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SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY

ELLENSBURG CEMENT PRODUCTS, INC.,

Petitioner/Plaintiff,

v.

KITTITAS COUNTY,

Respondent/Defendant,

and

HOMER L. (LOUIE) GIBSON, JAMES and  
DEANNA HAMILTON, and LARRY and  
SHERRIE MILLER,

Respondents.

No.

LAND USE PETITION; COMPLAINT FOR  
DECLARATORY JUDGMENT

**I. LAND USE PETITION**

Pursuant to the Land Use Petition Act, Chap. 36.70C RCW ("LUPA"), Petitioner Ellensburg Cement Products, Inc., seeks review of the *Findings of Fact, Gibson Conditional Use Permit CU-10-04* (hereafter "*Decision*") by the Kittitas County Board of Adjustment dated May 11, 2011. The Decision approved the issuance of a conditional use permit (CUP) to amend an existing CUP and to allow rock crushing on the Property. A copy of the *Decision* is attached as **Appendix A**.

**A. PARTIES**

1.1 Petitioner Ellensburg Cement Products, Inc. is a Washington corporation.

COPY

1 1.2 The mailing address for Petitioner is:

2 Ellensburg Cement Products, Inc.  
3 c/o Groff Murphy, PLLC  
4 300 East Pine Street  
5 Seattle, WA 98122.

6 1.3 Petitioner's attorneys are Groff Murphy, PLLC, 300 East Pine Street, Seattle,  
7 Washington, 98122.

8 1.4 The local jurisdiction whose land use decision is at issue is respondent Kittitas  
9 County: The mailing address for the County is:

10 Kittitas County Courthouse  
11 205 W. 5th Ave.  
12 Ellensburg, WA 98926

13 1.5 Respondent Homer L. (Louie) Gibson is identified in the *Decision* as the applicant for  
14 the land use permit at issue and the owner of the Property at issue. Gibson is also identified in the  
15 records of the Kittitas County Assessor as the owner of the Property at issue.

16 1.6 Respondents James and Deanna Hamilton, and Larry and Sherrie Miller are identified  
17 in the *Decision* as having filed administrative appeals regarding the *Decision*. On information and  
18 belief, these respondents have abandoned their appeal(s) for purposes of RCW 36.70C.040(2)(d).  
19 Hamilton and Miller are named as respondents out of an abundance of caution.

20 **B. IDENTITY OF DECISION MAKING BODY**

21 2.1 The decision-making body that issued the *Decision* at issue is the Kittitas County  
22 Board of Adjustment.

23 **C. JURISDICTION AND STANDING**

24 3.1 This Court has jurisdiction to review the *Decision* under RCW 36.70C.030.

25 3.2 Petitioner has standing to seek judicial review because it appealed the SEPA DNS, and  
26 objected to the issuance of the CUP at the administrative hearing. Petitioner has exhausted all  
available administrative remedies. Petitioner owns and/or operates quarries in the Ag-20 zone

1 pursuant to conditional use permits that purport to prohibit crushing and other associated processing  
2 activities.

3 **D. STATEMENT OF FACTS**

4 4.1 Respondent Gibson owns contiguous parcels of real property in Kittitas County  
5 described as map numbers 17-20-08010-0003 , 17-20-08010-0004, 17-20-08010-0005, 17-20-08040-  
6 0011, and 17-20-08010-0006 (hereafter "Property").

7 4.2 Gibson had an existing conditional use permit ("CUP") for gravel excavation on a  
8 small portion of the Property.

9 4.3 On or about June 11, 2010, Gibson applied for a CUP to amend the existing CUP to  
10 allow rock crushing, screening, washing, and concrete and asphalt processing. The application did  
11 not include a request to expand the existing gravel excavation operations by nearly 600%.

12 4.4 On or about October 21, 2010, the County issued a Determination of Nonsignificance  
13 ("DNS") pursuant to the State Environmental Policy Act, Chap. 43.21C RCW ("SEPA").

14 4.5 On or about November 2-3, 2010, petitioner and respondents Hamilton and Miller  
15 appealed the DNS to the Board of Adjustment.

16 4.6 On or about May 11, the Board of Adjustment held a closed record appeal hearing on  
17 the SEPA appeal. Petitioner objected, arguing that an open record hearing was required. Petitioner  
18 was not allowed to submit new information or to make argument, and the Board was instructed by  
19 County Staff to not consider any evidence or arguments from petitioner.

20 4.7 On or about May 11, the Board of Adjustment held an open record hearing on the  
21 CUP application at which the board heard testimony and argument from petitioner and members of  
22 the public.

23 4.8 At some point after the hearing on May 11, 2011, the Board of Adjustment issued the  
24 *Decision* granting the requested CUP subject to certain conditions. The Board made various findings,  
25 and concluded, *inter alia*, that rock crushing is permitted in the Ag-20 zone as "processing of  
26 products produced on the premises" under KCC 17.29.020(A)(13). **Appendix A.**

1       **E.     STATEMENT OF ERRORS**

2           5.1     The Board of Adjustment erred in entering Finding 7. Gibson did not prepare the  
3     required SEPA environmental checklist but re-used a checklist from an earlier application to a  
4     different agency. The checklist did not adequately address the possible significant environmental  
5     impacts of either the expanded size or the proposed rock crushing, washing, concrete or asphalt  
6     processing or other activities. Consequently the County did not engage in meaningful environmental  
7     review before issuing the DNS.

8           5.2     The County failed to follow required procedures for the use of existing environmental  
9     documents in WAC 197-11-600 et seq.

10          5.3     Finding 7 is not supported by substantial evidence and/or constitutes a clearly  
11     erroneous application of the law to the facts.

12          5.4     The Board of Adjustment erred as a matter of law in failing to provide an open record  
13     hearing on petitioners' SEPA appeal. Petitioner was not allowed to submit new information or to  
14     make argument, and the Board of Adjustment was erroneously instructed to not consider any  
15     evidence or arguments from petitioner.

16          5.5     The Board of Adjustment erred in entering Finding 11. The Board erred as a matter of  
17     law in concluding that rock crushing is permitted in the Ag-20 zone as "processing of products  
18     produced on the premises" under KCC 17.29.020(A)(13).

19          5.6     Finding 11 is a clearly erroneous application of the law to the facts.

20          5.7     The Board of Adjustment erred in entering Findings 13 through 15. Those findings  
21     are based on the Board's erroneous determination that rock crushing is a permitted use in the Ag-20  
22     zone.

23          5.8     The Board of Adjustment failed to consider evidence that Gibson was violating the  
24     conditions of an existing CUP.

25          5.9     Findings 13-15 are not supported by substantial evidence.

26          5.10    Findings 13-15 are a clearly erroneous application of the law to the facts.

1 **F. REQUEST FOR RELIEF**

2 6.1 Petitioner requests that this Court reverse the *Decision*, vacate the DNS, and deny the  
3 CUP.

4 **II. COMPLAINT FOR DECLARATORY JUDGMENT**

5 Pursuant to Chapter 7.24 RCW, plaintiff Ellensburg Cement Products, Inc. seeks a declaratory  
6 judgment determining whether rock crushing and other associated processing activities are a  
7 permitted use in agricultural zones as “processing of products produced on the premises” under KCC  
8 17.28.020(14), KCC 17.28A.020(15), KCC 17.29.020(A)(13), and/or KCC 17.31.020(9) where the  
9 mining of rock is already permitted on the site pursuant to a CUP or lawful nonconforming use.

10 7.1 Plaintiff re-asserts and incorporates by reference the averments in paragraphs 1.1 thru  
11 4.8 above.

12 7.2 Plaintiff owns and/or operates quarries in the Ag-20 zone pursuant to conditional use  
13 permits that purport to prohibit crushing and other associated processing activities.

14 7.3 As set forth above, there is an actual, present and existing dispute as to whether rock  
15 crushing and other associated processing activities are a permitted use in agricultural zones as  
16 “processing of products produced on the premises” under KCC 17.28.020(14), KCC 17.28A.020(15),  
17 KCC 17.29.020(A)(13), and/or KCC 17.31.020(9) where the mining of rock is already permitted on  
18 the site pursuant to a CUP or lawful nonconforming use.

19 7.4 Plaintiff has no other adequate, available remedy at law.


20 7.5 In the alternative to the relief requested under LUPA in paragraph 6.1 above, plaintiff  
21 requests a declaratory judgment determining whether rock crushing and other associated processing  
22 activities are a permitted use in agricultural zones as “processing of products produced on the  
23 premises” under KCC 17.28.020(14), KCC 17.28A.020(15), KCC 17.29.020(A)(13), and/or KCC  
24 17.31.020(9) where the mining of rock is already permitted on the site pursuant to a CUP or lawful  
25 nonconforming use.

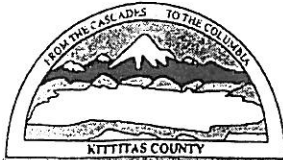
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DATED this 27<sup>th</sup> day of May, 2011.

Respectfully submitted,

GROFF MURPHY PLLC

  
Michael J. Murphy, WSBA #11132  
William J. Crittenden, WSBA #22033  
*Attorneys for Ellensburg Cement Products, Inc.*



## KITTITAS COUNTY COMMUNITY DEVELOPMENT SERVICES

411 N. Ruby St., Suite 2, Ellensburg, WA 98926

CDS@CO.KITTITAS.WA.US

Office (509) 962-7506

Fax (509) 962-7682

"Building Partnerships - Building Communities"

### NOTICE OF DECISION

**TO:** Applicant  
Interested Parties (KCC 15A.06)

**FROM:** Dan Valoff, Staff Planner

**DATE:** May 16, 2011

**SUBJECT:** Notice of Decision - Conditional Use Permit  
**Gibson CU-10-00004**

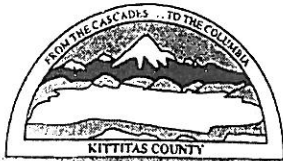
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Pursuant to RCW 36.70B.130 and KCC 15A.06, notice is hereby given that Kittitas County Board of Adjustment did on May 11, 2011 approved a Conditional Use Permit on an application from Louie Gibson, property owner for the expansion of the existing rock quarry on 85 acres and to allow for rock crushing in the Agriculture 20 zone. The subject property is located at 5121 Parke Creek Road approximately 3 miles east of the city of Kittitas, north of Parke Creek Road and east of Clerf Road. Ellensburg, WA, in a portion of the NW ¼ of Section 8, T17N R20E WM in Kittitas County. Map numbers: 17-20-08010-0003, 17-20-08010-0004, 17-20-08010-0005, 17-20-08040-0011, and 17-20-08010-0006.

Copies of the Kittitas County Board of Adjustment Findings of Fact and Decision and other related file documents may be examined at Kittitas County Community Development Services, 411 N. Ruby Suite 2, Ellensburg, WA 98926. (509) 962-7506.

Issuance of these land use decisions may be appealed by parties with standing, by filing a land use petition in Superior Court, and serving said petition on all required parties pursuant to RCW 36.70C and KCC 15A.08, within twenty-one days of the issuance of the land use decision.

## Appendix A



## KITTITAS COUNTY COMMUNITY DEVELOPMENT SERVICES

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"Building Partnerships - Building Communities"

### Findings of Fact Gibson Conditional Use Permit CU-10-04

This matter having come before the Kittitas County Board of Adjustment upon the above referenced Conditional Use Application from Louie Gibson landowner, the Board of Adjustment makes the following Findings of Facts, Conclusions at Law and Decision related to the above referenced matter:

1. The Board of Adjustment finds that Louie Gibson, land owner applied for an amendment to the Miller Conditional Use Permit (CU-97-17) for the expansion of the existing rock quarry on 85 acres and to allow for rock crushing in the Agriculture 20 zone.
2. The site is located at 5121 Parke Creek Road approximately 3 miles east of the city of Kittitas, north of Parke Creek Road and east of Clerf Road, Ellensburg, WA, in a portion of the NW  $\frac{1}{4}$  of Section 8, T17N R20E WM in Kittitas County. Map numbers: 17-20-08010-0003, 17-20-08010-0004, 17-20-08010-0005, 17-20-08040-0011, and 17-20-08010-0006.
3. The Board of Adjustment finds that the Community Development Services Department issued a Notice of Application pursuant to KCC 15A.03 on June 19, 2010 with a comment period ending on August 13, 2010 at 5:00 p.m. The Board of Adjustment finds further that said notice was published in the official county paper of record and was mailed to jurisdictional government agencies, adjacent property owners, and other interested parties. Written comments were received and included in the record for consideration.
4. The Board of Adjustment finds that in accordance with Kittitas County Code 15A.03.110, this project was accurately posed with the "Land Use Action" sign as provided by Community Development Services. The Affidavit of Posting was signed by the authorized agent and returned to the planner and is included as part of the record.
5. The Board of Adjustment finds that The Community Development Services Department on October 21, 2010 issued a SEPA Determination of Non-significance (DNS). The Board finds that the notice of said determination was provided to all required parties of record pursuant to 43.21C RCW and that said notice that said notice was published in the official county paper of record and was mailed to jurisdictional government agencies, adjacent property owners, and other interested parties. Two appeals were filed on November 2 and November 3, 2010 prior to the end of the November 4, 2010 appeal period. The appeals were filed by Michael Murphy, attorney on behalf of Ellensburg Cement Products, James and Deanna Hamilton and Larry and Sherrie Miller.

## Appendix A



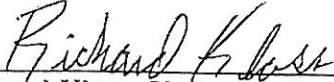
6. The Board of Adjustment finds that a Closed Record Appeal Hearing was held by the Board of Adjustment on May 11, 2011 to address the appeals as filed by Michael Murphy, attorney on behalf of Ellensburg Cement Products, James and Deanna Hamilton and Larry and Sherrie Miller.
7. The Board of Adjustment finds that the responsible official followed all of the proper procedures in the SEPA process and therefore the Board upheld the Determination of Nonsignificance (DNS) as issued by the responsible official.
8. The Board of Adjustment finds that immediately following the appeal hearing an open record hearing was held on May 11, 2011 and that testimony was taken from those persons present who wished to be heard. The Board of Adjustment also finds that due notice of this public hearing has been given as required by law, and the necessary inquiry has been made into the public interest to be served by this proposed project.
9. The Board of Adjustment finds that the Comprehensive Plan's Land Use Element designates the subject parcel as Rural and the zoning is AG-20.
10. The Board of Adjustment finds that the purpose and intent of 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.
11. The Board of Adjustment finds that in KCC 17.29.030(16): Sand and gravel excavation, provided that noncommercial excavation shall be permitted for on-site use without a conditional use permit; subject to the conditions set forth in Chapter KCC 17.60 Conditional Uses and KCC 17.29.020(13) Processing of products produced on the premises is a permitted use in the Ag-20 zone.
12. The Board of Adjustment finds that an administrative site analysis was completed by the staff planner in compliance with Kittitas County Code Title 17A, Critical Areas. There were no critical areas on site.
13. The Board of Adjustment finds that the proposed use is essential or desirable to the public convenience and not detrimental or injurious to the public health, peace, or safety or to the character of the surrounding neighborhood.
14. The Board of Adjustment finds that the proposed use at the proposed location will not be unreasonably detrimental to the economic welfare of the county and that it will not create excessive public cost for facilities and services by finding that (1) it will be adequately serviced by existing facilities or (2) that the applicant shall provide such facilities and (3) has demonstrated that the proposed use will be of sufficient economic benefit to offset additional public costs or economic detriment.
15. The Board of Adjustment finds that the proposed development has met the requirements of KCC. 17.60.010 (as listed in items 12 and 13 of the conditions).

## Appendix A

16. The Board of Adjustment finds that the following conditions are required for approval of the Conditional Use permit:

1. The hours of operation shall be limited to 7:00am and 5:00 pm, Monday thru Friday. It shall be the applicant's responsibility to insure that the project does not pose any threat to public safety and shall take measures to reduce conflict with scheduled school bus stops, mail delivery, etc.
2. The applicant shall be required to obtain a Department of Ecology Sand & Gravel permit and submitted to Community Development Services prior to beginning any excavation.
3. Storm water and surface runoff generated by this project must be retained and treated on site in accordance with regulating agencies' standards.
4. The applicant will be required to upgrade the two existing accesses to current Kittitas County Road Standards. Current standard require the construction of a paved apron onto the county road. The access shall be designed as specified in WSDOT Design Manual Figure 1340-5. The applicant shall apply for an access permit prior to beginning of construction. The apron shall be constructed and approved or bonded for prior to receiving final approval for the Conditional Use Permit.

17. Additional conditions are not necessary to protect the public's interest.

  
Richard Kloss, Chairman, Board of Adjustment

5-11-11  
Date

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SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY

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Petitioner/Plaintiff,

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HOMER L. (LOUIE) GIBSON, JAMES and  
DEANNA HAMILTON, and LARRY and  
SHERRIE MILLER,

Respondents.

No.

SUMMONS

TO: HOMER L. (LOUIE) GIBSON

A lawsuit has been started against you in the above-entitled court by ELLENSBURG CEMENT PRODUCTS, INC., the Petitioner/Plaintiff above-named. Petitioner/Plaintiff's claim is stated in the written Complaint, a copy of which is served upon you with this Summons.

In order to defend against this lawsuit, you must respond to the Complaint by stating your defense in writing, and serve a copy upon the undersigned attorney for the Petitioner/Plaintiff;

(a) within twenty (20) days after the service of this Summons, excluding the day of service, if served within the State of Washington;

(b) within sixty (60) days after the service of this Summons, excluding the day of service, if served outside the State of Washington,

COPY

1 or a default judgment may be entered against you without notice. A default judgment is one where  
2 Petitioner/Plaintiff is entitled to what it asks for because you have not responded. If you serve a  
3 Notice of Appearance on the undersigned attorney, you are entitled to notice before a default  
4 judgment may be entered.

5 You may demand that the Petitioner/Plaintiff file this lawsuit with the court. If you do so, the  
6 demand must be in writing and must be served upon the Petitioner/Plaintiff. Within 14 days after you  
7 serve the demand, the Petitioner/Plaintiff must file this lawsuit with the court or the service on you of  
8 this Summons and Complaint will be void.

9 If you wish to seek the advice of an attorney in this matter, you should do so promptly so that  
10 your written response, if any, may be served on time.

11 This summons is issued pursuant to Rule 4 of the Superior Court Civil Rules of the State of  
12 Washington.

13 Dated this 27<sup>th</sup> day of May, 2011.

14 Respectfully submitted,

15 GROFF MURPHY, PLLC

16 

17 Michael J. Murphy, WSBA #11132

18 William J. Crittenden, WSBA #22033

19 Attorneys for Ellensburg Cement Products, Inc.