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From: Morten Boyd <mboyd@gtclawgroup.com>
Sent: Tuesday, September 14, 2021 9:22 AM
To: Comp Plan Update
Subject: Comments to Request for Designation under Mineral Resource Land Overlay

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San Juan County Department of Community Development
compplancomments@sanjuanco.com

September 14, 2021

Re: Comments to Request for Designation under Mineral Resource Land Overlay

Dear Commissioners,

We listened with great interest and concern to the Commission's July 16 meeting with respect to the above-referenced matter. We have the following comments and questions at this time that we hope the Commission will consider during their upcoming meeting on September 17.

1. **Did the County Planner and Commission receive and consider our previous comment letter of July 14, 2021?**

Background: We ask this simply because the County Planner described the comments that had been received only as "concerns about expanded uses or changed uses on these properties," whereas our comment letter had raised numerous other concerns that were not discussed or even mentioned in the July 16 meeting. For convenience of reference, we have reproduced another copy of the contents of our previous comment letter at the end of this email.

2. **The County Planner repeatedly argues that the MRLO designation would not "expand or change what is allowed on any [MRLO-designated] property." This argument does not hold water. We ask the Commission to please consider the following:**

- **The area that would be covered by the MRLO is larger than the area of the existing mining operations**
Background: For example, in our particular case, the existing operations of the mine near our property generally occur at least 1/4 mile from our home whereas the proposed MRLO would come within ~400 feet of our home and within ~250 feet from our property line. Among other concerns, this would subject our property to new disclosure requirements per SJCC 18.35.015, which would impair our ability to resell our property and its resale value.
- **The hours that would be covered by the MRLO are greater than the current business hours of the existing mining operations**
Background: The County Planner argues, without supporting evidence, that the 60 hours per week (7.a.m. to 7 p.m., Monday through Friday) that would be protected under an MRLO designation constitutes normal "business hours" for these mining operators. This is patently false. Is the County aware of the existing business hours of the subject mining operators?
- **The types and levels of "nuisance" that would be protected by the MRLO are greater than the types and levels of nuisance currently caused by the existing mining operations**
Background: The proposed MRLO would provide broad protection against claims from nuisance caused by any activities on these lands so long as the activities are conducted "for mineral resource extraction and processing purposes." The protection is not limited to existing types and levels of nuisance; it applies regardless of the

consequences of the protected actions. For example, there are no exceptions for activities that may be unlawful, reckless, negligent or otherwise improper, unreasonable, harmful or dangerous.

- **Common sense dictates that the granting of immunity from nuisance claims is near-certain to result in mining operators expanding their use and/or changing their behaviors such as, with respect to avoiding or mitigating noise and other nuisance impacts to neighboring properties**

Background: Even if the MRLO designation does not technically grant rights for expanded or changed uses per se, the granting of immunity removes a barrier to expanded or changed uses such that expanded or changed uses can and should be expected to result.

3. Has the County conducted or commissioned any environmental or other study to assess and mitigate negative impacts of the proposed MRLO designation, including any SEPA review and any assessment of potentially adverse effects on groundwater users or the seismic stability of neighboring homes?

Background: The proposed MRLO site near our home is adjacent to and/or covered with Critical Areas including a Critical Aquifer Recharge Area, Wetlands, and Geo-hazards including slopes in excess of 15%, and erodible subclass “e” soils. There appears to have been little to no evaluation of continuing or expanding mining activity on these areas. For example, due to the entire County being classified as a Critical Aquifer Recharge Area, it is considered a hydrologically sensitive area by the DNR. The County has provided no indication or documentation that mining activity at the Proposed MRLO will not adversely affect groundwater users in the vicinity of the mine. The County has also provided no evidence of any SEPA review, which would be required for this proposed non-project action, nor of compliance with setback requirements under RCW 78.44.121.

4. Has the County taken advice from legal counsel as to the legality of the proposed action?

Background: Among other legality concerns, we understand the County actively solicited MRLO redesignation applications from commercial mining operators with the principal intent of stripping property owners of legally established rights for the benefit of the mining operators and the County. How would this not constitute a taking of property rights in blatant violation of the Fifth Amendment of the Constitution of the United States?

Respectfully, Morten & Monika Boyd, 609 Spring Hill Rd, PO Box 1651, Eastsound WA 98245

[What follows is a reproduction of the contents of prior July 14, 2021 comment letter]

The following comments are being provided with reference to that certain proposal and staff recommendation provided in a staff report dated July 2, 2021 from Adam Zach, entitled San Juan County Comprehensive Plan Element B.2 Land Use and Rural Mineral Lands Overlay and posted at <https://www.sanjuanco.com/DocumentCenter/View/23413> (the “Memo”).

We are the owners and full-time residents of the above-referenced single family residence, Tax Parcel No. 260213001000 (“Our Property”), which is adjacent and/or neighboring to at least one of the parcels for which MRLO designation has been requested as outlined in the Memo.

We are writing to express our significant concerns about and objections to the proposals outlined in the Memo, the principal function of which is described as **“to provide mining operations protection from nuisance claims,”** further described (in an MRSC article linked within the Memo) as **“an unreasonable or unlawful use of property that results in material annoyance, inconvenience, discomfort or injury to another person or to the public.”**

Our immediate concerns can be summarized as follows:

1. Our principal residence is located less than 500 feet from the proposed MRLO on TPNs 260221001000, 260222001000, and 260223001000 (the “Proposed MRLO”). As such, noise or other nuisance from mining operations at the Proposed MRLO significantly and adversely affect the peaceful enjoyment of Our Property and the comfort and repose of our family and guests.

2. On its face, we are immediately and deeply troubled by any proposal that property owners should relinquish rights, and mining operators should be granted protections, with respect to ***“an unreasonable or unlawful use of property that results in material annoyance, inconvenience, discomfort or injury to another person or to the public.”***

3. The Proposed MRLO would significantly and adversely affect our ability to resell Our Property and reduce its resale value. No compensation is being offered to mitigate these losses. We are concerned that the County’s proposed unilateral redesignation constitutes unconstitutional taking of property in violation of the Fifth Amendment and other applicable laws.

4. The Memo categorizes the existing mining operations at the Proposed MRLO as “nonconforming” due to mining and mineral extraction being prohibited in land areas not designated as for Rural General Use. The Memo is silent as to whether these operations are currently being conducted under and in compliance with a conditional use permit, including whether this mine has been permitted by the Washington Dept. of Natural Resources (“DNR”) as required by RCW 78.44.081 (SM-6 and SM-8) or what, if any, other conditions apply to any continuing nonconforming use. We are concerned that, in advocating for unilateral land redesignation to protect nonconforming commercial mining operations at the expense of neighboring residential property owners, the County is acting arbitrarily and capriciously and outside of its rulemaking authority.

5. The Memo describes several purported public benefits of continuing to conduct mining operations at the Proposed MRLO, while failing to adequately address potential adverse impacts on the environment and neighboring properties.

For example, the Memo alleges that ***“the benefits of continuing to have mineral resources locally produced outweigh the potential impacts from these operations,”*** without offering any evidence to support this assumption. No environmental or other study or other objective attempt to measure, quantify, document, evaluate and/or control the adverse impacts are mentioned.

Instead, the Memo simply argues that ***“it is unlikely the proposed change will increase these impacts given that the lands proposed for designation already have existing mining operations and the MRLO does not significantly change the regulations that apply to mining operations.”***

There are several obvious problems with this argument. First, it is inappropriate to speculate as to the likelihood of adverse effects without having undertaken a proper and thorough study. Under the proposed change, existing rights and remedies of property owners would be irreversibly lost whether or not any adverse effects were “likely” or otherwise foreseeable. Second, what is being proposed is not merely that neighboring property owners would relinquish their rights with respect to that portion of a nuisance claim represented by an increase in impacts, but also with respect to any portion represented by noise and other nuisance levels already existing due to current mining operations. Third, the argument assumes “existing mining operations” will remain unchanged, failing to take into account the probability that mining operators’ future behavior may change as a result of the protections offered under an MRLO and the consequently diminished rights of neighboring property owners. No mitigation has been proposed to protect existing residential development from expanded mining activity or increase in the intensity of mining activity.

In fact, the very definition of the “nuisance” exemptions in the MRLO regulations would protect any extraction and processing operations between 7 a.m. and 7 p.m. on all weekdays (amounting to 12 hours per day or 60 hours per week!). That in and of itself would represent a significant increase in operations and noise as compared to today’s levels, and is patently inconsistent with the arguments made in the Memo that existing levels of operations will not increase.

Without limiting the foregoing, the site of the Proposed MRLO is adjacent to and/or covered with Critical Areas including a Critical Aquifer Recharge Area, Wetlands, and Geo-hazards including slopes in excess of 15%, and erodible subclass “e” soils. With the exception of seeking to exclude wetlands from the Proposed MRLO, there appears to have been little to no evaluation of continuing or expanding mining activity on these areas. For example, due to the entire County being classified as a Critical Aquifer Recharge Area, it is considered a hydrologically sensitive area by the DNR. The County has provided no indication or documentation that mining activity at the Proposed MRLO will not adversely affect groundwater users in the vicinity of the mine. The County has also provided no evidence of any SEPA review, which would be required for this proposed non-project action, nor of compliance with setback requirements under RCW 78.44.121.

6. We are concerned that the categorical exclusions from what may be considered a nuisance, as defined in SJCC 18.35.015.C.1, are overly broad. For example, they purport to cover any activities conducted for mineral resource extraction and processing purposes on land designated as mineral resource land, regardless of the consequences and regardless of whether the activities are unlawful, reckless, negligent or otherwise improper, unreasonable, harmful or dangerous.

7. We are concerned that the proposal outlined in the Memo fails to even meet the County's own stated criteria for approving map amendments, as provided in SJCC 18.90.030.1. For example, as noted above, no meaningful attempt has been made to study, evaluate and mitigate the potentially significant impacts of the proposed change. As such, there is no basis for evaluating whether the benefits would outweigh the adverse impacts, as required per SJCC 18.90.030.F.1.e.

The Memo also contends that other criteria have been met based on arguments that seem constrained at best. For example, the Memo's recharacterization of the stated reason for the MRLO designation (i.e., to provide nuisance claim protection to mining operations that have already been ongoing for 25+ years and are not expected to change as a result of the MRLO designation) as a requirement to meet "a demonstrable need for additional land in the proposed land use designation," and as such warranting the proposed change, strikes us as a forced, misleading and fallacious argument.

8. The above list of concerns should by no means be construed as exhaustive, and we expressly reserve the right to raise additional objections as well as all of our other rights and remedies at law and in equity.

In closing, we strongly object to the proposed MRLO designations outlined in the Memo. This is not because we are anti-mining or insensitive to the ways in which the community can benefit from local mining operators. Nor does it suggest an intent to challenge the current operations at the Proposed MRLO which, according to the Memo, have been ongoing for "at least 25 years." However, throughout the course of those 25 years, the operators of the Proposed MRLO will have had to balance the commercial objectives of their mining business with respecting, and coexisting with, the environment in which they operate, including their neighbors. An important factor in this balancing act is the right of neighboring property owners to seek remedies from a Court should the acts or omissions of the mining operators rise to the level of a provable, unlawful "nuisance" as established by State and other applicable law. The proposal outlined in the Memo would eliminate the status quo established through years of coexistence by unilaterally depriving neighboring property owners of significant and well established rights, thus shifting the balance markedly in favor of the mining operators. We believe such an act by the County to be inappropriate, ill advised and unlawful and we respectfully ask that the County cease and desist from any further pursuits of such a path.

Please be advised that we intend to take any and all available legal actions necessary to protect our rights as property owners in this matter.

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