



# Appeal or Request for Reconsideration

Planning & Development Services · 1800 Continental Place · Mount Vernon WA 98273  
voice 360-416-1320 · inspections 360-416-1330 · [www.skagitcounty.net/planning](http://www.skagitcounty.net/planning)

File #:
Received by:

## Appeal

What are you appealing?

- Appeal of an Administrative Interpretation/Decision/Action to the Hearing Examiner
- Appeal of an Administrative Order to Abate (code enforcement order) to the Hearing Examiner
- Appeal of Impact Fees to the Hearing Examiner (impact fees must be paid) (SCC 14.30.070)
- Appeal of Hearing Examiner Decision/Action to the Board of County Commissioners
- Request for Reconsideration of a Hearing Examiner Decision (SCC 14.06.180)

File # of Appealed Decision or Permit	PL16-0097/98	Appeal Fee	\$	PDS will calculate
Date of Appealed Decision or Permit	June 17, 2021	Publication Fee	\$	PDS will calculate

*PDS staff: do not accept appeal form without full payment of fees*

## Appellant

Standing to appeal	<input checked="" type="checkbox"/> Permit applicant <input type="checkbox"/> Party of Record <input type="checkbox"/> Party subject to code enforcement order <input type="checkbox"/> Other			
Name	Miles Sand & Gravel Company and Concrete Nor'west			
Address	PO Box 280			
City, State	Mt Vernon	Zip	WA	Phone
Email	Dan.Cox@miles.rocks	Signature		

## Attorney or Representative None

Name	William T. Lynn and Reuben Schutz			
Address	1201 Pacific Avenue, Suite 2100			
City, State	Tacoma	Zip	WA	Phone 253-620-6500
Email	blynn@gth-law.com			

## Attachments

- For any of the **appeals** listed above, please attach a concise statement with numbered responses to the following questions.
  1. What is your interest in this decision? **See Attached Letter, paragraph (b)**
  2. How are you aggrieved by the decision you are appealing? **See Attached Exhibit B**
  3. What are the specific reasons you believe the decision is wrong? **See Attached Exhibit B**  
e.g. erroneous procedures, error in law, error in judgment, discovery of new evidence
  4. Describe any new evidence. **See Attached Exhibit B**
  5. List relevant sections of Skagit County Code. **See Attached Letter and Exhibit B**
  6. Describe your desired outcome or changes to the decision. **See Attached Letter, paragraph (d)**
- For a request for **reconsideration** of a Hearing Examiner decision, attach a statement identifying the specific errors alleged.

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

June 24, 2021

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

RE: PL16-0097/98 Determination of Need to Complete Standard Areas Review (Dated June 17, 2021)

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's June 17, 2021 Decision to require additional Critical Area review. A copy of the Decision appealed from is attached.

This Appeal is filed under Skagit County Code (SCC) 14.06.110 and SCC 14.06.160. 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 June 17, 2021, 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 Attorneys are William T. Lynn and Reuben Schutz, 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.

Reply to:

Tacoma Office  
1201 Pacific Ave., Suite 2100 (253) 620-6500  
Tacoma, WA 98402 (253) 620-6565 (fax)

Seattle Office  
520 Pike St, Suite 2350 (206) 676-7500  
Seattle, WA 98101 (206) 676-7575 (fax)

d) Desired outcome or changes to the decision.

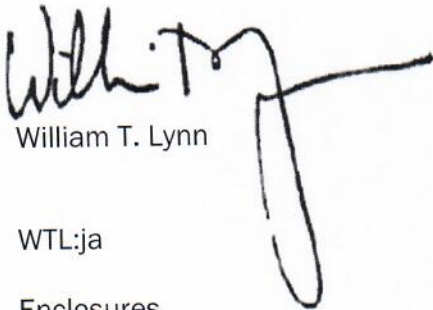
The appellant requests that the decision be reversed and the application be again deemed complete and processed.

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 Ch. 14.06 which implements RCW Ch. 36.70B.

We submit this appeal with a filing fee in the amount of \$1,080.00. If anything further is necessary to perfect this appeal please notify me immediately.

Very truly yours,



William T. Lynn

WTL:ja

Enclosures  
cc: Client

Approved this 24 day of June, 2021.

Miles Sand & Gravel Company  
(Concrete Nor'west)

By:  \_\_\_\_\_  
Dan Cox

# EXHIBIT A





## SKAGIT COUNTY PLANNING & DEVELOPMENT SERVICES

Mr. Dan Cox  
PO Box 280  
Mount Vernon, WA 98273

June 17, 2021

RE: PL16-0097/98 Determination of need to complete Standard Critical Areas Review

Dear Mr. Cox,

Please accept this letter as formal notification that pursuant to SCC 14.24.080 your project PL16-0097/98 requires Critical Areas Standard Review. This is a Type I decision that is appealable pursuant to SCC 14.06.170.

Critical Areas Standard Review has not been completed as to the whole of the proposed mine's operations. In particular, the use of the haul road to transport minerals from the proposed mine. As this portion of the mine operations constitutes a "land use activity that can impair the functions and values of critical areas or their buffers" critical areas review is required. SCC 14.24.060.

The County has completed a critical areas site visit as part of the standard project review and determined the likelihood of the presence of steep slopes, wetlands within 300 feet, and stream areas within 200 feet of the proposal. Please see the attached map for more detail on the approximate locations of these potential critical areas. As a result, a site assessment must be completed by a qualified professional and approved by County staff prior to completing review of your application.

The Skagit County Critical Areas Ordinance, chapter 14.24 SCC, requires that you retain a qualified consultant to create a plan that assesses the potential impacts of your proposal on any nearby critical areas. If you are unable to avoid impacts to any critical area and/or buffer, your consultant will need to design a mitigation plan.

Per SCC 14.06.105, you have 120 days to submit the information requested or your application will expire. The 120 days ends on October 15, 2021.

***Please note: This review is only to determine compliance with SCC 14.24. Approval of this proposal does not constitute approval under SCC 14.26, the Shoreline Master Program, SCC 14.16, Skagit County Zoning, or any other applicable regulations.***

If you have any questions, please feel free to contact our office.

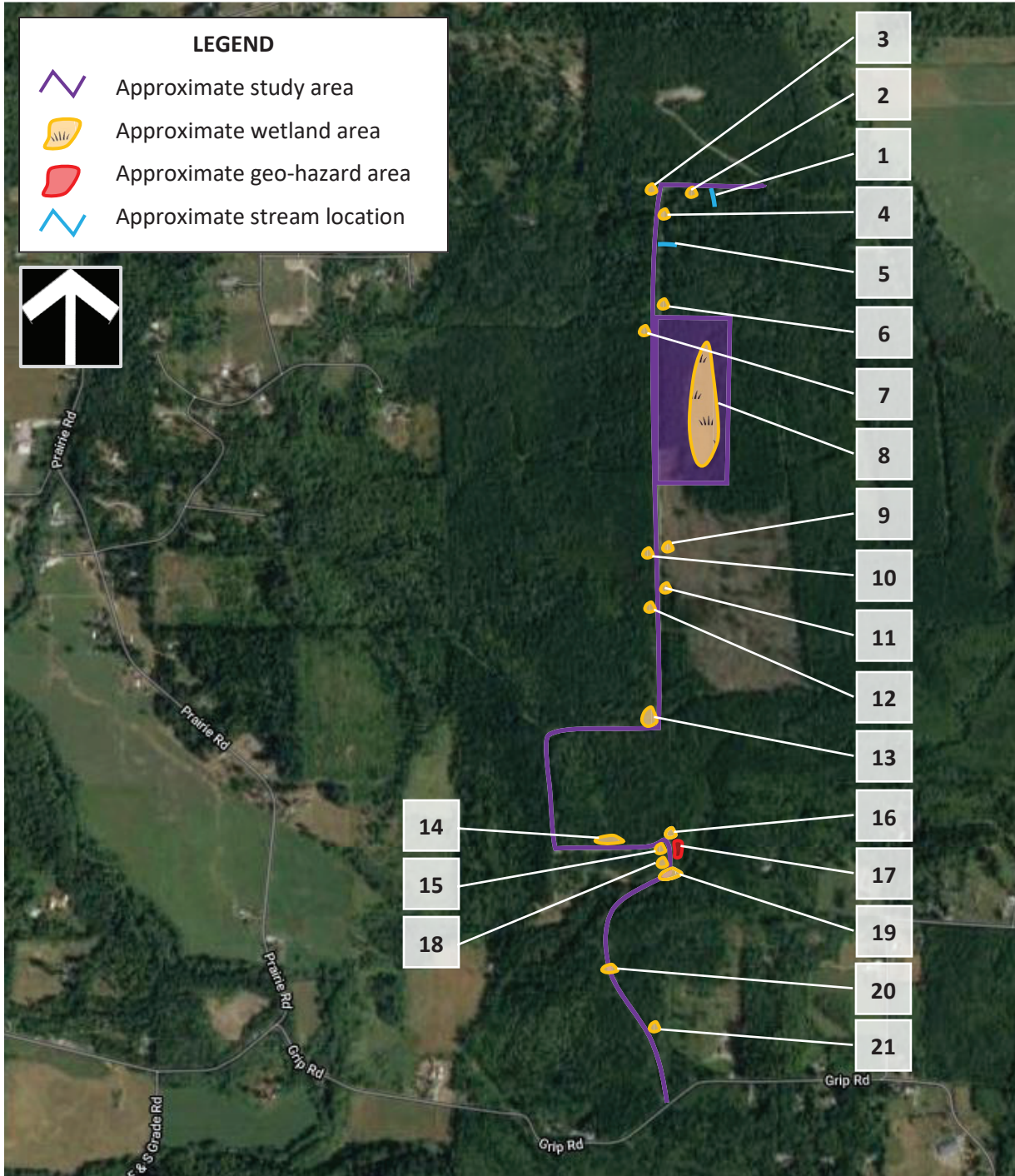
Sincerely,

Hal Hart, AICP  
Director

### Critical Areas Reconnaissance Sketch

Location: Skagit County, WA  
 Parcel Number: P35704 (road frontage)  
 Site Visit Date: June 4, 2021

Prepared for: Hal Hart, Michael Cerbone  
 TWC Ref. No.: 210231.4



**Note:** Field sketch only. Features depicted are approximate and not to scale. Portions of the site located outside of the approximate study area have not been screened for critical areas; additional regulated features may be present.

# EXHIBIT B

## EXHIBIT B TO APPEAL

This appeal is based upon the following assignment of errors.

### 1. THE PARTIES ARE BOUND BY THE HEARING EXAMINER'S OCTOBER 17, 2019 RULING

Under the County's code, the County is required to make a determination as to the completeness of a permit application, and for applications found to be complete the County must issue a determination of completeness.<sup>1</sup> A determination of completeness does not preclude the County from requesting additional information under certain circumstances.<sup>2</sup> In this case though the County's authority to request additional study and review related to Miles Sand & Gravel Company's (Miles') complete special use permit (SUP) application, including the use of the logging road, ended when the Hearing Examiner ruled that the County had all the information it needed.

The County deemed Miles' SUP application complete on March 22, 2016. Nearly two years later on, April 5, 2018, after a lengthy comment period and numerous submittals including new reports, the County denied the application on the basis that it was incomplete. On April 12, 2018, Miles filed an appeal in response to the County's denial determination.

In the course of that appeal, the Hearing Examiner ordered the County to provide a written statement of the specific information and items it claimed were deficient. The County did not comply with that order. Instead, it filed a motion for summary judgment to dismiss the appeal.

On October 17, 2019, the Hearing Examiner issued a decision that, among other things stated:

The overwhelming conviction derived from the record is of an Applicant attempting in every way possible to work with the County to resolve what is essentially an argument about process.

The Examiner is convinced that the Appellant has done what it can to resolve the County's perceived informational gap. The County has not identified any current shortcomings in the quantum of information presented. ***The Examiner concludes that the case should move forward, with the application being evaluated on the basis of the submissions made to date.***

.... The Application is deemed complete. The County shall prepare a new Staff Report based on the application information presently at hand. Thereafter, a

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<sup>1</sup> Skagit County Code (SCC) 14.06.100(3).

<sup>2</sup> SCC 14.06.100(5), .105.



hearing on the merits shall be scheduled in the ordinary course by County Staff.

Thus, the Examiner ruled that the application was complete and ready for final processing *in October of 2019*. This includes issues relating to the use of the private logging road for the following reasons:

- A. Even prior to Miles' submittal of its complete SUP application, the County was aware that the application review would cover Parcel Nos. P125644, P125645, and P50155 (the parcels on which mining would occur), and that the site will access onto Grip Road from "an existing private forest road...." It was clear to all at that time that the private logging road, outside of the special use permit parcels, was the planned access to the proposal.
- B. Miles provided the County with an as-built survey of the private logging road on September 17, 2018. This was followed by a field meeting on December 4, 2018, between Miles' representatives and the County. The only potential critical areas issue that was raised at that time had to do with a potential widening of a short bridge crossing. This widening was ultimately deemed unnecessary by the County and will not occur as part of the proposal.
- C. In February 2019, during the Hearing Examiner appeal process, Miles through its attorney sought written specification of all information, review, and studies that the County claimed it needed. This specifically included information as to the use of the private logging road. As discussed, the Examiner ordered the County to provide such written specification and the County did not do so.
- D. The Hearing Examiner – having reviewed the County's letter denying the application and Miles' request for written specification and having recognized the County's failure to provide any specification – determined that the "County has not identified any current shortcomings in the quantum of information presented" and ordered the County to process the application as is.

No appeal was taken by any party of the Hearing Examiner's decision.<sup>3</sup>

Over twenty years ago, in *Wenatchee Sportsmen*, the Washington Supreme Court enunciated the rule that, with the enactment of the Land Use Petition Act (LUPA), if a final land use decision is not timely appealed, it becomes immune from attack and must be given full effect.<sup>4</sup> Since that time, the Court has repeatedly affirmed and reinforced this rule.<sup>5</sup>

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<sup>3</sup> Under the County's Code, the decision of the Hearing Examiner is appealable to the Board of County Commissioners within 14 days of the Examiner's decision. SCC 14.06.110(13). The Board's decision is appealable to Superior Court under the Land Use Petition Act (LUPA). SCC 14.06.110(14), .220.

<sup>4</sup> 141 Wn.2d 169, 181-82, 4 P.3d 123 (2000).

<sup>5</sup> *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 904 (2002); *Samuel's Furniture, Inc. v. Washington Dept. of Ecology*, 147 Wn.2d 440, 54 P.3d 1194 (2003); *James v. Kitsap County*, 154 Wn.2d 574 (2005); *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2006); *Durland v. San Juan County*, 182 Wn.2d 55, 340 P.3d 191 (2014).

The policy behind this rule was stated in *Chelan County v. Nykreim*, which involved an attempt by Chelan County to withdraw its previously approved boundary line adjustment (BLA) when it later determined the BLA had unlawfully created an additional lot. The Supreme Court, applying the *Wenatchee Sportsmen* rule, overturned the attempted withdrawal despite the additional lot, holding that the rule:

is consistent with this court's stringent adherence to statutory time limits. This court has

also recognized a strong public policy supporting administrative finality in land use decisions. In fact, this court has stated that "[i]f there were not finality [in land use decisions], no owner of land would ever be safe in proceeding with development of his property... To make an exception ... would completely defeat the purpose and policy of the law in making a definite time limit."

146 Wn.2d at 931, quoting *Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d at 49, 26 P.3d 241.

Leaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited appeal procedures in a consistent, predictable and timely manner.<sup>6</sup>

Underscoring the import of this policy of finality, Washington courts have repeatedly stated that even illegal decisions under local land use codes must be timely challenged under LUPA.<sup>7</sup> Likewise, courts have held that the policy of finality prevails even in the absence of notice of a particular land use decision.<sup>8</sup>

Because no party appealed the Hearing Examiner's October 17, 2019 decision, it is final and binding on all parties. This includes the specific holding that the County must proceed based on the application information at hand, including the information it has as to the use of the private logging road. Clearly no entirely new application for critical areas or otherwise can be required.

The County's opportunity to request additional studies, including a critical areas review, existed at the latest until the Hearing Examiner issued his Order. That opportunity has long-passed. The parties are bound by the Examiner's final decision.

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<sup>6</sup> *Id.* at 933.

<sup>7</sup> *Asche v. Bloomquist*, 133 Wn. App. 784, 795, 133 P.3d 475 (2006) (Holding public nuisance claim preempted by LUPA because building permit was not timely appealed). See also, *Habitat Watch*, 155 Wn.2d at 406-07; *Applewood Estates Homeowners Ass'n v. City of Richland*, 166 Wn. App. 161, 168, 269 P.3d 288 (2012); *Vogal v. City of Richland*, 161 Wn. App. 770, 777, 255, P.3d 805 (2011).

<sup>8</sup> *Asche*, 132 Wn. App. at 798-99, *Habitat Watch*, 155 Wn.2d at 401.

## 2. A CRITICAL AREAS REVIEW IS NOT REQUIRED UNDER THE COUNTY'S ORDINANCE

Miles' proposed use and limited maintenance of the private logging road is, in any event, not subject to the County's Critical Areas Ordinance:

### A. Use and Maintenance of the Road Does Not Constitute "Development Activity"

While the County's Critical Areas Ordinance, SCC Ch. 14.24, (CAO) applies broadly,<sup>9</sup> the particular question of whether a critical areas review and written authorization is required is specifically set forth in SCC 14.24.060. That section states:

With the exception of activities identified as allowed without standard review under SCC 14.24.070, any land use activity that can impair the functions and values of critical areas or their buffers, including suspect or known geologically hazardous areas, through a development activity or by disturbance of the soil or water, and/or by removal of, or damage to, existing vegetation, shall require critical areas review and written authorization pursuant to this Chapter.<sup>10</sup>

Thus, under the County's code a critical areas review is triggered only in cases where either a "development activity" is planned or where the activity may disturb the soil, water, or existing vegetation.

"Development" is a specific defined term under the code:

**Development:** construction or exterior alteration of structures, dredging, drilling, dumping, filling, earth movement, clearing or removal of vegetation (except activities meeting the definition of forest practices), storage of materials or equipment in a designated floodway, or other site disturbance, other than internal logging roads, which either requires a permit, approval or authorization from the County or is proposed by a public agency.<sup>11</sup>

Other than the use of the existing private logging road, the only activity potentially planned for the road is the paving of a single, short section where the grade is greater than 12%. This paving will match the dimensions of the current road and no widening will occur. No alteration to any structures, no dredging, no drilling, no dumping, and no vegetation removal is contemplated.

### B. Use of and Maintenance Work on the Logging Road Are Not Subject to the CAO

Even if the activity resulted in a small amount of earth movement or otherwise disturbed the soil or existing vegetation, the activity is exempt as it involves an internal logging road and

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<sup>9</sup> SCC 14.24.040.

<sup>10</sup> SCC 14.26.060.

<sup>11</sup> SCC 14.04.020 (emphasis added).

maintenance of the road meets the definition of forest practices. Under the Forest Practices Act, RCW Ch. 76.09, "Forest Practices" means:

[A]ny activity conducted on or directly pertaining to forestland and relating to growing, harvesting, or processing timber, including but not limited to:

- (a) Road and trail construction, including forest practices hydraulic projects that include water crossing structures, and associated activities and maintenance....

RCW 76.09.020(17)(a). "Forest Road" is itself defined as follows:

"Forest road," as it applies to the operation and road maintenance and abandonment plan elements of the forest practices rules on small forestland owners, means a road or road segment that crosses land that meets the definition of forestland, but excludes residential access roads.<sup>12</sup>

RCW 76.08.020(20).

The private logging road at issue constitutes a forest road under the Forest Practices Act and maintenance of the road is exempt. The property on which the private logging road is located is under a Forest Land Designation and the property continues to be maintained as a Department of Natural Resources (DNR)-regulated productive tree farm. Moreover, the logging road is covered by a Road Maintenance and Abandonment Plan (RMAP) under the Forest Practices Act that was approved by DNR in 2002.

Under the DNR approved plans, all road surface, turnout, and shoulders are to be graded and shaped as needed to provide a suitable travel surface and to control water in an even dispersed manner. Roadside vegetation is to be controlled every 2-years using an appropriate herbicide or every 2-3 years using mechanical brush control.<sup>13</sup>

The fact that Miles' trucks will also use the private logging road does not change the fact

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<sup>12</sup> The Department of Natural Resources regulations also defined "Forest Road" as any: "[W]ays, means, lanes, roads, or driveways on forest land used since 1974 for forest practices...." WAC 222-16-010.

<sup>13</sup> This type of maintenance is required under the DNR regulations, which state that:

[T]he following maintenance shall be conducted on forest roads...:

- (c) Road surface must be maintained as necessary to:
  - (i) Minimize erosion of the surface and the subgrade; and
  - (ii) Minimize direct delivery of surface water to typed water; and
  - (iii) Minimize sediment entry to typed water; and
  - (iv) Direct any groundwater that is captured by the road surface onto stable portions of the forest floor.

WAC 222-24-052. The limited maintenance proposed by Miles will minimize erosion of the road's surface and the subgrade.

that it is an “internal logging road” and that maintenance of the road constitutes “forest practices.” The road was constructed as a forest road and continues to be used as such. Because this road and these activities are explicitly excluded from the definition of “development” under the CAO and because a critical areas review is only required in the case of development activity, such a review is not required here.

**C. Section .060 of the CAO Does Not Make the Use of the Logging Road Subject to its Terms**

SCC 14.24.060(1) does not change the analysis. That provision states that:

No land use development permit, land division, development approval, or other County authorization required by County Ordinance shall be granted until the applicant has demonstrated compliance with the applicable provisions of this Chapter.

All this means is that compliance with the Ordinance is required before permits may be issued. It does not set a new or different standard or a trigger for when a critical areas review and authorization is required. That is set forth in SCC 14.24.060 discussed above. Nor does it enlarge what is required for issuance of the “land use application,” which here is the special use permit. The only activity requiring a special use permit is surface mining and that will occur only on three parcels that are the subject of the application as noted above. Increased traffic does not require a special use permit or any other approval. Because the use and maintenance in this case does not trigger a critical areas review, Miles is complying with this the Ordinance and this provision.<sup>14</sup>

**D. The Use of the Private Logging Road is Also Specifically Exempt Under SCC 14.24.070**

Miles’ limited proposed maintenance of the private logging road is also specifically exempt under SCC 14.24.070(3), which states that:

The following developments, land use activities and associated uses are allowed without standard critical areas review; provided, that they are consistent with other applicable provisions of this Chapter and other chapters of the Skagit County Code....

...

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<sup>14</sup> To the extent that there is any perceived conflict between SCC 14.24.060 and SCC 14.24.040(1) or SCC 14.24.060(1), the more specific provisions of SCC 14.24.060 govern under the “general-specific” rule, which states that a specific statute, regulation, or code provision will prevail over a general one. *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Eval. Council (EFSEC)*, 165 Wn.2d 275, 309, 197 P.3d 1153 (2009). SCC 14.24.060 specifically addresses when a critical area review is required and it is not required here.



(3) Normal maintenance, repair, or operation of existing structures, utilities, sewage disposal systems, potable water systems, drainage facilities, detention/retention ponds, or public and private roads and driveways associated with pre-existing residential or commercial development, provided any maintenance or repair activities shall use best management practices (BMPs) with the least amount of potential impact to the crucial areas and any impact to a critical area or its buffer shall be restored after the maintenance to the extent feasible.

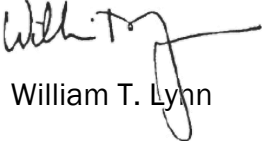
Miles' proposed activities associated with the private logging road fit squarely within this exemption. The small amount of paving that is proposed constitutes normal maintenance and repair of a "private road" associated with a pre-existing commercial use – i.e., timber production. This maintenance is contemplated under the Forest Management Plan and Road Maintenance and Abandonment Plan for the property. Maintenance and repair will need to comply with the BMP requirements and other provisions of SCC 14.24.070(3), but a separate critical areas review under SCC 14.24.060 is not required.

### **3. THE COUNTY'S ACTION IS CONTRARY TO THE COUNTY'S LONG-STANDING INTERPRETATION OF THE CAO**

The County has not required CAO analysis of areas adjacent to roads used by traffic from uses permitted through the special use permit process or other permit processes. That is a recognition that increases in traffic volumes are not development activities that trigger CAO analysis.

### **4. OTHER**

The decision is otherwise contrary to law and not supported by substantial evidence.

  
William T. Lynn