GORDON THOMAS HONEYWELL LLP

William T. Lynn
Direct: (253) 620-6416
E-mail: blynn@gth-law.com

November 19, 2014

Clark County Planning Commission
Attn: Marilee McCall (marilee.mccall@clark.wa.gov)
Oliver Orjiako (oliver.orjiako@clark.wa.gov)
Gordy Euler (gordon.euler@clark.wa.gov)
P.O. Box 9810
Vancouver, WA 98666-9810

RE: Clark County Surface Mining Overlay
Staff Recommended Changes October 21, 2014

Dear Ms. McCall, Mr. Orjiako and Mr. Euler:

This letter is submitted on behalf of J.L. Storedahl & Sons, Inc. to comment on the Surface Mining Overlay Planning Commission Recommendation with Staff Recommended Changes dated October 21, 2014. John Dentler, who has commented on behalf of Storedahl and Sons before, is out of the state. I have attached a copy of his October 10, 2014 letter as many of his comments remain pertinent.

Before turning to some specific issues, we wish to make a general observation about the process of approving surface mining. Clark County has a two-step process to identify and then permit mineral resource activities. The first is a more general screen to identify those properties that are included in the surface mining overlay. That step, of course, relies on very general information and screening criteria. But it is a critical step. Unless property has the overlay it cannot even be considered for mining. If property with important mineral resources is not included, it may be developed with another use, covering the resources.

The second step in the process is actually permitting a specific surface mine. At that point, the site specific SEPA process is followed with detailed studies on the geology, hydrology, traffic, land use impacts, critical areas and other important permitting issues. That information and a detailed plan are reviewed by local and state authorities and the public before a permit may be approved.

The proposed amendments make the second portion of this process much more restrictive, by establishing that the extraction of minerals is a conditional use rather than an outright permitted use as it was in the prior code. This conditional use permit

requirement makes the permitting process more rigorous, adding significant public involvement, and establishing new standards that any proposal must meet for approval.

However, the amendments also make the initial screening criteria for the overlay more restrictive, and we are concerned that action may exclude important resources from even being considered under the rigorous conditional use permit process. That denies the opportunity to fully understand the site and to consider design and environmental mitigation that could well protect the public interest.

With this background, we turn to specific provisions of the proposal.

1. Our first comment relates to the Policy 3.5.2 with the first level screening criteria for the overlay designating mineral resource lands. The proposal before you would make those criteria far more specific, leading to the exclusion of lands that might well be suitable for surface mining over the long term. These more specific issues can and should be reviewed during the conditional use permit process where detailed information is available and where potential concerns can be more comprehensively and precisely addressed. For example, draft provision 3.5.2A requires review at this preliminary stage for proximity to unstable slopes, other critical areas, and other "sensitive lands." This is unnecessary and overly restrictive. A large parcel might, for example, have one corner in close proximity to sensitive areas, but through design, those areas could be protected from the impacts of mining. Buffers or setbacks could well address sensitive areas through the environmental and permitting process. This rough first screening process should not exclude lands that could, upon site specific design, study and mitigation, be appropriate candidates for surface mining.

Similarly, Paragraph 3.5.2B excludes lands in proximity to residentially zoned areas of a particular density without taking into consideration other factors such as topography. Residential areas could be well-shielded from noise and other impacts by a topographical ridge or other feature. Again, this should be evaluated at the conditional use permit stage where noise studies and other pertinent information will be available to the decisionmaker.

Paragraph 3.5.2B also excludes lands in proximity to agricultural and forest lands. As noted in Mr. Dentler's letter of October 10, 2014, a mineral resource designation can overlap with forestry or agricultural land. Further, mining is not a permanent condition and reclamation could well be fully compatible with forestry or agricultural uses. This provision should be deleted.

We are also concerned about Policy 3.5.2.C which requires that a judgment be made about the transportation system at this early screening stage, well before specific studies and mitigation are presented. In very few, if any, areas of the County could mining occur without some improvement to transportation facilities. The analysis of specific traffic impacts on particular roads and intersections and mitigation of transportation impacts are

factors that should be considered at the conditional use permit stage when details are proposed.

2. We urge your careful review of Mr. Dentler's proposals on monitoring. As he noted, surface mines are heavily regulated by state agencies, in particular the Department of Natural Resources (the State agency with primary expertise and authority for surface mine reclamation) and the Department of Ecology, (the state agency with responsibility for water quality). These agencies have reporting requirements and the County should be careful not to duplicate those. Mr. Dentler's suggestions took into account those requirements and attempted to make the County's monitoring in align with those, to avoid duplication.

The County already has extensive tools at its disposal for enforcement. The recommended changes in Mr. Dentler's letter recognize those existing tools and provide a format where the monitoring and other remedies could be specifically made to fit the circumstances and compliance history of an applicant. This reflects a better use of the County's resources and avoids record keeping and public processes that add costs without providing any real public benefit. The provision should be carefully tailored to fit with existing tools and obligations.

We would be happy to provide additional information on these or other provisions.

Very truly yours,

William T. Lynn

WTL:cls
Enclosure

cc: Kimball Storedahl
John Dentler

John L. Dentler
Attorney at Law
8920 Franklin Avenue
Gig Harbor, Washington 98332

The Honorable David Madore
The Honorable Tom Mielke
The Honorable Edward Barnes
Clark County Board of Commissioners
1300 Franklin, 6th Floor,
Vancouver, WA 98666-5000,

October 10, 2014

RE: Proposed Changes regarding Mineral Resources -- Comprehensive Plan and Surface Mining Overlay Code

Dear Commissioners

The purpose of this letter is to submit comments on behalf of J.L. Storedahl & Sons, Inc. on the proposed revisions to the Comprehensive Plan (CP) Policies and Surface Mining Overlay (SMO) Ordinance.

Let me begin by thanking the Planning Commission, the Planning Staff and the Commissioners for the substantial work represented by the proposed changes in the CP and SMO ordinance. Mineral Resources and, in particular, aggregate materials are essential to a modern society. These materials are used to construct and maintain our roads, they are the base materials to the very foundation to our public infrastructure, such as schools, as well as the foundation of all private residences.

Aggregate materials must be accessible and affordable or the County's economy will surely suffer. On the other hand, we understand that extraction of these resources comes with some impacts to surrounding areas -- noise, traffic, etc. Our industry is, however, highly regulated. We must and do abide by regulations that govern, for example, the safety of our vehicles, the ability and skills of our drivers, dust and noise limitations, wastewater discharge limitations, erosion controls, and stormwater controls under the Clean Water Act and Washington Water Pollution Control Act and County regulations. Our operations must take into consideration effects on threatened and endangered species and any designated critical habitat. In fact, at our Daybreak Mine, Storedahl, in consultation and cooperation with the U.S. Fish & Wildlife Service and the National Marine Fisheries Service, developed and implemented the first comprehensive Habitat Conservation Plan designed to conserve, create and protect, in perpetuity,

fish and wildlife habitat and to help conserve several species listed as threatened or endangered under the Endangered Species Act. Moreover, our hard rock mines are highly regulated with regard to limitations on the time, place and manner of blasting and resulting vibrations, and a panoply of other regulations such as hours of operation, and various measures to protect our workers and the public under the Mining Safety and Occupation Act, etc..

Over the past several years, many allegations have been made to County staff and officials regarding violations at the mines we operate. We have responded and cooperated with staff to address the alleged violations. In each instance, the end result and conclusion was that there were no bases to the allegations. We are confident that if the Commission were to conduct a thorough review of alleged violations tendered by many individuals it would find, first that many of the alleged violations are tendered repeatedly by the same individuals, and secondly, as the staff has found, that conditions of operation have been followed and that all other applicable conditions were adhered to at Storedahl-operated mines.

The essence of making good decisions, is that (1) the "problem" be appropriately framed, (2) the alternatives identified can be implemented, if chosen, (3) that meaningful and reliable information is available that bear on each alternative, (4) that clear values and trade-offs are identified and (5) that logical reasoning is applied to arrive at the best solution. We urge the Board to consider these steps and make the best decision possible as it considers whether there is a problem, whether the existing regulatory framework resolves the matter and, if not, why not.

With that introduction, following are some general thoughts and comments on the proposed changes:

- the CP should explicitly recognize that aggregate resources are needed for a sound economy, strong employment opportunities and are essential in the construction and maintenance of public infrastructure such as roads and schools.
- Many of the current conditions applicable to existing mines and adopted under the current CUP process are inconsistent, even for mining operations directly adjoining one another. Thus each mine may have completely different hours of operation. The standards set out in the draft documents would be helpful helpful in eliminating confusion and inconsistency in conditions applicable between mining operations.
- *existing* road conditions should not govern whether Mineral Resource Lands should be designated; rather the issue should be whether existing road conditions may be reasonably improved to accommodate vehicle traffic anticipated with mining. Nearly every mining location in Clark County of which we are aware has required improvements in then-existing roads to accommodate the movement of aggregate resources from the mine to the areas of use. If *existing* road conditions governed whether MRL were designated no lands would be able to meet the criterion.
- The SMO Code should recognize the need for some exception to the CUP requirement for those situations where temporary stockpiling is necessary to public or private

construction or public road construction or maintenance. A CUP should not be required to merely use material that has been temporarily stock piled.

- The SMO Code regarding setbacks should recognize that the Growth Management Act requires that Mineral Resource Lands should be protected from uses that are incompatible with the extraction of mineral resources. For that reason, setbacks for structures on adjacent should be required rather than setbacks on lands designated as MRLs.
- We are concerned that the monitoring and enforcement provisions will create a burdensome and duplicative process with few additional benefits. The County has at its discretion considerable power to require compliance, such as using stop-work orders or administrative penalties, or even civil and criminal proceedings. The facts are that when staff has investigated complaints, no violations were found.
- The County should utilize modern data base management to track conditions applicable to each mine. The County has all this information at its disposal but the staff appears to lack the resources or technology to rapidly access and utilize such information.

Following are more specific comments and recommendations:

1. **The Comprehensive Plan "Goal" statement should be revised to recognize the value of mineral resources to Clark County. The following changes are recommended.**

   GOAL: To identify, and designate ~~and protect~~ adequate mineral resources needed for the future, ~~and~~ ensure appropriate use of gravel and mineral resources of the county, and ensure that such mineral resources are protected from incompatible or conflicting uses and to minimize conflict between surface mining and surrounding land uses.

2. **Section 3.5.2 should be amended to reflect the actual need for commercially significant mineral resources and that Natural Resource Land designation may overlap.**

   Designate mineral resource lands based on the following:

   a. The need for commercially significant mineral resources to supply long-term forecasted needs

   ~~a~~b. geological, environmental, and economic factors, which include, without limitation, consideration of ~~the proven~~ evidence of the quality, the quantity and characteristics of the resource deposits in the area of interest; proximity to ~~steep or~~ unstable slopes, riparian and wetland areas, habitat for endangered or threatened species, flood hazard areas, parks, public preserves, or other sensitive lands; and economic impacts of mining and other uses of the area;

   ~~b~~c. surrounding land uses, zoning, and parcel size, including, without limitation, consideration of proximity to and impacts on residentially zoned areas with existing

densities of predominantly one dwelling unit per five acres or higher, ~~and proximity to and impacts on agricultural and forest lands~~;[1] and

~~e~~d. suitability and safety of the existing and the potential of future transportation system to bear the traffic associated with mining, including, without limitation, the current suitability of public access roads to be used as haul roads and whether such roads may be improved or upgraded, the distance to market, the need to route truck traffic through residential areas, adequacy of intersections to handle mining traffic plus other traffic and necessary changes to accommodate mining.

e. Consideration that reclamation of mineral resource lands occurs after mining and that such lands may be used for subsequent uses, consistent with the Comprehensive Plan.

We also wish to point out an apparent misapprehension of the GMA and relevant rules. Mineral Resource Lands are not necessarily inconsistent with other Natural Resource Land designation or uses. In other words, MRL may overlap with Agricultural or Forestry Lands. The reasons for this are logical but perhaps not apparent without some reflection. Under Washington Law, all surface mines must be subject to reclamation plans that render the land capable of being used in accordance with the relevant comprehensive plan. RCW 78.44.091.[2] Thus if property is designated as MRL and Forestry Land, once mining is complete and reclamation implemented, then the land may be replanted for forestry uses or agricultural uses. The GMA rules also expressly note that Natural Resource Land designations often overlap. WAC 365-190-120.[3]

---

[1] Note that the GMA indicates that Mineral Resource designation can overlap with Forestry or Agricultural Land designation. Moreover, mining is not is not a permanent condition and reclamation must make the land compatible with uses designated under the Comprehensive Plan. For that reason, it is probably wiser to delete this provision. [cite]

[2] RCW 78.44.091 provides:

> Each applicant shall also supply copies of the proposed plans and final reclamation plan approved by the department to the county, city, or town in which the mine will be located. The department shall solicit comment from local government prior to approving a reclamation plan. The reclamation plan shall include:
>
> (1) A written narrative describing the proposed mining and reclamation scheme with:
>
> (a) A statement of a proposed subsequent use of the land after reclamation that is consistent with the local land use designation. Approval of the reclamation plan shall not vest the proposed subsequent use of the land;

[3] WAC 365-190-020(5) provides:

> (5) There are also qualitative differences between and among natural resource lands. The three types of natural resource lands (agricultural, forest, and mineral) vary widely in their use, location, and size. One type may overlap another type. For example, designated forest resource lands may also include designated mineral resource lands. Agricultural resource lands vary based on the types of crops produced, their location on the landscape, and their relationship to sustaining agricultural industries in an identified geographic area.

(Emphasis added).

Further, steep slopes should not be considered among the criteria that makes land unsuitable for mining. Mining often creates steep faces and this is not an impediment to mining -- in fact, such slopes and faces may facilitate mining. Unstable slopes, on the other hand, may be an impediment to safe mining and to good reclamation results. Unfortunately, most of the gentle sloping land with unconsolidated aggregates and materials which are easy to mine are no longer available because such parcels have been developed or nearby lands have been developed making mining all but impossible. For these reasons, we recommend that the language on steep slopes be deleted.

3. **The Conditional Use Permit requirement should be clarified so that temporary stockpiling of materials commonly used in private and public construction projects and public road construction does not trigger the requirement for a CUP.**

Part C, "Draft Surface Mining Overlay Standards" includes paragraph C "Uses." This section would amend the current code to require a Conditional Use Permit (CUP) for all future mining activity. However, from time to time, construction practices, primarily road construction and paving or large construction projects may require temporary stockpiling of aggregate materials. The language currently used would require a CUP for temporary stockpiling at such project locations. An exception should be made for temporary stockpiling of materials. A proposed amendment to the proposed provision is as follows:

> 2. Conditional uses. In addition to uses allowed conditionally in the underlying zoning district, the following uses are allowed in the surface mining overlay district, subject to conditional use approval:
>
> a. Extractions of rock, stone, gravel, sand, earth and minerals and the sorting, and stockpiling of such materials, except where aggregate materials have been moved from a mine to road improvement or construction project and temporarily stockpiled where such materials are needed on a short-term basis for efficient and timely completion of such projects;
>
> b. Asphalt mixing;
>
> c. Concrete batching;
>
> d. Clay bulking; and
>
> e. Rock crushing.

4. **The provision establishing setbacks should be amended to reflect the directives of the GMA or at the very least create symmetry in the required setbacks.**

Part D Standards, includes Section 2 relating to setbacks. The GMA mandates that the County is obligated to protect mineral resource lands from incompatible uses on adjacent lands. WAC

365-196-480(1)(f).[4] For that reason paragraph (a) should be eliminated. Moreover, the corresponding setback on adjacent properties set out in paragraph (b) should be increased from 100 to 200 feet. The GMA and rules adopted by the Washington Department of Commerce also make clear it is adjacent lands, not Mineral Resource Lands that should be burdened in protecting extraction of mineral resources from lands designated as MRL.[5] For that reason, we recommend this provision be eliminated.

Should the above recommendation not be accepted then, at a bare minimum, the corresponding setbacks should be increased for structures on adjacent properties. The following changes are recommended:

2. Setbacks.

a. A minimum two hundred- (200-) foot setback from properly permitted or grandfathered residential structures shall be required for all mining uses abutting existing residential structures or adjacent rural residential zoning. The setback may be reduced by the responsible official approval authority if the purposes of this chapter can be met with the reduced setback. The setback area shall be used only for roads, berms, landscaping, signs, fencing and reclamation activities.

b. Residential structures on ~~Adjacent~~ properties adjacent to lands with the surface mining overlay or Mineral Resource Land designation shall maintain a ~~one~~ two

---

[4] The WAC implementing the Growth Management Act states:

(1) Requirements:

***

"(f) In adopting development regulations to conserve natural resource lands, counties and cities shall address the need to buffer land uses adjacent to the natural resource lands. Where buffering is used it should be on land within the adjacent development unless an alternative is mutually agreed on by adjacent landowners."

[5] The Growth Management Act states:

Such regulations shall assure that the use of lands adjacent to agricultural, forest, or mineral resource lands shall not interfere with the continued use, in the accustomed manner and in accordance with best management practices, of these designated lands for the production of food, agricultural products, or timber, or for the extraction of minerals"

RCW 36.70A.060(1)(a) (emphasis added).

Similarly, the GMA Rules state:

(2) Recommendations for meeting requirements.

****

(e) The review of existing designations should be done on an area-wide basis, and in most cases, be limited to the question of consistency with the comprehensive plan, rather than revisiting the entire prior designation and regulation process. However, to the extent that new information is available or errors have been discovered, the review process should take this information into account. Review for consistency in this context should include whether the planned use of lands adjacent to agricultural, forest, or mineral resource lands will interfere with the continued use, in an accustomed manner and in accordance with the best management practices, of the designated lands for the production of food, agricultural products, or timber, or for the extraction of minerals.

WAC 365-196-480.

hundred- (~~1~~200-) foot setback~~.~~ from designated mineral resource land. The setback may be reduced by the approval authority only if no reasonable use of the property may be achieved due to the setback and site constraints and the purposes of this chapter can be met with the reduced setback ~~or if it is not feasible to meet the setback due to site constraints~~. Corresponding deeds and permit approvals shall note that mining may take place in the future which could create conditions incompatible with such residential development within the 200-foot setback. Setbacks shall not apply to existing structures.

5. The provisions regarding blasting should be modified to recognize that structures should be constructed in accordance with standards and criteria.

With regard to blasting, we note and have noted to the Commissioners in the past that all blasting must comply with federal and Washington law and, in particular, rules promulgated by the Washington Department of Labor and Industry. These rules, among other things, limit the vibration intensity at the property boundaries of a blasting site. These standards have been developed to ensure that blasting does not damage nearby structures such as building foundations.

In the past, unsupported and baseless claims have been made before the Commissioners; in particular, by Mr. Charles Bronson to the effect that blasting at the Livingston Quarry has damaged the foundation and windows of residential structure owned by Mr. Bronson. Planning Commission Hearing Transcript October 17, 2013. Storedahl and its exports went to Mr. Bronson's property and measured ground vibrations during blasting events. The measurements and data showed that at the time of a typical blasting event, the corresponding vibrations at the residence of Mr. Bronson were non-detectable. These materials and conclusion were provided to the Planning Commission. See Planning Commission Hearing Transcript of November 21, 2013 and Exhibits submitted by Storedahl on May 3, 2014. The blasting could not be the source of alleged damage to a foundation. Moreover, if off-site structures are not built according to standards at the time the structure was built, then claims that blasting has damaged the structure can be even more dubious. Accordingly, we suggest the following amendment to paragraph 7:

7. Blasting and mining activities shall must not adversely affect the quality or quantity of groundwater or groundwater wells or cause damage to offsite structures, where such structures have been constructed in accordance with applicable standards and criteria established or customary at the time of construction.

6. The new provisions under Section F, creating monitoring and reporting requirements and hearings are burdensome and costly and the required information is currently available to the County.

Under section F, Monitoring and Reporting, we note that generally, the procedure that would be established is generally duplicative of current reporting requirements. All monitoring results are

currently sent to the County upon request. Often, it is apparent that the County staff does not have a good method of tracking this information. When a complaint is received, often the first response of County staff is to call the mining operator asking for information that should be readily available to the County. For example, often staff is not aware of limitations on hours of operation at a mine and ask the operator about this. The County should implement a database system that could help staff easily access limitations, criteria and standards that apply to each mine.

The monitoring and reporting schedule for many activities is set out in federal or state law. Is it the County's intention to require duplication of these reporting requirements? While it is easy to ask for such information, the County should ask whether duplication is truly necessary as duplication comes with attendant costs both for the operator and the County in handling additional data and information.

The County has many tools available should it believe that a mining operator is not complying with the terms of a conditional use permit or related approvals. For example, the County may issue "stop work orders" if it determines non-compliance is an issue. Administrative, civil and criminal action may also be taken and penalties exacted by the County where non-compliance is an issue that has not been remedied. We urge the County to consider these options before a new highly burdensome process is created regarding compliance with permit terms.

We suggest that the Type 2 decision should depend on whether there appear to be violations of the criteria or reporting requirements. Staff can simply review the materials available and make a determination. Some of the proposed language is a bit awkward and unclear and could likely be improved. Following are some recommended changes. The first paragraph, for example, references "operating permits;" however, insofar as we are aware Clark County does not issue "Operating Permits". In summary, Storedahl does not believe the monitoring and enforcement provision is necessary and it would create additional and substantial burdens for mining operators and County staff with few benefits. However, should the County proceed with Section F, we recommend several changes to the Monitoring and Enforcement provision as follows:

F. Monitoring and Enforcement.

1. Mining operations shall comply with all applicable criteria, standards and conditions as set forth in conditional use permits, conditions adopted under the State Environmental Policy Act, or any other County-issued permit or approval. ~~Operating standards shall be implemented through compliance with conditions of approval as specified in this section and in the conditional use permit issued by the county.~~

2. In order to ensure compliance with conditions of approval the applicant shall develop and conduct a monitoring program. The monitoring program shall be approved by the county prior to beginning operations under the permit, and shall include the following:

a. A statement of the operating requirements and standards for each condition of approval in the relevant permits or approvals for mineral extraction and materials processing, and materials transport;

b. A brief description of the methodology for determining compliance with each requirement and standard. Where practical to do so, applicants may refer to relevant laws, codes, guidelines or standard methods adopted by government agencies or recognized institutions; and

c. A schedule for conducting the required monitoring. Where practical to do so, applicants may refer to relevant laws, codes, guidelines or standard methods adopted by government agencies or recognized institutions;

3. ~~At~~ The applicant ~~'s expense, all results of the required~~ shall maintain monitoring ~~shall be kept~~ for at least 10 years, ~~included in a report submitted~~ and upon the County's request, shall (a) submit such records to the county or (b) make such records available for inspection at reasonable times and places. Annual monitoring results shall be prepared and submitted:

a. beginning twelve (12) months after approval of the conditional use permit;

b. continuing at twelve- (12-) month year intervals thereafter; and

c. ~~as needed,~~ as determined by the responsible official to correct any instances of non-compliance.

4. The county will conduct a periodic performance review of permit requirements and standards at the end of the first three years, and subsequently, at three-year intervals ~~after that~~. ~~The periodic review shall be a Type 2 land use decision~~. ~~The periodic review shall determine whether the facility is operating consistent with all existing permit conditions~~. If the periodic review concludes that the facility is not operating consistent with all existing permit conditions then such decision shall proceed under a Type 2 land use decision.

5. Failure to comply with the operating requirements and standards specified in the conditional use permit may result in "stop work orders", administrative penalties, or revocation of the conditional use permit.

7. Conclusions: The proposed changes are in need of further revision in order to achieve the directives and objectives of the Growth Management Act.

We believe that the proposed amendments need additional changes in order to meet the directives, objectives and guidance set out in the Growth Management Act. The monitoring provisions as written are in need of clarification and improvement. However, the changes to some of the standards represent a significant improvement from the proposed revisions submitted

by the Planning Commission to the Board of County Commissioners. We believe several additional changes should be adopted and have provided our suggested changes. Please feel free to contact me should you have any questions.

Sincerely,

John L. Dentler
Attorney at Law

cc: Kimball Storedahl
Christine Cook, Sr. Dep. Prosecuting Attorney
Oliver Orjiako, Planning