

OFFICE OF THE HEARING EXAMINER

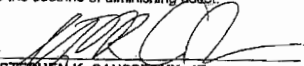
DECISION:

JEFFERSON COUNTY

The appeal of Iron Mountain Quarry, LLC, is hereby granted. Pope Resources and therefore Iron Mountain Quarry, LLC, have legal nonconforming use rights to mine the entire 142 acre leased parcel pursuant to the doctrine of diminishing asset.

REPORT AND DECISION

ORDERED this 9th day of April, 2008.


STEPHEN K. CAUSSEAU, JR.
Hearing Examiner

CASE NO.: UNIFIED DEVELOPMENT CODE INTERPRETATION
IRON MOUNTAIN QUARRY, MLA07-00638 (ZON07-00098)

APPELLANT: IRON MOUNTAIN QUARRY

APPELLANT'S ATTORNEY: KEITH MOXON
GORDON DERR

SUMMARY OF REQUEST:

The appellant is appealing the Code Interpretation issued by the Jefferson County Department of Community Development on January 5, 2008. The appeal was filed on January 11, 2008.

SUMMARY OF DECISION:

Appeal granted.

PUBLIC HEARING:

After reviewing the Jefferson County Department of Community Development and examining available information on file with the application, the Examiner conducted a public hearing on the request as follows:

The hearing was opened on March 14, 2008.

Parties wishing to testify were sworn in by the Examiner.

The following exhibits were submitted and made a part of the record as follows:

SEE ATTACHED INDEX LIST

MICHELLE FARFAN appeared, presented the Department of Community Development Staff Report, and introduced Log Item "61", the Examiner introduced Log Item "62", which is an email from Mr. Loomis. In 1994, the County began requiring a Mineral Resources Overlay to mine more than ten acres at one time. The County has consistently taken such position since 1995. The map showing the Mineral Resources Overlays is identified in the

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comprehensive plan. The MRO protects the mine from neighboring property owners and allows outright mining without a conditional use permit. GMA required the County to identify mineral resource lands, and originally they did not identify enough so they had to identify more. The adopted policies later became part of the code. The County has not determined as yet if the applicant's mine is conforming or nonconforming.

DALE JOHNSON, attorney at law, appeared and introduced Attachments "B" and "E2" to the appellant's brief.

KEITH MOXON, attorney at law, appeared on behalf of the appellant and referred to log item 60. They have no ability or intent to circumvent the permit process. This interpretation will determine which course they must follow. The question is whether the County considers only the development code, or does it also need to consider decisions of the Washington Supreme Court issued after the adoption of the UDC. The County has not dealt with the mine as a nonconforming use, nor has it confirmed it as a nonconforming use. The appellant has presented a voluminous record establishing nonconforming use rights. The area of the subject expansion is part of a 182 acre tract. Forty acres already consist of an existing quarry. The leased area covers the balance of 142 acres. The original mining on the site included areas in both Sections 29, and 30. Mineral use rights are not determined by the area of past extraction. We look at areas around the mine that are intended for extraction. Mining on the parcel began in the 1970s and has continued through the present time. Mining has occurred in areas which are subject to a lease. He then discussed the Supreme Court's language in McGuire. That case makes it clear that Pope's nonconforming use rights cover the entire 182 acre parcel. The parcel provides a 50 year reserve. The comprehensive plan recognizes nonconforming uses as set forth on pages 4-6 of his brief. The mine was legally established prior to the adoption of the ordinance. The original Shine quarry is within the footprint of the lease. He then introduced a chronology as log item 63. The ten acre limit became effective in 2001. Tab A contains a map showing the location of the existing Shine quarry in relation to the project site. A declaration says the old mine operated in 2006. He referred to Tab F2 and noted that the mine will not extend to 13, but is located in Sections 29 and 30. In 2004 the County authorized expansion of the Shine pit from 20 acres to 40 acres through Case No. MLA04-00314. The County allowed the expansion pursuant to the McGuire case and did not require an MRO even though the expansion was well in excess of ten acres. Attachment E2 concerns the Shine pit. The Jefferson County Code applies only to new mines. A mine has operated on the leased area since the 1970s. Section 18.20.240(G) allows the expansion of an existing mine. The only issue before us today is whether the appellant must obtain a comprehensive plan amendment. If they have a nonconforming use right, they do not have to go through the discretionary permit process. The Texas case cited by others is not applicable since the leased area covered the entire parcel and the mine area was set by the leased area. That decision in no way says that the mine lease determines the area of the mine. The original owner of the mine was not involved in the McGuire case. The County is looking only at its code but must also look at the Supreme Court decision. The SM-6 is a DNR document that the County signs. It says that the County has given the mining use permission to expand. The same fact pattern present here was present in

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McGuire. They have no argument that they do not have a MRO. Their request is for the Examiner to apply the diminishing asset doctrine to the 182 acre Pope parcel, and only that parcel. Section 18.05.085 provides that the Examiner must apply the case law. An alternative argument is that the mine is new, but that McGuire allows it to operate on part of the underlying parcel. He referred again to the administrative expansion granted to Shine which allowed it to go from 20 to 40 acres without a conditional use permit. He referred to the nonconforming use section of 18.20.260.

MS. FARFAN reappeared to refer to the comprehensive plan and the Interim Overlay which requires a conditional use permit for related activities and accessory uses. If a mine were within a MRO, it would have to measure ten acres minimum. The Shine quarry has existed since 1989. It underwent SEPA review by DNR which issued a DNS. She also referred to page 48 of log item 57 and noted that even though the Shine quarry covered 20 acres, Shine had actually leased 40 acres in 1989.

JIM MASON appeared and testified that he owns the Shine quarry and began his operation in 1989. The mining referred to as occurring in the 1970s was for the purpose of constructing logging roads. It is common to mine when logging to construct the roads. They mined rock for the roads. The appellant's argument opens 72,000 acres to mining. They have an SM-6 for 40 acres. It took them one year to get the permit as opposed to the 30 days referred to by the appellant.

DAVID ARMITAGE appeared and read his statement into the record. He questioned the intent of the owner, Pope, to actually mine the parcel. Pope started Port Ludlow in 1968, and since that time has promoted the Port and installed trails and other improvements on their land. The trails are an important part of the community. One tract goes through Section 29. The McGuire decision extends the mining to the property borders, but if the applicant abandons the mining rights, then McGuire does not apply. Pope abandoned mining when it promoted and developed the master planned resort. Trails go in and out of the MPR. One trail is only a couple thousand feet from the mining area. Pope intended to use the land for Port Ludlow and not mining. Pope gave up its mining rights in 1967.

MR. MOXON reappeared and testified that if Pope extended recreational trails through portions of the section, then it probably abandoned those areas for mining. He does not disagree. Mining is heavily regulated. Road construction doesn't open up a mine. The County relied upon the SM-6 before 2004. The County processed the expansion in 30 days as shown in log item 67. However, the applicant may have worked on the expansion for a long time prior to that.

MR. ARMITAGE reappeared and testified that the 140 acres are part of a larger parcel. The McGuire case says that a nonconforming use applies to all of the parcel or none. If the appellant gave up part of the parcel, then it gave up all of the parcel.

No one spoke further in this matter and the Examiner took the matter under advisement. The hearing was concluded.

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~~**NOTE:** A complete record of this hearing is available in the office of Jefferson County Department of Community Development.~~

FINDINGS, CONCLUSIONS AND DECISION:

FINDINGS:

1. The Hearing Examiner has admitted documentary evidence into the record, and taken this matter under advisement.
2. This appeal is exempt from SEPA review.
3. Appropriate notice was provided pursuant to the Jefferson County Code.
4. The appellant, Iron Mountain Quarry, LLC, (IMQ), appeals an interpretation of the Jefferson County Code (JCC) by the Jefferson County Department of Community Development (DCD). The appellant asserts that it has legal, nonconforming use rights to mine 142 acres of property leased to it by the owner, Pope Resources (Pope), pursuant to the doctrine of diminishing asset. The Washington Supreme Court determined that the doctrine is applicable in Washington in its decision entitled The City of University Place v. Brian P. McGuire, 144 Wn. 2d 640, 30 P3d 453 (2001). Appellant also asserts that its mining rights are not subject to the ten gross acre limitation set forth in JCC 18.20.240 as it is an existing mine, and that said code section applies to "new" mines only. For the reasons set forth hereinafter the doctrine of diminishing asset authorizes the appellant to mine the entire 142 acre parcel subject to meeting JCC requirements and undergoing review pursuant to the State Environmental Policy Act (SEPA).
5. Pope owns a 182 acre parcel of property located on the north side of SR-104 approximately four miles west of the Hood Canal Bridge, east of the SR-104/SR-19 intersection in unincorporated Jefferson County. The entire parcel is located within the Commercial Forest (CF) designation of the Jefferson County Comprehensive Plan and the CF zone classification of the JCC. Section 18.15.040 JCC authorizes mineral extraction activities as an outright permitted use in the CF classification. However, Section 18.20.240 JCC, entitled "Mineral Extraction, Mining, Quarrying, and Reclamation", provides the following limitation for mines located in areas outside of a Mineral Resource Land (MRL) overlay district:
 - (1) In addition to meeting all other applicable requirements of this code, including this section, all new mineral extraction and mineral processing activities located outside of an approved Mineral Resource Land (MRL) overlay district designation (as specified in Article VI-C of Chapter 18.15

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JCC) shall be subject to the following standards:

- (a) New mineral extraction and mineral processing activities in Rural Residential districts shall require a conditional use permit subject to a Type III permit approval process.
- (b) The total disturbed area of mineral extraction, mining and quarrying sites (excluding access roads) and any associated mineral processing activities shall not exceed 10 acres. Any proposed mineral extraction which would create disturbed areas in excess of 10 gross acres shall require an MRL designation in accordance with Article VI-C of Chapter 18.15 JCC...(emphasis added).

Article VI-C sets forth the designation procedures for an MRL overlay district. Thus, mines located in a CF zone classification in an area covered by a MRL overlay district have no area limitation. However, new mines located in a CF zone classification in an area not covered by a MRL overlay district are subject to the 10 acre limit even though permitted outright. To expand a mine beyond the 10 acre limit an owner must process a comprehensive plan amendment through the legislative process to add the MRL overlay district to the property proposed mining.

- 6. Subsequent to adoption of the State Growth Management Act (GMA) the County adopted the following ordinances:
 - A. July 5, 1994. Jefferson County Interim Ordinance 06-0705-94 (Conservation of Mineral Lands).
 - B. October 28, 1994 – November 28, 1994. Series of emergency ordinances addressing interim mineral and forest land designation.
 - C. June 5, 1995. Ordinance 09-0525-95 becomes effective and addresses interim mineral resource lands.
 - D. August 28, 1998, interim mineral resource land map incorporated into comprehensive plan.
 - E. January 16, 2001. The Jefferson County Unified Development Code (Title 18 JCC) becomes effective to include JCC 18.20.240(1)(b) setting forth the maximum ten acre mining limit as quoted above.
 - F. September 6, 2001. Washington Supreme Court issues its decision in City of University Place v. McGuire.
- 7. Mining activities previously occurring on Pope's 182 acre parcel are as follows:

- A. 1972 aerial photograph shows no disturbance of the site

- B. 1979 aerial photograph shows commencement of mining activity. However, it is unclear whether aggregate was exported from the site or used to construct on-site logging roads.
- C. 1981 aerial photograph shows an expansion of the quarry, but also extension of logging roads into the interior of the site.
- D. 1985 photograph shows extensive timber harvest and significant on-site road construction.
- E. 1990 photograph shows significantly more equipment in the mine and additional timber harvest.
- F. 1997-2005 photographs show continuation of the mining to include two separate mining sites.
- G. December 1, 1989. The State Department of Natural Resources (DNR) issues a surface mining permit for 20 acres for the Shine (Mason) quarry under Permit No. 01261-9.
- H. January 27, 1997. Shine quarry enters a lease agreement with Pope for 40 acres (20 additional acres).
- I. June 23, 2004. Jefferson County approves the Shine quarry expansion from 20 to 40 acres.
- J. 2006. Appellant enters into agreement with Pope to lease 142 acres which includes the old Shine quarry site.
- K. August 1, 2007. Appellant submits for pre-application conference with DCD for the purpose of developing and operating a hard rock quarry on the site.
- L. November 30, 2007. Appellant's attorney, Keith Moxon, requests an interpretation of JCC 240.20.240 by DCD as follows:

We request an interpretation of JCC 240.20.240. Specifically, we request that the County confirm that the 10-acre restriction found in JCC 18.20.240(1)(a), applicable to "new" mineral resource uses outside of designated mineral resource land, does not apply where the applicant can demonstrate that the property falls within the non-conforming mineral use rights established under the Diminishing Asset Doctrine of Mcquire [sic] v. City of University Place, 144 Wn. 2d 640, 30 P.3d 453 (2001).

- M. January 5, 2008. Stacy Hoskins, Planning Manager of DCD, interprets JCC 18.20.240 as requiring the appellant to obtain a MRL overlay to extend mining activities beyond the ten acre maximum.
 - N. January 10, 2008. Appellant timely files an appeal of DCD's interpretation.
8. The Shine quarry obtained a surface mining permit for 20 acres of Pope's 182 acre parcel in 1989 and expanded the permit to cover 40 acres in 2004. The County in recognition of the Shine permit and mine placed a MRL overlay district over some or

all of the mine area. Thus, 40 acres of the 182 acre Pope parcel (22%) is or was actively mined and/or covered by a MRL overlay. Furthermore, the aerial photographs show that mining which predated GMA and the interim ordinances adopted pursuant thereto occurred on other areas of the parcel. The aerial photographs show that mining has occurred continuously on the Pope parcel from approximately 1979 to the present.

9. In its decision in McGuire, the Supreme Court quoted from several authorities in describing the diminishing asset doctrine:

[C]ourts have observed that the very nature of the excavating business contemplates the use of land as a whole, not a use limited to a portion of the land already excavated. Such a diminishing-asset enterprise is "using" all of the land contained in a particular asset...

...A mineral extraction operation is susceptible of use and has value only in the place where the resources are found, and once the minerals are extracted it cannot again be used for that purpose...The rock must be quarried at the site where it exists, or not at all....

We think that in cases of a diminishing asset the enterprise is "using" all that land which contains the particular asset and which constitutes an integral part of the operation, notwithstanding the fact that a particular portion may not yet be under actual excavation. It is in the very nature of such business that reserve areas be maintained which are left vacant or devoted to incidental uses until they are needed. Obviously it cannot operate over an entire tract at once.

Our Supreme Court then held:

We agree with the overwhelming number of jurisdictions considering the issue. 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. 144 Wn. 2d 640 @ 649-651 (emphasis the Court).

Thus, the Court noted several times in its decision that the doctrine of diminishing asset extends to "the whole parcel of land" and not just portions of the land presently utilized for mining. The doctrine allows mining to expand into in areas of the parcel where the mineral is located.

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10. Residents assert that a Texas Court of Appeals decision cited by the Washington Supreme Court in McGuire, supra, stands for the proposition that the diminishing asset doctrine extends only across portions of a parcel subject to a lease for mining purposes. In The Board of Adjustment of the City of San Antonio v. Steve Wende, Charles Brown, and the City of Shavano Park, 45 Tex. Sup. Ct. 674, 92 S.W. 3d 424 (2002), the Supreme Court of Texas overruled the Texas Court of Appeals decision cited in the McGuire decision. In Board of Adjustment, Martin Marietta operated the Beckman quarry on property that it owned. In April, 1998, Martin Marietta entered into lease agreements for quarrying purposes with owners of tracts of land adjacent to its mining parcel. The leases were executed a short time before the City of San Antonio annexed said parcels and zoned them for residential use. In discussing the court of appeal's decision, the Texas Supreme Court wrote:

...[T]he court of appeals noted that the Board's construction of the provisions would allow a person to obtain nonconforming use rights not only by leasing property for a nonconforming purpose, but also by merely intending to use a property for a nonconforming use. It reasoned that such a construction produced an absurd result because it would be so "diametrically at odds with the fundamental conception of nonconforming uses throughout this country"...Accordingly, the court of appeals held that the preexisting leases were not sufficient to establish nonconforming rights....

...The court of appeals also noted that well-settled common law requires "that a nonconforming use must be actual, rather than merely contemplated [at the time of annexation]"...Moreover, merely "[a]cquiring and setting aside property in contemplation of a future use is insufficient to establish a nonconforming use"...More specifically, the court of appeals determined that "leasing land in reliance on existing zoning laws has generally been held insufficient to establish nonconforming use".

The Texas Supreme Court then reversed the court of appeals decision, adopting Martin Marietta's argument as follows:

...They argue that the unambiguous definitions of "use" and "nonconforming use" compel the conclusion that a "nonconforming use" exists when the purpose for which land or structures thereon is designed, arranged, or intended to be occupied or used, or for which it is occupied, maintained, rented, or leased"...In this case, no one disputes that the tracts were leased for quarry purposes.

The Texas Supreme Court ruled that the leased parcels on which Martin Marietta had not commenced mining fell under the existing nonconforming use as it was

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property owned and intended for mining at the time of annexation. The fact situation in the instance case is even stronger than in the Texas case as Pope has owned the entire parcel for many years, has intended to mine it, and has leased portions of it for mining at least since the 1980s. Thus, in accordance with the Texas Supreme Court's decision, mining can continue across the entire parcel. Furthermore, the property owners of the parcels in question had leased their parcels to Martin Marietta for mineral extraction. In the present case Pope, the underlying parcel owner, has leased its property to the appellant for mineral extraction purposes. Thus, the Texas Supreme Court decision supports the appellant's position.

11. In its staff report, DCD acknowledges that operations at the Shine quarry began in 1989 after DNR approved a reclamation plan and issued a permit authorizing surface mining on 20 leased acres. Furthermore, since the Shine quarry had obtained a renewable lease agreement with Pope covering 40 acres, DNR and the County agreed to expand the mine to 40 acres in June, 2004. The County based its expansion on the doctrine of diminishing asset (Page 8, Staff Report). However, DCD now asserts that because the balance of the 182 acre parcel is not covered by a reclamation plan or permit issued by DNR, that to expand mining beyond the 40 leased acres, the appellant must either (1) limit mining to ten gross acres as allowed outright by JCC 18.20.240(1)(b) in the CF classification; or (2) petition the Jefferson County Board of Commissioners to place an MRL overlay district over the balance of the 182 acre parcel.
12. Neither the Texas Supreme Court nor the Washington Supreme Court held that the diminishing asset doctrine applied only to those areas of the parcel covered by a mining permit. Neither court ruled that such permit was required to establish an intent to mine. Indeed, the mine owner in the Texas case had only leased the parcels a few short months before an annexation and rezone to residential uses. In McGuire, the Supreme Court emphasized that the entire tract of a diminishing asset operation is considered the "lot", and that the enterprise is using "all that land" which contains the mineral. The Court emphasized that the parcel in question was part of the original mine, was within the ownership of the mine company, and thus included within the doctrine of diminishing asset.
13. DCD asserts that the appellant proposes to mine areas of the Pope parcel never before mined, not subject to a DNR permit, and not located within a MRL overlay district. Therefore, DCD asserts that the mine is "new" and subject to JCC 18.20.240 which governs "all new mineral extraction and mineral processing activities located outside of an approved Mineral Resource Land (MRL) overlay district designation". Subsection (b) limits disturbed areas to ten gross acres. Acquisition of a DNR permit covering the entire 142 acre parcel is not necessary to establish mining rights under the doctrine of diminishing asset. The McGuire case and cases in other jurisdictions have authorized extension of mines throughout an entire parcel under the mine's ownership as of the date the mine became nonconforming, whether or not a mining permit covered the entire parcel.

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14. DCD correctly asserts that if the appeal is granted that mining will extend into areas not previously mined and not previously subject to a mining lease, and that mining will extend into areas of Pope's parcel not covered by a MRL overlay district. However, DCD confuses the leasing and the areas covered by the lease with the overall underlying ownership of the parcel. If Pope itself was operating the Shine (Mason) quarry and proposed to extend its mine over its entire parcel, it could clearly do so under the doctrine of diminishing asset. Because Pope elected to lease portions of the parcel to experienced mining companies does not prevent application of the doctrine to the entire parcel. The doctrine does not penalize landowners for leasing all or portions of their parcels for mineral extraction to mining companies. According to the Texas Supreme Court and the Washington Supreme Court in McGuire, a lessee or the owner could mine the entire parcel.

15. DCD argues that applying the doctrine of diminishing asset in the manner proposed by the appellant would open thousands of acres of commercial forest land to mining:

1. If the diminishing asset doctrine is applied in this case, then you could presume that the entire 72,000 acres owned by Pope Resources would also be subject to the diminishing asset doctrine (Page 6 Unified Development Code Interpretation, Log Item 35).

However, according to McGuire, a landowner asserting the diminishing asset doctrine must show the extent of the ownership at the date of adoption of the Unified Development Code and the intent to mine the site. Furthermore, the parcel must contain marketable minerals. In the present case, Pope officials have made it clear in their declarations that the company has always intended to mine the 182 acres only. Therefore, this application does not apply to the balance of the 72,000 acre Hood Canal Tree Farm. In a letter dated May 21, 2007 (Attachment B to Log Item 57), David L. Nunes in a declaration testified in part:

As further clarification of the landowner's intent regarding the extent of nonconforming mineral use rights at this location, Pope Resources confirms that the total area that is subject to the diminishing asset doctrine at this location is 182 acres – 142 acres that is the subject of Iron Mountain Quarry's appeal and 40 acres that is the expansion granted to the Shine Quarry operation at this location in 2004.

Furthermore, in Section 6.52 Anderson's American Law of Zoning, 4th Edition, cited by the Supreme Court in McGuire, the author writes:

...The courts have declined to permit great expansion of a very

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small operation commenced prior to enactment. Where, for example, the owner had striped loam from an area 30x35 feet, he was held not entitled to strip an entire 19 acre tract.

While expanding a 40 acre mine over a 182 acre parcel does not constitute a "great expansion of a very small operation", expanding a 40 acre mine to 72,000 acres would appear to fall within said prohibition.

16. Residents assert that Pope abandoned its intent to mine the parcel based upon its development of the Port Ludlow Master Planned Community, its golf course, and trails. The Timberon Trail established by Pope in 2001 extends beyond the borders of the Port Ludlow community and is considered an essential amenity of the community. Mining would extend to within 1,800 feet of the community and to within 1,250 feet of the Timberon Trail. However, the Washington Court of Appeals in Van Sant v. City of Everett, 69 Wn. App 641 (1993), held that once a nonconforming use is established, one asserting abandonment must show the intent to abandon and an overt act or failure to act which demonstrates that the owner does not retain an interest in the right to the nonconforming use. The Court held:

...Nonconforming uses are vested property rights which are protected...Protected property rights cannot be lost or voided easily. There is properly a high burden of proof that must be met by the City before Van Sant loses what was a vested property right....69 Wn. App 641 @ 649.

Development of Port Ludlow, the golf course, and the trails a minimum of 1,250 feet from the exterior boundary of the 182 acre parcel does not establish an intent to abandon a nonconforming use right to mine. However, the appellant acknowledges that it must meet all requirements of the JCC covering mines as well as undergo SEPA review. Such review may impose limitations on the mining of portions of the site. See Quality Rock v. Thurston County, 139 Wn. App 125 (2007), and Rhod-A-Zalea and 35th Inc. v. Snohomish County, 136 Wn. 2d 1 (1998).

17. In answer to the Examiner's question regarding whether the County considered the appellant's mining rights as a nonconforming or a conforming use, staff testified that the County had not decided as yet. Such is an understandable answer because the appellant has both conforming and nonconforming use rights to mine the site. The CF zone classification authorizes the appellant to mine the entire 142 acre leased parcel subject to disturbing no more than ten acres as any one time. Thus, the appellant has conforming use rights to mine the site. The appellant also has nonconforming use rights to mine the site which is more valuable than the conforming use. The nonconforming use, pursuant to the doctrine of diminishing asset, allows the appellant to mine the 142 acres, but does not limit the size of the disturbed area. The appellant desires to use its nonconforming use rights as opposed to applying for a comprehensive plan amendment to place a MRL overlay

over the portion of the site not presently covered. The law does not require the appellant to forego its nonconforming use rights and attempt to obtain the MRL overlay through the legislative process.

18. At the hearing, staff advised that Al Scalf, DCD Director, planned on attending the hearing, but could not due to a family emergency. At the conclusion of the hearing the Examiner with the consent of the appellant left the record open for Mr. Scalf to provide written response to materials submitted at the hearing. However, Mr. Scalf phoned the Examiner on Monday, March 17th and stated that he thought that the Examiner wanted an oral response. He then indicated that he had nothing to add in response to materials submitted by the appellant at the hearing. However, he further stated that in clarification to staff's testimony at the hearing, the County considered the appellant's mine a new use and therefore a conforming as opposed to a nonconforming use. Mr. Scalf also advised the Examiner that he could contact David Alvarez, Deputy Prosecuting Attorney, regarding specific legal questions as the JCC provides that Mr. Alvarez is the Examiner's legal counsel. Mr. Scalf ended the conversation by stating that the County's position was fully set forth in the staff report and that the County stood by the staff report. On March 20, 2008, Keith Moxon, attorney for the appellant, requested that the Examiner exclude Mr. Scalf's phone conversation and "enter an order that the decision in this code interpretation appeal hearing will be based exclusively on the exhibits and testimony presented at the public hearing on March 14, 2008". The Examiner did not consider that Mr. Scalf presented additional testimony as he confirmed that the County's position was adequately presented in the staff report and that he had nothing further to add. The Examiner has considered nothing that Mr. Scalf said over and above that statement. Furthermore, the Examiner has not and will not contact Mr. Alvarez.

CONCLUSIONS:

1. The Hearing Examiner has jurisdiction to consider and decide the issues presented by this request.
2. The doctrine of diminishing asset as set forth by the Washington Supreme Court in University Place v. McGuire, supra., applies to the entire 182 acre parcel owned by Pope. Through aerial photographs and declarations, Pope has established that mining commenced on the parcel in the 1980s and that it intended to mine the minerals located on the entire 182 acre parcel.
3. The appellant has a conforming use under the applicable CF zone classification to mine the entire 142 acre leased parcel subject to disturbing no more than ten gross acres at any one time. The appellant also has nonconforming use rights to mine the entire parcel which are not subject to the ten acre limitation. However, the appellant must meet requirements of the JCC and the DNR pursuant to Rhod-A-Zalea, supra.
4. Pope has not abandoned its nonconforming use rights by development of Port

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Ludlow. However, the location of Port Ludlow and its amenities must be considered in both SEPA review and review under the JCC mining requirements.

5. The appellant's proposed mineral use operation is not a "new" mineral extraction and mineral processing activity governed by JCC 18.20.240(1)(b).
6. The doctrine of diminishing asset requires the County to consider the entire 182 acre parcel as one ownership and not as separate areas subject to separate leases. The nonconforming use rights for mining on the parcel belong to Pope as the underlying property owner. Pope may elect to mine the entire parcel itself or lease all or portions of the parcel to mining companies.
7. Section 18.05.085(1) JCC sets forth the "Hearing Examiner Rules of Procedure". Said section provides:

Conflicts Among Authorities. These rules may conflict with other sources or authorities of law. The order of precedence applicable to such conflict situations shall be (from top of to bottom) as follows:

- (a) State or federal constitution;
- (b) State or federal statute;
- (c) State or federal regulations;
- (d) State or federal published case law;
- (e) UDC or other applicable duly elected Jefferson County ordinance;
- (f) These rules.


Thus, for example, to the extent these rules conflict with the UDC, then the applicable UDC provision shall apply.

Based upon the above, the Examiner has applied the Washington Supreme Court decision in University Place v. McGuire, supra, where it conflicts with the UDC.

DECISION:

The appeal of Iron Mountain Quarry, LLC, is hereby granted. Pope Resources and therefore Iron Mountain Quarry, LLC, have legal nonconforming use rights to mine the entire 142 acre leased parcel pursuant to the doctrine of diminishing asset.

ORDERED this 9th day of April, 2008.


STEPHEN K. CAUSSEUX, JR.
Hearing Examiner

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