

Karl Eberhard

Elma Ranch
2628 West Valley Road, San Juan Island

August 28, 2022

David Williams, Director
Department of Community Development
San Juan County, WA
135 Rhone Street
Friday Harbor, WA 98250

Re: Illegal Uses - 450113005000 and 450111003000

Dear Mr. Williams,

It is unclear if the statements that the mineral extraction use of these parcels is "nonconforming" was the result of a formal determination or simply expressions of general understanding and belief. In either case, we respectfully ask that you consider, or reconsider, based on the following and that the Planning Commission at the hearing on the 16th be informed that the use of each parcel is illegal and not nonconforming.

Regarding 450113005000 (South Portion)

A small shale pit existed on the property before May of 1980 when a plat map was drawn. In a 1978 purchase and lease back agreement (AFN 100547), the extent of the shale pit operation was contractually limited to 2 acres and the lease was to terminate in 1980.

In 1983, the property was platted as A Short Plat Ridge View (AFN 125972), and the slightly less than two-acre shale pit was shown on the plat. On the face of the plat is a restriction (#2) that says no use of the lots other than a single-family residence is permitted without County approval and further requires a written request for such a determination¹. Also referenced on the face of the plat is a Statement of Disclosure.

¹ The text is virtually identical the current U.D.C. required restriction.

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The Statement of Disclosure (AFN 125973) requires that any future changes must be recorded, and that any purchaser must read and sign the Statement of Disclosure before signing any agreement to purchase or other binding contract. Under Hazards and Nuisances within that document, is the following notation, "Unstable bank due to previous excavation of shale, see face of plat for location." Under Site Considerations, the notation is, "Shale pit on Parcel #3" and there is a handwritten note in margin next to this that says, "Abandoned shale *unreadable* shale pit? Yes." And, under Private Restrictions or Covenants is, "Private restrictions have been placed on this property" box is checked and the reader is directed to the "face of the plat" for the restrictions.

We believe that the Ridge View Plat and the Statement of Disclosure alone establishes the owner's intention to abandon the shale pit use and is an overt act which carries the implication that the owner does not claim or retain any interest in the right to the nonconforming use.

Additional Owner Representations of the Use:

A week later, William Carlson acquired the property (AFN 126142) and Lots 1, 2 and 4 were sold. Even though acquired by a Quit Claim Deed In Lieu Of Foreclosure, he acquired the plat and the plat restrictions that run with the land. He then sold off lots² and the various deeds for these Lots through the years list the restrictions as being shown on the face of the plat.

In 1987, William Carlson as owner of Lots 3 and 4 and Moran as owner of Lot 2 sought and were granted a Boundary Line Modification (AFN 145222). The Boundary Line Modification is silent as to the use. The Planning Department noted that the Comprehensive Plan Designation was R-10 and that the Statement of Disclosure (that abandoned the shale pit use and restricted the use of all lots to single-family residences) had been reviewed for completeness.

We believe that the fact that the plat was amended by a Boundary Line Modification does not change the restrictions on the lots as shown on the face of the plat, more so since the Boundary Line Modification specifically indicates that the Statement of Disclosure was considered in the action. Notably deeds for these Lots since continue to refer purchasers to the face of the plat for applicable restrictions.

² By selling the lots so platted and restricted, the owner acted on the plat which is another overt act which carries the implication that the owner does not claim or retain any interest in the right to the nonconforming use.

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In 2014 Michael Carlson (son of William) purchased Lot 2 from the then owner Hershberger (AFN 620001). The Statutory Warranty Deed specifies that the restrictions as, "as set forth on the face of the Short Plat of Ridgeview".

The transfer of Lot 3 from William Carlson to Michael Carlson has not been found in recorded documents. However, in 2010 and again in 2017 there are Deeds of Trust (AFN 1230061 and 315004) showing West Valley Holdings (signed by Michael Carlson) as the grantor and which prohibit mineral extraction without the lenders consent. This is typically a residential loan requirement - certainly not a requirement for a loan for a known and declared mineral extraction property.

In 2017, West Valley Holdings, with Mitchel Carlson (grandson of William, son of Michael) signing, sought and were granted a Boundary Line Modification (AFN 707014). Again, the Boundary Line Modification is silent as to use and was found to be "in compliance with the codes applicable at the time of application" (the current code).

Per U.D.C. 18.70.020.C, in the absence of the applicant identifying a different use, this Boundary Line Modification was for the creation or modification of lots for the purpose of single-family residential development. And, as it was for the 1987 Boundary Line Modification, a Boundary Line Modification does not change the restrictions on the lots as shown on the face of the plat. U.D.C. 18.70.030 requires a subdivision alteration to affect a platted lot line, but also U.D.C. 18.70.030.1.c clearly states that a Boundary Line Modification cannot amend the conditions of approval for previously platted property.

We believe that an addition to and since formally abandoning the shale pit use, the Carlson's, all of them and including all their holding companies, have repeatedly and continuously represented the properties to the County, purchasers, and others as single-family residential lots.

In their application for a Comprehensive Plan Map Amendment, the Carlson's indicate additional uses taking place on the property including recycling concrete, aggregate waste, and composted green waste, notably originating from off-site. "Commercial composting" and "Recycling collection/processing" are prohibited uses under the RFF designation. To the extent the property serves as a disposal site in lieu of hauling materials off-island (as stated in the application), the "dump" use best fits an "unnamed industrial use" - also prohibited.

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We believe that it cannot be found, even given the greatest latitude, that the existing uses of the site are anything other than illegal, and specifically that they are not nonconforming uses, as both terms are clearly defined in the code (U.D.C. 18.20) and State law.

Regarding 450111003000 (East Portion)

Determining whether or not this property has a mineral extraction use³ that pre-dates the current Comprehensive Plan and implementing code is found in the public record.

While the property has a convoluted history of ownership and errant land divisions, the key document is a survey performed by Thomas Metke for Mike Sekmistrz in 1999 (AFN 322040). This is a survey of Lot 2 of the Ridge View Short Plat, but it clearly indicates that at that time there was no physical road to 450111003000. Without road access, it is reasonable to determine that the mineral extraction was established after March of 1999.

That being the case, the mineral extraction use⁴ was established at a time when the current Comprehensive Plan and implementing code were in effect. Mineral extraction is a prohibited use under the RFF designation.

In 2001 the owner, Whittier Trust of Nevada, sought and was granted a Simple Land Division (AFN 1128038). It is silent as to the use, but the map (AFN 814004) includes identifying "buildable" and "non-buildable" areas as would be expected (required) on lots intended for the purpose of single-family residential development. And this is the code defined use when an applicant does not specify a different use (U.D.C. 18.70.020.C). The mining use was likely established after Whittier sold the property to Durhack (the neighbor to the south) in 2002.

Notably, the Carlson's (West Valley Holdings) did not actually acquire the property until July of 2017 (AFN 324 019⁵). A week prior, Durhack and was granted another Boundary Line Modification (AFN 707014). This oddly reconfigured the lots but notably added the portions of the Durhack's parcel that had been encroached upon by the mining activity. As before, the map indicates "buildable" and "non-buildable" areas and is silent as to the intended use.

³ Including accessory processing uses.

⁴ *ibid*

⁵ As written, the Carlson's sold the lot to Durhack - an administrative error.

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Again, we believe that it cannot be found, even given the greatest latitude, that the existing use of the property is anything other than illegal, and specifically that it is not a nonconforming use, as both terms are clearly defined in the code (U.D.C. 18.20) and State law.

Use Not Legal by Prescription

To wrap up this line of thought, I'd like to address a comment you made to me which the general idea appears a few times in the various writings of staff. This is the idea that somehow because the Carlson's have been doing this for a long time, that the use is allowed - "grandfathered". In one writing, staff offers up a specific parameter of "25 years". We find no such time specification in local or State laws.

As to whether or not a long-standing illegal use enjoys a different status, an "upgrade" to "nonconforming" status for example, is clearly addressed in State law. Keeping in mind that the U.D.C. clearly defines an illegal use as a public nuisance (U.D.C. 18.100.050), R.C.W. 7.48.190 is amazing clear, "No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right."

Thank you for your consideration and we look forward to working with an informed Planning Commission.

Sincerely,



Karl Eberhard

Cc Randall K. Gaylord, County Prosecutor, SJCO
Amy Vira, Deputy Prosecutor, SJCO