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No. 88165-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ELLENSBURG CEMENT PRODUCTS, INC.
Appellant,

v.

KITTITAS COUNTY,
Respondent,

v.

HOMER L. (LOUIE) GIBSON,
Respondent.

SUPPLEMENTAL BRIEF OF HOMER L. (LOUIE) GIBSON

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ORIGINAL

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I. Introduction.

This case presents issues that have plagued in site-specific land use planning over the years. A simple, straight forward and noncontroversial land use proposal gets derailed and delayed through procedural wrangling and gamesmanship. All consulted agencies, county departments, adjacent land owners and appointed appellate officials concurred that the proposed gravel mining expansion was appropriate at the site and complied with all applicable laws. The sole opposition came from Gibson's primary competitor – Ellensburg Cement Products (ECP).

The legislature sought to remove these tactics from the land use planning process. Deference was extended to local jurisdictions in both interpretation of adopted ordinances and implementation of review procedures. Review and administrative hearing processes were simplified, consolidated and structured to avoid unnecessary delay, expense and uncertainty. RCW 36.70B.010, *et seq.*[1] Regulatory Reform was supplemented by clear legislative direction recognizing deference to local jurisdictions in land use matters.

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[1] The 1995 Regulatory Reform amendments stem from a legislative recognition that numerous and duplicative environmental review and permit requirements were creating an excessive and unnecessary regulatory burden, adding to costs and causing delay in the review and issuance of local and state land use permits. 1995 c 347 § 401. This legislation came to be known as "Regulatory Reform". 1995 c 347 Part IV-Local Permit Process. The manner of implementation was left to local jurisdictions. RCW 36.70B.050.

> The legislature finds that while this chapter requires local planning to take place within a framework state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

RCW 36.70A.3201. The legislative deference to local decision-making was consistent with decades of judicial deference to local authority in land use matters. Despite the clear call to respect local decision-making and processes, the parties now find that these fundamental premises will be tested in this court.

II. Assignments of Error.

A. Court of Appeals erred in failing to provide deference to local jurisdiction's interpretation of ordinance as required by RCW 36.70C.120(1)(b).

B. Court of Appeals erroneously concluded that a local jurisdiction was obligated as a matter of law to provide one open record hearing on an administrative appeal of a SEPA threshold determination.

III. Statement of the Case.

Homer L. (Louie) Gibson ("Gibson" or "Respondent") owns and operates a sand and gravel excavation and processing business located

primarily in Kittitas County, Washington. The salient facts are straight forward and undisputed.

Gibson filed an application to expand its existing excavation and processing activities on to adjacent properties. (CP 265-279). Mining and processing had been conducted on the site since 1982. (CP 262). The proposal did not introduce a new use or activity. It simply sought to expand the operation to adjacent property (CP 35).

The property is zoned A-20 (Agricultural) and designated "Rural" under the Kittitas County Comprehensive Plan (CP 192). "Sand and gravel excavation" is permitted through a conditional use permit. KCC 17.29.030. KCC 17.29.020(A)(13) also allows "processing of products produced on the premises." Attachment A. The issue presented is whether the ordinance allows processing of sand and gravel excavated on the premises.

Kittitas County Community Development Services (CDS) is vested with sole responsibility for administering and enforcing the local zoning ordinance. KCC 17.04.020 and .040 (Administration, enforcement and interpretation). CDS determined that "... [p]rocessing of *products produced on the premises* is a permitted use in the Ag-20 zone." (CP 36 and 192). Gibson was authorized to process (wash, crush, screen and stockpile) sand and gravel removed through the excavation process. The

authorization did not allow processing of off-site materials or the operation of asphalt or concrete batch plants. Board of Adjustment concurred in this interpretation.

ECP challenged the local jurisdiction's interpretation of its zoning ordinance. It argued that processing on products produced on-site was limited to "agricultural products". Division III found the ordinance unambiguous and limited on-site processing to *agricultural* products.

> Because the phrase "processing of products produced on the premises" is not ambiguous, we need not consider the issue of deference to the County or the impact of construing the ordinance in the light most favorable to the property owner.

Ellensburg Cement Products, Inc., 171 Wn. App. at 706.

The second issue arises from a challenge to the administrative review procedures adopted by Kittitas County with respect to SEPA environmental threshold decisions.[2] Kittitas County followed all ordinance and regulatory procedures in processing the application and conducting environmental review. Notice of Application was published, posted and mailed to adjacent property owners, county departments and

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[2] SEPA Responsible Official is responsible for evaluating environmental information and issuing a "threshold decision" regarding preparation of an environmental impact statement. WAC 197-11-330. Upon review of a threshold decision, a reviewing body must be mindful that "the decision of the governmental agency shall be accorded substantial weight." RCW 43.21C.090. A governmental agency's threshold determination is reviewed under the clearly erroneous standard. *Norway Hill Preserv. & Protect. Ass'n. v. King Cy. Coun.*, 87 Wn.2d 267, 275, 552 P.2d 674 (1976).

government agencies. (CP 192; 261-263; 282; and 325-326). Not a single commenting agency objected to the permit application, identified unaddressed adverse environmental impacts, or objected to the issuance of a Determination of Nonsignificance (DNS). (CP 256-260). All neighbors expressed support for the project. (CP 186 and 189-190). And Department of Natural Resources (DNR) had previously determined that the same proposal did not have significant environmental impacts and issued a surface mining permit. (CP 164-172). The sole party raising objections was Gibson's competitor – Ellensburg Cement Products. (CP 247-251).

Kittitas County SEPA Responsible Official is responsible for issuance of a "threshold decision". KCC 15.04.040. As lead agency, CDS considered the application, environmental documents, agency and public comments and applicable regulations. Included in the review were all of ECP's arguments and contentions. [3] Based on this record, SEPA

[3] ECP submitted through legal counsel comments on the Notice of Application. (CP 309-313). The comments were provided on August 12, 2010. The comments included the following: (1) the application was facially defective because of requested rock crushing and asphalt plant authorization; (2) Gibson was purportedly in violation of the existing permit; (3) challenges to the incorporation of the 2008 DNR SEPA Environmental Checklist; and (4) purported additional flaws in the review process including noise impact analysis, studies related to dust control and air quality impacts, issues related to blasting and vibration, traffic impact analysis (i.e. increased truck traffic on Park Creek Drive), and other miscellaneous and unsubstantiated contentions. ECP provided no substantive evidence with respect to purported impacts.

Responsible Official issued a Determination of Nonsignficance (DNS) on October 21, 2010. (CP 244).

ECP appealed the threshold environmental determination (DNS) on November 2, 2010.[4] (CP 238-243 and 229-237). Under Kittitas County ordinance, appeals are limited to "... review of the county's *procedural compliance* with Chapter 197-11 WAC." KCC 15.04.210.[5] An administrative appeal of DNS is considered by Kittitas County Board of Adjustment. KCC 15.04.210 and 15A.04.020(3). Administrative review is based upon the record established before the SEPA Responsible Official. KCC 15A.07.010(2). KCC 15A.07.020 specifically provides:

> 1. Administrative appeals shall serve to provide argument and guidance for the body's decision. *No new evidence or testimony shall be given or received.* The briefing shall not contain new evidence, testimony, or declarations, *but shall consist only of legal arguments based upon the documents comprising the record as transmitted to the parties by the relevant officer.* The parties to the appeal shall submit timely written statements or arguments to the decision-making body.

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[4] ECP literally reprinted its earlier comments. The appeal letter was a literal reprinting of ECP's prior SEPA comments as contained in correspondence dated August 12, 2011. (CP 302-307). SEPA Responsible Official had fully considered the comments before issuance of the threshold decision on October 21, 2010. (CP 244).

[5] This appeal standard is consistent with the fact that "... SEPA is essentially a procedural statute to ensure that environmental impacts and alternatives are properly considered by the decision-makers." *Save Our Rural Environment v. Snohomish County*, 99 Wn.2d 363, 371, 662 P.2d 816 (1983). "SEPA does not demand a particular substantive result in government decision-making; rather, it ensures that environmental values are given appropriate consideration." *Glasser v. City of Seattle*, 139 Wn. App. 728, 742, 162 P.3d 1134 (2007).

> 2. The hearing body shall deliberate on the matter in public in the manner of a closed record hearing and reach its decision on the appealed matter.

All parties were allowed to submit written argument based on the administrative record. ECP filed its appellate brief on March 10, 2011 (CP 207-226). Kittitas County and Gibson filed responsive briefs. (CP 198-206 and 191). BOA had authority to affirm, reverse or remand if it is determined that the "record on appeal is insufficient or otherwise flawed". KCC 15A.07.040. ECP did not request a remand under the ordinance. BOA considered the administrative record and written argument of the parties and unanimously denied the SEPA Appeal. (CP 34-35).

IV. Argument.

Court of Appeals held that (1) local governments are *obligated* to provide at least one "open record hearing" on administrative appeals pursuant to RCW 36.70B.060(6); and (2) appellate courts are not required to apply statutory deference to a local jurisdiction's interpretation of its zoning ordinance. Both determinations are contrary to law and precedent.

A. RCW 36.70B.060(6) Does Not Mandate or Obligate Local Jurisdictions to Provide an "Open Record Hearing in Administrative Land Use Appeals.

Division III sustained a collateral attack on Kittitas County's administrative review procedures applicable to SEPA threshold

determinations. The court concluded "... that the County's failure to provide one open record hearing on the SEPA appeal was erroneous as a matter of law." *Ellensburg Cement Products, Inc.*, 171 Wn. App. at 695. This holding is in direct conflict with RCW 36.70B.060(6) and WAC 197-11-680(2) and (3).

As a beginning proposition, local jurisdictions are granted broad authority to establish or eliminate administrative appeals from SEPA decisions. RCW 43.21C.060 (authorizing elimination of appeals). WAC 197-11-680(2) provides:

> *Agencies may establish procedures for such an appeal or may eliminate such appeals altogether, by rule, ordinance or resolution.* Such appeals are *subject to the restrictions* in RCW 36.70B.050 and 36.70B.060 that local governments provide no more than one open record hearing and one closed record appeal for permit decisions.

WAC 197-11-680(2) (Emphasis added). RCW 36.70B.060 sets forth the applicable restrictions as follows:

> 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 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 an open record hearing, it shall be a closed record appeal before a single decision-making body or officer; ... .*"

(Emphasis added). The sole limitation or *restriction* on the exercise of local authority is that there be (1) no more than one open record hearing; and (2) no more than one closed record appeal for permit decisions. *See also*, RCW 36.70B.050(2) (Except for the appeal of a determination of significance as provided in RCW 43.21C.075, *provide for no more than one open record hearing and one closed record appeal.*) Kittitas County complied with the statutory restrictions.

ECP utilized the site specific permit review as a vehicle to collaterally attack Kittitas County procedures. The local procedures are evaluated in the context under the Washington Constitution article XI, section 11. ("Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.") An ordinance is invalid "... if it directly and irreconcilably conflicts with the statute." *Lawson v. City of Pasco,* 168 Wn.2d 675, 687, 230 P.3d 1038 (2010). If the ordinance and statute may be harmonized, no conflict will be found. *Brown v. City of Yakima,* 116 Wn.2d 556, 559, 807 P.2d 353 (1991). Irreconcilable conflict cannot be predicated upon unstated or inferred meanings.

Court of Appeals inverted the statutory restriction and held that Kittitas County was *obligated* to provide an open record environmental appeal hearing. Court of Appeals' reasoned:

> This interpretation ignores the fact that the first sentence of RCW 36.70B.060(6) states that if a local government elects to provide an appeal, "the local government shall provide no more than one consolidated open record hearing on such appeal." *While perhaps cryptic, this sentence is based on the assumption that there will be at least one open hearing.* The phrase "the local government *shall provide for no more than one* consolidated open record hearing" indicates that the local government *shall provide* one open hearing. *This language does not provide that the local government can elect to have only a closed hearing.*

Ellensburg Cement Products, 171 Wn. App. at 711-12. The court is not authorized to make *assumptions* that are not in the clear from language of the statute. *Vita Food Products, Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978) ("It is not within our power to add words to a statute even if we believe the legislative intended something else but failed to express it adequately."); *Multi-Care Medical Center v. DSHS*, 114 Wn.2d 572, 591, 790 P.2d 124 (1990) (overruled on other grounds – "... The court may not speculate as to the intent ... ."). Interestingly, the administrative review procedures were virtually identical to judicial review of a threshold decision under LUPA. RCW 36.70C.110 and .120. The appellate review is on the record with limited rights to supplement the record. *Id.*

Division III's decision is also contrary to the intent and purpose of Regulatory Reform. The purpose of Regulatory Reform was to reduce complexity and expense associated with local project review. *Id.*

> The 1995 Regulatory Reform amendments stem from a legislative recognition that numerous and duplicative environmental review and permit requirements were creating an excessive and unnecessary regulatory burden and adding significantly to the costs and time needed to obtain local and state land use permits. These provisions create new project review requirements designed to simplify and streamline the permit review process and afford increased predictability to permit decisions.

24 Wash. Prac. Environmental Law and Practice Section 18.31 (2d Ed.). Kittitas County's procedures were adopted in accordance with Regulatory Reform. RCW 36.70B.010. Division III has now added to the time, expense and complexity of permit processing.

Finally, Division III operated under a flawed understanding of environmental review standards and processes by requiring an additional open record hearing. It reasoned as follows:

> ECP describes the practical side to this controversy. ECP asserts that a meaningful closed record appeal cannot take place unless an open record hearing has been held. Because ECP was not allowed to submit any evidence or argument after the SEPA threshold decision was made, there was nothing for BOA to review in deciding the appeal.

Ellensburg Cement Products, Inc., 171 Wn. App. at 712-13. ECP was provided an opportunity to submit written argument and there were no claims that the procedure violated due process rights. (CP 207-226). Neither judicial nor administrative appeal processes involve substantive fact finding. An appeal of a SEPA threshold determination is reviewed

under the "clearly erroneous" standard which is an erroneous application of law to a set of facts. *Norway Hill Preserv. & Protect. Ass'n. v. King Cy. Coun.*, 87 Wn.2d 267, 274-75, 552 P.2d 674 (1976) (the clearly erroneous standard allows for the reviewing body to give substantial weight to the agency determination while considering the public policy contained in SEPA). The review is on the record and, if the record is insufficient, the matter is remanded to the SEPA Responsible Official.

B. Court of Appeals Failure to Provide Deference to Local Interpretation of Zoning Ordinance is Contrary to Statutory and Judicial Directives and Common Law Property Rights.

Kittitas County Code authorizes "sand and gravel excavation" and allows "processing of products produced on the premises" in the AG—20 zoning district. KCC 17.29.020(m) and .030(25).[6] Court of Appeals found that the language was unambiguous and on-site processing was limited to *agricultural products*:

> Because the phrase "processing of products produced on the premises" is not ambiguous, *we need not consider the issue of deference to the County or the impact of construing the ordinance in the light most favorable to the property owner.*

Ellensburg Cement Products, Inc., 171 Wn. App. at 706. (Italics added).

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[6] Kittitas County follows a logical permit process. The more intrusive activity is "sand and gravel excavation." It is the excavation activity that disturbs the soil, removes material and provides the "product" for processing. The excavation component requires a conditional use permit. The ordinance then *allows* (without conditional use permit) the "processing of products produced on the premises." It is logical, efficient and economic to process extracted material on-site.

The legislature has established a clear standard for review of interpretations of local ordinances. RCW 36.70C.130(1)(b). LUPA requires deference to a local jurisdiction with expertise.

> The land use decision is an erroneous interpretation of the law, *after allowing such deference as is due the construction of the law by a local jurisdiction with expertise; ... .*

RCW 36.70C.130(1)(b). The courts have consistently applied this statutory directive in land use cases. See e.g. *Milestone Homes, Inc. v. City of Bonney Lake*, 145 Wn. App. 118, 127-128, 186 P.3d 357 (2008) ("in any doubtful case, the court should give great weight to the contemporaneous construction of an ordinance by the officials charged with its enforcement."); *Pinecrest Homeowners Association v. Colninger & Assoc.*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004) (Supreme Court's review of city ordinance must accord deference to City Council's expertise); *Citizens to Preserve Pioneer Park, LLC v. City of Mercer Island*, 106 Wn. App. 461, 475, 24 P.3d 1079 (2001) (Courts generally accord deference to an agency's interpretation of an ambiguous statute).

The foundation and rationale for judicial deference was set forth in in *Mall, Inc. v. City of Seattle*, 108 Wn.2d 369, 377, 739 P.2d 668 (1987).

> In the context of a zoning case, this court has explained the reasons for this rule of deference is as follows:

> The primary foundation and rationale for this rule is that considerable judicial deference should be accorded to the special expertise of administrative agencies. Such expertise is often a valuable aid in interpreting and applying an ambiguous statute in harmony with the policies and goals the legislature sought to achieve by its enactment. At times, administrative interpretation of a statute may approach "law making" but we have heretofore recognized that it is an appropriate function of administrative agencies to "fill in the gaps" where necessary to the effectuation of a general statutory scheme ... . It is likewise valid for an administrative agency to "fill in the gaps" via statutory construction – as long as the agency does not purport to "amend" the statute.

(citation omitted). *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975). Kittitas County is in the best position to interpret, construe and "fill-in the gaps" in its ordinances.

This Court has recognized the legislature's clear direction to grant deference to local decision-making in land use matters. *Phoenix Development, Inc. v. City of Woodinville,* 171 Wn.2d 820, 256 P.3d 1150 (2011). In *Phoenix Development*, this Court reaffirmed the well-established principle that a "reviewing court gives considerable deference to the construction of the *challenged ordinance* by those officials charged with its enforcement." 171 Wn.2d at 830. An analogy was then drawn to Growth Management Act (GMA):

> When construing an ordinance, a "'reviewing court gives considerable deference to the construction of' the

> challenged ordinance 'by those officials charged with its enforcement.'" [citations omitted.] Although this is not a Growth Management Act (GMA) (ch. 36.70A RCW) case, to the extent that the GMA is implicated, we note that GMA does not prescribe a single approach to growth management. *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 125, 118 P.3d 322 (2005). Instead, the legislature specified that "'the ultimate burden and responsibility for planning, harmonizing the planning goals of [the GMA], and implementing a county's or city's future rests with that community.'" ... *Thus, the GMA acts exclusively through local governments and is to be construed with the requisite flexibility to allow local governments to accommodate local needs.* *Id.* at 125-26, 118 P.3d 322. *These principles of deference apply to a local governments' site-specific land use decisions where the GMA considerations play a role in its ultimate decision.*

(Emphasis added). *Id.* at 830.[7] GMA is clearly implicated with regard to mineral and agricultural resource lands.[8] A court should reject deference only if there is "a compelling indication" that the interpretation "conflicts with the legislative intent or is in excess of the agency's authority." *Silverstreak, Inc. v. Wash. State Dept. of Labor & Indust.*, 159 Wn.2d 868, 884, 154 P.3d 891 (2007).

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[7] *Phoenix Development* was based upon a developer's land use petition challenging the city's denial of a site-specific rezone and subdivision. City of Woodinville's zoning ordinance provided that a rezone shall be granted only if "... there is a demonstrated need for additional zoning as the type proposed." *Id.* 171 Wn.2d at 831. The court deferred to the municipality's interpretation of "demonstrated need" and interpretation of its zoning ordinance.

[8] GMA carries a mandate to preserve and protect resource lands which include agriculture, forest and mineral lands of long-term commercial significance. RCW 36.70A.060. This site has not been designated agricultural lands of long-term commercial significance.

Division III found the ordinance to be unambiguous. *Ellensburg Cement Products, Inc.*, 171 Wn. App. at 704-05. The court acknowledged that the dictionary definitions of *process* and *produced* "... could be applied to rock crushing ... [b]ut the definition of 'product' is dispositive." *Id.* Under this interpretation, the ordinance term "product" is limited to "agricultural products."

To begin, an ordinance or statute is ambiguous when it "... it is susceptible to more than one meaning." *Shoreline Community College Dist. No. 7 v. Employment Security Dept.*, 120 Wn.2d 394, 405, 842 P.2d 938 (1993); and *Timberline Air Service, Inc. v. Bell Helicopter Textron, Inc.*, 125 Wn.2d 305, 312, 884 P.2d 920 (1994) ("... where a statute is susceptible to more than one meaning it is ambiguous ... .") There were clearly two plausible interpretations of the ordinance. Kittitas County CDS construed its ordinance and concluded that the term "product" encompassed sand and gravel excavation from the site. (CP 103). The courts have consistently recognized "... the well-known rule that we will uphold an agency's interpretation of its own regulations as long as the interpretation is plausible and not contrary to legislative intent." *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 45, 202 P.3d 334 (2009). Kittitas County's interpretation is certainly plausible.

Second, Division III's recital of the dictionary definition of "product" is neither complete nor accurate. The current and complete definition of "product" is as follows:

> 2 a. something produced by physical labor or intellectual effort : the result of work or thought <use for hammocks and other ~*s* – P.E. James> <even the simplist poem is the ~ of much ... work – Gilbert Highet>
>
> b: a result of the operation of involuntary causes or an ensuing set of conditions : CONSEQUENCE, MANIFESTATION <a ~ of liberal arts education – B.W. Hayward> <he was a ~ of his time – Allan Nevins>
>
> c: something produced naturally or as the result of a natural process (as by generation or growth <major ~*s* from forest lands ... are mahogany and chicle – *Americana Annual*>
>
> ***
>
> 4. A substance produced from one or more other substances as a result of chemical change

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 1810 (2002). The dictionary does *not* have a separate "agricultural" definition. Sand and gravel is "something produced naturally or as the result of a natural process." This definition is consistent with the other dictionary definitions. See e.g. Merriam Webster Advanced Learners Dictionary, 1290 (2008) (Product is defined as "something that is the result of a process."). And excavated sand and gravel is certainly "... something

produced by physical labor." Each of the referenced definitions supports the local jurisdiction's interpretation of its ordinance.

Third, Court of Appeals has effectively rewritten the ordinance language to permit only the "... processing of *agricultural* products produced on the premises." The word "agricultural" does not appear in the ordinance language. *Caritas Services, Inc. v. Department of Social and Health Services*, 123 Wn.2d 391, 409, 869 P.2d 28 (1994) ("A court may not add words to a statute even if it believes the Legislature intended something else but failed to express it adequately.")

Fourth, the court improperly applied the interpretive maxim *expressio unius est exclusio alterius. Ellensburg Cement Products, Inc.*, 171 Wn.2d at 705-06 ("... rock crushing is not allowed in A-20 because it is not listed as a permitted or conditional use.") Overlooked in the reasoning is the fact that "processing of *agricultural products*" is specifically covered by a separate ordinance provision. KCC 17.29.030(11) requires a conditional use permit for "... feedmills, canneries and *processing plants for agricultural products*." The application of *expressio unius est exclusio alterius* would actually support the County interpretation since processing of agricultural products is specifically covered within the same ordinance chapter.

Fifth, the local jurisdiction's interpretation is logical. Since sand and gravel excavation is allowed within the zone, the efficient and economic processing of such material should occur on-site. Division III makes the odd argument that a restrictive or narrow interpretation of the ordinance is appropriate because "the purpose of agricultural zones is to allow agricultural activities to exist with low density development and 'to preserve fertile farmland from encroachment by nonagricultural land uses.'" *Id.* 171 Wn. App. at 705. Processing does not convert farmland. Farmland is converted by the excavation of sand and gravel. And no one disputes the fact-that excavation is permitted at the site.

Finally, Court of Appeals also specifically rejected the well-established requirement that the ordinance must be construed "... in a light most favorable to the property owner." *Ellensburg Cement Products v. Kittitas County*, at 17. Zoning ordinances are in derogation of common law property rights and "should not be extended by implication to case not clearly within the scope of the purpose and intent manifest in their language." *Hauser v. Arness*, 44 Wn.2d 358, 370, 267 P.2d 691 (1954). This fundamental legal principle was reiterated in the leading case of *Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d 569 (1956):

> It must be remembered that zoning ordinances are in derogation of the common-law right of an owner to use private property so as to realize its highest utility. *Such*

> *ordinances must be strictly construed in favor of property owners and should not be extended by implication to cases not clearly within their scope and purpose.*

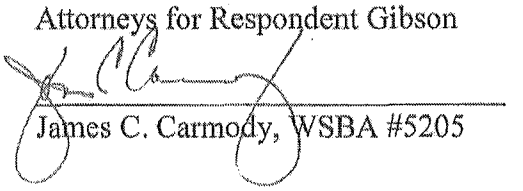
(Emphasis added). See also *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990 (2007). This court has deviated from this principle on only one occasion. *Development Services of America, Inc. v. City of Seattle*, 138 Wn.2d 107, 117, 979 P.2d 387 (1999). In *Development Services*, the court found that "... in any doubtful case, the court should give great weight to the contemporaneous construction of an ordinance by the officials charged with its enforcement." *Id.* In the present case, both principles militate in favor of the County's interpretation.

V. **Conclusion**

Respondent Gibson requests that Division III's decision be reversed and conditional use permit and associated processing right be affirmed.

DATED this 6th day of May, 2013.

Halverson Northwest Law Group P.C.
Attorneys for Respondent Gibson



James C. Carmody, WSBA #5205

CERTIFICATE OF SERVICE

I, Tori Durand, hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am the legal assistant to James C. Carmody, attorney for Respondent, HOMER L. (LOUIE) GIBSON, and am competent to be a witness herein.

On the 6th of May, 2013, I caused to be served via the method indicated below, a copy of the following documents:

- Supplemental Brief of Homer L. (Louie) Gibson.

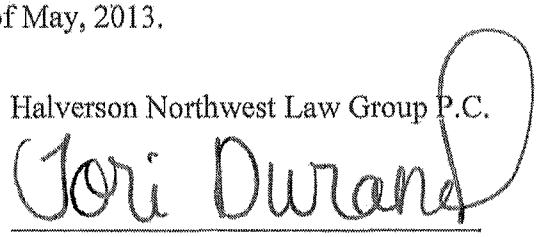
And a copy this Certificate of Service to:

Michael J. Murphy William J. Crittenden Groff Murphy, PLLC 300 East Pine Seattle, WA 98122 Attorneys for Ellensburg Cement Products	☒ Via UPS Overnight Mail ☒ Via Email: mmurphy@groffmurphy.com

Neil Caulkins Deputy Prosecuting Attorney Kittitas County, Washington Room 213, Kittitas County Courthouse 205 W. Fifth Avenue Ellensburg, WA 98926	☒ United States 1st Class Mail ☒ Via Email: neil.caulkins@co.kittitas.wa.us

DATED this 6th day of May, 2013.

Halverson Northwest Law Group P.C.



Tori Durand
Legal Assistant to James C. Carmody

VI. APPENDIX.

Attachment A

KCC 17.29 – A-20
Agricultural Zone

d. Adequate and convenient vehicular access, circulation and parking should be provided.
e. Economic and environmental feasibility;
f. Public health and safety of campers and those reasonably impacted by the campground (i.e. heath, water, sanitation)

22. Public utility substations
23. Riding academies
24. Room and board lodging involving no more than four boarders or two bedrooms
25. Sand and gravel excavation, provided that noncommercial excavation shall be permitted for on-site use without a conditional use permit
26. Stone quarries
27. Temporary offices and warehouses of a contractor engaged in construction (not to exceed two years). (Ord. 2009-25, 2009; Ord. 2007-22, 2007; Ord. O-2006-01, 2006; Ord. 2005-05, 2005)

17.28A.140 Administrative uses.
The following uses may be permitted in any A-5 zone subject to the requirements set forth in Chapter 17.60B.

1. Accessory Dwelling Unit (if outside UGA or UGN) (Ord. 2007-22, 2007)

Top

Chapter 17.29
A-20 - AGRICULTURAL ZONE*

Sections
17.29.010 Purpose and intent.
17.29.020 Uses permitted.
17.29.030 Conditional uses.
17.29.040 Lot size required.
17.29.050 Yard requirements - Front yard.
17.29.060 Yard requirements - Side yard.
17.29.070 Yard requirements - Rear yard.
17.29.075 Yard requirements- Zones adjacent to Commercial Forest Zone.
17.29.080 Yard requirements - Sale or conveyance restrictions.
17.29.090 Dimensional requirements.
17.29.100 Repealed.
17.29.110 Access.
17.29.120 Special setback requirements.
17.29.130 Administrative uses.

* For provisions on the right to farm for protection of agricultural activities, see Ch. 17.74. For provisions on the commercial agricultural and commercial agricultural overlay zones, see Ch. 17A.55. Prior history: Ords. 81-Z-1, 80-Z-2, 68-1.

17.29.010 Purpose and intent.
The agricultural (A-20) zone is an area wherein farming, ranching and rural life styles are dominant characteristics. The intent of this zoning classification is to preserve fertile farmland from encroachment by nonagricultural land uses; and protect the rights and traditions of those engaged in agriculture. (Ord. 83-Z-2 (part), 1983: Res. 83-10, 1983)

17.29.020 Uses permitted.

1. The following uses are permitted:
   a. One-family or two-family dwellings;
   b. Parks and playgrounds;
   c. Public and parochial schools, public libraries;
   d. Single family homes not including mobile homes or trailer houses;
   e. Duplexes and residential accessory buildings;
   f. All types of agriculture and horticulture not otherwise restricted or prohibited herein;
   g. Agriculture, livestock, poultry or swine or mink raising, and other customary agricultural uses, provided that such operations shall comply with all state and/or county health regulations and with regulations contained in this title related to feedlots;
   h. Community clubhouses, parks, playgrounds, public utility buildings, pumping plants and substations;
   i. Commercial greenhouses and nurseries;

j. Roadside stands for the display and sale of fruits and vegetables raised or grown on the premises when located not less than forty-five feet from the centerline of a public street or highway;
k. Existing cemeteries;
l. Airport;
m. Processing of products produced on the premises;
n. Forestry, including the management, growing and harvesting of forest products, and including the processing of locally harvested forest crops using portable equipment;
o. Home occupations that do not involve outdoor work or activities, which do not produce noise;
p. Gas and oil exploration and construction;
q. Uses customarily incidental to any of the above uses;
r. Any use not listed which is nearly identical to a listed use, as judged by the administrative official, may be permitted. In such cases, all adjacent property owners shall be given official notification for an opportunity to appeal such decisions to the county board of adjustment within ten working days of notification pursuant to Title 15A of this code, Project permit application process;
s. Accessory Dwelling Unit (if in UGA or UGN);
t. Accessory Living Quarters;
u. Special Care Dwelling;
v. Hay processing and container storage;
w. Electric Vehicle Infrastructure. See KCC Chapter 17.66.

2. Agriculture Study Overlay Zone: The list of permitted in subsection A shall apply, except that the following uses are not permitted:
   a. Parks and playgrounds;
   b. Public and parochial schools, public libraries;
   c. Duplexes and residential accessory buildings;
   d. Community clubhouses, parks, playgrounds, public utility buildings, pumping plants and substations;
   e. Airport;
   f. Gas and oil exploration and construction. (Ord. 2011-013, 2011; Ord. 2009-25, 2009; Ord. 2007-22, 2007; Ord. 92-1 (part), 1992; Ord. 83-Z-2 (part), 1983; Res. 83-10, 1983)

17.29.030 Conditional uses.
It is the intent of this code that all conditional uses permitted in this zone shall be subordinate to primary agricultural uses of this zone. The following are conditional uses:

1. Auction sales of personal property, other than livestock
2. Bed and breakfast business
3. Churches
4. Commercial Activities Associated with Agriculture
5. Convalescent homes
6. Dairying and stock raising except the raising of swine and mink commercially and the establishment of livestock feed lots; provided that no permit shall be issued for dairying or stock raising on any tract of land having an area of less than nine acres or for animal sheds or barns to be located less than one hundred feet from any property held under different ownership from that upon which such shed or barn is located
7. Day care facilities
8. Farm implement repair and maintenance business of a commercial nature, not to include automobiles, trucks or bikes
9. Farm labor shelters, provided that:
   a. The shelters are used to house farm laborers on a temporary or seasonal basis only, regardless of change of ownership, if it remains in farm labor-needed status;
   b. The shelters must conform with all applicable building and health regulations;
   c. The number of shelters shall not exceed four per twenty acre parcel;
   d. The shelters are owned and maintained by the owner or operator of an agricultural operation which clearly demonstrates the need for farm laborers;
   e. Should the parent agriculture operation cease or convert to non-agriculture use, then the farm labor shelters shall conform with all applicable building, zoning, and platting requirements or be removed
10. Feedlot. Feedlots existing at the time of adoption of the ordinance codified herein may expand or be enlarged only in compliance with standards and regulations

contained herein, and such operations shall comply with all state and/or county health regulations

11. Feed mills, canneries and processing plants for agricultural products
12. Golf courses
13. Governmental uses essential to residential neighborhoods
14. Guest ranches
15. Home occupations which involve outdoor work or activities, which produce noise
16. Hospitals
17. Kennels
18. Livestock sales yard
19. Log sorting yard
20. Museums
21. Private Campgrounds. In considering proposals for location of such campgrounds, the board of adjustment shall consider at a minimum the following criteria:
    a. Campgrounds should be located at sufficient distance from existing or projected rural residential/residential development so as to avoid possible conflicts and disturbances;
    b. Traffic volumes generated by such a development should not create a nuisance or impose on the privacy of nearby residences or interfere with normal traffic flow;
    c. Landscaping or appropriate screening should be required and maintained where necessary for buffering;
    d. Adequate and convenient vehicular access, circulation and parking should be provided;
    e. Economic and environmental feasibility;
    f. Public health and safety of campers and those reasonably impacted by the campground (i.e. heath, water, sanitation)
22. Public utility substations
23. Riding academies
24. Room and board lodging involving no more than four boarders or two bedrooms
25. Sand and gravel excavation, provided that noncommercial excavation shall be permitted for on-site use without a conditional use permit
26. Shooting ranges
27. Stone quarries
28. Temporary offices and warehouses of a contractor engaged in construction (not to exceed two years). (Ord. 2009-25, 2009; Ord. 2007-22, 2007; Ord. 2001-13 (part), 2001; Ord. 93-6 (part), 1993; Ord. 92-1 (part), 1992; Ord. 90-10 (part), 1990; Res. 83-10, 1983)

17.29.040 Lot size required.

1. Minimum lot (homesite) requirements in the agricultural (A-20) zone are:
    a. Twenty acres for any lot or parcel created after the adoption of the ordinance codified in this chapter, except that one smaller lot may be divided off any legal lot; provided such parent lot is at least eight acres in size; and provided, that such divisions are in compliance with all other county regulations (e.g., on-site septic system). Parcels must be located within the Agriculture-20 zone at the date of the adoption of this code. Once this provision has been applied to create a new parcel, it shall not be allowed for future parcel subdivision. Onetime splits shall be completed via the short plat process. The onetime parcel split provision should be encouraged where it is adjacent to ongoing agricultural practices, especially since the intent of this provision is to encourage the development of homesite acreage rather than removing agricultural lands out of production.
    b. In no case shall there be more than two dwellings (residences) on any lot or tax parcel unless such parcel is twice the required minimum (twenty-acre) size.
2. Agriculture Study Overlay Zone: Properties containing prime farmland soils with capability grades between 1 and 4 shall be a minimum of 20 acres in size. (Ord. 2010-014, 2010; Ord. 2009-25; 2009; Ord. 2007-22, 2007; Ord. 96-15 (part), 1996; Ord. 95-13 (part), 1995: Ord. 83Z-2 (part), 1983; Res. 83-10, 1983)

17.29.050 Yard requirements - Front yard.

There shall be a minimum front yard of 25 feet. (Ord. 96-19 (part), 1996; Res. 83-10, 1983)

17.29.060 Yard requirements - Side yard.

Side yard shall be a minimum of five feet; on corner lots the side yard shall be a minimum of 15 feet on the side abutting the street. (Res. 83-10, 1983)

17.29.070 Yard requirements - Rear yard.
There shall be a rear yard with a minimum depth of twenty-five feet to the main building. (Res. 83-10, 1983)

17.29.075 Yard requirements - Zones Adjacent to Commercial Forest Zone
Properties bordering or adjacent to the Commercial Forest zone are subject to a 200' setback from the Commercial Forest Zone. (KCC 17. 57.050(1)). For properties where such setback isn't feasible, development shall comply with Kittitas County Code 17.57.050(2). (Ord. 2007-22, 2007)

17.29.080 Yard requirements - Sale or conveyance restrictions.
No sale or conveyance of any portion of a lot for other than a public purpose shall leave a structure or the remainder of the lot with less than the minimum lot, yard, or setback requirements of this zone. (Res. 83-10, 1983)

17.29.090 Dimensional requirements.
The minimum average lot width shall be two hundred feet. No platted lot or parcel may be created with a dimensional ratio greater than 4:1. (Res. 83-10, 1983)

17.29.100 Division of nonconforming lots.
Repealed by Ord. 95-13. (Res. 83-10, 1983)

17.29.110 Access.
No dwelling shall be constructed or located on a lot or parcel which is not served by a legal sixty-foot right-of-way or existing county road. (Res. 83-10, 1983)

17.29.120 Special setback requirements.
None of the following uses shall be located within the distances indicated of any public street or road, any school or public park, or any dwelling (except such dwelling as may exist upon the same property with the restricted):

1. Within one and one-half miles:
    a. (Deleted by Ord. 88-5)
    b. Farms or establishments for feeding of garbage or other refuse to hogs or other animals:
        i. Provisions made that all other operations (subdivisions 1 and 2 of Section 17.28.110A1) shall be conducted in compliance with all state and county health regulations, and
        ii. Reasonable protection from any potential detrimental effects such use might have on surrounding properties will be provided.
2. (Deleted by Ord. 87-11)
3. Within one hundred feet:
    a. Barns, shelters or other buildings or structures for keeping or feeding of any livestock, poultry, or other animals or birds whether wild or domestic.
4. Feed lots containing fifty to one hundred head at a density of less than five hundred square feet per head for a period of six months or more shall be located no closer than three hundred feet to any existing home, school or park. (Ord. 88-5 (part), 1988; Ord. 87-11 (part), 1987; Res. 83-10, 1983)

17.29.130 Administrative uses.
The following uses may be permitted in any A-20 zone subject to the requirements set forth in Chapter 17.60B.

1. Accessory Dwelling Unit (if outside UGA or UGN) (Ord. 2007-22, 2007)

Top

Chapter 17.30
R-3 - RURAL-3 ZONE

Sections
17.30.010 Purpose and intent.
17.30.020 Uses permitted.
17.30.030 Conditional uses.
17.30.040 Lot size required.
17.30.045 Development Standards.
17.30.050 Yard requirements.

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This is being filed on behalf of James C. Carmody, attorney for Respondent Gibson, phone no. 509.248.6030, WSBA #5205, email: jcarmody@halversonNW.com. Thank you. Please contact me if you did not receive the attachment.

HALVERSON NORTHWEST

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