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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF JEFFERSON

IRON MOUNTAIN QUARRY, LLC, a
Washington Limited Liability Company, and
POPE RESOURCES, a Delaware Limited
Partnership;

Petitioner,

vs.

JEFFERSON COUNTY, a Washington
Municipal Corporation; acting through its
Department of Community Development and
Office of the Hearing Examiner,

Respondent.

No. 08 2 00350 6'

PETITION FOR REVIEW-
LAND USE PETITION ACT

Petitioners, Iron Mountain Quarry, a Washington limited liability company,
("IMQ") and Pope Resources, a Delaware limited partnership, ("Pope Resources") by and
through their undersigned counsel petition this Court pursuant to the Land Use Petition
Act ("LUPA"), Ch. 36.70C RCW. Petitioners challenge the September 24, 2008, Report
and Decision (the "Decision") issued by the Jefferson County Hearing Examiner in
response to IMQ's code interpretation appeal. The Decision erroneously determined that
(1) Jefferson County Code ("JCC") 18.20.240(1)(g) (which requires a Conditional Use

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Seattle, WA 98121-3140
(206) 382-9540

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1 Permit ("CUP") if increased off-site impacts (noise, vibration, dust, traffic) would result
2 from expansion, intensification, or modification of existing surface mining operations)
3 applies to all existing mining operations, whether "conforming" or nonconforming; (2)
4 that Respondent Jefferson County may require Petitioner IMQ to acquire a CUP to mine
5 those areas of a parcel to which it has nonconforming use rights as established by
6 controlling legal authority in *City of Universtiy Place v. McGuire*, 144 Wn. 2d 640, 30
7 P.3d 453 (2001); and, (3) that neither *McGuire*, 144 Wn. 2d 640, 30 P.3d 453, nor *Rhod-*
8 *A-Zalea and 35th Inc. v. Snohomish County*, 136 Wn. 2d 1, 959 P. 2d 1024 (1998), limit
9 Respondent Jefferson County's authority to require a CUP as a condition for IMQ's
10 exercise of its existing nonconforming mineral use rights.

11 The Decision should be reversed based on multiple errors of law and fact.
12 Significantly, the Decision (1) is an erroneous interpretation of the law governing
13 regulation of mineral use rights in Washington, (2) is not supported by substantial
14 evidence, and (3) is a clearly erroneous application of law to the facts.

15 1. Name and Mailing Address of Petitioner.
16 Iron Mountain Quarry, LLC
17 22121 17th Avenue S.E., Suite 117
18 Bothell, WA 98021-7404

19 Pope Resources
19 19245 Tenth Avenue Northeast
20 Poulsbo, WA 98370-7456

21 2. Name and Mailing Address of Petitioner's Attorney.
22 Keith Moxon
23 Dale Johnson
24 GordonDerr, LLP
25 2025 First Ave., Ste. 500
Seattle, WA 98121

GordonDerr.
2025 First Avenue, Suite 500
Seattle, WA 98121-3140
(206) 382-9540

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3. Name and mailing address of the Local Jurisdiction Whose Land Use Decision is at Issue.

Jefferson County
Jefferson County Courthouse
1820 Jefferson Street
Post Office Box 563
Port Townsend, Washington 98368

4. Identification of the Decision-Making Body, Together with a Duplicate Copy of the Decision

Jefferson County
Jefferson County Courthouse
1820 Jefferson Street
Post Office Box 563
Port Townsend, Washington 98368

On September 24, 2008, the Jefferson County Hearing Examiner, Stephen K. Causseaux, Jr., issued the Decision denying the appeal of Petitioner IMQ to an interpretation of the JCC issued by the Jefferson County Department of Community Development ("DCD") on June 11, 2008. A copy of the Decision is attached hereto as **Exhibit A**. A copy of the Code Interpretation issued by the DCD is attached as **Exhibit B**. IMQ challenges the Decision under LUPA by filing this Petition for Review in the Jefferson County Superior Court.

5. Identification of Persons to be Made a Party Under RCW 36.70C.040(2)(b)-(d).

5.1 By reference to the Report and Decision of the Hearing Examiner on April 9, 2008, the Decision identifies the name of the owner of the property at issue as Pope Resources, with a leasehold-interest held by IMQ. Therefore, Pope Resources is a party to this appeal under RCW 36.70C.

1 5.2 Pursuant to RCW 36.70C.040(2)(c), the owners of the property at
2 issue are, according to the Jefferson County Assessor's Office and the Secretary of State's
3 Office:

4 Pope Resources, a Delaware Limited Partnership
5 c/o Olympic Resource Management
6 ATTN: Land Records
7 19245 Tenth Avenue NE
8 Poulsbo, Washington 98370-7456

9 6. Facts Demonstrating the Petitioner Has Standing to Seek Judicial Review
10 Pursuant to RCW 36.70C.060.

11 6.1 IMQ has standing to bring this Petition under RCW 36.70C.060,
12 because IMQ has been "aggrieved or adversely affected by the land use decision ..." The
13 Decision purports to require IMQ to acquire a CUP as a precondition to exercise of
14 IMQ's existing nonconforming mineral resource use rights. This requirement for a
15 general use permit would allow Jefferson County to deny IMQ the full benefit of its
16 nonconforming mineral resource use rights under Washington law. If the Decision is not
17 reversed, Petitioner IMQ's property rights will be severely and illegally impacted.

18 6.2 Pope Resources has standing to bring this Petition under RCW
19 36.70C.060, because Pope Resources has been "aggrieved or adversely affected by the
20 land use decision ..." Pope Resources is the owner of the property at issue in this case.
21 Pope Resources has entered into a lease arrangement with IMQ under which IMQ will
22 engage in hard rock mining operations on the property pursuant to Pope Resources' and
23 IMQ's existing nonconforming mineral use rights. The Decision purports to require a
24 CUP as a precondition to exercise of these nonconforming mineral resource use rights.
25 This requirement for a general use permit would allow Jefferson County to deny IMQ, and
therefore Pope Resources, the full benefit of Pope Resources' and IMQ's nonconforming

1 mineral resource use rights under Washington law. If the Decision is not reversed,
2 Petitioner Pope Resources' property rights will be severely and illegally impacted.

3 6.3 LUPA sets forth the following requirements for a party to be
4 aggrieved or adversely affected: "(a) the land use decision has prejudiced or is likely to
5 prejudice that person; (b) that person's asserted interests are among those that the local
6 jurisdiction was required to consider when it made the land use decision; (c) a judgment in
7 favor of that person would substantially eliminate or redress the prejudice to that person
8 caused or likely to be caused by the land use decision; and (d) the petitioner has exhausted
9 his or her administrative remedies to the extent required by law." RCW 36.70C.060.

10 Petitioner IMQ satisfies each of these requirements in this case.

11 6.4 In this case, (a) the Hearing Examiner's Decision prejudices IMQ
12 because it would prevent, impair, or terminate IMQ's ability to exercise its vested
13 property rights to mine the parcel to which IMQ maintains mineral use rights; (b) the
14 County was required to consider IMQ's interests, because IMQ requested the Code
15 Interpretation based upon the County's previous affirmation of IMQ's mineral use rights
16 and because IMQ has a leasehold interest in the property at issue in this case; (c) a
17 judgment in IMQ's favor reversing the Decision would eliminate the CUP requirement in
18 this case, and thereby would "substantially eliminate or redress the prejudice" to IMQ;
19 and, (d) IMQ exhausted its administrative remedies before the Hearing Examiner and as
20 required by JCC 18.40.360 thru JCC 18.40.400.

21 6.5 Further, (a) the Hearing Examiner's Decision prejudices Pope
22 Resources because it would prevent, impair, or terminate Pope Resources' ability to
23 exercise, or allow its lessee to exercise, its vested property rights to mine the parcel to
24 which Pope Resources maintains mineral use rights; (b) the County was required to
25 consider Pope Resources' interests because Pope Resources is the owner of the property at

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1 issue in this case and has existing nonconforming mineral use rights on the property; (c) a
2 judgment in Pope Resources' favor reversing the Decision would eliminate the CUP
3 requirement in this case, and thereby would "substantially eliminate or redress the
4 prejudice" to Pope Resources; and, (d) because Pope Resources' interests are aligned with
5 those of IMQ and were, therefore, represented by IMQ before Jefferson County, Pope
6 Resources exhausted its remedies as required by JCC 18.40.360 thru JCC 18.40.400.

7 6.6 This Court has jurisdiction to consider this Petition pursuant to
8 RCW 36.70C.040. This Petition, which challenges a Decision by Jefferson County
9 through its Office of the Hearing Examiner, is properly brought before this Court under
10 RCW 36.01.050.

11 7. A Separate and Concise Statement of Each Error Alleged to Have Been
12 Committed

13 7.1 Without waiving a general assignment of error to the entirety of the
14 Decision, Petitioner IMQ asserts the following specific assignments of error and hereby
15 incorporates all facts and allegations set forth in the paragraphs above as if fully set forth
16 herein.

17 7.2 The Hearing Examiner erred in Conclusion 2 by concluding that JCC
18 18.20.240(1)(g) applies to IMQ's nonconforming mineral use rights and that IMQ must
19 acquire a CUP to mine those areas of the parcel where the mining operations will increase
20 off-site impacts. This is an erroneous interpretation of the law, is not supported by
21 substantial evidence, and is an erroneous application of law to the facts. The Decision
22 would unlawfully give the County authority to immediately terminate IMQ's existing
23 nonconforming use rights.
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1 7.2.1 The Hearing Examiner's conclusion is not supported by the
2 rule of law in Washington nor by the plain language of Jefferson County's code pertaining
3 to the scope and purpose of the CUP process. JCC 18.40.500 defines the scope of
4 Jefferson County's CUP process: "Only those uses indicated by a "C(a)," "C(d)" or "C"
5 opposite the use in Table 3-1 in JCC 18.15.040 will be considered for a conditional use
6 permit." No such designation appears in Table 3-1 for "mineral extraction activities,"
7 even without an MRL overlay. Instead, the use designation for "mineral extraction
8 activities" in the Commercial Forest zone is "Yes," meaning that mineral extraction is an
9 allowed use in this zone. The Hearing Examiner's finding that Jefferson County may
10 impose a CUP requirement on IMQ is in direct conflict with the express limitation in JCC
11 18.40.500 regarding the scope of the County's CUP process, which applies "only" to
12 "those uses indicated by a 'C(a),' 'C(d)' or 'C' ... in Table 3-1." IMQ's proposed mineral
13 use operations are not within this scope.

14 7.2.2 The Hearing Examiner's Conclusion 2 also ignores the plain
15 language of Jefferson County's code pertaining to the purpose of the CUP process: "This
16 review shall determine whether the proposed use should be permitted by weighing the
17 public need or the benefit to be derived from the use against the impact that it may cause."
18 JCC 18.40.490 (*emphasis added*). The purpose of a CUP process is to determine whether
19 the proposed use should be allowed, not to determine what conditions should be imposed
20 on a proposal whose use rights have already been established. The Hearing Examiner's
21 conclusion to the contrary is erroneous.

22 7.2.3 The Hearing Examiner's Conclusion 2 is contrary to the rule
23 of law established in *City of University Place v. McGuire*, 144 Wn. 2d 640, 30 P.3d 453
24 (2001) and *Rhod-A-Zalea and 35th Inc. v. Snohomish County*, 136 Wn. 2d 1, 959 P. 2d
25 1024 (1998).

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1 7.2.3.1 Pursuant to JCC 18.050.085(1), when the UDC or
2 other applicable duly enacted Jefferson County Ordinance conflicts with published case
3 law, such as that set forth in *City of University Place v. McGuire*, 144 Wn.2d 640, 30 P.3d
4 453 (2001) and *Rhod-A-Zalea*, 136 Wn. 2d 1, 959 P. 2d 1024 (1998), the published case
5 law must take precedence. The Hearing Examiner failed to abide by this requirement.

6 7.2.3.2 Jefferson County previously issued a final
7 decision confirming the nonconforming mineral resource use rights of Pope Resources
8 and IMQ under the diminishing asset doctrine as set forth in *City of University Place v.*
9 *McGuire*, 144 Wn.2d 640, 30 P.3d 453 (2001). The County's previous decision is not
10 limited to the protection of only past mining operations at this site, but applies to the
11 future "alteration, intensification, and expansion" of mining that is within the scope of
12 nonconforming use rights under the diminishing asset doctrine.

13 7.2.3.3 On September 6, 2001, the Washington State
14 Supreme Court issued its unanimous decision in *City of University Place v. McGuire*, 144
15 Wn.2d 640, 30 P.3d 453 (2001), adopting the doctrine of diminishing asset, as applied to
16 nonconforming mining operations. The diminishing asset doctrine is controlling legal
17 authority with respect to Jefferson County's regulation of nonconforming mining
18 operations. Jefferson County adopted the existing JCC, Title 18, Unified Development
19 Code ("UDC") in January of 2001, before the *McGuire* decision. The UDC does not
20 expressly recognize the diminishing asset doctrine. Nonetheless, the diminishing asset
21 doctrine is the law in Washington, and Jefferson County cannot invalidate or terminate
22 IMQ's existing nonconforming use rights by requiring IMQ to apply for a CUP to
23 establish use rights, which IMQ already has as a matter of law. The Hearing Examiner's
24 Conclusion 2, to the contrary, results from an erroneous interpretation of the law, is not
25 supported by substantial evidence, and is an erroneous application of law to the facts.

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1 7.3 The Hearing Examiner erred in Conclusion 3 by relying upon
2 Jefferson County DCD's assertion that parcel 821291002 abuts a single family residential
3 zone of the Port Ludlow Master Planned Resort. The boundaries of the referenced parcel
4 do not correspond to the boundaries of IMQ's leased mineral use area. The reference to
5 this larger parcel resulted in a misleading description of the IMQ lease area. The Hearing
6 Examiner's Conclusion 3 results from an erroneous interpretation of the law, is not
7 supported by substantial evidence, and is an erroneous application of law to the facts.

8 7.4 The Hearing Examiner erred in Conclusion 4 by reaching an
9 incorrect legal conclusion regarding the limit of Jefferson County's authority to require a
10 CUP for IMQ's nonconforming mine under the legal doctrines established in *McGuire*,
11 144 Wn. 2d 640, 30 P.3d 453 (2001) and *Rhod-A-Zalea and 35th Inc. v. Snohomish*
12 *County*, 136 Wn. 2d 1, 959 P. 2d 1024 (1998). *Rhod-A-Zalea* nor the secondary sources
13 cited in Conclusion 4 of the Decision support Jefferson County's authority to apply the
14 general use requirements of a CUP to property with mineral use rights to the extent those
15 requirements are represented by the CUP process. The Hearing Examiner's Conclusion 4
16 results from an erroneous interpretation of the law, is not supported by substantial
17 evidence, and is an erroneous application of law to the facts.

18 7.4.1 Under *Rhod-A-Zalea*, 136 Wn. 2d 1 (1998), Jefferson
19 County has authority to impose "reasonable performance standards" to ensure that
20 "alteration, intensification, and expansion of existing gravel pits and surface mining
21 operations" will "have minimal adverse impacts on surrounding areas and uses."
22 However, a CUP is not a "reasonable performance standard." A CUP is not a "police
23 power regulation." A CUP is not a "specific operational activity permit" such as the
24 building code requirement for a grading permit upheld in *Rhod-A-Zalea*. A CUP is a
25 general use permit for the purpose of determining whether a use will be allowed at a

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1 particular location. The County has already made the relevant and controlling use
2 determination for the property at issue in this case. IMQ has valid nonconforming use
3 rights to undertake mineral resource use activities, subject to SEPA, DNR requirements,
4 and JCC provisions applicable to nonconforming mineral resource uses. As discussed,
5 *infra*, contrary to the Hearing Examiner's findings, imposition of the CUP requirement is
6 both unlawful and unnecessary under the facts of this case.

7 7.5 The Hearing Examiner erred in Finding 4 by finding that the Jefferson
8 County Department of Community Development (DCD) interpreted JCC 18.20.240(2)(g)(i)
9 as requiring IMQ to obtain a CUP for its nonconforming quarry "if increased off-site impacts
10 (noise, vibration, dust, traffic) would result from expansion, intensification, or modification"
11 of said quarry (emphasis added). This finding misconstrues evidence in the record, which
12 establishes that DCD concluded that "[a] Conditional Use Permit shall be required for further
13 mining activities on parcel 821291002."

14 7.6 The Hearing Examiner further erred in Finding 4, by finding that
15 neither the controlling decisions in *McGuire*, 144 Wn. 2d 640 (2001), and *Rhod-A-Zalea*,
16 136 Wn. 2d 1 (1998), nor the doctrine of diminishing asset prohibit Jefferson County from
17 requiring a CUP for those portions of the mine causing "increased off-site impacts." This
18 finding ignores Washington law and evidence in the record that such a requirement is a
19 general use permit, not a police power regulation that would unlawfully give the County
20 authority to immediately terminate IMQ's nonconforming use rights. The Hearing
21 Examiner's Finding 4 is based upon an erroneous interpretation of the law, is not
22 supported by substantial evidence, and is an erroneous application of law to the facts.

23 7.7 The Hearing Examiner erred in Finding 5, by finding that subsection
24 (g) and all other standards set forth in JCC 18.20.240(2) apply to legally permitted surface
25 mines. When a use right for a proposed mineral use exists because it (1) is outright

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1 permitted pursuant to JCC 18.15.040 and JCC 18.20.240(1)(b); (2) is within the scope of a
2 preexisting general use permit; or, (3) is within the scope of nonconforming mineral use
3 rights; such a use right is subject to the CUP requirements of JCC 18.20.240(g) only to the
4 extent that an “alteration, intensification, and expansion” will result in impacts which are
5 not already permitted or allowed. Furthermore, any preexisting mineral use rights are
6 subject only to specific operational permits or SEPA mitigation requirements related to
7 the specific impacts of “noise, vibration, dust, [and] traffic.” JCC 18.20.240(g)(i). An
8 existing permitted or nonconforming mineral use right is not subject to general CUP use
9 requirements set forth in JCC 18.40.530. The Hearing Examiner’s Finding 5 is based
10 upon an erroneous interpretation of the law, is not supported by substantial evidence, and
11 is an erroneous application of law to the facts.

12 7.8 The Hearing Examiner erred in Finding 6 by finding that “even if
13 IMQ’s mine were a conforming use, it would have to comply with [JCC
14 18.20.240(2)(g)].” This finding erroneously relies upon the term “conforming use,” which
15 is not defined in the JCC. Moreover, the Hearing Examiner committed legal error by
16 assuming that a “permitted mine” would be subject to the CUP requirement as set forth in
17 JCC 18.20.240(g). When a use right for a proposed mineral use exists because it (1) is
18 outright permitted pursuant to JCC 18.15.040 and 18.20.240(1)(b); (2) is within the scope
19 of a preexisting general use permit; or, (3) is within the scope of nonconforming mineral
20 use rights; such a use right is subject to the CUP requirements of JCC 18.20.240(g) only
21 to the extent that an “alteration, intensification, and expansion” will result in impacts
22 which are not already permitted or allowed. Furthermore, any preexisting mineral use
23 rights are subject only to specific operational permits or SEPA mitigation requirements
24 related to the specific impacts of “noise, vibration, dust, [and] traffic.” JCC
25 18.20.240(g)(i). An existing permitted or nonconforming mineral use right is not subject

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1 to general CUP use requirements set forth in JCC 18.40.530. The Hearing Examiner's
2 Finding 6 is based upon an erroneous interpretation of the law, is not supported by
3 substantial evidence, and is an erroneous application of law to the facts.

4 7.9 The Hearing Examiner erred in Finding 8 by finding that to accept
5 IMQ's "argument would mean that either JCC 18.20.240(g)(i) does not apply to
6 conforming mines or that nonconforming mines have greater rights than conforming
7 mines." This finding is based upon an erroneous interpretation of the law, is not
8 supported by substantial evidence, and is an erroneous application of law to the facts.

9 7.9.1 Finding 8 erroneously relies upon the term "conforming
10 use," which is not defined in the JCC.

11 7.9.2 The Hearing Examiner improperly treated IMQ's existing
12 mineral use rights as a "conditional use," subject to the provisions of JCC 18.40.530.

13 7.9.2.1 IMQ's existing mineral use rights are not
14 "conditional" uses subject to provisions of JCC 18.40.530. As this Hearing Examiner
15 stated in the County's final decision pertaining to IMQ's mineral use rights, IMQ has
16 "legal use rights to mine the entire 142 acre leased parcel pursuant to the doctrine of
17 diminishing asset."

18 7.9.2.2 The Hearing Examiner's flawed Finding 8 results
19 from his failure to address the fact that the CUP requirement in JCC 18.20.240(2)(g)(i)
20 was adopted before the *McGuire* decision and must be interpreted in a manner that
21 protects nonconforming mineral resource uses consistent with that decision. Under
22 *McGuire*, 144 Wn. 2d 640 (2001) and *Rhod-A-Zalea*, 136 Wn. 2d 1 (1998), the County
23 cannot impose a CUP requirement where valid nonconforming use rights have been
24 established. Accordingly, any finding that requires IMQ to obtain a CUP general use
25 permit (as opposed to "specific operational activity permits") is unlawful.

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1 7.9.3 The Hearing Examiner further erred in Finding 8 by finding
2 that IMQ's interpretation of the CUP requirement would curtail the County's authority to
3 regulate off-site impacts of both conforming and nonconforming mines and would limit
4 the ability of adjacent property owners and area residents to request either mitigating
5 measures or denial of the expansion. The Hearing Examiner also erred in Finding 8 by
6 concluding that the County would have no public process to review either conforming or
7 nonconforming mines. The finding erroneously relies upon the term "conforming use,"
8 which is not defined in the JCC. Moreover, the finding is based upon an erroneous
9 interpretation of the law, is not supported by substantial evidence, and is an erroneous
10 application of law to the facts. There is no evidence or legal authority in the record to
11 demonstrate that the County's performance standards for mineral resource activities under
12 JCC 18.20.240 (a)-(f) and (h), the County's substantive SEPA authority under JCC
13 18.40.770, or the County's public notice requirements set forth at 18.40.150 through
14 18.40.250 are inadequate to address any of the off-site impacts attributable to IMQ's
15 proposed mineral resource activities.

16 7.9.3.1 "Reasonable performance standards" are included
17 in JCC 18.20.240(2)(a)-(f) and (h), DNR mineral resource use requirements, and the
18 County's substantive authority under SEPA – JCC 18.40.770. The record contains no
19 legal authority, testimony or evidence of any kind that these reasonable performance
20 standards are inadequate to address any of the real or imagined off-site impacts of IMQ's
21 proposed mineral resource activities. Without such evidence, the record is wholly
22 inadequate to support a finding that the CUP process is necessary to protect the public
23 interest (even if it were lawful to require conditional use permits for valid nonconforming
24 uses under Washington law).

25

1 7.10 The Hearing Examiner erred in Finding 9 by finding that a CUP
2 requirement would not: (1) affect an existing permitted mine, (2) “shut down” active
3 mining areas, or (3) prohibit mining on those portions of the mine parcel which would not
4 increase impacts to off-site parcels. The Hearing Examiner further erred by finding that
5 the JCC does not provide for the eventual termination of a nonconforming mine. This
6 finding is based upon an erroneous interpretation of the law, is not supported by
7 substantial evidence, and is an erroneous application of law to the facts.

8 7.10.1 The Hearing Examiner disregarded the plain language of
9 Jefferson County’s code pertaining to the purpose of the CUP process, which provides
10 that “[T]his review shall determine whether the proposed use should be permitted by
11 weighing the public need or the benefit to be derived from the use against the impact that
12 it may cause.” JCC 18.40.490 (*emphasis added*). Thus, the purpose of the CUP process
13 is to determine whether the proposed use should be allowed, not to determine what
14 conditions should be imposed on a proposal where use rights have already been
15 established. It does not matter whether these use rights are nonconforming use rights or
16 whether these use rights are based on “allowed” or “permitted” use designations under the
17 applicable zoning designation. The purpose of the County’s CUP process, based on the
18 County’s own code, is to determine whether a use should be permitted, not to add a layer
19 of review and conditions where use rights have already been established.

20 7.10.2 Moreover, JCC 18.40.530 establishes discretionary approval
21 criteria for a CUP that are unrelated to any “off-site impacts” due to alteration,
22 intensification and expansion of mining activities that purport to justify a CUP process
23 under JCC 18.20.240(g)(i). For example, JCC 18.40.530(1) requires, *inter alia*, that:

24 (j) The conditional use has merit and value for the
25 community as a whole;

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(k) The conditional use is consistent with all relevant goals and policies of the Jefferson County Comprehensive Plan; and the public interest suffers no substantial detrimental effect.

JCC 18.40.530(1) (*emphasis added*)

The CUP process requires that “[i]n instances where all of the above findings cannot be made, the application shall be denied.” JCC 18.40.530(2). The Hearing Examiner ignored evidence of the contents of these code provisions, erroneously interpreted the JCC by finding that the JCC process does not provide for the eventual termination of a nonconforming mine, and erroneously applied law to the facts.

7.11 The Hearing Examiner erred in Finding 10 by erroneously interpreting the decision in *McGuire*, 144 Wn. 2d 640 (2001), to find that because Jefferson County has the authority to adopt an ordinance ameliorating nonconforming uses the County has the authority to subject nonconforming use expansions to the CUP process. This finding constitutes legal error. First, the Supreme Court’s discussion of reasonable amortization periods in *McGuire*, 144 Wn. 2d 640, 651 (2001) is dicta. The issue of amortization was not before the Court. The Court’s discussion is therefore not determinative of Jefferson County’s ability to impose of a CUP requirement on IMQ’s exercise of its existing nonconforming mineral use rights. Second, the CUP requirement is not an amortization requirement. Thus, the discussion of such a requirement in *McGuire*, 144 Wn. 2d 640, 651 (2001), was not relevant to the question before the Hearing Examiner. Furthermore, the Hearing Examiner ignored the fundamental distinction between a CUP and reasonable “police power” regulations, which IMQ

1 concedes Jefferson County may impose upon IMQ as set forth in *Rhod-A-Zalea*, 136 Wn.
2 2d 1 (1998).

3 7.11.1 The County has authority to impose “reasonable
4 performance standards” to ensure that “alteration, intensification, and expansion of
5 existing gravel pits and surface mining operations” will “have minimal adverse impacts on
6 surrounding areas and uses.” JCC 18.20.240(2)(g). However, a CUP is not a “reasonable
7 performance standard.” The JCC makes it clear that the CUP requirement mentioned in
8 subsection (g)(i) is not included in the description of “reasonable performance standards.”
9 It is a requirement in addition to the reasonable performance standards described in the
10 preceding paragraph (g). The conditional use language follows the conjunctive phrase
11 “and provided, that” Nothing in the County’s code describes this CUP process as a
12 “performance standard.” On its face, JCC 18.20.240(2)(g)(i) is a general CUP
13 requirement that cannot be imposed on a valid nonconforming use. *Rhod-A-Zalea*, 136
14 Wn.2d 1 at 7 (“*Rhod-A-Zalea* was not required to obtain a general conditional use permit
15 (because it is a valid nonconforming use)”). The Hearing Examiner’s findings to the
16 contrary are based upon an erroneous interpretation of the law, are not supported by
17 substantial evidence, and erroneously apply law to the facts.

18 7.11.2 The Hearing Examiner’s decision in the previous code
19 interpretation appeal confirms what IMQ has acknowledged throughout both code
20 interpretation appeals, namely, that despite its valid nonconforming use rights, “the
21 appellant must meet requirements of the JCC and the DNR pursuant to *Rhod-A-Zalea* . . .”
22 The important qualifier on this conclusion is that such requirements must be “pursuant to
23 *Rhod-A-Zalea*.” Jefferson County has no authority to impose requirements beyond the
24 limits established by the Washington Supreme Court in *Rhod-A-Zalea*, 136 Wn. 2d 1
25 (1998). Under the rule of law established in *Rhod-A-Zalea*, a “general use permit” such as

1 a CUP must be distinguished from “specific operational activity permits,” such as a
2 grading permit. *Rhod-A-Zalea* 136 Wn.2d at 4-5.

3 7.11.3 The Hearing Examiner committed further legal error by
4 converting Jefferson County the CUP requirement into a “reasonable police power”
5 regulation simply by re-characterizing the CUP process. The rule of *Rhod-A-Zalea* is
6 clear: “prohibition of any requirement of a general use permit does not lift the requirement
7 of specific operational activities permits.” *Id.* *Rhod-A-Zalea* does not allow a local
8 jurisdiction to require a CUP or any other “general use permit” under the guise of
9 “performance standards,” “police power” regulations, or “health and safety” requirements.
10 The Hearing Examiner failed to cite any legal authority that would over-ride the clear rule
11 of *Rhod-A-Zalea*, which prohibits the imposition of a conditional use or any other general
12 use permit requirement for a valid nonconforming use.

13 7.12 The Hearing Examiner erred in Finding 11 by misinterpreting the
14 Court’s holding in *Rhod-A-Zalea*, 136 Wn. 2d 1 (1998), and incorrectly applying the
15 doctrine set forth in that case to the facts of this case. The Hearing Examiner improperly
16 dismissed (as “mere dicta”) *Rhod-A-Zalea*’s explicit acknowledgement of the distinction
17 between a CUP general use requirement and general police power regulations.

18 7.12.1 In *Rhod-A -Zalea*, 136 Wn. 2d 1 (1998), the Washington
19 Supreme Court reversed and reinstated a decision of the Snohomish County Hearing
20 Examiner, including the Examiner’s ruling that a conditional use permit requirement
21 could not be imposed on a valid nonconforming use. *Id.* The Court’s analysis of
22 nonconforming use rights in *Rhod-A -Zalea* is a clear rejection of the Hearing Examiner’s
23 conclusion that IMQ can be required to obtain a CUP, notwithstanding its valid
24 nonconforming use rights to mine on the entire 142-acre property. The Court in *Rhod-A -*
25 *Zalea* stated: “A business attempting to establish a use prohibited by the zoning ordinance

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1 must obtain a conditional use permit unless it is a valid nonconforming use.” *Id.* at 4
2 (*emphasis added*). This rule of law is clear. Even a use “prohibited by the zoning
3 ordinance” cannot be required to obtain a CUP if it is a valid nonconforming use. *Id.*
4 Contrary to the Hearing Examiner’s conclusion, under *Rhod-A-Zalea*, 136 Wn. 2d 1
5 (1998), a valid nonconforming use cannot be subjected to a CUP process.

6 7.13 The Hearing Examiner erred in Finding 12 by finding that the
7 language in *Rhod-A-Zalea*, 136 Wn. 2d 1 (1998), supports the conclusion that Jefferson
8 County has full authority to require a CUP for a nonconforming mine, the expansion of
9 which would result in increased off-site impacts. As set forth, *supra*, *Rhod-A-Zalea*, 136
10 Wn. 2d 1 (1998), expressly recognized the distinction between a CUP general use
11 requirement and a reasonable police power regulation. In *Rhod-A-Zalea*, the Court noted
12 that “[c]ourts have consistently recognized that uses are subject to subsequently enacted
13 reasonable police power regulations.” *Rhod-A-Zalea*, 136 Wn. 2d 1, 9. None of the cases
14 cited in support of that proposition, however, involved a requirement to obtain a CUP in
15 order to exercise mineral use rights established by operation of the diminishing asset
16 doctrine.

17 7.14. The Hearing Examiner further erred in Finding 12 to the extent he
18 found that application of JCC 18.20.240(g) and JCC 18.40.530 to IMQ’s nonconforming
19 use rights will not result in the immediate termination of those rights. As discussed *supra*,
20 the criteria for CUP approval set forth at JCC 18.40.530, most of which have no
21 relationship to the “off site impacts” sought to be addressed by JCC 18.20.240(g), must be
22 satisfied or the application “shall be denied.” JCC 18.40.530(1). Thus, under the facts of
23 this case, application of the CUP requirement would give the County authority to
24 immediately terminate IMQ’s nonconforming mineral use rights. Accordingly, the
25 Hearing Examiner’s finding that Jefferson County has full authority to require a CUP for a

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1 nonconforming mine contradicts protecting nonconforming use rights as set forth in *Rhod-*
2 *A-Zalea*, 136 Wn. 2d 1 (1998). The Hearing Examiner's Finding 12 is based upon an
3 erroneous interpretation of the law, is not supported by substantial evidence, and is an
4 erroneous application of law to the facts.

5 7.15. The Hearing examiner erred in Finding 13 by finding that the
6 language in *Rhod-A-Zalea*, 136 Wn. 2d 1 (1998), supports conditional use permits for
7 nonconforming uses. None of the cases cited by the Court in *Rhod-A-Zalea*, 136 Wn. 2d 1
8 (1998), involved a requirement to obtain a CUP in order to exercise mineral use rights
9 established by operation of the diminishing asset doctrine. Moreover, the Hearing
10 Examiner improperly analogized a CUP to a "special permit," which may be "used to
11 insure that surrounding areas will be protected when nonconforming uses are allowed to
12 make specified changes . . ." Under the rule of law established in *Rhod-A-Zalea*, a
13 "general use permit" such as a CUP must be distinguished from "specific operational
14 activity permits," such as a grading permit, which was issue in that case. 136 Wn.2d at 4-
15 5. The Hearing Examiner erroneously determined that a CUP is equivalent to a "special
16 permit" tailored to meet the specific impacts addressed in JCC 18.20.240(2)(g). As
17 discussed, *supra*, that is not the case. A CUP is a general use permit used to determine
18 whether a use should be allowed. Moreover, the CUP requirements set forth at JCC
19 18.40.500 include criteria unrelated to off-site impacts of alteration, intensification, and
20 expansion of existing mines and require discretionary findings related to whether the use
21 should be allowed. Thus, the Hearing Examiner's conclusion that a CUP is a "special
22 permit" appropriate under *Rhod-A-Zalea*, 136 Wn. 2d 1 (1998), to address the off site
23 impacts of the exercise of nonconforming mineral use rights is an erroneous conclusion of
24 law. The Hearing Examiner's finding is based upon an erroneous interpretation of the
25

1 law, is not supported by substantial evidence, and is an erroneous application of law to the
2 facts.

3 8. A Concise Statement of Facts Upon Which Petitioner Relies to Sustain the
4 Statements of Error.

5 8.1 IMQ hereby incorporates all facts and allegations set forth in the
6 paragraphs above as if fully set forth herein.

7 8.2 IMQ has mineral lease rights to a 142-acre parcel of land owned by
8 Pope Resources ("Property"). The Property is located on the north side of SR-104
9 approximately four miles west of the Hood Canal Bridge, east of the SR-104/SR-19
10 intersection in unincorporated Jefferson County. Pope Resources owns the entire 182-
11 acre parcel upon which the Property is situated. The Pope Parcel comprises the existing
12 40-acre Mason Quarry and the proposed 142-acre IMQ lease area. The Shine/Mason
13 Quarry is a presently active mine. The Property leased by IMQ includes an area of prior
14 mining. IMQ seeks to establish its own active mineral use operation at this location. In
15 order to establish such an operation, IMQ will necessarily alter, intensify and/or expand
16 surface mining on the Property.
17

18 8.3 The Property is zoned Commercial Forest. Mineral extraction
19 activities are permitted uses in the Commercial Forest zone. JCC 18.15.040, Table 3-1.
20 To date, no permit application or project description has been submitted to Jefferson
21 County. Nor has any SEPA checklist for any mineral resource project at this site been
22 submitted to Jefferson County.

23 8.4 In a previous code interpretation appeal filed by IMQ, the Jefferson
24 County Hearing Examiner issued a decision dated April 9, 2008, which confirmed that
25

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1 IMQ has nonconforming mineral use rights to mine IMQ's entire 142-acre parcel lease
2 area. This same property is the subject of this Petition.

3 8.5 Shortly after the first code interpretation appeal was decided an
4 associate planner in the Jefferson County Department of Community Development, issued
5 a letter to IMQ dated May 7, 2008, stating that IMQ would be required to apply for a CUP
6 in order to proceed with mining at this site. The letter referred to "off-site impacts (noise,
7 vibration, dust, traffic)" and informed IMQ that the Department of Community
8 Development has "good reason to believe that the Iron Mountain mining activities as
9 proposed will create such impacts to the Port Ludlow community and therefore will
10 require a Conditional Use Permit" pursuant to JCC 18.20.240(2)(g)(i), which provides:

11 (g) The alteration, intensification, and expansion of
12 existing gravel pits and surface mining operations is allowed
13 subject to reasonable performance standards to ensure that
14 alteration, intensification, and expansion of such uses have
15 minimal adverse impacts on surrounding areas and uses: and
16 provided, that:

17 (i) If increased off-site impacts (noise, vibration, dust,
18 traffic) would result from expansion, intensification, or
19 modification, a conditional use permit shall be required.

20 (ii) Modification to include a new use or operation (e.g.,
21 a rock crusher) shall require a conditional use permit subject
22 to a Type III approval process.

23 JCC 18.20.240(2)

24 8.6 In response to the County's May 7, 2008 letter, IMQ filed a code
25 interpretation request dated May 14, 2008, requesting confirmation that the CUP
requirement in JCC 18.20.240(2)(g)(i) does not apply where an applicant has existing
nonconforming mineral use rights established for a specific location. As set forth in its
code interpretation request:

1 IMQ interprets JCC 18.20.240(2)(g)(i) to apply to an
2 expansion, intensification, or modification of an existing
3 surface mining operation except where nonconforming
4 mineral resource use rights have been established, as is the
5 case for IMQ's 142-acre lease area. It is IMQ's position
6 that the County's final decision confirming IMQ's
7 nonconforming mineral resource use rights precludes the
8 County from requiring a conditional use permit. IMQ's use
9 rights have been established and cannot be subjected to a
10 permit process that could deny or terminate IMQ's existing
11 mineral use rights.

8 8.7 The Jefferson County Department of Community Development
9 Director issued a Unified Development Code Interpretation on June 11, 2008, which
10 concluded that JCC 18.20.240(2)(g)(i) should be interpreted to require IMQ to obtain a
11 conditional use permit for mineral resource use activities at this location. IMQ filed a
12 timely appeal of the Director's code interpretation on June 23, 2008.

13 8.8 Following a hearing on July 25, 2008, and receipt of post hearing
14 submissions, the Hearing Examiner issued the County's final decision in his Report and
15 Decision, dated September 24, 2008.¹ The Hearing Examiner denied IMQ's appeal and
16 held that IMQ's nonconforming use rights are subject to the CUP requirement where
17 exercise of those rights will increase off-site impacts. That Decision is the subject of this
18 LUPA petition.

19 9. Request for Relief, Specifying the Type and Extent of Relief Requested

20 9.1 IMQ respectfully requests that this Court:
21

22
23 ¹ The Parties and Hearing Examiner agreed to stipulate, for the limited purpose of this
24 code interpretation request, that IMQ's proposed mining activities will result in off-site
25 impacts. IMQ does not concede, however, that such impacts will result from its proposed
operations. Moreover, it was erroneous for the Jefferson County DCD staff to make a
determination of off-site impacts when no project or permit application has been submitted
to the County.

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9.1.1 Require the County to submit to the Court and to IMQ a certified copy of the administrative record pertaining to the Decision, so that the Court may review the same;

9.1.2 Adjudge the Decision clearly erroneous, arbitrary, and capricious, and not supported by the record or applicable legal authorities;

9.1.3 Adjudge the Decision to be null and void and of no force or effect;

9.1.4 Stay enforcement of the Decision to the extent it allows Jefferson County to require IMQ to submit to the CUP process; and,

9.1.5 Enter such other relief as the Court deems just and equitable, including but not limited to the award of reasonable costs and statutory attorneys' fees to IMQ.

DATED this 14th day of October, 2008.

GORDONDERR LLP


By: 
Keith Moxon, WSBA #15361
Dale Johnson, WSBA #26629
Attorneys for Petitioners
Iron Mountain Quarry, LLC and
Pope Resources

EXHIBIT A

REC-1

SEP 29 2008

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**JEFFERSON COUNTY NOTICE OF DECISION
APPEAL OF A CODE INTERPRETATION**

September 26, 2008

The Jefferson County Hearing Examiner has submitted his written Findings, Conclusions, and a DECISION regarding the following application: MLA08-00239

Applicant: GORDON DERR ATTORNEYS AT LAW
KEITH MOXON
2025 FIRST AVE SUITE 500
SEATTLE WA 98121

Parcel: 821291002

Project Description:
APPEAL OF CODE INTERPRETATION MLA08-00239. On June 11, 2008 the Administrator issued a UDC code interpretation in response to a request by the applicant for clarification of JCC 18.20.240(2)(g)(i). The code interpretation determined that the Jefferson County DCD would require a conditional use permit for the expansion of mining activities on parcel 821291002 proposed by Iron Mountain Quarry. The applicant for Code Interpretation MLA08-00239 submitted an appeal to the DCD on June 23, 2008 within the 14 day appeal period.

Project Location:
Parcel Number 821 291 002, Section 29, Township 28, Range 1 E, WM, Located on State Route 104, Port Ludlow, W A 98365

For the above project, the Hearing Examiner has:

Denied the Appeal

A copy of the Hearing Examiner's report and decision is attached for information. Appeals of this decision must be made as outlined in the attached instruction sheet.

INSTRUCTION FOR FILING APPEALS:

REFERENCE FILE NO. MLA08 -00239

PROJECT PLANNER:D W Johnson

The Hearing Examiner's decision on the Appeal of the Unified Development Code Interpretation may be appealed by a party of record to Superior Court within twenty-one (21) calendar days of the date of issuance of this land use decision.

For more information related to judicial appeals see JCC 18.40.340 and RCW 36.70C. For more information on reconsideration, see JCC 18.40.310.

JCC 18.40.310 Reconsideration.

A party of record at a public hearing may seek reconsideration only of a final decision by filing a written request for reconsideration with the hearing examiner within five business days of the date of the final written decision. The request shall comply with JCC 18.40.330(5)(b). The hearing examiner shall consider the request without public comment or argument by the party filing the request, and shall issue a decision within 10 working days of the request. If the request is denied, the previous action shall become final. If the request is granted, the hearing examiner may immediately revise and reissue his/her decision or may call for argument in accordance with the procedures for closed record appeals. Reconsideration should be granted only when an obvious legal error has occurred or a material factual issue has been overlooked that would change the previous decision.

The request for reconsideration shall contain a concise statement identifying:

- (i) The decision being appealed and the identification of the application which is the subject of the appeal;
- (ii) The name, address, and phone number of the appellant and his/her interest in the matter;
- (iii) Appellant's statement describing standing to appeal (Le., how he or she is affected by or interested in the decision);
- (iv) The specific reasons why the appellant believes the decision to be wrong. The appellant shall bear the burden of proving the decision was wrong;
- (v) The desired outcome or changes to the decision; and
- (vi) A statement that the appellant has read the appeal and believes the contents to be true, signed by the appellant.

JCC 18.40.340 Judicial appeals.

(1) Time to File Judicial Appeal. The applicant or any aggrieved party may appeal from the final decision of the administrator, hearing examiner, or to a court of competent jurisdiction in a manner consistent with state law. All appellants must timely exhaust all administrative remedies prior to filing a judicial appeal.

(2) Service of Appeal. Notice of appeal and any other pleadings required to be filed with the Court shall be served by delivery to the county auditor (see RCW 4.28.080), and all persons identified in RCW 36.70C.040, within the applicable time period. This requirement is jurisdictional.

(3) Cost of Appeal. The appellant shall be responsible for the cost of transcribing and preparing all records ordered certified by the court or desired by the appellant for the appeal. Prior to the preparation of any records, the appellant shall post an advance fee deposit in an amount specified by the county auditor with the county auditor. Any overage will be promptly returned to the appellant.

RECEIVED

OFFICE OF THE HEARING EXAMINER

SEP 25 2008

JEFFERSON COUNTY

JEFFERSON COUNTY DCD

REPORT AND DECISION

CASE NO.: APPEAL OF UNIFIED DEVELOPMENT CODE
INTERPRETATION: MLA08-00239-ZON08-00062
IRON MOUNTAIN QUARRY

APPELLANT: Iron Mountain Quarry (IMQ)

REPRESENTATIVE: Keith Moxon, GordonDerr

SUMMARY OF REQUEST:

The appellant filed an appeal requesting a Code Interpretation requesting clarification of JCC 18.20.240(2)(g)(i) based upon a DCD letter in which Jefferson County determined a conditional use permit (CUP) was required for expansion of mining activities on parcel 821291002.

SUMMARY OF DECISION:

Appeal denied.

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 July 25, 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

DAVID JOHNSON appeared, presented the Department of Community Development Staff Report, and testified that the issue is whether or not the County can require a conditional use permit for a nonconforming use, namely a surface mine. In the preapplication conference held in May, 2007, the appellant indicated its desire to mine the entire 142 acre parcel. Staff found that the impacts delineated in Section 18.20.240 of the Jefferson

County Code would occur if the mining proceeded as planned. Staff is looking at the code as written and feels that it applies to nonconforming uses. The conditional use permit process is not used to establish mining rights, but it ensures that the expansion of mines does not impact Port Ludlow. The purpose of the conditional use process is not to terminate mining. The conditional use permit criteria does more than allow or not allow the use to occur. He believes that the appellant can meet the conditional use criteria.

KEITH MOXON, attorney at law representing the appellant, appeared and testified that for the purposes of this hearing he will assume that the mine creates the impacts set forth in the JCC. The issue then is not whether or not those impacts will occur, they assume they do occur. The Examiner's previous decision allowed mining uses on the entire 142 acre parcel. The size of the mine will probably not exceed the existing shine quarry. They will not mine more than 40 acres at any one time and will never mine 142 acres. The County is relying on a code enacted before the Washington Supreme Court decision in McGuire. The County has misapplied the Rhod-A-Zalea case which in effect did not require a nonconforming use to obtain a conditional use permit, but did require such use to meet all police power regulations. A conditional use permit is not a regulatory authority. Furthermore, the County cannot interpret its code as saying it does not have the authority to deny a permit. The County says it just wants to apply the conditions, but the conditional use permit criteria are not standards. The question is whether the use is allowed in this location. SEPA review will address sufficiently the impacts of the mine. The County is not saying that it does not have SEPA authority. The County has already allowed a quarry to expand without the necessity of obtaining a conditional use permit.

STAN MEATH appeared and testified that he has two concerns. He wants the citizens to have an opportunity to voice their concerns regarding impacts. IMQ has no outreach program. He acknowledges the rights to mine 142 acres. They have already taken down 100 acres of trees and the noise has increased. If the mine removes the two ridges buffering the mine from the highway they will have more noise. The conditional use permit process fits like a glove, as it addresses more than just mining impacts. The appellant seems to say that it can't be regulated by the code because the County would not be fair. The residents want the County involved in every step and want the County to use its police power and require a conditional use permit. He expresses the views of people in his community.

BERNIE KESTLER appeared and testified that he opposes the quarry. Lost in this whole process is common sense. We don't put a mine next to a residential area.

DAVID ARMITAGE appeared and testified that a valley extends from the south into Port Ludlow. The appellant proposes to mine the hill blocking the valley versus the Shine mine which is located in the bottom of a valley. The mining of the hill will open up Port Ludlow to noise, dust, and pollution from SR-104. The upper portion of the mining parcel is covered by an easement. The easement does not allow the continuation of mining rights. He questioned the Rhod-A-Zalea case as it did not concern expansion of an existing use. A local government can seek reduction or termination of nonconforming uses. He argues that

Section 18.22.060 governs the expansion of nonconforming uses. It does not allow the increase of land areas by 100%. The County does not allow expansion of nonconforming uses if there is a significant increase. When Pope applied for the nonconforming use status the total was 20 acres. Shine now has 40 acres which precludes further expansion. The appellant must obtain a conditional use permit because the nonconforming use permit standards prohibit further expansion. Pope restricted the lease to a specific hill which it intended to mine, but it did not intend to mine anything beyond that.

BRUCE SCHMITZ appeared and testified that Rhod-A-Zalea stands for not being able to immediately terminate a nonconforming use. A local jurisdiction can limit such uses. The conditional use permit will not terminate the use, but will require the appellant to meet the criteria of the UDC. The Rhod-A-Zalea case did not specifically address a conditional use permit requirement because it was not a question in the case. The issue was whether Rhod-A-Zalea had to obtain a grading permit. Furthermore, Rhod-A-Zalea was not seeking to expand its mine. Nonconforming uses are disfavored in the law. The previous decision did not state that the appellant need not obtain a conditional use permit. It doesn't say in the decision that a conditional use permit is not required. It says the appellant must comply with all of the requirements, and the Examiner should confirm his original decision.

SUZANNE GRABER, Olympic Terrace Village, appeared and testified that counsel for the mine says that McGuire supercedes the code, but in Footnote 3 the decision says that nonconforming uses can be amortized. Concerning SEPA authority, the code provisions are there because they take into account the impacts on the community specifically as opposed to SEPA which is a general environmental statute. Section 18.20.240 is a police power regulation and the County exercises it to protect the community. McGuire does not say that a mine does not need to meet all regulations. A County is allowed to protect a community as it does in Shine. The appellant has testified that its mine will not exceed the size of the Shine mine. If they are doing nothing different, then why not acquire a conditional use permit?

KATHLEEN TRACI appeared and introduced a petition signed by 509 residents. Concerns include noise and other impacts if the appellant levels the land.

DORIS MONTI appeared and testified that her concerns include the trails. Pope/Olympic established the trails for Port Ludlow's use and an easement granted by Pope allows the trails onto its property.

HELEN COTTON appeared and testified that her concerns include air quality. Port Ludlow is a retirement community and they are concerned about their property values. A mine in this area makes no common sense considering the golf course, the beautiful area, and residents. Jefferson County should protect the area.

CAROL REICHSTETTER appeared and testified that the assumption is not factual. The appellant concedes it will not mine 142 acres, but it could mine 141.5 acres. What is the exact area?

JIM MASON, owner of the Shine mine, appeared and testified that his mine is approximately 40 acres and that he has ten years of materials left. He is not going anywhere. If the appellant mines 42 acres then they will double the impact. The appellant continues to appeal everything and has now had two appeals and still has not submitted an application.

DR. THOMAS CLAUDSON appeared and testified that he has noted the lack of an outgoing program by the appellant. He referred to the Superior Court decision. The rules of law are not black and white, they are always subject to interpretation. We have moral and integrity issues here.

ANTHONY SIMPSON, professional engineer, appeared and testified regarding transportation. The Shine mine has 131 truck trips to include trailers per day. The IMQ mine will be 3.5 times larger which would mean 700 truck trips per day or one every 40 seconds. The Shine mine satisfies all local needs so IMQ will provide material for distant markets. The mine could extend beyond the initial application. Transport could go to a new dock and trucks would travel through Port Ludlow.

CAROL PUTUSNEY, appeared and testified that she is a real estate appraiser and knows that a mine would have a definite, negative impact on property values.

DIANNE RIDGLEY appeared and testified that if the mine opens up the noise of SR-104 it will cut their property values in half. At least one community member is on a lung transplant list and they need to maintain clean air. The appellant proposes water to suppress the dust. How will that affect the aquifer and water purity. She also has concerns about the animals and the trails.

JOHN CRAGOE appeared and testified that this is the first time that anyone from IMQ has agreed to speak. Don't limit the police power of the County.

GREG PILMER appeared and testified that the Examiner needs to uphold DCD, as the conditional use permit process is the best way to ensure public review. If the permit is not required, it is not clear that SEPA and other reviews would properly evaluate the impacts. Issues of concern include noise and dust and are not addressed. If the CUP is not required, IMQ would argue that the impacts of the permits they must acquire are the only ones they must address. The CUP would ensure an evaluation of the entire proposal.

DAVID FRASER appeared and encouraged the Examiner to uphold the County. The County properly interpreted its own ordinance. The Washington Supreme Court must determine whether its decision overturned the ordinance. He is very experienced in NEPA. Before the County gets very far in the permitting process it needs to evaluate the environmental impacts pursuant to SEPA. The County is appropriately doing so through the CUP process. Even though the County won't deny the permit at the end of the process, it allows the County to set parameters on the permit. NEPA considers cumulative impacts

and the County needs to evaluate cumulative impacts of another mine.

GEORGE FOLLETT, a retired attorney, prosecuting attorney, and judge, appeared and testified that if he had nothing to do and was 30 years younger he would love to take this case on behalf of the community.

DAVE DITZLON appeared and testified that the community wants notice of all future meetings. He noted the attendance of 230 plus people.

GENE CARMODY appeared and concurs with the other speakers and urged the Hearing Examiner to deny the appeal. The key element in the CUP process is public input.

An 11 year resident appeared and commented upon the lack of disclosure. Pope didn't advise of a possible mine next to the golf course. The County code requires a MPR in an area of natural beauty. If the County knew of the 182 acre mine, would they have approved the MPR designation? She has property rights as well as IMQ. IMQ can mine their property, but not too close to Port Ludlow.

MR. MOXON reappeared and testified that they are not unwilling to meet with the community and will do so in the future to address concerns. All impacts will be covered by the County through the SEPA process. The process provides many opportunities for public involvement. The County, however, cannot compel a process that requires a permit as they already have one. He has not heard from the County that it will miss something if the CUP is not required. Both the Rhod-A-Zalea and McGuire cases were decided subsequent to adoption of the Jefferson County Code. The nonconforming use section of the code is not applicable to a mine. The County's final decision on the nonconforming use is final and binding. The only way to resolve the two cases is to recognize the nonconforming use. Rhod-A-Zalea made an express finding that no conditional use permit was required. The Court held that they would not have to obtain a conditional use permit if they had a valid nonconforming use. The County will address all impacts through the SEPA process. They are prepared to address all impacts, but not through the permit process. The County's interpretation is unconstitutional as the permit could require immediate termination of a nonconforming use. Assuming the impacts will occur, the decision can then be made as a matter of law. The CUP is not a police power ordinance. The County cannot require a use permit, but can require compliance with the JCC and other laws. All of the CF zoned areas allow mineral extraction. There is no way they will open a 142 acre site according to their client. There is no likelihood that they will open 142 acres. They will perform a traffic impact analysis which will indicate the size and number of trips. They propose no dock transport. No issues will be lost if the CUP is not required.

DAVID JOHNSON reappeared and testified that SEPA does not have the same criteria as a CUP. The CUP requires a higher level of review and requirements. Conditions are placed on how the mining operation is conducted. He then read the CUP criteria from 18.40.540. It provides a much higher level of review than SEPA. He believes that the mine can meet the criteria. Concerning the Examiner's decision, the diminishing asset doctrine permits the

nonconforming use status, but it does not address health, safety, and welfare. Section 13.20 talks about expanding a conditional use permit. Rhod-A-Zalea answered a question of whether a jurisdiction can terminate a nonconforming use by enacting a zoning ordinance. The County does not propose changing the zone from CF to another zone. Concerning the Shine mine, he has not heard any complaints so he assumes there are none. IMQ has the right to mine, but not to the detriment of residents' quality of life. If the County's interpretation is wrong, they need to correct the ordinance. Part of the leased area is located in the RR classification.

MR. MOXON reappeared and testified that the County is expanding the appeal and the Examiner should set it aside. The issue is not whether mining can occur in an RR zone, and the Examiner should not rely upon that for revision. He does not argue that a conditional use permit would be needed for a new use. He agrees that they would need a conditional use permit if they added something like a rock crusher to the mine.

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

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 heard testimony, admitted documentary evidence into the record, and taken this matter under advisement.
2. This request is exempt from review under State Environmental Policy Act (SEPA).
3. Appropriate notice of the date and time hearing was published, posted, and mailed to property owners pursuant to the Jefferson County Code.
4. The appellant, Iron Mountain Quarry, LLC (IMQ), appeals an interpretation of the Jefferson County Code (JCC) issued by the Jefferson County Department of Community Development (DCD). DCD interpreted JCC 18.20.240(2)(g)(i) as requiring IMQ to obtain a conditional use permit (CUP) for its nonconforming quarry "if increased off-site impacts (noise, vibration, dust, traffic) would result from expansion, intensification, or modification" of said quarry. IMQ appealed DCD's interpretation, asserting that the JCC could not require a CUP based upon the Washington Supreme Court decisions of City of University Place v. Brian P. McGuire, 144 2d 640, 30 P.3d 453 (2001), and Rhod-A-Zalea and 35th Inc. v. Snohomish County, 136 Wn. 2d 1, 959 P.2d 1024 (1998). For the reasons set forth hereinafter, neither the Supreme Court decisions nor the doctrine of diminishing asset prohibits Jefferson County from requiring a CUP for those portions of the mine

causing "increased off-site impacts".

5. By Report and Decision dated April 9, 2008, the Examiner determined that IMQ has legal nonconforming use rights to mine a 142 acre parcel leased from Pope Resources (PR) pursuant to the doctrine of diminishing asset in accordance with the Supreme Court's decision in University Place v. McGuire, supra. DCD recognized the Examiner's decision, but also noted JCC 18.20.240 (2)(g) which applies to all permitted surface mines as follows:

2. The following standards apply to all surface mining and reclamation activities:

- (g) The alteration, intensification, and expansion of existing gravel pits and surface mining operations is allowed subject to reasonable performance standards to ensure that alteration, intensification, and expansion of such uses have minimal adverse impacts on surrounding areas and uses; and provided, that:

- (i) If increased off-site impacts (noise, vibration, dust, traffic) would result from expansion, intensification, or modification, a conditional use permit shall be required....(emphasis added).

Thus, subsection (g) and all other standards set forth in JCC 18.20.240(2) apply to all legally permitted surface mines. When legally permitted mines expand their areas of operation and such expansions result in increased off-site impacts, all such mines, even if permitted outright, must acquire a CUP.

6. The site is located within the Commercial Forest (CF) zone classification. Section 18.15.040 JCC authorizes mineral extraction activities in the CF zone classification as an outright permitted uses. However, JCC Section 18.20.240(1)(b) limits disturbed areas of mineral extraction to a maximum of ten acres for those mines located in the CF classification and not covered by a Mineral Resource Land Overlay District (MRL). The areas of the parcel proposed for mining do not have a MRL Overlay and are subject to the 10 acre limit. However, the April 9, 2008, Report and Decision determined that IMQ had a nonconforming use right to mine more than 10 acres pursuant to the doctrine of diminishing asset. Mineral extraction activities are also authorized as outright permitted uses in the Agricultural, RR1:5, RR1:10, and RR1:20 zone classifications subject to the 10 acre limit of JCC 18.20.240(1)(b). Furthermore, even though authorized outright, such mines must also comply with JCC 18.20.240(2)(g) and apply for and receive a CUP if a mine

expansion, intensification, or modification increases offsite impacts. Thus, even if IMQ's mine were a conforming use, it would have to comply with said section. The fact that IMQ has a nonconforming mine does not grant it an exemption to which permitted mines are not entitled.

7. The appellant agrees that its nonconforming mine must meet all reasonable JCC police power regulations. As set forth in IMQ's Post Hearing Brief:

IMQ is even willing to conceded that except for the conditional use permit, the County has authority to impose "reasonable performance standards" to ensure that "alternation, intensification, and expansion of existing gravel pits and surface mining operations" will "have minimal adverse impacts on surrounding areas and uses". However, a conditional use permit is not a "reasonable performance standard". A conditional use permit is not a "police power regulation". (p.7, Brief; emphasis, the author's).

Thus, IMQ agrees that it will meet all standards required of permitted mines and that it will undergo review pursuant to the State Environmental Policy Act (SEPA) and satisfy all mitigating measures imposed pursuant thereto. However, IMQ asserts that DCD cannot require it to obtain a conditional use permit because the CUP standards set forth in JCC 18.40.530 allow DCD to terminate its nonconforming use.

8. Section 18.40.530 JCC sets forth the approval criteria for all conditional uses. Said section provides in part:

(1) The County may approve or approve with modifications an application for a conditional use permit...if all of the following criteria are satisfied.

...

(2) In instances where all of the above findings cannot be made, the application shall be denied.

IMQ asserts that said language violates the doctrine of diminishing asset as it allows DCD to revoke its nonconforming use rights to mine the 142 acre leased parcel. However, accepting appellant's argument would mean that either JCC 18.20.240(g)(i) does not apply to conforming mines or that nonconforming mines have greater rights than conforming mines. Such interpretation would curtail the County's mechanism to regulate off-site impacts of both conforming and nonconforming mines. Such interpretation would also limit the ability of adjacent property owners and area residents to request either mitigating measures or denial of the expansion. The County would have no public process to review either

conforming or nonconforming mines.

9. The CUP process as set forth in the JCC does not apply to permitted mines except where expansion of the existing pits and mine operations increases impacts to off-site properties. In such case a CUP is required. However, such CUP would not affect the existing mine, would not "shut-down" active mining areas, and would not prohibit mining on those portions of the mine parcel which would not increase impacts to off-site parcels. The CUP basically prohibits mining in areas of the parcel where the appellant could either not meet State and JCC mining standards or where it could not mitigate other identified impacts. As set forth in the staff report:

The Hearing Examiner's decision has already established that the use shall be permitted as a nonconforming use. What JCC 18.20.240(2)(g) does is prevent an expansion of an existing [either nonconforming or permitted] use from causing adverse impacts to surrounding areas and uses by subjecting the proposal to the conditional use criteria and conditioning how that expansion shall occur.

The JCC does not provide for the eventual termination of a nonconforming mine. The JCC does, however, require the conditional use process when any mine creates "increased off-site impacts".

10. In its decision in University Place v. McGuire, supra., the Washington Supreme Court did not rule that the doctrine of diminishing asset allows an owner to mine an entire parcel from property line to property line. Thus, a nonconforming mine the same as a conforming mine must recognize critical areas and mitigate impacts associated with traffic, noise, dust, and other environmental impacts. Depending upon the topography and abutting land uses, a mining operation may not be able to sufficiently mitigate its impacts. Thus, it may not obtain a permit to mine portions of its parcel. The Supreme Court noted in McGuire, supra.:

...We note that potential damage to zoning schemes may be ameliorated through reasonable amortization periods...144 Wn. 2d 640 @ 651.

Since the Supreme Court notes that Jefferson County has the authority to adopt an ordinance ameliorating nonconforming uses, the County certainly has the authority to subject nonconforming use expansions to the CUP process.

11. Appellant cites Rhod-A-Zalea and 35th Inc. v. Snohomish County, supra, as authority for its position that since it mine is a legal, nonconforming use, Jefferson County cannot require it to obtain a conditional use permit. However, the CUP issue was not before the Supreme Court for consideration:

The Examiner found Rhod-A-Zalea had established that it was a valid nonconforming use and that a conditional use permit was not required. This ruling was not challenged on appeal...

...The issue before this Court is whether Rhod-A-Zalea's nonconforming peat mining operation is subject to police power regulations subsequently enacted for the health, safety, and welfare of the community....136 Wn. 2d at 4, 6.

The Supreme Court's decision assumed that Snohomish County had not required Rhod-A-Zalea to apply for and obtain a CUP. Therefore, language in the Court's decision referring to exemption of a valid nonconforming use from the CUP process are dicta or in accordance with the unappealed portion of the Examiner's decision. The Court decided that nonconforming uses had to meet police power ordinances adopted subsequently to the establishment of the use. IMQ agrees that it must meet all such police power ordinances.

12. The Rhod-A-Zalea decision does not decide the issue of whether a County can require a legal, nonconforming use to obtain a "general" CUP. However, language in the decision supports JCC provisions requiring a CUP for all mines which increase off-site impacts. The Court discusses nonconforming uses as follows:

This right [nonconforming use], however, only refers to the right not to have the use immediately terminated in the face of a zoning ordinance which prohibits the use....

...[N]onconforming uses are allowed to continue based on the belief that it would be unfair and perhaps unconstitutional to require an immediate cessation of a nonconforming use...

For these reasons, nonconforming uses are uniformly disfavored and this court has repeatedly acknowledged the desirability of eliminating such uses..."It is a valid exercise of the City's police power to terminate certain land uses which it deems adverse to the public health and welfare within a reasonable amortization period." 136 Wn. 1 at 7, 8.

The Court also discusses the authority granted to local jurisdictions to regulate nonconforming uses by the Washington Enabling Acts:

...Washington's enabling acts are silent regarding the regulation of nonconforming uses...Instead, the state Legislature has deferred to local governments to seek solutions to the nonconforming use problem according to local circumstances. In Washington, local governments are free to preserve, limit, or terminate

nonconforming uses subject only to the broad limits of applicable enabling acts and the constitution....136 Wn. 1 at 7.

Thus, Jefferson County has broad authority to limit nonconforming uses. It also has authority to terminate nonconforming uses subject only to the prohibition of immediate termination. Jefferson County also has full authority to require a CUP for either a conforming or nonconforming mine, the expansion of which would result in increased off-site impacts.

13. Language in the Rhod-A-Zalea decision also supports conditional use permits for nonconforming uses:

Thus, it is clear that local governments have the authority to preserve, regulate, and even, within constitutional limitations, terminate nonconforming uses...

...Nonconforming uses generally are held to be subject to later police power regulations imposed by statute or local ordinances regulating the manner or operation of use. These regulatory restrictions often take the form of licensing or special permit requirements...

[A] nonconforming use is amenable to municipal ordinances which regulate similar uses, conforming or nonconforming...

...Only where the regulation should immediately terminate the nonconforming use have courts found the regulation to be invalid as applied to the nonconforming use....136 Wn. 2d at 8, 9.

Where the County has the authority to terminate a nonconforming use, it certainly has the authority to adopt ordinances requiring a nonconforming use to obtain a CUP, the same as a conforming use. Finally, Section 21.07 Anderson's American Law of Zoning, 4th Edition, provides:

The special permit is a device which is frequently used to insure that surrounding uses will be protected when nonconforming uses are allowed to make specified changes...Such approval is the equivalent of a special permit as the term is used in this chapter.

Special permits as defined in Chapter 21 are either administrative permits or permits issued after notice, hearing, and specified findings. Section 21.01 Anderson's, supra.

14. Residents of the Port Ludlow Master Planned Resort appeared and testified at the public hearing to consider the IMQ appeal. Many residents testified regarding the

significant adverse environmental and other impacts associated with surface mines. However, the appeal before the Examiner is limited to whether Washington Supreme Court decisions allow the County to require a nonconforming mine to obtain a conditional use permit. Thus, no findings are made regarding impacts of mining on Port Ludlow. Residents may raise mining impact issues during the processing of the mining application, SEPA review, and a conditional use permit application.


CONCLUSIONS:

1. The Hearing Examiner has jurisdiction to consider and decide the issues presented by this request.
2. Section 18.20.240(1)(g) JCC applies to all existing gravel pits and surface mining operations whether conforming or nonconforming. Therefore, IMQ must acquire a conditional use permit to mine those areas of the parcel where the mining operations will increase off-site impacts.
3. The code interpretation request (log item 3) asks a specific question concerning whether JCC 18.20.240 requires a CUP for its nonconforming mine. The appellant did not identify any specific area of the mine parcel that it believed that mining would cause increased off-site impacts. In neither the staff report nor its closing statement did DCD identify a specific portion of the mine which it believed would cause such impacts. However, DCD did note that parcel 821291002 abuts a single family residential zone of the Port Ludlow Master Planned Resort. However, since IMQ has not submitted an application for either a surface mine or for SEPA review, any determination of the areas of the mine parcel which might need a CUP is premature.
4. Neither McGuire, supra., nor Rhod-A-Zalea, supra., limit the authority of Jefferson County to require a conditional use permit for its nonconforming mine. To the contrary, Rhod-A-Zalea, supra, Anderson's American Law of Zoning, supra, and Settle, Washington Land Use and Environmental Law and Practice (Section 2.7) all support Jefferson County's authority to apply not only its mining standards to a nonconforming mine, but also its procedural requirements.

DECISION:

The appeal of Iron Mountain Quarry LLC is hereby denied.

ORDERED this 24th day of September, 2008.



STEPHEN K. CAUSSEAU, JR.
Hearing Examiner

EXHIBIT B

REC'D
JUN 12 2008
Gordon Derr LLP



JEFFERSON COUNTY

DEPARTMENT OF COMMUNITY DEVELOPMENT

621 Sheridan Street
Port Townsend, WA 98368
Al Scalf, Director

Unified Development Code Interpretation

This interpretation is made according to Article VI of Chapter 18.40 of the Unified Development Code, Jefferson County Code (JCC 18.40.350). An interpretation of the provision of the UDC is intended to clarify conflicting or ambiguous wording, interpret proper classification of a use, or interpret scope or intent. The "Factors for Consideration" listed in JCC 18.40.360(4) were considered in making this UDC interpretation, including applicable policies of the Jefferson County Comprehensive Plan.

Date: June 11, 2008
Case: ZON08-00062/MLA08-00239

Applicant: Gordon Derr, Attorneys at Law
Attn: Keith Moxon
2025 First Ave Suite 500
Seattle, WA 98121

Property Owner: Pope Resources
C/O Olympic Resource Management
19245 10th Ave NE
Poulsbo, WA 98370

Subject: Iron Mountain Quarry (IMQ) seeks clarification and interpretation of Jefferson County Code (JCC) 18.20.240(2)(g)(i).

Request: IMQ requests that the County confirm that JCC 18.20.240(2)(g)(i) which requires a conditional use permit "if increased off-site impacts (noise, vibration, dust, traffic) would result from expansion, intensification, or modification" of "existing gravel pits and surface mining operations" does not apply where the applicant has existing non-conforming mineral use rights for the proposed mineral resource uses.

Relevant Law, Code, Plans, Ordinances or Policies:

This interpretation is made according to Article VI, Chapter 18.40 JCC. An interpretation of the provision of the Unified Development Code is intended to clarify conflicting or ambiguous wording, interpret proper classifications of a use, or interpret scope or intent. The "Factors for Consideration" listed in JCC 18.40.360(4) (identified below) were considered in making this UDC interpretation, including applicable goals and policies of the Jefferson County Comprehensive Plan.

- (a) The applicable provisions of this code, including its purpose and context;
- (b) The implications of the interpretation for development within the county as a whole, including the precedent the interpretation will set for other applicants; and
- (c) Consistency with the Jefferson County Comprehensive Plan and other relevant ordinances and policies.

JCC 18.20.240 Mineral extraction, mining, quarrying and reclamation.

(2)

The following standards apply to all surface mining and reclamation activities:

- (g) states: "The alteration, intensification, and expansion of existing gravel pits and surface mining operations is allowed subject to reasonable performance standards to ensure that alteration, intensification, and expansion of such uses have minimal adverse impacts on surrounding areas and uses; and provided, that:"
- (i) states: "If increased off-site impacts (noise, vibration, dust, traffic) would result from expansion, intensification, or modification, a conditional use permit shall be required."

Hearing Examiner Decision:

On April 9, 2008 the Jefferson County Hearing Examiner ordered a decision on appeal of a Department of Community (DCD) Code Interpretation (MLA07-00638) in which IMQ sought relief from the JCC 18.20.240(1)(a) 10 acre at a time mining restriction without a Mineral Resource Land (MRL) overlay by demonstrating they had nonconforming use rights under the Diminishing Asset Doctrine. The Hearing Examiner concluded the following relevant to the subject Code Interpretation:

- 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. (emphasis added)*
- 4. Pope has not abandoned its nonconforming use rights by development of Port Ludlow. *However, the location of Port Ludlow and its amenities must be*

considered in both SEPA review and review under the JCC mining requirements.
(emphasis added)

Rhod-A-Zalea:

Although the Hearing Examiner Decision allows mining beyond the ten acre limitation without an MRL, he refers to the Supreme Court of Washington case Rhod-A-Zalea as a basis for the applicant to meet County Code requirements exclusive of JCC 18.20.240(1)(b). Relevant cites from Rhod-A-Zalea as they relate to the Hearing Examiners requirements and the subject Code Interpretation are as follows:

Referring to a supporting case, Dock Watch Hollow Quarry, Inc v. Township of Warren, the Court states "The court found that although the quarry's status as a nonconforming use 'may protect it from later zoning restrictions, its status as such does not render it immune from reasonable regulations pursuant the police power in the interest of the public health, welfare and safety,' including 'those designed for the preservation of the environment and protection of ecological values.'" Dock Watch, 361 A.2d at 20.

"the welfare of the community should not be sacrificed for the purpose of permitting Dock Watch the most profitable use of that land." Id. at 25.

"Thus, courts agree that nonconforming uses, although protected from zoning ordinances which immediately terminate their use, are subject to later enacted regulations enacted for the health, safety and welfare of the community."

"A successful defense to the imposition of one regulation does not erect a constitutional barrier to all other regulation. The first suit was brought to enforce a zoning ordinance, while the present one is to enforce a safety ordinance." Goldblatt, 369 U.S. at 597, 82 S.Ct. 987

"In conclusion, we find that Rhod-A-Zalea's nonconforming use is subject to the grading permit requirement contained in SCC 17.04.280. Nonconforming uses have only a vested right not to have the use immediately terminated in the face of a zoning ordinance which prohibits the use. The case law overwhelmingly holds that nonconforming uses are subject to later enacted reasonable police power regulations."

Comprehensive Plan Goal & Policy:

NRG 7.0 Provide for mitigation of potential adverse impacts associated with mining extraction and processing operations.

Policies:

NRP 7.1 Require environmental review on all mineral lands designation requests and/or conditional use permits

NRP 7.2 Provide for the following factors in mineral resources land use decisions:

- a. The range of environmental impacts, including short-term and long-term effects arising over the lifetime of the proposal;
- b. The ability of the site to confine or mitigate all operational impacts;
- c. The compatibility of operations with adjacent land uses when mitigating measures are applied;
- d. The capacity of transportation facilities to handle safely the transport of products from the site; and,
- e. The adequacy of plans for reclamation of the site for appropriate future use.

NRP 7.3 Develop standards and guidelines to identify and address the impact of mining operations on adjoining properties. Such conditioning should not have the intent of rendering mining operations economically unfeasible.

NRP 7.4 Evaluate small mining operations to determine when the cumulative impact of small operations becomes a significant adverse impact upon the land or upon adjacent lands.

Findings of Fact:

The Hearing Examiner Decision issued April 10, 2008 requires IMQ comply with JCC mining requirements exclusive of JCC 18.20.240(1)(b).

JCC 18.20.240 Mineral extraction, mining, quarrying and reclamation, are the JCC mining requirements referred to in the Hearing Examiner's Decision.

Rhod-A-Zalea states, "Nonconforming uses have only a vested right not to have the use immediately terminated in the face of a zoning ordinance which prohibits the use."

JCC 18.20.240 Mineral extraction, mining, quarrying and reclamation, are not zoning restrictions, regulations or ordinances that prohibit the use, but are the Performance Standards (regulations) enacted for the health, safety and welfare of the community.

JCC 18.20.240(2)(g)(i) states, "The alteration, intensification, and expansion of existing gravel pits and surface mining operations is allowed subject to reasonable performance standards to ensure that alteration, intensification, and expansion of such uses have *minimal adverse impacts on surrounding areas and uses; and provided, that:*

- (i) If increased off-site impacts (noise, vibration, dust, traffic) would result from expansion, intensification, or modification, *a conditional use permit shall be required.*" (emphasis added)

The subject parcel 821291002 which IMQ proposes to mine a portion of abuts the Single Family Residential zone of the Port Ludlow Master Planned Resort (MPR) boundary. The "leased area" indentified by IMQ for mineral extraction activities are within 1/2 a mile of the MPR boundary.

The Hearing Examiner Decision specifically identifies Port Ludlow and its amenities as important considerations when reviewing any mining under JCC mining requirements.

The Hearing Examiner Decision does not specifically state that a Conditional Use Permit shall not be required.

Conclusion:

The Hearing Examiner's Decision of April 10, 2008 allows IMQ to mine the entire 142 acre leased area without a ten acre limitation as long as IMQ meets the JCC mining requirements. JCC 18.20.240(2)(g)(i), which is part of the JCC mining requirements, requires a Conditional Use permit if increased off-site impacts would result from an intensification or expansion of mining activities. Due to the proposed mining activities within close proximity to the Port Ludlow MPR, and the potential for IMQ to mine 142 acres at one time, Jefferson County believes that the proposed mining by IMQ will result in increased impacts to Port Ludlow.

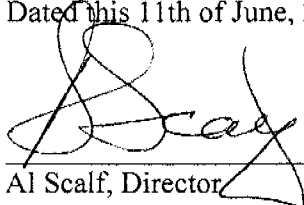
Decision:

A Conditional Use Permit shall be required for further mining activities on parcel 821291002.

Appeal:

As outlined in JCC 18.40.390, the applicant requesting a code interpretation may appeal the decision to the Hearing Examiner within fourteen (14) calendar days of the decision using the process for appeals of Type II permit decisions as set forth in JCC 18.40.330.

Dated this 11th of June, 2008.



Al Scalf, Director