BEFORE THE SKAGIT COUNTY HEARING EXAMINER

In the Matter of the Appeal of **Central Samish Valley Neighbors** re: Mitigated Determination of Nonsignificance	NO. PL22-0142 (Application Nos. PL16-0097 & PL16-0098) PREHEARING BRIEF ON SPECIAL USE PERMIT

INTRODUCTION

The very extensive staff report quotes and analyzes applicable criteria under the Skagit County Code and also includes a number of recommended conditions to assure consistency with adopted standards. Because the staff report is thorough, we will not repeat that analysis. Instead, this brief will focus on some applicable Comprehensive Plan and state policies, as well as concepts of common law and Washington statutory law relevant to the issuance of a special use permit in circumstances like those present here.

A. The State Legislature Has Declared Mineral Extraction An Appropriate And Important Land Use

Though mining operations undoubtedly have some environmental impacts, our State Legislature recognized the important role mineral resources play in the state

economy when it enacted the Growth Management Act ("GMA"), chapter 36.70A RCW, and directed:

> … each county, shall adopt development regulations … to assure the conservation of … mineral resource lands designated under RCW 36.70A.170…. Such regulations shall assure that the use of lands adjacent to … 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 extraction of minerals.[1]

The Growth Management Hearings Board, the administrative body with expertise tasked with interpreting the GMA, has for years recognized that the designation of resource lands under the GMA is based upon the characteristics of the land at issue. In one of its earlier decisions, the Board noted that under the statutory sequencing of events under the GMA, "the land speaks for itself first," meaning that resource lands are designated prior to doing other GMA planning such as establishing urban growth areas or adopting comprehensive plans.[2] The Supreme Court has recognized the importance of this sequencing to prevent the irreversible loss of resource lands before the completion of the comprehensive planning process:

> The GMA set aside special land it refers to as "natural resource lands," which include agricultural, forest, and mineral resource lands. "Natural resource lands are protected not for the sake of their ecological role but to ensure the viability of the resource-based industries that depend on them. Allowing conversion of resource lands to other uses or allowing incompatible uses nearby impairs the viability of the resource industry."[3]

The Legislature also acknowledges the importance of balancing mining operations with environmental and community concerns. That policy is expressed in the Surface Mining Act ("SMA"), chapter 78.44 RCW, enacted in 1970.

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[1] RCW 36.70A.060(1)(a).

[2] *See* Bremerton v. Kitsap County*, CPSGMHB Case No. 95-3-0039, FDO p. 31 (October 6, 1995).*

[3] *City of Redmond v. CPSGMHB*, 136 Wn.2d 38, 47-48, 959 P.2d 1091 (2001) (quoting Richard L. Settle & Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future,* 16 U PUGET SOUND L. REV. 867, 907 (1993).

> The legislature recognizes that the extraction of minerals by surface mining is an essential activity making an important contribution to the economic well-being of the state and nation. It is not possible to extract minerals without producing some environmental impacts. At the same time, comprehensive regulation of mining and thorough reclamation of mined lands is necessary to prevent or mitigate conditions that would be detrimental to the environment and to protect the general welfare, health, safety, and property rights of the citizens of the state. Surface mining takes place in diverse areas where the geologic, topographic, climatic, biologic, and social conditions are significantly different, and reclamation specifications must vary accordingly. Therefore, the legislature finds that a balance between appropriate environmental regulation and the production and conservation of minerals is in the best interests of the citizens of the state.[4]

The Legislature further clarified its intent in 1993:

> It is the intent of the legislature to clarify that surface mining is an appropriate land use, subject to reclamation authority exercised by the department of natural resources and land use and operation regulatory authority by counties, cities, and towns.[5]

As noted earlier, the Legislature also sought to balance environmental and community concerns with the need to continue surface mining operations. Toward that objective, the SMA requires reclamation of the mines after mining is completed.

> [T]he basic objective of reclamation is to reestablish on a continuing basis the vegetative cover, slope stability, water conditions and safety conditions suitable to the proposed subsequent use consistent with local land use plans for the surface mine site.[6]

Permitting and supervision of reclamation is under the exclusive jurisdiction of the Washington State Department of Natural Resources ("DNR").[7].

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[4] RCW 78.44.010.

[5] RCW 78.44.011.

[6] RCW 78.44.131.

[7] RCW 78.44.091.

B. Skagit County Has Also Recognized Surface Mines are a Suitable Use in the Rural Area

Under the County's Comprehensive Plan: "Natural Resource Lands are the cornerstone of Skagit County's economy, community, and history. As such, their protection and enhancement is of paramount importance to Skagit County and its citizens...."[8]

> The natural resource lands designation indicates areas where Skagit County land-use plans, regulations, and incentives are intended to promote long-term, commercially significant resource use. These natural resources provide valuable products and raw materials that support jobs, create tax revenues, and are an important component in regional and local economies and markets.[9]

Under the Plan, a "guiding principle" of the natural resource lands policies is to:

> Ensure that the uses of lands adjacent to natural resource lands do not interfere with the continued use, in the accustomed manner, for farming, forestry, mining, and related uses.[10]

Given this,

> [i]t is essential that neighbors and residents of natural resource lands better understand and be prepared to accept attendant conditions and the natural result of living in or near natural resource lands and rural areas.[11]

And it is essential to

> [r]educe the loss to Skagit County of its natural resource lands by limiting and defining the circumstances under which natural resource lands management operations may be considered a nuisance.[12]

This concept – that non-natural resource land uses that extend into natural resource areas or exist side-by-side are subordinate to the primacy of natural resource

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[8] Comp. Plan, pp. 104-05.

[9] *Id.*

[10] *Id.*, p. 152.

[11] *Id.*

[12] *Id.*

uses – is implemented by the Right-to-Manage Natural Resource Lands chapter of the Code, SMC Ch. 14.38, which states that:

> (a) It is the declared policy of this County to enhance and encourage Natural Resource Land management within the County. It is the further intent of this County to provide to the residents of this County proper notification of the County's recognition and support through this Chapter of those persons and/or entities' right-to-manage Natural Resource Lands.
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> (b) State planning goals encourage the conservation of productive Natural Resource Lands and discourage incompatible uses. This goal can be fulfilled by assuring that the use of lands adjacent to Natural Resource Lands do not interfere with the continued use, in the accustomed manner, for the production of food and agricultural products, timber, and extraction of minerals.

SMC 14.38.010(1)(a)-(b).

Consistent with these policies and goals, Skagit County has included in its Comprehensive Plan policies to facilitate surface mining. It allows mines as a special use in the rural area and establishes both absolute requirements like buffers and more general regulations. The Skagit County Code provides that the Hearing Examiner must make certain findings before approval of a special use permit, and those are addressed in the staff report. A general discussion of the law applicable to special use permits though is appropriate, and that follows.

1. A special use is a permitted use.

Several terms are applicable to describe a use expressly provided for by a zoning ordinance: a special use, a conditional use or a special exception. These terms are used interchangeably and each "authorizes a use *which is permitted* by zoning regulations, subject to approval by the administrative body charged with issuing such permits."[13]

[13] *Lund v. Tumwater*, 2 Wn. App. 750, 754, *rev. denied,* 78 Wn.2d 995 (1970).

These permits "allow a property owner to put his property to a use which the regulations expressly permit under conditions specified in the zoning regulations themselves."[14]

2. A special use is not a variance or rezone.

A special use is distinguishable from a variance. A variance "authorizes a landowner to establish or maintain a use which is prohibited by the zoning regulations." A special use permit, "[u]nlike a variance ... does not involve a use of property forbidden by the zoning ordinance."[15] Rather, a special use permit "constitutes a recognition of a use which the ordinance permits under stated conditions."[16] Specifically, a special use "is a use in compliance with, rather than in variance of, the ordinance."[17] The distinction between a variance and a special use has therefore been described as follows:

> The fundamental difference between a variance and a special permit is that a variance is the authority to use property in a manner forbidden by an ordinance while a special permit or exception is the authority to use property in a manner expressly permitted.[18]

A special use is also different from a rezone. A rezone "contemplates the amendment of an existing zoning ordinance which changes the zoning classification of a previously zoned area."[19] Conversely, a special use permit "contemplates an exception granted pursuant to a *previously existing* zoning ordinance," subject to the standards required by the ordinance.[20]

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[14] Robert M. Anderson, AMERICAN LAW OF ZONING, pg. 14-3, 5th Ed. 2009. Anderson, AMERICAN LAW OF ZONING § 21.02, p. 634 (1986).

[15] *Texaco Refining & Marketing v. Valente*, 571 N.Y.S.2d 328, 330 (A.D.2d 1991).

[16] *Id.*

[17] *Steen v. County Council of Sussex County*, 576 A.2d 642, 646 (Del.Ch. 1989).

[18] *C & A Carbone, Inc. v. Holbrook*, 591 N.Y.S.2d 493, 495 (A.D.2d 1992).

[19] *Durocher v. King County*, 80 Wn.2d 139, 154 (1972).

[20] *Id*. (emphasis added).

3. A special use permit must be issued if the requirements for such a permit are satisfied.

The establishment of a special use in a zoning ordinance "is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and that it will not adversely affect the neighborhood."[21]

Inclusion of specific uses in an ordinance "reflects a legislative finding that the listed conditional uses advance the 'public convenience and necessity.'"[22] Therefore, no specific finding of need is necessary in order to issue a special use permit for a use specified in the applicable ordinance.[23] Further, the fact that the project will alter the surrounding area is not sufficient to justify the denial of a special use permit.[24] "The law does not require that all adverse impacts be eliminated; if it did, no change in land use would ever be possible."[25]

A county authority's issuance of a special use is a permitted administrative act.[26] The issuing authority *must* grant the permit if the applicant has satisfied the standards of the ordinance.[27] Once the applicant has demonstrated compliance, "a presumption

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[21] *South Woodbury Taxpayers*, 428 N.Y.S.2d at 163; *see also Wahl v. Zoning Board of Appeals*, 497 N.Y.S. 2d 784, 785 (A.D.4th 1985) (When a zoning ordinance authorizes a particular use, the ordinance constitutes a "legislative finding" that the use is appropriate for the area.); *Pioneer-Evans Co. v. Garvin*, 595 N.Y.S.2d 586, 587 (A.D.4th 1993) (the "classification of a particular use [as a conditional use or special use] ... constitutes a legislative finding that the use is consistent with the zoning plan.").

[22] *Pease Hill v. County of Spokane*, 62 Wn. App. 800, 807 (1991); *see also McNaughton v. Boeing*, 68 Wn.2d 659, 664 (1966).

[23] *Pease Hill*, 62 Wn. App. at 808.

[24] *Id.*

[25] *Id.*

[26] *Durocher*, 80 Wn.2d at 153 [unclassified use permit]; *State ex rel Standard Min. v. Auburn*, 82 Wn.2d 321, 327 (1973) [special use permit]; *Lund v. Tumwater*, 2 Wn. App. 750, 755 (1970) [special use permit].

[27] *State ex rel Ogden*, 45 Wn.2d at 495; *Pease Hill*, 62 Wn. App. at 807-09; *see also Grace Church v. Planning and Zoning Com'n*, 615 A.2d 1092, 1097 (Conn. Supp. 1992) (an issuing authority may deny the permit "*only* for failure to meet specific standards in the regulations.") (emphasis added).

arises that [the proposed use] is consistent with the health, safety and general welfare of the community."[28]

Importantly, general community displeasure by itself is irrelevant to zoning decisions.[29] Rather, residents must have a substantial and well-founded basis for their fears, not one based on popular prejudices or stereotypes.[30] Courts have been particularly sensitive to denial of permits based on disharmony with surrounding properties, because such a determination is subjective with a potential for abuse:

> The courts rarely disapprove the granting of a special permit solely on the grounds that the use is not in harmony with a neighborhood, or with the intent and purpose of the zoning ordinance. Legislative authorization of a special permit supports a presumption that the use is generally in harmony with a neighborhood and that it will promote the general welfare. The burden of proof will rest with a municipality or person protesting the granting of the permit.[31]

These rules also apply under Washington statutory law. Following the adoption of the Growth Management Act, the Legislature made clear that the rules developed through the extensive GMA process were to be used as the basis for decision-making. This concept is manifested in RCW 36.70B.030, and 040, and RCW 43.21C.240, all of which were adopted as part of the Regulatory Reform Act. Those provisions include the following:

> Fundamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review.[32]

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[28] *Manor Healthcare v. Zoning Hearing Bd.*, 590 A.2d 65, 70 (Pa. 1991).

[29] *Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. 795, 804 (1990); *Kenart & Assocs. v. Skagit County*, 37 Wn. App. 295, 303, *review denied*, 101 Wn. 2d 1021 (1984).

[30] *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn. 2d 782, 903 P. 2d 986 (1995); *Washington State Dept. of Corrections v. City of Kennewick*, 86 Wn. App. 51, 532, 937 P. 2d 1119 (1997).

[31] Robert M. Anderson, AMERICAN LAW OF ZONING, pg. 14-61 to 14-65, 5th Ed. 2009.

[32] RCW 36.70B.030(1).

If a county has a development regulation that adequately addresses a project's environmental impacts, the government "shall not impose additional mitigation under SEPA"[33] Developmental regulations are considered to have adequately addressed the environmental impact if the "local government has designated a specified development standard."[34] Under these provisions of the Regulatory Reform Act, local governments may not alter adopted development standards on an ad hoc basis.

CONCLUSION

Surface mining is an important land use that the County has deemed appropriate in rural areas. In other words, mining is compatible if the standards are met. The very extensive staff report demonstrates that the applicable criteria are met and that the recommended conditions assure consistency with all adopted standards. Because the proposal here will meet all statutory and regulatory requirements for the issuance of a special use permit, it should be approved.

Dated this 7th day of July, 2022.

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[33] RCW 43.21C.240(3).

[34] RCW 43.21C.240(4)(b).