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Via email

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Re: Ellensburg Cement Products, SEPA Appeal
File No. RZ-24-00001 (Gibson-SEPA MDNS)

Dear Board and Manager:

We represent Kristen Gibson ("Gibson" or "Applicant") with regard to her application to rezone Assessor Tax Parcel No. 280533 (Kittitas County Parcel Map No. 17-20-08010-0006). The application requests approval of a nonproject rezone of the subject property from Agriculture 20 to Forest & Range zoning district.

The rezone is consistent with *Kittitas County Comprehensive Plan (December 2021)*. Both zoning districts implement and are consistent with the Rural Working land use designation, and designed to achieve the goals and policies applicable to the land use designation. *Comprehensive Plan Table 8-1*.

The application is a nonproject rezone. No site specific development is requested or permitted through this process. The land use designation and associated development regulations (zoning ordinances) were approved following environmental review as part of the update process. RCW 43.21C.450(1) states that the following nonproject action is categorically exempt from SEPA review processes:

- (1) Amendments to development regulations that are required to ensure consistency within adopted comprehensive plan pursuant to RCW 36.70A.040, where the comprehensive plan was previously subjected to environmental review pursuant to this chapter and the impacts associated with the proposed regulation were specifically addressed in the prior environmental review.

Impacts related to both Agriculture 20 and Forest & Range zoning districts were specifically reviewed as a part of that comprehensive plan review process and are exempt from SEPA review when the amendment of the development regulation (i.e. change from one implementing zoning district to another) is undertaken and consistent with the adopted comprehensive plan. Even though we believe that the Gibson rezone is exempt from environmental review, we will still provide responses to the *Notice of Appeal* filed by Ellensburg Cement Products.

A. Ellensburg Cement Products appealed Kittitas County SEPA Responsible Official's issuance of a Mitigated Determination of Non-Significance (MDNS).

Ellensburg Cement Products has appealed Kittitas County's issuance of a Mitigated Determination of Nonsignificance (MDNS) for the Gibson rezone. An agency SEPA threshold determination is reviewed under the "clearly erroneous" standard of review. *Moss v. City of Bellingham*, 109 Wn. App. 6, 13, 31 P.3d 703 (2001). "A decision is clearly erroneous when the court [or reviewing body]" is 'left with a definite and firm conviction that a mistake has been committed.'" The reviewing body does not substitute it's judgment for that of the decision-making body, but rather examines the record in light of the public policy contained in the legislation authorizing the decision. *Id.* "An agency's decision to issue a mitigated DNS and not to require an EIS is accorded substantial weight." *Moss v. City of Bellingham*, 109 Wn. App. at 14; and *Indian Trail Property Owner's Ass'n v. City of Spokane*, 76 Wn. App 430, 442, 886 P.2d 209 (1994).

B. Kittitas County has previously determined that lands designated Rural Working are implemented through and consistent with Agriculture 20 and Forest & Range zoning districts.

In its comprehensive planning process, Kittitas County has developed through GMA compliant processes, goals, policies and objectives applicable to rural lands. The subject properties were designated Rural Working. The Rural Working land use designation is implemented through either Agriculture 20 or Forest & Range zoning districts. Each zoning district is consistent with and implements the policies, goals and objectives of the adopted Kittitas County Comprehensive Plan. In that planning process, Kittitas County reviewed and established permitted and conditional land uses that are permitted withing the perspective zoning districts. Those determinations have been made and are binding on all properties. Gibson has not requested a change in the land use designation.

Ellensburg Cement Products' appeal is based upon a fear of competition through the potential authorization of a new rock crushing source on the subject property. It is well-established that purely economic interests are not within the zone of interests protected by SEPA. *Kucera v. Department of Transportation*, 140 Wn.2d 200, 212, 995 P.2d 63 (2000); *Harris v. Pierce County*, 84 Wn. App. 222, 231, 928 P.2d 1111 (1996). Ellensburg Cement Products sole interest in this appeal to prevent the introduction of economic competition to it's business.

In her application materials, Gibson clearly sets forth the facts that the subject property is not suited to agricultural production. The purpose of the rezone was stated as follows:

The rezone is to align the property's existing natural characteristics and potential with the allowed uses in the zone. Since there is no irrigation or agricultural soil on site, Agriculture-20 (AG-20) zoning does not fit the existing conditions of the land. Forest and Range is the other potential zoning within the Rural Working designation in the Kittitas County Comprehensive Plan that applies to this area, and is a better fit for the natural conditions on the subject site.

SEPA Checklist ¶ 7. Ellensburg Cement Products ignores these facts.

Forest & Range is a more accurate zoning district. Not a single agency objected to the rezone proposal. Kittitas County Public Works provided guidance on access permits, site grading, and confirmed that no transportation concurrency management application is required for the proposal. Public Works also confirmed that the parcel is not located within a FEMA identified special flood hazard area (100-year floodplain). Department of Fish and Wildlife did not object to the rezone proposal but offered assistance in developing "...plans for habitat restoration once the current mining areas are completed."

"Rock crushing" is a permitted use within the Forest & Range zone. The application meets rezone criteria. Kittitas County has determined that "rock crushing" is a permitted land use within the Forest and Range zoning district. ECP is well aware of this fact since virtually all of its sites have been rezoned to Forest and Range in areas that were traditionally Agriculture 20 zoning districts.

C. Ellensburg Cement Products objections do not support its environmental appeal.

Ellensburg Cement Products offers a laundry list of purported deficiencies with the current SEPA Checklist, including the following:

- ECP argues that the SEPA Checklist is deficient because it does not "...address noise and other impacts associated with blasting and vibration associated with rock crushing operations." Blasting and vibration are actually impacts of mining and excavation operations that are currently permitted and allowed on the site, and was subjected to SEPA review.
- ECP argues that there are not "... any studies [that] address dust control, emissions, and air quality impacts from rock crushing operations..." ECP is well aware of the fact that specific air quality permits are required from Department of Ecology for any portable or stationary rock crushing facility. SEPA does not require a duplicious review where development regulations address a specific environmental impact. RCW 43.21C.240.
- ECP criticizes the SEPA Checklist because there are not "...any studies addressing potential traffic impacts and safety associated with increased truck traffic and heavy machinery associated with the uses..." Kittitas County Public Works confirmed that there were no issues of concurrency or other concerns with the rezone as they regard traffic and use of public roadways.
- ECP is critical because there are not "...any studies addressing potential impacts to groundwater, hydraulic connectivity with surface water bodies, or aquafer impacts." There

is no connection between “rock crushing” and the expressed concerns. Public Works also confirmed that the site is not within a FEMA identified special flood hazard area (100-year flood plane).

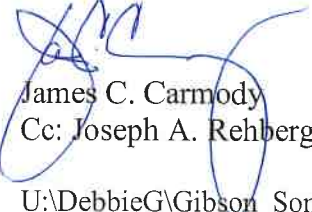
- ECP raises questions with regard to the lack of any water right associated with the property. ECP also ignores the fact that MDNS included standard condition that “adequate proof of water availability be provided prior to or at time of building permit.”

ECP argues that “...the conditions included in the MDNS have no bearing on and fail to mitigate the probable impacts associated with the *increase gravel and mining operations that would be permitted under the proposed spot rezone*. “The rezone does not authorize or address any increase in ‘gravel and mining operations.’ Those uses currently exist and are permitted by Kittitas County. Interestingly, the MDNS does require (1) fill and grade permits for any proposed grading on the site; (2) adherence to all applicable regulations and road standards; proof of water availability to serve proposed projects; development of a habitat management plan in conjunction with Washington State Department of Fish and Wildlife; and protections appropriate in the event of inadvertent discovery of cultural or archeological materials on the site.

Conclusion

SEPA responsible Official’s mitigated determination of non-significance (MDNS) is not clearly erroneous and Ellensburg Cement Products appeal should be denied.

Very truly yours,
MEYER, FLUEGGE & TENNEY, P.S.



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