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**BEFORE THE HEARING EXAMINER
FOR CLALLAM COUNTY**

In Re:
Conditional Use Permit Hearing for
Olympic Systems Properties
File No. CUP2021-00005, and

Comment on
*Mitigated Determination of
Nonsignificance for
Olympic Systems Properties*
(March 22, 2022)
File No. ECL2021-00019

**Hearing Examiner File No.
CUP2021-00005**

**DCD File No.
ECL2021-00019**

A-M SYSTEMS, LLC
AND
ARTHUR B. GREEN III's
RESPONSE TO APPLICANT'S
MOTION FOR CONTINUANCE

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A-M Systems, LLC and Arthur B. Green, III (A-M Systems) request that the Hearing Examiner deny the applicant's Motion for a Continuance. In the alternative, if the Hearing Examiner were to continue the hearing, A-M Systems requests that a status conference be held and a briefing schedule be put in place to allow A-M Systems and other parties to file motions for summary judgment on the zoning incompatibility issue with a decision issued prior to holding any continued hearing.

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The applicant is displeased with a staff recommendation of denial that is based on the incompatibility of a high-intensity garbage transfer use being located in a low-nuisance zone. Upon learning in the last few weeks that the staff were unlikely to change that recommendation, the applicant brought this motion for a continuance. That motion should be

1 denied because it is time to finalize the status of the application, as inconsistent with planning
2 and zoning for the site and therefore ineligible for approval as a conditional use.

3 There is no factual dispute in this case that a solid waste transfer facility is not listed in
4 the table of zoning uses for the Carlsborg UGA; it is not allowed in the Carlsborg Industrial
5 zone, either outright or by conditional use permit. None of the grounds for a continuance cited
6 by the applicant can change that basic law of the case.

7 In the event our request to move forward with the hearing is denied and a continuance
8 is granted, A-M Systems requests that the Examiner schedule a status conference within the
9 next 60 days, requiring the applicant to provide a written report on readiness for hearing. We
10 also request that the Examiner set a briefing and decision schedule in the months prior to the
11 new hearing date, to hear and decide a motion for summary judgment that A-M Systems plans
12 to file based on pure questions of zoning law. We request that new notice be issued for any
13 continued hearing, in order to ensure the public has up-to-date information on the status of this
14 case and an opportunity to be heard.

15 Under the applicable rule for continuances, the applicant must "state reasonable
16 grounds." Having offered none, the motion must be denied. A last-minute delay by the
17 applicant (for the second time) less than seven business days prior to the hearing comes at a
18 substantial cost to the public, Clallam County, and other parties like A-M Systems. Delay
19 would be unreasonable.

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21 Two Hearing Examiner Rules govern whether to delay this hearing until November
22 2022, as requested by the applicant:

23 **9.7 Continuances of Hearings**

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25 **(2) At the request of a party**

26 Any party of record may request continuance of a hearing. The request, if made
27 prior to the hearing, must be in writing and state reasonable grounds for a
28 continuance. If the request is made orally at the hearing it must be based on

1 reasonable grounds. The Hearing Examiner shall have discretion to grant or
2 deny the request for continuance. It shall be the policy of the Hearing Examiner
3 that a maximum of two (2) continuances be granted in a matter.

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5 **9.8 Evidence**

6 **(1) Burden of proof**

7 In each proceeding, the applicant shall have the burden of proof to show
8 compliance with applicable laws and regulations of Washington State and
9 Clallam County.

10 *Clallam County Administrative Manual*, Policy 921 at 7-8 (Rev. 12/13/2011).¹ The Hearing
11 Examiner weighs whether the request is reasonable in light of the rule that the applicant is
12 alone responsible to prepare for hearing and has the burden to prove compliance with
13 applicable standards for issuance of a CUP.

14 The motion points at DCD staff as the reason the applicant is not prepared for hearing.
15 The staff issued an MDNS in January 12, 2022 and a recommendation of denial for the CUP
16 on January 26, 2022, thus putting the applicant on notice as to all of the key issues in the case.
17 The recommendation of denial was based on a finding that the proposed use was not similar to
18 the kinds of industrial uses allowed in the Carlsborg Industrial zone, which are classified as
19 "low-nuisance industrial use." The applicant has had over five months (since the Feb. 3
20 continued hearing) to try and persuade staff to change that negative recommendation. During
21 that period of time, the applicant submitted nothing into the record of the case, offered no new
22 analysis, and scheduled no meetings with staff. The applicant has not demonstrated any good

23 ¹ See also, **33.27.110. Burden of proof.**

24 At every stage of the conditional use permit process, the burden of demonstrating that any proposed
25 development is consistent with the Comprehensive Plan, and the spirit and intent of this chapter and is
26 compatible with the permitted uses in the zone in which it will be located is upon the applicant.

27 Clallam County Code (CCC) § 33.27.110.

1 faith effort between February 3 and June 30 to achieve the result they say now they need time
2 to achieve. The fact of a single meeting with staff on June 30, without other facts anywhere in
3 the motion or attached declarations demonstrating a good faith effort to proceed to hearing,
4 speaks for itself. The applicant's reasons for a continuance are overshadowed by the
5 applicant's own lack of due diligence in pursuing the application approval.

6 Beyond that effort to blame the DCD staff, the applicant has stated no reasonable
7 grounds for delaying a hearing and a decision on the essential threshold question in the case
8 that affects the entire Carlsborg community and adjacent property owners like A-M Systems.
9 At a minimum, the hearing should be commenced so that the Hearing Examiner can review
10 and decide the legal issue concerning zoning incompatibility under the following two
11 requirements for any CUP approval:

- 12 (a) The proposed action is consistent with the spirit and intent of the Clallam County
13 Comprehensive Plan.
- 14 (b) The proposed action is consistent with this title [Title 33, Zoning].

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16 CCC § 33.27.040(1)(a),(b) (Hearing Examiner Action).

17 At its heart, the fundamental issue in the case is whether a solid waste transfer facility
18 of any scope may be characterized as: (a) an industrial use under the zoning code definition;
19 and, if so (b) whether solid waste handling at the proposed scale, in any sense of the word, be
20 classified as a "low nuisance" industrial use. The City of Port Angeles has added another
21 threshold zoning issue decided under the same criteria cited above and other principles of law:
22 Whether Clallam County can issue a permit for a solid waste facility when that is not
23 authorized under the adopted regional Solid Waste Management Plan, adopted by the County
24 Commissioners in July 2021. A-M Systems agrees that the CUP criteria mandate denial at
25 this time, since the whole CUP approval process is in conflict with the County's adopted solid
26 waste management plans which are of obvious regional significance. Holding the hearing on
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1 these threshold issues of law, as scheduled, will give neighbors, the community, Clallam
2 County and the region the certainty they deserve as to whether Waste Connections has the
3 right to operate its own private solid waste facility in Carlsborg.

4 Evidently realizing that a negative staff recommendation would remain unchanged as
5 they headed to hearing, the applicant presents new fact-declarations and arguments on what
6 the zoning code authorizes, and asks essentially that the Hearing Examiner weigh in on those
7 questions, if not decide those issues, as a basis for granting the requested continuance. A-M
8 Systems concurs with the applicant that this zoning issue is ready for decision now, as a
9 matter of law, if that is what their motion asks, but A-M Systems requests that a decision be
10 issued following briefing and oral argument on the merits, not under the cover of a motion for
11 continuance.

12 The issue raised by the applicant's reference to other CUP approvals is whether a solid
13 waste facility can be permitted by the Hearing Examiner in the Carlsborg Industrial zone
14 under this procedure for review of an unclassified use. Unhelpfully, the applicant makes
15 much of the prior CUP granted in 2017 on the adjoining lot to the north.² That case did not
16 involve any disclosure of a solid waste facility prior to approval and cannot serve as a basis
17 for what is right or authorized here. Citing that approval also is not a reasonable basis for
18 delay in the instant application for CUP approval.

19 The applicant's contention concerning the 2017 CUP approval should not divert
20 attention away³ from their own failure to prepare for the hearing they requested. Nonetheless,
21 the following analyzes and disputes the claim that the 2017 CUP somehow authorized a solid
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24 ² Rather than provide a detailed accounting of the facts involved in that prior 2017 CUP approval, A-M Systems
25 incorporates by reference as though fully set forth herein the *City of Port Angeles's Response to Applicant's Motion to*
Continue filed today as well.

26 ³ The Waste Connections reference to a 2017 CUP permit is a deflection because, even if one accepts for the sake of
27 argument only that a solid waste handling facility was approved in 2017, approval of a permit in one instance does not *a*
priori determine whether a subsequent permit decision is correct or incorrect.

1 waste transfer facility. The applicant contends that by now applying for a building permit
2 under the 2017 CUP, Waste Connections has a right to use that facility for a solid waste
3 transfer facility, and then by analogy they have a right to do so in the parcel to the south which
4 is similarly zoned.

5 The problem with that argument in the first instance is that the application statement of
6 intended land use, and the staff report recommending approval, never mentioned the words
7 "solid waste transfer facility."⁴ *Declaration of Tom Ehrlichman*, attached hereto as Exhibit 1,
8 and incorporated by reference. The only use ever described for the third phase of the project
9 was "transload or bailing." Nothing in the Hearing Examiner's 2017 CUP decision discussed
10 or authorized use of the site for a solid waste facility, which is use the legislature has defined
11 as being subject to state regulation.⁵

12 While Waste Connections (or one of its subsidiaries) has a right to apply for a building
13 permit on the site to the north, doing so does not operate by law to change a "transload
14 facility" into a solid waste handling facility as defined in RCW ch. 70.95. Nothing in the
15 application or elsewhere in the record presented by the applicant specified either the process
16 for obtaining Health Department review of the facility, as required by RCW ch. 70.95 and
17 WAC ch. 173-350, or described the specific limitations on use necessary to qualify for a state-
18 law exemption, under WAC 173-350-225.⁶ In short, the 2017 CUP for a "*transload or*
19 *bailing facility*" does not provide Waste Connections any cover on what it is now proposing
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23 ⁴ In its 2021 application for this CUP on the south parcel, Waste Connections was careful to word the proposed use as a
24 "Municipal Solid Waste Transfer Station." See Application 2021-00005. In its 2017 application for a CUP, it worded the
25 proposed use as a "Trans-load or baling facility" [sic]. See Exhibit 1, *Ehrlichman Decl., Exh. B* (2017 Application).
Nothing in the applicant's submittal materials ever disclosed an intent to operate a solid waste transfer station or seek
County or state approvals for such a facility on the north parcel. *Id., Exh. C* (Applicant's 2017 Environmental Checklist).

26 ⁵ *Findings, Conclusions and Decision of the Clallam County Hearing Examiner*, Case No. 2017-00005, Finding No. 1 at 2,
attached as Exhibit A to the *Declaration of Alexander M. Wu in Support of Applicant's Motion*.

27 ⁶ WAC 173-350-225.

1 now in 2022, which is a solid waste transfer facility. Waste Connections' effort to blur the
2 lines on a 2017 approval does not serve their cause.

3 This case is ready to go to hearing. The applicant has known of the challenges it faced
4 for over half a year. The proposal's direct adverse impacts on the Carlsborg UGA were well-
5 documented by February 2022, in over 400 comments in the record from neighboring business
6 owners, trail-users, agencies and the public. For example, the applicant has known in detail
7 what traffic safety issues to address. It had had video evidence submitted by the Principal of
8 Greywolf Elementary school identifying significant traffic congestion on the route to and from
9 the project.

10 Following the continuance of the February 3 hearing date, the applicant had five
11 months within which to perfect their arguments on traffic, landscaping and other issues
12 identified in the record. An applicant's failure to conduct that work does not constitute
13 reasonable grounds. Further delay is to the detriment of A-M Systems, Arthur B. Green, III
14 and the public as they gear up then down then up for presentation at hearing. When opposing
15 a major siting issue involving solid waste handling, that involves a tremendous amount of time
16 and resources. The rules for continuances give the Hearing Examiner discretion to move
17 ahead and we request that you do so on July 21.

18 Respectfully submitted this 18TH day of July, 2022,

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20 DYKES EHRLICHMAN LAW FIRM

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25 Tom Ehrlichman, WSBA No. 20952
26 Counsel for A-M Systems, LLC and
27 Arthur B. Green, III

CERTIFICATE OF SERVICE

I, Tom Ehrlichman, am a partner at the Dykes Ehrlichman Law Firm. I hereby certify that on July 18, 2022 I caused this *Response to Motion for Continuance* to be filed with the Clerk for the Clallam County Hearing Examiner, and served upon counsel for the applicant at Hillis Clark Martin & Peterson, counsel for the City of Port Angeles at Foster Garvey, and upon Chief Civil Deputy Prosecuting Attorney, Elizabeth Stanley, all via electronic mail.

Signed, July 18, 2022:

Tom Ehrlichman, WSBA No. 20952

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