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Bonner County Planning & Zoning Commission
1500 Highway 2, Suite 208
Sandpoint, ID 83864

RE: Title 12 Text Amendment Application from Applicants Matthew & Mark Linscott, and Matt & Mike Peak

Dear Planning & Zoning and County Commissioners:

I write today on behalf of my clients, Citizens Against Linscott/Interstate Asphalt Plant, to provide legal analysis in anticipation of a hearing on Applicant Whiskey Rock Planning + Consulting's ("Applicant") proposed zoning code text amendment (the "Application"), currently scheduled for May 17, 2022. The Application's legal arguments are wholly without merit and would lead to disastrous effects on zoning policy in Bonner County. The County should consider this matter carefully, as my clients do not wish for the County's taxpayers to incur liability for attorneys' fees as they did in the last application concerning the Linscott gravel pit.

Summary of Response to Applicant's Arguments

Applicant raises two main issues in the Application in support of their zoning code amendment. First, the Applicant argues that state mining law, including a constitutional protection for mining, preempts a county's ability to regulate mining operations under zoning law. This is untrue, and the Idaho courts have been clear that zoning laws are not preempted by mining laws absent a direct conflict. There is no direct conflict between Bonner County zoning law and those laws cited by the Applicant. As such, Bonner County zoning applies.

Second, the Applicant argues that a non-conforming use may be expanded to a parcel's boundaries, and that the non-conformance should be measured as of a date much later than the passage of the zoning code. Both assertions are incorrect. While Idaho law does explicitly allow mining and

regulates mining activity under the Idaho Department of Lands, local zoning laws still operate to protect the public from its negative effects. Zoning laws that regulate mining but do not prohibit it, like Bonner County's, do not conflict directly with state laws allowing for extractive services like mining. Preventing mining around residences or proscribing specific areas of the county where mining may occur, is not in direct conflict with state law, and therefore is not preempted.

In the case of the Linscott pit, nothing prohibits the Linscotts from obtaining a conditional use permit to operate a gravel pit throughout their property. But apparently the Linscotts do not wish to comply with the conditions that would likely be imposed were they to do so. In fact, the Linscotts held a conditional use permit in 1997, but it failed because the Linscotts were unwilling to construct the road improvements required to mitigate the impact of their operations on SH 95. They and others in their position should not receive a free pass based on the false premise that they have nonconforming use rights or constitutional rights to mine whenever and wherever they want. They do not.

The paragraphs below discuss each of the Applicant's arguments in more detail.

Preemption Doctrine

The Applicant's argument regarding Idaho state and constitutional provisions around mining is called preemption. On page five of the narrative for the Application, the Applicant summarizes the argument: "Where a right is granted by the Constitution, local regulation which rendered it impossible to exercise that right would be in conflict." The preemption doctrine essentially states that where two laws from two separate levels of government conflict, the superior level's law wins. In the Idaho context, articulated succinctly in *Arthur v. Shoshone County*[1], if a constitutional or state law provision conflicts with a county law, the state law wins out.

In regards to zoning, this is articulated in the Idaho Constitution Article XII, § 2, which states that "Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws."[2] In *Arthur*, there was a direct conflict when state law provided for a twenty-eight day period for judicial review, while county law provided for a sixty day period. As those two provisions could not exist at the same time, there was a direct conflict.

Though a state law could preempt local regulation by including express language doing so, even absent such language, a state can be found to have impliedly preempted local regulation where the state law occupies the field such that a county cannot regulate the activity at all. This is called implied preemption. However, even where an activity like mining is extensively regulated by the state, concurrent regulation by a county regarding an activity's location may be permitted.[3] In *Idaho Dairymen's Ass'n, Inc. v. Gooding County*, the Idaho Supreme Court directly confronted a claim of implied preemption in the context of a confined animal feeding operation, or CAFO.[4] The Court found that even though the state had comprehensively regulated water quality at CAFOs,

[1] *Arthur v. Shoshone Cty.*, 133 Idaho 854 (Ct.App. 2000).
[2] *Id.* at 861.
[3] 3 Rathkopf's The Law of Zoning and Planning § 48:18 (4th Ed.).
[4] *Idaho Dairymen's Ass'n, Inc. v. Gooding Cty.*, 148 Idaho 653, 659 (2010).

the extensive regulations were insufficient to establish preemption. Consequently, Twin Falls County was permitted to impose additional regulations on CAFOs to protect health and welfare.[5] The language of the case most relevant to this Application is as follows:

> County ordinances cannot conflict with state statutes and are void to the extent that they do. County ordinances can, however, complement or supplement state statutes regulating water quality to the extent they are not in conflict. While state and federal regulations, including the issuance of NPDES permits and approval of NMPs, are administered by the ISDA, Gooding County has the authority to complement these regulations by overseeing the siting of CAFOs.[6]

As in the regulation of CAFOs, Idaho state law and the Idaho constitution allow and regulate mining operations, including requiring applications and permits, site plans, and more. The mere creation of state-level mining rights and regulations do not, however, preclude a county from regulating the approvals necessary to conduct a mining operation, or from protecting the public from mining's noxious effects to the extent practicable by requiring setbacks and other land use limitations. Of course, Bonner County's zoning law would be preempted by Idaho state code and constitutional provisions if it completely zoned mining out of the county. But that is not the situation at hand. Bonner County's zoning law is not making it impossible to mine generally, or even on this parcel, where mining operations have been taking place for well over 40 years. The non-conforming use, however, cannot be expanded to include more acres, or generally to increase in intensity.

In fact, the Local Land Use Planning Act ("LLUPA"), which governs local land use regulation, specifically contemplates that land use regulations will govern over less stringent laws, including mining laws. Idaho Code section 67-6518 states, "Whenever the ordinances made under this chapter impose higher standards than are required by any other statute or local ordinance, the provisions of ordinances made pursuant to this chapter shall govern."

The mining laws cited by the Applicant, including "IDAPA 20.03.02, the Idaho Dredge and Placer Mining Protection Act, and the Idaho Mined Land Reclamation Act,"[7] provide a broad regulatory scheme, but do not invade the purview of local land use authority or preempt that authority. Idaho's Mined Land Reclamation Act even expressly allows counties and cities to exercise their zoning powers: "(c) No city or county shall enact or adopt any ordinance, rule or resolution to regulate exploration or mining operations or a permanent closure plan in this state that conflicts with any provision of this chapter or the rules promulgated thereunder. *This subpart shall not affect the planning and zoning authorities available to cities and counties pursuant to chapter 65, title 67, Idaho Code*." Additionally, neither IDAPA 20.03.01 (Dredge and Placer Mining Operations rules)

[5] *Id.*
[6] *Id.* at 660, internal citations omitted.
[7] Application narrative, pg. 6. The Applicant also cited Title 47, Ch. 15, which is, in fact, the Idaho Mined Land Reclamation Act.

nor IDAPA 20.03.02 (Idaho Mined Land Reclamation Act rules) discuss the siting or land use regulation of mining operations.

Where the Idaho Supreme Court did find preemption was on state lands, which were held to be the exclusive control of the Idaho State Board of Land Commissioners in *State ex rel. Kempthorne v. Blaine County*.[8] However, there is no state case that says that a state mining permit preempts a county's ability to regulate private land use by zoning ordinance. The overwhelming weight of Idaho law, in fact, holds the opposite.

Non-Conforming Use Law

The Applicant claims to represent the interests of those attempting to expand gravel pit mining operations to make "full use" of the parcel for which the land owners have a state mining permit. However, the mine is now considered a non-conforming use because the parcel is zoned rural, and as such, a nonconforming use "shall not be enlarged upon, expanded or extended."[9] Though Bonner County Code expressly permits "accumulated expansion by up to ten percent (10%) of a commercial, industrial, or public use or structure in any zoning district that was established prior to December 9, 1981… provided no additional land area is being acquired for the expansion,"[10] and requires only a conditional use permit (CUP) for expansion between 10-50%,[11] any expansion beyond 50% is prohibited by the county zoning code.[12]

Non-conforming use law exists to protect those whose operations pre-date zoning law, but also protect the right of a local government to enact and enforce public health and safety regulations like zoning under their police powers. A non-conforming use has no inherent right to be extended or enlarged under Idaho law.[13] Further, by law, a non-conforming use is defined *at the time of the passage of the zoning ordinance making that land use illegal*.[14] Though Title 12 was replaced in 2008, it did not change the non-conformance of the mine at issue in this Application.

The zoning ordinance is perfectly clear as to the date of non-conformance: "The accumulated expansion by up to ten percent (10%) of a commercial, industrial or public use or structure in any zoning district that was established prior to December 9, 1981, and that has been in use continuously since December 9, 1981, is permitted, provided no additional land area is being acquired for the expansion."[15]

If the Applicant's logic were to be followed and the text amended to establish a new date of 2008, merely reorganizing a zoning ordinance would grandfather in a whole host of new non-conforming uses, rendering it practically impossible to eliminate those nonconforming uses. Elimination,

[8] *State ex rel. Kempthorne v. Blaine Cty.*, 139 Idaho 348, 351 (2003).
[9] BCRC § 12-340.
[10] BCRC § 12-341(A)(1).
[11] BCRC § 12-341(A)(2).
[12] This has not prevented the Applicant's clients from doing so. The operation has continued to expand since the passage of the zoning law, and now encompasses over 100 acres as of 2021. *Citizens Against Linscott/Interstate Asphalt Plant v. Bonner Cty. Bd. of Comm'rs.*, 168 Idaho 705 (2021).
[13] *Bastian v. City of Twin Falls*, 104 Idaho 307 (1983).
[14] *Baxter v. City of Preston*, 115 Idaho 607 (1989).
[15] BCRC § 12-341(A)(1).

however, is the general purpose of the non-conforming use law: "the continuation of nonconforming uses is designed to avoid the imposition of hardship on the owner of the property *but eventually the nonconforming use is to be eliminated.*"[16] This protects the validity of a zoning law, and the County's ability to protect the general welfare of its citizens through that law.

Further, LLUPA likely does not allow the County to pass an ordinance that treats one gravel pit differently from another, which the proposed amendment would do by allowing pre-existing gravel pits to expand without complying with county regulations, while new gravel pits would have to comply. Contrary to the proposal, several sections of LLUPA require that a pre-existing, expanding gravel pit, the expansion of which does not enjoy constitutional non-conforming use rights, must be regulated under the same rules as a new gravel pit. LLUPA requires that the County must adopt "standards" in its zoning ordinance, which must be "uniform" across uses. I.C. §§ 67-6511, 67-6518, 67-6519(5), and 67-6535(1) and (2). This is only fair. Why should the Linscotts get a free pass from the County's rules while a newly approved operator has to comply?

Conclusion

In conclusion, the Applicant's revisions to county code are unwarranted. The County has the duty under Idaho law to regulate land use for the public welfare, and to apply those zoning regulations uniformly.[17] To change the rules for one parcel for the benefit of a private party would constitute illegal spot zoning,[18] subjecting the County to further litigation, all to protect a landowner who has already expanded its nonconforming use in violation of the County zoning code. The meritless arguments raised by the Applicant in the Application do not warrant any amendment of County zoning code and must be denied.

Thank you for your time and attention.

Sincerely,

Gary G. Allen

cc: Jonna Plante, Citizens Against Linscott/Interstate Asphalt Plant

[16] *Cole-Collister Fire Protection Dist. v. City of Boise*, 93 Idaho 558, 561, (1970) (citing 8A McQuillin, Law of Municipal Corporations, § 25.183, at 16-18 (1965)).
[17] Idaho Code § 67-6511(1)(a)
[18] *Dawson Enterprises, Inc. v. Blaine County*, 98 Idaho 506 (1977).