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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. 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

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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?<sup>1</sup>

#### **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.

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<sup>1</sup> 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.

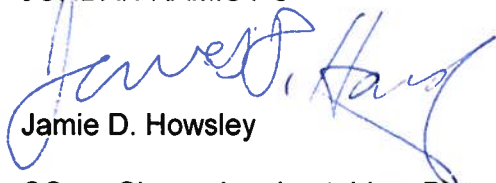
As the Planning Commission may or may not be aware, our client, along with other parties interested in the Washougal Pit, have been in extensive, and still ongoing, litigation regarding the lawful application of the County's Code, specifically with respect to the jurisdiction of the Columbia River Gorge Commission in the context of the County's code enforcement and land use review processes.<sup>2</sup> 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

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<sup>2</sup> See Clark County Superior Court, Case No. 19-2-01896-06.