

BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF OBJECTIONS TO)
THE MINING PERMIT APPLICATION)
OF MOUNTAIN CEMENT COMPANY) DOCKET NO. 2826-97
TFN 3 4/70

AFFIDAVIT OF BRIAN WILL

State of Wyoming)
)ss.
County of Albany)

Brian Will, being first duly sworn, deposes and states as follows:


1. My name Brian Will. I am a Planner for the City of Laramie and Albany County, Wyoming. I am a records custodian for the City/County Planning Office.
2. The documents attached to this affidavit (Bates stamped 100,000 through 100,653) are all true and accurate copies of records kept and maintained by the City/County Planning Office in the regular course of its business.
3. The documents attached to this affidavit are all public reports or records setting forth activities of the City/County Planning Office, and/or dealing with matters observed or reported to the City/County Planning Office pursuant to a legal duty.
4. It is the regular practice of the planning office to make reports and records like those attached to this affidavit . The reports and records attached to this affidavit were made at or near the time of the events described in the reports or records, from information



transmitted by individuals with knowledge of the events.

5. The attached documents are the County Planning Commission's public file on the Summit Estates proposed Major Land Division. The entire file is public information and is available to all members of the public. The file also contains a video tape filed by Mountain Cement Company called "Plant Tour."

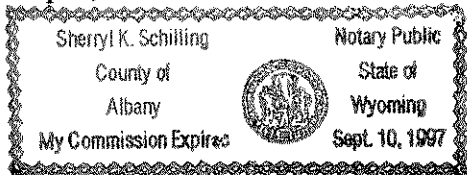
Dated: April 16, 1997.

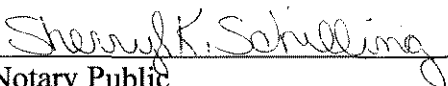


Brian Will

STATE OF WYOMING)
) ss.
COUNTY OF ALBANY)

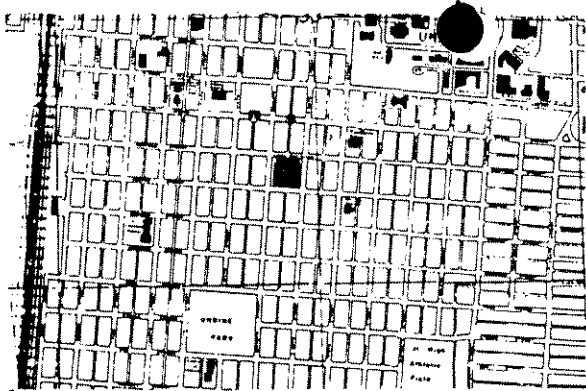
The foregoing Affidavit was subscribed and sworn to before me by Brian Will this 16th day of April, 1997.



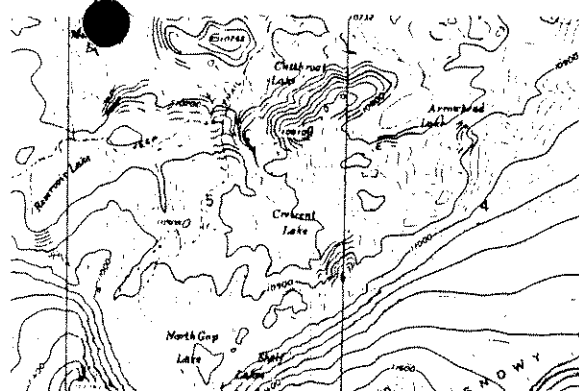


Notary Public

My commission expires: Sept. 10, 1997



CITY
OF LARAMIE
ALBANY
COUNTY
PLANNING
OFFICE



405 Grand Avenue

Laramie, Wyoming 82070

Telephone (307) 721-5286

September 9, 1993

Millard and Deanna Johnson
566 North 9th Street
Laramie, WY 82070

Dear Mr. and Mrs. Johnson:

At their September 7, 1993 regular meeting, the Board of County Commissioners denied your land use change permit for a major land division called Summit Estates. While this does prohibit you from subdividing your land into eight 40 acre parcels, you can legally divide your land without any County review as long as all the parcels created are 80 acres or more in size.

As a reminder, Albany County has not yet received your payment for engineering review of the Summit Estates survey map in the amount of \$100.00. Please remit this payment, payable to the 'Albany County Treasurer', to the County Treasures's Office, Albany County Courthouse by September 30, 1993.

Thank you for your cooperation throughout the land use change permit process. If you have any questions, please do not hesitate to contact Brian Will at this office.

Sincerely,

Andy Kasehagen
City/County Planner

ACK/bjw

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NICHOLAS LAW OFFICE

DAVID R. NICHOLAS
PHILIP A. NICHOLAS
STEPHEN N. GOODRICH
JEFF ANTHONY*

July 13, 1993

FIRST INTERSTATE BANK BUILDING
221 IVINSON AVENUE
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LARAMIE, WYOMING 82070
TELEPHONE (307) 742-7140
TELECOPIER (307) 742-7354

*ADMITTED IN NEBRASKA AND COLORADO

Mr. Andy Kasehagen
Albany County Planning Commission
405 Grand Avenue
Laramie, WY 82070

RE: Land Use Change Request
for a Major Land Division Called
Summit Estates, Millard and Deanna
Johnson, Applicants

Dear Mr. Kasehagen:

This letter is submitted on behalf of Mountain Cement Company opposing the proposed land use change for the N1/2 of Section 25, Township 15 North, Range 73 West, 6th P.M. submitted by Deanna and Millard Johnson.

A. SECTION 25 BACKGROUND

Monolith Portland Cement Company previously owned the W1/2 of Section 25. Monolith mined the limestone on that property and reclaimed the land. An agreement was later made with Bill and Deanna Despain (she is now Deanna Johnson) which provided that this land owned by Monolith would be conveyed to Despains in exchange for an easement for a road across the E1/2 of Section 25, and an agreement to pay surface damage payments, which have been made by Mountain Cement Company. Monolith reserved to itself easements across the W1/2 of Section 25 for access to the east and to the south to mine limestone. Monolith's rights have been transferred to Mountain Cement Company.

B. PERMITS AND MINING ACTIVITY

Mining has been going in this area since 1946. Mining permits have been issued for the cement plant by the Department of Environmental Quality, Divisions of Land Quality and Air Quality for Mining in the sections north, west and east of Section 25. The section immediately north, Section 24, is within Mountain Cement Company's present mining permit no. 298C-A4. Mountain Cement Company expects to continue to mine limestone from this permit area for a number of years. Lands in the Section immediately west, Section 26, are within permit no. 298C. Limestone in this area has been mined by Monolith Portland Cement Company, and the area will be reclaimed by Mountain Cement Company. The area immediately east, in Section 30 of Township 15 North, Range 72 West, is encompassed by mining permit no. 319C. Permit No. 319C also

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includes Howe Road and the road across Section 25, all of which Mountain Cement Company intends to use for mining in the future.

In 1969 Monolith Portland Cement Company obtained a permit to mine (permit 21) under the Open Cut Land Reclamation Act. Monolith expanded that permit three times, Open Cut Land Reclamation Act Permit Nos. 21A1, 21A2, and 21A3. In 1975, following the passage of the Environmental Quality Act, Monolith Portland Cement Company was issued Permit No. 298C. Permit No. 298C encompassed most of the land covered by Open Cut Land Reclamation Act Permit No. 21 as amended. Permit No. 298C was then expanded by Monolith on three occasions, 298C-A1, 298C-A2 and 298C-A3. The most recent permit expansion was made by Mountain Cement Company as 298C-A4. The application for 298C-A4 was filed in February of 1987.

As part of that application process, public notice was required and adjacent land owners were notified. Attached as Exhibit B are copies of the legal publications, and the public notices to the Despains. Deanna Despain, now Deanna Johnson, signed the acceptance of the notification to mine. All of Mountain Cement's mine permit areas are covered by both Land Quality and Air Quality permits each of which required public notice.

In response to the application to expand the permit in 1987 neighbors north of the permit area filed protests. There were several public meetings discussing the issues. Attached as Exhibit C are copies of front page articles from the Laramie Daily Boomerang for May 13, May 15 and May 20, 1987, which discuss some of the process followed. These articles will provide you some idea of the amount of public scrutiny given to the mining application process.

As a result of the public hearings, negotiations with the staff of the Department of Environmental Quality, and discussions with neighbors, Mountain Cement Company prepared a response to the objections in a prehearing memorandum to the Department of Environmental Quality. Attached as Exhibit D is a copy of Mountain Cement Company's response to objections and prehearing memorandum. That response discusses many of the issues raised by the residents near the quarry and discusses Mountain Cement Company's mining plans.

Mountain Cement Company negotiated a compromise mining plan with the neighbors and they withdrew their objections. To obtain their neighbors' acceptance, Mountain Cement Company agreed to certain permit conditions. One of the conditions was that Mountain Cement Company would move its mining operations to the most

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northern part of the permit area, and then mine southward. That condition is number 14 to the final permit, which is annexed as Exhibit E. That southward progression, which brings the mining activity toward Section 25, is now underway.

One of the major concerns regarding mining of limestone is the need for blasting. Attached as Exhibit F is a copy of the blast vibration study conducted by VibraTech Engineers, Inc.

The entire permit application for Permit No. 298C is very extensive, and includes much more information than we have provided to you. If there is additional information you would like, please contact us.

Attached as Exhibit G is a copy of Permit No. 319C which covers the area immediately east of the Johnson property.

C. JURISDICTION

We have had conversations in the past with City and County Planners regarding the jurisdiction over mining activities of the County and the Wyoming Department of Environmental Quality. W. S. §18-5-201 provides, inter alia, as follows:

. . . however, nothing in W. S. §18-5-201 through 18-5-207. . . shall prevent any use or occupancy reasonably necessary to the extraction or production of the mineral resources in or under the lands subject thereto.

Chapter I of the Land Use Management System for Albany County, at Page 4, Section 3, paragraph E provides that the standards shall apply to any change in land use outside the corporate limits of municipalities in Albany County, except that the provisions of this resolution shall:

Not prevent the use or occupancy reasonably necessary to the extraction or production of mineral resources in or under lands subject to this resolution.

Previous planners have taken the position that jurisdiction concerning mining activities is preempted by the State in favor of the State Department of Environmental Quality. Therefore, the only permits that Mountain Cement Company and its predecessor Monolith Portland Cement Company have been required to obtain are permits from the Department of Environmental Quality.

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D. IMPACT ON COUNTY, DIVERSIFIED ECONOMIC BASE

Howe Road, principal access to Section 25, was largely built by Monolith Portland Cement Company for access to its mineral claims. Monolith's rights have been transferred to Mountain Cement Company. Attached as Exhibit H is a copy of the Assignment of the Agreement between Albany County and Monolith Portland Cement Company which discusses maintenance of Howe Road. That Agreement, assumed by Mountain Cement Company, requires that Mountain Cement maintain Howe Road, which is done at considerable expense. If Mountain Cement is unable to mine limestone in this area, there would be no need for Mountain Cement to maintain Howe Road, the county would then be required to pay the additional cost of road maintenance.

Mountain Cement has invested heavily in Albany County. It provides jobs to more than 100 employees, pays property, severance and sales taxes, and contributes to the economic well being of the community in numerous other ways. Mountain Cement Company must be able to mine limestone to continue its cement manufacturing operations.

E. CONCLUSION

The land use management system provides various standards for evaluating land use change applications. Each one of the goals and policies considers compatibility with the uses of the surrounding lands. The Land Use Management System requires that changes be as compatible as possible with existing uses and lifestyles. This area has been mined for limestone for decades and is covered with permits for future mining. Mining is consistent with the existing agricultural use. The construction of home sites in a subdivision is not compatible with the existing uses and lifestyles of the area.

Mining is also necessary to maintain a diversified economic base within the county. There are many other locations in the county available for residential development. In addition, once mining has been completed in this area and the lands reclaimed, it may then be available for residential development. On the other hand, there are a very limited number of areas with sufficient reserves of cement grade limestone which are available to sustain Mountain Cement's operations.

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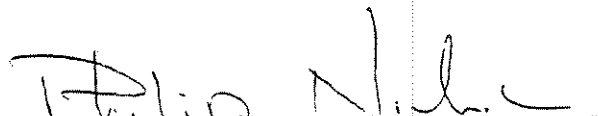
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Mr. Andy Kasehagen
July 13, 1993
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If there is any additional information you require, please
call.

Very truly yours,

NICHOLAS LAW OFFICE



Philip Nicholas

PAN:sbd
cc: Jerry Hoyle

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NICHOLAS LAW OFFICE

DAVID R. NICHOLAS
PHILIP A. NICHOLAS
STEPHEN N. GOODRICH
JEFF ANTHONY*

July 28, 1993

*ADMITTED IN NEBRASKA AND COLORADO

FIRST INTERSTATE BANK BUILDING
221 IVINSON AVENUE
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Mr. Andy Kasehagen
City and County Planner
Albany County Planning Commission
405 Grand Avenue
Laramie, WY 82070

RE: Land Use Change Request
for a Major Land Division Called
Summit Estates, Millard and Deanna
Johnson, Applicants

Dear Mr. Kasehagen:

This letter, opposing the proposed land use change for a major land division called Summit Estates, is submitted to you on behalf of Mountain Cement Company.

During the last Planning Commission meeting, Mountain Cement Company was invited to submit language for a proposed release, which would release Albany County, Mountain Cement, and the land developers from any liability arising out of the approval by Albany County of the land use change for Summit Estates.

We have obtained a copy of the July 22, 1993 letter from Cary Alburn to you proposing language for such a release. Mr. Alburn's proposed release language does not include a release of liability to Mountain Cement Company nor does it, in our opinion, constitute an assured effective release for anybody.

Annexed hereto is a July 22, 1993 letter from Mr. Alburn to me. In that letter Mr. Alburn states that the land developers offer to include Mountain Cement Company in any such release language for payments to the developers of \$50,000 per year.

A. Legal Effect of Releases to the County.

During the public meeting held by the Planning Commission Mountain Cement Company expressed concerns about the legality of a release. The general law, articulated at 66 Am. Jur. 2d Releases §14, is as follows:

A release given before a liability arising may in some instances be void as contrary to public policy, including anticipatory releases from liability for injuries to the person of the releasor or to his property or business...

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This issue was addressed by the Montana Supreme Court in *Haynes v. County of Missoula*, 517 P.2d 370 (Mont. 1973). In the Montana case, the County Fair Board required that entrants release the County Fair Board from all liability for injury to livestock or other property. The plaintiff in that action sued the county for the death of two registered quarter horses in a fire at the fairgrounds. In considering the validity of the County's release, the Court, at pages 377 through 378 ruled as follows:

We hold the county is precluded from disclaiming liability by virtue of the release when performing an act in the public interest. This principle is recognized in *Restatement, Contracts*, §575, providing in pertinent part: '(1) A bargain for exemption from liability for the consequences *** of negligence is illegal if '(a)*** '(b) one of the parties is charged with a duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation.'

Mountain Cement Company continues to believe that the release language is ineffective to discharge Albany County, the developers, or Mountain Cement from future liability, if any.

B. Deficiencies in Applicant's Release.

Although Mountain Cement Company believes that the Release will not work, the following discussion is provided in response to the County Planner's and Planning Commission's requests that Mountain Cement Company comment on the release language.

All language of the release must be complete and truthful. It is difficult to draft a release which fully discusses the hazards of building homes next to a quarry operation. At a minimum, the following additional language should be considered in any release:

1. The Wyoming Department of Environment Quality, Division of Land Quality has granted to Mountain Cement Company a permit for an open pit mining operation in the areas directly north and east of Summit Estates. Mountain Cement Company has advised the County and the developers that mining of limestone will occur up to the borders of Summit Estates. Such mining will require, and Mountain Cement's permits allow for, blasting with Ammonium Nitrate Fuel Oil (ANFO).
2. Mountain Cement Company's right to mine is prior in time to the decision of the real estate developers to apply for a major land division called Summit Estates

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Subdivision, therefore, Mountain Cement is not required to mitigate or otherwise amend its previously approved mining plan to accommodate homes constructed in Summit Estates.

3. The mining plan previously approved for Mountain Cement anticipated that there would be no structures closer than 3,000 feet from its blasting operations. Homes within Summit Estates will be adjacent to and well within 3,000 feet of Mountain Cement's blasting operations.
4. Neither the County nor the developer has conducted studies to determine the effect of blasting by Mountain Cement Company adjacent to Summit Estates on structures built on property in Summit Estates. Because Mountain Cement Company's rights are prior in time and its permit has been previously approved, it is not required to provide such studies.
5. It is known that blasting can cause permanent damage to structures. The developer has not provided a plan to mitigate against such damage. Even if structures are built to a seismic zone code of 4, it is not known whether such construction will be adequate to prevent damage to structures.
6. Neither the developer nor the County has provided for a buffer area or other mitigation against the effects of Mountain Cement's open pit mining operations. Mountain Cement Company's quarries, which will be adjacent to Summit Estates, require the use of heavy construction machinery. People and animals can be severely or even mortally injured by such heavy equipment and mining operations.
7. The mining operations generate dust and noise. The operations will also adversely affect the scenery until mining is completed and reclamation is accomplished.
8. In addition to the previously obtained mining permits adjacent to Summit Estates, Mountain Cement Company has filed mining claims in areas north and east of its existing permit areas. Mountain Cement Company has expressed its intent to mine in those areas. Mining in the area is projected to last as long as 30 years.

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9. The access road to Summit Estates and the lots within Summit Estates was built by and has been used for many years by Mountain Cement and its predecessor in title as a haul road. There is a legal dispute regarding Mountain Cement Company's right to use the dirt road at the end of Howe Road which crosses the proposed major land division. Mountain Cement believes it has the legal right to continue using the road as long as it pays certain payments to the land developers. Mountain Cement Company uses large tractor trailer units which haul 60 tons of material at a time on its haul roads. Mountain Cement asserts that the haul road through what would be called Summit Estates was built by it for its exclusive use.
10. Purchasers of the property in the proposed Summit Estates may be required to install, at their own expense, adequate fencing, signs, berms, landscaping, walls, or other barriers to mitigate against the impacts of Mountain Cement Company's open pit mining operations.
11. Areas within the proposed Summit Estates were previously mined and may be subject to settling.

C. CONCLUSION.

The land developers propose to use a Release, Covenant Not to Sue and Hold Harmless Agreement between the purchasers of property and the developers in the form provided by the applicant to accomplish the intended purposes. Mountain Cement Company believes the release will be ineffective. However, if a release is to be used, comprehensive language in the form offered above addressing the potential impacts of Mountain Cement Company's preexisting mining operations on the proposed Summit Estates should be included.

Comprehensive language should also be contained in the Deeds to the property and incorporated as covenants which run with the land.

Of course, such Release, Covenant Not to Sue and Hold Harmless Agreements could only be effective, if at all, against the owners of the real property. It is hard to see how such provisions could be effective against invitees, guests, children, and others who come on to the proposed Summit Estates who are not parties to any release or deed.


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Mr. Andy Kasehagen
July 28, 1993
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I hope this of some assistance to you in your considerations.
If either you or the County Attorney have any questions of Mountain
Cement, please do not hesitate to call.

Very truly yours,

NICHOLAS LAW OFFICE


Philip Nicholas

PAN:sbd
cc: Jerry Hoyle

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