



COUNTY COMMISSIONERS

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District Two
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District Three

HEARING EXAMINER

BEFORE THE HEARING EXAMINER FOR THURSTON COUNTY

In the Matter of the Application of)	NO. 2006103057
)	
)	
LAKESIDE INDUSTRIES)	FINDINGS, CONCLUSIONS,
)	AND DECISION
)	
For Amendment to a Special Use Permit)	
_____)	

SUMMARY OF DECISION

A Special Use Permit, approved in April 2001, which authorized the construction and operation of an asphalt production facility at the Holroyd Gravel Mine, is **AMENDED** to allow for the construction of three asphalt storage silos, subject to conditions.

SUMMARY OF RECORD and PROCEDURAL BACKGROUND

Request:

Lakeside Industries requests approval of an amendment to a 2001 Special Use Permit (SUPT 990457) which authorized the construction and operation of an asphalt production facility at its Holroyd Gravel Mine. The requested amendment seeks to construct three asphalt storage silos as opposed to the two silos authorized under the original SUPT. The Holroyd Gravel Mine is located within the Nisqually Sub-Area Planning Area of Thurston County at 11125 Durgin Road SE, Olympia, Washington.

Procedural History:

Public hearings for the original special use permit and an appeal of an environmental determination were heard by the Hearing Examiner between October 30, 2000 and December 19, 2000. Testimony was received from over 50 individuals and over 90

exhibits, plus attachments, were submitted into the record. On April 20, 2001, the Hearing Examiner approved SUPT 990457, subject to seven conditions, and upheld the County's environmental determination.¹ Friends of Nisqually (Friends), a citizens group, appealed the Hearing Examiner's decision to the Thurston County Board of Commissioners (the Board), who after conducting a closed record hearing on September 17, 2001, reversed the Hearing Examiner's approval of the Applicant's permit. The Applicant appealed the Board's denial to Mason County Superior Court under Washington's Land Use Petition Act (LUPA, RCW 36.70B) and Friends cross-appealed the environmental determination. The Superior Court reversed the Board's decision, reinstating the Hearing Examiner's decision but rejected the Applicant's request to recycle asphalt. The Superior Court also denied the environmental appeal of Friends. The Superior Court's decisions were appealed to the Washington State Court of Appeals, Division II, by the County, Friends, and the Applicant. The Court of Appeals rendered its decision on January 13, 2004. *Lakeside Industries v. Thurston County*, 119 Wash. App. 886 (2004), *reviewed denied*, 152 Wash.2d 1015 (2004) in which it upheld the Superior Court's decision to reinstate the Hearing Examiner's decision, denial of the appeal of the environmental determination, and the prohibition on asphalt recycling within Nisqually Sub-Area.

On October 31, 2005, the Applicant submitted an application for a building permit. The permit requested construction of the previously authorized asphalt plant and included a bag house, office, fuel tanks, asphalt heating unit, and *three* storage silos instead of the two silos authorized by SUPT 990457. The application to amend SUPT 990457 was submitted on July 14, 2006, as a Type I administrative amendment.² After review and consultation with the Applicant and legal counsel, on October 16, 2006, the County determined that there was an issue as to whether the proposed change is significant or insignificant and, therefore, the application was more properly should be reviewed as a Type III Hearing Examiner amendment.

The Hearing Examiner may approve an application for a Special Use Permit only if the general and use-specific standards set forth in TCC 20.54.040 and TCC 20.54.070(21), respectively, are satisfied. On April 20, 2001, the Hearing Examiner approved the Applicant's requested special use – an asphalt product facility – when he determined that the proposal satisfied both the general and use-specific standards contained in TCC 20.54. Therefore, the review of this amendment is limited to the issue of whether the Applicant's proposal to install three storage silos as opposed to two storage silos would result in any changes which would substantially change the original proposal so as not to comply with the general and specific-use standards set forth in the TCC.

¹ The Hearing Examiner's decision, including Findings of Fact, Conclusions of Law, and Conditions of Approval, admitted as Exhibit 7 for the December 4, 2006 Public Hearing, is incorporated by reference as part of the record and part of the decision of the instant request.

² Pursuant to TCC 20.54.030, once a special use has been authorized, the use shall not be *enlarged, extended, increased in intensity, or relocated unless an application is made for a new or amended special use authorization*. (Emphasis added).

Hearing Date:

An open hearing on the Applicant's requested amendment was held before the Hearing Examiner of Thurston County on December 4, 2006.

Testimony:

The following individuals presented testimony under oath at the open record hearing:

1. Michael Kain, Planning Manager, Thurston County Development Services
2. Arthur Saint, Thurston County Roads & Transportation Services
3. John Hempleman, Attorney for Lakeside Industries
4. Mike Lee, President, Lakeside Industries

Exhibits:

The following exhibits were admitted at the open record hearing:

1. Staff Report dated November 28, 2006 with the following attachments:
 - Attachment a: Notice of Public Hearing
 - Attachment b: Special Use Permit Application, received July 14, 2006
 - Attachment c: Thurston County Geodata Center Area Map and Summary Table, printed November 17, 2006
 - Attachment d: Project Narrative including Site Plans and Silo Volume Calculations, received July 14, 2006
 - Attachment e: Correspondence from Applicant, dated July 13, 2006
 - Attachment f: Public Comment: Tom Cook, dated August 15, 2006
 - Attachment g: Public Comment: Howard Glastetter, dated November 6, 2006
 - Attachment h: Public Comment: Marie Taylor, dated November 3, 2006
 - Attachment i: Public Comment: Howard Glastetter dated June 10, 2006, August 1, 2006, and August 18, 2006
2. Photograph of Notice of Public hearing
3. Public Comment: Tom Cook, dated November 20, 2006
4. Agency Comment: Thurston County Public Health & Social Services, dated November 22, 2006
5. Site Area Photograph – 90 foot tower
6. Revised Condition No. 4
7. April 20, 2001 Hearing Examiner Decision – SUPT 990567 Lakeside Industries

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

FINDINGS

1. Lakeside Industries (Applicant) requests approval of an amendment to a SUPT, Permit 990457, issued in April 2001. Permit 990457, authorized the construction and operation of an asphalt product facility at the Applicant's Holroyd Gravel Mine and included the installation of two 90-foot tall asphalt storage silos. *Exhibit 1, Staff Report, Pages 1-2; Exhibit 1, Attachment B, SUPT Application; Attachment D, Project Narrative; Testimony of Mr. Kain.*
2. On October 31, 2005, the Applicant submitted an application for a building permit for an asphalt plant, including a bag house, office, fuel tanks, asphalt heating unit, and three storage silos. The building permit application is on hold pending a determination of the instant application to amend the SUPT. *Exhibit 1, Staff Report, Page 2; Testimony of Mr. Kain.*
3. The application to amend Permit 990457 was submitted on July 14, 2006, as a Type I administrative amendment.³ After review and consultation with the Applicant and legal counsel, on October 16, 2006, the County determined that there was a question as to whether the proposed change is significant or insignificant and, therefore, the application was more properly reviewed as a Type III Hearing Examiner amendment. *Exhibit 1, Staff Report, Page 2; Testimony of Mr. Kain.*
4. The Applicant's requested amendment seeks to modify Permit 990457 by allowing three 65.5-foot storage silos instead of the previously approved two 90 foot storage silos.⁴ The Applicant contends that three silos would allow for greater flexibility in production of hot-mix asphalt (HMA) by providing storage for different asphalt mix types⁵ concurrently and reflects improvements in pavement design which has occurred in the last seven years. According to the Applicant, the different types of HMA vary in volume due to the size of rock utilized and therefore require varying storage capacity to accommodate that volume. *Exhibit 1, Staff Report, Page 3; Exhibit 1, Attachment D, Project Narrative; Testimony of Mr. Lee.*
5. The two previously permitted silos would allow for a storage volume of 16,316 cubic feet.⁶ The three proposed silos would provide for a storage volume of 15,

³ Pursuant to TCC 20.54.030, once a special use has been authorized, the use shall not be *enlarged, extended, increased in intensity, or relocated unless an application is made for a new or amended special use authorization.* (Emphasis added).

⁴ The Applicant asserted that this reference to a specific number of silos was in error since the original 1999 application made no mention as to the number of proposed silos. *Exhibit 1, Attachment D, Project Narrative*

⁵ The three types of hot-mix asphalt include traditional dense-graded mixes as well as stone matrix asphalt and various open-graded HMAs.

⁶ The storage capacity per 90-foot silo is shown as 8,279 cubic feet or 16,557 cubic feet for both silos. The Applicant demonstrated more specific calculations in Figure 3 of Attachment D which shows that the volume of the two silos would actually be 16,316 cubic feet.

453 cubic feet. Construction of a three-silo system as opposed to a two-silo system would result in a reduced storage capacity by 863 cubic feet (16,316 cubic feet less 15,453 cubic feet). The variance in height between silos would be 24.5 feet (90 feet less 65.5 feet). All silos have a width of 12.5 feet. *Attachment D, Figure 3; Testimony of Mr. Kain; Testimony of Mr. Lee.*

6. Public Comment was received by Thurston County including comments from individuals who participated in the original permit process. Mr. Tom Cook, acknowledged that he appreciated the reduced visibility of the silos resulting from the lowered height. However he stated concern about the potential for an increase in toxic fugitive emissions and the production of recycled asphalt pavement. In addition, Mr. Cook alleged that the Olympic Region Clean Air Agency (ORCAA) has not been notified of the proposal. Another public witness, Mr. Howard Glastetter, expressed concern that the facility was being converted from a “local facility” to a “regional facility” and that the entire operation had the potential to overwhelm the Nisqually Valley. Mr. Glastetter further submitted that ORCAA had voiced reservations about the Applicant’s current facility and that approval of the amendment would increase truck traffic and could result in recycled asphalt pavement being used, even though it is not permitted by the Court Decisions or the Nisqually Sub-Area Plan. Another witness, Ms. Marie Taylor, submitted comments in regard to air quality in the Nisqually Valley. *Exhibit I, Attachment F, Cook Comments; Attachment G, Glastetter comments; Attachment H, Taylor Comments; Attachment I, Glastetter comments; Attachment J, Glastetter comments; Exhibit 3, Cook comments.*
7. The Applicant submitted that the proposal to use three 65.5-foot silos instead of two 90-foot silos would “reduce overall environmental impact.” This assertion is based both the reduction of height which lessens visibility impacts, and, that the three-silo system’s total storage capacity is 863 cubic feet less that of the two-silo system. *Exhibit I, Staff Report, Attachments D and E; Attachment D, Figures 2 and 3; Testimony of Mr. Lee.*
8. As it was in the original SUPT review, public concern was raised in regard to adverse visual affects of the asphalt plant.⁷ (See Exhibit 7, Findings of Fact No. 8, Page 16; Conclusions of Law Nos. 7 and 8, Page 23). Although the three silos would be visible from some locations within the Nisqually Valley, County Staff determined that the smaller structures would be more in character with other structures at the mine site. The Staff stated that the requested amendment would substantially mitigate the concerns raised during the review of the original SUPT application by reducing the height of the structures by approximately 25 feet. *Exhibit I, Staff Report, Pages 3-4; Exhibit I, Attachment F, Cook Comments; Testimony of Mr. Kain.* It was also noted by Staff that the north and east portions of the subject property are screened by a berm of over 100 feet in height. In

⁷ County Staff recommended denial of the original SUPT application primarily due to the adverse visual affect the plant would have on the Nisqually Valley.

addition, a berm descending from a height of 100 feet to one of 20 feet is located to the northwest and a 10-foot concrete wall is to the west of the site, near Old Highway 99. Although the Nisqually Valley has some vantage points where members of the public can view down into the Holroyd mine site the Staff determined that the reduction in height would render the silos less intrusive from all vantage points and totally obscure from some. *TCC 20.45.010; TCC 20.45.040; Exhibit 1, Staff Report, Page 3.*

9. Members of the public also expressed concern over the potential for an increase in truck traffic. (This concern was also addressed during the public hearings on the original SUPT application. (See Exhibit 7, Findings of Fact Nos. 10 to 17 (Pages 4-6) and Nos. 20 to 24 (Pages 17-18)). County Staff noted that the original assessment of traffic impacts was based on maximum production levels, both hourly and annually. The proposed change in the number of silos would not increase production levels and therefore, no modification as to the impact on traffic is anticipated. *Exhibit 1, Staff Report, Page 3; Attachments D and E; Attachment D, Figures 1 and 2; Attachment F, Cook Comments; Attachments G and I, Glastetter Comments.*
10. In original SUPT review, the potential for increases in truck traffic and production of asphalt and the resulting impact on air quality were considered.⁸ At the hearing on the proposed amendment public comment was submitted that construction of third silo would result in an increase of toxic fugitive emissions by 50 percent. There were also assertions that ORCAA had not been notified of the requested amendment. In response, the Applicant testified that there would be no change in emissions due to the three-silo system and that, therefore, there was no need to notify ORCAA of the proposed amendment. According to the Applicant, the silos do not generate emissions but the loading of the trucks result in the emission. Because production capacity would not be increased from that of the two-silo system, there would still be only one truck being loaded at any given time. The amount of the resulting emissions would not change from those of the two silo system. *Exhibit 1, Staff Report, Page 3; Exhibit 1, Attachment F and Exhibit 3, Cook Comments; Attachment H, Taylor Comments; Attachments I and J, Glastetter Comments; Testimony of Mr. Hempleman; Testimony of Mr. Lee.*
11. The proposed three-silo system would be located in the same area of the site that the two-silo system was anticipated to be constructed. The silos would be placed on an impervious concrete pad with a scale platform for weighing of the trucks at the time of loading. The size of the pad, approximately 5.5 acres, would not increase in order to accommodate the additional size. Because there is only one scale available there would be no increase in the number of trucks being loaded. *Exhibit 1, Staff Report, page 3; Exhibit 1, Attachment D, Figures 1 and 2; Testimony of Mr. Kain; Testimony of Mr. Lee.*

⁸ Exhibit 7, 2001 Hearing Examiner SUPT Decision, Air Quality, Toxicology, and Odor Findings of Fact Nos. 18 to 34 (Pages 6 – 8) and Nos. 28 to 33 (Page 19),

12. The subject property is within a Rural Residential – One Dwelling Unit per Five Acres (RR 1/5) zoning district. The purpose of the RR 1/5 zone is to maintain the commercial timber industry and to protect the public health in areas with severe soil limitation for septic system, severely limited water supply, aquifer recharge and floodplains, and the Nisqually Subarea. Mineral extraction⁹ and an accessory use to an existing mineral extraction operation, such as an asphalt plant, are permitted within the RR 1/5 subject to issuance of a SUPT by the Hearing Examiner. *TCC 20.09.010; TCC 20.54; TCC 20.54.065 (Table 1, Item 21); TCC 20.54.070(21); Exhibit 1, Staff Report, Pages 2-3; Attachment B, SUPT Application; Attachment C, Zoning Map.*
13. The RR 1/5 zoning district provides certain design standards for commercial uses. The district restricts the height of structures to 35 feet. The proposed structures are 65.5 feet in height. However, pursuant to TCC 20.07.080, height limitations established in TCC Title 20, do not apply to “silos.” Commercial structures are required to be setback a minimum of 35 feet from an arterial roadway, 25 feet from a local and/or collector roadway, and 10 feet from a flanking street. A minimum side and rear yard of 10 feet must be provided. All proposed structures would satisfy the underlying zoning district design standards. *TCC 20.07.030(1)(a); TCC 20.07.080; TCC 20.09.040(2); Exhibit 1, Staff Report, Attachment D, Proposed Site Plan.*
14. The Nisqually Sub-Area is comprised of approximately 8,980 acres or 14 square miles in 885 parcels. It includes the Nisqually Indian Reservation, a majority of the Nisqually Wildlife Refuge and a portion of the Fort Lewis Military Reservation. The primary goal of Nisqually Sub-Area Plan¹⁰ (NSAP) is to maintain the existing rural environment of the planning area with an emphasis on preserving the Nisqually Valley viewshed and its rural, aesthetic character. *NSAP, Goal A.* The Thurston County Comprehensive Plan and the NSAP identify the Holroyd mine site as Designated Mineral Resource Land with a Mineral Resource Overlay. *Comprehensive Plan Map M-43; NSAP, Figures 7 and 13).* The NSAP does not permit the reprocessing of asphalt due to water quality concerns. *NSAP, Policy E.5.*
15. Pursuant to Washington’s State Environmental Policy Act (SEPA), RCW 43.21C, Thurston County acted as lead authority for the identification and review of environmental impacts resulting from the Applicant’s project as proposed in 2000. Based on this review, the County determined that the proposal, which included two 90-foot tall asphalt storage silos, would not, subject to conditions¹¹,

⁹TCC 20.03.040(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.

¹⁰ The NSAP was drafted in 1992 and was re-enacted in 1995. The Plan has not been modified since that time.

¹¹ Conditions stated in the MDNS pertained to traffic, noise, odor, spill prevention, drainage, stormwater, aquifer protection, air quality, fire safety, and utilities.

have a probable significant adverse impact on the environment and issued a Mitigated Determination of Non-Significance (MDNS) on September 18, 2000.¹² *Exhibit 7, Hearing Examiner's April 2001 Decision - Attachment D, MDNS*. The County Staff determined that additional environmental was not warranted because the amendment proposes a project that is substantially similar to the original 2000 proposal. Pursuant to WAC 197-11-600(4), the September 28, 2000 MDNS has been incorporated by reference as part of the County's environmental review process.¹³ *WAC 197-11-600; Exhibit 1, Staff Report, Page 2*.

16. The Thurston County Public Health and Social Services Department (Public Health) reviewed the Applicant's proposed amendment and recommended approval. Health concluded that the substitution of three smaller silos would "not result in any change" in traffic patterns, production volume, storage capacity, and noise levels. In addition, Public Health determined that the proposal would "not adversely impact existing sewage systems or wells (on-site or neighboring)." *Exhibit 1, Staff Report, Page 3; Exhibit 4, Public Health Comments; Testimony of Mr. Kain*.
17. The County provided proper notice of the public hearing. Written notice of the public hearing was sent to all property owners within 2600 feet of the site on November 15, 2006. Notice was and notice was published in *The Olympian* on November 18, 2006, at least 10 days prior to the hearing. Notice was posted on-site. *Exhibit 1, Staff Report, Page 2; Exhibit 1, Attachment A, Notice of Public Hearing; Exhibit 2, Notice Photograph*.

CONCLUSIONS

Jurisdiction

The Hearing Examiner has jurisdiction to decide an amendment to an existing Special Use Permit under Sections 20.54.015(2) and 20.60.020 – Table 2, and Chapter 2.06 of the Thurston County Code. Pursuant to TCC 20.54.050, the Hearing Examiner is authorized

¹² The County's environmental determination was appealed to the Hearing Examiner by a citizens group, Friends of Nisqually (Friends) and the Nisqually Indian Tribe. The Appeal requested that the County produce a full Environmental Impact Statement (EIS). Public hearings on the SEPA appeal were heard concurrently with the SUPT application in 2000 and resulted in the Hearing Examiner denying the SEPA appeal and upholding the MDNS. The Hearing Examiner's denial was appealed to Mason County Superior Court by Friends and subsequently, to the Court of Appeals. Both the Superior Court and the Court of Appeals denied Friends' appeal as untimely.

¹³ WAC 197-11-600 (4) Existing documents may be used for a proposal by employing one or more of the following methods:

(a) "Adoption," where an agency may use all or part of an existing environmental document to meet its responsibilities under SEPA. Agencies acting on the same proposal for which an environmental document was prepared are not required to adopt the document; or

(b) "Incorporation by reference," where an agency preparing an environmental document includes all or part of an existing document by reference.

...

to impose such additional conditions, safeguards, and restrictions upon the proposed use as may be necessary in the public interest.

Criteria for Review

The Hearing Examiner may approve an application for a Special Use Permit only if the following general and use-specific standards set forth in TCC 20.54.040 and TCC 20.54.070(21), respectively, are satisfied.

Conclusions Based on all of the above Findings

As noted above, the Hearing Examiner's decision of April 20, 2001 thoroughly reviewed the general and use-specific standards for a Special Use Permit in conjunction with the Applicant's original application and determined that the proposal, as conditioned, satisfied those standards. The review of the proposed amendment was limited to whether the Applicant's proposal to install three storage silos instead of two storage silos would result in any changes so that the proposal would no longer comply with the general and specific-use standards set forth in the TCC.

Based on the Findings of Facts, the Hearing Examiner finds that the Applicant's proposed amendment which would only change the number of asphalt storage silos from two 90-foot structures to three 65.5-foot structures. This change would not substantially alter the original SUPT which, on April 20, 2001, the Hearing Examiner determined complied with all applicable federal, state, regional and Thurston County laws and plans including the Comprehensive Plan and the Nisqually Sub-Area Plan, and the applicable zoning district regulations. In addition, as with the original SUPT, the amendment to the SUPT is appropriate in the location for which it is proposed, and, would not result in substantial or undue adverse effects on adjacent property, neighborhood character, natural environment, traffic conditions, parking, public property or facilities, or other matters affecting the public health, safety and welfare, and would not impose an undue burden on any of the improvements, facilities, utilities, or services within the area. Production capacity will be maintained and the aesthetic impact of the silos would be lessened due to the reduction in height.

The proposed amendment complies with the approval criteria of TCC 20.54.070(21). (This section of the TCC notes that asphalt plants are permitted as an accessory use when expressly permitted in a SUPT). The original SUPT authorized the asphalt plant and the subsequent review by the Courts did not alter that authorization with the exception of prohibiting the recycling of asphalt products. The proposed amendment does not seek to change the previously permitted use; the amendment only seeks to change the number of storage silos utilized. The amendment would create no new impacts nor substantially alter the previously permitted use.

DECISION

Based upon the preceding Findings and Conclusions, Lakeside Industries request for approval of an amendment to Special Use Permit 990457 to modify the number of approved asphalt storage silos from two 90-foot silos to three 65.5 feet silos on property located at 11125 Durgin Road SE within the Nisqually Sub-Area Land Use Planning Area of Thurston County is **GRANTED**, subject to the following conditions:

1. EXCEPT for Condition No. 2 of the April 20, 2001 decision of the Hearing Examiner (File SUPT/APPL 990457), all other conditions shall remain in effect.¹⁴
2. As referenced in the April 20, 2001 decision of the Hearing Examiner (File SUPT/APPL 990457), all conditions as set forth in the September 18, 2000 Mitigated Determination of Non-Significance (MDNS) remains in effect and are applicable to the amended SUPT.
3. The September 28, 2000 MDNS, the original approved SUPT, and this amendment are based on the project proposal as described in the Environmental Checklist, submitted May 27, 1999, by Lakeside Industries.
4. The maximum plant product rate shall be 300 tons of asphalt per hour and 300,000 tons per year. Plant production shall not be increased based on the number of silos on the site.
5. The building permit for the plant, including the third silo, shall not be issued prior to the completion of the natural gas pipeline currently under construction to serve the plant. Asphalt production operations shall not be initiated until all applicable “pre-operational” conditions of the original asphalt plant special use permit (SUPT/APPL 990457) are satisfied.
6. A maximum of three asphalt storage silos shall be located on the subject property. The storage silos shall a maximum height above grade of 66 feet and a maximum combined storage capacity of 16, 316 cubic feet.
7. The storage silos shall be placed in a linear configuration. Loading capacity of the silos shall be limited to one truck at a time.

Decided this 19th day of December, 2006.

James M. Driscoll
Hearing Examiner for Thurston County.

¹⁴ Condition No. 2 allowed for the recycling of asphalt product (RAP) as an accessory use in conjunction with a permitted crusher and in accordance with County and State health Department regulations and requirements. This condition was deleted by the Superior Court.