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No. 303811

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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ELLENSBURG CEMENT PRODUCTS, INC.,

Appellant,

v.

KITTITAS COUNTY,

Respondent,

v.

HOMER L. (LOUIE) GIBSON,

Respondent.

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BRIEF OF APPELLANT

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January 20, 2012

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## I. INTRODUCTION

Appellant Ellensburg Cement Products, Inc. (ECP), seeks review of a decision of the Kittitas County Board of Adjustment (Board) to (i) approve a conditional use permit (CUP) to expand an existing gravel excavation pit from 13.4 acres to 85 acres, and (ii) allow rock crushing on the agriculturally-zoned property. The property at issue is owned by respondent Homer L. Gibson (Gibson).

The Board erroneously concluded that rock crushing is permitted in an agricultural zone as “[p]rocessing of products produced on the premises.” CP 103. In addition, the County failed to comply with the State Environmental Policy Act, Chap. 43.21C RCW (SEPA) in issuing a determination of nonsignificance (DNS) for the CUP, and the Board failed to provide an open record hearing to consider ECP’s appeal of the DNS.

ECP sought review in superior court under the Land Use Petition Act, Chap. 36.70C RCW (LUPA). The trial court upheld the Board’s decision. ECP Appeals.

Rock crushing is *not* a permitted use on agricultural lands under the Kittitas County zoning code. The Board’s unprecedented decision to equate rock crushing with the processing of agricultural products is both erroneous as a matter of law, and another example of the County’s failure to adequately protect agricultural lands from incompatible land uses.

The Board's erroneous approval of rock crushing on Gibson's agricultural lands must be reversed. In addition, the CUP for expanded gravel extraction must be reversed and remanded to the County for compliance with SEPA.

## II. ASSIGNMENTS OF ERROR

**Assignment of Error.** The trial court erred in issuing the *Order On Land Use Petition* dated November 4, 2011.

### **Issues Pertaining to Assignment of Error:**

A. Whether the Board erroneously concluded that rock crushing is a permitted use in an agricultural zone.

B. Whether the SEPA determination of nonsignificance (DNS) must be reversed where the County violated SEPA rules and failed to conduct meaningful SEPA review of the project.

C. Whether the County violated state law by failing to provide an open hearing on ECP's appeal of the DNS.

D. Whether the trial court erred in striking the *Declaration of Michael J. Murphy* (CP 367-408) where that declaration authenticated documents that were improperly rejected by the Board.

E. Whether the trial court erred in striking the *Declaration of J. Jeff Hutchinson* (CP 502-516) where that declaration authenticated two

documents that rebutted unsubstantiated and false assertions made for the first time in Gibson's LUPA brief.

F. Whether the trial court erred in denying ECP's motion to strike unsubstantiated and false assertions made for the first time in Gibson's LUPA brief.

### **III. STATEMENT OF THE CASE**

#### **A. History of Gibson Quarry and Existing CUP**

Respondent Gibson owns five contiguous parcels of real property in rural Kittitas County (hereafter "Property"). The Property is zoned Agriculture-20 ("A-20"). CP 102, 192. Extraction of sand and gravel in the A-20 zone requires a CUP. CP 192 at 1; *see* KCC 17.29.030(25). An aerial photo/map of the Property at issue is attached as **Appendix A** for the Court's convenience. *See* CP 142.

In December 1997, Gibson's predecessor, Miller, obtained a CUP for gravel excavation on one of the five parcels owned by Gibson. CP 149. That parcel was only 13.4 acres in size. CP 138.

At some point Gibson began illegally expanding the gravel extraction area into the other parcels owned by him. CP 150. On August 11, 2008, the Department of Natural Resources ("DNR") issued a stop work order to Gibson based on Gibson's surface mining without a permit. CP 151-155.

On or about October 20, 2008, Gibson applied for a DNR surface mining permit. The SEPA checklist submitted by Gibson indicated that Gibson sought to mine an area of approximately 60 acres. CP 130. On October 24, 2008, the County completed a DNR approval form which erroneously indicated that Gibson had a CUP for a 60 acre site. CP 156. In fact, Gibson only had a CUP for one 13.4 acre parcel. CP 138, 149.

In December 2008, DNR issued Gibson a surface mining permit for a 60 acre site. CP 165. But Gibson still only had a Kittitas County CUP for one 13.4 acre parcel. CP 138, 149.

Gibson has never had a legal right to engage in rock crushing on the Property. On about April 2, 2009, the County issued a notice of violation for unauthorized excavation and/or rock crushing on the five Gibson parcels. CP 121. There is no evidence that the County ever followed up on the violation or took any meaningful enforcement action.

**B. Gibson CUP Application and SEPA Process**

On or about June 11, 2010, Gibson submitted the CUP application at issue in this case. CP 265-274. Gibson's application did *not* seek to expand the existing CUP; the application misleadingly implied that the existing CUP already applied to all five parcels. CP 266. Instead, Gibson's CUP application sought to amend the existing 1997 CUP to

allow new uses, including rock crushing, screening, and washing, as well as temporary plants for concrete, asphalt, and concrete recycling. *Id.*

Gibson's application included what appeared to be a copy of the 2008 SEPA checklist that Gibson submitted to DNR. However, a careful review of the checklist indicates that the checklist had been altered. Pages 1 and 3 thru 6 of the checklist submitted to the County are the same as the 2008 checklist submitted to DNR. *Compare* CP 129-135 and CP 268-274. However, page 2 of the checklist had been significantly altered. Paragraph 11 of the 2008 checklist referred to mining on a *60 acre* site:

11. Give brief, complete description of your proposal, including the proposed uses and the size of the project and site. There are several questions later in this checklist that ask you to describe certain aspects of your proposal. You do not need to repeat those answers on this page. (Lead agencies may modify this form to include additional specific information on project description.) Mining, crushing and removal of approximately 3,000,000 cubic yards of basalt/basalt shale from an area of approximately 60 acres. At present rock crushing is not occurring on the site, but might possibly occur in the future. Upon completion of mining the site will be used as a shop and equipment storage area, and house sites, therefore replacement of topsoil on either the pit floor or slopes is not anticipated or desirable.

CP 130. In contrast, paragraph 11 of the altered checklist submitted with the CUP application referred to mining on an *84 acre* site:

11. Give brief, complete description of your proposal, including the proposed uses and the size of the project and site. There are several questions later in this checklist that ask you to describe certain aspects of your proposal. You do not need to repeat those answers on this page. (Lead agencies may modify this form to include additional specific information on project description.) Mining, crushing and removal of approximately 3,000,000 cubic yards of basalt/basalt shale from an area of approximately 84 acres. At present rock crushing is not occurring on the site, but might possibly occur in the future. Upon completion of mining the site will be used as a shop and equipment storage area and house sites, therefore replacement of topsoil on either the pit floor or slopes is not anticipated or desirable. Also to include rock crushing, screening, washing operations, temporary concrete and asphalt plants.

CP 269. In addition, the bottom of page 7 of the checklist had been altered to remove the original 2008 date. *Compare* CP 135 and CP 274.

On June 29, 2010, the County issued a determination that Gibson's application was complete. CP 264. On July 29, 2010, the County published a Notice of Application for the CUP. The Notice indicated that

the County expected to issue a determination of nonsignificance (DNS) for the CUP application. CP 261.

On August 12, 2010, ECP objected to the CUP application. ECP pointed out that rock crushing and asphalt plants are neither permitted nor conditional uses in the A-20 zone. CP 212. ECP also explained that (i) Gibson's gravel extraction had been illegally expanded, (ii) the application did *not* ask to expand the existing CUP to other parcels, (iii) the 2008 SEPA checklist submitted to DNR did not address the impacts of the current application, and (iv) no studies of the impacts of the CUP on dust, water, noise, vibration, traffic safety, storm water, toxics or spill prevention. CP 213-216. ECP explained that the County, as SEPA lead agency, could not simply re-use the 2008 SEPA checklist from DNR. CP 215. ECP noted that no meaningful SEPA review had occurred, and that the County had abdicated its responsibilities under SEPA. *Id.*

On September 15, 2010, Gibson amended his application to delete the washing operations and temporary concrete and asphalt plants. CP 255.

On October 21, 2010, the County issued a DNS to expand the existing gravel pit and to allow rock crushing. CP 244. There is no evidence that any studies or additional information was obtained before

the DNS was issued. Nothing in the record indicates that the County gave any consideration whatsoever to the likely impacts of the project.

On or about November 2, 2010, ECP appealed the DNS to the Board. CP 218-223.

**C. SEPA Appeal Process**

On March 28, 2011, the County issued a notice that the Board would hold a *closed record* hearing on the SEPA appeal as well as a hearing on the CUP on April 13, 2011. CP 196. (The hearing was later re-scheduled to May 11, 2011. See below).

On March 30, 2011, the County filed its SEPA appeal brief, which expressly recognized that rock crushing was neither a conditional nor permitted use in the A-20 zone.

Indeed, there appears a problem with this application comporting with the underlying zoning in that it is asking for permission to engage in rock crushing, which is not a listed conditional use in this zone. But only the BOA has jurisdiction to answer that question when it reviews the merits of the application.

CP 206.

On April 5, 2011, ECP wrote to the County's attorney to object to the Board's stated intent to hold only a closed record SEPA appeal. ECP noted that, although the County had recently amended its code to eliminate the established procedures for open record hearing. However, ECP also explained that the proposed closed record SEPA appeal was unlawful:

We are concerned that the County appears to be under the impression that our SEPA appeal will be treated as a closed record hearing at which no new evidence will be submitted or considered. Such a procedure is not only substantively unfair, but contrary to both state law and other provisions of the County Code. We are clearly entitled to an open record hearing on the SEPA decision prior to any closed record appeal.

CP 146. ECP explained that both RCW 36.70B.020 and the relevant County codes required an open record hearing on the SEPA appeal. CP 146-147. ECP also asked the County attorney to explain the discrepancies and apparent alterations in the 2008 SEPA checklist. CP 145-146.

The County attorney responded by email the same day. The two-sentence email directed ECP to chapter 15A.07 of the County code. The County attorney did not address the 2008 DNS at all. CP 148.

On April 7, 2011, the County attorney issued a memo to the Board regarding the County's new SEPA procedures. The County attorney stated that KCC 15A.07.010 and -.020 required a closed-record process with only written briefs from the parties:

The process was designed by the Board of County Commissioners to provide for no oral argument, no presentation of witnesses, testimony, or cross-examination, and no presentation of evidence additional to the existing record. The matter is to be dealt with completely in writing. The record is essentially closed, the argument has been made in the form of the briefs before you, and your task is to make your decision based upon that record and briefing. If you have procedural questions, you may ask staff, but may not ask staff substantive questions about the matter.

Nor may the BOA address or be addressed by the applicant or appellant during this deliberation.

CP 108. The County attorney made no attempt to explain how this unfair process complied with state law. *Id.*

**D. Board of Adjustment SEPA Hearing and Decision**

On May 11, the Board of Adjustment held a closed record appeal hearing on the SEPA appeal. At the hearing, ECP's counsel again objected, arguing that an open record hearing was required. CP 31-32. ECP's counsel attempted to submit a binder of exhibits as well as a supplemental memorandum on the SEPA issues. CP 367-408. The Board chair clearly stated that ECP would not be allowed to address the Board on the SEPA appeal, and directed the Board to not consider any new information. CP 30-33. The Board members were clearly not satisfied with the SEPA appeal procedure. The members did not ask any substantive questions or engage in any meaningful discussion before proceeding with a motion to deny the SEPA appeal:

MR. KLOSS: Your question Stan?

MR. BOSSART: Yeah, I'm just trying to take in all this stuff. Makes it tough when you can't ask questions.

MR. KLOSS: Well, we need to move this along. Does anyone have a motion -- make a motion or comments?

MR. GOEBEN: Well, I move that the appeal be denied and the county's determination be upheld.

CP 34. The Board voted to deny ECP's SEPA appeal. CP 35, 103.

**E. Board of Adjustment CUP Hearing and Decision**

Immediately after the Board denied ECP's SEPA appeal, the Board held an open record hearing on Gibson's CUP application. CP 103. ECP testified and argued against approval of the CUP. ECP explained, *inter alia*, that rock crushing was not a permitted use in the A-20 zone. CP 49-54. At the end of the hearing the Board voted to approve the CUP. CP 76-78.

On or about May 11, 2011, the Board issued the written *Decision* granting the CUP subject to certain conditions. The Board made various findings, and concluded, *inter alia*, that rock crushing is permitted in the A-20 zone as "processing of products produced on the premises" under KCC 17.29.020(A)(13). CP 103.

**F. Procedural History**

ECP sought review in superior court under LUPA. After briefing by the parties and a hearing on the merits the trial court upheld the Board's decision. CP 533-535.

The trial court also granted Gibson's motion to strike two declarations filed by ECP. CP 534. The first declaration authenticated two documents that ECP submitted to the Board during the closed record hearing on the SEPA appeal. CP 367-408. The second declaration

authenticated two documents that rebutted false assertions in Gibson's LUPA brief that the property had a long history of rock crushing. CP 428-429; 502-516. In fact, the property had a short, on and off history of illegal rock crushing.

#### IV. STANDARD OF REVIEW

This Court's review of the Board's *Decision* is governed by the LUPA standards of review in RCW 36.70C.130(1). The issues in this case are primarily legal, and this Court's review of questions of law is *de novo*. *Isla Verde Int'l Holdings, Inc., v. City of Camas*, 146 Wn.2d 740, 751, 49 P.3d 867 (2002); RCW 36.70C.130(1)(b). "Statutory construction is a question of law reviewed de novo under the error of law standard." *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 175, 4 P.3d 123 (2000).

Section B of this brief also challenges the County's issuance of the SEPA DNS. A SEPA threshold determination is reviewed under the "clearly erroneous" standard. *Kettle Range Conserv. Group, v. Department of Natural Resources*, 120 Wn. App. 434, 455, 85 P.3d 894 (2003) (citing *Norway Hill Pres. & Prot. Ass'n v. King County Council*, 87 Wn.2d 267, 275, 552 P.2d 674 (1976)). The Board was required to apply the same standard to the DNS. *Id.* This Court's review of the Board's decision to uphold the DNS is reviewed de novo. *Id.* at 455-56.

RCW 36.70C.120(1) limits the Court's review of factual matters to the record created before a quasi-judicial tribunal, such as a hearing examiner. Where such a tribunal hears evidence at an open record hearing and makes findings of fact on the basis of that evidence, judicial review of those findings is based on the record. RCW 36.70C.120(1). RCW 36.70C.120(2) provides several exceptions to RCW 36.70C.120(1), including an exception for "[m]atters that were improperly excluded from the record after being offered by a party to the quasi-judicial proceeding." RCW 36.70C.120(2)(b).

The trial court erroneously struck the declaration of ECP's counsel which authenticated two documents that ECP submitted to the Board during the closed record hearing on the SEPA appeal. CP 367-408; 534. This was error because the Board did not provide an open-record hearing at which ECP was permitted to create a factual record. But even if RCW 36.70C.120(1) applied to the Board's closed record hearing, those documents were admissible under RCW 36.70C.120(2)(b) because those documents were erroneously excluded from the record by the Board after being offered by ECP. CP 367. As explained in section V(C), the Board excluded these documents based on the County's unlawful decision to

provide only a closed record appeal on ECP's appeal of the determination of nonsignificance (DNS).<sup>1</sup>

## V. ARGUMENT

### A. Rock crushing is *not* a permitted use in the A-20 zone.

The Board erroneously concluded that rock crushing is a permitted use in the A-20 zone. Even though "rock crushing" is expressly listed as a either permitted or conditional use in various zones *other than* agricultural zones, the Board concluded that rock crushing was permitted outright in the A-20 zone as "[p]rocessing of products produced on the premises." CP 103.<sup>2</sup> The Board's interpretation of the County's zoning code was erroneous for several reasons.

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<sup>1</sup> The trial court also struck a declaration from ECP's president. CP 534. This declaration rebutted Gibson's unsubstantiated and false assertions, made for the first time in Gibson's LUPA brief, that the Property has a "long history" of rock crushing, and that rock crushing has been conducted on the Property since 1982. CP 428-29. In reply, ECP moved the trial court to either strike Gibson's unsupported assertions or to allow ECP to supplement the record with two documents attached to the declaration. CP 483-84. Those documents clearly show that the County has historically taken the position that rock crushing is *not* allowed in the A-20 zone. CP 507, 515. The trial court ignored ECP's motion, and granted Gibson's motion to strike. CP 534. It is not necessary for this Court to address the trial court's decision to strike the declaration as long as the Court ignores Gibson's unsubstantiated and false assertions about the historical status of the Property.

<sup>2</sup> Although denominated a "finding of fact," the Board's determination that the rock crushing is permitted in the A-20 zone, Ex. 3 at 2 (Finding 11) is an erroneous conclusion of law.

The following table shows the relevant use classifications, the zones in which those uses are either permitted or conditional uses, and the applicable sections of the Kittitas County zoning code (KCC Title 17):

<b>Land Use Classification</b>	<b>Permitted Use Zones</b>	<b>Conditional Use Zones</b>	<b>Zoning Code Sections</b>
“Processing of products produced on the premises”	A-3, A-5, A-20, CA		17.28.020(14); 17.28A.020(15); 17.29.020(A)(13); 17.31.020(9)
“Sand and gravel excavation...” <i>and</i> “Stone quarries”		A-3, A-5, A-20, CA	17.28.130(25); 17.28A.130(25); 17.29.030(25); 17.31.030(15)
“All mining including ... rock, sand and gravel excavation, rock crushing, and other associated activities ... <i>within an established mining district</i> ”	Rural-3, Rural-5		17.30.020(7); 17.30A.020(7)
“All mining including ... rock, sand and gravel excavation, rock crushing, and other associated activities ... <i>outside an established mining district</i> ”		Rural-3, Rural-5	17.30.030(5); 17.30A.030(5)
“Mining and associated activities”	F&R, LH		17.56.020(7); 17.59.020(7)

Land Use Classification	Permitted Use Zones	Conditional Use Zones	Zoning Code Sections
“Quarry mining, sand and gravel excavation, and rock crushing operations”	F&R, LH		17.56.020(8); 17.59.020(8)
“Mining and associated activities, extraction and processing of rock, sand, gravel, oil, gas, minerals and geothermal resources”	Commercial Forest (CF)		17.57.020(6)

By separately and expressly listing both “gravel extraction” and “rock crushing” as either permitted or conditional uses in the Rural (“R-3” and “R-5”), Forest and Range (“F&R”), Liberty Historic (“LH”), and Commercial Forest (“CF”), the zoning code clearly indicates that “gravel extraction” and “rock crushing” are *not* the same use. In all four of the agricultural zones “gravel extraction” is expressly designated as a conditional use while “rock crushing” is *not* listed. Therefore, omission of “rock crushing” from the agricultural zones clearly shows that “rock crushing” is not a permitted use in those zones. “Under expressio unius est exclusio alterius, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other.” *State v. Delgado*, 148 Wn.2d 723, 729, 63 P.3d 792 (2003) (citing *In re Det. of Williams*,

147 Wn.2d 476, 491, 55 P.3d 597 (2002). Correctly interpreted, the zoning code prohibits rock crushing in agricultural zones.

The purpose of the agricultural zones is to allow agricultural activities to exist with low density development, and “to preserve fertile farmland from encroachment by nonagricultural land uses.” KCC 17.29.010; KCC 17.31.010; *see* KCC 17.28.010; KCC 17.28A.010. The prohibition on rock crushing in the agricultural zones is consistent with the purpose of those zones. Gravel *extraction* must, of necessity, occur where raw materials are located. Consequently, gravel extraction (and other types of mining) is a permitted use in the F&R, LH, and CF zones as well as established mining districts in rural zones. Gravel extraction is a conditional use in other zones, including rural zones outside mining districts and all agricultural zones, where gravel extraction use is less compatible with other uses in the zone.

In contrast, rock crushing can occur at other locations, away from the land from which the rock is extracted. Rock crushing (and other activities associated with mining) is a permitted use in rural mining districts and the F&R, LH, and CF zones, but only a conditional use in rural zones outside established mining districts. *See* table above. This shows that rock crushing may be, but is not necessarily, an appropriate or compatible use on the land where rock is extracted. Consequently, rock

crushing is not permitted in the zones that a primarily devoted to agriculture.

Despite the unambiguous exclusion of “rock crushing” from the permitted and conditional uses in the agricultural zones, the Board erroneously concluded that rock crushing was permitted in the A-20 zone as “[p]rocessing of products produced on the premises.” CP 103. This interpretation is not consistent with the zoning code as a whole. Courts look for the meaning of a statute in its wording, the context in which the statute is found, and the entire statutory scheme. *State v. Stratton*, 130 Wn. App. 760, 764, 124 P.3d 660 (2005) (citing *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)). As shown in the table above, “Processing of products produced on the premises” is a permitted use in each of the four agricultural zones. KCC 17.28.020(14) (A-3); KCC 17.28A.020(15) (A-5); KCC 17.29.020(13) (A-20); KCC 17.31.020(9) (CA). But that use is not listed anywhere else in the zoning code. *See* Title 17 KCC. This shows that “products produced on the premises” refers to agricultural products only, and that “[p]rocessing of products produced on the premises” refers to processing of agricultural products. Rock is not an agricultural product, and rock crushing is not permitted in agricultural zones.

The correct interpretation of “products” is shown by the other permitted uses in the agricultural zones. Along with “processing of products,” the zoning code includes the following permitted uses in agricultural zones:

- “All types of agriculture and horticulture not otherwise restricted or prohibited herein,” KCC 17.28.020(6); KCC 17.28A.020(21); KCC 17.29.020(A)(6);
- “The raising of animals (excluding swine and mink)..., KCC 17.28.020(7); KCC 17.28A.020(22);
- “Agriculture, livestock, poultry or swine or mink raising, and other customary agricultural uses...,” KCC 17.28.020(8); KCC 17.28A.020(9); KCC 17.29.020(A)(7); KCC 17.31.020(3);
- “Commercial greenhouses and nurseries,” KCC 17.28.020(10); KCC 17.28A.020(11); KCC 17.29.020(A)(9); KCC 17.31.020(5);
- “Roadside stands for the display and sale of fruits and vegetables raised or grown on the premises...,” KCC 17.28.020(11); KCC 17.28A.020(12); KCC 17.29.020(A)(10); KCC 17.31.020(6); and
- “Forestry, including the management, growing and harvesting of forest products, and including the processing of locally harvested forest crops using portable equipment,” KCC 17.28.020(15), KCC 17.28A.020(16); KCC 17.29.020(A)(14).

Under the *ejusdem generis* canon of statutory construction, “Where general words follow specific words, ‘the general words are construed to embrace a similar subject matter’ as the specific words.” *State v. Marohl*, 170 Wn.2d 691, 699-700, 246 P.3d 177 (2010) (quoting *Burns v. City of Seattle*, 161 Wn.2d 129, 149, 164 P.3d 475 (2007)). Therefore, the term “products” must be understood to mean the agricultural products the production of which are expressly permitted uses. Nothing in the list of permitted uses in the agricultural zones suggests that “products” refers to extracted rock.

Finally, the correct, narrow interpretation of “products produced on the premises” is confirmed by the definition of “agricultural activity” in KCC 17.74.020(3). Chapter 17.74 of the zoning code establishes the “Right to Farm for the Protection of Agricultural Activities.” The definition of “agricultural activities” provides, in relevant part:

“Agricultural activity” includes, but is not limited to, the growing or raising, harvesting, storage, disposal, transporting, conditioning, **processing**, sale, and research and development of, but not limited to, the following: horticultural crops, poultry, livestock, grain, mint, hay, forages and feed crops, apiaries, beekeeping, equine activities, leather, fur, wool, dairy products and seed crops. (Emphasis added).

KCC 17.74.020(3). In other words, “processing” agricultural products is an agricultural activity under the zoning code. Consequently, such

processing is a permitted use in all four of the agricultural zones. The Board's determination that rock crushing also constitutes "processing of products" is inconsistent with the meaning of the word "processing," inconsistent with the context in which that term is used, and inconsistent with the zoning code as a whole.

Furthermore, "[g]as and oil exploration and construction" is also a permitted use in the A-3, A-5 and A-20 zones. KCC 17.28.020(17); KCC 17.28A.020(18); KCC 17.29.020(A)(16). If the Board's interpretation were correct, petroleum refining would be permitted in these zones as "processing of products produced on the premises." But such an intensive, industrial use is obviously incompatible with agricultural uses. Indeed, "oil refining" is expressly designated a conditional use in the General Industrial zone, KCC 17.52.030(1)(j), and that use is not allowed in any other zone. The Board clearly erred in interpreting KCC 17.29.020(A)(13) to include rock crushing.

Nonetheless, both the County and Gibson argue that the Board's untenable interpretation of the zoning code is entitled to judicial deference under RCW 36.70C.130(1)(b).<sup>1</sup> LUPA does not require the Court to automatically defer to County's interpretation of an ambiguous ordinance.

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<sup>1</sup> The County asserts that the Board is entitled to deference. CP 425. Gibson argues that both County staff and the Board are entitled to deference, but focuses on the alleged expertise of staff. CP 440-441, 444.

On the contrary, questions of law are reviewed *de novo*, *Isla Verde Int'l Holdings, Inc.*, 146 Wn.2d at 751, “after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise.” RCW 36.70C.130(1)(b). No deference is “due” to either County staff or the Board because there is no showing that either staff or the Board has any special “expertise” in determining the meaning of “products” in the County’s zoning code.

County staff originally assumed that rock crushing was a **conditional** use in the A-20 zone. CP 261, 264. Staff also failed to notice, until ECP objected, that temporary concrete and asphalt plants were *not* permitted or conditional uses.<sup>1</sup> *Id.* Nothing in the record explains how staff eventually concluded that rock crushing could be considered “processing of products” under KCC 17.29.020(13). The hearing transcript clearly shows that the Board had no expertise in interpreting that section of the zoning code. CP 69-76.<sup>2</sup>

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<sup>1</sup> Staff planner Valoff also signed off on the DNR approval form which erroneously indicated that Gibson had a CUP for a 60 acre site. CP 156.

<sup>2</sup> One member of the Board stated that he or she originally did not interpret “processing” to include rock crushing. CP 70. One member complained that “the language was not written specifically enough.” CP 71. Another member stated “Well, we can’t go back to the county commissioners to get their opinion on this, you know?” CP 73. Another stated “Well, it’s also difficult because this Board is not the Board that created the ordinance.” CP 74.

In *Sleasman v. City of Lacey*, 159 Wn.2d 639, 151 P.3d 990 (2007) the city charged a homeowner with violating an ordinance prohibiting removal of trees from any “undeveloped or partially developed lot.” The city’s hearing examiner upheld the fine, and the superior court and Court of Appeals affirmed. 159 Wn.2d at 641-42. The Supreme Court reversed, holding that the ordinance was “unambiguously inapplicable.” 159 Wn.2d at 642. The Supreme Court noted that it had granted review, in part, to address the Court of Appeals’ deference to the city’s interpretation of the ordinance. *Id.* The court emphatically held that “The city’s interpretation is not entitled to deference.” 159 Wn.2d at 646.

[E]ven if the ordinance were ambiguous, Lacey’s interpretation would not be entitled to deference. Lacey’s claimed definition was not part of a pattern of past enforcement, but a by-product of current litigation. Often when an agency or executive body is charged with an ordinance’s administration and enforcement, it will interpret ambiguous language within that ordinance. **But the agency must show it adopted its interpretation as a “matter of agency policy.”** While the construction does not have to be memorialized as a formal rule, it cannot merely “bootstrap a legal argument into the place of agency interpretation,” but must prove an established practice of enforcement. (Citations omitted; emphasis added).

159 Wn.2d at 646 (citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992)). The court further stated:

[The City] did not proffer its current construction until the trial court asked for further briefing. These facts are similar to *Cowiche Canyon* where this court refused to

credit an agency interpretation where it was applied only “one or two instances stances in 14 years.” Here Lacey applied this interpretation to only one or two instances in 30 years, and the Sleasman were the first.

159 Wn.2d at 647 (citing *Cowiche*, 118 Wn.2d at 815, 828 P.2d 549).

Under *Sleasman*, the County is not entitled to any deference in the interpretation of KCC 17.29.020(A)(13) to include rock crushing. Nothing in the record suggests that the County has ever allowed rock crushing in the agricultural zones. Nor has the County ever interpreted “processing of products” to include rock crushing. Like the City of Lacey’s interpretation in *Sleasman*, the County’s interpretation of “processing of products” was developed and applied for the first time in this case, after ECP pointed out that rock crushing was not a conditional use. As in *Sleasman*, the County’s interpretation was *not* a reasoned determination of County development policy, but a completely new and unprecedented interpretation of the zoning code. That interpretation is not entitled to any deference whatsoever.

At the Board hearing, Gibson suggested that the zoning code distinguished between crushing rock on the property from which the rock was extracted and crushing rock from other sources. According to Gibson, where rock is extracted from the same property, crushing is permitted as “processing a product produced on premises.” CP 64-65.

Gibson's theory is not consistent with the zoning code. If Gibson were correct, then "processing of products produced on the premises" would be a permitted use in all zones. But that use is only permitted in the four agricultural zones. In rural zones outside established mining districts, "rock crushing" is only a conditional use regardless of the source of the rock. *See* table (above).

There is no evidence that the County has ever allowed rock crushing in the agricultural zones. On the contrary, ECP objected that it had always obtained rezones to a zone that allows rock crushing as a permitted or conditional use, that Gibson should not be treated differently than any other property owner in the A-20 zone, and that Gibson should apply to rezone his property if he wants to use the property for rock crushing. CP 46, 57. The Board's decision circumvented the rules that have applied to all other property owners in the County.

Finally, the Board's decision is not consistent with the purpose of the County's agricultural zones, which is to "to preserve fertile farmland from encroachment by nonagricultural land uses." KCC 17.29.010; KCC 17.31.010; *see* KCC 17.28.010; KCC 17.28A.010. The Board's decision to permit rock crushing outright fails to protect agricultural lands from nonagricultural uses.

This is not the first time the County has failed to adequately protect agricultural lands from nonagricultural uses. In *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 144, 170-72, 256 P.3d 1193, 1205 (2011), the Supreme Court recently upheld a determination of the Growth Management Hearings Board that the County had violated the Growth Management Act, Chap. 36.70A RCW, by allowing impermissible uses of agricultural lands, including sand and gravel excavation as **conditional** uses. Allowing rock crushing as a **permitted** use is even less appropriate in agricultural zones, and is clearly inconsistent with the recent Supreme Court decision. Allowing rock crushing in agricultural zones is not the type of protection that the State Supreme Court has told the County is necessary under the GMA. As noted above, if the Board's interpretation of KCC 17.29.020(13) were correct then "processing of products produced on the premises" would permit **oil refining** because oil exploration and production are permitted uses in agricultural zones. *See* KCC 17.28.020(17); KCC 17.28A.020(18); KCC 17.29.020(A)(16). Such an intensive, industrial use is obviously incompatible with agricultural uses and the preservation of agricultural lands.

In sum, the Board erroneously concluded that rock crushing is a permitted use in the A-20 zone. The language, context and overall

structure of the zoning code clearly shows that “Processing of products produced on the premises” refers to agricultural products. “Rock crushing” is a distinct use that is not permitted in agricultural zones. Because rock crushing is neither a permitted nor conditional use in the A-20 zone, Gibson’s application for rock crushing must be denied.<sup>1</sup>

**B. The County’s issuance of a DNS was must be reversed.**

The DNS issued by the County must be reversed for two reasons. First, the County violated clear SEPA regulations regarding the use of existing environmental documents. *See* Chap. 197-11 Part Six – Using Existing Environmental Documents (WAC 197-11-600 et seq.). Second, the record shows that no meaningful SEPA review of the project occurred before the County issued the DNS.

**1. The County violated the SEPA rules governing the use of existing environmental documents (WAC 197-11-600 et seq.).**

The SEPA checklist submitted by Gibson with the CUP application was merely a copy of the 2008 DNR environmental checklist that had been altered to revise the description of Gibson’s proposal. CP 130, 269. The altered checklist increased the size of the proposal to 84

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<sup>1</sup> In approving the CUP, the Board also found that the project met the CUP requirements in KCC 17.60A.010 were met. Ex. 3 at 2 (Findings 13-15). Presumably these findings apply to the proposed gravel extraction because gravel extraction is a conditional use in the A-20 zone. KCC 17.29.030(25). To the extent these findings suggest that rock crushing is appropriate in the A-20 zone these findings are based on the Board’s erroneous determination that rock crushing is a permitted use.

acres, and added rock crushing, screening, and washing, as well as temporary plants for concrete, asphalt, and concrete recycling. *Id.* Given that the rest of the 2008 SEPA checklist was unchanged, it is clear that Gibson gave no serious consideration to the impacts of his current proposal.

ECP repeatedly told the County that SEPA has specific rules governing the use of existing environmental documents, and that the County could not simply reuse the 2008 environmental checklist for a larger proposal with new significant environmental impacts. CP 215, 221. In response, the County erroneously argued that the SEPA environmental checklist is merely “optional,” and that the County had properly reused the 2008 checklist. CP 202-205. The Board apparently agreed, and upheld the DNS. CP 103.<sup>1</sup>

Numerous provisions of the SEPA rules (Chapter 197-11 WAC) confirm that the use of the SEPA environmental checklist is mandatory. WAC 197-11-315 provides, in relevant part:

**Environmental checklist.**

(1) Agencies **shall** use the environmental checklist substantially in the form found in WAC 197-11-960 to assist in making threshold determinations for proposals...

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<sup>1</sup> Although denominated a “finding of fact,” the Board’s determination that the County “followed all of the proper procedures in the SEPA process,” CP 103 is an erroneous conclusion of law.

[exceptions not applicable]...

(2) For projects submitted as planned actions under WAC 197-11-164, a GMA county/city shall use the existing environmental checklist or modify the environmental checklist form to fulfill the purposes outlined in WAC 197-11-172(1), notwithstanding the requirements of WAC 197-11-906(4).

If the GMA county/city chooses to modify the existing environmental checklist, the modified form shall be submitted to the department of ecology to allow at least a thirty-day review prior to use. The department shall notify the GMA county/city within thirty days of receipt if it has any objections to the modified form and the general nature of the objections. If the department objects, the modified form shall not be used until the GMA county/city and the department have reached agreement...

(4) The lead agency **shall** prepare the checklist or require an applicant to prepare the checklist. (Emphasis added).

In addition, WAC 197-11-906 states that the provisions of Chapter 197-11 are generally **mandatory**, and specifies when the provisions of the Chapter are optional or permissive. WAC 197-11-909(4) specifically addresses the environmental checklist:

The forms in Part Eleven shall be used substantially as set forth. Minor changes are allowed to make the forms more useful to agencies, applicants, and the public, as long as the changes do not eliminate requested information or impose burdens on applicants. **The questions in Part Two of the environmental checklist shall not be altered.**

WAC 197-11-909(4) (emphasis added). This unambiguous prohibition on alteration of the environmental checklist confirms that the checklist is

mandatory. If the checklist were optional, as the County suggests, the prohibition would serve no purpose.

The prescribed form for the Environmental Checklist is set forth in WAC 197-11-960. The instructions on the form state that agencies use the checklist to determine whether an EIS is required, and that the applicant **“must answer each question accurately and carefully, to the best of your knowledge.”** WAC 197-11-960 (emphasis added). This language further confirms that the checklist is mandatory.

Numerous other provisions of Chapter 197-11 confirm that the environmental checklist is mandatory. *See* WAC 197-11-060(2)(b) (the content of environmental review “is specified in the environmental checklist”); WAC 197-11-340(2)(b) (“The responsible official shall send the DNS and environmental checklist to agencies with jurisdiction...”); WAC 197-11-720 (environmental checklist is *not* required where an action is categorically exempt); WAC 197-11-970 (DNS form states that decision to issue DNS “was made after review of a completed environmental checklist”); WAC 197-11-985 (form for assumption of lead agency status states that the agency has reviewed the environmental checklist). And numerous SEPA cases state that the environmental checklist is mandatory. *See City of Federal Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 24, n.6, 252 P.3d 382 (2011); *Moss v. City*

*of Bellingham*, 109 Wn. App. 6, 31 P.3d 703 (2001); *Magnolia Neighborhood Planning Council v. City of Seattle*, 155 Wn. App. 305, 310, 230 P.3d 190 (2010); *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 414, 225 P.3d 448 (2010); *Anderson v. Pierce County*, 86 Wn. App. 290, 295, 936 P.2d 432 (1997); *Indian Trail Property Owner's Ass'n v. City of Spokane*, 76 Wn. App. 430, 432, 886 P.2d 209 (1994); *Pease Hill Community Group v. County of Spokane*, 62 Wn. App. 800, 810, 816 P.2d 37 (1991); *Brown v. City of Tacoma*, 30 Wn. App. 762, 764-65, 637 P.2d 1005 (1981).

The County's brief cited WAC 197-11-100 for the proposition that the environmental checklist is optional. CP 202. WAC 197-11-100(1) states that "An applicant may be required to complete *the* environmental checklist in WAC 197-11-960 in connection with filing an application." (Emphasis added). This provision merely recognizes that (i) there are specific situations where a checklist is not required (*see* WAC 197-11-720 regarding Categorical Exemptions), and (ii) either the agency or the applicant shall prepare the checklist. WAC 197-11-315(4). Nothing in the section supports the County's argument that the environmental checklist is optional, or contradicts the other WAC provisions cited above and the extensive body of case law recognizing that the checklist is mandatory unless the project is categorically exempt.

Because the SEPA environmental checklist is a mandatory SEPA document, the County was required to comply with the SEPA regulations regarding the use of existing environmental documents. *See* WAC 197-11-600 et seq. “Environmental document” is defined as follows:

**“Environmental document” means any written public document prepared under this chapter.** Under SEPA, the terms environmental analysis, environmental study, environmental report, and environmental assessment do not have specialized meanings and do not refer to particular environmental documents (unlike various other state or federal environmental impact procedures). (Emphasis added).

WAC 197-11-744 (emphasis added). The environmental checklist is a written public document defined by WAC 197-11-742, and required by WAC 197-11-100, -315. *See* section (A) (above). Therefore the environmental checklist is an “environmental document.”

In order to use an existing environmental checklist (or any other existing environmental document) for a new proposal, an agency must use one (or more) of four formal methods: (a) “Adoption,” (b) “Incorporation by reference,” (c) preparation of an “addendum,” or (d) preparation of a supplemental environmental impact statement (SEIS). WAC 197-11-600(4). Specific procedures for each of these four methods are set forth in WAC 197-11-620, -625, -630, and -635. In addition, the terms “adoption,” “incorporation by reference,” and “addendum” are specifically

defined in WAC 197-11-706, -708, and -754. *See also* WAC 197-11-965 (adoption notice form).

Case law confirms that these rules must be followed. *See Thorton Creek Legal Defense Fund v. Seattle*, 113 Wn. App. 34, 51-52, 52 P.3d 522 (2002) (agency should have adopted existing SEPA document rather than incorporating it by reference). In *SEAPC v. Cammack II Orchards*, 49 Wn. App. 609, 744 P.2d 1101 (1987), the county issued an environmental impact statement for a planned housing development and an adjoining 31-lot subdivision. The applicant later withdrew its application for the planned housing development, leaving only the subdivision, which was approved. Project opponents argued, *inter alia*, that the county should have either (i) treated the application as a new proposal requiring the applicant to submit a new environmental checklist or (ii) utilizing the adoption procedure in WAC 197-11-630. The Court of Appeals disagreed, holding that the revised application was the same proposal for purposes of WAC 197-11-600(4)(a) because it had less environmental impact than the original proposal. 49 Wn. App. at 613.

In this case, Gibson applicant submitted a two year old checklist that had been submitted to a different agency for a different proposal involving substantially less acreage and less impacts. The County accepted this “recycled” environmental checklist for a project that will

have substantially more environmental impact than either the currently permitted use or the permit that was previously applied for with DNR. The County failed to employ any of the four allowable methods for the use of an existing environmental document under WAC 197-11-600 *et seq.* The Board's determination that the County "followed all of the proper procedures in the SEPA process," (CP 103) was erroneous as a matter of law.

**2. The DNS is clearly erroneous because no meaningful SEPA review of the project occurred before the County issued the DNS.**

Even assuming, *arguendo*, that the County was permitted to recycle the 2008 environmental checklist from DNR, the County's issuance of a DNS was clearly erroneous. The DNS is a SEPA threshold determination that this Court reviews under the "clearly erroneous" standard. *Kettle Range Conserv. Group*, 120 Wn. App. at 455. This Court must reverse the DNS if the Court is "left with the definite and firm conviction" that a mistake has been made. *Id.* at 456 (citing *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997)). In this case, the DNS is clearly erroneous because no meaningful SEPA review of the project occurred before the County issued the DNS.

"[T]he record of a negative threshold determination by a governmental agency must 'demonstrate that environmental factors were considered in a manner

sufficient to amount to prima facie compliance with the procedural requirements of SEPA.” The determination must be based upon information reasonably sufficient to determine the environmental impact of a proposal. (Citations omitted).

*Pease Hill*, 62 Wn. App. at 810 (quoting *Sisley v. San Juan Cy.*, 89 Wn.2d 78, 85, 569 P.2d 712 (1977)). In *Pease Hill*, the Spokane County Board of Adjustment issued a CUP for a wood waste landfill. The Board’s decision included a mitigated determination of nonsignificance (MDNS) with ten required mitigation measures. A community group appealed, arguing that the Board erred in issuing an MDNS and that an EIS was required. 62 Wn. App. at 809. The appellate court disagreed:

A review of the record demonstrates that the Board did a complete and thorough review of the project prior to issuing the final MDNS and conditional use permit. Comments on the DNS were received from several of those agencies and based on those comments the zoning adjuster withdrew the DNS on April 14, 1988. Mr. Loshbaugh, responding to the environmental concerns which had been raised, and the Spokane Planning Department, pursuant to WAC 197-11-335, sought additional information from various agencies. Significantly, no agency recommended an EIS be required. On July 21, 1988, a MDNS was issued pursuant to WAC 197-11-350. It set forth 10 mitigating measures. On September 14, 1988, the zoning adjuster held a public hearing and issued a summary decision on October 10, 1988, denying the conditional use permit. This determination was appealed and the Board held two public hearings on that appeal, reversed the zoning adjuster, and granted the permits. The record of those hearings further demonstrates an examination of SEPA policies and environmental concerns. The Board’s decision not to require an EIS is not clearly erroneous.

*Pease Hill*, 62 Wn. App. at 810.

In contrast, the County failed to conduct a complete and thorough review of the environmental impacts of the proposal. The recycled environmental checklist submitted by Gibson did not address any of the impacts of rock crushing or any of the other uses proposed by Gibson. There was no consideration of the effects of rock crushing, washing, concrete and/or asphalt plants on noise, dust, toxins, odors, vibration, water or traffic. There is no evidence that any studies or additional information was obtained before the DNS was issued. Unlike the MDNS in *Pease Hill*, the DNS did not require any mitigation measures whatsoever. Nothing in the record indicates that the County gave any consideration whatsoever to the likely impacts of the project.

In sum, the record demonstrates that the County did *not* sufficiently consider the environmental impacts of the proposal, and that the DNS was *not* based on “information reasonably sufficient to determine the environmental impact of a proposal.” *Pease Hill*, 62 Wn. App. at 810. The DNS is clearly erroneous. The CUP must be reversed and remanded to the County for compliance with SEPA.

**C. The County failed to provide an open record hearing on ECP's SEPA appeal.**

When ECP appealed the DNS, the County notified the parties that the Board would hold only a closed record appeal hearing on the DNS. CP 196. ECP objected, explaining that a local agency cannot hold a closed record SEPA appeal without first providing an open record hearing. CP 146-147. The County responded by directing ECP to Chapter 15A.07 KCC, which had recently been amended to omit any provisions for an open record SEPA appeal hearing. CP 148. The County Attorney later instructed the Board to provide only a closed record appeal hearing, without allowing any testimony, evidence, or additional argument. CP 108-109.

At the hearing, the Board followed the County Attorney's instructions. ECP was not allowed to present any evidence or argument. The members did not ask any substantive questions or engage in any meaningful discussion before voting to deny the SEPA appeal. CP 31-34, 103.<sup>1</sup>

It is unclear why the County amended Chapter 15A.07 KCC to omit provisions for an open record SEPA appeal. **However, state law**

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<sup>1</sup> The Board made a "finding of fact" that the Board held a closed record hearing on ECP's SEPA appeal. CP 103. That finding is accurate as a purely

**unambiguously requires an open record hearing before a local agency hear a closed record appeal from such a hearing.** RCW 36.70B.020(1) provides the following definition:

(1) “Closed record appeal” means an administrative appeal on the record to a local government body or officer, including the legislative body, **following an open record hearing** on a project permit application when the appeal is on the record with no or limited new evidence or information allowed to be submitted and only appeal argument allowed. (Emphasis added)

WAC 197-11-721 also defines a “closed record appeal” as an administrative appeal “following an open record hearing on a project permit application.” In addition, RCW 36.70B.060(6) provides that, while a local agency is not required to provide a closed record appeal at all, such an appeal can only occur after an open record hearing has been provided.

(6) Except for the appeal of a determination of significance as provided in RCW 43.21C.075, if a local government elects to provide an appeal of its threshold determinations or project permit decisions, the local government shall provide for no more than one consolidated open record hearing on such appeal. The local government need not provide for any further appeal and may provide an appeal for some but not all project permit decisions. ***If an appeal is provided after the open record hearing, it shall be a closed record appeal before a single decision-making body or officer...*** (Emphasis added)

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factual matter. But the Board did not address or rule upon ECP’s argument that an open record hearing was required.

These provisions definitions clearly state that a closed record appeal can only occur after an open record hearing has been held. Because the County never provided an open record hearing on ECP's SEPA appeal, the Board was not permitted to provide only a closed record appeal.

Other provisions of the County's own code show that a closed record appeal must follow an open record hearing. KCC 15A.02.030 defines "closed record appeal" as follows:

"Closed record appeal" means an administrative appeal on the record to a local government body or officer, including the legislative body, **following an open record hearing** on a project permit application when the appeal is on the record with no or limited new evidence or information allowed to be submitted and only appeal argument allowed. (Emphasis added)

Furthermore, KCC 15A.01.040 clearly states that the Board must provide an open record hearing on a SEPA appeal where, as here, the Board makes the decision on the underlying CUP:

**5. Board of Adjustment.** The board of adjustment shall review and act on the following subjects: ...

b. Conditional use permits pursuant to the zoning code, KCC Title 17 ...

d. Open record appeals of administrative SEPA actions when the board of adjustment makes decision on, or hears appeals of, the underlying action.

Because the Board made the decision whether to approve the CUP, this provision confirms that the Board was required to provide an “open record” appeal of the SEPA decision.

It should be obvious that a meaningful closed record appeal cannot occur unless and until an open record hearing has been held. Because ECP, as the appellant, was not allowed to submit any evidence or argument after the SEPA threshold determination was made, there was virtually nothing for the Board to review in deciding ECP’s appeal. The hearing record shows that the Board members were not happy with the constraints that were placed on their decision-making, and that the Board members did not ask any substantive questions or engage in any meaningful discussion before voting to deny the SEPA appeal. CP 33-34.

The memorandum submitted by the County’s attorney to the Board asserts that the amended SEPA appeal process was “designed” by the Board of County Commissioners to eliminate oral argument, witness testimony and the presentation of additional evidence. CP 108. This suggests that the County wanted to reduce the time and resources devoted to SEPA appeals. This may or may not be a salutary political goal, depending on one’s perspective. Unfortunately for the County, the decision to provide only a closed record appeal is unlawful. Under SEPA, local agencies are not required to provide any administrative appeals from

threshold determinations. RCW 43.21C.075(3). But if such an appeal process is provided then it must start with an open record hearing so that a record can be made based on the adequacy of the actual threshold determination. RCW 36.70B.020(1); RCW 36.70B.060(6).

The County's failure to provide an open record hearing on ECP's SEPA appeal was erroneous as a matter of law. The CUP must be reversed and remanded to the County for compliance with SEPA.

## VI. CONCLUSION

For all these reasons, this Court should reverse the decision of the Board. Rock crushing is neither a permitted nor conditional use in the A-20 zone, and Gibson's application for rock crushing must be denied. In addition, the County failed to comply with SEPA in issuing a DNS for the CUP for the expanded gravel pit operation. The CUP must be reversed and remanded to the County for compliance with SEPA.

Respectfully submitted this 20<sup>th</sup> day of January, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served on January 20, 2012 a true and correct copy of the foregoing document to the parties listed below, via the method indicated:

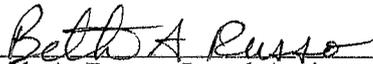
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DATED this 20<sup>th</sup> day of January, 2012.

  
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