timing of this interim ordinance is far too convenient to be a coincidence. Our client owns the only operational mine in the National Scenic Area and is currently in the process of applying for a National Scenic Area Permit.

At this time, Clark County has not provided us with the records we requested *prior* to the October 16 Planning Commission meeting. Therefore, our Client cannot properly determine whether the 2003 amendment made to CCC 40.240.240(G) [subsequently renumbered to be 40.240.440(H)] by Ord. 2003-11-01, requiring a Type IV process for the development and production of mineral and geothermal resources was intentional and not the result of a scrivener's error.

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Although we wish that we had been provided the requested records in time for tonight's hearing, we look forward to a continued dialog with the Planning Commission and County Council regarding permitting surface mining activity in Clark County.

Very truly yours,

JORDAN RAMIS PC



A handwritten signature in blue ink, appearing to read "Jamie D. Howsley". The signature is fluid and cursive, with a large, stylized "H" and "s". Below the signature, the name "Jamie D. Howsley" is printed in a smaller, sans-serif font.