

COLUMBIA COUNTY BOARD OF COMMISSIONERS
BOARD MEETING

MINUTES

March 28, 2007

The Columbia County Board of Commissioners met in scheduled session with Commissioner Rita Bernhard, Commissioner Anthony Hyde and Commissioner Joe Corsiglia, together with John Knight, County Counsel, Sarah Hanson, Assistant County Counsel, and Jan Greenhalgh, Board Secretary.

Commissioner Bernhard called the meeting to order and led the flag salute.

MINUTES:

Commissioner Hyde moved and Commissioner Corsiglia seconded to approve the minutes of the March 21, 2007 Board meeting; March 21, 2007 Staff meeting; and March 21, 2007 Budget meeting. The motion carried unanimously.

VISITOR COMMENTS:

Bill Eagle, Parks Committee member, came to speak to the Board about the development of the CZ Trail. The Parks Committee is concerned about the development of this trail and there are a lot of groups that are showing interest in it and wanting to help out. He asked if it would be possible to open up a portion of the trail near Scappoose. He has also heard that the Ford Foundation class has some plans for this trail and he would like to know what those plans are.

Commissioner Hyde stated that he has assured the neighbors along the trail that their concerns about the trail would be mitigated before the trail is opened. He stated that the County is waiting for word on the re-authorization of the school funding, which should happen at 11:00 today. Personally, he is waiting to see if the county is going to be broke or not before moving forward on any type of expenditures.

Bill stated that he is not asking for any money - there are just a number of groups that would like to do maintenance on a portion of the trail at no cost.

Commissioner Hyde - regarding the Ford Foundation has a class in the Scappoose/St. Helens area and around each class is a project. They have decided to dedicate their project to the opening of the CZ Trail from B&B Market to Hwy 30. They won't start the physical work until July.

Deborah Holton, Sexual Assault Victims Advocate Prevention Coordinator with the Women's Resource Center. She is here on behalf of the WRC, CCCC, Juvenile Department, Amani Child Abuse Assessment Center and Riverside Centers. All of these groups have been working together because there are several state and national awareness months tied together in April. March is the month nationally declared to raise awareness around issues related to people with developmental disabilities. The different local agencies work together on many of these interlocking issues and have therefore decided to collaborate jointly in observance of the

difference awareness issues. They came up with the idea to use different color ribbon that signify these different awareness observances and wrap trees in different locations around the county with ribbon signifying the observance. She is here today to ask for approval to wrap some of the tree trunks in the plaza area from April 8-30. The Board expressed their total agreement with this recognition project and gave their permission to allow it. They recommended that Deborah contact Bill Potter for any details. Commissioner Corsiglia suggested Deborah also attend the Traffic Safety Committee meeting next Wednesday, where a representative from ODOT will be present. Deborah appreciated that and will make that meeting. She also stated that press releases will be done to inform the public on these observances and she will be personally responsible for removing the ribbons afterwards.

JAN KENNA - REPORT ON "EMPTY BOWL" EVENT:

Jan Kenna, CCCCCF Director, came before the Board along with Ronda Dunn, Cecilia Hack, OSU Nutrition Educator and Susan Easley, CCCCCF member, to report on the "Empty Bowl" event held in St. Helens last Friday night. Susan handed the Board written information on the event, which was very successful. She mentioned that a similar event was held in Napa, California with 8 renown chefs, and had the same turn out as ours. This event raised \$2360.00. Commissioner Bernhard attended that event. The soup was good and everyone seemed to be enjoying themselves.

Jan Kenna presented Cecilia with a check for \$2,360 for the Columbia Pacific Food Bank on behalf of the Empty Bowl project. Cecilia thank everyone for their participation in the event and truly appreciates this donation, which will buy 15,000 lbs of food for the citizens of Columbia County.

HEARING: SCAPPOOSE SAND & GRAVEL/LIMITED EXEMPTION CERTIFICATE:

This is the time set for the public hearing, "In the Matter of the Application of Scappoose Sand and Gravel Co. for a Limited Exemption Mining Certificate to Mine 10 Acres".

The Board stated they had no exparte contact or conflicts of interest. Sarah read the pre-hearing statement into the record as required by ORS 197.763. She entered County Counsel's hearing file into the record, marked Exhibit "1". She has prepared a list of all contents in the record and made copies for the public.

Todd Dugdale, LDS Director, came before the Board to give the staff report. The applicant, Scott Parker, Scappoose Sand & Gravel (SS&G) is requesting a Limited Exemption Certificate (LEC) to mine a 10 acre portion of the 113 acre SS&G mine in Scappoose. The 10 acres is located in the northeast corner of the mine. The entire area mined, or to be mined, is 113 acres. However, 103 acres was already approved under a LEC in 1993. All but approximately 2 to 3 acres of the subject 10 acres was mined prior to 1990. The portion of the requested area yet to be mined is on property over which an access easement ran. The property is 60 foot wide and runs along the sites northeast boundary and a strip of land along West Lane Road south to the existing haul road. The applicant recently acquired the easement area and indicates that mining will now be possible on that area. Todd went over the list of items included in the application.

Notice was sent to all neighboring property owners and no comments have been received to date. Todd then went over the applicable criteria and findings in the staff report. Bob Brinkmann, DOGAMI and County Surface Mining Administrator, prepared a report to SMAC and recommended approval of this application. The Surface Mining Advisory Committee heard this matter on January 31, 2007 and, based on the findings and recommendations in DOGAMI's report, also recommended approval of the application. However, based on review of the findings, staff is recommending denial. The Board needs to determine a vested right as of July 1, 1972, as it relates to the 10 acres. Staff has determined that the vesting requirement has not been demonstrated. Todd went over the staff report in detail to explain the reason for the recommendation to deny this application.

The hearing was opened for public testimony.

PROPONENTS:

Larry Derr, Attorney for Scappoose Sand & Gravel: Larry spoke briefly on who was present to testify and then turned it over to Scott Parker to present his testimony. He will give testimony afterwards.

Scott Parker, SS&G, PO Box AF, Scappoose: Scott submitted his analysis of errors in facts and reasoning in the March 7, 2007 staff report. He has made application with the county for a Limited Exempt permit to mine approximately 10 acres. His grandfather purchased this property in 1942, he purchased about 70 acres. Scott referred to Attachment 4 in the staff report, which are two maps. In photo A which is marked #1, this is the original piece of property purchased by his grandfather in 1942. Everything on top of that, north of the line on the map, was purchased in 1965. The farmhouse is located in the area outlined by 2 on the map. Basically, what he is asking for is to be able to mine the rock there. He would like to mine this area so he can complete the reclamation. The entire 113 is the total outline of the property. When Scott took this business over from his grandfathers estate in 1977, his sister and himself had inherited the business and the property was, at that time, gifted to the Oregon State University foundation. He assumed a lease that had been drawn up in 1970 between the property owner, his grandfather and Scappoose Sand & Gravel. That lease set forth an annual payment plus a royalty fee that he had to pay per yard of aggregate that was mined. It was a 50 year lease, with 5 year increments. That lease was for the entire 113 acre site. In 1990, when the county rewrote the SMO, he was on SMAC and was involved with amending the ordinance and they went through the hearing process. At this time, there were some problems with some (SS&G) neighboring wells and those issues were addressed. Six wells were de-watered and although there was no proof SS&G caused that, SS&G deepened them and replaced them in a very short order. However, as a result of that, when he came before the Board for a Limited Exempt Certificate, the Board withheld 10 acres of the 113 acre site. In 1990, he had already mined a majority of that 10 acres. Referring to the aerial map, the property going south from the farmhouse has been stripped and that property was being used by the Bonneville Power Administration to store steel on. The area north of that, to the driveway had not been stripped or prepared yet for mining. In 1993, when the Commissioners withheld the LEC for the 10 acres, Scott was told by the Board that he had the ability to come back and apply for the LEC if he chose to do so. He didn't fight it then, for a couple of reasons - he had already mined a majority of it and he was going south with the mining

operation and didn't, at that time, see an immediate need for it and he was given the right to come back. That is what he is doing now. As far as the vesting, when he took the business over in 1977 he had 113 acres to mine and he had a permit for 113 acres. In 1993, somehow he lost 10 acres of that right and doesn't feel that is right or fair.

Larry - Staff is taking the position that, under the 1990 ordinance, the county would have the ability to take away the permit Scott had up until 1993 to mine the whole property, unless he had established a vested right. Scott had mined a good portion of the 10 acres, so not only has Scott established right, 7 acres or more, but he actually had a non-conforming use going. If Scott had known prior to 1993 that the county was going to take it away - he asked Scott what he would have done.

Scott stated that he would have extended it out to the boundaries. Scott stated that he is inspected annually by the Surface Mining Administrator, although that position has changed over the years. As far as the knowledge that he would not be able to mine that area, the easement has always been on his property. It was a driveway easement to Jeff's house and a non-exclusive easement. Scott has always felt that he had the right to take the rock off from under it and Jeff has the right to get to his home. As long as they coordinated that effort, the rock was Scott's. The property is his and he is paying taxes on that property. The property along West Lane Road, although not required, he constructed a sight obscuring berm along there to soften the impact. That was constructed on top of rock, a lot of rock.

Dale Heimuller, 335 S. 2nd St., St. Helens: Dale read his written testimony into the record. This is supplemental to his 1993 affidavit, which is included with this current application. He was employed by the operators of the mine now operated by Scappoose Sand & Gravel for over 39 years, beginning in 1951. When a state statute was passed in 1971 granting regulatory control over surface mining to DOGAMI, a number of mining operators in the county were concerned that their ability to continue to operate could be in jeopardy. The County Commissioners at that time, recognized the value of the mining industry to the county, but they had no expertise in mining operations. So he and three others with mining operation experience were enlisted to draft a county ordinance so that the County could exercise local control over surface mining. The primary concerns were to ensure that existing mining operations would be grandfathered and not subject to the new regulations. That ordinance was adopted in 1972.

On behalf of Scappoose Sand & Gravel, he prepared and submitted the first application for a permit under the new ordinance. The application included overlays of aerial photographs and text describing in detail the plans to mine the entire 113 acre site broken down by the areas, quantities and time table. Unfortunately, after the permit was granted, he did not keep the company copy of the application. Apparently, the only record that remains in the county files are copies of the cover page of the application signed by himself and the initial Surface Mining Permit issued by the County Commissioners. On the copy, the box for total number of acres to be mined contains the number 113 with the "3" written over another number. Dale had been under the belief that the total site size was 117 acres, but was told that it was only 113 acres, so he wrote "3" over the number "7".

The application was for a grandfathered mining permit for the entire 113 acre site, and that is what was granted. From that time on, until the 1990 ordinance was adopted, Scappoose Sand & Gravel had a permit to mine the entire site and did so, except for just a few acres on the northern part of the site and a narrow strip along West Lane Road. Every year after the initial permit was issued, SS&G paid the fee and received a renewal of the operating permit, until the 1990 ordinance was adopted.

Charles Parker owned and mined approximately 79 acres since 1974. In 1965, Dale purchased for Mr. Parker, an approximately 34 acre parcel north of the original ownership. We immediately began stripping and mining that parcel, moving generally from south to north. By 1972, they had stripped and begun mining all but an irregularly shaped area in the north of the 8-10 acres. That area included some fields, a stand of trees and a house that was included in the 1965 purchase. Their work in this area continued after the 1972 ordinance permit was issued. By 1974 we had torn down the house and stripped and begun mining most of the remaining parcel. By 1993 when the Board of Commissioners approved a Limited Exemption Certificate under the 1990 ordinance, everything had been stripped and mined except for a 60 foot strip along the north property line and a narrow strip along West Lane Road.

It is his opinion that this application by SS&G must be granted because the county granted a permit to mine the entire site in 1972. SS&G relied on the permit to mine for the next 20 years and is entitled to complete the mining. He believes that is the case, regardless of any requirements of the 1990 ordinance. However, he also believes that SS&G made its case in 1993 and makes it again today that it has a vested right to complete the mining of its property.

Dale left SS&G when he was elected as County Commissioner in 1993. Although the Board withheld the 8-10 acres, it did not do so because it didn't believe it qualified for a permit, instead, Commissioner Hugo moved to exempt the area, even though most of it had already been mined, as a hoped for incentive to SS&G to be sure that any area well problems would not reoccur. He was not totally in agreement with that, but because SS&G could reapply for this area and he did not expect the well problems to continue, he went along with it.

Dale has seen the staff report from the county planning department and legal staff questioning whether there were adequate expenditures before the 1972 ordinance date to create a vested right. He has stated there were.

Larry Derr gave lengthy testimony on why this Limited Exempt Certificate should be granted and how this application meets the criteria of vested interest. He then entered a spreadsheet into the record, as Exhibit "3" and his written testimony as Exhibit "4".

Bruce Hugo 135 Krause Way, St. Helens: Bruce gave testimony in support of this application. Referring to the transcript of the SMAC meeting of January 31, 2007, he asked Todd Dugdale to explain the distinction between a mining and a mine site. Mr. Dugdale's response is pivotal to this discussion. To paraphrase Mr. Dugdale, he noted that he was unable to give a legal response to the question. However, he did acknowledge that "...the 1972 ordinance clearly identified the entire 113 acres as the Scappoose Sand & Gravel mine site and it has been variously referred to by different names. In the 1972 permit, there is no dispute about that, all the way through '90

and '91, so that is the mine site for purposes of the 1972 ordinance clearly it is described what way and that is what the permit was issued for". In that same passage, Mr. Dugdale also states, "...this whole 113 acres was grandfathered under the '72 ordinance however in applying the new criterion you look at within the mine site". A significant issue that the 1990 SMO attempted to address was the physical, geographical expansion of limited exempt mining. When Columbia County adopted the SMO in 1972, it did not provide definitions of mine or mine site or explain in any detail the exemption process. That lead to questions later when an exempt mine proposed to expand beyond the property it owned or controlled in 1972. He does not believe the 1990 ordinance clarified this issue. That was part of the reason he objected to the Tide Creek Rock proposal.

However, there was never any question that the 1972 Operating Permit granted to Scappoose Sand & Gravel allowed mining on the entire 113 acre site controlled by Scappoose Sand & Gravel in 1972. There was no issue of the County having to later determine areas Scappoose Sand & Gravel claimed it intended to expand into after 1972.

The purpose of his bringing litigation in 1998 which became *Hugo v. Tide Creek Rock*, (LUBA No. 98-035, CA A102789) was two fold: First, he argued that the County's SMO was a land use ordinance and decisions made under the ordinance must comply with land use hearing procedures. LUBA agreed and the Oregon Court of Appeals affirmed. The second reason for bringing the suit was to address the County's practice of expanding mining operations under the SMO provisions for Limited Exempt Certificates that he believed to be unwarranted. LUBA determined that it did not need to address this particular issue and made its decision solely on the land use hearing procedural issues.

Tide Creek Rock was issued a Limited Exempt Certificate for approximately 11 acres in 1972. Under the 1990 ordinance, Tide Creek sought to expand its exempt status to include an additional 160 acres. The 160 acre area was not owned or controlled by Tide Creek Rock in 1972, was not zoned to allow surface mining in 1972 and Tide Creek Rock has not engaged in any activity on that land to warrant a finding of investment of time or money.

Interestingly, the 160 acres included property that was part of the County's very first subdivision plat. When the County approved Tide Creek Rock's exempt certificate application for a physical expansion beyond its 1972 mine site designation, he filed suit.

Unlike the Tide Creek application, the Scappoose Sand & Gravel application to mine the final 10 acres in its 113 acre mine site does not include land it did not own or control in 1972 and simply includes land approved for limited exempt status in the 1972 application. The current application does not attempt to expand mining activity beyond the area approved and grandfathered, using Mr. Dugdale's word, as determined in the original 1972 decision..

An argument raised by Tide Creek Rock in its application was the issue of intent. The applicants argued that even though they were only operating an 11 acre mine site in 1972, they argued that in 1972 they *intended* to mine a much larger area and were merely acting on that intention some 26 years later.

Scappoose Sand & Gravel is not making such an argument today. SS&G is simply seeking to mine the remaining portion of its mine site as that mine site was defined in 1972. Whether you view it as having established a vested right to mine the remainder of its site, or simply acknowledge the geographical extent of the permit granted in 1972, the result should be the same. SS&G is entitled to complete its mining on the small remaining area. One of the reasons he can support this application is that it does not establish a precedent for unwarranted expansion of mines to new areas based on a vague claim of past intent. As for intent, it is interesting to note that in 1984, before the adoption of the 1990 amended SMO, the Columbia County Comprehensive Plan and Zoning Ordinances were submitted to the State Land Conservation and Development Commission for acknowledgment and the entire 113 acre SS&G mine site was included in the comprehensive plan. Apparently, the intent of the County itself was to recognize and agree to the decision made in 1972 regarding the status of this mine site.

The other reason he supports this application is because it should have been approved by the Board of Commissioners that he was a member of in 1993. There was no question then that SS&G had a vested right to complete mining on its site. The decision of the Commissioners in 1993 was a political decision based on constituent complaints regarding water well quality and/or quantity. Because that decision was reached prior to the LUBA ruling requiring the County to conduct hearings and to reach findings of fact and conclusions of law, that decision was not based on anything other than political considerations. The 1993 decision was an attempt to address a local neighborhood problem. The 1993 decision of the Board was largely influenced, he believes, by he himself. Basically, it was blackmail and an inappropriate use of an ordinance. He was wrong to use a Limited Exempt Certificate mining application to address a water well problem.

He respectfully asked that this Board of Commissioners correct his error and issue the Limited Exempt Certificate to Scappoose Sand & Gravel for its entire 113 acre mine site that should have been issued 14 years ago.

Commissioner Corsiglia asked Dale if, when he was Commissioner at that time, was there always an intention to complete the mining of the 10 acres that's in question. Dale stated that there was question from the time he left his position at the mine until today, that the intent was to mine the entire piece of property.

Bruce submitted his written testimony into the record, labeled Exhibit "5".

Larry reiterated that they believe there are two basis in law why Scappoose Sand & Gravel are entitled to the LEC so they can finish off their work. The first is, that if we apply the vested rights concepts that the 1990 ordinance refers to properly, then SS&G has met that test. Secondly, there is a similar but not identical concept recognized in the law that applies both to private transactions between individuals and to government. The application to the government is more restricted. In 1972, the county clearly granted a mining permit for 113 acres, not just for what had already been stripped, but the entire 113 acres. From 1972 to 1993, SS&G and the county both operated in reliance on that permit. Therefore, the money expended and the commitments made, additional equipment purchased, is relevant to the second theory legal basis of collateral estoppel. Scott took action in reasonable reliance on a permit that he had in hand.

Jeff Magog, 53277 West Lane Road, Scappoose: In answer to the question about his access to his property, Jeff stated that he has met with Scott a number of times to look at different options to keep the access to his property. Jeff told Scott that he just needs to maintain access to his home, he doesn't want his property value to go down and he mentioned concerns about his well. Scott has continually keep him informed of the proceedings and has been concerned all along with the safety of Jeff's property and his family. From Jeff's perspective, Scott is doing everything he can to make it right.

OPPONENTS:

None

REBUTTAL:

None.

With no further testimony coming before the Board, the hearing was closed for deliberation. The Board has a lot of information to review before they can make a decision.

Per a request, the Board re-opened the hearing for comments from Dale Heimuller. Dale stated that there is only one document the Board needs to review, which is the permit approved in 1972 showing 113 acres.

The hearing was closed again.

With that, Commissioner Hyde moved and Commissioner Corsiglia seconded to carry over deliberations to April 11, 2007, at or after 10:00 a.m. The motion carried unanimously.

CONSENT AGENDA:

With that, Commissioner Hyde moved and Commissioner Corsiglia seconded to approve the consent agenda, without reading, as follows:

- (A) Ratify the Select-to-Pay for 3/20/07.
- (B) Ratify Commissioner Rita Bernhard's signature on the March 29, 2007 Certificate for Cascade Grain.
- (C) Order No. 36-2007, "In the Matter of Claim No. 07-29 for Compensation under Measure 37 Submitted by Hubert J. and Mary E. Harms".
- (D) Order No. 37-2007, "In the Matter of Claim No. CL 07-10 for Compensation under Measure 37 submitted by Erickson Enterprises Inc.".
- (E) Order No. 38-2007, "In the Matter of Claim No. CL 07-16 for Compensation under Measure 37 submitted by Lester J. and Janice J. Prado".

- (F) Order No. 39-2007, "In the Matter of Claim No. CL 07-11 for Compensation under Measure 37 submitted by John S. McCarthy".
- (G) Order No. 40-2007, "In the Matter of Claim No. CL 07-37 for Compensation under Measure 37 submitted by Patrick & Carla McGillivray".
- (H) Order No. 41-2007, "In the Matter of Claim No. 07-30 submitted by Dale C. Lee and Darrell C. Lee and Claim No. 07-31 submitted by Dale C. Lee and Diana Lee for Compensation Under Measure 37".
- (I) Order No. 42-2007, "In the Matter of the Proposed Vacation of a Portion of County Road #3 and County Road #44 near Vernonia, Oregon [Dan & Delinda Baer & Columbia County, Petitioners]".
- (J) Resolution No. 43-2007, "In the Matter of Co-Sponsoring with the City of St. Helens and the City of Columbia City an Application for Re-Designation of the St. Helens/Columbia City Enterprise Zone".
- (K) Resolution No. 44-2007, "In the Matter of Participation in Funding Activities of the Oregon Office for Community Dispute Resolution".
- (L) Approval of a request by the Economic Development Director to participate in the NW Oregon Works (NOW) Readiness Assessment and provide \$8,200 as Columbia County's share of the \$50,000 USDA Rural Business Opportunity grant to Col-Pac for this assessment.
- (M) Authorize Janet Wright to apply for a Community Involvement Request for \$5,000 from CRPUD for Transportation Services, with no required match from the County.

AGREEMENTS/CONTRACTS/AMENDMENTS:

- (N) Amendment #57 to the 2005-2007 Intergovernmental Agreement with DHS.
- (O) Amendment #2 to Agreement #22591 with ODOT to purchase 4 transit vehicles.
- (P) Approve the Project Completion Report for the CCMH Facility #C03022 to OECDD and authorize Commissioner Corsiglia to sign.

The motion carried unanimously.

COMMISSIONER BERNHARD COMMENTS:

Commissioner Bernhard attended the Empty Bowl event and the MTC Job Fair, where approximately 40 businesses participated. There were several hundred job seekers in attendance.

She also attended the Clatskanie PUD meeting last week, where discussion was held on the Cascade Grain agreement, however no decisions were made.

Last week, the Board met with the Budget Committee to update them on the county's financial situation.

COMMISSIONER HYDE COMMENTS:

Commissioner Hyde stated that most of his focus has been on the timber bill, which was supposed to be voted on today at 11:00 am.

COMMISSIONER CORSIGLIA COMMENTS:

No comments.

There was no Executive Session held.

With nothing further coming before the Board, the meeting was adjourned.

Dated at St. Helens, Oregon this 28th day of March, 2007.

NOTE: A tape of this meeting is available for purchase by the public or interested parties.

BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

By: *Rita M. Bernhard*
Rita Bernhard, Chair

By: *Anthony Hyde*
Anthony Hyde, Commissioner

By: *Joe Corsiglia*
Joe Corsiglia, Commissioner

Recording Secretary:

By: *Jan Greenhalgh*
Jan Greenhalgh