



COUNTY COMMISSIONERS

Cathy Wolfe
District One
Sandra Romero
District Two
Karen Valenzuela
District Three

HEARING EXAMINER

Creating Solutions for Our Future

**BEFORE THE HEARING EXAMINER
FOR THURSTON COUNTY**

In the Matter of Appeal of)	NO. 2008104219
)	
Gordon Boe and Myron Struck)	Findings of Fact, Conclusions-
)	and Decision
<u>of an Administrative Decision</u>)	

Decision

The appeal of Gordon Boe and Myron Struck of the administrative decision of Thurston County of a refusal to sign a Washington State Department of Natural Resources' form SM-6 that would acknowledge official Thurston County recognition of the property on the south side of Offutt Lake Road about one mile east of Old Highway 99 as being a mining site is **DENIED**. The administrative decision remains as issued.

Background

Gordon Boe and Myron Struck (Appellants) are the owners of a 322 acre parcel of property (subject property) on the south side of Offutt Lake Road about one mile east of Old Highway 99.¹ The County refused to sign the SM-6 form, and in a letter to the Appellants dated November 6, 2008, set forth the reasons for the denial. This letter was treated as an administrative decision by the County. The County's decision was timely appealed on November 20, 2008.

A hearing on the appeal was held before the Hearing Examiner of Thurston County on March 16, 2009. At the hearing the following exhibits were submitted and admitted as part of the official record of this proceeding:

EXHIBIT 1 Development Services Planning and Environmental Section Report with the following Attachments:

Attachment a Appeal received November 20, 2008
Attachment b November 6, 2008 Administrative Decision
Attachment c October 2, 2008 Letter from Greg Jones, President, Forest Pro, Inc., including the following attachments:

¹ No site address is established for the property. The legal description of the property is A portion of Section 5, Township 16 North, Range 1 West; known as tax parcel #11605120000, Thurston County.

1. September 18, 2008 Comment letter from Louie Rota
2. DNR form SM-6 County or Municipality Approval for Surface Mining
3. April 17, 2008 Comment letter from Louie Rota
4. March 12, 2008 Comment letter from Bill Bronson
5. 1996 Aerial Photo of site

Attachment d June 16, 2008 Email from Mike Kain to Greg Jones

Attachment e Statutory Warranty Deeds

Attachment f Geodata map showing site of 1953 pit

Attachment g Aerial photos of site 1953 - 2006

EXHIBIT 2 Appellant's Responsive Memorandum including the following attachments:

Attachment a February 9, 2009 Request for Public Records to the State of Washington Department of Natural Resources - copies of Gibson Rd. DOT Reclamation Permits

Attachment b June 5, 2008 Thurston County Permit Center Sign In Sheet

Attachment c January 26, 2009 James A. Berg Request for Public Documents to Development Services Department regarding T.C. Ordinances 13040 and 10368 public hearing announcement information

Attachment d Notice of Public Hearing before the Thurston County Planning Commission: Natural Resource Lands Policy Amendments; Board Review Draft dated December 2002 of Proposed Amendments to the Thurston County Building Code (Title 14), Platting and Subdivision Ordinance (Title 18), Mineral Extraction Code (Chapter 17.20), Forest Lands Conversion Ordinance (Chapter 17.25), and Zoning Code (Title 20)

Attachment e April 5, 2001 Letter from Gordon Boe to Dave Hurn, Thurston County Development Services Department

Attachment f Thurston County Gravel Mine Registration Form – Year 2009 for Alpine Sand and Gravel, County Mine ID# 59

EXHIBIT 3 Photo of Public Hearing Notice Posting

EXHIBIT 4 September 17, 2007 Letter to Glenn Schneider from Michael Kain, Development Services Department

EXHIBIT 5 Written Testimony of Michael Kain, Development Services Department

EXHIBIT 6 Billing History for Mine #3 and Thurston County Gravel Mining Registration Form 2009

EXHIBIT 7 April 6, 2009 Letter from Mike Kain including the following attachments:

Attachment a Notice of Public Hearing for the County Board of Commissioners, published July 30, 2003

Attachment b Affidavit of Publication for Notice Published July 30, 2003

Attachment c Notice of Public Hearing for the Planning Commission, published October 31, 2002

Attachment d: Affidavit of Publication for Notice Published
November 19, 2003
Attachment e: Notice of Public Hearing for the County Board of
Commissioners, publish November 18, 2003
Attachment f: Hearing Notice Mailing List

EXHIBIT 8 April 30, 2009 Appellant Closing Argument
EXHIBIT 9 May 1, 2009 Thurston County Summation

At the hearing the following submitted testimony and evidence:

Michael Kain, Planning Manager, Development Services Department
Gordon Boe
Myron Struck
Greg Jones

Attorney Representation:
Jeff Fancher, Deputy Prosecuting Attorney, Thurston County
Jim Berg, Applicant Attorney

Prior to the hearing the County identified Matt Brookshier of the Washington State Department of Natural Resources as a witness that it intended to call at the hearing. However, Mr. Brookshier was not present at the hearing and the Appellant requested that the record be held open to take his testimony. The Appellant and the County agreed that the testimony could be taken via a telephone conference. After coordination of the parties' schedules the testimony of Mr. Brookshier's testimony was taken via a telephone conference call on April 15, 2009. As of that date the record was deemed complete.

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

Findings of Facts

1. The Appellants, the owners of a 322 acre parcel of property on the south side of Offutt Lake Road east of Old Highway 99, notified the County of their intent to mine the northern 80 acres of the site. In order to mine the site the Applicant must secure approval from the Washington State Department of Natural Resources (DNR). Part of the DNR permitting process requires a submittal from Thurston County of a signed form SM-6 that acknowledges official County recognition of the property as a mining site. Thurston County officials refused to sign form SM-6. *Testimony of Mr. Kain*
2. The 322 acre site is approximately one-quarter mile from the south shore of Offutt Lake in Thurston County. The site contains numerous critical areas, including hazardous slopes, a stream, wetlands and high groundwater areas. To the north of the site, across Offutt Lake Road, are over 100 small residential lots; to the west

are numerous five-acre residential lots; and to the east and south are larger rural parcels. *Exhibit 1, Staff Report, pg. 2*

3. The subject property is part of six parcels owned by the Appellants that total 514 acres. The property was purchased from the Weyerhaeuser Corporation who owned it from at least 1937 until 1998. During Weyerhaeuser's ownership the property was used for forest production. Weyerhaeuser sold it to The TCT Profit Sharing Plan in 1998. In October 2006 the Appellants purchased the property. There is no legal record with the County of any mining activities being conducted on the site by Weyerhaeuser, TCT or the Appellants. *Exhibit 1, attachment e; Exhibit 1, Staff Report, pg. 2; Testimony of Mr. Kain.*
4. Upon review of its records and a review of the property, the County determined that the site has never been an official legal recognized mine, and refused to sign form SM-6. The County further submitted that if, for some unbeknownst reason the site had once been a legal recognized mine, that status has lapsed based on specific provisions of the Thurston County Code. The County reasons for the refusal to sign form SM-6 were memorialized in a November 6, 2008, letter that was sent to the Appellants. The letter was treated as an administrative decision by the County. The County's administrative decision was timely appealed by the Appellant on November 20, 2008. *Exhibit 1, Staff Report; Exhibit 1, attachment a; Testimony of Mr. Kain.*
5. In 1993 the Thurston County Board of County Commissioners enacted the Mineral Extraction Code (TCC 17.20²) for Thurston County. TCC 17.20.020(A)(2) required that specific parts of the code apply to all mines in existence on the date of adoption³. Another part of the ordinance Mineral Code, TCC 17.20.150, established the registration requirements for mines in Thurston County. The ordinance was amended in 2003 and established that if a mine is not registered with the County for three consecutive years or if significant mining activity has ceased for a period of three consecutive years, the mine is considered as being vacated [see: TCC 17.20.150C]. A mine is vacated if less than 500 cubic yards of material are extracted over a three-year period. TCC 17.20.150(C). No mine in Thurston County has a vested exemption from the Mineral Extraction Code. *Exhibit 1, Staff Report, pgs. 1 and 3; Testimony of Mr. Kain; Exhibit 1, attachment b.*
6. For more than three consecutive years the mining activity on site has not been registered pursuant to the requirements of TCC 17.20.150 (C). *Testimony of Mr. Kain Exhibit 1, Staff Report, pg. 3*

² TCC17.20.010 through TCC 17.20.280

³ TCC 17.20.020 Application.

A. Sections 17.20.040 through 17.20.190 apply to:

1. -----
2. All gravel mines in existence on the date of adoption of this chapter or for which special use permit applications have been filed before the date of adoption.

7. The Appellants argued that in insufficient public notice was given by the County for hearings to amend mineral regulations in Thurston County. Specifically they contended that the amendment to the Mineral Extraction Code was not properly noticed and that the amendments cannot be applied to the as a limiting regulation for mining activity on site. *Testimony of Mr. Boe*. In response to the argument the County was allowed to supplement the record with copies of official notice of the Board of Commissioners hearings and actions on the passage of the Amended to the Mineral Code. *Exhibit 7, attachments a through f*.
8. There are two small borrow pits on the property that are approximately one-half acre in total. The County submitted that these pits were probably the source of gravel for the 3.5 miles of logging roads on the subject property and the adjacent former Weyerhaeuser property. The County did not recognize the probable use of gravel from these pits as a mining operation. *Testimony of Mr. Kain; Exhibit 1, Staff Report, pg. 2* There is no evidence that gravel has been taken from the site during the last 40 years and any gravel that was taken was done in the late 1940s or early 1950s. *Testimony of Mr. Jones on cross examination*.
9. The County representative testified that upon review of County records it was determined that the subject property has never been registered as a mine with the County, and, there is no evidence that any significant mining activity has occurred on site since the enactment of the Mineral Extraction Code. *Exhibit 1, attachment b; Testimony of Mr. Kain*.
10. Based on available aerial photos the County was able to determine that the subject property has been forested since at least 1953. Exhibit 1, Staff Report, pg. 2. Records available to the County also indicate that the site has been enrolled in the timber tax program⁴ since at least 1977. Exhibit 1, Staff Report, pg. 4. The site continues to be forested. Exhibit 1, Staff Report, pg. 2.
11. The Appellants submitted that the subject property was the site of a mine prior to Thurston County's enactment of the County Mineral Extraction Code (TCC 17.20). They contend that mining activities were conducted on site by Weyerhaeuser in the 1940's and 1950's and that the mines on site could remain dormant without being vacated and without any vested rights being vacated. As noted in Finding number no mine in Thurston County has a vested exemption from the Mineral Extraction Code. Exhibit 2 (Appellant's Responsive Memorandum, pgs. 1 and 5); Exhibit 1, attachment b.
12. As support for historical use of the site as a mining operation the Appellants submitted a signed statement from Mr. Louie Rota who has lived in the area for many years. In two separate pieces of correspondence (dated September 18, 2008 and April 18, 2008) Mr. Rota wrote that sometime between 1949 and 1951 the majority of the rock from the borrow pits was used for the road to the pits and for

⁴ The tax program is authorized by the State of Washington and implemented by Thurston County
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development on the south side of Offut Lake. *Exhibit 1, attachment c.* The Appellant also submitted a letter from Mr. Bill Bronson attesting to the existence of roads in the area. However, there is nothing in the Bronson letter that describes mining on site. *Exhibit 1, attachment c.*

13. The Appellants argued that on, or about, May 5, 2008, one of their agents submitted a form SM-6 to the County to be signed. Apparently when the agent telephoned the County about the status of the form he was informed that it had been misplaced. The agent submitted that he was then informed by the Planning Manager, Mike Kain, that the form SM-6 would be signed upon receipt of a new form. When the agent arrived at the Thurston County Planning office Mr. Kain did not sign the form. The Appellant argues an order of equitable estoppel against the County. *Testimony of Mr. Jones; Exhibit 2 (Appellant's Responsive Memorandum, pgs. 2 and 3).*
14. Mr. Kain submitted that the refusal to sign the form SM-6 was neither sudden nor arbitrary. He testified that there was never any indication that the County was going to consider the site a valid mine and at no time did he say he was going to sign the form SM-6. Upon his review of the site, he determined that pursuant to the Mineral Extraction Code the site did not qualify as an existing mine. The refusal to sign was "based both on standards within the adopted mineral extraction code, as well as an assessment of reasonableness in the determination that the site has never been anything more than a timber operation from which a small amount of gravel may have been used for internal roads or nearby roads". *Testimony of Mr. Kain; Exhibit 1, Staff Report, pg. 4.*
15. The Appellants submitted that the County has signed form SM-6 for a different mining operation on Gibson Road that is owned by the Washington Department of Transportation (DOT) even though the DNR has acknowledged that the DOT site is inactive. The Appellants argued that the DOT operation is similar to the historical use of the subject property. *Testimony of Mr. Berg; Exhibit 2, Appellant's Responsive Memorandum, pg. 2 attachment a- form SM-7A; Exhibit 1, attachment d.* The County argued that the DOT site is not similar to the subject property because "[I]t was clearly a mine in the past and had been mined within the past three years. Thus, extraction activities were allowed to restart." *Exhibit 1, Staff Report, pg. 5.* The DNR representative submitted that upon DNR approval the materials removed from the DOT site were sent to Chehalis for floodplains and for concrete for I-5 projects. *Testimony of Mr. Brookshier*
16. Matt Brookshier of the Washington State Department of Natural Resources testified that he is a geologist who works with the surface mining regulations at the DNR. He testified that there are no DNR records of the subject property and that no state reclamation permits have been issued for the site. He submitted that the DNR cannot issue any permits until the County signs the SM-6 form. Once the County signs the SM-6 form the DNR inspects the physical properties of the site. The DNR permitting process includes all grading or removal of topsoil and

those activities have not been permitted on subject property. *Testimony of Mr. Brookshier.*

17. The County submitted that while it does not qualify as a nonconforming mining site, the site may contain gravel and may eventually qualify to be a gravel mine. However, in order to qualify it would have to be approved with a special use permit from Thurston County. As part of the review of the special use permit the site would be subject to an environmental review.⁵ *Exhibit 1, Staff Report, pg. 5; Testimony of Mr. Kain*

Conclusions

Jurisdiction

The Hearing Examiner is authorized to decide appeals of administrative determinations pursuant to Thurston County Code Sections 2.06.010(H) and 17.15.410(A).

Relevant Law

TCC 17.20.150 Registration

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 (or, in the case of Thurston County mining operations, application to a Thurston County project), 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.

Conclusions of Law

1. Mineral activity in Thurston County is regulated by the Mineral Extraction Code, codified as TCC 17. 20 et. seq. Specific sections of the Code apply to all mines in existence on the date of its adoption. . No mine in Thurston County has a vested exemption from the Mineral Extraction Code. *TCC 17.20.020(A)(2).* .
2. Lawful nonconforming uses are allowed to continue for some period of time. *Rhod-A-Zalea v. Snohomish County*, 136 Wn.2d 1, (1998). The initial burden of proving the existence of a nonconforming use is on the land user making the assertion. *Van Sant v. Everett, Wn. App. 641 (1993)*. In the instant case the

⁵ In its Staff Report the County stated: "As of this writing, a moratorium on new gravel mines exists in Thurston County. However, the Board of County Commissioners is on track to release the moratorium and adopt mineral extraction code revisions in 2009. Thus, application for a special use permit for mineral extraction on this site should be possible in the near future." *Exhibit 1, Staff Report, pg. 5*

burden falls upon the Appellants to prove that there is a nonconforming mining operation on the subject property. The Appellants have not met that burden. The site has been used for forest purposes and has never been recognized as a mine by the County or the State. *Findings of Fact Nos. 9 and 16*. The only testimony relating to the possible use of gravel was from Mr. Rota. *Finding of Fact No. 12*. While the Hearing Examiner does not question Mr. Rota's credibility or memory, his testimony is not sufficient to establish a mining activity that qualifies as a nonconforming use. The Thurston County Deputy Prosecuting Attorney in his written summation has correctly described the activity of Mr. Rota of over fifty years ago as being a forestry use that "...included moving a minute amount of fill around for logging road purposes over 50 years ago" *Thurston County's Summation, pg. 1*.

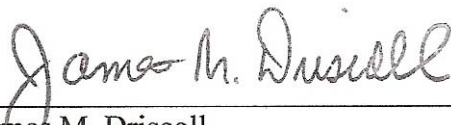
3. A mineral extraction use shall be considered vacated if the mining operator has not timely submitted a complete registration form and related fee to Thurston County per Section 17.20.140 for three consecutive years. The mining activity on site has not been registered pursuant to the requirements of TCC 17.20.150 (C) for more than three consecutive years. *Finding of Fact No. 6*. No mine in Thurston County has a vested exemption from the Mineral Extraction Code.
4. Administrative agencies are creatures of the legislature without inherent or common-law powers and may exercise only those powers conferred either expressly or by necessary implication. *Chaussee vs. Snohomish County Council*, 38 Wn. App. 630, (1984). The *Chaussee* case was an interpretation of the authority of the Snohomish County Hearing Examiner and has been cited for years as the leading case for defining the authority of Hearing Examiners in the State of Washington. Applying the limitations of *Chaussee* to the instant appeal the Thurston County Hearing Examiner cannot make any decision or determination on various issues raised by the Appellant. These include: 1) Whether proper notice was given by Thurston County at the time of adoption of the amendments to the Mineral Extraction Code; 2) Whether any Mineral Extraction Code changes are void [see: *Appellant's Memo to Hearing Examiner (April 30, 2009), pg.3*]; 3) Whether the Thurston County "{T}reated the DOT site more favorable than the subject site" and whether the County "[T]reated the Central site differently than the subject site, allowing it to be opened" " [see: *Appellant's Memo to Hearing Examiner (April 30, 2009), pg.4*]; 4) Whether Thurston County failed to produce proof that the "...proposed ordinance at issue here was filed in the Auditor's Office prior to its adoption". [see: *Appellant's Memo to Hearing Examiner (April 30, 2009), pg.4*].
5. Mr. Kain's refusal to sign the form SM-6 was not arbitrary. He is responsible for reviewing the files and laws of Thurston County before making any land use or related legal decisions and he properly exercised that responsibility in denying to sign the form. *Finding of Fact No. 4*

6. The review of this appeal and the decision of the Hearing Examiner are based entirely on the facts relating to the requested signature of form SM-6 and the facts relating to the subject property.

DECISION

Based on the record developed in this proceeding and the above Finding of Facts and Conclusions, the appeal of Gordon Boe and Myron Struck of the administrative decision of Thurston County of a refusal to sign a Washington State Department of Natural Resources' form SM-6 that would acknowledge official Thurston County recognition of the property on the south side of Offutt Lake Road about one mile east of Old Highway 99 as being a mining site is **DENIED**. The administrative decision remains as issued.

Dated this 29th day of May, 2009.



James M. Driscoll
Thurston County Hearing Examiner