



COUNTY COMMISSIONERS

Cathy Wolfe
District One
Diane Oberquell
District Two
Robert N. Macleod
District Three

HEARING EXAMINER

Michael Welter
Director

Creating Solutions for Our Future

BEFORE THE HEARING EXAMINER IN AND FOR THE COUNTY OF THURSTON

In the Matter of the Application of)	Project # 2007105168
)	
)	
Mike Wood, Wood Land Investments, LLC)	DECISION ON MOTIONS TO
)	DISMISS
<u>For Approval of an Administrative Appeal</u>)	

Background

Mike Wood and Wood Land Investments LLC (hereinafter referred to as “Appellant”) operate a gravel mining operation on Tax Parcel 22624001600 in rural Thurston County. On April 1, 2008, Robert Smith, a Thurston County planner, issued an administrative determination on behalf of Thurston County regarding the mining operation. The administrative determination, issued in the form of a letter, required the Appellant: 1) “to bring your mining operation into compliance with all applicable sections of the Mineral Extraction Code within 30 days from the date of this letter [April 1, 2008]”; 2) “to provide indisputable evidence of a grandfathered rock crusher on the subject property or cease crushing operations on the property within 30 days from the date of this letter.” The following was also included by Mr. Smith in the administrative determination: “I note that you have submitted a Special Use Permit application to add the rock crusher to the gravel mine as an accessory use. That application is in review. Operation of a crusher on the property will not be permitted until (or if) the Special Use Permit is approved.”

In addition to the April 1, 2008 administrative determination Mr. Smith issued a “Memorandum” dated April 1, 2008. The Memorandum, addressed to “Interested Parties”, referenced an “attached copy of a letter mailed to Mr. Wood”.¹ In the first paragraph of the Memorandum it was stated that “...Thurston County believes the mining operation is a grandfathered use.” The last paragraph of the Memorandum provided an

¹ Although not stated in the Memorandum it is assumed that the “letter mailed to Mr. Wood” is the April 1, 2008 administrative determination issued to the Appellant.

appeal process of “this determination” but did not indicate if the determination was the April 1, 2008 administrative determination or the Memorandum.

On April 3, 2008, the Appellant filed an appeal of the April 1, 2008 administrative determination. The appeal was submitted on a Thurston County form but the Appellant did not check any of the boxes that provide notice of a specific ordinance relevant to the appeal. In the section of the form requiring the Appellant to provide the basis of the appeal it was stated “appealing cease crushing operation”.

On April 15, 2008, another appeal of the April 1, 2008 administrative determination was filed with Thurston County. The named appellants in the second appeal (hereafter referred to as “Neighbors”), are owners of property near the Appellant’s gravel operation site and are identified as Harold and Jean Hillesland, Gary Miller, Dennis and Shannon Gubser and Andrew Wright and Lisa Fitkin. As part of their appeal the Neighbors submitted the Thurston County appeal form on which they checked the notice box of “Zoning”. They supplemented their appeal with a statement of issues of appeal and included exceptions and objections to the April 1, 2008 administrative determination.

After the appeal deadline had passed a telephone pre-hearing conference was held by the Thurston County Hearing Examiner on April 29, 2008. Participating in that conference were:

Jeff Fancher - Thurston County Prosecuting Attorney’s Office
Robert Smith - Thurston County Development Services Department
Tom Bjorgen, Bjorgen Bauer, PLLC
Ben Cushman, Cushman Law Offices P.S.
Doreen Milward, Cushman Law Office P.S.

At the conference the following schedule for the appeal was established:

1. The Appellant, represented by Mr. Bjorgen, and the Applicant, represented by Mr. Cushman, shall submit all pre-hearing motions by May 5, 2008.
2. All responses to pre-hearing motions shall be submitted by May 9, 2008. Decisions on all pre-hearing motions will be issued by May 13, 2008.
3. The County shall submit a staff report by May 22, 2008.
4. All other submittals, including list of witnesses and exhibits and briefs, shall be submitted by the Applicant and Appellant by May 20, 2008.
5. The hearing on the Administrative Appeal is set for **June 2, 2008 at 1:00 p.m.** The hearings will be held at the Thurston County Courthouse, 2000 Lakeridge Drive SW, Olympia, WA 98502, Building #1, Room 152.

On May 5, 2008 the Appellant filed a Motion to Dismiss the Neighbors appeal. A Response was filed by the Neighbors on May 9, 2008.

On May 5, 2008 the Neighbors filed a Motion to Dismiss of the Appellant's appeal. On May 9, 2008 the Appellant submitted a Response to the Neighbor's Motion.

Each of these Motions is addressed below:

A. Appellant's Motion to Dismiss Neighbor's appeal

As noted above Thurston County issued an Administrative Decision on April 1, 2008. The document established two specific requirements for the operation of gravel mining on Thurston Tax Parcel 22624001600. The first requirement read: "You are hereby required to bring your mining operation into compliance with all applicable sections of the Mineral Extraction Code within 30 days from the date of this letter [April 1, 2008]." The second requirement was: "You are hereby required to provide indisputable evidence of a grandfathered rock crusher on the subject property or cease crushing operations on the property within 30 days from the date of this letter." It is from these stated requirements that the Appellant seeks relief through his appeal of April 3, 2008.

In their April 15, 2008 appeal the Neighbors' stated that the relief requested for their appeal was:

The Hearing Examiner should reverse the April 1, 2008 administrative determinations that the mineral extraction operation is a legal nonconforming use. The Hearing Examiner should rule that the operation is illegal due to the absence of the required special use permit, the extensive violations of the County Mineral Extraction Code, and the violations of County ordinances and state rules governing solid waste.

The Neighbors did not reference in their appeal any of the information or statements contained in the Memorandum.

The Neighbors listed seven reasons to support their argument. A paraphrasing of these reasons is:

1. The mining use of the Appellant's property does not have a nonconforming status.
2. No conditional use permit or special use permit has been issued by Thurston County for mineral extraction on the property.
3. No state permit was issued for the mineral extraction activities on this property from 1968-1990.
4. If there is nonconforming status on the property it has been illegally expanded without the required permits.
5. If a nonconforming use were established on the property prior to 1980, it has been abandoned.

6. The violations of the County Mineral Extraction Code have occurred since 1995.
7. The Appellant has imported concrete asphalt and similar material onto the property without a waste or recycling permit.

The Appellant's moved to dismiss the Neighbors' appeal claiming that the above stated reasons were not the subject of the April 1, 2008 administrative decision and the issue of a grandfathered use or a nonconforming use is not properly before the Hearing Examiner. For support of its position that the nonconforming status is not an issue the Appellant identified various actions of the Appellant, Thurston County and the State of Washington that had previously established a nonconforming status for the mining operation on site. These include: an application to Thurston County dated June 7, 2007 seeking a grandfather status of the mining operations on site; references to fees and receipts from the County specifically identifying the property and the status sought; site maps identifying the property; a form issued by the Washington Department of Natural resources entitled "County or Municipality Approval for Surface Mining (form SM-6); signed acknowledgement on the SM-6 form by a Thurston County planning manager that the surface mining had been approved under local zoning and land use regulations and that the instant operation was "vested"; and that no appeals of any County action were filed.

According to the Appellant the nonconforming status has been determined and is not subject to an appeal before the Hearing Examiner. The Appellant argued that the only issues of appeal relate to the requirements stated in the April 1, 2008 administrative decision.

Decision on Motion to Dismiss Neighbor's appeal

The Washington Court of Appeals in the case of *Lejeune v. Clallam County*, 64 Wn. App. 257, 823 P.2d 1144, set forth general principles relating to powers of administrative tribunals such as the Thurston County Hearing Examiner. The Court stated at page 268:

Administrative tribunals are creatures of the legislative body that creates them, *Jaramillo v. Morris*, 50 Wn. App. 822, 829, 750 P.2d 1301, review denied, 110 Wn.2d 1040 (1988); *State v. Munson*, 23 Wn. App. 522, 524, 597 P.2d 440 (1979); *Chaussee v. Snohomish Cy. Coun.*, 38 Wn. App. 630, 636, 689 P.2d 1084 (1984), and their power is limited to that which the creating body grants. *State ex rel. PUD 1 v. Department of Pub. Serv.*, 21 Wn.2d 201, 208-09, 150 P.2d 709 (1944). They cannot possess inherent power, because by definition such power is power not granted yet still possessed. *Emphasis added*

The Hearing Examiner of Thurston County acts in the role of an administrative tribunal on land use issues. While the Examiner's authority is extensive it is limited to that which is established in County ordinances. *Chaussee v. Snohomish County*, 38 Wn. App. 630. Applying the principles that the Hearing Examiner has no inherent power and that all authority is limited to that as stated in the local ordinances the relief requested by the

Neighbors' appeal cannot be granted. The Neighbors' appeal was of the administrative determination issued by Thurston County on April 1, 2008. That determination was specific on the issues on compliance with the Mineral Extraction Code and the continued operation of the rock crusher on site. The issues relating to nonconforming status of the mining operation, other permits and violations are not addressed in the administrative determination and are outside the scope of review of the Hearing Examiner. Only the requirements as stated in the April 1, 2008 administrative determination are within the current jurisdiction. Based on the law of this state the Hearing Examiner cannot expand the review. It is for these reasons that the Appellant's Motion to Dismiss the Neighbors' appeal is granted.

B. Neighbor's Motion to Dismiss Appellant's appeal

It is the contention of the Neighbors that the Appellant did not meet the requirements of Thurston County with its April 3, 2008 appeal of the County's administrative decision issue on April 1, 2008. Their argument is that the Appellant failed to check any of the required boxes identifying the Thurston County Code (TCC) provision that was being appealed.

The Neighbors also contend that, contrary to Thurston County Hearing Examiner rules, the appeal fails to include any statement as to how the Appellant is affected or interested in the matter appealed. In support of this argument they contend that under the "Basis of the Appeal" heading of the appeal form, the Applicant provided only a minimal statement of "Appealing cease crushing operation". In addition that the Hearing Examiner Rules have not been satisfied because the appeal contains no statement of the Appellant's issues on appeal; no statement of the Appellant's specific exceptions and objections; and no statement of the relief requested.² They argue that these are jurisdictional defects, which compel dismissal of the Appellant's appeal.

In response the Appellants contend that email exchanges of the County staff and representatives of the Appellants and a document issued by the Washington Department of Natural Resources provided necessary notice of the issues being appealed. Further the Appellant claims that the Appellant, the owner of the mining and crushing operation, is easily identified as being affected and interested in the appealed matter.

The Appellants contend that the Hearing Examiner has no authority to dismiss the appeal based on a technical format error.

² Chapter II, Section 2.4 of the Thurston County Hearing Examiner Rules requires:

"An appeal must be in writing and contain the following:

- a. A brief statement as to how the appellant is significantly affected by or interested in the matter appealed;
- b. A brief statement of the appellant's issues on appeal, noting appellant's specific exceptions and objections to the decision or action being appealed;
- c. The specific relief requested, such as reversal or modification.

Thurston County submitted no Motion to Dismiss the Appeal of the Appellant.

Decision on Motion to Dismiss filed by Neighbors

The Motion to dismiss Appellant's appeal is denied. It is very obvious that the Appellant is the owner of the mining and crushing operation and is affected and interested in the decision issued by the County. Further the correspondence between the County staff and the Appellant support the Appellant's contention that the County was aware of the position of the Appellant and had notice of the Appellant's disagreement with the County's position. This is corroborated by the fact that the County did not file any motions to dismiss the appeal.

It is also noted that the appeal form provides "...written notice of APPEAL to the Hearing Examiner of said decision under the provisions(s) of the ordinances marked below". While the Appellant did not mark any boxes on the form this does not provide grounds for dismissal of the appeal. Any deficiencies of awareness of the appealable issues were remedied through the pre-hearing conference that was held in this matter (April 29, 2008). Pursuant to the order of the Hearing Examiner issued at the pre-hearing conference the parties are required to identify the issues in a timely manner prior to the hearing set for June 2, 2008.

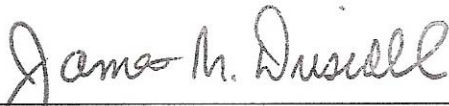
Summary

Upon a review of all Motions and supporting documentation the following Order is issued:

1. Appellant's Motion to Dismiss the Neighbors' appeal is **granted**.
2. Neighbors' Motion to dismiss Appellant's appeal is **denied**. The appeal of the requirements of the April 1, 2008 Administrative Determination will be held on June 2, 2008 at 1 p.m.

Attention is directed to the opening paragraph of this Order and that Mr. Smith has noted that the Appellant has applied for a Special Use Permit to add the rock crusher as an accessory use to the mining operation and the request is pending. Through that process issues germane to the crusher will be reviewed.

Done and dated this 14th day of May 2008.



James M. Driscoll
Thurston County Hearing Examiner