ADDENDUM

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April 12, 2018

Skagit County Hearing Examiner
1800 Continental Place
Mount Vernon, WA 98273

RE: Concrete Nor'west
PC16-0097 – County Decision to Deny Application dated April 5, 2018

This letter shall serve as the Appeal by Miles Sand & Gravel Company and Concrete Nor'west of the Skagit County Planning and Development Services Department Decision April 5, 2018 to deny the above-referenced Miles' application for failure to submit timely requested information. A copy of the Decision appealed from is attached.

This Appeal is filed under Skagit County Code (SCC) 14.06.105 and .110. The following statements are set forth to meet the requirements of SCC 14.06.110(8)(a-e)

a) The Decision Being Appealed. The Decision being appealed is the letter dated April 5, 2018 a copy of which is attached as Exhibit A.

b) The Name and Address of the Appellant and His Interest(s) in the Matter. The Appellant is Miles Sand & Gravel Company and Concrete Nor'west, c/o Dan Cox, P.O. Box 280, Mt. Vernon, Washington 98273. The Appellant's Attorney is William T. Lynn, Gordon Thomas Honeywell, 1201 Pacific Avenue, Suite 2100, Tacoma, Washington 98402. Appellant has standing in this matter because it is the owner of the property that is the subject of the application and is the applicant for the permit at issue.

c) *The specific reasons why the appellant believes the decision to be wrong.* See attached Exhibit B.

d) Desired outcome or changes to the decision. The appellant requests that the decision be reversed and the application processed. Alternatively, the Appellant requests that the matter be remanded by the Examiner so that the Appellant has a fair opportunity to cure any defects.

e) Any Skagit County Code Section(s) the appellant deems relevant. Relevant Code Sections are included on Exhibit B. In general, this is based on SCC 14.06 chapter which implements RCW 36.70B chapter

We submit this appeal with a filing fee in the amount of $1,000.00. If anything further is necessary to perfect this appeal please notify me immediately.

Very truly yours,

William T. Lynn

WTL:lb
Enclosures
cc: Client

Approved this _____ day of April, 2018.

Miles Sand & Gravel Company
(Concrete Nor'west)

By:_____
Dan Cox

EXHIBIT A

Skagit County
Planning & Development Services

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April 5, 2018

Via E-mail Only: johna semrau.com; BLynn@gth-law.com

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Dan Cox
Concrete Nor'West/Miles Sand & Gravel
P.O. Box 280
Mount Vernon, WA 98273

RE: Denial of Application for Failure to Timely Submit Requested Information (PL16-0097)

Gentlemen:

We are in receipt of your correspondence dated February 23, 2018. Your project application materials continue to be incomplete as discussed in person with Planning & Development Services on November 20, 2017 and as noted in our prior correspondence. Courtesy copies of our prior correspondence are enclosed for your convenience. To summarize, dating back to our March 14, 2017 letter, we asked you to update your application materials and all supporting documentation to address numerous factual inaccuracies and to ensure consistency with your current project plans. We reiterated our request for this additional information in our July 6, 2017 letter. As discussed at the November 20, 2017 meeting, we specifically requested new, updated versions of these documents, which we have not received.

In our July 6, 2017 letter, we asked you to revise your application and plans to indicate a 300-foot buffer from the edge of the wetlands to the gravel mining operation. We also asked you to amend your application to ensure the access road is in compliance with the private road standards. However, your submittal on February 23, 2018 did not include this information. The revised application form recently transmitted fails to address the access road.

Our July 6, 2017 letter also requested a site-specific Spill Control Plan to address potential water pollution impacts under Skagit County Code ("SCC") 14.16.900(1)(b)(v)(C). Via letter on October 24, 2017 and again in person on November 20, 2017, we informed you that the Spill Control Plan was incomplete. The revised Spill Control Plan submitted on February 23, 2018 remains incomplete since it fails to address on-site operations and site-specific equipment, and does not contain a site plan.

With respect to the Noise Study submitted on February 23, 2018, several underlying assumptions in the study appear to be incorrect. For example, page 7 of the study states the primary noise source will be a "front-end loader excavating material from the floor of the pit." However, a front-end loader is not used to excavate material. In addition, the Noise Study fails to analyze other heavy equipment (excavator, dozer and dump trucks) that may be used at the site according to your application. The Noise Study also inaccurately states that the proposed mine "would be situated in the middle of 726 acres of continuously owned property" and presumes that "most of the existing buffers would remain intact." It is our understanding that your surrounding properties may be harvested and buffers de-forested, which may impact noise transmission off-site. It is unclear whether this was addressed in the Noise Study. Accordingly, we find the Noise Study to be inaccurate and incomplete for the operations proposed.

Concrete Nor'West's revised application materials also failed to provide sufficient evidence showing compliance with the criteria in SCC 14.16.900(1)(b)(v) as noted in the March 14, 2017 letter. Specifically, there have been numerous public comments on the "potential adverse effects on the general public health, safety and welfare" of the proposed operations, which Concrete Nor'West has failed to address.

Since the additional information requested on March 14, 2017 and again on July 6, 2017 was not provided (despite an extension through the end of February, 2018), Skagit County Planning & Development Services is denying your application (PL16-0097) at this time pursuant to SCC 14.06.105. A denial for failure to timely submit requested information is a Level I decision that may be appealed to the Hearing Examiner. Pursuant to SCC 14.06.105(4), Concrete Nor'West may only reinitiate review by submitting a new application consistent with all current requirements.

If you have any questions, please contact me at (360) 416-1328.

Sincerely,

Hal Hart
Director of Planning & Development Services

Enclosures

1. March 14, 2017 letter from Skagit County
2. July 6, 2017 letter from Skagit County
3. October 24, 2017 letter from Skagit County

cc: John Cooper
Betsy Stevenson
Board of County Commissioners
Tim Holloran
Julie Nicoll

EXHIBIT B

EXHIBIT B

The Appellant alleges that the County Decision dated April 5, 2018 is incorrect for the following reasons:

1. Brief Procedural History. A brief procedural history will help provide context for the additional allegations set forth below. The Special Use Permit Application (Application) was filed March 7, 2016, assigned permit number PL16-0097, and deemed complete by the County on March 22, 2016. Notice of the Application was published March 31, 2016. The SEPA review process was completed, the SEPA MDNS was issued May 24, 2016, and the matter was set to go before the Hearing Examiner for public hearing. The Examiner actually convened the Hearing on November 16, 2016. The published staff report presented to the Examiner (attached here as Exhibit C) found that the Application met the requirements of applicable County codes, and that all findings necessary for the approval by the Examiner could be made. The staff report recommended approval subject to conditions.

Near the time of the public hearing, the County determined that notice of the Application had not been properly given. As a result, the hearing was opened by the Hearing Examiner, but then continued to a date to be set in the future. The County then recirculated a Notice of the Application for public comment and provided an opportunity for additional public comment with a deadline of December 30, 2016.

Since that time, the County has essentially treated the Application as being in an unending public comment period. In place of codes that formed the basis of its prior staff determination, the County has requested information seemingly based on "whatever the public wants", and has required the Appellant to meet a standard of "whatever will satisfy objecting parties."

The County has disregarded its own previous determinations made as to the completeness of the Application, and has disregarded the analysis of its own experts in reviewing Application materials, particularly related to wetlands, public works and traffic. In some cases (the noise and vibration study) the Appellant has been given no County comments and no real opportunity to respond to public comments. In some cases (traffic) the Appellant is still awaiting County comments. In other cases, the County has completely ceded its review authority to others (agencies or the public) without exercising the review discretion that the County staff is provided by code and statute. In still other cases, the County has ignored important mitigation measures provided by other agency permitting, in contravention of SEPA. More specific allegations are set forth below.

2. The first cited basis for denial in the letter is the Appellant's failure to show a 300-foot buffer from the edge of the wetland to the gravel mining operation. This ignores the previous County determination that a 200-foot buffer was consistent with County standards (see staff report attached as Exhibit B, p. 6). Moreover, this so-called defect does not affect the sufficiency of the Application. An application is complete if the submittal standards are met and requested information is provided SCC 14.06.090, .100 and .105. Here, the County is not requesting "information" but rather substantive changes to the proposal. The Application should go to the Examiner for his review. If the Hearing Examiner should determine that a 300-foot buffer is

required, that condition can be imposed at the time of the public hearing on the Application and the plan can be simply revised.

3. The County asserts that the Application must be modified to ensure the access road is in compliance with the private road standards that it deems applicable. This again does not affect the adequacy of the Application, which was previously deemed complete. And again, this is not a request for "information". If the Hearing Examiner determines that the project has to meet the private road standards, then a condition to that effect can be imposed. The most recent application materials submitted by the Appellant (February 23, 2018) specifically suggest a condition of approval to this effect if deemed necessary.

4. The County then requests a "site-specific Spill Control Plan" to address potential water pollution impacts. The County is required by SEPA to take into account mitigation provided by other permits to which an application is also subject. WAC 197-11-330(1)(c). The Appellant has advised the County on several occasions that the Department of Ecology has authority under the Clean Water Act to protect water quality and will require the applicant to comply with the provisions of the Sand and Gravel General Permit issued by the Department of Ecology under the National Pollution Discharge Elimination System process and the requirements of the State Waste Discharge General Permit. This includes the requirement for a Spill Control Plan. The County erred in failing to consider the requirements of these permit requirements administered by the State agency with primary authority with respect to water quality.

The County further asserts that the Spill Control Plan is inadequate because it fails to address "on-site operations and site-specific equipment and does not contain a site plan." This ignores the fact that a surface mine by its very nature is a land use that evolves over time. The various features that have the potential to adversely affect water quality move throughout the site as the mining proceeds. That is the reason that, as a generally accepted practice in the field, spill control plans are written generically so that the required measures (BMPs) apply wherever on the site activities with potential impact might occur. Nothing in the County Code including the provision cited by the County in its letter (SCC 14.16.900(1)(b)(v)(C) requires the details requested by the County, and the absence of those certainly has no bearing on the completeness of the Application. In fact a site specific plan would defeat the purpose of the measures by tying them to a specific location.

5. The County's comments regarding the noise study are particularly disturbing for several reasons. First, there was no evidence presented to the County to support the need for a study. The County should have adhered to its staff report finding of no adverse impact unless presented with facts to overcome that. Community displeasure is not a basis for land use decision-making. *Marantha Mining v. Pierce County*, 59 Wn. App. 795 (1990). The County's finding is supported by adopted noise standards (SCC Chapter 9.50) that apply to the proposal.

Second, the noise report was submitted on February 23, 2018 at the County's request, and the Appellant was never provided <u>any County comments</u> about the alleged "defects" until the application was denied. The only comments the Appellant received from the County were those forwarded from a neighbor on March 29th, four business days before the County denied the Application as incomplete. It is arbitrary and capricious and an erroneous process to summarily reject a noise study prepared by the professional without any opportunity to respond to

comments. We are confident that none of the bases cited in the County's April 5th letter would change the conclusions of the noise expert. In any event, the standard practice in this County and elsewhere (and the only process consistent with the rights of an applicant) is to provide comments and then allow an opportunity for correction or modification.

Moreover, the alleged deficiencies in the April 5 letter are exactly the same as those identified by the objecting neighbor in the comment forwarded by email on March 29th. The County is clearly not providing its own analysis and applying its own expertise. It is simply forwarding comments of neighbors and asking the Appellant to respond. In this case, the County went a step further and determined that the Appellant's failure to respond to the neighbor concerns within 4 business days was a reason to deny the Application altogether. This is completely inconsistent with any fair and objective process and unlawfully delegates the County's duties and powers to the public.

6. The County asserts that the Appellant failed to provide sufficient evidence showing that the criteria for the issuance of the Special Use Permit have been met. Of course, this first ignores the County's own previous findings that the criteria were met (see staff report). Second, it is not a request for "information". Third, it ignores the fact that the County staff's role here is to merely provide a recommendation and input to the Hearing Examiner. The Hearing Examiner's role is to make these determinations. Though this Appellant certainly makes every effort to do so, it is not required to satisfy the staff as to the merit of the proposal. The Appellant's burden is to satisfy the Hearing Examiner, and in denying the Application on the basis of incompleteness, the staff has usurped the Examiner's authority.

It is particularly troublesome that the staff's assertion here is that there were "numerous public comments" as to adverse effects that the applicant failed to address. It is not the Appellant's responsibility to respond to every public concern (though the Appellant certainly attempts to respond to all legitimate comments). The County staff's responsibility is to analyze the public comments and discern which of those require further analysis and then to advise the Appellant of that in due course. The staff is not to simply pass along every public comment and determine as a gate-keeper that all must be satisfied prior to advancing the Application to the Hearing Examiner process.

7. Although not mentioned in the letter, the Appellant is also concerned about the County's review of traffic impacts. We were advised some months ago that the County has retained a third party expert to review and comment upon the traffic study submitted to support the Application. To date, the Appellant has received no communications regarding the third party experts' conclusions. Based upon the history of this County review, the Appellant is justifiably concerned that, should this Application move forward as requested, the County will at some later point present a new list of comments requiring a response. The County should be required to provide all of its comments, including any as to the traffic report, in a specified period of time, well in advance of the hearing on this appeal. And, an extension of the Application time is appropriate for this. The County has specific authority to extend the time when needed to get input from another reviewer. SCC 14.06.105(5).

8. The staff has opened this Application to what seems to be unending public comment, and has changed its views about the proposal based upon those comments, even when they consisted of statements of opinion or mere conclusions. Many if not most comments do not present facts,

and certainly not facts based on expertise. The staff has set impossible goals for the Appellant: to address all public comments even from those who would never be satisfied. It would be bad enough if these public comments simply affected the staff's recommendation to the Hearing Examiner, but here, they are being used as a screen to deny the Appellant an opportunity to present its case to the Hearing Examiner. That is not a lawful process. It is arbitrary and capricious and contrary to the Appellant's right to have its proposal heard fairly before the Hearing Examiner. It also denies the Appellant the due process the U.S. and State Constitutions require.

9. On these bases, the Appellant will be requesting that the Hearing Examiner either overturn the staff's decision altogether and bring the matter on for hearing, or at the very least, remand the application for specific information requests consistent with the requirements of law.