



Clark County Planning Commission

Karl Johnson, Chair
Ron Barca, Vice Chair
Rick Torres
Steve Morasch
Bryan Halbert
Matt Swindell

CLARK COUNTY PLANNING COMMISSION MINUTES OF PUBLIC HEARING THURSDAY, NOVEMBER 21, 2019

Public Service Center
Council Hearing Room
1300 Franklin Street, 6th Floor
Vancouver, Washington

6:30 p.m.

CALL TO ORDER & ROLL CALL

JOHNSON: Good evening. I'd like to call this meeting to order for Thursday, November 21st, 2019, for the Clark County Planning Commission. I am Planning Commissioner Chair, Karl Johnson. Can we please have a roll call.

ROLL CALL

SWINDELL: HERE
MORASCH: HERE
HALBERT: HERE
TORRES: HERE
BARCA: HERE
JOHNSON: HERE

GENERAL & NEW BUSINESS

A. Approval of Agenda for November 21, 2019

JOHNSON: I'd like to move on to general and new business to start off with. Can we get an approval of the agenda for October 17th, 2019.

HALBERT: So **moved**.

BARCA: **Second** it.

JOHNSON: We have a first and a second. All those in favor?

EVERYBODY: AYE

B. Approval of Minutes for October 3rd, 8th and 16th, 2019

JOHNSON: All those opposed? Approval of the agenda is passed. Now we're looking at approval for the minutes for October 3rd, 8th and 17th for 2019. I'll take a motion for approval.

BARCA: Motion to **Approve** the minutes as written.

SWINDELL: I'll **second** it.

JOHNSON: We have a motion and a second. All those in favor?

EVERYBODY: AYE

C. Communications from the Public

JOHNSON: All those opposed? Motion passes. At this time I'd like to ask if there's any communications from the public of things that are not on our agenda today, anything separate? If they're on the agenda today, we'll talk about those, but if they're not on the agenda.

JOHNSON: Seeing none, I will move on, and I'm going to read a short statement to start off before we begin. Right now I'd like to ask any Commissioners, is there anybody on the Planning Commission that would like to disclose any conflicts of interest? Thank you.

Planning Commission Rules of Procedure

Seeing none, the procedures are as follows: We will begin the hearing with a staff report. The Planning Commission members will ask staff questions if they have any at this point. I will then open the hearing for public testimony.

Members of the audience who wish to testify on a hearing item need to sign in on the sign-in sheets at the back of the room. Members of the public wishing to give oral testimony are to come to the front of the room at the table facing the Planning Commission.

The Chair has the discretion to make the following statement if reasonable and appropriate under the circumstances, testimony of this matter is limited to three minutes per person.

Your testimony should be related to the applicable standards for this hearing item. The relevant standards are set out in the staff report, copies of which are available on the table in the back of the hearing room.

If you have any exhibits you want us to consider such as a copy of your testimony, photographs, petitions or other documents or physical evidence, please hand it into the staff. This information will be included in the record for the hearing item, we will consider it as part of our deliberations.

When you testify, you must testify at the front table in front of the microphone so the court reporter can hear your testimony. State your name and address for the record and spell your name for the court reporter. Be relevant and concise and don't repeat yourself or others testifying.

I will then close the public testimony portion of the hearing. The Planning Commission will deliberate and ask staff to answer questions or make rebuttals. The Planning Commission will then take a vote on their decisions. And this is the most important thing I think I can read, our recommendation will be forwarded to the Board of County Councilors who have the final decision-making authority.

JOHNSON: With that said, we will move on to public hearing item that was continued from October 17th, 2019, Clark County Unified Development Code Title 40.250.030 Amendments which is CPZ2019-00033, Columbia River Gorge National Scenic Area Code Update. Staff report, please.

PUBLIC HEARING ITEMS, Continued from October 17, 2019:

A. Clark County Code Unified Development Code (Title 40.250.030) Amendments (CPZ2019-00033 Columbia River Gorge National Scenic Area Code Update)

The proposal is to amend the Clark County Code pertaining to the Columbia River Gorge National Scenic Area to correct a scrivener's error to CCC 40.240.H, which states that the development and production of mineral and geothermal resources are required to follow a Type IV (legislative) process. The review procedures should be a Type III (quasi-judicial) process as they are elsewhere in code.

ORJIAKO: Good evening, Planning Commission members and Chair. For the record, Oliver Orjiako, Community Planning Director. Before I turn it over to Sharon, I just want to make a very brief remark.

Following your hearing on this matter, I followed up with my staff to make sure that we are responsive to your requests. The first one was to complete the public record request that the

law firms of Mr. Horenstein and Jamie Howsley requested, and upon checking with staff, the public record request for Jamie Howsley was sent to Keenan and I think the last name is spelled O-r-d-o-n, that was completed on 10/30, October 30th, and the documents or the public record request sent to Mr. Horenstein was also completed on 10/30.

And I believe we provided you two documents that on the first one relating to Jamie Howsley's law firm on Page 3 of 4 of that document it will show where it says Completed/Closed: Yes, again October 30th was when that was completed.

We started providing documents as requested that was in our possession and all pertaining to what was requested, started that on the 25th of October and completed that on the 30th, that's for Mr. Howsley. And then for Mr. Horenstein, started delivering all the records that they requested on October 15th and then completed that on the 30th.

The final thing I will add is that I also did a thorough check in my department and we could not find any record, could not find any deliberation by the Commissioners at the time when amendment or was switched over from Title 18 to 40, could not find any discussion pertaining to this issue, so I have no other record to show that this was the intention of the Council at the time to leave this as a Type IV.

As was testified by our legal counsel, I can say that there is no process if an application were to come in under Title IV, legislative Type IV, for me to do anything. So I can assure you that I have looked in my department, checked our record, I could not find anything, deliberation minutes, internal staff, nothing to show that this was not an error. With that, I'll turn it over to Sharon unless you have a question for me.

LUMBANTOBING: Good evening, Planning Commissioners. Sharon Lumbantobing, for the record. This is just a review since this is a continuation. My mouse is not working. Oh, okay.

As to repeat what Oliver said, in reviewing the legislative history, the evidence indicates that the initial change from a Type III to a Type IV process was a scrivener's error and not the result of a conscious policy decision.

In Title 18 this was always a Type III process. And in 2003, when the County repealed the entire Title 17 and 18 and replaced it with Title 40, that's where the error occurred, there was no underline or strikethrough text in the adopting ordinance. A November 12, 2003, letter sent to the Gorge Commission staff with the adopted code changes state there was nothing of substance changed or added, this could be seen in this table. Can you go to the next slide, please.

The Gorge does not require a Type IV process, only Type II and Type III processes are required in

the Gorge. Next slide, please. This is Code Section 40.510.040, it delineates what is in the Type IV process, permits are not Type IV, they are a Type III. And there's a lack of consistency with other code sections. In the same Gorge Code Section 40.250.520(H) which pertains to review uses for Gorge small woodland designations, the development and production of mineral and geothermal resources on forest land requires a Type III process.

The Council approved an interim ordinance on September 25th to approve this change and then adopted another ordinance on November 5th to extend the interim ordinance. We're here before you today, next slide, on the 21st and we will go to a Council hearing in January with the permanent ordinance. I have no other evidence to suggest. If you have any questions, I'd be happy to answer.

JOHNSON: Any questions for staff?

HALBERT: Not right now.

Public Comment

JOHNSON: Okay. With that said, we'd like to start the public comment. And first off, let me make sure we have this, Ryan Rittenhouse, can you please come up to the mic, be seated and state your name and spell it, please.

RITTENHOUSE: Good evening. My name is Ryan Rittenhouse, R-y-a-n, R-i-t-t-e-n-h-o-u-s-e. I work for Friends of the Columbia Gorge.

We are a nonprofit organization with over 6,500 members dedicated to protecting and enhancing the resources of the Columbia River Gorge National Scenic Area with the effective implementation of the Act and other laws. Our membership includes hundreds of citizens --

JOHNSON: Please slow down.

RITTENHOUSE: Oh, sorry. I'm used to having to go really fast, so... Our membership includes hundreds of citizens who reside within the Columbia River Gorge National Scenic Area. Friends supports the staff recommendation which will permanently correct the scrivener's error in Clark County Code Section 40.240.440(H).

The scrivener's error occurred back in June 2003 during your restructuring of the code. On September 25th, Clark County Council passed a resolution, as you heard, to correct the scrivener's error on a temporary basis. The Council's temporary correction should now be made permanent. Friends urges the Planning Commission to adopt that staff recommendation. Thanks.

JOHNSON: Any questions? Thank you.

RITTENHOUSE: Thank you.

JOHNSON: Next we have Steve Horenstein.

HORENSTEIN: Thank you, Mr. Chair, members of the Planning Commission. For the record my name is Steve Horenstein, H-o-r-e-n-s-t-e-i-n, 500 Broadway, Suite 370 in Vancouver. I've given you a very short memo that I will walk through because I realize you haven't had a chance to read it.

First, I want to thank you for continuing the hearing to this day in order to allow us to receive information pursuant to public records request that we had filed with Clark County. We have received quite a bit of information. I don't know whether there's more coming or not.

If I might direct a question to staff, Mr. Chair, you posted, staff posted a number of supporting, what I would describe as supporting documents, on the Planning Commission agenda page, and do you know whether we received all those documents or not as part as our public records request?

ORJIAKO: It is my understanding that all the pertaining public records request that you made was provided.

HORENSTEIN: Okay. We will compare what was posted with what we received and take action accordingly if we didn't get it all.

HALLVIK: Steve, I would point out that it's possible that there are some documents posted that didn't exist at the time of the --

HORENSTEIN: Well, these look like historical documents to me, Title 18.

HALLVIK: Correct. One of the documents that's been posted I just wanted to note is the proposed permanent ordinance which may or may not have existed at the time that you --

HORENSTEIN: Yes, I'm not concerned about that. Okay. Thank you. You know, although we're here to formally object to your passage of the ordinance as we did last time somewhat vociferously, it's hard to believe that proceeding with this scrivener's error narrative tonight is the best pro forma.

And the reason I say that is the Board of County Councilors has now twice adopted the interim ordinance, once without notice and hearing, once with notice and hearing that was driven by your need to continue the hearing because of for the reasons that you did and there doesn't

appear to be any chance that they're going to change their mind on this, so although we formally object, it may be a bit of a waste of time that we're all here tonight.

Given the lack of written legislative history that we've been able to find so far, I reached out to former County Councilor, County Commissioner I should say Betty Sue Morris who I recall was very active in taking a lead role in the surface mining issues back in the early 2000s. She had a very clear recollection that the Board of County Councilors in the interest of enhanced public participation made a decision to stay involved through what was then a Type IV process.

Admittedly Type IV is a little different today than it was then, but her recollection is that the Board felt a strong need because of the nature of the issues around permitting mining and neighbors concerns and such that the Board ought to stay involved and have the final say. This Board doesn't appear to have the same political will and courage that Board did at the time, hence, they've adopted the interim ordinance.

But, you know, Oliver says he can't find anything to tell us that, that it was anything other than a scrivener's error, but I didn't hear him say he could not find anything to say it was a scrivener's error either, but be that as it may, we are where we are and the Board has spoken on this.

Since June of 2018, and we have tried repeatedly to get the County to take a broader look at the permitting issue involved and to update the code for current mining practice in a way that is consistent with the Columbia Gorge Commission rules and regulations that are promulgated for these purposes in Chapter 40.240 and 40.250 of your code, the County Code.

Only when the owner of the Washougal Pit advised County staff that he intended out of frankly desperation and to limit litigation cost to submit a permit for mining activity under protest did the County rush, without even giving us the courtesy of a call much less notice and opportunity to be heard, adopted emergency or an interim ordinance. Now, can you do that, absolutely. Did the County follow the correct procedure for that, yes. But given the amount of time and interaction that the mine operator and the mine owner had had with the County, we found it, we found it concerning that we didn't even get the courtesy of a call.

Again, why after being in the code for 16 years was this change to the code changing a Type IV to a Type III process so urgent that it had to be done through the emergency or the interim ordinance process. We can only conclude that this was done to give the Community Development Department control over the permitting process for the Washougal Pit without involvement by the Board of County Councilors on the policy issues involved, and I brought those up last time.

The policy issues are really balancing the need for material including the County's need for material to build roads against impact on surrounding property owners. Those are

the -- that's the fundamental set of issues that is perhaps more exacerbated when you come to mining activity than most issues where there's development and there are neighbors involved, we get that.

Staff has pushed through this modification to the code that is for all practical purposes now a done deal so that staff controls this process. We have been completely unsuccessful since June of 2018 in working with staff to bring the entire surface mining code up-to-date to reflect current technology. The way crushing is done now is not nearly as intrusive as it was back in the early 2000s, that's just one example. Staff only appears interested in the regulation side of this, so that is where we are at this point.

The resulting lack of cooperation between the County's vote is to work with the owner and the operator has resulted in two matters of litigation, one an appeal and one actual lawsuit so far, I count two more on the horizon. This is going to go on, as one county person said for five to seven years, it's nuts that that happens to be the case because the County needs the material for the county to grow, the private sector needs the material, the people in the business of excavating, in this case mining in some of the more traditional surface mines and blasting are willing to be properly regulated and yet we're going to litigate our way through this.

The Growth Management Act requires that counties provide for mineral resources as part of an overall approach to land use planning. These resources that I believe you all know are rapidly diminishing in Clark County. We are finding it necessary to engage in both appellate and civil litigation to enforce this mandate to make the material available. How many lawsuits and appeals will be necessary for the County to finally get on board and the need for the balance I just described, how many are we going to get into here.

I have this theory, and I think I said it last time that I truly believe and that is this, cases that are only good for lawyers are not good cases and believe me, this case is only good for lawyers at this point. The County's being hurt, the community is being hurt and the people in the business of surface mining and pit excavation are being hurt.

Again, regardless of the action you take on the ordinance before you, we would strongly encourage you to encourage the Board of County Councilors to find a way to revisit the policies around permitted surface mining activity to ensure that material for roads and other projects that are available as I've been describing.

Importing this material from elsewhere is very expensive. We just took a big bite out of the County's road fund with the passage of I-976 and the other side of that coin is we're going to make the fundamental material that goes into the roads far more expensive when it's not necessary to do that. With that, I'm happy to answer any questions.

JOHNSON: Any questions?

HALBERT: Steve, could you expand a little more on the differences between the Type III and Type IV application process and how it affects your application, I don't think I quite understand that.

HORENSTEIN: Okay. Well, that's a fair question, Bryan. Type IV applications under the current code require Planning Commission approval, a recommendation of final Board approval. I think in this case that doesn't totally fit what's before us, the way Type IV is structured today as opposed to the way it was back in the day that some of us can remember.

I think there are a couple of ways that we could be creative about this. One is to use development agreements so that all the conditions that are required to operate a pit where we excavate like this one or a surface mine, we're blasting and more, and heavier duty activity goes on, all those conditions would be in a development agreement and those have to go to the Board, that's a Type IV process.

The other option is just have a special code provision that says the Board will make the final decision on these, on these mines as somewhat done in the past. So I don't think it's complicated, I think it will take code changes. And, again, the only reason to do that is to balance the need for the materials, something the County Council is responsible for, building roads, versus just regulating where you have a working backwards from no mindset that we run into here. Okay. Any other questions for me?

BARCA: Steve.

HORENSTEIN: Yes, sir.

BARCA: So under the circumstances we see County Council has voted for this twice --

HORENSTEIN: Yes.

BARCA: -- and in essence they're saying they're taking themselves out of the decision-making process by upholding it --

HORENSTEIN: Correct.

BARCA: -- and yet I consider the make up of the Council right now to be quite pro development and a group of people that are interested in seeing the economic development.

So your argument to me has the appearance that you think we're boxing ourselves into a corner by not moving positively on this for your mine to be open and operating, but it has the appearance that the Council thinks that there are other options perhaps available.

Have we done an analysis on available aggregate throughout the county with the other operating mines to see that there would be a genuine deficit if this is not opened?

HORENSTEIN: First, I don't know the answer to that question whether there's been a true study done. Secondly, I don't want to leave you the impression I think that this is the last and only hope for mines, but I do know from talking to people in the industry that the few mines we have left are running out and that's anecdotal evidence on my part, I don't know whether we've studied it as you've said.

BARCA: Okay. Thank you.

HORENSTEIN: Yeah. My client has frankly told me that, that it's getting very scarce and he's likely to have to haul from elsewhere.

BARCA: Yeah. And I believe when Yacolt came forward they said that there was a limited amount and they needed to expand --

HORENSTEIN: Yes.

BARCA: -- and I think every mine is using that particular argument as the reason for their relevance, so it makes sense up to a point.

HORENSTEIN: Yeah.

BARCA: Yeah.

HORENSTEIN: Well, I guess we'll find out, won't we.

BARCA: I think so.

JOHNSON: Any other questions? All right. Thank you, Steve.

HORENSTEIN: Thank you.

JOHNSON: Next up, Don Steink, Staink.

STEINKE: Steinke.

JOHNSON: Steinke, sorry.

STEINKE: Hello everybody. My name is Don Steinke, S-t-e-i-n-k-e, 4833 N.E. 238 Avenue,

Vancouver, 98682, and I live in rural Clark County in a forest.

I support the staff recommendation to require surface mining permits to be processed as a Type III application for two reasons. One purpose of having a Type III policy I believe is to prevent special interests from harming the public interest such as protecting the scenic values in the Gorge.

Secondly, I oppose sprawl which gravel mines tend to support. If we are to protect our children's future from climate change, we need to start developing in such a way that public transit is the preferred option rather than more and more roads.

I support the staff recommendation and I would like to respond to the idea that or maybe I'd like to add that gravel mines in the Columbia Gorge protected scenic area should be treated differently than gravel mines elsewhere. So thank you very much.

JOHNSON: Thank you. It looks like our final person signed up on the sheet is Jamie Howsley.

BARCA: Is this new?

HOWSLEY: Yes. It was submitted today to Sonja I think.

BARCA: Wonderful.

HOWSLEY: Again, for the record, Jamie Howsley, 1499 S.E. Tech Center Place, Vancouver, Washington, 98683, the attorney for Judith Zimmerly, the owner of the Washougal Gravel Pit.

The first thing I wanted to do with my testimony is apologize to the Chair, Mr. Johnson, for some of my testimony last week or last month, I did take what you said to heart and will take that under advisement again for future testimony in front of you. I did immediately apologize to some staff both that evening and that next day and I do take ownership of my actions and my testimony.

Now, moving forward. I do want to correct the record as to our public record request that we did submit and my attorney associate Mr. Ordon-Bakalian is here with me this evening who is the person that filed that and is available to testify to confirm what we understand from the requests, but we ended up filing three separate PRAs with three separate departments at the County including Public Works, Community Development and then the County Manager's Office.

It's my understanding that we only received one public records request back, I believe it was on November 6th from Public Works and just due to some traveling obligations that we had internally, we didn't get around to contacting them until this week and they informed us that

we owed a whopping \$2.91 to make those records finalized. We did follow up with them, unfortunately the staff person that's in charge of that is out until Monday and so we can't get the records until Monday.

As far as the records from the County Manager's Office or Community Development, and again Mr. Ordon-Bakalian can testify to this, we have not received them. We did receive communication from Ms. Lamberton I believe last week signifying that one of the records request was currently with County legal counsel and being reviewed and that they needed additional time to go over that before they released that to us.

So, again, we scheduled this hearing a month out to try to obtain those records and still we don't have them. So I'm a little bit perplexed again how the position of the County can, continues to be that this is a scrivener's error when they don't have any firm evidence to indicate that and yet we don't also have these records to maybe support our position other than the fact that Mr. Horenstein contacted a couple of people that were in charge of the rule making at the time of this.

Before I get to my asks here this evening, I did want to go to the -- I think, Mr. Halbert, I hope Mr. Horenstein sort of answered your question as to the differences between the process, but I wanted to more specifically answer Mr. Barca's question. And you specifically had asked whether or not there had been studies made available suggesting the availability or available supply of aggregate either through gravel pits or basalt type of mines in the county and, yes, there has been some studies given to the County, and in fact as part of a larger discussion that we've been having with leadership here, they've been made aware of that.

And specifically we submitted a letter to Community Development and Public Works on January 9th of this year providing that information to them and suggesting that we are in a dwindling resource. And just again practically speaking, the Planning Commission, I know a couple of you were here when this happened, when we last revisited the surface mining overlay discussion, we actually removed the aggregate designation from various sites even further diminishing what the potential is out there.

So the ask here is as, you know, as Mr. Horenstein said, it's kind of a foregone conclusion at this point based upon the Councilors actions that we're going to be moving forward again under protest through a Type III process with our permit while also seeking our litigation remedies there.

Again, I would implore the Commission in all you can do through your communications with the Board that we do need to do a wholistic look at the availability of mineral resources in Clark County, one, because that is a mandate of the Growth Management Act to ensure that you do have adequate resources; and, secondly, quite frankly, there's the practical reality again that it's needed.

We have a lot of schools being built in this community, where do we think the rock comes from to help assist build that. We have roads that are currently either planned or under construction that need the materials. For economic development purposes it's needed so we can build facilities to create jobs, and ironically I find it amusing that there's a couple of former mines including Section 30 and in Fishers Quarry themselves that are going through development opportunities that will in a sense be needing aggregate to be put back in to create stuff, and then finally we would need it for housing including the subdivisions out there, mixed use and other types of apartment projects.

So, again, we understand where we're at with the Councilors in terms of this request, but again we would implore the Planning Commission to do whatever they can to encourage revisiting these matters, revisiting the inconsistencies in the surface mining overlay as it pertains to the Gorge Scenic Area and move forward accordingly. So with that unless there's any more questions for me.

SWINDELL: I have a couple of questions. So can I just back the clock up just a minute and ask, what is prompting all of this, like where is this starting from?

I guess I'm, I think I'm missing a piece of the puzzle.

I guess from staff's standpoint this is a scrivener's error and we're going to correct that from that standpoint, but from your standpoint you're trying to go through a process to do, I mean you're trying to -- what are you trying to accomplish?

I understand you're trying to go through a Type IV rather than a Type III, but what's prompting you to need to go through that process, one of those processes, can I ask that?

HOWSLEY: That's a good question. From my perspective, again we had already had an adjudicated hearing that determined that we had a valid nonconforming right on the property, you know, we, the Gorge Commission, and I don't want to get into the litigation here, but, you know, they purported to take jurisdiction over this and as our litigation is still moving forward in a different venue, you know, next door, we've decided to move forward on sort of on parallel tracks and one is to go ahead and seek a permit while we're, you know, defending our rights here.

From my perspective the biggest problem I have, Mr. Swindell, is just really one of process and, you know, I had given indications to many people at the County as an entity that we would be going ahead and seeking a permit and let them know of my expectations and lo and behold again, we feel like the rug was sort of pulled out from under us in the cloak of night, and so it's really a due process problem for me.

SWINDELL: So I want to clarify. If you're forced to go into a Type III process your concern is,

that's a question I guess?

HOWSLEY: Well, I mean I think, you know, we're pretty familiar with a Type III process, we do that quite frequently for subdivisions, for other types of, you know, land use approvals like conditional use permits, it's not something that those of us in the development community are not familiar with, certainly we're aware of that.

I think given the specific concerns related or the emotions I should say that that surface mining seems to always bubble to the surface. Again, I have to agree with my colleague that the prior policymakers I think wanted to have some additional ability to have their decisions be or have those decisions be made by them and not having it necessarily be heard by an independent hearings examiner.

So, again, from my perspective, practically speaking, you know, we're used to it, it's fine. Again, my objection is mostly a process one. I don't, I wholeheartedly don't buy that this was a scrivener's error or if it's a scrivener's error, why did it take 13 years to identify. Why did it have to happen when I let the County know that we were coming in for a permit and why did they do it through an emergency interim ordinance without giving us notification of that? It just doesn't feel right.

SWINDELL: Thank you.

HOWSLEY: Thank you.

TORRES: Jamie, I have a question. So what documents did you request that you haven't received that you feel are so compelling to what you want to accomplish here?

HOWSLEY: Well, we had a pretty, we're used to filing public records requests, we do that frequently. I will admit that we had a pretty broad sweeping terms. Mr. Bakalian can specify what those terms were, but we were trying to mostly capture that period of time where the changes would have occurred and using search terms that would have yielded a result to the changes here.

TORRES: Okay. I saw minutes from a meeting in September I think it was 2003 talking about reviewing the amendment to or the change to Title 40 with Betty Sue Morris and I didn't see anything in there that kind of says what you guys are saying she said.

It seemed like it was just very light discussion on some of the changes that were going to be made which were corrections to terminology, nothing to do with going from a Title III to a -- Type III to Type IV review.

HOWSLEY: And, again, I haven't gotten any of the documents so I can't --

TORRES: Well, I looked at that one online last week, so...

HORENSTEIN: I would encourage you to talk to her.

TORRES: I'm sorry, sir?

HORENSTEIN: I would encourage you to ask her about it, she's very willing to talk about it.

TORRES: Okay.

HOWSLEY: And I find it a little bit perplexing to me that now staff is saying that they have that yet they're not producing it to us when they know that they have a pending request for all this stuff.

TORRES: Okay. I saw it, it's online. Obviously it didn't come through your records request is what you're saying?

ORDON-BAKALIAN: Yeah. Keenan Ordon-Bakalian for the record. Do you want my last name again? O-r-d-o-n hyphen B-a-k-a-l-i-a-n, Jordan Ramis.

So I guess preliminarily we don't know what we don't know. We requested documents, we've not received them. So I understand what you're saying that some of the things are posted online, but that will not necessarily be exactly what we're receiving from the records request.

We recommended or we requested, excuse me, all of the title history from the interim ordinance, from, you know, the change from Title 18 to Title 40 back in 2003, we haven't had the documents yet, so again we're kind of shooting in the blind here.

BARCA: So how much of your records request though is online?

ORDON-BAKALIAN: So we haven't received our request responses yet so we don't know, we can't match it up with what's online. I think Steve has received records.

BARCA: Have you looked at what is online?

ORDON-BAKALIAN: Yes.

BARCA: And you're unable to determine based on that?

HORENSTEIN: There's very little online that you no doubt noticed, Commissioner Barca. I'm not sure we received everything that's online. Some of what's online are just partial

documents which is a no-no in our world at least. I will check very carefully or Keenan will ask to whether we received the things that staff felt were relevant enough to give to you in the material we've received so far.

BARCA: Okay. I'm just trying to determine how big of a gap there is, and I understand you're saying that if you aren't able to check the box of what you have requested specifically it makes it difficult, but it seems like some of the documents you should have been able to look at what was online and say this meets the criteria or if it's partial, it doesn't meet the criteria and I'm --

ORDON-BAKALIAN: So, Mr. Barca.

BARCA: Yes.

ORDON-BAKALIAN: I believe that we have reviewed the records Steve received, we actually printed it out into a binder, the binder is taller than yay big, there's two of them actually, the stuff that was posted online is nowhere near that amount of documents.

We haven't received our record request yet, so we can't cross-reference what we haven't received with what was posted online yet. Once we receive the responses, we can match up what we have and haven't received.

TORRES: So I have a question. So in those tall binders of the documents that you've received, that you printed out, there's nothing in there that tells you that this is more than a scrivener's error; is that correct?

ORDON-BAKALIAN: I'd have to let Steve talk to that because it was his firm that filed that request.

HORENSTEIN: My response would be somewhat the opposite of what Mr. Orjiako said, we can't find anything that says it was a scrivener's error and he's telling you he can't find anything that says it wasn't a scrivener's error. So the only evidence we really have is the legislative, oral legislative history we received from county, former County Commissioner Morris.

SWINDELL: Can I ask, you had mentioned that Ms. Morris, Betty Sue Morris had told you that she did remember something of that, did you ask her to attend tonight's meeting?

HORENSTEIN: We did not. We believe this matter is done frankly for this phase.

SWINDELL: Thank you.

JOHNSON: Mr. Howsley, you said that, I've heard it twice maybe, I don't know, you said something to the effect of we let the County know we were going to file a permit, what does

that mean? Did you file a permit or did you just --

HOWSLEY: Yeah.

JOHNSON: So you filed a permit prior to them taking action, it wasn't I let the County know --

HOWSLEY: No. Let me correct that very very carefully. So we had a hearing up in The Dalles, I can't remember what month it is, these years are all running together for me, it was August sometime. We sort of saw what their intention was and they had to draft a written decision with findings of fact and all of that, but because we knew it was coming, we sort of knew what our course of action was going to be at that point.

So I communicated with the County letting them know of my client and Mr. Horenstein's client's intention on seeking a permit under protest while we were waiting for this decision to come down to pursue our additional, you know, appellate rights in court.

Upon giving them notice of this permit application, about I would say two days later over the weekend - I get notices of all of your Planning Commission hearing agendas, I'm a land use geek, I like to know what's going on in case there's matters of importance that come before you, and I also do have, you know, client matters that do come before you - I happened to notice that the, that it was intended on taking this issue up in a future Planning Commission hearing.

So I communicated with those that I had communicated with at the County that I intended on showing up in front of this body and making some of the similar points that I'm making to you this evening, also from a policy standpoint that we need to do something larger to address the dearth of aggregate in the county, and upon that communication, the next day I got a call saying that the County Councilors had passed an emergency interim ordinance.

JOHNSON: So is it safe to say that you became aware that the scrivener's error was going to be changed?

HOWSLEY: Yes.

JOHNSON: At the time you said or your client said we need to file a permit or something to that effect?

HOWSLEY: I was intending on filing a permit. I was intending on filing a permit and going through the Type IV process. I had been aware of the timing issue for a long time.

JOHNSON: So then the -- I'm just trying to get a clarification on process here. So then the next step would have probably been something to the effect of the County said this is coming,

we're going to put a temporary emergency moratorium on that or stop it, so that's the process. They said, hey, we're going to correct the scrivener's error, you came in and said, wait a minute, we want to, we're going to do something here.

HOWSLEY: The way Washington, well, the way that Clark County Code works is once you submit an application, you're called what's contingently vested.

JOHNSON: Sure, I understand that.

HOWSLEY: The regulations are frozen in time as to when you make that submittal and then you have a period of time to make full application in order to make I guess vest that.

HORENSTEIN: To be a little, probably a little more direct answer to your question, the staff knew we were going to file an application under protest, we told them that. I suspect that had we not told them that, we wouldn't be here tonight discussing this.

HOWSLEY: That it would have been filed and we'd be proceeding under a Type IV.

JOHNSON: Okay. Yeah, the other thing is, is this is, you know, I read this book once called Crucial Questions, sometimes it's hard to ask them but, you know, you work with the County a lot and they're good folk and --

HOWSLEY: They're very good folks.

JOHNSON: -- you know, you get what you don't, you get what you want, but do you think that's, and I mean the County, but specifically anybody or staff purposefully is slow getting records to you or acting in a nefarious way?

And think very carefully because I'm just I'm trying to get to the heart of what you're thinking and I understand what you want and I understand why you want it, but now we have this records request and it seems to me, and just off the top, and I don't have a decision yet, but is it just muddying the waters. Are we trying to just -- what are we looking for? What would they have done?

I see pages of public records requests here of, it looks like that County staff did everything that you were asking. Now, it's a quick -- it's just a you were asking we did this, you were asking we did this. So my question is, do you think they didn't give you records request on purpose?

HOWSLEY: No, because here's what I think, public records request take time. I don't view the County staff as having any malicious intent or nefarious intent or however you want to characterize that. To me, again, this is a process question and that's what it is.

HORENSTEIN: Can I answer, can I provide a slightly different answer to that?

JOHNSON: Yeah.

HORENSTEIN: I don't know the answer why we got quite a bit. I don't know if they've given us it all yet, but we got quite a bit which we've shared very recently because we didn't know until very recently they didn't get theirs, I don't know why we did and they didn't.

There's a bigger issue here and I think the elephant in the room is that is this, in my 30 years of doing land use work I've never felt as distrustful of the County as I do now. Now, they may not trust us, but we don't trust them, whether that is flopped over in this records request or not is a different question, but we don't trust that.

We find we're in these appellate proceedings and litigation proceedings, we find the County not defending their own code. We find them doing a number of things that I will not detail here because we don't want to, we don't want to get into the position we were in in the last meeting here, but the bottom line is we do not trust Community Development, and their lawyers are part of this process, it's all together as far as we're concerned, and so we're doing our best for our client in a for the first time ever in a distrustful environment.

JOHNSON: Thank you. Is there any more questions?

BARCA: I have another question. Mr. Howsley, has the mine been in constant production all this time?

HOWSLEY: We would argue yes.

BARCA: You would argue yes. Not an unequivocal yes?

HOWSLEY: It has the same operating permit that it initially established in 1972.

BARCA: And it's producing aggregate that is being mined and leaving through sales of aggregate off of the property?

HOWSLEY: Yes.

HORENSTEIN: Not today because we were threatened with another notice in order to stop work by the Director of Community Development, so in the short run we are not processing.

ORDON-BAKALIAN: That's one of the key questions that the litigation is trying to address right now.

BARCA: Okay. So the 16 years in which we had this potential scrivener's error, the mine has been in constant operation producing aggregate during that time?

HOWSLEY: I don't want to weighed into the facts that are in litigation right now, but what I would say is that we had a couple-day hearing in front of a hearing's examiner who adjudicated a code enforcement complaint filed by Clark County Code Enforcement for failure to have a Clark County permit and the examiner determined on factual basis that the pit had a valid nonconforming use right established in 1972.

HORENSTEIN: That was still good today.

HOWSLEY: That was still good at that moment. And mind you, the Code for Title 32 appeal says any appeals of that goes to Clark County Superior Court under a LUPA action within 21 days, no file, no appeal is filed to court, so from my perspective matter is done.

BARCA: Okay. Thank you.

JOHNSON: Any more questions? Thank you very much, gentlemen.

HOWSLEY: Thank you.

HORENSTEIN: Thank you.

JOHNSON: Is there anybody else in the audience that is not on the sheet that would like to speak to this matter? You may come forward and please state your name and relevant facts.

DYRLAND: My name is Richard Dyrland, D-y-r-l-a-n-d. I live at 27511 N.E. 29th Avenue, Ridgefield, Washington.

I'd like to express my concern about some of the discussion about the demand for materials and shortages. I was on the original gravel committee the County had in 2002 and at that time we had evolved that there were areas in the county that had potential and the county was going to be proactive in seeing that they would look into those to see what the possibilities were. That really didn't happen; in fact, during some of the discussions with the Councilors this past year they've admitted that they were negligent on that, that they should have gotten ahead of that and encouraged expiration. The demand for rock in the long run has been overestimated I feel.

I'm also an analyst as well as a hydrologist and I think we need to have a whole new look at that because there's a lot of misinformation floating around. There are reserves in some places right now for 30 years yet, Yacolt Mountain, Cadman's got some reserves, there are possibilities of bringing it down from on the east side. If you look at what's going on in Vancouver Island,

they're shipping boatloads of rock and aggregate quarry materials all over the West Coast.

So I think we need to have a very practical objective look at this, as much as 20 percent of the rock out of Clark County is shipped over to Portland. So we need to be a lot more objective and honest I think about really what's our situation. And we -- and a couple of other groups are trying to work on this new committee that's been formed that Mitch has been heading up to get the Councilors behind doing some real support of exploration in some of these other areas. There's mines that are being or possibly there are mines being looked at up at Ariel that is economical.

So I think we need to take a whole fresh look and be a lot more objective because there's a lot of information out there and there's information that we need to get because these blanket statements, oh, we're running out or we're doing this, there's reason for concern, but some of that is almost like planned shortages. I hesitate to use those words but it's true. We got to manage it a lot better and it starts with the County Councilors, but there is a lot of rock around if we go after it in the way we should. Thank you.

JOHNSON: Thank you very much. Any questions? Thank you, Richard, appreciate it.

HALBERT: Yeah, Richard, sorry, I do have a question for you.

JOHNSON: Come back to the microphone, Richard, could you please. Sorry about that.

HALBERT: I have heard that we have a lot of rock supplies in the county but the process of getting that permitted is definitely a challenge, could you speak to that and what you know like you just said with Ariel, how many years would it take in order to have a mine or a pit opened up and ready to deliver?

DYRLAND: It varies so much because of the location. You know, if it's in the backyard of a place like Ariel, you need to think that through a little differently and some of the regulations are pretty, in the County are very archaic. They're in the process of changing them now, their chickens are coming home to roost, but there are some other locations west of Ariel that do hold some promise.

There's some areas right here in the north part of the county that has some real potential, part of it is that who's going to build the road, but that needs to be built in with it, you know, that goes with it and profit margins are relatively high. I work with some multinational companies quite a bit and so I think we need a whole fresh look and an objective look, put it that way.

HALBERT: Thank you.

JOHNSON: Thank you. Any more questions? Again, thank you, Richard. Okay. With

that said, is there anybody else in the audience that would like to speak to this issue? Seeing none, I would like to bring our discussion back to the Commissioners. Gentlemen. Do you want to go first?

BARCA: No.

SWINDELL: I guess I'd like to ask staff, it's been raised a little bit of concern about whether or not somebody's gotten their documents that they've asked for, I'm not sure, I saw someone talking about that, I don't know, do you have any clarification for us, maybe we didn't actually get it or --

HALLVIK: Yeah, I think I have a little bit of clarification that I can add to that. I believe that Oliver when he was addressing the Commission earlier was addressing the public records request that was made to his department for the legislative history records that Mr. Horenstein's office and Mr. Howsley's office requested prior to the last Planning Commission meeting, so I think that's what was being addressed earlier.

I do, I have learned tonight since, through some of the testimony that that those public records request included the 2003 minutes that were referenced online, that those were among the documents produced. With regard to public records requests that have been made to other departments, I can't speak to the status of those except to say that I have been reviewing some thousands of pages of recent e-mails, excuse me, hundreds of pages of recent e-mails that were responsive to a very broad public records request, so it is true that those are still being processed.

SWINDELL: Okay. And I believe the County Council is not going to see this until January; is that true?

LUMBANTOBING: Correct.

ORJIAKO: That's correct.

SWINDELL: Okay. So there's probably still time to get them all the records that they're hoping to see so they can present it to the County Council at that time. I'm assuming somebody's going to follow through and make sure?

HALLVIK: The public records request will be processed as fast as they can be.

SWINDELL: Okay. Thank you.

HALBERT: County Council though has already extended the ordinance by another six months, so I'm assuming we really have six months or they have six months to present this case.

BARCA: Yeah. And as Mr. Horenstein pointed out, they voted to do the emergency ordinance twice now, so the aspect of them being concerned about losing grip on the determination of the mining doesn't appear to be very strong in their thought process.

SWINDELL: I have to say I'm somewhat perplexed by that, I can't believe that they would not want to be involved in something as delicate as mining in our county. I just, I'm sorry, but I would think that they would want to have something to do with that, so I'm hoping that maybe they will, but...

ORJIAKO: I can't speak to that.

SWINDELL: I'm just stating my opinion. I would hope that they would as a body governing our county and maybe they'll listen that I think that they should be involved in that, but that's my opinion.

HALLVIK: If it's appropriate, I had a couple of points that I was hoping that I could address in response to some of the comments that were made tonight.

JOHNSON: Yeah, go ahead.

HALLVIK: Is that okay?

JOHNSON: Yeah, it's appropriate. Yes, go ahead.

HALLVIK: All of the evidence before the Planning Commission supports the conclusions that the change from a Type III process to a Type IV process that occurred in 2003 was a scrivener's error. It's not clear to me from public records or otherwise what evidence there would be that it was not a scrivener's error what that would look like, what the record indicating an intentional choice would be if it's not in these minutes, so I would add that.

Chief among the reasons why the evidence supports the conclusion that this was a scrivener's error is that the Type IV process in Clark County's Code since this change has been made has been limited to four types of decisions none of which include the passage of, or excuse me, the consideration of land use applications.

Clark County Code 40.510.040 is very specific and provides that it is limited to essentially the comprehensive plan changes, surface mining, excuse me, shoreline master plan changes, arterial atlas and development regulations, this is a limited, it's limited to four things, none of which are consideration of any type of land use application and that's been the case since this change was made in 2003.

To Mr. Horenstein and Mr. Howsley's point regarding the need to balance policy in the surface mining arena as well as the Columbia River Gorge, the Council does have a role in balancing policy and that's through the adoption of development regulations through a Type IV process which it did prior to 2003 and it has done since then. The balancing of the policy is done through that adoption of code, not through the processing of a specific application for that use.

So the County Council at various times, and as recently as 2014, has balanced these policy interests applicable to surface mining as it has updated its Surface Mining Code in 40.250.022, it has also made changes in the Columbia River Gorge Scenic Area Code in 40.240. All of the surface mines in Clark County under the Surface Mining Overlay Code go through a Type III process, this is not an unusual anomaly to have a Type III process apply to a surface mining application.

Given that and all of the other evidence that's before the Commission, it's clear to me and to the County as evidenced by the passage of the interim ordinance twice that this was a scrivener's error. I'm prepared to address any questions you have.

TORRES: So I have a question. So just to be clear, you're saying that a Type IV would not be used for a land use permit process?

HALLVIK: That's correct. At, in the past, in the somewhat distant past, the Council sat in an appellate role after the hearing's examiner had made a decision, but that is not the same thing as sitting in the review in the first instance of the facts of relating to a land use application. So I think some of the historical roles that the Council have played have been conflated and through this discussion.

ORJIAKO: And, Planning Commission members, the only thing I will add is that I have worked with both Mr. Horenstein and Mr. Howsley, I have respect for them. I will only add that since this change where we found out or if you believe that this was not a scrivener error, the Council or the Commissioners at the time would have directed us to write a process because there, admitted there is no process, so we have to write a code requirement or a process for them to use to go through a Type IV, it doesn't exist.

So if that were the desire of the Commissioners at the time, since then they would have directed staff you go write a process, you go write a code outlining the process by which this will be done through a Type IV, staff is not objecting to this application going through a Type III and I've worked with the County for a very long time.

The review of excavating, crushing, mining has never come through the Planning Commission and through the Council since I've been with the County. So when we found out that this was an error, the timing is not what I'm after, and I've made this very clear to my, what I would call my good friend Howsley, that if you would have come to me, my department, Planning

Department and submit, to submit an application to go through a Type IV, I don't know what I'm supposed to do, I would have directed you to go through the Type III process because that is a conditional use permit, that is why it's a Type III, it is a conditional use permit.

We come before you here during designation of a mining overlay and we say that in the next process when they go through the hearing examiner for the actual mining permit that the public has another opportunity to weigh in, and if there is additional requirement to go through a SEPA, that they will do additional SEPA review, that have always been our case before you, we with you and the Council review a designation of a surface mining, not the actual application to mine the site.

And, again, we are not objecting to them not going through the hearing examiner to receive a permit through a CUP to mine the site, that's not what we are, we are not objecting to anything, nothing. We just found out that this is a scrivener error which in other sections of the code we come before you and say that this is an error and we go to the Council and have made the case that it needs to be corrected.

I don't know what else to add because right now I strongly believe that if that was the intention of the Council or Commissioners at the time, we would have written a code or a process outlining what needs to happen if this were to come through a Type IV process, we don't have it.

HALLVIK: I would also say that from my perspective it defies logic that if it were truly the County Councils' policy decision in 2003 to have a role in the mining application process that they would have not developed a process as Oliver suggests and that they would have passed a code that applied a Type III process throughout Clark County with the sole exception of the large agricultural area within the Columbia River Gorge National Scenic Area, that the fact that that particular code section would have been the only area where that Type IV process applied defies logic.

JOHNSON: Thank you. Any questions of staff?

HALBERT: Sure. You still have two clients that are very upset with the process and how do you address that and why did it get to that point where they're upset?

HALLVIK: I don't know how much I can speak to that except that as Oliver pointed out, the County, when the County became aware of the scrivener's error, the County acted relatively quickly to fix it through the process that it did, which as Mr. Horenstein acknowledges, is an awful process that the County followed pursuant to State law and the County Code, so I think that's all I can say about that, but I do, I do hear the frustration.

TORRES: Well, I appreciate your guys input, it was pretty important information I think. I

mean, from my perspective I spent the better part of a morning going through everything online, I'm a slow reader, but, you know, the minutes of September 23rd of 2003 from that meeting, the memorandum from the staff on September 17th of 2003 which outlaid the process is nothing less, I got a really good education on the history of all this and how it all rolled out, but I will tell you nothing in here leads me to believe that this is anything other than a scrivener's error.

SWINDELL: And just to clarify, I would actually agree with that, I read everything, I've gone through it all, I've asked as many questions as I can and everything to me says it's a scrivener's error, it really does, I'm just surprised that --

MORASCH: I'm going to take the opposite view here when you're done.

SWINDELL: -- the County Council doesn't want to be involved, that's all I'm saying, I'm just surprised that they're not wanting to have it as a Type IV, that's what I'm saying. So I just I want to say I went through everything and that's all I can see as well.

MORASCH: Well, I mean, my only comments are I think it's clear there's a conflict in the code and the code doesn't have a process for a Type IV mining operation. I'm not sure it's -- a scrivener's error is a typo. That's -- I mean, if you look at the definition, I'm writing what someone else wrote here, I'm going to copy it, but I transcribed it wrong.

And the one thing that gives me pause on that is the code says Type IV not Type III and that's a little hard to, you know, when you're using Roman numerals it's not underlined, but then someone not only wrote Type IV but then they also went and looked up the code section, the new code section that goes with Type IV and they wrote that in the, in the new ordinance.

So it refers to 40.510.040, not 030. 030 would have been the Type III code. So if it was just purely I wrote it, I wrote a IV when I meant a III, it would have referred to 030 and not 040. So someone had to write a IV instead of a III, and then they had to go look up what code provision went with IV. So I don't know.

I mean, it's clearly a conflict and there's no process. I don't know if it's a scrivener's error or not. It's not mentioned in the minutes, but the minutes are not a transcript like we have now, they're just minutes. And so the minutes do say things like, well, we further explain the changes, it's possible that it was mentioned at the hearing, not saying it was, but it's possible. Also possible that it was discussed at a work session and there are no minutes from the work session. I mean, we talk about lots of things at work sessions and changes are made and then we never talk about them at the hearing. So I don't know.

It doesn't seem like a scrivener's error to me. It seems like for whatever reason it fell through the cracks and they never implemented it properly and that creates an issue today with the

code because there's a conflict now between Type IV and then we don't have any process for it. I mean, it seems obvious that it's an interim ordinance because staff saw this issue and brought it to the County's attention and didn't want the application to move forward before they got it fixed.

Otherwise, we'd be dealing with an annual review and a whole laundry list of other typos and scrivener's errors that we do on biannual reviews. So I mean it's obvious that the reason we're here today is they want to stop this application from coming through. It's the only application I think that could come through under this because I don't think there's any other gravel pits in the Gorge area.

I think Mr. Horenstein's correct, it doesn't really matter what we say today, the Board of County Councilors has already made up their mind but, and I understand why they don't want to hear these, but I don't think it's technically a scrivener's error, I think it's another kind of error perhaps, but not a scrivener's error.

TORRES: An error indeed.

SWINDELL: That's a good point.

HALBERT: Could I throw out, and I read all the same documents on the September 23rd minutes, on Page 2, Gordy Euler from the Department of Community Development spoke and this is in support of it not being a scrivener's error and he says that it's noted that he added that the last part of the staff report is a list of additional corrections and clarifications that have come across since the public review draft was made available in mid-August.

He said the document was reviewed by numerous individuals and that a number of changes resulted from a very thorough scrutiny. Euler thanked a number of staff people that had worked on this program, Cathy Corliss of Angelo and Eaton, Mike Butts, Susan Ellinger, Mitch Kneipp, Alan Boguslawski for their hard work on the project.

So it just seems with that many staff reviewing it and that many drafts that they knew what was in there, it wasn't an error, that was my take.

SWINDELL: So, Steve, I want to ask, are you thinking that that there was a, it wasn't supposed to be a Type IV, that this just fell through the cracks, that they didn't finish what they started?

MORASCH: That's what it looks like to me, that they should have asked Oliver to do what Oliver said, should have asked them to do and they never did and that was the error, that they never followed up and then years later they don't want to be involved anymore. I mean, it was, I don't know, five or six years ago now, they stopped hearing the appeals. Previously the appeals from Type III went to the Board of Councilors and they would hear the appeals and now

they've changed that so that they're completely out of it, so...

I think at some point in the last 20 years they probably if someone had brought it to their attention they probably would have changed it, but it never got changed. It's one of those things that fell through the cracks, I think that's the kind of error it was, not technically a typo.

But the problem, which you often have in codes and statutes where one piece gets amended and another piece gets amended years later and another piece gets amended, and maybe they forget to completely implement something that they did 20 years ago and then they change other things and, you know, now maybe if it was brought to their attention they would have changed, you know, this other piece over here, but they just never got around to it until now.

TORRES: I just think that's a pretty big error to be overlooked and not have anyone at some point recognize it and bring it up. I do see what you're saying about, you know, an error versus a scrivener's error just a typo, but I think for going from a title or Type III to a Type IV purposely and not having someone, many people, that many people knowing about it and not having anyone bring it up, you know, in a memorandum of the 17th, the Content says that the prime directive of the reorganization is that no substantive changes would be made to the code, that to me --

MORASCH: It's not a substantive change though, it's a procedural change.

SWINDELL: But the one thing that Steve said that I actually missed is that they actually took the time to change the code, it wasn't just a III to a IV, they actually put in the number to the code for a Type IV, that's more than just a, it really is.

MORASCH: And that's what got me thinking it may not be a scrivener error.

SWINDELL: I mean, and other than maybe there's --

MORASCH: To look up the Type IV and put it in instead of just writing the Type III like they did with all the other sections that were Type III that reference 030 instead of 040.

TORRES: Cut and paste.

JOHNSON: Yes.

COOK: Okay. Chris Cook with the Deputy, I'm a Deputy Prosecuting Attorney and I should probably keep my mouth shut but I can't help it. This going from Title 17 and 18 to Title 40 was a big project. People who were not staff were hired as temporary staff to work on this, it took months and it involved hundreds and hundreds of pages, lots of cross-references.

I understand what Councilor Morasch was saying about how, well, they would have noticed when they put that code in, but who says that happened at the same time and that the same person did it, you know. This is a multistep process and somebody, oh, typed, somebody might have done some of the drafting of the text and somebody else might have inserted the citations to the text. In pretty much every large document that we do there's some kind of word error, you can call it a typo, you can call it a thinko, you can call it whatever you want, all of those probably to me come under the notion of a scrivener's error.

In our last comprehensive plan update, and this is absolutely a scrivener's error, the word conservation was wrongly entered into the comprehensive plan as conversation and one of Clark County's adversaries in the comprehensive plan appeal was going to appeal that, that was listed as an issue and I said, okay, you go ahead and appeal that and the Board can spend its time deciding whether it's a GMA violation to say the word conversation when it should be conservation in there, not time well spent. No one here has been able to find actual evidence from the time that this was intentional.

Mr. Horenstein's conversation with Betty Sue Morris when he talked about it at your last hearing discussed the Board's desire to be involved in appeals. If you review the transcript, that's what was said, and, yes, the Board was involved in appeals then. They changed their minds about six years later and got out of the appeal business for permits, but although we hear there's no evidence that it is a scrivener's error. The idea that there would be evidence that it was a scrivener's error to me calls on one to think about what that evidence would be. Oh, I'm about to make a mistake. Whoops, we made a mistake.

If anyone had known that the mistake was there, it would have been changed, and the reason that it hasn't been addressed for 16 years is that nobody's applied under it and, you know, most of us don't take the Gorge code home to read for fun, so we don't look at what's in it except when we need to to review something that is before the County. Those are my thoughts. I'd be happy to answer any questions.

SWINDELL: I do have one question for you. The way Steve was kind of explaining it could have been, is that possible that it could have been a Type IV and that somebody just forgot to tell staff to put it together?

COOK: You know, to tell staff to put it together, you know, you have real world experience with this Planning Department, planners plan. I have never seen so many people with calendars and timelines and to do lists and this is on our work plan and this is what might ought to be on our work plan and we'll put this aside to think about next year.

I have never seen a group of people in my life who do that kind of stuff like these folks do which is what you would expect of them as professional planners and the idea that something of that nature just kind of floated away because nobody was thinking of it after making what is a

change, I find very difficult to believe.

SWINDELL: Is going from a Type III to a Type IV in that situation kind of a large change that it maybe it would have really been on the minds of people?

COOK: There's no other permit in the County as Taylor testified, as Oliver testified, as Sharon testified, there is no other permit in the County that is processed as a Type IV, yeah, that's a change.

SWINDELL: That's what I'm asking, like the odds of that being forgotten because it is such a large different path would be pretty narrow.

COOK: I think those odds are pretty low.

SWINDELL: Okay. Thank you.

MORASCH: Although something somewhat similar happened with the public facility zone and we finally got rid of it because there were no procedures for really implementing it and that lasted for a few years and then they get rid of it finally.

ORJIAKO: Commissioner, we know that and that's why we came before the Council and this body to say that we need to make that change because we couldn't and we were on top of it. In the past, we made a similar change to change light industrial to business park if you recall, we came back here quickly and amended that, we're on top of issues that we know will become an issue and we made the correction.

So this one my shop have never received application for mining whether it is in the Gorge or outside of the Gorge to come through a Type IV, that's a fact. I have never, since 1989, I have never brought any application for mining whether in the Gorge or outside the Gorge before this body and that's the fact.

MORASCH: Have there been any applications for mining since 1989 in the Gorge?

ORJIAKO: I don't know that because I haven't reviewed any.

MORASCH: I don't think there have, their permit dates back to 1972.

HORENSTEIN: Apparently we're being a little preform tonight. There is no other site in the Gorge for which a mine could be filed under the Clark County Code, under the comprehensive plan, so it wouldn't be possible. Thank you.

BARCA: Can I speak on this?

JOHNSON: Yes, Mr. Barca.

BARCA: So going through what was posted online, I think I would like to say that I had expected the documents that were posted to be complete and I was disappointed that they appeared to be either amended or portional, it did not look like the complete documents to me and perhaps that's the case, but the way that the page numbers went in comparison to the size of the .pdfs it did not have that appearance to me. So I'm just saying that I'm working with what was posted online, that's the only record that was available to me.

I would say that the idea of proving a scrivener's error is impossible unless indeed there was some sort of purposeful reasoning that would have been documented for having that which I believe is the direction that Commissioner Morasch was going. But my experience with staff and knowing the size of the change by needing to put a process in place, and agreeing with Chris, it is indeed such a significant change that the process I would have expected to have been built with the change so that the questions would have been at the time of the change what does this look like and staff would have had an answer, that's been my historical expectation of staff and I would say that's what normally would have been presented.

But errors do happen, and over the 20 years I've been doing this we've seen errors come forward, and these are scrivener errors, annually we see some scrivener errors. This one's significant in comparison to what we've seen, but an error is an error in one fashion or another. I don't see anything compelling in what has been posted to think that this is anything but an error, a mistake.

I think based on what was also said whether it's a Type III or a Type IV, this permit's going to go forward, and what has also been in the testimony is seeing that the Commissioner, Councilors have twice passed the emergency ordinance, they too think it's a delicate issue but perhaps not delicate in the way you're thinking, I'm thinking more delicate like nitroglycerin and they don't want to handle it, so it's appropriate then to return it to staff who has to handle it and I consider that the prerogative that's been put before them.

So they passed it twice, they consider it an error, I don't see anything compelling. It's possible that when the public records actually arrive that something compelling will be pulled up and that will be presented to the Councilors, but I don't have anything in front of me that could tell me there was intent for this to be a Type IV, I just don't have it in front of me.

JOHNSON: Thank you. Any other discussion?

MORASCH: Just one quick point is we usually deal with scrivener's error or any type of errors through a biannual code amendment and this is a little different than that, this is in an interim ordinance.

BARCA: Yeah. Emergent.

MORASCH: Emergent. Emergency. Is it an emergency ordinance? I thought it was just in interim ordinance.

HALLVIK: It's an interim ordinance.

COOK: It's an emergency.

BARCA: That's what I thought initially.

HALLVIK: I stand corrected.

MORASCH: So it was an emergency.

JOHNSON: Well, my position is pretty basic that it is an error, I mean one way or another, scrivener or not. Then I look at how it was, how it came about, was the permit filed prior to the change or the understanding that the error had to be corrected and the testimony seem to say that the County came forward and said this needs to be changed and then the process of Mr. Howsley connecting and saying we're going to or something to that effect and then the emergency hearing, that's the testimony that was received tonight.

So as you're shaking your head that's what I just heard from Mr. Howsley which was that the County came forward and said this error, whichever type of error it is happened, we need to change it, Mr. Howsley gave notice that their intent to permit --

MORASCH: That's not what I heard.

JOHNSON: Correct me.

HOWSLEY: I want to be very clear here that I gave notice to the County as an entity that we would be filing a permit application.

JOHNSON: Did you not give that notice because the County, your statement was something to the effect that you were going, that you had heard or that they were going to change, that the change was happening, that you went and filed your permit and then the County came back and changed, is that what your testimony is?

HOWSLEY: My testimony, and I'm going to be very clear here, is I notified them that I would be filing a permit application under protest for this property. A week or so later after I made that notification I got wind that this change was coming before the Planning Commission as a

docket item code amendment which would be the normal process for doing code amendments and I notified the County at that juncture that I intended on showing up in front of the Planning Commission and making some statements about that. Then the next day I get a call saying that the County Councilors passed an emergency ordinance changing this from a Type IV to a Type III.

JOHNSON: Was your permit filed prior to that?

HOWSLEY: I mean, my intention, I think I let staff know was I was filing it that Friday, the change happened on Wednesday.

JOHNSON: And you had no knowledge that this change was, this scrivener's error was --

HOWSLEY: I had no knowledge that they would rush this through as an emergency ordinance.

JOHNSON: Not the emergency ordinance. You had no idea that they were getting ready to change this scrivener's error in general, not the emergency ordinance?

HOWSLEY: I only had notice that they intended on bringing this before the Planning Commission for discussion.

JOHNSON: And then that's when you made your decision to file a permit or give them --

HOWSLEY: No, I intended on filing the permit, I gave them notification well before I was aware of that Planning Commission hearing, before this change.

TORRES: So a question for you. So when you say you gave them notice, what does that look like, is it an official document, is it a casual conversation, how does that work?

HOWSLEY: I know it was on a couple of phone calls at the very least, I've been, and maybe an e-mail but I don't recall.

TORRES: So it wasn't an official document? And the reason I ask is it seems you're implying that they tried to undercut you on this; right?

MORASCH: Well, that's exactly what they did. I mean, I don't think there's any --

BARCA: I don't --

MORASCH: Chris Cook admitted it when she came up here.

TORRES: I'm trying to get to that. So my point is if you filed an official document and then

now this happens all of a sudden or you had a conversation with someone, I'm just trying to get, what does you gave notice mean; right?

HORENSTEIN: There's no requirement for an official notice before you file an application. This is, we've been in dialogue on this project since June of 2018, we have conversations with the Prosecutor's Office and the Planning Department all the time.

It was a courtesy by Mr. Howsley to let staff know that out of desperation to keep things moving we were going to file an application. Right after that, staff took that in and got the emergency ordinance on an interim basis approved.

I can assure you had we not told them we were going to do that they would have processed that code change in the normal course where it would come to you for a permanent change to the code and probably with a package of others like periodically happens here and before the Board. This was done entirely to beat the clock.

TORRES: Does it seem plausible that your notification spurred someone to say, hey, we haven't done this before, let's start looking into it, they see that it's listed as a Type IV process and they know that it should be a Type III and so that's what drove this?

HORENSTEIN: It's not possible, Commissioner Torres, that's a very naive view of this, pardon the lack of respect, I don't mean it that way, but there is no question that this was done solely because we had given the courtesy of telling them we were going to file an application.

TORRES: So that's not possible for that to happen?

HORENSTEIN: It's not possible.

TORRES: At all?

HORENSTEIN: Pardon me?

TORRES: That's not possible at all that that happened?

HORENSTEIN: It is not what happened here. It's just too coincidental. You can choose to believe that if you like and vote accordingly, but that's not what happened here.

TORRES: Thank you.

ORJIAGO: I put into the record -- my mic is not on. I will put into the record I was never given a heads up, neither was I even communicated with. I have great respect for both of you, no one contacted Planning, gave Planning a heads up of an application, so this did not come

through my department.

HORENSTEIN: Because it wouldn't because you're in Long Range Planning and this goes to current planning, it wouldn't, we wouldn't notify you of an application for site plan approval, you know that, Oliver.

ORJIAKO: Yes. You know that, I just wanted to indicate, A, the application and the heads up never came through my shop, period.

HORENSTEIN: Because it wouldn't.

JOHNSON: Okay. All right. Going back and forth isn't going to help us. Thank you. Okay. The other thing is let's --

ORJIAKO: I just wanted to get that into the record.

JOHNSON: -- be civil here. Okay. My - and I'll bring this back to us and keep it up here. Thank you gentlemen for your testimony. - is that I'm looking at that it's an error. I'm looking at that the filing was not an official, I don't see anything in the record where we filed something in the whether formally or informally, so therefore it's still an error to me. What type, Steve, I don't know.

That was interesting stuff you had to say because I really want to try to find -- I respect what's happening here, but at the same time I can't see this being anything but what it is, it was some type of error. If it is an error, it needed to be fixed, then it comes to timing, who filed first. If something's there, is it not and I don't see that anything is there. And so my position is that I'm leaning towards this is an error, this is a scrivener's error or at worst or something else. Any other comments?

MORASCH: I mean, I don't think there's a question about the timing, the County beat the applicant, they got their emergency ordinance adopted before the applicant filed.

JOHNSON: This is a question to you. So we keep jumping to that emergency ordinance, what I'm saying is somebody on staff said this is an error at some time, okay, and so then my question is, did the County come and say this is a typical error we need to fix it and then somebody else said this is we want to file or was we filed, right --

MORASCH: Well, they didn't file, right, they didn't file.

JOHNSON: No, that's -- or did they even, I'll even take, you know, did we, to quote from Mr. Howsley, we let the County know we were going to file. So my question is, is did that happen and then there was an action to let's fix this error or was it, hey, we're going to fix this

error, we're walking along, we're doing what we're supposed to do and all of a sudden we're going to file.

It sounds like to me, and I'm not talking about the emergency ordinance, it sounds like the County was going along and they were saying let's fix this error and then the applicants came in and said, hey, we're going to file informally or formally, I don't know, that's I'm not at the emergency ordinance, I'm at the initial part and so that's what it is to me and we don't know, we can't tell, we can't tell because lack of records on what the error is.

I love these things by the way getting thrown in our laps. I mean, this is not what the Planning Commission is supposed to do and that's testimony in there too, and it also goes to the, I got to be careful here, but it goes to the character of our Councilors, you know, their ability to handle this and take care of it and not lay it in our lap, I mean we're sitting here trying to think what's right. I don't know.

I trust these guys, you know, you've been before us before and it puts us between a rock and a hard place. So all I'm saying is when did it happen. I'm not talking about the emergency, I'm kind of before that. So that's what I was trying to get to when I said chicken before the egg so to speak and so just really quick here I wrote on here again and that's clear as mud too now so that's the second time I've told you that, Mr. Howsley.

MORASCH: And my only point briefly is it seems obvious that the reason it's an emergency ordinance and not just a normal ordinance in the ordinary course was to block this applicant from being able to file an application and be vested under the old ordinance.

SWINDELL: And I would say that if it sat there for 16 years and nobody ever looked at it and then someone says, hey, I'm getting ready to put in an application, I would say that staff probably said, hey, we haven't done this in a while, we better take a look at that thing, they looked at it and said, oh, hey, there's an issue here, we need to fix this, and I'm not saying out of malice or staff was trying to be mean or anything, they just, oh, wow, we see an issue here, we better get this fixed and therefore they did the emergency to stop it because, and again, I, they don't have a process, there is no process, there was never ever a process put together.

So they're all looking at it 16 years later as nobody knows the intent of what happened back then, nobody knows, you know, for sure, for a hundred percent sure, nobody really knows what happened 16 years ago when this was put into place, but it did go, hey, I'm getting ready to do this, somebody looked at it and said, wait a minute, there's an issue, we better stop this, and I'm not trying to say anybody did it to be malice, but that to me looks like the process that happened.

BARCA: That's a grand amount of supposition. I hear us and there's people trying to attribute motive and understanding behind it. Can we just deal with what has been presented

here? I mean, we still get back to the idea that if staff was out of line and tried to present to the Councilors an emergency ordinance, Councilors could have said, no, build a process, but that is not what happened. So can we turn this over to the Councilors, please. I just --

JOHNSON: No, I think there's a point we discuss it.

BARCA: Well, and I think we have, but I also hear us starting to attribute motive, to try and understand characters and none of it is building the record, none of it is adding to the substance. It appears to me that now we are trying to understand motive and put a story together because everybody wants a good story as to how could this have happened.

Errors happen and, you know, from the time when the County Commissioners wanted to hear all of these items to the current stay where the County Councilors don't, there's a lot of water under the bridge and I don't know who else we can throw under the bus before we decide to vote on this thing, but...

TORRES: Agreed.

JOHNSON: With that said, is there any more discussion? If not, I would consider a motion.

SWINDELL: I make a **Motion** we adopt as presented CPZ2019-00033 as presented.

TORRES: **Second.**

JOHNSON: We have a **Motion** and a **second**. Sonja, can we please have a roll call.

ROLL CALL VOTE

SWINDELL: AYE
MORASCH: NO
HALBERT: NO
TORRES: AYE
BARCA: AYE
JOHNSON: NO

WISER: 3/3.

BARCA: And we couldn't have done this on the 30th.

OLD BUSINESS

None.

NEW BUSINESS

None.

COMMENTS FROM MEMBERS OF THE PLANNING COMMISISON

JOHNSON: Comments from the Planning Commissioners? I have one and I said it lightly before and I'm going to say it a little more firmly now and it will tell if our Councilors actually listen to what we do here.

There are seven members that are to be on this body and I have spoken to you, you, Oliver, and I appreciate that it is not, it's not your decision, but I want to underline the importance of this body to the Councilors, today's a perfect day, that a seventh member, a seventh debating member, a seventh person looking at these things should be here and why over, I'm not sure how long that that person hasn't been here, it is affecting us and I would encourage our Councilors to find us our seventh member.

With that said, any other comments? We're adjourned.

ADJOURNMENT

The record of tonight's hearing, as well as the supporting documents and presentations can be viewed on the Clark County Web Page at:

<https://www.clark.wa.gov/community-planning/planning-commission-hearings-and-meeting-notes>

Television proceedings can be viewed on CTVV on the following web page link:

<http://www.cvtv.org/>

*Minutes Transcribed by: Cindy Holley, Court Reporter/Rider & Associates, Inc.
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