

1 SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR THE COUNTY OF JEFFERSON
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7 PORT LUDLOW VILLAGE COUNCIL, PORT
8 LUDLOW ASSOCIATES, LLC. and SOUTH BAY
9 COMMUNITY ASSOCIATION,

Case No.: 08-2-00142-2

10
11 Petitioners,

MEMORANDUM OPINION

12 vs.

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14 JEFFERSON COUNTY, POPE RESOURCES,
15 And IRON MOUNTAIN QUARRY, LLC.,

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17 Respondents.
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21 THIS MATTER came on for oral argument on October 8, 2008 to consider
22 Petitioners' appeal of Jefferson County Hearing Examiner Stephen K.
23 Causseaux, Jr's April 9, 2008 Report and Decision. Petitioners appeared
24 through their attorney, Richard B. Shattuck. Respondent Jefferson County
25 appeared through Jefferson County Deputy Prosecuting Attorney, David W.
26 Alvarez. Respondents Pope Resources and Iron Mountain Quarry appeared
27 through their attorneys Keith E. Moxon and Dale N. Johnson of Gordon Derr,
28 LLP.
29

30 The Court considered the complete record from the March 14, 2008
31 hearing before Hearing Examiner Causseaux, Jr., including the Log items
32 admitted in that hearing, the complete court file in this matter including
33 the opening brief of Petitioners, the Response of Iron Mountain Quarry to
34 Petitioners' Opening Brief, the Brief of Respondent Jefferson County,
35 Petitioners' Reply to Opening Briefs of Jefferson County and Iron Mountain
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41 P.O. Box 1220
42 Port Townsend, WA 98368
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1 Quarry, and all exhibits annexed to those legal memoranda. The Court also
2 considered the out of jurisdiction cases submitted by Petitioners
3 supplementing their opening brief and the arguments of counsel.
4

5 **NATURE OF ACTION**
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7 Respondent Iron Mountain Quarry (IMQ) leases 142 acres of land from
8 Respondent Pope Resources. Those 142 acres are adjacent to the 40 acre
9 "Shine Quarry" which is also owned by Pope Resources and leased to Jim Mason
10 who owns that hard rock mining business. After informal discussions and
11 meetings, IMQ asked the Jefferson County Department of Community Development
12 (DCD) for a formal interpretation of the Jefferson County Unified
13 Development Code. IMQ requested the DCD apply the Washington State Supreme
14 Court decision in *City of University Place v. McGuire*, 144 Wn. 2d 644, 30
15 P.3d 453 (2001) and determine that IMQ has nonconforming mineral resource
16 use rights and that the County cannot require IMQ to apply for an amendment
17 to the Jefferson County Comprehensive Plan to establish a Mineral Resource
18 Land Designation. DCD interpreted its code adversely to IMQ and IMQ filed
19 its appeal to the Jefferson County Hearing Examiner. On April 9, 2008, the
20 Hearing Examiner, in the above referenced Report and Decision, granted IMQ's
21 appeal and determined that IMQ, through Pope Resources, had legal
22 nonconforming mineral use rights to mine the 142 acres pursuant to
23 application of the "diminishing asset" doctrine of *McGuire*. Petitioners
24 filed this Land Use Petition challenging that decision.
25

26 **ANALYSIS**
27

28 Petitioners argue that they are entitled to relief from the Report and
29 Decision under RCW 36.70C.130, subsections (a), (b), (c) and (d).
30

31 RCW 36.70C.130(b) provides that the court may grant relief if: "the
32 land use decision is an erroneous interpretation of the law, after allowing
33 for such deference as is due the construction of a law by a local
34 jurisdiction with expertise." Petitioners bear the burden of proving the
35 alleged error. *Wellington River Hollow, LLC v. King County*, 121 Wn. App.
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1 224, 230, 54 P.3d 213 (2002). The court reviews challenges to land use
2 decisions under RCW 36.70C.130(b) "de novo", *City of University Place v.*
3 *McGuire*, 144 Wn. 2d 644, 647, 30 P.3d 453 (2001), and may substitute its own
4 judgment, giving substantial weight to the hearing examiner's legal
5 interpretation. *Van Sant v. City of Everett*, 69 Wn. App. 641, 647, 849 P.2d
6 1276 (1993). The statute itself requires the court to give deference to the
7 hearing examiner and to consider all of the evidence and reasonable
8 inferences in the light most favorable to Iron Mountain as the prevailing
9 party. RCW 36.70C.130 (b); *Freeburg v. Seattle*, 71 Wn. App. 367, 371-72,
10 859 P.2d 610 (1993); *Davidson v. Kitsap county*, 86 Wn. App. 673, 680, 937
11 P.2d 1309 (1997).

12
13 Petitioners, in part, argue that the Report and Decision incorrectly
14 determined that the "tract" of land at issue is the 182 acres, not the 40
15 acres subject to the Shine Quarry mining operation. Thus Petitioners assert
16 that the hearing examiner erroneously interpreted the diminishing asset
17 doctrine of *McGuire* to apply to the entire 182 acre parcel. Here the record
18 contains sufficient evidence for the hearing officer to conclude that the
19 "parcel" or "tract" at issue is the entire 182 acres, much like the 80 acres
20 at issue in *McGuire*. Applying the burden of proof principles and giving
21 deference to the hearing examiner as required does not leave the court with
22 a "definite and firm conviction that a mistake has been committed" by the
23 hearing examiner in concluding that the 182 acres is one parcel owned by
24 Pope Resources and is subject to the decision.

25
26 Petitioners also argue that the land use decision is an erroneous
27 application of the diminishing asset doctrine of *McGuire* to the facts of
28 this case (RCW 36.70C.130 (d)) because IMQ did not show an objectively
29 manifested intent to mine the 142 acres adjacent to the 40 acre Shine
30 Quarry. Petitioners point out that Pope did not obtain mining permits to
31 mine the 142 acres. They also assert that as Pope did not obtain permits to
32 mine the area the non conforming use (mining) was not a "legal"
33 nonconforming use as required by *McGuire*. As the hearing examiner points
34 out, *McGuire* does not require that permits must be obtained to demonstrate
35 intent to mine the parcel at issue. The failure to obtain a permit does
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1 not mean that the nonconforming "use" itself (mining) is "illegal" within
2 the meaning of the Jefferson County Uniform Development Code even though
3 that failure may be a violation of other regulations. *Van Sant v. City of*
4 *Everett*, 69 Wn. App. 641, 849 P.2d 1276 (1993).
5

6 In determining that Pope Resources had met the burden of showing its
7 intent to mine the entire 182 acres, the hearing examiner relied on the list
8 of exhibits included in his findings under Finding 7, page 5-6 of the Report
9 and Decision to conclude that mining activity previously occurred on the 182
10 acre parcel. Those exhibits, taken in a light most favorable to Pope
11 Resources and IMQ, demonstrate an objective intent to mine the entire 182
12 acres. The hearing examiner did not err in making that determination. The
13 hearing examiner was free to give such weight as he saw fit to the testimony
14 of Jim Mason, (owner of the Shine Quarry) and balance that testimony with
15 the other evidence to reach the factual finding he reached. The declaration
16 of David Nunes, Log Item 57 with its attachment, is one piece of evidence
17 the hearing examiner was free to evaluate in making his decision. There is
18 substantial evidence in the record to support the hearing examiner's factual
19 finding when viewed in light of the whole record before this Court and which
20 was before the hearing examiner. (RCW 36.70C.130(c)). Substantial
21 evidence is a sufficient quantity of evidence to persuade a fair-minded
22 person of the truth or correctness of the order. *McGuire, supra.*, at 144
23 *Wn. 2d 647*, citing *City of Redmond v. Central Puget Sound Growth Management*
24 *Hearing Board*, 136 Wn. 2d 38, 46, 959 P.2d 1091 (1998).
25

26 While Petitioners argue that Pope Resources abandoned its non
27 conforming use, the evidence does not support that argument. The 142 acres
28 is not part of the Port Ludlow Master Planned Resort and mining those 142
29 acres is not inconsistent with the establishment of that Master Planned
30 Resort. While a portion of the 142 acres is on a parcel that abuts the
31 Master Planned Resort, the 142 acres which could possibly be used for mining
32 does not abut the Resort. This contention by the Petitioners is similar to
33 their contention that this decision could establish a precedent which would
34 open over 72,000 acres of Pope Resources land to mining without following
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1 the requirements of the Code. That is not the case. The decision is
2 limited expressly to the 142 acres adjacent to the 40 acre Shine Quarry.

3
4 Petitioners also argue that they are entitled to relief under RCW
5 36.70C.130 (a) as the hearing examiner engaged in an unlawful procedure or
6 failed to follow a prescribed process in the conduct of the hearing. This
7 claim arises from the hearing examiner's preliminary statement defining the
8 scope of the hearing. The hearing examiner correctly defined the scope of
9 the question before him as whether the County legally interpreted its code.
10 There is no indication that Petitioners' evidence was in any way restricted.
11 Petitioners did not offer any evidence which was not considered by the
12 hearing examiner. The Court concludes that Petitioners are not entitled to
13 relief under RCW 36.70C.130 (a) as there was no "unlawful procedure" and the
14 hearing examiner followed the prescribed process in the conduct of the
15 hearing.

16
17 In his Report and Decision, Examiner Causseaux, Jr. conducts an in-
18 depth analysis of the doctrine of diminishing asset as set forth in *McGuire*,
19 and applies both *McGuire* and the cases cited in that decision to the facts
20 found by the examiner in this case. This Court has reviewed that analysis
21 including the examiner's application of the law to the facts in this case
22 and interpretations of the law as applicable to this case, and adopts that
23 analysis without repeating it in this opinion.

24
25 **CONCLUSION**

26
27 The Report and Decision of the hearing examiner is AFFIRMED. Pope
28 Resources and Iron Mountain Quarry have legal nonconforming use rights to
29 mine the 142 acres pursuant to the doctrine of diminishing asset as set
30 forth in *McGuire, supra*.

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