



FRIENDS OF THE COLUMBIA GORGE

Via email

February 17, 2020

Clark County Council
P.O. Box 5000
Vancouver, WA 98666-5000

**Re: CPZ2019-00033 Clark County Unified Development Code (Title 40.240.440)
Amendments to Columbia River Gorge National Scenic Area Ordinance**

Dear Council:

Friends of the Columbia Gorge (“Friends”) has reviewed and submits these comments in support of the above-referenced proposed ordinance. Friends is a nonprofit organization with approximately 7,000 members dedicated to protecting and enhancing the resources of the Columbia River Gorge through the strict implementation of the Columbia River Gorge National Scenic Area Act and other laws protecting the region of the Columbia River Gorge. Our membership includes hundreds of citizens who reside within the Columbia River Gorge National Scenic Area (“National Scenic Area”).

The proposed ordinance would permanently correct a scrivener’s error in Clark County Code (“CCC”) section 40.240.440.H. The Council has already corrected the error on an interim basis twice (in Interim Ordinances No. 2019-09-13 and 2019-11-07). The Council should adopt the staff recommendation to make the correction permanent.

The scrivener’s error was inadvertently introduced in June 2003, when the code was reorganized and restructured. At that time, a cross-reference between code sections was inadvertently revised. The effect of the scrivener’s error was to require review of certain types of mining applications within the National Scenic Area by the Clark County Council via a legislative (Type IV) process, rather than by the Clark County Hearing Examiner via a quasi-judicial (Type III) process.

The legislative history of the 2003 code reorganization shows that the scrivener’s error was not intended. First, during the County’s process for updating and reorganizing the code, the change

in section 40.240.440.H to a Type IV process was never indicated as a change to the code through strikeouts and underlining (as were all other changes).

Second, in a September 17, 2003 memo to the Clark County Board of County Commissioners, Clark County staff discussed all proposed changes to the code and attached a table listing all changes. Nowhere in the memo and list did the County discuss or indicate any intent to modify section 40.240.440.H to require a Type IV process.

Third, after the code changes were adopted, the County on November 12, 2003 sent a letter to the Columbia River Gorge Commission assuring the Commission that “[t]here was nothing of substance changed or added [to the code] except where current practice was codified” and that the “public review draft” of the changes “shows (in highlight and ~~strikeout~~) what changes were made.” Once again, the change in section 40.240.440.H was not indicated. If the scrivener’s error were intentional, it would have been indicated with strikeouts and underlining, and also would have been discussed in the County’s letter as a substantive change.

Fourth, several related provisions of the current code (at CCC section 40.500.010.D1, table 40.500.010-1, section 40.240.050.E.2.c, and section 40.240.050.I) require that all land use applications in the National Scenic Area must be reviewed via the Type II or Type III procedures, *not* via the Type IV procedures. These other code provisions are further legislative context demonstrating that the language in section 40.240.440.H requiring a Type IV process was the result of an inadvertent error, because this language directly conflicts with the rest of the Clark County Code.

Fifth, the scrivener’s error, if not corrected, would require mining applications in certain zones within the National Scenic Area to be reviewed via the Type IV process, even though a different section of the code requires mining applications in other National Scenic Area zones to be reviewed via the Type III process. *Compare* CCC § 40.240.440.H (applying Type IV process within General Management Area (“GMA”) Large-Scale and Small-Scale Agriculture zones) *with* § 40.240.520.H (applying Type III process within GMA Small Woodland zones). It would make absolutely no sense to apply drastically different types of procedures for reviewing mining applications to different zones within the National Scenic Area. If such disparate treatment had truly been intended, it would have been documented at the time of the code change.

Finally, the code section governing “Type IV Process – Legislative Decisions” expressly states that “Type IV legislative decisions . . . *are limited to* adoption or amendment . . . of . . . “[c]omprehensive plan map and text, and zoning change consistent with the map change;” “[d]evelopment regulations;” “[a]rterial atlas; and” “Shoreline Master Program.” CCC § 40.510.040.A.1 (emphasis added). Project-specific land use applications (such as mining applications within the National Scenic Area) are not included in this list.

If the scrivener’s error is not permanently corrected, proposed mines within the National Scenic Area in Clark County (of which the Zimmerly Mine is the only one) would be the only type of permit application in the entire county to be reviewed and decided directly by the Clark County Council (rather than by a Hearing Examiner). No landowner or mining company should receive such special treatment—especially given that there are no procedures in the code explaining how

the County Council would conduct a “legislative” review for such an application.

Please adopt the staff recommendation and permanently fix the scrivener’s error in the county code. Thank you for this opportunity to comment.

Sincerely,

A handwritten signature in black ink that reads "Nathan Baker". The signature is written in a cursive style with a large initial "N".

Nathan Baker
Senior Staff Attorney

cc: Gary Kahn, Reeves, Kahn, Hennessy & Elkins
Peggy Hennessy, Reeves, Kahn, Hennessy & Elkins
Taylor Hallvik, Clark County Prosecuting Attorney’s Office
Sharon Lumbantobing, Planner II, Clark County

From: [Jana Peterson](#)
To: [Sharon Lumbantobing](#)
Subject: Re: Proposed Amendment to Clark County Unified Development Code (Title 40.240.440) (CPZ2019-00033).
Date: Friday, February 14, 2020 7:46:48 PM

CAUTION: This email originated from outside of Clark County. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dear Clark County Council Planner II Sharon Lumbantobing,

I support the staff recommendation to permanently correct the scrivener's error in Clark County Code section 40.240.440, which will require surface mining permits to be processed as Type III applications.

The scrivener's error requires surface mining permit applications in the Columbia River Gorge National Scenic Area to be reviewed by the Clark County Council via a legislative (Type IV) process, rather than by the Clark County Hearing Examiner via a quasi-judicial (Type III) process. This is an obvious typo in the code, because Clark County literally has no provisions in its code explaining how such a review would be conducted. This is an invitation to chaos that needlessly delivers uncertainty and confusion about how permit applications are to be processed.

If this error is not permanently corrected, proposed mines within the National Scenic Area in Clark County (of which the Zimmerly Mine is the only one) would be the only permit applications in the entire county to be handled directly by the Clark County Council. Zimmerly should not receive such special treatment.

The error in the code has already been temporarily corrected by the County Council twice (in Interim Ordinances No. 2019-09-13 and 2019-11-07). This temporary fix is currently in effect, but it will expire if you don't act. Please adopt the staff recommendation and permanently fix the scrivener's error in the county code. Thank you.

Regards,
Jana Peterson
10714 NE 109th Ave
Vancouver, WA 98662

From: [Dylan Starratt](#)
To: [Sharon Lumbantobing](#)
Subject: Re: Proposed Amendment to Clark County Unified Development Code (Title 40.240.440) (CPZ2019-00033).
Date: Friday, February 14, 2020 8:19:42 PM

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Dear Clark County Council Planner II Sharon Lumbantobing,

I support the staff recommendation to permanently correct the scrivener's error in Clark County Code section 40.240.440, which will require surface mining permits to be processed as Type III applications.

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Regards,
Dylan Starratt
25909 NE 52nd Way
Vancouver, WA 98682

From: [Martha Martin](#)
To: [Sharon Lumbantobing](#)
Subject: Re: Proposed Amendment to Clark County Unified Development Code (Title 40.240.440) (CPZ2019-00033).
Date: Friday, February 14, 2020 8:31:20 PM

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Dear Clark County Council Planner II Sharon Lumbantobing,

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Regards,
Martha Martin
37015 SE Gibson Rd
Washougal, WA 98671

From: [David Finn](#)
To: [Sharon Lumbantobing](#)
Subject: Re: Proposed Amendment to Clark County Unified Development Code (Title 40.240.440) (CPZ2019-00033).
Date: Saturday, February 15, 2020 10:12:36 AM

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Dear Clark County Council Planner II Sharon Lumbantobing,

I support the staff recommendation to permanently correct the scrivener's error in Clark County Code section 40.240.440, which will require surface mining permits to be processed as Type III applications.

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Regards,
David Finn
3003 SE 297th Ave
Washougal, WA 98671

From: [Cameron Purandare](#)
To: [Sharon Lumbantobing](#)
Subject: Re: Proposed Amendment to Clark County Unified Development Code (Title 40.240.440) (CPZ2019-00033).
Date: Saturday, February 15, 2020 7:19:34 PM

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Dear Clark County Council Planner II Sharon Lumbantobing,

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Regards,
Cameron Purandare
2694 SE Bella Vista Loop
Vancouver, WA 98683

From: [Maggie McCue](#)
To: [Sharon Lumbantobing](#)
Subject: Re: Proposed Amendment to Clark County Unified Development Code (Title 40.240.440) (CPZ2019-00033).
Date: Sunday, February 16, 2020 8:09:30 AM

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Dear Clark County Council Planner II Sharon Lumbantobing,

I support the staff recommendation to permanently correct the scrivener's error in Clark County Code section 40.240.440, which will require surface mining permits to be processed as Type III applications.

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Regards,
Maggie McCue
10804 NE 30th Ave
Vancouver, WA 98686

From: [Patricia Ingraham](#)
To: [Sharon Lumbantobing](#)
Subject: Re: Proposed Amendment to Clark County Unified Development Code (Title 40.240.440) (CPZ2019-00033).
Date: Sunday, February 16, 2020 11:21:31 AM

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Dear Clark County Council Planner II Sharon Lumbantobing,

I support the staff recommendation to permanently correct the scrivener's error in Clark County Code section 40.240.440, which will require surface mining permits to be processed as Type III applications.

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Regards,
Patricia Ingraham
3200 E McLoughlin Blvd
Vancouver, WA 98661

From: [Janice MacArthur](#)
To: [Sharon Lumbantobing](#)
Subject: Re: Proposed Amendment to Clark County Unified Development Code (Title 40.240.440) (CPZ2019-00033).
Date: Sunday, February 16, 2020 6:18:03 PM

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Dear Clark County Council Planner II Sharon Lumbantobing,

I support the staff recommendation to permanently correct the scrivener's error in Clark County Code section 40.240.440, which will require surface mining permits to be processed as Type III applications.

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Please stop this mining it is ruining the land. They were told to stop and didn't.

Regards,
Janice MacArthur
1020 SE Coffey Rd
Washougal, WA 98671

From: [Deborah Perry](#)
To: [Sharon Lumbantobing](#)
Subject: Re: Proposed Amendment to Clark County Unified Development Code (Title 40.240.440) (CPZ2019-00033).
Date: Monday, February 17, 2020 4:06:02 PM

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Dear Clark County Council Planner II Sharon Lumbantobing,

I support the staff recommendation to permanently correct the scrivener's error in Clark County Code section 40.240.440, which will require surface mining permits to be processed as Type III applications.

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Regards,
Deborah Perry
31203 NE 49th St
Camas, WA 98607

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Regards,
Kathy Seabrook
1906 C St
Vancouver, WA 98663 ||

This e-mail and related attachments and any response may be subject to public disclosure under state law.

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Kathy Lane
gorgegirl999@gmail.com

This electronic message, including any attachments, may contain information that is proprietary, confidential, legally privileged, and/or protected by state and federal laws. It is intended only for the use of the individual(s) and/or entity named in the message. If you are not an intended recipient of this message, please notify the sender immediately and delete the message and any attachments it may have contained from your computer. Do not deliver, distribute, forward, or copy this message, and do not disclose its contents or take any action in reliance on the information it contains..



1499 SE Tech Center Place, Ste. 380
Vancouver, WA 98683

Tel. (360) 567-3900
Fax (360) 567-3901

www.jordanramis.com

Jamie D. Howsley
Admitted in Oregon and Washington
jamie.howsley@jordanramis.com
Direct Dial: (360) 567-3913

February 18, 2020

VIA EMAIL AND HAND DELIVERY

Board of Clark County Councilors
ATTN: Rebecca Messinger, Clerk to the Board
Public Service Center
1300 Franklin Street
Vancouver, WA 98660
E-Mail: Rebecca.messinger@clark.wa.gov

Re: **CPZ2019-00033 - Clark County Unified Development Code (Title 40.240.440)**
Amendments – Columbia River Gorge National Scenic Area

Dear Councilors:

Our office represents Judith Zimmerly, property owner of the Washougal Pit, and we are submitting the following comments regarding Clark County's ("County") proposed amendments to the Columbia River Gorge National Scenic Area District CCC 40.240.440(H) to correct a "scrivener's error." County staff has proposed an amendment to CCC 40.240.440(H) to change the review procedure for the development and production of mineral and geothermal resources to a Type III (quasi-judicial) process. Currently, the development of mineral and geothermal resources are required to follow a Type IV (legislative) process.

As the property owner of the Washougal Pit, Judith Zimmerly is currently involved in appeal proceedings related to Amended N&O #CDE2017-Z-1069(A), and it is our client's belief that this proposed amendment to CCC 40.240.440(H) is a function of the work that has been done on-site. In addition, although this proposed amendment has been described as a mere attempt to amend a "scrivener's error," the underlying effect of such an amendment to CCC 40.240.440(H) will have a profound impact on our client's current application for a National Scenic Area permit. Staff's decision to correct this "scrivener's error" at the same time our client is in the process of applying for a National Scenic Area permit is not a coincidence.

The 2003 Amendment made in CCC 40.240.240(G) by Ord. 2003-11-01 Requiring Type IV Process for the Development and Production of Mineral and Geothermal Resources was Intentional and Not the Result of a Scrivener's Error

The amendment to CCC 40.240.240(G) [subsequently renumbered to 40.240.440(H)] which established that development and production of mineral and geothermal resources (hereinafter referred to simply as "surface mining") within the National Scenic Area would no longer be reviewed under a Type III process, but rather a Type IV legislative process, was the result of a conscious determination—not a scrivener's error. A scrivener's error is an error due to a minor mistake or inadvertence and not one that occurs from judicial reasoning or determination. Most commonly, it is a

typographical error or unintentional addition or omission of a word or phrase. The change in review process from Type III to Type IV was not the result of a mere typographical error.

Staff maintains that this was the result of a scrivener's error because the amendment was not done using an underline and strikethrough process. This conclusion departs from common sense and rational thought. Not only did Ord. 2003-11-01 change the review procedure from Type III to Type IV—a change in roman numeral denomination which is not easy to mistakenly draft—but the author went so far as to look up and insert the code section correlating with Type IV review. The amount of work that went into this process indicates the change in review procedure was the result of a conscious determination, not a mere typographical error.

Moreover, the role of the Board of County Commissioners (the prior iteration of the current Board of County Councilors) as an appellate review body at the time of this amendment must be considered. As acknowledged by the County at the November 21, 2019 Planning Commission hearing, the Board of Commissioners previously sat in an appellate role after the hearing's examiner had made a land use decision. As such, it makes sense that in 2003, applications for surface mining would proceed as under a Type IV process and involve review by the Board of Commissioners. The change in review procedure from Type III to Type IV was a policy determination designed to carve out a role for the Board of Commissioners in permitting surface mining, given the need for further and enhanced public involvement in this permitting process and the interest of the public on the impacts thereof.

When this amendment is viewed in conjunction with the history surrounding surface mining in 2003, as well as statements made by former County Commissioner Betty Sue Morris who recalled the Commissioners taking a very active and leading role in surface mining issues in the early 2000's, it's clear the change in review procedure was not the result of a scrivener's error.

Staff's Conclusion that the Change from a Type III process to a Type IV process in CCC 40.240.440(G) was the Result of a Scrivener's Error is Not Supported by Substantial Evidence

On October 2, 2019, our office filed a public records request with Clark County for "[a]ll documents, correspondence, and communications between staff and officials of Clark County regarding the revision and amendment of CCC 40.240, including the adoption of Interim Ordinance No. 2019-09-13." More than four months later, this request was finally fulfilled last Friday (the 14th) at 3:18 PM in the afternoon. With our office being closed for Presidents' Day on Monday, February 17th, this leaves a single day to review the thousands of records produced. The fact these records were finally produced late in the afternoon of the final business day before the date of the hearing on CPZ2019-00033 leaves our office without enough time to adequately review said records in preparation of the public hearing.

In addition to the County's abject public records failure, staff has wholly failed to produce any concrete evidence suggesting the change in review type was the result of a scrivener's error. First, staff's sole reasoning for a scrivener's error is that the change was not made with an underline or strikethrough process. The use of an underline or strikethrough alone, however, does not confirm or refute the existence of a scrivener's error. If anything, the failure to use the underline or strikethrough may, in and of itself, be the "scrivener's error."

Beyond that, staff has stated generally and maintained throughout this process that it is not clear from a review of pertinent records and history that the change in review procedure was not a scrivener's error. Staff's neutral position on the pertinent records and history is wholly insufficient to support their

conclusion. Especially when those pertinent records and history were not made available to interested parties until one business day before the hearing, staff has no concrete evidentiary basis to suggest that the change in review type was a result of a scrivener's error. Nonetheless, in proposing Interim Ordinance No. 2019-09-13 staff disregarded the lack of support for its conclusion and moved forward with the emergency ordinance in order to steal a march on our client and her pending National Scenic Area permit application.

Therein lies our client's primary complaint with CPZ2019-00033—the procedural irregularities and actions by staff in proposing the amendment serve to abrogate our client's due process rights. It is our client's position that the proposed code amendment has not been undertaken for the right reasons, namely to correct an irregularity in review procedures for surface mining. Rather, it appears that this amendment has been proposed by staff in order to retain control over review and permitting of surface mining. This is supported by staff's failure to produce records relating the Interim Ordinance No. 2019-09-13 in an even somewhat timely manner. Among other things, this failure suggests only one conclusion—that staff did not want our client to receive records contradicting their stated position that the change from a Type III to a Type IV process was a scrivener's error.

Response to Public Comments Submitted in Favor of CPZ2019-00033.

The manufactured public comment submitted in favor of CPZ2019-00033 is flawed in several regards. First, of the over forty copies of the same comment, only seven were submitted by Washougal residents. Although our client supports the opportunity and right of all Clark County citizens to be heard, it is our client's belief that this manufactured comment is simply another attempt by those opposed to the Washougal Pit to spread misinformation and invite chaos. This is demonstrated by the fact that CPZ2019-00033 is a proposed amendment to the County's National Scenic Area ordinance and the comment specifically references the Washougal Pit (located within the National Scenic Area), yet most commenters have listed addresses outside the National Scenic Area and nowhere near the Washougal Pit (one public comment was submitted by an individual with a listed address of Hawaii).

Second, the manufactured public comment argues that unless CPZ2019-00033 is adopted, the "Zimmerly Mine" will receive special treatment by having the opportunity to proceed through a Type IV legislative review process. This is inapposite. Requiring our client's National Scenic Area permit application to be reviewed by the Clark County Council will ensure the highest level of transparency and public participation, while still providing staff ample opportunity to provide an official recommendation and technical assistance to the Councilors. The proponents of CPZ2019-00033 are likely motivated to ensure our client's application is subjected to the most stringent review possible—what better way to do this than by placing it before the Clark County Councilors?

Finally, the manufactured comment takes the position that unless the review process for surface mining in the National Scenic Area is changed from a Type IV to a Type III process, there will be uncertainty and confusion regarding how permit applications are to be processed. Looking past the overly broad nature of this statement, our client fails to see the reasoning behind this comment. Due to the sensitive nature of surface mining, especially in the Gorge, retaining the Type IV process ensures upmost transparency throughout the permit review process. Furthermore, the Type IV process will allow the elected officials of Clark County to balance the need for aggregate materials and the conditions of approval for surface mining permits, as well as fulfil the County's mandate under the Growth Management Act to provide for mineral resources as a part of its overall approach to land use planning. There is nothing uncertain or confusing about this process.

Our client opposes staff's recommendation to permanently correct the alleged scrivener's error in CCC 40.240.440(H), as it is not supported by substantial evidence. As stated previously, this amendment is targeted solely at the Washougal Pit and our client. The process undertaken by staff to correct the supposed scrivener's error is highly irregular and was not done in good faith. Furthermore, staff has repeatedly failed to produce records our client desperately needs in order to make an informed decision as to the validity of the proposed amendment. As such, the Councilors should decline to adopt CPZ2019-00033.

We thank you for taking this letter and our testimony under advisement.

Very truly yours,

JORDAN RAMIS PC

A handwritten signature in blue ink that reads "James J. Howsley". The signature is written in a cursive style with a large, sweeping flourish at the end that extends to the right.

Jamie D. Howsley