

1
2
3 **RESOLUTION NO. 2003-03-22**
4

5 A RESOLUTION relating to land use, regarding an appeal of the
6 Hearings Examiner's decision denying an application for CPZ2002-
7 00009; CUP2002-00003; PSR2002-00015; SEP2002-00025;
8 ARC2001-00050 (Yacolt Mountain Quarry), a request for a zone
9 change, a conditional use permit, site plan review and
10 environmental review for a mining and rock crushing operation.
11 The site is located at 30500 NE Mystic Drive; Southeast Quarter of
12 Section 5, Township 4 North, Range 3 East of the Willamette
13 Meridian; Northwest, Southwest and Southeast Quarter of Section
14 4, Township 4 North, Range 3 East of the Willamette Meridian.
15

16 **WHEREAS**, the Clark County Hearings Examiner received testimony about this
17 application at public hearings on June 20 and August 22, 2002; and,

18 **WHEREAS**, the Examiner concluded that the rezone, conditional use permit and site plan
19 should be denied; and,

20 **WHEREAS**, James Sellers has petitioned the Board of County Commissioners on behalf
21 of the applicant to overturn the Hearings Examiner's denial of the request for granting of the
22 rezones, conditional use permit and site plan on the grounds that the Examiner erred in his
23 interpretation of the County regulation for a rezone and a conditional use permit; and,

24 **WHEREAS**, Keith Hirokawa has petitioned the Board of County Commissioners on behalf
25 of the Yacolt Mountain Neighborhood Association to uphold the Hearings Examiner's denial of the
26 request for granting of the rezones, conditional use permit and site plan, but that the Examiner erred
27 in his interpretation of the County regulation for a rezone and a conditional use permit; and,

28 **WHEREAS**, the Board of County Commissioners has considered the appeal at a duly
29 advertised public meeting; now, therefore,

1 **BE IT ORDERED AND RESOLVED BY THE BOARD OF COUNTY**
2 **COMMISSIONERS OF CLARK COUNTY, STATE OF WASHINGTON, as follows:**

3 **Section 1. Jurisdiction.** The Board has jurisdiction to consider the appeal of the applicant.

4 As an agent, the attorney for the applicant had authority to sign the applicant's appeal.

5 **Section 2. Analysis.** The Examiner's decision errs in the following particulars:

- 6 (1) Burden of proof: The applicant has the burden to demonstrate compliance with
7 applicable standards. However, such burden is affected by regulatory reform
8 legislation (RCW 36.70B.030 and .040) which requires that an application be first
9 tested for consistency with development regulations. The Final Decision of the
10 Examiner denying this application does not cite any code violation. Second,
11 regulatory reform legislation provides that if anticipated impacts are not addressed
12 by development regulation, the decision-maker is to consider consistency with
13 comprehensive plan policies. Here, plan policies limit mining to resource areas
14 (agriculture and forest zones) exclusive of floodplains. The Examiner failed to
15 adequately consider the generally substandard condition of roads within resource
16 areas. It is not apparent from the Examiner's decision how the roads serving the
17 subject proposal differ in any material way from other resource areas eligible for
18 mining. Finally, regulatory reform legislation permits impacts not covered in
19 either regulation or plan documents to be addressed under substantive SEPA
20 authority. Such authority, however, is also limited by RCW 43.21.060 which
21 requires, inter alia, that denial be premised upon a significant impact identified in
22 an EIS and that reasonable mitigation measures be insufficient. Here, an EIS was

1 not required (and no timely DNS appeal was filed); and the Examiner has failed to
2 sufficiently explain why the applicant's proposed mitigation measures are
3 inadequate.

4 (2) Change of circumstances. The Examiner correctly concluded that no change of
5 circumstances need be shown.

6 (3) Furthers public health, safety, morals or welfare. The Examiner misconstrued
7 CCC 18.503.060 (3) to require road conditions to improve. Such standard merely
8 reflects the general requirement that any police power enactment bear a substantial
9 relationship to a public purpose. Here, such relationship is demonstrated by
10 adherence to comprehensive plan policies relating to mining.

11 (4) Matrix. The Examiner erred in applying the Comprehensive Plan Matrix (Table
12 4.4) for the reasons set forth in Subsection 1), above.

13 (5) Traffic impacts. The proposal meets off-site traffic standards. The Examiner
14 erred in denying the proposal on the basis of traffic impacts, which have not been
15 shown to be more significant than in other areas where mining is allowed.

16 (6) Water usage. Substantial evidence supports the Examiner's conclusions that the
17 proposal can operate within the limits of its current water right. However, the
18 Examiner erred in prohibiting the applicant from using surface water for
19 operational purposes if such use is approved by the Washington State Department
20 of Ecology (DOE). No substantial evidence in the record supports such
21 prohibition.

1 (7) Groundwater. The Examiner erred in demanding a level of certainty as to
2 avoidance of ground water impacts to wells which is neither required by code,
3 called for by comprehensive plan policies, nor substantiated by environmental
4 analysis. Such error is underscored by the Examiner's failure to acknowledge the
5 applicant's voluntary agreement as a reasonable mitigation measure to provide
6 public water to properties with affected wells as a last resort.

7 (8) Noise. The EDNA classification of the adjacent property is industrial given its
8 predominant use and zoning. However, the county's aspirational standard in CCC
9 20.50.025(3)(g) that sources of noise otherwise exempt from WAC 173-60
10 effecting existing or proposed residential uses be mitigated to the standards of a
11 Class B source of noise (i.e. 57 dBA) applies; in the circumstances of the present
12 application, such standard should be measured at the property line rather than the
13 residence.

14 (9) Habitat ordinance. The Examiner properly applied the habitat ordinance. Issues
15 of water draw-down and application of dust inhibitors are not addressed by such
16 ordinance.

17 (10) Stormwater ordinance. The Examiner properly applied the stormwater ordinance.
18 Final design issues are not required to be addressed at this stage so long as
19 substantial evidence exists that compliance with code requirements is feasible.

20 (11) Unconstitutional gift. Anticipated county road work whose timing is in part
21 necessitated by impacts from this proposal does not constitute an unconstitutional

1 gift of public funds since provision of roads constitutes a fundamental county
2 purpose.

3 (12) Failure to withdraw MDNS. Under WAC 197.11.680 both the Examiner and the
4 Board lack authority to consider this issue.

5 (13) Groundwater study. Substantial evidence supports Condition SEPA 3.

6 (14) Liability for well impacts. The Examiner lacks jurisdiction to impose a
7 requirement that the operator be liable for a diminution in property value resulting
8 from impacts to wells, as provided for in Condition G3.

9 (15) Neighborhood advisory group. Substantial evidence supports the geographic
10 scope of the neighborhood advisory group provided for in Condition Q6.

11 (16) Cost recovery. Reasonable limits on recovery of county costs should be provided
12 if requested by the applicant.

13 (17) Pre-blast survey. The pre-blast survey required by Condition B11 should include
14 examination of the structural integrity of existing homes if inspection is permitted
15 by the owner.

16 **Section 3. Disposition.** Based upon the foregoing analysis the Hearings Examiner's
17 decision in the matter of CPZ2002-00009; CUP2002-00003; PSR2002-00015; SEP2002-00025;
18 ARC2001-00050 (Yacolt Mountain Quarry) denying a zone change, a conditional use permit, site
19 plan review and environmental review for a surface mining and rock crushing operation is
20 overturned, the applications approved, and the alternative Conditions of Approval as proposed by
21 the Examiner are hereby approved with the following changes:

1 (1) Conditions F/P1 and SEPA 1 shall be modified to read: "On-site surface
2 runoff shall be directed to collection areas for infiltration back into the ground or
3 used on-site as allowed under Department of Ecology water rights regulations.

4 Disturbed soils and overburden storage areas shall be replanted and/or reseeded
5 with vegetation."

6 (2) Condition G3 shall be modified to read: "If future monitoring indicates that
7 the Quarry activity has significantly or noticeably affected a neighboring property
8 water supply, the Quarry could choose from several mitigation options, including
9 but not limited to the following: deepening of a well, drilling a new well, altering
10 Quarry operations, or providing public water."

11 (3) Condition B11 shall be modified to read: "A program of pre-blasting
12 structural surveys shall be conducted by an independent third party for all
13 residents requesting one and providing access whose homes lie within the 1,500-
14 foot impact area. This survey shall be offered at no cost to the homeowners and
15 they will receive copies of the report and copies of any photographs taken. This
16 ~~structural~~ inspection for structural integrity will establish the home's pre-blasting
17 condition and, should there later be questions about the effect of blasting upon
18 their home, this report will have documented its condition prior to the start of
19 Quarrying operations. Information generated from the blast-monitoring program
20 shall be given to all residents requesting this data."

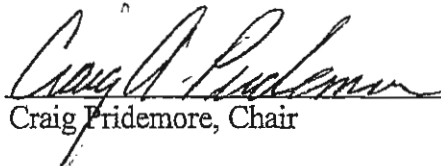
1 (4) The applicant shall be entitled to have a cap placed on the county cost
2 recovery requirements of Condition Q9 and the last sentence of Condition N9,
3 through an applicant-initiated post decision review.
4

5 ADOPTED this 25 day of March, 2003.

6
7 Attest:

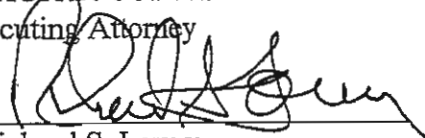
BOARD OF COUNTY COMMISSIONERS
FOR CLARK COUNTY, WASHINGTON

8
9
10 
11 Clerk to the Board

12 By 
13 Craig Fridemore, Chair

14 Approved as to Form Only
15 ARTHUR D. CURTIS
16 Prosecuting Attorney

17 By _____
18 Betty Sue Morris, Commissioner

19 By 
20 Richard S. Lowry
Chief Deputy Prosecuting Attorney

By _____
Judie Stanton, Commissioner