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March 15, 2019

Via Email (clare.may@bonnercounty.id.gov)

Bonner County Board of Commissioners
1500 Highway 2, Suite 208
Sandpoint, Idaho 83864

Re: File C1015-18 – Conditional Use Permit – Batch Plant

Dear Commissioners:

This letter is submitted on behalf of Citizens Against Linscott/Interstate Asphalt Plant (the “Citizens”) in support of their motion to the Bonner County Board of Commissioners (“Board”) to reconsider the approval of the conditional use permit (“CUP”) for the asphalt batch plant (the “Batch Plant”) at the Linscott/Interstate gravel pit (the “Gravel Pit”), the written decision for which is dated January 14, 2019 (the “Decision”). The application for the Batch Plant does not comply with the provisions of the Bonner County Code (“BCC”) or the Idaho Local Land Use Planning Act (“LLUPA”) and must be denied.

There are three primary reasons the CUP must be denied: (1) the Gravel Pit is not a lawful non-conforming use; (2) even if it were a lawful non-conforming use, which it is not, the Batch Plant unlawfully enlarges, increases, extends and/or alters the Gravel Pit, and (3) the ordinance under which the Batch Plant was approved was not lawfully adopted under the requirements of LLUPA. The sections below discuss these issues in turn.

1. The Gravel Pit is not a lawful nonconforming use.

Setting aside for the moment the legality of the recent modification of the ordinance, the Bonner County Code permits the Batch Plant in the Rural-5 zone “only in association with an active gravel pit”. Bonner County Code (“BCC”) § 12-336, Standard 22. The Gravel Pit operates in this location as a nonconforming use without permits,¹ and would not otherwise be allowed

¹ Citizens understand that a conditional use permit was approved for the Gravel Pit in 1995 that conditionally permitted some level of expansion. However, the conditions of the permit, including road improvements on SH95,

here. *See* BCC Subchapter 3.4, Nonconforming Uses and Structures, §§ 12-340 through 12-346 (the “Nonconforming Use Ordinance”). The Decision states the requirement of Standard 22 is met because “the proposal will occur within an active, legal non-conforming gravel pit”. Decision, p. 4. However, neither the Decision nor the record before the Board contain any evidence or analysis to support the conclusion that the Gravel Pit is a “legal non-conforming gravel pit”. The lack of factual support for this conclusion by itself is sufficient for the Board to reconsider the Decision.

The Batch Plant cannot be approved without a determination that the Gravel Pit is a lawful nonconforming use. While Standard 22 only speaks of the batch plant activities occurring within “an active gravel pit”, BCC Section 12-130.A. states “[t]he planning director shall not issue a permit unless the intended uses of the buildings and land conform in all respects with the provisions of this title.” Thus, the Batch Plant cannot be approved unless the Gravel Pit complies with the Nonconforming Use Ordinance and the Batch Plant does not cause the Gravel Pit to be out of compliance with the Nonconforming Use Ordinance. Here, the Application fails both of these requirements.

BCC Section 12-341.A. states:

A. Subject to the provisions of this subchapter, a nonconforming use or structure may be continued but may not be extended or altered . . . Exceptions:

- 1. 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.*
- 2. The accumulated expansion of such use identified in subsection A1 of this section by more than ten percent (10%), but no more than fifty percent (50%) is conditionally permitted, provided no additional land area is being acquired for the expansion.*

BCC Section 12-343 further clarifies the permitted nonconforming use of lands:

Nonconforming uses of land may be continued so long as they remain otherwise lawful, provided:

A. No such nonconforming use shall be enlarged or increased, nor extended to occupy a greater area of land than was occupied at the effective date of

were not completed, and the permit never actually was issued. See Exhibit “A”, Key Documents in 1995 CUP. In addition, in 2015, the County Commission denied a Comprehensive Plan amendment and zone change for an asphalt plant in this location. See Exhibit “B”, Key Documents in 2015 Denial of Asphalt Plant. The Asphalt Plant is no more compatible with its surroundings now than it was in 2015.

adoption or amendment of this sections, except where otherwise noted in this subchapter.

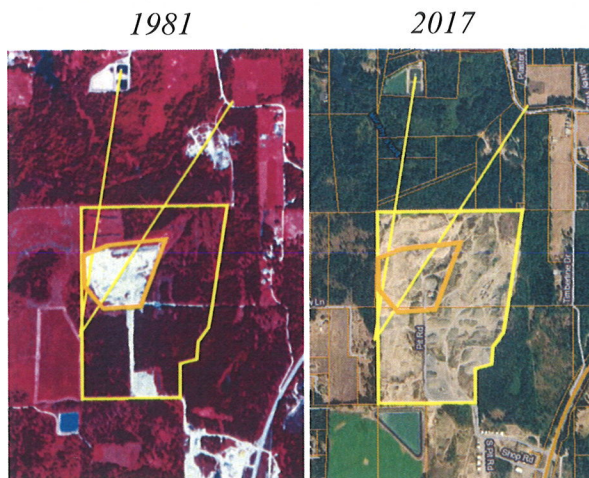
B. No such nonconforming use shall be moved in whole or in part to any portion of the lot or parcel other than that occupied by such use at the effective date of adoption or amendment of this section.

To summarize the requirements for the Gravel Pit to be a legal, nonconforming use,

- (1) It must have been in operation before December 9, 1981 and must have been continuously in operation since then. The evidence available to the Citizens is that these requirements have been met and we will not discuss them further in this letter;
- (2) The use must not have an accumulated expansion of more than 10 percent without a conditional use permit and must not have an accumulated expansion of more than 50 percent regardless of additional permitting;
- (3) No additional land may be “acquired for the expansion”;
- (4) The operation must be “otherwise lawful”;
- (5) The use may not be “enlarged or increased to occupy a greater area of land than was occupied at the effective date of adoption”, except as otherwise allowed; and
- (6) the use may not be “moved in whole or in part to any portion of the lot or parcel other than that occupied by such use at the effective date . . .”

As discussed in the following paragraphs, the Gravel Pit dramatically fails several of these requirements.

The disturbed area of the Gravel Pit has expanded illegally beyond its nonconforming use rights. Aerial photographs show the Gravel Pit occupied approximately 17 acres in 1981, the time at which protected grandfather rights were established.



The 1981 image is an infrared image, to better show the area of disturbance. A more complete analysis of this and other aerial photographs are attached as Exhibit “C”, History of Aerial Photographs for Linscott/Interstate Gravel Pit.

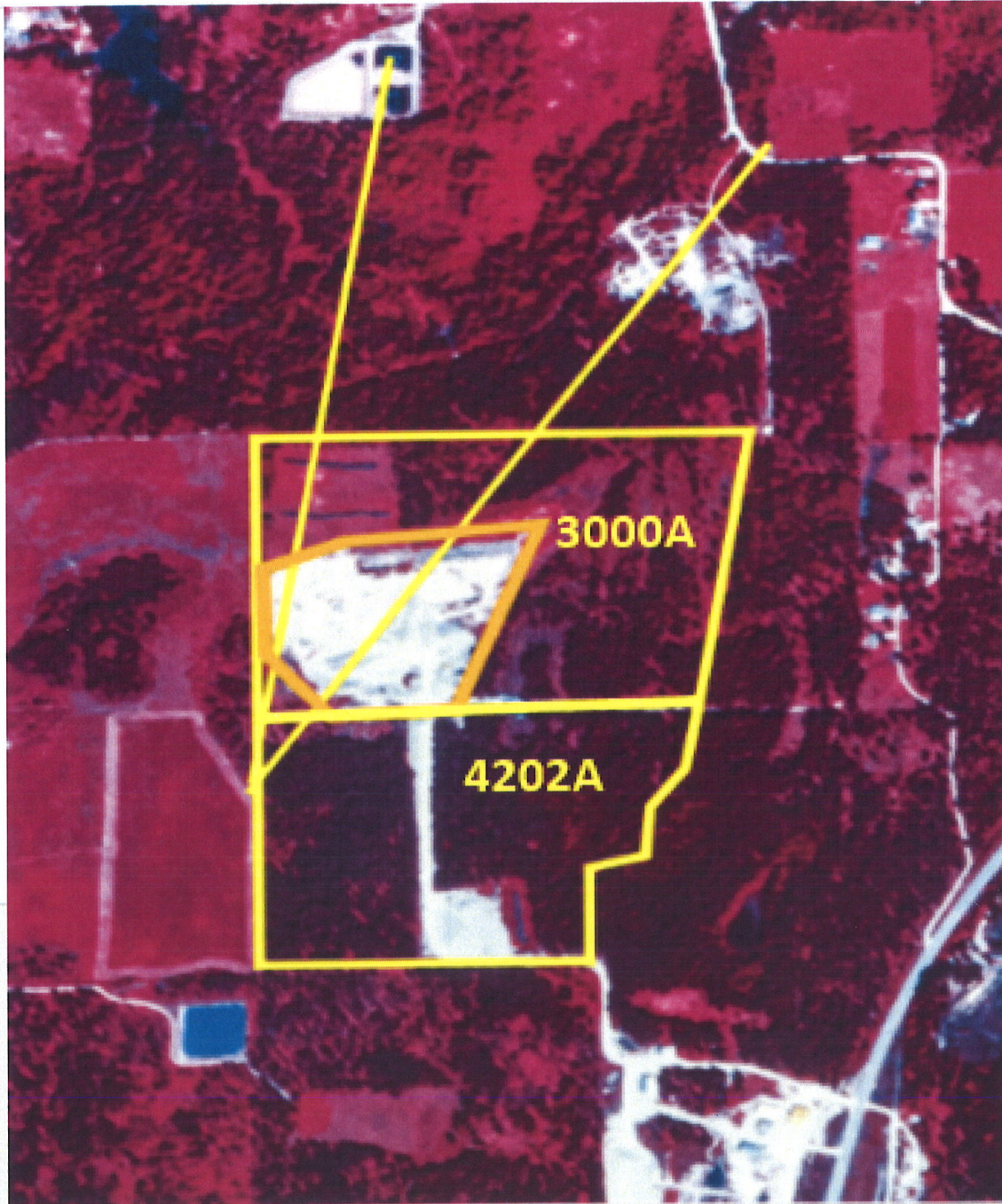
In addition, the Applicant represented to the Idaho Department of Lands (“IDL”) in its 1998 application that only 30 acres were disturbed at that time. *See* Reclamation Plan timeline (the “Timeline”). contained in letter from Eric Wilson, IDL to Frank Linscott, dated February 15, 2019, attached as Exhibit “D” (the “IDL Letter”).

Today, the Gravel Pit occupies somewhere between 98 and 112 acres based on the IDL Letter and numerous aerial photographs taken since 1981, such as this one:



See Exhibit “C”. This evidence demonstrates an expansion of somewhere between 230 percent and over 500 percent, far outside the limits of the Nonconforming Use Ordinance. Therefore, the Gravel Pit is not a legal, nonconforming use because it has expanded illegally far beyond its nonconforming use rights. BCC §§ 12-341.A (“a nonconforming use or structure may be continued but may not be extended or altered . . .”), 12-343.A (“No such nonconforming use shall be enlarged or increased, nor extended to occupy a greater area of land than was occupied at the effective date”). Because the Gravel Pit lacks valid nonconforming use rights, Citizens request the Planning Administrator to investigate and require the Gravel Pit owner to cease operations until proper permits to continue the current operations are obtained.

The Gravel Pit has added additional land parcels in violation of the Nonconforming Use Ordinance. In 1981, we believe the Gravel Pit operations were limited to Parcel 3000A, below:



The only use occurring on Parcel 4202A was material storage, as shown in this image:



In addition, in 2001, the Linscotts acquired a portion of the McGoldrick property to the west of the Gravel Pit pursuant to the Warranty Deed attached as Exhibit "E", to resolve allegations that the Gravel Pit encroached on the McGoldrick land.

BCC Sections 12-341.A and 12-341.B do not permit expansions of nonconforming uses if “additional land area is being acquired for the expansion”. As a result of at least two such acquisitions, the Gravel Pit forfeited its expansion rights.

The Gravel Pit is not “otherwise lawful”. The Gravel Pit violates applicable laws in at least three respects, making it ineligible for a conditional use permit because it is not “otherwise lawful” pursuant to BCC Section 12-343. The violations are: (1) flagrant violations of IDL requirements; (2) possibly illegal structures; and (3) the Gravel Pit appears to trespass on neighboring properties.

The Gravel Pit does not comply with IDL requirements. As set forth in the IDL Letter, the Gravel Pit has misrepresented its disturbed footprint to IDL for 20 years, and has failed to meet the financial requirements for reclamation. This is a second reason the Gravel Pit is not “otherwise lawful” and is not eligible for a conditional use permit.

Several structures in the Gravel Pit have no nonconforming use rights and were constructed in violation of the Zoning Ordinance. County building permit records demonstrate Parcel 4202A, which includes significant portions of the Gravel Pit, has added a large number of new or modified structures since 1981 including building permits issued in 1985, 1988, 1989, 1990 and 1995. *See* Exhibit “F”, Linscott/Interstate Building Permit Records. Any post-1981 structures that are part of the Gravel Pit use have no nonconforming use rights because they were not in existence on December 9, 1981. Therefore they were required to comply fully with the County’s zoning ordinance (“Zoning Ordinance”). It is unclear what uses many of these buildings serve and whether they are permitted in the rural or commercial zone. To the extent the buildings are part of the gravel operation, they are not allowed. *See* BCC § 12-336, Table 3-6 (gravel pit uses not allowed in commercial zone, require CUP in rural zone). At least, the County needs to investigate to determine the compliance of all structures on Parcels 3000A and 4202A.

County records appear to show the Gravel Pit encroaches on neighboring properties. As set forth in photographs from the County Assessor’s office and aerial photographs, the Gravel Pit encroaches on properties to the north and west. *See* Exhibit “G”, Map of Encroachments.

If survey markers bear these facts out, the Gravel Pit owner has violated civil trespass laws and likely has committed a criminal trespass as well. I.C. §§ 6-202 and 18-7008. The applicant should be required to show by surveyor and engineer testimony that the Applicant is not encroaching, and that the excavated areas have the proper slope to provide lateral support to adjacent properties, so that these do not suffer damage from excavations. Because of the evidence of encroachment, the Gravel Pit should not be considered “otherwise lawful”, and not eligible for a conditional use permit. A copy of this letter is being forwarded to the Bonner County Prosecutor, as my understanding is the adjacent property owners may want to press charges against the owner of the Gravel Pit once the encroachment is verified. A criminal action as well as a civil trespass action may be maintained. In a civil action, the owner of the Gravel Pit may be subject to treble damages and payment of attorneys’ fees. I.C. § 6-202(3)(b). As

discussed above, the Applicant has previously purchased property from a neighbor to resolve prior allegations of encroachment.

2. The Batch Plant unlawfully extends, alters, enlarges or increases the Gravel Pit.

If the Gravel Pit somehow has valid nonconforming use rights, which it does not, the Batch Plant still cannot be approved because the Batch Plant unlawfully increases, alters or enlarges the Gravel Pit. BCC Section 12-341.A states a nonconforming use may not be “extended” or “altered” and Section 12-343.A does not allow the use to be “enlarged or increased”. There is no way to interpret the addition of the Batch Plant other than as an “extension”, “alteration”, “enlargement” or “increase” of the Gravel Pit. The Gravel Pit has more than used up any expansion rights pursuant to BCC Section 12-341, so the Batch Plant cannot be considered on this site.

3. The ordinance permitting batch plants in rural zones was unlawfully adopted.

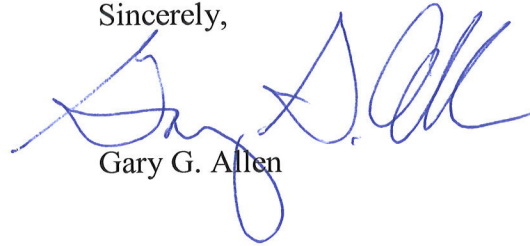
As part of a file entitled AM161-18, the County adopted changes to the Zoning Ordinance that permitted asphalt batch plants in the rural, forestry and agriculture/forestry zones with a conditional use permit. *See* Exhibit “H”, Key Documents in Ordinance Amendment. However, the notices for AM161-18 only state that the County was considering the following: “Resource Based Code: Amend the uses allowed to expand uses allowed in a gravel pit located in the industrial zone”. Thus, members of the public living and working in rural, forestry and agriculture/forestry zones would not have been put on notice that the County was considering changes that would affect their properties. This violates Idaho Code Sections 67-6511 and 67-6509,² which require that the hearing notice include “a summary of the plan to be discussed”. No summary reflecting the change in uses in the rural, agriculture, or agriculture/forestry zones was provided, and in fact, the notice misleads the public by stating only that changes to the industrial zone were being considered. Merriam Webster’s online dictionary defines “summary” as “comprehensive especially: covering the main points succinctly”. *See* Exhibit “I”, Printout of Definition of “Summary”. This definition reflects the need to tell the public about the important points of the proposal, which the notice failed to do. As a result, the portions of AM161-18 addressing batch plants were unlawfully adopted and therefore are void.

² It may violate due process requirements as well.

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Thank you for considering these concerns. The Citizens look forward to addressing you at the reconsideration hearing on March 22.

Sincerely,



Gary G. Allen

cc: Bonner County Prosecutor
Bonner County Planning Director
Jonna Plante, Citizens Against Linscott/Interstate Batch Plant

Attachments

- Exhibit "A", Key Documents in 1995 CUP
- Exhibit "B", Key Documents in 2015 Denial of Asphalt Plant
- Exhibit "C", History of Aerial Photographs for Linscott/Interstate Gravel Pit
- Exhibit "D", IDL Letter
- Exhibit "E", McGoldrick to Linscott Warranty Deed
- Exhibit "F", Linscott/Interstate Building Permit Records Post 1981
- Exhibit "G", Map of Encroachments.
- Exhibit "H", Key Documents in Ordinance Amendment
- Exhibit "I", Printout of Definition of "Summary"