



COUNTY COMMISSIONERS

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District Three

**HEARING EXAMINER**

*Creating Solutions for Our Future*

**BEFORE THE HEARING EXAMINER  
FOR THURSTON COUNTY**

In the Matter of the Appeal of	)	No. 2007105168 AAPL
	)	
<b>Harold Hillesland, et al.</b>	)	FINDINGS, CONCLUSIONS,
	)	AND DECISION
Of an Administrative Determination	)	
_____	)	

**SUMMARY OF DECISION**

The appeal of an administrative determination issued on April 1, 2008, that a gravel mining operation conducted by Mike Wood at 15700 Bald Hill Road SE in Thurston County is a legal nonconforming use is **GRANTED**.

**SUMMARY OF RECORD**

Procedural History:

On December 28, 2007 Mike Wood applied for a Special Use Permit (SUPT) from Thurston County to operate a rock crusher as part of a gravel mining operation at 15700 Bald Hill Road SE in Thurston County. As part of the administrative review of the application Thurston County Senior Planner Robert Smith, on April 1, 2008, issued two documents that have resulted in the present appeal. The documents were:

- (a) A letter to Mike Wood, the operator of gravel mining operation as 15700 Bald Hill Road SE, with the subject "Gravel Mining on Tax Parcel 22624001600, Rescinding March 11, 2008 Letter and Re-Issuance of Same";
- (b) A memorandum to "Interested Parties" with the subject "Wood Gravel Mine at 15700 Bald Hill Road, Tax Parcel 22624001600." The memorandum sent to interested parties included the letter to Mr. Wood as an attachment.

The documents included the following language that is relevant to the present appeal:

*April 1, 2008 letter to Mike Wood:* -"Based on review of aerial photos this department concludes that there was a gravel extraction operation on the subject property prior to adoption of the Thurston County Zoning Ordinance (TCC 20) and the Mineral Extraction Code (TCC 17.20)."

*April 1, 2008 memorandum to Interested Parties:-* “Based upon review of pre1980 aerial photos and discussion with Mr. Wood and his representatives, Thurston County believes the mining operation is a grandfathered use. Land uses in existence prior to adoption of the Thurston County Zoning Ordinance in 1980, and not compliant with current zoning regulations, are considered grandfathered non-conforming uses. Such grandfathered uses may continue to operate unless vacated. Further, mining operations are subject to the Thurston County Mineral Extraction Code (TCC 17.20). The letter to Mr. Wood sets out requirements for him to maintain the grandfathered rights of the mining use.”

*Exhibit 1, Attachments d and e.*

On April 15, 2008, Harold and Jean Hillesland, Gary Miller, Dennis and Shannon Gubser, Andrew Wright, and Lisa Fitkin (all hereafter referred to as “Appellant”) filed an appeal of the nonconforming use determination embodied in the April 1, 2008 letter and memorandum. The appeal included specific arguments that extraction activities were not established on the site prior to adoption of the Thurston County zoning code in 1980; that mineral extraction prior to 1980 was illegal because no state permit had been issued to authorize the use; that if a mineral extraction nonconforming use was established on the site prior to 1980, the mining operation was later illegally expanded, vacated, or abandoned; and that any legal nonconforming use status has been forfeited by violations of the County’s Mineral Extraction Code, solid waste regulations, and the state reclamation permit.<sup>1</sup> *Exhibit 1, Attachment c.*

On May 14, 2008, the Thurston County Hearing Examiner dismissed the Hillesland appeal. The Appellants appealed the dismissal to the Board of County Commissioners, who on July 21, 2008, reversed the Hearing Examiner’s dismissal of the appeal and remanded it “for a hearing on the issue of whether or not the mine is a legal nonconforming mine site.” Subsequently a Thurston County Superior Court affirmed the Board’s decision on February 27, 2009.

#### Hearing Date:

An open record hearing on the appeal was held before the Thurston County Hearing Examiner on July 20, 2009, August 17, 2009, and August 31, 2009.

#### Issues on Review:

The issue on review, based on the April 15, 2008 appeal and the July 21, 2008 decision of the Board of Commissioners, is whether the County correctly determined in its April 1, 2008 administrative decision that gravel mining on Tax Parcel No. 22624001600 is a legal nonconforming use.

The Hearing Examiner will not confine his review of the April 1, 2008 administrative decision to whether it is consistent with the Washington Department of Natural Resources Form SM-6 (County or Municipality Approval for Surface Mining) issued on July 18, 2007, as suggested by Mr. Wood. The SM-6 (Exhibit 1, Attachment g) was based on the County’s determination that the mine was “vested” under local land-use regulations, and it was not appealed. Mr. Wood argued that because the SM-6 was not appealed, the determination is binding on the April 1,

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<sup>1</sup> The statement of appeal included an additional allegation (regarding the effect of the County’s 1968 interim zoning ordinance) that was later withdrawn. *Exhibit 1, Attachment c; Argument of Mr. Bjorgen.*

2008 determination. However, upon review of the Board of County Commissioners' July 21, 2008 Decision, the Hearing Examiner concludes that the Board intended that he reach the merits of the case and not limit his review to whether April 1, 2008 decision was consistent with the SM-6. The Board considered the relevant decision for review to be the April 1, 2008 decision, and remanded it "for a hearing on the issue of whether or not the mine is a legal nonconforming mine site." In its decision, the Board acknowledged that Mr. Wood had argued that the appeal was not timely because the nonconforming use determination was first made in 2007 when the SM-6 was issued, but it still remanded the case for a hearing. Thurston County Superior Court upheld the Board's decision.

Mr. Wood requested that the Hearing Examiner rule on the issue of whether his nonconforming use rights extend to an adjacent 10-acre parcel he owns (a portion of Lot 17 of Bald Hill Acreage Lots, Tax Parcel No. 22624220201) pursuant to the court decision *University Place v. McGuire*, 144 Wn.2d 640 (2001). Mr. Wood's site plan and reclamation plan include the 10-acre parcel (compare Exhibit A-26 with Exhibit A-13), although the County does not consider his nonconforming use rights to extend to that parcel (see Exhibit 6 and Testimony of Mr. Kain).

The Hearing Examiner will not rule on the issue of whether nonconforming use rights extend to the 10-acre parcel for two reasons. First, the Examiner's jurisdiction is limited to reviewing the administrative decision embodied in the April 1, 2008 letter to Mr. Wood and memorandum to interested parties (Exhibit 1, Attachments d and e). Both documents specifically reference Tax Parcel No. 22624001600 and make no mention of Tax Parcel No. 226242201. Second, due to the Hearing Examiner's decision in the instant case that Mr. Wood does not have nonconforming use rights to Tax Parcel No. 22624001600, the issue of whether nonconforming use rights extend to the adjacent parcel is moot.

Testimony:

At the open record hearing the following individuals presented testimony under oath:

Robert Smith, Associate Planner, Resource Stewardship Department  
Mike Kain, Planning Manager, Resource Stewardship Department  
Arthur Saint, P.E., Public Works Department  
Harold Hillesland, Appellant  
Mike Wright  
Terry Curtis  
Greg Jones  
Mike Wood

Attorney Representation:

Ben Cushman, attorney representing Mike Wood  
Tom Bjorgen, attorney representing Harold Hillesland, et al  
Jeff Fancher, deputy prosecuting attorney, representing Thurston County Resource Stewardship Department

Exhibits:

At the open record hearing the following exhibits were admitted into the record:

**EXHIBIT 1** Resource Stewardship Department Report including the following attachments:

- |              |   |
|--------------|---|
| Attachment a | Notice of Public Hearing  |
| Attachment b | Zoning/Site Map   |
| Attachment c | Harold Hillesland, et al Appeal, received April 15, 2008  |
| Attachment d | April 1, 2008 Determination Letter from Robert Smith, Thurston County Development Services Department   |
| Attachment e | April 1, 2008 Memorandum to Interested Parties from Robert Smith, Thurston County Development Services Department                                     |
| Attachment f | Site Plan   |
| Attachment g | Washington State Department of Natural Resource, Form SM-6, Signed July 17, 2007 by Michael Kain  |
| Attachment h | 1972 Aerial Photograph  |
| Attachment i | 1992 Aerial Photograph  |
| Attachment i | Photograph of Thurston County Interim Zoning Map  |
| Attachment j | July 1, 2009 E-mail from Bill Dean to Robert Smith  |
| Attachment k | September 17, 2007 Letter from Bill Dean, Thurston County Public Health and Social Services Department, to Mike Wood regarding solid waste violations |

**EXHIBIT 2** Full Size Aerial Photo of Site from 1972

**EXHIBIT 3** 1992 Color GeoData Aerial (exhibit 1, attachment i)

**EXHIBIT 4** Color Photograph of Thurston County Interim Zoning Map (exhibit 1, attachment j)

**EXHIBIT 5** No exhibit

**EXHIBIT 6** March 17, 2008 Letter from Robert Smith to Greg Jones

**EXHIBIT 7** 1981 and 1985 Black and White Photos of Site, submitted by Terry Curtis

**Pre-Hearing Submittals:**

- Thurston County's Response to the Hearing Examiner's Request for Applicable Law, dated July 15, 2009
- Exhibit and Witness List for Appellants Hillesland, et al, dated July 6, 2009
- Legal Memorandum by Appellants Hillesland, et al, dated July 15, 2009
- Appellant Hillesland Exhibits:
  - A-1. List of site landowners since 1952; Auditor's file sheet showing prior owners; real estate contract dated December 23, 1998 between John and Margaret Meek and Wood & Sons; special warranty deed dated December 23, 1991 between Municipality of Metropolitan Seattle and John and Margaret Meek; special warranty deed dated February 25, 1988 between John Hancock Mutual Life Insurance Co. and Municipality of Metropolitan Seattle; warranty deed dated April 13, 1987 between Boise Cascade Corporation and John Hancock Mutual Life Insurance Co.; sheet noting 1969 merger of West Tacoma Newsprint Co. and Boise Cascade; and statutory warranty deed dated April 1952 between Ben

and Clara Wilson and West Tacoma Newsprint Co.

- A-2. Aerial photographs of site:
  - 5-20-78 – DNR low altitude
  - 6-25-81 – DNR low altitude
  - 6-25-85 – DNR low altitude
  - 6-9-86 – WSDOT low altitude
  - 9-3-89 – DNR low altitude
  - 7-15-90 – USGS high altitude
  - 8-9-92 – WSDOT low altitude
- A-3. Series of seven aerial photographs of Wood mine site from 1992 to 2006 from Thurston GeoData Center, depicted at a scale of 280 feet, labeled Series 1.
- A-4. Series of seven aerial photographs of Wood mine site from 1992 to 2006, from Thurston GeoData Center, depicted at a scale of 560 feet, labeled Series 2.
- A-5. Series of six aerial photographs of Wood mine site from 2000 to 2006, from Thurston GeoData Center, depicted at a scale of 560 feet, labeled Series 4.
- A-6. Ground photographs of Wood mine in 2007 and 2008, labeled Photograph Nos. 1 through 34.
- A-7. DNR renewal of state Surface Mining Permit No. 11289 by Boise Cascade, dated October 17, 1975.
- A-8. Letter dated August 30, 1976 from J.P. Hess of Boise Cascade to DNR terminating state Surface Mining Permit No. 11289 by Boise Cascade.
- A-9. Letter dated September 3, 1992 from Bill Boyum of DNR to Boise Cascade, granting Surface Mining Permit No. 12725 in eastern Washington.
- A-10. Thurston County Ordinance No. 6708, adopted August 15, 1980.
- A-11. Seattle Times article from January 5, 1990, showing intent by Metro to use land for sewage sludge disposal during the approximately three and one-half years it owned the property.
- A-12. Forest Practices application by John E. Meek, dated December 1991 to clearcut property.
- A-13. Survey of large lot subdivision for John Meek, dated April 20, 1994.
- A-14. Declaration of Protective Covenants, Conditions and Restrictions by John and Margaret Meek, recorded May 26, 1994, with amendment.
- A-15. Letter dated January 10, 2004 from Harold Hillesland to Robert Smith.
- A-16. Letter dated January 13, 2004 from Robert Smith to Eddie True.
- A-17. Letter dated July 25, 2004 from Mike Wood to Robert Smith.
- A-18. Letter dated September 8, 2004 from Robert Smith to Eddie True.
- A-19. E-mail from Robert Smith to Roger Giebelhaus, dated April 29, 2005.
- A-20. Letter dated May 4, 2005 from Robert Smith to Eddie True.
- A-21. Letter dated September 14, 2006 from Steven G. Eberl of the state Department of Ecology to Michael Wood, on need for NPDES general permit.
- A-22. Letter dated September 26, 2006 from Robert D. Mead of DNR to Mike Wood, stating that the current surface mine is operating without the required Surface Mine Reclamation permit.

- A-23. DNR Notice of Correction (Form SM-7B) dated September 26, 2006 for operating without a Surface Mine Reclamation permit.
  - A-24. DNR Surface Mine Inspection Report (Form SM-7A), dated September 26, 2006, showing that mine is operating without a permit, and stating that recycled concrete and asphalt were present in the pit and that there may be a solid waste issue.
  - A-25. Application for DNR Reclamation permit by Mike Wood, dated June 7, 2007.
  - A-26. As-built and reclamation sequence maps submitted by Wood on June 7, 2007 showing existing and planned cement recycle areas.
  - A-27. Letter dated August 14, 2007 from the state Department of Ecology to DNR, reiterating need for NPDES general permit.
  - A-28. Letter dated September 19, 2007 from Mike Wood to Bill Dean.
  - A-29. DNR Surface Mining Reclamation permit (Form SM-9), dated November 30, 2007, with conditions.
  - A-30. Memorandum dated January 23, 2008 from Nadine Romero to Robert Smith, Darrell Cochran and John Ward, with attachments.
  - A-31. E-mail exchange on February 29, 2008 and March 3, 2008 between Robert Smith and Kevin Chambers, showing operation without a grading permit.
  - A-32. Letter dated March 27, 2008 from Harold Hillesland to Robert Smith, and noise survey result dated May 15, 2008.
  - A-33. DNR Surface Mine Inspection Report (Form SM-7A), dated April 17, 2008.
  - A-34. Letter dated June 22, 2009 from Dave Sclair to Harold Hillesland.
  - A-35. Letter dated June 29, 2009 from Tom Turner to Thomas Bjorgen.
  - A-36. Fact Sheet – Sand and Gravel General Permit, dated January 2005, obtained from the Department of Ecology website on July 1, 2009.
  - A-37. Curriculum Vitae for Terry A. Curtis.
  - A-38. E-mail from Matt Brookshier of DNR to Mike Wright, sent July 2, 2009, stating that the reclamation permit of 2007 for the Wood mine and the DNR operating permit of 1977 for the Owl Hill pit are the only DNR surface mining permits for either site.
  - A-39. Communication from Thurston County Environmental Health, stating there is no solid waste handling permit for activities at the Wood mine.
  - A-40. Letter from Ray Wilson.
  - A-41. Aerial Photographs titled “Comparison of pit conditions 1981 through 1990”
  - A-42. Aerial Photographs labeled 1992, 1993 and 1996, including typed comments of Terry Curtis
  - A-43. Aerial Photograph titled “DNR Photo ID: SW-93; 34-78-153. Taken August 30, 1993”
- Wood’s Identification of Exhibits and Witnesses, dated July 6, 2009
  - Respondent Wood’s Prehearing Brief, including the following exhibits:
    - B-1 Aerial photograph of the site from August 19, 1977. The photo was obtained from and authenticated by DNR on June 1, 2009.

- B-2 June 30, 2009 Declaration of former Thurston County Sheriff Gary P. Edwards
- B-3 June 30, 2009 Declaration of Patrick M. Johnson. Mr. Johnson is a resident in the vicinity since the early 1970's.
- B-4 May 24, 2005 letter from Dave Walczyk, PLS, of Walczyk Land Surveying, Inc.
- B-5 March 11, 2008 letter from Robert Smith to Mike Wood identifying information and actions needed for the mine to be compliance with the Mineral Extraction Code.
- B-6 May 5, 2008 letter from Cushman Law Offices to Robert Smith identifying how the Wood mine is now in compliance with the Code.
- B-7 March 2, 2008 letter from Wood to the BOCC identifying his compliance efforts.
- B-8 Transcribed excerpt of Robert Smith's testimony at the June 2, 2008 hearing (on Wood's administrative appeal in this case).
- B-9 Letter dated September 19, 2007 from Mike Wood to Bill Dean of Public Health, with copy of Dean's September 17, 2007 letter regarding concrete and asphalt recycling.
- B-10 Deeds and surveys which show the chain of title of the subject site.
- B-11 November 2007 issued surface mining reclamation permit from DNR to Wood.
- B-12 Mining site plan maps attached to the November 2007 DNR permit.
- B-13 DNR's SM-6 form signed by Mike Kain on July 18, 2007.
- B-14 Email from Kain to Greg Jones, dated December 13, 2007.

Upon consideration of the testimony and exhibits admitted at the open record hearing, the Hearing Examiner enters the following Findings and Conclusions:

### **FINDINGS**

1. The subject property, known as the Bald Hill Gravel Mine, is an approximate 40-acre parcel located at 15700 Bald Hill Road SE. The legal description of the property is Lot 16 of the Bald Hills Acreage Lots Survey, which is a portion of the Northwest Quarter of Section 24, Township 16 North, Range 2 East WM; Tax Parcel No. 22624001600. *Exhibit 1, Staff Report, pages 1-2; Exhibit A-13.*
2. The current owner, Mike Wood, purchased the subject property in December of 1998 for mineral extraction purposes. He commenced mining from an existing pit within a month of purchase in order to supply gravel to a Safeway project in Yelm. Since then, he estimates that he has supplied gravel to approximately half of the commercial applications in Yelm. *Testimony of Mr. Wood; Exhibit B-10.*
3. Appellant Harold Hillesland lives northeast of the subject property. His driveway borders the eastern edge of gravel pit. *Exhibit 3; Exhibit A-26; Testimony of Mr. Hillesland.*
4. The subject property is zoned Rural Residential/Resource – One Dwelling Unit per Five Acres (RRR 1/5). *Exhibit 1, Staff Report, page 2.* Mineral extraction requires special use

permit approval in the RRR 1/5 zone, and has required special use permit approval since the zoning code was initially adopted on September 1, 1980.<sup>2</sup> *TCC 20.54, Table 1; Exhibit 1, Staff Report, page 2; Exhibit A-18.* Mr. Wood has never obtained a special use permit for mineral extraction on the subject property. *Testimony of Mr. Wood.*

5. The zoning code as it is currently written defines mineral extraction as follows:

84.5 "Mineral extraction" means the removal of minerals, including, but not limited to, sand, gravel, shale, rock, coal, soil, peat or clay, from an excavation in the earth. This shall not include the following: ...

e. Excavation and grading where the excavated material will be used on the same property or on property contiguous to and under the same ownership as the excavation.

*TCC 20.03.040.* The exclusion of excavated materials used on the same or contiguous property has been in the ordinance since 1993. While the language was not codified until 1993, the County has used the definition since 1980. *Testimony of Mr. Kain.*

6. Thurston County adopted a Mineral Extraction Code (TCC 17.20) in 1993. The code is explicit that certain operational standards (specifically, Sections 17.20.040 through 17.20.190) shall apply to "all gravel mines in existence on the date of adoption of this chapter." *TCC 17.20.040.* One of the standards applicable to existing mines is a registration requirement. Since 2003 the registration requirement has been as follows:

A. Owners of all gravel mining operations shall submit completed registration forms to the county on an annual basis. For existing operations, initial forms shall be submitted to the county by not later than six months from date of adoption of this chapter....

C. A mineral extraction use shall be considered vacated if the mining operator has not timely submitted a complete registration form and related fee to Thurston County per Section 17.20.140 for three consecutive years, or if more than fifty percent of the permitted mining site has been converted to another use at any time, or if significant mining activity has ceased for a period of three consecutive years. "Significant mining activity" as used in this section means extraction, sale ..., and delivery for use of more than five hundred cubic yards of a mineral resource from the permitted mineral extraction area within a three-year period.

TCC 17.20.150.

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<sup>2</sup> Although an interim zoning ordinance was adopted in 1968, it did not apply to that part of Thurston County where the subject property is located. Thus, 1980 is the relevant date for purposes of determining nonconforming use rights. *Exhibit 1, Staff Report, page 4.*



7. Mr. Wood did not register the mine on the subject property until 2008. *Testimony of Mr. Smith.* However, no evidence was presented that Mr. Wood ceased “significant mining activity” for any three consecutive years since 2003, or has converted any portion of the mine to another use. The mine has expanded under Mr. Wood’s ownership. *Testimony of Mr. Wood; Exhibits A-3, A-4, A-5, A-24, and A-33 (for A-24 and A-33, compare the “current disturbed area” identified in the DNR inspection reports); see also Testimony of Mr. Kain.*
8. Following adoption of the 2003 amendment to the Mineral Extraction Code that resulted in the language quoted in Finding 5 above, the County sent notice to all known mine owners/operators to make them aware of the registration requirement. Because the County was not aware of the Wood mine at the time, it did not at that time send notice to Mr. Wood. The County notified Mr. Wood of the requirement in the April 1, 2008 letter that is the subject of this appeal. Following receipt of that letter, Mr. Wood registered the mine. *Exhibit 1, page 6.* The County did not enforce the vacation requirement of TCC 17.20.150 because it did not provide Mr. Wood personal notice in a timely manner. *Testimony of Mr. Smith.*
9. The County became aware of gravel mining on the subject property after Mr. Wood applied for a large lot subdivision in late 2003. The County requested additional information on the mine on January 13, 2004. In correspondence dated July 25, 2004, Mr. Wood responded that the site had historically been used for gravel mining and that he was in the process of obtaining a permit from the Department of Natural Resources for a three-acre mining operation. On September 8, 2004, the County requested more detailed information on the mine, and stated that mining operations commencing after September 1, 1980 that export material off the parcel would require a Special Use Permit. *Exhibits A-15, A-16, A-17, A-18, A-19, and A-20.*
10. On September 26, 2006, the Washington State Department of Natural Resources (DNR) issued a Notice of Correction to Mr. Wood because he did not have a Reclamation Permit for mining on the site. A reclamation permit was required because the disturbed area exceeded three acres and the mined slopes were greater than 30 feet high and steeper than one foot horizontal to one foot vertical. Based on the DNR’s inspection, the disturbed area was 7.8 acres and the working face was 34 feet high. The inspection report noted, “Recycled concrete and asphalt were present in pit; there may be a solid waste issue.” The Notice of Correction provided a 60-day deadline for submitting the application, but allowed extensions for good cause. *Exhibits A-22, A-23 and A-24.*
11. On June 7, 2007, Mr. Wood applied for a DNR Reclamation Permit. The proposed disturbed area was 27.5 acres. *Exhibits A-25 and A-26.*
12. Thurston County Planning Manager Michael Kain issued a Department of Natural Resources Form SM-6 (“County or Municipality Approval for Surface Mining”) to Mr. Wood on July 18, 2007. The form included the question, “Has the proposed surface mine been approved under local zoning and land-use regulations?” Mr. Kain answered yes,

with the notation “vested”. *Exhibit 1, Attachment g*. Mr. Kain made this determination based on conversations with Mr. Wood regarding the use of the property since the 1970’s; County aerial photographs dated 1972, 1977, 1983, and 1987; and a site visit in July of 2007 (after Mr. Wood’s use was operational). Mr. Kain did not review any aerial photographs for the time period between 1977 and 1980. Mr. Kain is not an expert in aerial photography and did not use the services of an expert prior to making the 2007 determination. *Testimony of Mr. Kain*.

13. The Planning Manager based his nonconforming use determination on the assumption that a commercial mining use was conducted on the property prior to 1980. He submitted that if the principal use of the pit had been to build or maintain roads on the subject property or on contiguous parcels *also* owned by Boise Cascade, then the use would be exempt from the mineral extraction code requirements. The mineral extraction would not be considered a commercial use unless a significant amount was used on properties not under the same ownership. No threshold for the amount that must be exported is codified. *Testimony of Mr. Kain*.
14. On November 30, 2007, the DNR issued a Surface Mining Reclamation Permit (Form SM-9) to Mr. Wood. *Respondent Exhibit 11; Exhibit A-29*. The November 30, 2007 permit was the first DNR permit issued for mining on the subject property. *Exhibit A-38*. At the time of the DNR inspection conducted on April 17, 2008, the disturbed area was approximately 16 acres. *Exhibit A-33*.
15. On December 28, 2007 Mike Wood applied for a SUPT from Thurston County to operate a rock crusher as part of a gravel mining operation at 15700 Bald Hill Road SE in Thurston County. As part of the review of the requested SUPT on April 1, 2008 Senior Planner Robert Smith issued two documents that are the subject of the present appeal: (A) a letter to Mike Wood with the subject “Gravel Mining on Tax Parcel 22624001600, Rescinding March 11, 2008 Letter and Re-Issuance of Same”, and (B) a memorandum to “Interested Parties” with the subject “Wood Gravel Mine at 15700 Bald Hill Road, Tax Parcel 22624001600.” The memorandum sent to interested parties included the letter to Mr. Wood as an attachment. The documents included the following language that is relevant to the present appeal:

*April 1, 2008 letter to Mike Wood:*

Based on review of aerial photos this department concludes that there was a gravel extraction operation on the subject property prior to adoption of the Thurston County Zoning Ordinance (TCC 20) and the Mineral Extraction Code (TCC 17.20).

*April 1, 2008 memorandum to Interested Parties:*

Based upon review of pre1980 aerial photos and discussion with Mr. Wood and his representatives, Thurston County believes the mining operation is a grandfathered use. Land uses in existence prior to adoption of the Thurston County Zoning Ordinance in 1980, and not compliant with current zoning

regulations, are considered grandfathered non-conforming uses. Such grandfathered uses may continue to operate unless vacated. Further, mining operations are subject to the Thurston County Mineral Extraction Code (TCC 17.20). The letter to Mr. Wood sets out requirements for him to maintain the grandfathered rights of the mining use.

*Exhibit 1, Attachments d and e.* Both documents included a notice of appeal rights. *Exhibit 1, Attachments d and e.*

16. On April 15, 2008, Harold and Jean Hillesland, Gary Miller, Dennis and Shannon Gubser, Andrew Wright, and Lisa Fitkin (hereafter “Appellant”) filed an appeal of the nonconforming use determination embodied in the April 1, 2008 letter and memorandum. *Exhibit 1, Attachment c.* The appeal was timely under the 14-day deadline specified in TCC 20.60.060. *TCC 20.60.060.*
17. The Thurston County Hearing Examiner dismissed the appeal on May 14, 2008<sup>3</sup>, and the Appellants appealed the dismissal to the Board of County Commissioners. On July 21, 2008, the Board reversed the Hearing Examiner’s decision of dismissal and remanded it “for a hearing on the issue of whether or not the mine is a legal nonconforming mine site.” *Decision, Board of County Commissioners, No. 2007105168.* A Thurston County Superior Court affirmed the Board’s decision on February 27, 2009. *Order, No. 08-2-01946-0.*
18. Mr. Smith based the April 1, 2008 letter and memorandum on the SM-6 form signed in 2007. He did not conduct an independent analysis of whether the gravel mine was a legal nonconforming use. He did not review aerial photographs of the site, have conversations with Mr. Wood, or review correspondence between the County and Mr. Wood prior to issuing the documents. *Testimony of Mr. Smith.*
19. Boise Cascade owned the subject property (as part of a much larger acreage) when the zoning code was first adopted. Boise Cascade’s predecessor, West Tacoma Newsprint Co., had purchased the property in 1952, and Boise Cascade merged with West Tacoma Newsprint Co. in 1969. Boise Cascade did not sell the property until April 13, 1987. *Exhibit A-1.*
20. Boise Cascade extracted gravel from a small borrow pit on the subject property, for use on its logging roads. The borrow pit is visible in aerial photographs dating from 1972 (see Exhibit 2). According to a surveyor who oversaw the timber operations on the site, “Rock from this pit was used for road construction and road maintenance as needed for the timber harvest requirements on the tree farm until the tree farm was sold in 1988.” *Exhibit B-4.* Another individual stated in a declaration that the gravel pit was being used

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<sup>3</sup> The basis for dismissal was the Hearing Examiner’s conclusion that the letter to Mr. Wood did not constitute a decision on the nonconforming use status of the mine. The remainder of the letter, not quoted here, required Mr. Wood to comply with various provisions of the Mineral Extraction Code and to stop rock crushing activities on the property. *Exhibit 1, Attachment d; Decision on Motions to Dismiss, No. 2007105168.*

for building and maintaining logging and access roads on properties west and southwest of the pit, with all operations performed in the 1970's. *Exhibit B-3*.

21. Both Mr. Wood and the Appellants relied on analysis of aerial photography to determine the extent of Boise Cascade's and subsequent owners' use of the borrow pit from the 1970's until the time that Mr. Wood purchased the property. The Hearing Examiner finds that the most credible the analysis provided by the Appellant's expert, Mr. Terry Curtis, and relies on his testimony for the findings that follow. Mr. Curtis is an expert in photogrammetry<sup>4</sup> and current Photogrammetry Supervisor for the DNR. Mr. Curtis reviewed sets of aerial photographs taken by DNR, WSDOT, and USGS stereoscopically<sup>5</sup> using a Sokkia stereoscope, a laboratory instrument that allows up to eight times magnification. While Mr. Wood's witness, Mr. Greg Jones, also reviewed some photos stereoscopically, he used a geoscope, a field instrument that allows only 1.2 times magnification. High magnification is important when reviewing the original "contact prints" issued by the agencies because the scale of those prints is 1" = 1,000 feet. The photos marked as Exhibit A-2 are based on digital scans of the contact prints (also issued by the agencies), and they have been cropped to show the area of interest. The Exhibit A-2 photos, as well as additional photos<sup>6</sup>, were used in the photo arrays marked as Exhibits A-41 and A-42. Mr. Curtis relied on contact prints or digital scans of the contact prints for his analysis but not on the photocopies appearing in the record. *Testimony of Curtis; Exhibit A-37; see also Testimony of Mr. Hillesland (regarding the acquisition of the photos Mr. Curtis reviewed)*.
22. Based on the analysis of aerial photography, mining occurred on the subject property sometime between May 20, 1978 and June 25, 1981.<sup>7</sup> During that time the borrow pit grew from approximately one-quarter acre to approximately one-third acre.<sup>8</sup> There was no increase in pit size between the 1981 photo and a June 25, 1985 photo, and Mr. Curtis was not able to discern any evidence of excavation. Neither the "disturbed area" nor the "active area" increased in area, and in fact the active area actually decreased in area.<sup>9</sup> The area surrounding the pit was forested, and between 1981 and 1985 vegetation began to grow back within the pit and the access road began to show signs of non-use. *Testimony of Mr. Curtis; Exhibit A-41; Exhibit A-2; Exhibit 7*. Mr. Jones' testimony to the contrary - that the pit grew wider between 1981 and 1985 - was not supported by the detail of the exhibits provided by Mr. Curtis. The shadow of trees in the 1981 photo (which is plainly visible in Exhibit A-41 and Exhibit 7) creates the illusion that the pit was narrower in

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<sup>4</sup> Photogrammetry is the "art and science of obtaining reliable information on earth's surface and objects on earth's surface from photographs." *Testimony of Mr. Curtis*.

<sup>5</sup> Stereoscopic analysis requires two photos with sixty percent overlap. *Testimony of Mr. Curtis*.

<sup>6</sup> The 1996 photo in the A-42 array was found on the Thurston County GeoData website. The 1993 photo in the A-42 array is a DNR photo taken August 30, 1993. Mr. Curtis reviewed the photos in stereo. *Testimony of Mr. Curtis*.

<sup>7</sup> No party submitted an aerial photograph dated 1980.

<sup>8</sup> Mr. Curtis' exact testimony was that in 1981 the pit was 0.34 acre in area, and that in 1978 it was roughly two-thirds that size. *Testimony of Mr. Curtis*.

<sup>9</sup> Mr. Curtis testified that some activity might have occurred between the 1981 and 1985 photos; due to the lapse of time, activity could have occurred after the 1981 photo was taken and was covered by vegetation by 1985. *Testimony of Mr. Curtis*.

1981 than in 1985. However, Mr. Curtis identified the actual pit boundary and demonstrated that the pit did not increase in area. *Testimony of Mr. Curtis; Exhibit 7.*

23. No mining activity occurred between June 25, 1985 and July 15, 1990, based on analysis of 1985 and 1990 photos as well as photos dated June 9, 1986 and September 3, 1989. During this time period vegetation continued to spread throughout the pit and grew increasingly larger, and vegetation grew within the access road.<sup>10</sup> *Testimony of Mr. Curtis; Exhibit A-41, Exhibit A-2.* Mr. Jones' testimony to the contrary – that mining occurred between 1985 and 1989 – was not credible. Mr. Jones based his conclusion on two new disturbed areas he alleged are visible in the 1989 photo, including a 100-foot area in the center of the pit. Mr. Curtis did not see a disturbed area in the center of the pit with his higher-power instrument. Further, mining in the center of the pit would have been unusual due to access constraints. Mr. Curtis did see disturbance in the other area identified by Mr. Jones, but he identified the disturbance as bike tracks. *Testimony of Mr. Curtis; Exhibit A-41; Exhibit A-2; Exhibit 7.*
24. Based on Mr. Curtis' analysis of aerial photos dated July 15, 1990, August 9, 1992, August 30, 1993, and 1996, there was significant activity within and around the pit between 1990 and 1992. The site had been logged during that time period, and the pit boundaries were extended to the north and west. The pit measurement in 1992 was 0.97 acre. By 1993, however, vegetation had re-grown in and around the pit area, and within the access road. Continued vegetation re-growth is evident in the 1996 photo. Although it is possible that trucks could have used the access road during that time period, any such use was extremely light. The amount of truck traffic needed to haul a significant amount of gravel (Mr. Cushman posed the hypothetical scenario of 500 cubic yards over three years) would have resulted in the appearance of an active road. Mr. Curtis saw no evidence of excavation or road use between 1993 and 1996. *Testimony of Mr. Curtis; Exhibits A-2, A-41, A-42, and A-43.*
25. The periods of non-use visible in the photographs are consistent with what is known about the property from other sources. Boise Cascade sold the property to John Hancock Mutual Life Insurance Company on April 13, 1987, and John Hancock sold the property to the Municipality of Metropolitan Seattle (Metro) on February 25, 1988. *Exhibit A-1.* Metro had planned to use the subject property as a disposal site for sewage sludge, but later changed its plans and sold the property to John Meek on December 23, 1991. *Appellant Exhibit 11; Testimony of Mr. Wright; see also Exhibit A-35.* None of the submitted evidence suggests that the City of Seattle ever mined or intended to mine the subject property. The aerial photographs as interpreted by Mr. Curtis show that the subject property was not being mined when the City purchased the property in 1988, and was not being mined in 1989 or 1990. *Exhibit A-41; Testimony of Mr. Curtis.* The Appellant argued that the mine was abandoned during that time period. *Argument of Mr. Bjorgen.*

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<sup>10</sup> The access road referred to is the one extending northwest of the pit, not the one running along the east side of the pit. Mr. Curtis observed that the road to the east does not go into the pit, but runs along the top of the scarp (vertical wall). *Testimony of Mr. Curtis.*

26. Additional evidence supports that mining activities on the subject property ceased during the early 1980s. The Appellant submitted a letter from Dave Sclair, who owned Mr. Hillesland's property between 1983 and 1989. In the letter Mr. Sclair indicated that he was not aware of the operation of a gravel pit on the subject property during the years of his ownership. Mr. Sclair's letter is consistent with the aerial photography as interpreted by Mr. Curtis. Although there is no aerial photograph for 1983, a comparison of the 1981 and 1985 photos show that mining activities ceased at some point during that time period. *Exhibit A-34 and A-41; see also Testimony of Mr. Hillesland.*
27. The activity on site occurring between 1990 and 1992 corresponds with Mr. Meek's ownership of the property. In December of 1991, Mr. Meek filed a Forest Practices Application/Notification to clear-cut the property. *Exhibit A-12.* The aerial photos show that in 1990, when the property was owned by Metro, the pit was overgrown with vegetation and did not show signs of use. In 1992, under Mr. Meek's ownership and after submittal of the Forest Practices Application, the pit and surrounding area was cleared of trees. *Exhibits A-41 and A-42; see also Exhibit A-35.*
28. The chronology of events is further supported by the testimony of Mr. Mike Wright, who moved to the general area in 1991. Mr. Wright walked the subject property in 1991 prior to the clear-cut, and observed that the pit was small and had vegetation growing in it. After the clear-cut, the pit became larger. *Testimony of Mr. Wright.*
29. The period of non-use in the 1990s corresponds with the Meeks' subdivision of the property. The Meeks recorded a 19-lot survey (Bald Hills Acreage Lots) on April 22, 1994. *Exhibit A-13.* The subdivision was exempt from County review because the lots exceeded 40 acres. *Testimony of Mr. Smith.* The subject property is Lot 16 of Bald Hills Acreage Lots. The Meeks recorded a Declaration of Protective Covenants, Conditions and Restrictions (CCRs) for the Bald Hills Acreage Lots that included the following:
1. Property Use. Property owners shall use their respective properties to their respective properties to their own enjoyment in such a manner so as not to offend or detract from other owners' enjoyment of their own respective properties. No noxious or offensive activity shall be carried on upon any lot nor shall anything be done thereon which may become a nuisance. All lots within the survey shall be used solely for single-family residential and agricultural uses. Mobile homes and multiple family units ....

*Appellant Exhibit 14.* On June 24, 1994, the Meeks recorded an amendment to the CCRs that added tree farming as an allowed use under Section 1. *Appellant Exhibit 14.* The Meeks conveyed Lot 16 to Wood Family LLC (Mr. Wood) in December of 1998.<sup>11</sup> *Exhibit B-10; Exhibit A-1.* The Appellant argued that the Meeks abandoned the mine when it recorded the restrictive covenants. *Argument of Mr. Bjorgen.*

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<sup>11</sup> Mr. Wood's purchase was not subject to the covenants. *Argument of Mr. Cushman.*

30. The Thurston County Code has two provisions that relate to the vacation of nonconforming uses. In addition to the vacation provision set forth in the Mineral Extraction Code at TCC 17.20.150, the code contains a vacation provision that applies to all nonconforming uses. This provision reads in relevant part as follows:

20.56.040 Vacation.

1. A nonconforming use of a structure or premises which has been vacated for three years shall not thereafter be returned to such nonconforming use. A nonconforming use shall be considered vacated if the use has not been maintained in the manner which is customary for the use.

*TCC 20.56.040.*

31. Thurston County planning staff does not consider a “dormant” mine to be a vacated mine. Thus, the County would not lapse a dormant mine, even if dormant longer than three years, unless the owner changed the use of the mine. *Exhibit 1, page 5; Testimony of Mr. Smith.*
32. Mr. Jones testified that it is typical for a mine to be used only intermittently, when a customer needs rock. He testified that the periods of dormancy might last one or two years. *Testimony of Mr. Jones.*
33. Mr. Wood argued that the mine was never vacated. It was never developed in a manner that precluded mining in the future. The mine has never been reclaimed because of the intent for its continued use. *Argument of Mr. Cushman; see also, Testimony of Mr. Wood; Testimony of Mr. Curtis.*
34. Mr. Wood attempted to demonstrate that Boise Cascade’s use of the property was commercial in nature through analysis of the logging roads. Mr. Jones testified that the gravel from the borrow pit must have been used in off-site applications (contrary to the evidence in B-3 and B-4) because no new logging roads had been constructed after 1977.<sup>12</sup> However, Mr. Jones did not account for the maintenance requirements of existing roads, such as filling potholes and repairing edges. *Testimony of Mr. Curtis.* Mr. Jones does not know how much gravel had been extracted from the site, how many miles of logging roads Boise Cascade maintained, or how much gravel would have been required to maintain the roads. *Testimony of Mr. Jones.* Mr. Hillesland identified at least 13 miles of logging roads (17 miles including dead-ends) on Boise Cascade’s property on the north side of Bald Hill Road<sup>13</sup>. *Testimony of Mr. Hillesland.* Mr. Curtis reviewed Mr.

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<sup>12</sup> The 1977 photo relied on by Mr. Jones was not entered into the record; however, his testimony regarding the lack of new logging roads was confirmed by Mr. Hillesland, who, in his own review of photos dating from 1978 to 1992, did not observe any new roads during that time period. *Testimony of Mr. Hillesland.*

<sup>13</sup> Mr. Hillesland estimated the boundary of Boise Cascade’s property by measuring the extent of Mr. Meek’s clear-cut as shown on 1992 aerial photography. He used the measurement tool on the Thurston County GeoData website. Mr. Meek’s land can be traced back to Boise Cascade. Using the measurement tool, he estimated that the land area north of Bald Hills Road was approximately 2,200 acres (he did not know whether Boise Cascade owned land on

Hillesland's work and testified that his estimate was reasonable. *Testimony of Mr. Curtis.*

35. Mr. Wood further attempted to demonstrate that Boise Cascade's use of the property was commercial in nature through analysis of the pit access. The road serving the interior of the gravel pit exited the pit to the northwest. A distance north of the pit, the road switched back towards Bald Hill Road. Mr. Jones testified that the access road only went from the pit to the road, and that there were no spur roads leading anywhere else. *Testimony of Mr. Jones.* Mr. Jones' testimony regarding the access road was false. Both Mr. Hillesland and Mr. Curtis provided credible testimony that the pit access road led to a network of logging roads to the north of the pit. The road configuration did not require that drivers switch back to Bald Hill Road.<sup>14</sup> Thus, gravel from the pit could have been used on on-site logging roads. *Testimony of Mr. Hillesland; Testimony of Mr. Curtis.*
36. The DNR does not have any permits on file for Boise Cascade's mineral extraction use of the subject property. The first permit DNR issued for mineral extraction on the subject property was to Mr. Wood in 2007. *Testimony of Mr. Wright; Exhibit A-38.*
37. Although Boise Cascade did not have permits for surface mining on the subject property, it did have permits for other mining operations in the state, including a permit for a mining operation in Yakima County that was renewed in 1975, and a permit a mining operation in Yakima County that was issued in 1992. *Exhibits A-7, A-8, and A-9.*

## **CONCLUSIONS**

### Jurisdiction

The Hearing Examiner has jurisdiction to hear and decide appeals of administration determinations pursuant to Sections 2.06.010 and 20.60.060 of the Thurston County Code.

### Criteria for Review:

Thurston County Code 20.03.040(88.1) defines a nonconforming use as "an activity that was lawfully established prior to the adoption of the ordinance codified in this title, but because of the application of the ordinance codified in this title, does not conform to the provisions of the ordinance codified in this title."

Although the code specifies that nonconforming uses may continue subject to the provisions of Chapter 20.56, it also states that the chapter "is not intended to encourage the continuance of nonconforming uses." *TCC 20.56.010.*

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the south side of Bald Hills Road also; the deed from Boise Cascade made specific reference to some land on the north side of the road). This measurement is consistent with a Seattle Times news article describing Metro's plans to spread sewage sludge (Exhibit A-11). The article describes Metro's ownership as "2,200 acres of Yelm-area forestland." *Exhibit A-11.*

<sup>14</sup> The Hearing Examiner notes that a faint road extending north from the switch back is visible in the 1972 aerial photograph that is marked as Exhibit 2.



In Washington court decisions, the right to continue a nonconforming use is sometimes referred to as a “vested” right. However, this terminology should not be confused with the vested rights doctrine, which applies only to permit applications. Within the context of nonconforming uses, the right refers “to the right not to have the use immediately terminated in the face of a zoning ordinance which prohibits the use.” *Rhod-a-Zalea v. Snohomish County*, 136 Wn.2d 1, 6 (1998). Nonconforming are subject to later enacted reasonable police power regulations. *Id.* at 19-20.

A nonconforming use in existence when an ordinance is enacted cannot be changed into some other type of nonconforming use. In *Coleman v. City of Walla Walla*, 44 Wn.2d 296 (1954), the Washington Supreme Court determined that a nonconforming rooming house (rooms and limited cooking privileges to a maximum of 13 individuals), cannot be changed into a fraternity house (room and board to up to 35 individuals, plus social functions). In its decision the Supreme Court cited *Town of Lexington v. Bean*, 272 Mass. 547, 172 N.E. 867, a case in which nonconforming use rights to operate a repair shop for trucks used in a trucking and furniture business did not allow operation of a public garage. *Id.* at 300.

Under Washington common law, nonconforming uses may be intensified, but not expanded. *University Place v. McGuire*, 144 Wn.2d 640, 649 (2001). Under the Thurston County Code, nonconforming, nonresidential uses may be expanded up to 15 percent or intensified<sup>15</sup>, subject to the limitations set forth in TCC 20.56.030. The limitations include a requirement that a special use permit be obtained prior to expansion.

Pursuant to TCC 20.56.040, “A nonconforming use of a structure or premises which has been vacated for three years shall not thereafter be returned to such nonconforming use. A nonconforming use shall be considered vacated if the use has not been maintained in the manner which is customary for the use.” Vacation, or abandonment, requires (a) an intent to abandon, and (b) an overt act, or failure to act, which carries the implication that the owner does not claim or retain any interest in the right to the nonconforming use. *Id.* at 652.

The initial burden of proving a nonconforming use is on the landowner making the assertion. Once the nonconforming use is established, the burden shifts to the party claiming abandonment to prove the elements of abandonment. *Van Sant v. Everett*, 69 Wn. App. 641 (1993). In this case the allocation of the burden of proof is in dispute. Mr. Wood argues that the Appellant has the burden of proof on appeal to show both the absence of a nonconforming use and abandonment of the use. The Appellant argues that Mr. Wood has the burden of proving a nonconforming use on appeal, even through the appeal was of a County decision in his favor. Due to the unique procedural posture of this case, the Hearing Examiner concludes that the Appellant appropriately has the burden of proof.

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<sup>15</sup> “An intensification of use is permitted outright and occurs when the intensified use is contained within the existing structure, or use area if no structure is involved, and is not different in kind from the existing nonconforming use.” TCC 20.56.030(1).

### Conclusions Based on Findings:

1. Commercial gravel mining is not a legal nonconforming use of the subject property. The mine that existed in 1980 was not part of a commercial mining operation, but served as a borrow pit for a timber company, Boise Cascade. The distinction is significant, because one type of nonconforming use cannot be changed into another type of use. Under current Thurston County regulations, and County interpretations preceding the current regulations, a borrow pit used for logging roads on site or on contiguous parcels is a different type of use than a commercial mining operation. *Findings 5, 13, 20.*
2. Mr. Wood argued that the 1980 code did not make a distinction between commercial mines and mines used for on-site logging roads, and for that reason a commercial mine existed on the property based on the standards in effect at that time. The Hearing Examiner disagrees with that argument. However, to the extent that Mr. Wood can establish a commercial mining operation prior to 1980, current mining operations significantly exceed the scope of the nonconforming use and constitute an illegal expansion of the use. *Findings 10, 14, and 22.*
3. Mr. Wood argued that the expansion was legal pursuant to *University Place v. McGuire*, 30 P.3d 453 (2001), in which the Washington Supreme Court adopted the diminishing assets doctrine for mining operations. Under the diminishing assets doctrine, “The proper scope of a lawful nonconforming use in an exhaustible resource is the whole parcel of land owned and intended to be used by the owner at the time the zoning ordinance was promulgated.” *Id.* at 651. The Hearing Examiner concludes that the diminishing assets doctrine does not apply to Mr. Wood’s mine.

The mine that existed in 1980 was not part of a commercial mining operation, but served as a borrow pit for a timber company, Boise Cascade. No evidence was presented that Boise Cascade ever intended to mine all of what is currently Lot 16, and in fact the evidence suggests that Boise Cascade only intended to remove enough gravel to maintain its logging roads. Under Boise Cascade’s ownership, the borrow pit remained extremely small in scale. Although Boise Cascade or its predecessor West Tacoma Newsprint had owned the property since 1952, by 1978 the borrow pit was less than a quarter acre in area. Between 1978 and 1981, it grew to approximately one-third acre, and it did not grow after that point. Boise Cascade never obtained mining permits from the DNR, even though it obtained mining permits for other properties it owned. Such permits might have evidenced an intent to mine a larger area.<sup>16</sup>

These circumstances are a sharp contrast from *McGuire*, in which the property owner at

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<sup>16</sup> This is not to suggest that Boise Cascade was operating illegally at the time. No evidence was presented as to the threshold for obtaining a DNR permit in the 1970s. The current surface mining act (RCW 78.44) excludes mines with a disturbed area of less than three acres from the definition of “surface mine.” It also excludes excavations used “primarily for forest or farm road construction or maintenance on site or on contiguous lands.” *RCW 78.44.031.*

the time of the zoning change was a commercial mining business, which was “gradually and continually mining various portions of [its 80-acre parcel].” *Id.* at 644. The owner sought DNR permits when such permits became required, and identified the 80 acres in some of the mining permit applications. *Id.* at 645.

4. Because the mine on the subject property is different in kind than the type of mine protected by the diminishing assets doctrine, the mine should be treated as any other nonconforming use, and must be subject to restrictions on expansion of the use. Under those restrictions, the mine has been illegally expanded. The expansion has far exceeded the 15 percent authorized by the code, and no special use permit was obtained prior to the expansion. Even if the 15 percent expansion regulation did not exist during the relevant time periods, under the common law rules on nonconforming uses, expansion is not allowed. *Findings 2, 4, 10, 11, and 14.*
5. Even if a legal nonconforming use could be established, the use was vacated pursuant to TCC 20.56.040 on two separate occasions. The mine was not used, and was allowed to become overgrown with vegetation, for a period exceeding three years commencing in approximately 1983 and ending sometime after the Meeks’ purchase of the property in December of 1991. Metro’s plan to use the subject property as a sewage disposal site is clear evidence of its intent to abandon the mine. The fact that the plan did not materialize does not negate the expression of intent. Once Metro’s plans changed, it did not commence mining but sold the property. Intent to abandon can also be inferred from the length of time the mine was dormant. Although an “on demand” mining operation might have periods of dormancy between jobs, an eight-year period of dormancy combined with changes in ownership involving entities that are not in the mining business strongly suggests abandonment. *Findings 21, 22, 23, 25, 26, and 32.*
6. In addition, the mine was not used, and was allowed to become overgrown with vegetation, for a period exceeding three years commencing sometime between August 9, 1992 and August 30, 1993 and ending sometime after 1996. The Meeks’ recording of covenants prohibiting mining on the subject property in 1994 is clear evidence of intent to abandon the mining use. *Findings 24, 29.*
7. Even if a legal nonconforming use could be established, the use was vacated pursuant to TCC 17.20.150. The County Code is clear that even mining operations in place prior to 2003 must register their mines, and failure to do so for three consecutive years constitutes vacation of the mine. Although Mr. Wood has raised fairness issues with respect to the lack of notice he received of the registration requirement, the Hearing Examiner does not have jurisdiction to exempt him from the requirement based on equitable factors. *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 638 (1984).
8. The Hearing Examiner rejects the Appellant’s argument that based on *Van Sant v. Everett* and *Rhod-a-Zalea v. Snohomish County*, Mr. Wood abandoned or vacated the mine based on his failure to obtain DNR and NPDES permits and for conducting unauthorized

activities such as recycling asphalt.<sup>17</sup> The following language from *Van Sant* is instructive on this issue:

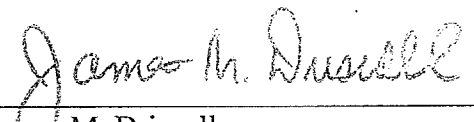
Consequently, the abandonment of a nonconforming use and the consequent termination of any legal rights thereto results from a concurrence of facts, circumstances, and the intention of the owner of the premises or other person entitled to the use. The intent cannot be inferred from or established by a period of nonuse alone, but must be shown by the owner or occupier's overt acts or failure to act, such as written or oral statements evincing an intent to abandon the use, structural alterations to the building inconsistent with the continuance of the nonconforming use, or failure to take some step such as license renewal necessary to the continuance of the use.

*Van Sant v. Everett*, 69 Wn. App. 641, 653 (1993). In this case, it is clear that Mr. Wood intended to mine his property from the time of purchase, and he did in fact mine his property and has continued mining his property. *Findings 2, 9, 10, 11, and 14*. The Appellant provided no evidence that Mr. Wood stopped mining for three or more years. Consequently, the Hearing Examiner need not look to factors such as his failure to obtain DNR and NPDES permits in timely manner to discern his intent regarding the use of his property. *Rhod-a-Zalea* does not dictate a different result. In that case the court determined that nonconforming uses are subject to subsequently enacted police power regulations. Nowhere in the case does the court indicate that nonconforming use status is automatically vacated when a party fails to comply with a regulation. It does suggest, though, that the government agency could terminate the use through a code enforcement action. That has not happened here.

### DECISION

Based upon the preceding Findings and Conclusions, the appeal of the April 1, 2008 administrative determination is **GRANTED**.

Decided this 28<sup>th</sup> day of September 2009.

  
James M. Driscoll  
Thurston County Hearing Examiner

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<sup>17</sup> Although this decision does not contain findings on the unauthorized activities, the Appellant provided evidence on them and the evidence is part of this record. See e.g., *Testimony of Mr. Hillesland and Exhibit A-6*.



Project No. 2007105168 AAPL  
Appeal Sequence No.: \_\_\_\_\_

☐ Check here for: **RECONSIDERATION OF HEARING EXAMINER DECISION**

THE APPELLANT, after review of the terms and conditions of the Hearing Examiner's decision hereby requests that the Hearing Examiner take the following information into consideration and further review under the provisions of Chapter 2.06.060 of the Thurston County Code:

(If more space is required, please attach additional sheet.)

☐ Check here for: **APPEAL OF HEARING EXAMINER DECISION**

TO THE BOARD OF THURSTON COUNTY COMMISSIONERS COMES NOW \_\_\_\_\_  
on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, as an APPELLANT in the matter of a Hearing Examiner's decision  
rendered on \_\_\_\_\_, 20\_\_\_\_, by \_\_\_\_\_ relating to \_\_\_\_\_

THE APPELLANT, after review and consideration of the reasons given by the Hearing Examiner for his decision, does now, under the provisions of Chapter 2.06.070 of the Thurston County Code, give written notice of APPEAL to the Board of Thurston County Commissioners of said decision and alleges the following errors in said Hearing Examiner decision:

Specific section, paragraph and page of regulation allegedly interpreted erroneously by Hearing Examiner:

1. Zoning Ordinance \_\_\_\_\_
2. Platting and Subdivision Ordinance \_\_\_\_\_
3. Comprehensive Plan \_\_\_\_\_
4. Critical Areas Ordinance \_\_\_\_\_
5. Shoreline Master Program \_\_\_\_\_
6. Other: \_\_\_\_\_

(If more space is required, please attach additional sheet.)

AND FURTHERMORE, requests that the Board of Thurston County Commissioners, having responsibility for final review of such decisions will upon review of the record of the matters and the allegations contained in this appeal, find in favor of the appellant and reverse the Hearing Examiner decision.

### **STANDING**

On a separate sheet, explain why the appellant should be considered an aggrieved party and why standing should be granted to the appellant. This is required for both Reconsiderations and Appeals.

Signature required for both Reconsideration and Appeal Requests

\_\_\_\_\_  
APPELLANT NAME PRINTED

\_\_\_\_\_  
SIGNATURE OF APPELLANT

Address \_\_\_\_\_  
\_\_\_\_\_  
Phone \_\_\_\_\_

Please do not write below - for Staff Use Only:

Fee of ☐ \$595.00 for Reconsideration or \$820.00 for Appeal. Received (check box): Initial \_\_\_\_\_ Receipt No. \_\_\_\_\_  
Filed with the Development Services Department this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_. \\MC1\Data\DevServ\Track\Planning\Forms\03.09.Appeal-Recon  
form.he.DOC

**THURSTON COUNTY**  
**PROCEDURE FOR RECONSIDERATION AND APPEAL**  
**OF HEARING EXAMINER DECISION TO THE BOARD**

**NOTE:** THERE MAY BE NO EX PARTE (ONE-SIDED) CONTACT OUTSIDE A PUBLIC HEARING WITH EITHER THE HEARING EXAMINER OR WITH THE BOARD OF THURSTON COUNTY COMMISSIONERS ON APPEALS (Thurston County Code, Section 2.06.030).

If you do not agree with the decision of the Hearing Examiner, there are two (2) ways to seek review of the decision. They are described in A and B below. Unless reconsidered or appealed, decisions of the Hearing Examiner become final on the 15th day after the date of the decision.\* The Hearing Examiner renders decisions within five (5) working days following a Request for Reconsideration unless a longer period is mutually agreed to by the Hearing Examiner, applicant, and requester.

The decision of the Hearing Examiner on an appeal of a SEPA threshold determination for a project action is final. The Hearing Examiner shall not entertain motions for reconsideration for such decisions. The decision of the Hearing Examiner regarding a SEPA threshold determination may only be appealed to Superior Court in conjunction with an appeal of the underlying action in accordance with RCW 43.21C.075 and TCC 17.09.160. TCC 17.09.160(K).

**A. RECONSIDERATION BY THE HEARING EXAMINER (Not permitted for a decision on a SEPA threshold determination)**

1. Any aggrieved person or agency that disagrees with the decision of the Examiner may request Reconsideration. All Reconsideration requests must include a legal citation and reason for the request. The Examiner shall have the discretion to either deny the motion without comment or to provide additional Findings and Conclusions based on the record.
2. Written Request for Reconsideration and the appropriate fee must be filed with the Development Services Department **within ten (10) days of the written decision**. The form is provided for this purpose on the opposite side of this notification.

**B. APPEAL TO THE BOARD OF THURSTON COUNTY COMMISSIONERS (Not permitted for a decision on a SEPA threshold determination for a project action)**

1. Appeals may be filed by any aggrieved person or agency directly affected by the Examiner's decision. The form is provided for this purpose on the opposite side of this notification.
2. Written notice of Appeal and the appropriate fee must be filed with the Development Services Department **within fourteen (14) days of the date of the Examiner's written decision**. The form is provided for this purpose on the opposite side of this notification.
3. An Appeal filed within the specified time period will stay the effective date of the Examiner's decision until it is adjudicated by the Board of Thurston County Commissioners or is withdrawn.
4. The notice of Appeal shall concisely specify the error or issue which the Board is asked to consider on Appeal, and shall cite by reference to section, paragraph and page, the provisions of law which are alleged to have been violated. The Board need not consider issues, which are not so identified. A written memorandum that the appellant may wish considered by the Board may accompany the notice. The memorandum shall not include the presentation of new evidence and shall be based only upon facts presented to the Examiner.
5. Notices of the Appeal hearing will be mailed to all parties of record who legibly provided a mailing address. This would include all persons who (a) gave oral or written comments to the Examiner or (b) listed their name as a person wishing to receive a copy of the decision on a sign-up sheet made available during the Examiner's hearing.
6. Unless all parties of record are given notice of a trip by the Board of Thurston County Commissioners to view the subject site, no one other than County staff may accompany the Board members during the site visit.

**C. STANDING** All Reconsideration and Appeal requests must clearly state why the appellant is an "aggrieved" party and demonstrate that standing in the Reconsideration or Appeal should be granted.

**D. FILING FEES AND DEADLINE** If you wish to file a Request for Reconsideration or Appeal of this determination, please do so in writing on the back of this form, accompanied by a nonrefundable fee of **\$595.00** for a Request for Reconsideration or **\$820.00** an Appeal). Any Request for Reconsideration or Appeal must be **received** in the Permit Assistance Center on the second floor of Building #1 in the Thurston County Courthouse complex no later than 4:00 p.m. per the requirements specified in A2 and B2 above. **Postmarks are not acceptable.** If your application fee and completed application form is not timely filed, you will be unable to request Reconsideration or Appeal this determination. The deadline will not be extended.

\* Shoreline Permit decisions are not final until a 21-day appeal period to the state has elapsed following the date the County decision becomes final.