

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

FINDINGS, CONCLUSIONS AND DECISION

Applicant: 3D-H Aggregates
c/o David and Helen Weber &
Dave and Darcy Harvin
PO Box 607
Stanwood, WA 98292

Agent: David Hough
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File No: PL01-0435

Request: Special Use Permit

Location: 50596 State Route 20, near Concrete, within a portion of
Sec. 28, T35N, R9E, W1M.

Land Use Designation: Rural Reserve (RRv)

Summary of Proposal: To modify a previous conditional use permit to allow for
addition of a crusher, asphalt plant and concrete ready mix
operation within an existing permitted gravel pit. The
operation would include recycling of concrete and asphalt.

Public Hearing: After reviewing the report of the Planning and Permit
Center, the Hearing Examiner conducted a public hearing
on September 22, 2004.

Decision: The application is approved, contingent on meeting further
reporting requirements and subject to conditions.

FINDINGS OF FACT

1. 3D-H Aggregates (applicant) seeks a Special Use Permit to conduct new operations within an existing permitted gravel pit. The pit is located near Concrete.
2. The location is 50596 State Route 20, within a portion of Sec. 28, T35N, R9E., W.M. The Comprehensive plan/zoning designation is Rural Reserve (RRv).
3. The site is adjacent to the County Solid Waste Transfer Station. There is another surface mine (WSDOT Pit M-106) that borders the northern property boundary.
4. The permit sought will effectively modify a Conditional Use Permit issued in 1977 (CU#77-031). The Conditional Use Permit was reaffirmed through the signing of a Department of Natural Resources SM-6 form by the County in April of 2002. The permit is still active.
5. The original permit authorized a gravel pit. There were seven conditions of operation. Condition #7 stated, "Additional permits shall be obtained for each new operation of the rock crusher and asphalt machinery."
6. The instant application states that it is made pursuant to Condition #7 of the original permit. The applicants' project narrative states:

We are requesting approval for concrete ready mix and annual crushing and asphalt production which would also include recycling of concrete and asphalt. Crushing and asphalt production would normally occur March through October. Only an emergency situation would require crushing during other times of the year. We would expect that normal crushing and asphalt production would be for a period of 6 to 12 weeks annually. Crushed material would be stockpiled and sold throughout the year. We would anticipate an average daily traffic increase of 5 to 7 vehicles per day.
7. The idea is to be able to supply road building material for Highway 20 projects in the eastern part of Skagit County. The new activities proposed by the applicants would permit importation of material to the site for processing. No information is given about the expected volume of recycling work, but it is inferred from the estimate of vehicle trips that the amount will be quite small.
8. To date a little over 12 acres of gravel have been mined. The site currently has an active borrow area open to a maximum depth of approximately 30 feet below the natural topography. The undisturbed area within the original permit boundary consists of gently rolling land with upland forest and shrub communities. The site was logged

within the past decade. No streams or critical habitat area are located within or immediately adjacent to the site. The Skagit River is located over 800 feet to the southwest of the property boundary.

9. A paved two-lane road connecting to SR 20, provides a shared access to the mining area and to the adjacent solid waste transfer station. (The Washington State Department of Transportation has advised that the activities applied for will constitute a change in use making it necessary for the applicant to obtain a new access connection permit for the project.)

10. Limited mining operations continue in the pit. There are typically two employees. The proposed new operations will require two to three additional employees. Under the proposal, the crushing, asphalt production and ready mix concrete operations will take place between Monday morning and noon on Friday.

11. The parcel is 40 acres in size. Of the equipment involved, the crusher will be the major noise source. It will be located in the active pit at 25 or more feet below grade. The apparent belief is that the below-grade location and the horizontal distances involved will result noise standard compliance at receiving properties.

12. The proposed concrete production operations will require a water well. No well may be located closer than 1,000 feet from landfill property lines. There is ample room on the applicants' property to drill a well that is considerably more than 1,000 feet from the adjacent landfill. At hearing the applicants' consultant stated that the well will be exempt from a water rights permit. This means that the use will have to be kept at below 5,000 gallons per day. This restriction will operate, to some degree, as a limiting factor on the concrete operations.

13. A traffic study was performed which accepted the average of 5 to 7 vehicles per day. The study assumed that in an extreme case, the project would generate 10 trips during the p.m. peak-hour period. The study found that the sight distance at the entrance to SR-20 exceeds the required distance and that the impact of project-generated traffic on the adjacent roadways will be minimal. No level of service impacts at the access location were noted. Parking will be on site in spaces currently provided.

14. The adjacent land is rural in nature with scattered residential development. Except for the county transfer station and the old WSDOT borrow pit to the north, the immediate area is essentially in forest. The nearest residence is 1,500 feet from the proposed location of the batch plant. The operation of the gravel pit is not visible from any adjacent residential properties.

15. Critical area review revealed no critical areas on the site except steep slopes. None of the activities appear to be closer than 200 feet from steep slopes. A hydrogeological report was submitted on April 8, 2004. No concerns were raised by Staff after reviewing the report.

16. The Departments of Health and Public Works reviewed the project but found no problems that cannot be addressed through conditions of approval. Their comments are responded to in the conditions proposed by Staff.

17. An environmental checklist was prepared and reviewed. A Mitigated Determination of Non-Significance (MDNS) under the State Environmental Policy Act (SEPA) was issued on May 27, 2004. The MDNS is a threshold determination that no environmental impact statement need be prepared. The MDNS was not appealed. It imposed the following conditions on the project:

(1) The water well must be drilled greater than 1,000 feet from the Skagit County landfill property boundary. The Skagit County Health Department must be notified before the well is drilled.

(2) The facility must comply with WAC 173-350-320. The operator of the concrete and asphalt inert wastes storage piles must adhere to the piles standards which require that at least 50% of the material stored in the pile must be used within one year and all of the materials is used within three years.

(3) Inert waste can not be landfilled unless the facility obtains an inert waste landfill permit (WAC 173-350).

(4) Temporary erosion/sedimentation control measures, as approved by the Skagit County Department of Public Works, shall be in place prior to the start of operation. The applicant shall maintain all temporary erosion/sedimentation control measures in accordance with the Skagit County Drainage Ordinance 14.32. Said measures shall remain in place until completion of the project.

(5) The applicant shall comply with Northwest Air Pollution Authority requirements.

(6) The applicant shall comply with the provisions of Chapter 14.32 of the Skagit County Code, the Skagit County Drainage Ordinance, as it relates to increased runoff resulting from additional impervious surfaces.

(7) The applicant shall comply with Fire Code Standards.

(8) The applicant shall comply with all relevant provisions of 14.24 (Skagit Critical Areas Ordinance).

18. The Rural Reserve district does not allow mining. The subject mine is a non-conforming use that is not within the Mineral Resource Overlay (MRO).

19. However, the MRO provisions have a section dealing with Pre-existing Designated and Undesignated Mining Operations. As to these the code states at SCC 14.16.440(3)(b):

Commercial mining operations lying outside of a designated MRO that are allowed at the time of adoption of this Ordinance may continue to operate on the permitted mining site. Expansion of the existing operations beyond the geographical and/or operational limits imposed by the existing approval is allowed provided the owner applies for and receives a new mining special-use permit issued under this Section that covers the expanded operation area. Expansion will not extend beyond the legal parcel on which the legally existing use is located.

20. Assuming the proposal at hand is a form of expansion of operational limits, it appears that the rock crushing, recycling, asphalt batching, and concrete batching are all allowable through a Special Use Permit

21. Under the Rural Reserve zoning, temporary asphalt/concrete batching is allowed as a special use. SCC 14.16.320(4)(00). SCC 14.16.020 defines "temporary asphalt/concrete batching" as follows:

The mixing of asphalt or concrete from the raw ingredients for a discrete project in the vicinity of the batching operation. For the purposes of this definition, "temporary" shall mean no longer than 1 year.

22. The Examiner takes this to mean that an approval to move the asphalt and concrete batching operations off-site to be near some particular job can only be effective for one year. The Staff interprets the one year limit to equate to 52 weeks of operation time—that is the clock can start and stop with the termination coming when a year's worth of work time has elapsed.

23. The Examiner is not sure if the applicants intend to seek approval through this permit for only on-site asphalt and concrete batching or are looking for the ability to take the batching equipment off-site, as well. The latter cannot be approved via this permit because a "discrete project" site is needed for the analysis. Such off-site use cannot be given blanket approval because it can lawfully occur only in zones that allow "temporary asphalt/concrete batching." Moreover, approvals under SCC 14.16.440(3)(b) must be limited to the "legal parcel on which the legally existing use is located."

24. A number of residents of the area wrote letters of concern, testified at the hearing or did both. Most of them were upset at the public notice requirement that limits mailed notice to those property owners within 300 feet of the proposal. There was a general feeling that this limit is inadequate in rural areas with widely separated residences such as this one.

25. The main substantive concerns expressed by members of the public were (1) the possibility of excessive noise, (2) the possibility of ground water contamination, (3) the possibility of excessive odor, (4) hours of operation and the possibility of illumination at night, and (5) the suitability of the proposed uses in this area of high scenic and recreational value. They pointed out that the site is at the base of Sauk Mountain, less than a mile from Rockport State Park, and close to a nationally designated stretch of Wild and Scenic River.

26. The criteria for Special Use Permit approval are set forth at SCC 14.16.900(2)(b)(v), as follows:

- (a) The proposed use will be compatible with existing and planned land use and comply with the Comprehensive Plan.
- (b) The proposed use complies with the Skagit County Code.
- (c) The proposed use will not create undue noise, odor, heat, vibration, air and water pollution impacts on surrounding, existing, or potential dwelling units, based on the performance standards of SCC 14.16.840.
- (d) The proposed use will not generate intrusions on privacy of surrounding uses.
- (e) Potential effects regarding the general public health, safety, and general welfare.
- (f) For special uses in ... Natural Resource Lands ..., the impacts on long-term natural resource management and production will be minimized.
- (g) The proposed use is not in conflict with the health and safety of the community.
- (h) The proposed use will be supported by adequate public facilities and services and will not adversely affect public services to the surrounding areas, or conditions can be established to mitigate adverse impacts on such facilities.

27. The Staff accepted the applicants' response to these questions. In general, the applicants' approach was to say that it must comply with the requirements of various regulations and agencies, that it will do so, and that therefore no problems will ensue. There is little in the record that provides a basis for simply accepting these assurances. There is no analysis of the noise likely to be generated, what control mechanisms will be used, what noise limits apply or what technical justification there is for assuming noise

standards will be met. There is essentially no discussion of odor. No information is provided on the kind of containment facilities to be utilized or what spill control measures will be taken. No analysis is provided of the risk posed by these operations to contamination of the aquifer used for drinking water by area residents.

28. The applicants and the Staff seem to have relied primarily on the remoteness of the location and the modest size of the proposed operation to infer that there will be no "untrue" impacts on residential life in the vicinity.

29. Any conclusion herein which may be deemed a finding is hereby adopted as such.

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over the persons and the subject matter of this proceeding.

2. The requirements of SEPA have been met. Because no appeal of the MDNS was filed, it is now too late to raise the issue of whether an environmental impact statement should be written.

3. The County fulfilled the legal requirements for notice in this case. The question over whether the legal requirements are good enough for rural areas with widely scattered settlement is a policy issue that the Examiner has no power to review.

4. The proposal appears to be consistent with the Comprehensive Plan. The plan, in Policy 5D-3.7, states:

Pre-existing legally operating commercial mining operations outside the Mineral Resource Overlay may continue to operate subject to the terms of the existing approval(s). Such operations may expand beyond the scope of the original approval and within the existing parcel provided that they apply for and receive a mining special-use permit.

5. The Examiner's reading of SCC 14.16.440(3)(b) is that it offers the possibility of approving the types of operations sought here on a more or less permanent basis. The subsection provides a means for dealing with a particular type of non-conforming use and for allowing its expansion. It does not matter what uses are allowed in the zone. As long as the changes are operational expansions related to the basic permitted use, they may be allowed if they meet the special use permit criteria. No particular duration is implied. In this case, the activities applied for are clearly activities within the contemplated ambit of the initial permit.

6. What limits the potential duration of the permission available here is Condition #7 of the original permit. As noted, that condition states: "Additional permits shall be obtained for each new operation of the rock crusher and asphalt machinery." This language is somewhat ambiguous, but the most satisfactory way to deal with it is to treat it as analogous to the definition of "temporary asphalt/concrete batching" which sets a duration of one year. This approach brings us out where both the applicants and the Staff thought they were.

7. The Examiner, therefore, concludes that any permit issued for the uses proposed should be limited to a year. Further, the Examiner defers to the County's interpretation that this means a year's worth of actual operation rather than a calendar year.

8. But before any permit can be issued, the Special Use Permit criteria of SCC 14.16.900(2)(b)(v) must be satisfied. The Special Use Permit criteria require an inquiry into whether the activities applied for will be compatible with the other uses of the area and whether they will impose "undue" environmental harm on existing or potential residential uses.

9. Where there is a reasonable doubt about whether a project will be able to meet relevant standards, at least some preliminary analysis of the ability to do so should be presented. Otherwise, the simple statement that a project will meet all applicable regulations will be enough to authorize almost anything.

10. For example, the special use criteria make reference to SCC 14.16.840. This is the County's performance standard for, among other things, noise. It requires that the most restrictive noise standards (Class A EDNA) be met in Rural Reserve zones. On the instant record, we have no information on what the relevant dBA levels are, nor (except for the applicants' word) have we any basis for confidence that they will be achieved. Similarly, on the matter of odor we have no information on the likelihood of problems or on the control technology proposed. We know only that an operating permit will have to be obtained from the local air pollution control agency.

11. On the potential for water pollution, we have not been advised of what potential contaminants may be brought to the property or how it is proposed to prevent their escape into the environment. It may be that the existence of an aquitard makes pollution of the deep drinking water aquifer unlikely even if there are spills, but on the record such a conclusion can only be reached by guesswork.

12. In short, because of what isn't there, the record raises reasonable doubt about the proposal's ability to meet standards in the areas of noise, odor and ground water contamination. If, indeed the concerns about these issues are not warranted, then the project should be approved. But more information on these subjects needs to be presented and reviewed. The Examiner, therefore, is requiring some additional reporting

and making approval of the Special Use Permit contingent upon the County's satisfaction that compliance with the protective standards involved can be achieved.

13. It is not enough to say that these matters will be dealt with by post-operation enforcement. The whole purpose of permit review is to provide some assurance that enforcement will not be necessary.

14. The record contains adequate information on the risk that nighttime illumination may prove a problem. The hours of operation proposed appear to take care of this fear. A condition can be added that any departure from day-time operations will have to be specially approved on a one-time basis.

15. The answer to whether the proposed uses are really compatible with maintenance of the high scenic and recreational values of the area depends on the outcome of inquiries into the noise, odor and pollution issues. The project may be visible from some areas on Sauk Mountain, but the new uses will not present much in the way of new visual affront.

16. The project may be contingently approved, with the following conditions.

CONDITIONS

1. The applicants shall obtain all other necessary land use and environmental approvals and comply with the conditions thereof.

2. The applicants shall comply with the conditions of the MDNS issued on May 27, 2004. (See Finding 17 above.)

3. The applicants shall provide the Planning and Permit Center with additional information on the likelihood of compliance with (a) relevant noise standards, including a discussion of the noise characteristics of the equipment involved and the control technology to be used, (b) relevant odor control requirements, including a discussion of the odor producing characteristics of the equipment and material involved and the control technology to be used, (c) ground water quality standards, including a discussion of the pollutants to be introduced to the site and the controls to be used to prevent the escape of such pollutants. In addition, the ground water information shall include an evaluation of the likelihood that spilled pollutants might contaminate drinking water for any of the users in the area.

4. The additional information provided shall be made a part of the application file herein and shall be made available to parties of record herein for review and comment.

5. The permit allows rock crushing, concrete ready mix production, and asphalt production on the site of the existing gravel mine. Recycling of concrete and asphalt

shall be included in the allowed activities. This permit provides no authority to perform any of these activities off-site.

6. The permission granted shall be limited to one year of operations. One year is defined as 52 weeks of work. The period taken to accomplish this work may extend over several calendar years.

7. The activities are authorized to occur between March 1 and October 31 annually. The hours of operation shall be 8:00 a.m Monday through 12 noon Friday of any week. There shall be no night time operations. There shall be no weekend operations.

8. Should an emergency need for the materials produced arise, permission to deviate from the time limits on operation on a one-time basis may be sought from the Planning and Permit Center. Approval of any such request shall only be made if the Planning and Permit Center is satisfied that there is an emergency.

9. Operation of equipment/construction and daily operations shall comply with Chapter 173-60 WAC, Maximum Environmental Noise Levels, and the performance standards of SCC 14.16.840.

10. State surface and ground water standards, Chapters 173-201A and 173-200 WAC, shall be maintained. Best management practices shall be used to prevent degradation of water quality from sources on the site or the development of conditions that could lead to degradation of water quality.

11. Water shall not be withdrawn from the well constructed for concrete batching operations in an amount exceeding 5,000 gallons per day.

12. All necessary permits shall be obtained from the County Health Department. The applicants shall comply with all requirements regarding stockpiling or disposal of material or wastes.

13. A general permit for storm water discharges shall be obtained from the State Department of Ecology.

14. Stormwater management shall comply with Chapter 14.32 SCC. Prior to the start of operations, the applicants shall submit and receive approval of both an Erosion and Sedimentation Control Plan and a Stormwater Pollution Prevention Plan.

15. All necessary approvals from the State Department of Natural Resources shall be obtained.

16. Prior to the start of operations, the applicants shall obtain a new access connection permit from the State Department of Transportation. If re-construction of the

current access to SR 20 is required, the necessary improvements shall be made. The applicants shall comply with WSDOT standards and with County Road Standards.

17. The owner or operator shall supply an annual report of operation time to the Planning and Permit Center, so that the County can monitor the 52-week time limit.

18. The applicants shall meet the time requirements of SCC 14.16.900(2)(d).

19. Failure to comply with any condition of approval may result in permit revocation.

DECISION

The Special Use Permit is approved, contingent upon satisfaction of the additional reporting requirements set forth in Condition 3 above and the subsequent conclusion of the Planning and Permit Center that the project is likely to comply with relevant standards for the control of noise, odor and water pollution. No permit shall issue until the Planning and Permit Center makes such a decision.

Should the Planning and Permit Center conclude that there is substantial reason for doubt that compliance will be achieved or that additional conditions of approval are necessary, they shall note this matter for an additional hearing before the Hearing Examiner.

Any permit issued shall be subject to the conditions set forth above.

Wick *Wick* Hearing Examiner

Date of Action: November 15, 2004

Date Transmitted to Applicant: November 15, 2004

RECONSIDERATION/APPEAL

As provided in SCC 14.06.180, a request for reconsideration may be filed with the Planning and Permit Center within 10 days after the date of this decision. As provided in SCC 14.06.120(9), the decision may be appealed to the Board of County Commissioners by filing a written Notice of Appeal with the Planning and Permit Center within 14 days after the date of the decision or decision on reconsideration, if applicable.