

No. 36177-9

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

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COURT OF APPEALS
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J.L. STOREDAHL & SONS, INC. and STOREDAHL PROPERTIES
LLC,

Appellants,

v.

CLARK COUNTY; FRIENDS OF THE EAST FORK; FISH FIRST –
LEWIS RIVER; and RICHARD DYRLAND,

Respondents.

APPELLANT STOREDAHL'S OPENING BRIEF

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I. INTRODUCTION

This case asks whether Clark County (the "County") properly denied J.L. Storedahl & Sons, Inc.'s ("Storedahl") request for a rezone to mine approximately 10 million tons of valuable gravel at its Daybreak Mine in Clark County. After reviewing over 700 exhibits and thousands of pages of studies and reports including a Habitat Conservation Plan that would govern mining and a thorough environmental impact statement, and entering 81 pages of detailed findings and conclusions, the County Hearing Examiner ("Examiner") concluded that the standards and criteria for obtaining a rezone had been met. The Clark County Board of County Commissioners ("Board" or "BOCC"), however, reversed the Examiner and denied the rezone, citing a vague concern that the rezone would not further the public welfare.

After denying the rezone, the Board remanded the matter to the Examiner to determine whether mining might be pursued under nonconforming use rights and the diminishing asset doctrine.

Storedahl satisfied the statutory criteria for the rezone *and* for mining under established nonconforming use rights, but the County both denied the rezone and curtailed beyond recognition Storedahl's nonconforming use rights. Moreover, the Board violated the appearance of fairness doctrine by permitting the participation of Commissioner Steve Stuart, who, prior to joining the BOCC, had partnered with the respondents in this very action to organize community opposition to the Daybreak Mine

expansion. Commissioner Stuart then cast the tie-breaking vote to deny Storedahl's use of its property.

In declining to disqualify Commissioner Stuart, and then in denying the requested rezone and restricting Storedahl's nonconforming use rights, the County committed clear error that is reviewable and reversible under the Land Use Petition Act ("LUPA"), Chapter 36.70C RCW. This Court should reverse the County's decisions below.

II. ASSIGNMENTS OF ERROR

1. The BOCC erred in reversing the Examiner's decision and denying the requested rezone for the Daybreak Mine property, and the superior court erred in affirming that decision.

2. The BOCC erred in holding that August 1973 was the date the Daybreak Mine became a nonconforming use for purposes of the application of the diminishing asset doctrine, thus limiting the parcel to be mined under the diminishing asset to the 71 acres covered in a DNR reclamation plan, and the superior court erred in affirming that decision.

3. The BOCC erred in allowing Commissioner Stuart to participate in the decision regarding the Daybreak Mine notwithstanding his prior affiliation with an organization sponsoring opposition to the project prior to being appointed to the BOCC, and the superior court erred in affirming that decision.

4. The superior court erred in refusing to allow discovery regarding the claimed appearance of fairness violation and in quashing

Storedahl's request under the Public Records Act, Ch. 42.56 RCW, to review correspondence between Mr. Stuart and groups opposing the project.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the BOCC unlawfully deny the rezone, approved by the Examiner, on "public welfare" grounds where the Board entered no findings or relevant explanation to support the decision? Ground for reversal: RCW 36.70C.130(1)(b), (c), (d). Assignment of Error 1.

2. Did the BOCC unlawfully deny the rezone, and thereby limit mining on a substantial portion of the Daybreak Mine, on the purported grounds that the County could achieve environmental benefits of the Habitat Conservation Plan through other regulatory controls? Grounds for reversal: RCW 36.70C.130(1)(b), (c), (d). Assignment of Error 1.

3. Did the County erroneously conclude that mining on the Storedahl property was a nonconforming use for purposes of the diminishing asset doctrine as of the first rezone in 1973, where the Clark County Code ("CCC" or "Code") expressly provided that existing lawful uses "shall continue as conforming uses"? Grounds for reversal: RCW 36.70C.130(1)(b), (d). Assignment of Error 2.

4. Did the County err in limiting mining under the diminishing asset doctrine to the 71 acres referenced in a DNR reclamation plan where the Code permitted expansion on the "parcel" on which the mine was located, and the contiguous ownership of the property at the time was 350 acres and where the record showed an intent to mine the entire site at the

time of nonconformity, January 1, 1995? Grounds for reversal:

RCW 36.70C.130(1)(b), (d). Assignment of Error 2.

5. Did the BOCC err in permitting Commissioner Stuart to decide the case after he was duly challenged on bias and appearance of fairness grounds related to his prior advocacy role opposing the Daybreak Mine? Grounds for reversal: RCW 36.70C.130(1)(b), (c), (d). Assignment of Error 3.

6. Did the superior court wrongfully deny petitioners the right to access to public documents under Ch. 42.56 RCW and to conduct limited discovery pursuant to RCW 36.70C.120(2)(a) and (b) and (5), where Commissioner Stuart failed to disclose facts material to the issue of bias at the start of the appeal process. Grounds for reversal: RCW 36.70C.130(1)(d) and (f). Assignment of Error 4.

IV. STATEMENT OF THE CASE

This case asks whether a municipal government may prohibit the proposed expansion of a beneficial surface mine that extracts mineral deposits essential to development in the state¹ simply because it concludes—without any supporting findings—that the mine is not in the public interest. The extensive record developed in this case shows that every state and federal agency to review the proposed mine expansion has

¹ The public interest in accessing significant mineral deposits is found in the goals of the state's Growth Management Act, RCW 36.70A.020(8), and the legislative declaration in the state's Surface Mining Act that "the extraction of minerals by surface mining is an essential activity making an important contribution to the economic well-being of the state and nation." RCW 78.44.010.

found few negative project impacts and ample mitigation for those few impacts. Because this project is well known, well studied, and well understood, the Examiner made factual findings to support a conclusion that the mine expansion advanced the public welfare and was otherwise consistent with statutory criteria.² Based on this record, described more fully below, the Examiner's decision to grant Storedahl's rezone application was well founded and should stand.

A. Statement of Facts

1. Overview of the Daybreak Mine

The Daybreak Mine, a gravel mine comprised of approximately 300 acres, was part of a 350-acre parcel of land formerly owned by the Woodside family, which purchased the property in 1968 and added adjacent lands to the parcel in 1972. CP³ 132 (HE Ex. 738). The site is located roughly equidistant between Battleground and LaCenter in rural Clark County. A small portion of the site lies adjacent to the East Fork Lewis River ("EFLR") and some of the property abuts Dean Creek, an intermittent stream. AR at HE Ex. 276 Figs. 1-1 and 4-2.

Mining—as well as crushing, sorting, stockpiling and other related activities—commenced at the site by 1968, and operated continuously

² Storedahl invites this Court to review the detailed 63-page Staff Report, Administrative Record ("AR") at HE Ex. 390, and the over 80-page Examiner decision, CP 37-117. These show the level of in-depth analysis that provided the foundation for the Examiner's decision to grant Storedahl's rezone application.

³ Because much of the administrative record was submitted as attachments to briefing filed with the superior court, this brief includes citations to the Clerk's Papers ("CP") wherever possible. All other citations are to the AR certified separately to this Court. The index to the AR is found at CP 282-305.

through 1995. CP 42, 134-35. The Washington Department of Natural Resources ("DNR") issued one of the very first surface mining operating permits (#70-10139) for the site in 1971, pursuant to the Surface Mining Act of 1971. CP 751 (HE Ex. 30). A Mr. Paul Zimmerly leased the property for mining purposes in 1975 and this lease was assigned to Storedahl in 1987. CP 2160-61 (HE Ex. 39). The mining permit was transferred to J.L. Storedahl & Sons in 1989. CP 795. Storedahl Properties LLC purchased the property in 1997, and the mine has been operated by J.L. Storedahl & Sons, Inc. (collectively, these entities are referred to herein as "Storedahl"). CP 2406-14.

When Mr. Zimmerly requested DNR approval to transfer the permit to Storedahl, DNR stated its belief at that time that the reclamation plan was comprised of 71 acres and that as the mine expanded, the reclamation permit must be updated. CP 791-92. Ultimately, through an informal hearing process, the DNR determined that the mine operating permit comprised all of the Woodside property (349 acres), consistent with the 1971 application. CP 808-09. Further, DNR issued a 1997 letter (AR at HE Ex. 44) to Storedahl stating that mining permit #70-10139 covered a 349-acre area, and that future mining would require a reclamation permit covering the whole site—a statement which ultimately led to the applications here.

2. Proposed Expansion of the Daybreak Mine

By 1991, Storedahl began to develop a plan to mine outside the 1975 Zimmerly reclamation plan area. AR at HE Ex. 30 at D-24 to -26, Ex. 40 at 6. Because any expansion required a new reclamation plan under the Surface Mining Act, Storedahl commenced efforts to secure the necessary approvals. *See, e.g.*, AR at HE Ex. 30 at D-24 to -27, E-28 to -29. In all, Storedahl's proposed expansion would produce about 10-12 million tons of high-quality gravel over 10 to 15 years. AR at HE Ex. 580 at 15, 39; AR at HE Ex. 390 at 29-30; CP 57-60 (HE Ex. 711); AR at HE Exs. 276, 277.

Storedahl hired environmental scientists and engineers to assist in developing an overall mining program and reclamation plan. AR at HE Ex. 580 at 43-44. Storedahl also began working in consultation with the U.S. Fish & Wildlife Service and the National Marine Fisheries Services (collectively, "Services") to develop a Habitat Conservation Plan ("HCP") for the site, pursuant to the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, as well as an Environmental Impact Statement ("EIS") under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.* At the culmination of the EIS and HCP processes, the Services concluded that the proposed project met the requirements for HCP approval and that the EIS adequately identified, analyzed, and mitigated environmental impacts. AR at HE Ex. 410, 414-15, 439.

As part of this process, Storedahl began seeking all applicable permits and approvals, including, at the local level (1) a Site Plan Review for the overall mine plan, (2) a Conditional Use Permit ("CUP") for

operation of a rock crusher, (3) a wetlands permit for planned wetland enhancement, (4) a Shoreline Substantial Development Permit and Shoreline CUP for, among other things, reclamation in the statutory "shoreline area" of the site, (5) a Habitat Conservation Ordinance approval, and (6) an application for designation of a surface mining overlay (or "S-Overlay") rezone for part of the property. *See* discussion, AR at HE Ex. 390 at 28-59. DNR approved a reclamation plan to implement the planned expansion, AR at HE Ex. 712, Att. 20; the Department of Fish & Wildlife issued Hydraulic Project Approvals for Dean Creek rehabilitation and pond modifications, AR at HE Ex. 712, Att. 19; and Storedahl obtained many other approvals for its planned mine expansion.⁴

⁴ A summary of some of the HCP conservation measures and agency approvals is recounted at CP 1290-96 and includes creating a perpetual conservation easement over the entire property, creating many acres of emergent and forested wetlands, establishing a \$1 million endowment, conveying all water rights for instream flows to benefit salmon and habitat, conveying the property in fee to a non-profit organization for future park use, and many other benefits. Further, in reviewing the project under Executive Order 11988, the Federal Emergency Management Agency ("FEMA") stated that the project would reduce risk of flooding, risk to lives and damage to properties from flooding. AR at HE Ex. 157, Ex. 278 at "FED-4." The Examiner also noted several other key facts about the project:

[The] proposed mine (as opposed to the historic mining operation) will be more than 1,800 feet from the EFLR, outside of the [coastal management zone], outside the 100-year floodplain, and mostly outside of the 500-year floodplain. Finally the beneficial effects of riparian and wetland habitat restoration . . . , \$250,000 in habitat restoration services, a \$1 million habitat restoration endowment, and the ultimate protection of the entire property from development will, over the long-run, substantially benefit the listed fish and their habitat.

3. Summary of Zoning Regulations Applicable to the Daybreak Mine

When mining at the Daybreak Mine commenced in 1968, the entire 350-acre Woodside property was zoned "F-X," CP 1372, a zone that permitted all uses except those authorized in a heavy manufacturing zone, CP 1528. As the Examiner found, the F-X designation permitted "mining as a use allowed outright." CP 105 (HE Ex. 738).

In 1973, the County amended the F-X zone to prohibit *new* mines but expressly protected existing mines by enacting a provision stating that they "shall continue as conforming uses." CP 1379, 1528.

In 1980, the County again amended its zoning ordinances, this time eliminating the F-X zone and adopting Agriculture ("AG") zoning, overlaid with a Surface Mining ("AG-S") zone, which covered the majority of the Woodside property. CP 733. The 1980 amendment also established a "surface mining combining district," CP 1528, 1556-58 (former CCC Ch. 18.329), to designate properties within AG-20 and other resource zones that were suitable for mining. The County determined the Woodside property was suitable for mining and designated 270 acres of the Woodside property, including the active Daybreak Mine, with the S-Overlay. CP 733, 1371-74. The 1980 Code amendments retained the protections for existing mines, directing that they "shall continue as conforming uses," codified in 1980 at CCC 18.411.070. CP 1379.

CP 101. The Shoreline Hearings Board affirmed all shoreline permits and found that the HCP adequately addressed all water quality issues. CP 369.

In late 1994 (effective 1995), the BOCC adopted a County Comprehensive Plan policy prohibiting mining in the mapped 100-year floodplain, including the EFLR. Consequently, the County reduced the S-Overlay from 270 acres (including the area of active mining) to only 60 acres on the Daybreak Mine site as the S-Overlay was removed from areas thought to be largely in the 100-year floodplain. CP 931 (HE Ex. 40) and CP 1373-4 (AR at HE Ex. 712 Tab 15 (map)).⁵ Effective January 1, 1995, the County also repealed the "conforming use" language for uses commenced in the former F-X zone, making Storedahl's mining activities nonconforming uses.

B. Procedural History

1. Proceedings before the Examiner and Board

Administrative proceedings in Clark County involved multiple appeals and remands. The three Examiner decisions constitute the proceedings before the finder of fact in an open record hearing, and the three BOCC resolutions collectively represent the "final decision" that this Court is to review under the terms of RCW 36.70C.130(1)(a-f).

(a) *Hearing Examiner* (November 2004 Decision)

⁵ In 2000, FEMA revised its flood insurance rate map ("FIRM"), concluding that most of the Daybreak Mine was actually *not* within the 100-year floodplain. The County adopted the new map for County use. AR at HE Ex. 157. As is explained below, this revision to the flood map was pivotal in leading the Examiner to conclude that the Daybreak Mine expansion would comport with the Comprehensive Plan policy prohibiting mining within the 100-year floodplain. See § VI.B.2 below.

The local administrative proceedings began before the Examiner, who considered Storedahl's permit applications, Storedahl's application for designation of the S-Overlay rezone for the site, and appeals challenging the adequacy of the County's SEPA EIS. At the conclusion of these proceedings, the Examiner issued an 81-page decision in November 2004. CP 37-117. The Examiner reviewed approximately 700 exhibits, the EIS, HCP, and other federal supporting materials, staff reports, and briefs, and he ruled as follows: (1) approved the S-Overlay rezone as consistent with the newly approved FEMA floodplain map; (2) approved all County permit applications; (3) upheld the environmental review and denied the SEPA challenges; and (4) adopted various conditions of approval. *Id.*

(b) *BOCC* (Resolution No. 2005-02-14)

When the Examiner's November 2004 decision was appealed to the BOCC, the Board held a closed-record appeal pursuant to CCC 40.510.030(H)(3). The Board addressed the Examiner's decision by (1) reversing the Examiner's approval of the S-Overlay rezone, (2) affirming all permit decisions, and (3) denying the opponents' SEPA appeal. CP 119-27. The Board remanded to the Examiner to determine whether, in the absence of a rezone, Storedahl's mining expansion was consistent with nonconforming use rights for the Daybreak Mine. CP 2426-35.

(c) *Hearing Examiner on remand*

On the first remand, the Examiner addressed the nature and extent of nonconforming use rights and concluded: (1) that the date on which mining on the Daybreak property became nonconforming was August 1973, but

nevertheless (2) that under the diminishing asset doctrine, Storedahl could mine the entirety of the former Woodside property. CP 130-48 (HE Ex. 738).

(d) *BOCC* (Resolution No. 2005-08-13)

Friends of the East Fork and Fish First ("FOEF/FF") appealed the grant of nonconforming use rights, and Storedahl appealed the decision establishing 1973 as the date of nonconformity. The BOCC affirmed that 1973 was the date of nonconformity, but reversed the Examiner's decision regarding the scope of Storedahl's nonconforming use rights. From there, the Board remanded a final time for resolution of one final issue that is not before this Court; on appeal, the Board affirmed the Examiner and issued its final decision. CP 151-55.

2. The Superior Court Action

The BOCC's decisions are collectively a "final determination" for purposes of the LUPA, RCW 36.70C.020, and appeals were filed both by Storedahl and project opponents. Upon review of the record and the arguments of counsel, the Honorable Judge Nichols of the Clark County Superior Court entered a decision, ruling in relevant part as follows:

- Upholding the denial of the rezone (denying Storedahl's appeal);
- Denying the opponents' SEPA appeal;
- Upholding the nonconforming use decisions of the County (denying Storedahl's appeal);
- Upholding the decision to allow Commissioner Stuart to

participate in the hearing (denying Storedahl's appeal); and

- Dismissing Storedahl's claims for damages against the County.

The judgment is found at CP 2167-73 (Memorandum Opinion); *see also* CP 2216-17. This appeal by Storedahl followed. Neither the County nor the opponents appealed the superior court's adverse rulings.

V. SUMMARY OF ARGUMENT

This case presents three overarching questions. The first concerns the validity of BOCC's grounds for reversing the Examiner's approval of Storedahl's rezone application. The County failed to follow its own Comprehensive Plan and statutory criteria for rezone applications and denied the rezone based solely on unidentified "public welfare" grounds. In this quasi-judicial administrative review of a rezone decision, the BOCC disregarded the Examiner's findings and simply disagreed with the Examiner's conclusion without explaining or supporting its decision with facts in the record. The BOCC's summary rejection of the rezone was clearly erroneous and should be reversed.

The second question asks whether the County erroneously concluded that the surface mine became nonconforming in 1973, even though the 1973 County Code directed that existing mines "shall continue as conforming uses." The County's decision was clearly erroneous because it violated every canon of statutory construction and was inconsistent with years of conduct approving mine expansion.

Only if both of these issues are resolved in the County's favor need this Court address the third and final question: whether the BOCC and the trial court erred in ruling that Commissioner Stuart's participation on the BOCC in this case did not violate the appearance of fairness doctrine, notwithstanding his prior efforts to organize public opposition to the mine expansion.

Appellant Storedahl believes the County committed clear error on all three issues, and respectfully requests that this Court reverse the decisions below.

VI. ARGUMENT

A. Standard of Review

Administrative land use decisions are subject to judicial review under LUPA, Chapter 36.70C RCW. In reviewing a land use decision, this Court stands in the same position as the trial court and limits its review to the administrative record before the BOCC. *Pavlina v. City of Vancouver*, 122 Wn. App. 520, 522, 94 P.3d 366 (2004). Storedahl is entitled to its requested relief if it satisfies any one of the following LUPA standards:

- (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
- (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
- (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

- (d) The land use decision is a clearly erroneous application of the law to the facts;
- (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision;
- (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1)(a-f). Standards (a), (b), (e), and (f) present questions of law reviewed de novo by this Court. *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006). Standard (c) concerns a factual determination that this Court reviews for substantial evidence. *Id.* at 768. Standard (d) involves application of law to the facts and is reviewed under a clearly erroneous standard. *Id.* See also *Peste v. Mason County*, 133 Wn. App. 456, 136 P.3d 140 (2006), *rev. denied*, 159 Wn.2d 1013, 154 P.3d 919 (2007).

B. The Board Erred in Denying Storedahl's Rezone Application.

The BOCC erred in concluding that Storedahl was not entitled to a rezone. The BOCC made that determination without any explanation of how Storedahl had failed to satisfy the statutory criteria for a rezone, how the Examiner had failed to make the predicate findings, or how the record failed to support the Examiner's decision to grant the rezone. The Board's erroneous decision disregarded the Examiner's extensive review of a comprehensive record and entry of over 80 pages of findings and conclusions in support of the rezone. The Examiner's November 2004 decision approved all of the requested permits and the rezone, and denied the SEPA appeals of project opponents. CP 37-117. The BOCC affirmed

the permit decisions and rejected the SEPA appeals, but nevertheless offered only the vague statement that a rezone would not further the public welfare. Because the rezone was properly granted by the Examiner and improperly reversed by the BOCC, the rezone should be reinstated.⁶

The BOCC gave one solitary ground for reversing the Examiner and denying the rezone:

The zone change should be denied because the change does not further the public health, safety, morals or welfare as required by CCC 18.503.060(3).

CP 121 (Resolution 2005-2-14). At no point did the BOCC explain how the public welfare would be adversely impacted by a rezone, and the record would not have supported such an explanation if one had been offered. Instead, the BOCC explained that, in its view, the Examiner had wrongly concluded that the public welfare was served because the substantial and comprehensive mitigation provided by Storedahl in the federal HCP and federal and state environmental review processes would only be implemented if the property were rezoned:

The Hearings Examiner erred in concluding the "public interest" rezone criteria was met because substantial mitigation would not occur if mining proceeded under the nonconforming use rights.

CP 121-22.

⁶ Storedahl specifically took the position during the proceedings below that if the project were approved in substantially the form submitted, Storedahl would relinquish the corresponding nonconforming use rights for the Daybreak Mine site. AR at HE Ex. 580 (Tr. of Apr. 29, 2004 hearing) at 29-30.

The BOCC offered two reasons for concluding that the Examiner erroneously relied on the comprehensive mitigation commitments as furthering the public welfare:

First [stating its belief that most of the mitigation measures in the HCP were designed to avoid "take" liability under the federal Endangered Species Act], nothing in the record suggests that the applicant would alter its commitment to a federal safe sanctuary depending on whether county approvals are premised upon a conforming zone change or nonconforming mining rights. Second, the county has independent authority to regulate nonconforming uses, so long as such regulation does not effectively prohibit the use.

CP 122. This Court should reverse the Board's decision denying the rezone because: (1) its analysis was factually wrong, as the comprehensive mitigation commitments in the HCP, EIS, and elsewhere expressly contemplated approval of the rezone, *see, e.g.*, citations at 2100-01; and (2) even if the mitigation measures were *not* tied to the rezone and would have been implemented pursuant to Storedahl's exercise of nonconforming use rights, the Board failed to explain why the rezone did not further the public welfare. It is one thing to say that Storedahl's substantial mitigation commitments would be put into effect under *any* approval scenario; it is another to say that the rezone is affirmatively detrimental to the public welfare. The Board offered no finding or explanation to support the latter critical determination.

This section will explain that the site met all of the objective statutory criteria set forth in the County Code and the Comprehensive Plan for the extension of the AG-S overlay rezone as requested by Storedahl; that

the application adequately identified and addressed all environmental and public health and safety issues required for designation with the S-Overlay as requested by Storedahl; and that the BOCC's ground for the reversing the rezone was factually and legally insufficient to warrant reversal.

1. In exercising its quasi-judicial appellate role, the Board must explain its decision in light of determinative criteria.

In determining whether the BOCC adequately supported its summary reversal of the Examiner's rezone decision, this Court looks to the County Code provision on Type III appeal procedures, which applies to parcel-specific rezones. CCC 40.510.030(H)(3)(b)(3). If the BOCC is to reverse a Type III decision based on an assignment of error, the Board is *required* to include:

- (a) A statement of the applicable criteria and standards in this code and other applicable law relevant to the appeal;
- (b) A statement of the facts that the board finds show the appealed decision does not comply with applicable approval criteria or development standards[.]

Id.

Under the Code, the BOCC must review "appeals" of the Examiner's decisions "on the record" established by the Examiner. *Id.* Unlike initial zoning decisions, in which the BOCC is vested with broad discretionary "legislative" authority entitled to substantial deference, *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 243, 821 P.2d 1204 (1992), applications for site-specific rezones are "adjudicatory" and subject to much closer judicial

scrutiny, with no presumption of validity as to the BOCC's reversal, *Parkridge v. City of Seattle*, 89 Wn.2d 454, 573 P.2d 359 (1978).⁷

A leading authority on zoning matters explains the standards by which quasi-judicial decisions are reviewed. Arden H. Rathkopf, *The Law of Zoning and Planning* § 40:25 (2005 ed.). The reviewing administrative agency—here the BOCC—must evaluate the rezone application

against legislatively predetermined and objective criteria of general applicability. The record of the quasi-judicial action must show, first, fact findings that are supported by substantial evidence in the record and, second, a statement of reasons or conclusions by the decision making body that relate the fact findings to the predetermined criteria in a way that demonstrates satisfaction of those criteria.

Id. (emphasis added and internal citations omitted).

Decisions on site-specific rezones must therefore be evaluated under legislatively established criteria (here Comprehensive Plan policies and development regulations), and these criteria constrain the County's discretion and particularly so in Washington, where the law mandates that, where a proposal meets the guidelines or standards, such criteria are “determinative” of real property uses. RCW 36.70B.030(2).⁸

⁷ Although the burden is on the party seeking a site-specific rezone, the actions of the administrative reviewing authority are adjudicatory and are not given deference. 89 Wn.2d at 460-464. In *Parkridge*, the city downzoned a property, thereby restricting land uses; however, the court carefully reviewed the record which the City claimed supported its site-specific downzone, and the court reversed when it found the record did not support the city council's downzoning of the property. *Id.*

⁸ State law provides:

2. The County has adopted standards that govern review of rezone applications, and the Examiner concluded that those criteria had been satisfied.

Washington State does not require every permit to be guided by specific criteria; Washington courts will uphold a local permit decision if the decision is governed by “only general standards, such as those contained in a comprehensive plan.” *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn.2d 782, 797, 903 P.2d 986 (1995) (citing *State ex rel. Standard Mining and Dev. Corp. v. City of Auburn*, 82 Wn.2d 321, 329-30, 510 P.2d 647 (1973)). Where standards are adopted and are satisfied, however, those criteria are determinative and conclusive.
RCW 36.70B.030(2), .040.

The County enacted detailed standards and policies for a rezone approval. Under the County Code, a party seeking a parcel-specific rezone must show that (1) the zone change "is consistent with the Comprehensive Plan map designation," (2) it is "consistent with the plan policies and

(2) During project review, a local government or any subsequent reviewing body shall determine whether the items listed in this subsection are defined in the development regulations applicable to the proposed project or, in the absence of applicable regulations the adopted comprehensive plan. At a minimum, ***such applicable [development] regulations or [comprehensive] plans shall be determinative of the:***

(a) ***Type of land use permitted at the site***, including uses that may be allowed under certain circumstances, such as . . . conditional and special uses, if the criteria for their approval have been satisfied.

RCW 36.70B.030(2) (emphasis added).

locational criteria and the purpose statement of the zoning district,"

(3) "conditions have substantially changed since the zone was applied to the property and the rezone furthers the public health, safety and welfare," and

(4) there are "adequate public facilities and services to serve the requested zone change." CCC 18.503.060(1-4) (now codified at

CCC 40.560.020(H)(3-4)). Storedahl satisfied these criteria.

The Examiner thoroughly addressed the statutory rezone criteria and concluded that they had been amply satisfied.

Rezone Criteria	Hearing Examiner's Analysis
<p>CCC 18.503.060(1)⁹</p> <p>The "zone change is consistent with the comprehensive plan map designation." CP 58.</p>	<p>Examiner's Finding 1 - "This requirement is met" because the "plan designation for the subject property is Agricultural (AG-20). The Surface Mining Combining District (S) is an overlay that can be combined with other resource zones, including AG-20..." CP 58 (HE Ex. 711).</p>
<p>CCC 18.503.060(2)</p> <p>The "zone change is consistent with the plan policies and locational criteria and the purpose statement of the zoning district." CP58.</p>	<p>Examiner's findings 2 through 17 found that "evidence in the record" and "staff's favorable recommendation" support the conclusion that the rezone complied with each applicable comprehensive plan policy for locating surface mines. CP 58-64.</p>
<p>CCC 18.503.060(3)</p> <p>"[C]onditions have substantially changed since the zone was applied to the property and that the rezone furthers public health, safety... or</p>	<p>Examiner's Finding 18. The Examiner found that FEMA had changed the floodplain map, removing the mining activity from the 100-year floodplain, a substantial change since the zone</p>

⁹ The rezone application vested under the County Code, Title 18 Code Chapters, which have since been recodified into Title 40.

<p>welfare." CP 64.</p>	<p>was applied. CP 65.</p> <p>Examiner's Findings 19-22. Many findings supported a conclusion that the rezone furthered the public welfare, including findings regarding the high quality of the gravel (finding 19),¹⁰ that groundwater wells would be protected (20), that concerns about noise and aesthetics would be satisfactorily addressed (21), and that species and the environment would be protected (22). CP 65-67.</p> <p>The Examiner found that the proposal would "insure proper management and protection of the property so that adverse effects of naturally caused events are appropriately addressed. This will add to the public welfare." <i>Id.</i></p>
<p>CCC 18.503.060(4)</p> <p>"There are adequate public facilities and services to serve the requested zone change." CP 67.</p>	<p>Examiner's Finding 23 found that the public facilities requirements were met. CP 67.</p>

In addition, the Examiner thoroughly evaluated 15 additional specific Comprehensive Plan policies, all of which were met and all of

¹⁰ The Examiner detailed the strong public policy supporting extraction of significant mineral resource deposits. The statewide expression of this policy is found both in the Surface Mining Act, Chapter 78.44 RCW, and the Growth Management Act, Chapter 36.70A RCW, which collectively promote the productive use of mineral resources and the designation and protection of those resources for long-term use. RCW 36.70A.080. This state policy is reflected in the Comprehensive Plan, which establishes mineral resource criteria and specific goals for evaluating and designating mineral resource lands with the S-Overlay. AR at HE Ex. 390 at 28-35 (containing planning staff's project review and recommendations regarding comprehensive plan criteria for mineral resources).

which supported designating this high-quality mineral site with the S-Overlay. CP 58-65 (Findings 3-17). The Examiner found, for example, that Storedahl's rezone was consistent with Comprehensive Plan Policy 4.5.9 regarding mitigation of potential adverse effects on water quality, fish and wildlife, adjacent activities, and the scenic quality of the shorelines, CP 63 (Finding 12); Policy 4.5.14 favoring continued mining at existing active sites, CP 63-64 (Finding 14); and Policy 4.5.19 regarding the high commercial or industrial value and quality of the approximately 10 million tons of resource to be extracted, CP 64 (Finding 17).

Furthermore, the Examiner considered the substantial environmental review performed for the project under the ESA and NEPA. With the 18 conservation measures and 10 monitoring and evaluation measures of the HCP, the considerable mitigation conditions in the NEPA FEIS, and the additional conditions of approval,¹¹ the Examiner concluded that the environmental consequences were adequately identified, evaluated, and mitigated.¹² The Examiner's environmental findings retain their full

¹¹ See, e.g., CP 113-14 (HE Condition A-3) (requiring implementation of a closed-loop gravel washwater system).

¹² The Examiner's Finding 12 stated:

This Policy [4.5.9 requiring the minimization and mitigation of adverse environmental impacts for mining proposals] is addressed by many of the county ordinances, the shoreline master program and SEPA process. The FEIS and HCP Exs. 276 & 277 include 18 conservation measures that will minimize impacts to water quality, fish and wildlife habitat and surrounding land use activities. *The conclusion of the FEIS is that all of the potentially adverse impacts are mitigated. The scenic qualities of the shoreline area [are]*

validity because, although challenged by project opponents, the appeals were uniformly denied, and those denials were not appealed to this Court. As such, the Examiner's findings regarding the adequacy of all environmental determinations and mitigation measures stand undisputed. The findings did not turn on whether the site could or could not be mined as a nonconforming use, but on the merits of the rezone application before the Examiner. The objective record supported the rezone regardless of the nonconforming use status.

3. The Board disregarded this extensive and comprehensive review and simply substituted its own summary determination.

The Board reversed the Examiner's approval of the rezone request without reversing any finding of fact, purportedly on the basis that the rezone "does not further the public health, safety, morals or welfare as required by CCC 18.503.060(3)." CP 121. That conclusion, without any effort to show support in the record or explain how the public welfare would be harmed, flatly ignored the Examiner's application of the statutory criteria and conclusion that the rezone was in the public interest.

The Board did not take exception to the Examiner's statement of applicable standards in the County Code, nor did it disagree with the Examiner's findings of fact. *See* CCC 40.510.030(H)(3)(b) (requiring that the Board enter a "statement of the facts that the board finds show the

addressed below in a separate section. Based upon these facts, the examiner concludes that this policy is met.

CP 63 (HE Ex. 711) (emphasis added).

appealed decision does not comply with applicable approval criteria"). Because it offered no alternative standards or findings, the Board is not entitled to this Court's deference. Such deferential review should be accorded to the decision of the highest finder of fact. *City of University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001) ("Evidence will be viewed in the light most favorable to . . . the party who prevailed in the highest forum that exercised fact-finding authority, a process that necessarily entails acceptance of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.") (internal quotation marks and citation omitted).¹³

Although this is a closed record appeal, the final decision is that of the BOCC and this Court is deferential only where the Board made findings supported by the record. Where, as here, the Board took no exception to the Examiner's findings, the Examiner's findings are binding in future proceedings and the BOCC's decision must be consistent with the Examiner's findings. *See Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. 795, 802, 801 P.2d 985 (1990) ("It also follows that because the Council did not make findings, it did not disagree with the examiner's findings and is, therefore, bound by them. . . . The Council simply disagreed with the examiner's conclusion that the proposed conditions would effectively mitigate those effects."). Even where findings are

¹³ The appellate standard for administrative appeals follows a similar line of judicial deference to the trier of fact. *See, e.g., Parkridge*, 89 Wn.2d at 464 (the "rule is that if there is substantial evidence to support the trial court's findings, we will not substitute our judgment for the court's even though, had we been the trier of fact in the first instance, our judgment might have been different.").

provided, they must be based on more than unfounded fears and community displeasure; they must be based on facts in the record. *Sunderland*, 127 Wn.2d at 798. Moreover, where objective standards are not used to justify a decision, "it is appropriate for the decision-making body to have the burden to justify its decision." *Id.* at 797. Here, the Board clearly did not meet its burden and should therefore be granted no deference.

Even if the Board's decision were entitled to deference, however, the Board offered no relevant substance to which to defer. The BOCC's extra-record speculation about whether Storedahl would have implemented an HCP even if the rezone were *denied* is not relevant to a determination that the public welfare would be harmed if the rezone were *granted*. Nor is the Board's suggestion that it could regulate the Daybreak Mine as a nonconforming use relevant to application of the rezone criteria. The Board had before it an application for a rezone, not a proposal to mine as a nonconforming use. Further, the Board did not indicate what it would do with its nonconforming use authority. The Board's decision simply superimposed an unquantifiable and irrelevant criterion—whether the County could or could not regulate mining as a nonconforming use—on the criteria already adopted by the County in the Comprehensive Plan and Code for review of rezone applications.

Because the Examiner showed full satisfaction of the statutory rezone criteria and the Board articulated no relevant basis for reaching a contrary view, the adopted criteria in the Comprehensive Plan are determinative on the permitted uses of property. RCW 36.70B.030(2).

The Board took issue with only one aspect of one rezone criterion—the public welfare provision in CCC 18.503.060(3). The decision expresses no standard at all and lapses into a subjective and unmeasurable expression of the public interest used to deny projects due to public controversy rather than the merits. Such subjective grounds for land use decision-making are insufficient to warrant the denial in this case. *See Anderson v. City of Issaquah*, 70 Wn. App. 64, 82-83, 851 P.2d 744 (1993) ("It is equally unreasonable, and a deprivation of due process, to expect or allow a . . . board . . . to create standards on an *ad hoc* basis, during the design review process."). Accordingly, this Court should reverse the decision of the BOCC (overturning the Examiner's approval of the rezone).

C. The Board Erred as a Matter of Law in Ruling that Storedahl's Mining Operations Became Nonconforming in 1973.

Alternatively, even if the Board's rezone denial were permitted to stand, the County committed clear error in determining the date on which mining operations became nonconforming.¹⁴ The County erroneously concluded that mining activities at the Daybreak Mine site became nonconforming in 1973. This conclusion is directly at odds with the plain

¹⁴ The state Supreme Court has defined nonconforming uses as follows:

A nonconforming use is a use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the zoning restrictions applicable to the district in which it is situated.

University Place, 144 Wn.2d at 648 (quoting *Rhod-A-Zalea and 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 6, 959 P.2d 1024 (1998)).

language of the County Code, is fully inconsistent with the County's course of conduct after 1973, and should be reversed. The County's error is not harmless because it radically limits the amount of rock Storedahl can mine under the diminishing asset doctrine.¹⁵

The language of the 1973 County Code, relied on by the Examiner and the BOCC, unambiguously recognized mining at the Daybreak Mine as a "conforming" use:

18.30.070 Existing permitted uses. All uses in existence and occurring on a specific parcel of land which legally qualified as "permitted uses" under provisions of the former F-X Rural Use Zone ***shall continue as conforming uses*** after the effective date of the ordinance codified herein and for the duration of this interim measure, but in no case shall any use be allowed to expand into adjoining or contiguous property without an approved zone change. (Ord. 73-235 (part), 1973).

CP 1378 (HE Ex. 716) (emphasis added). In spite of the clarity of the declaration that previously permitted uses "shall continue as conforming uses," the Examiner held that, "***regardless of the term used in the code . . .***

¹⁵ As explained more fully below, the date on which mining at the Daybreak site became a lawful nonconforming use under the laws of the County is fundamental to establishing the scope of mining rights under the diminishing asset doctrine:

The proper scope of a lawful nonconforming use in an exhaustible resource is the *whole* parcel of land owned and ***intended to be used by the owner at the time the zoning ordinance was promulgated.***

University Place, 144 Wn.2d at 651 (second emphasis added).

the Examiner finds that the Daybreak mine became nonconforming in August 1973." CP 139 (HE Ex. 738) (emphasis added).¹⁶

The record below demonstrates that mining and processing were in existence and occurring on the "parcel"¹⁷ as "permitted uses" in the F-X zone, CP 117, and the only question for the County and for this Court is whether the legal term of art "conforming uses" may be construed to mean its opposite: "nonconforming uses." Because it cannot, the County's finding that mining became a nonconforming use in 1973 must be reversed.

¹⁶ In full, the Examiner held as follows:

The parties and the County's attorney emphasize the use of the expression "conforming uses" in this code section. However, the rest of the section clearly comports with the common law notion of a nonconforming use. *The Examiner finds that, regardless of the term used in the code, restrictive zoning is first imposed on mining operations in the County's F-X zone with the adoption of this code in August 1973 because the use is no longer allowed outright in the F-X zone, and existing mines are not allowed to expand. For purposes of this decision, therefore, the Examiner finds that the Daybreak mine became nonconforming in August 1973.*

CP 139 (HE Ex. 738) (emphasis added). The BOCC affirmed this interpretation and further limited the scope of nonconforming use rights to 71 acres of the 350 formerly owned by the Woodsides. CP 153 (Res. 2005-08-13).

¹⁷ Although this issue did not provide a basis for the Examiner's limitation on Storedahl's nonconforming use rights, notably the Woodside property in 1973 was 350 contiguous acres of land, with no noncontiguous holdings. By common term usage, the Woodside "parcel" was the 350 acres that existed in 1973 and encompassed the "continuous tract" or parcel. *See, e.g., Black's Law Dictionary* 1144 (8th ed. 2004) (defining "parcel" as a "tract of land; esp., a **continuous tract or plot of land in one possession**, no part of which is separated from the rest by intervening land in another's possession") (emphasis added). Under the express language of the 1973 code, mining on the entirety of the Woodside parcel was a "conforming use" in 1973, and the Examiner erred in concluding that mining was nonconforming because mining "could not expand," CP 132 (HE Ex. 738).

1. The Code shows that the County understood the distinction between conforming and nonconforming uses.

The County zoning code showed that the County legislature understood the distinction between conforming and nonconforming uses. In fact, the Code effective in 1973 contained a clear definition of "nonconforming use":

“Nonconforming use” means a use to which . . . land was lawfully put at the time the ordinance codified herein became effective, but which is *not a permitted use* in the zone in which it is located.

CCC 18.02.330 from 1961-1973, CP 1549-50 (HE Ex. 724) (emphasis added). By contrast, in that same year, the Code provision governing surface mining in the F-X zone (which included the Daybreak Mine) provided that activities existing at that time would continue as "permitted uses," and "shall continue as conforming uses." CP 1378.

In addition, following 1973, the code provision governing surface mining in the F-X zone was amended two more times, and those amendments further reflected the County's clear understanding of the distinction between conforming and nonconforming uses:

August 1973. This provision, quoted above, prohibited certain new uses in the F-X zone, but expressly mandated that formerly lawful existing uses on parcels in the F-X zone “shall continue as conforming uses....” The only limitation on lawful existing uses was that they could not be expanded to adjoining or contiguous “property” without a rezone. CP 1378.

June 1980. The County repealed the F-X zone in 1980 and designated the vast majority of the Woodside property as an agriculture (AG) zone and a “surface mining overlay” (S-Overlay), which expressly permitted mining.

CP 1373. The 1980 ordinance retained the conforming use clause stating that “existing uses” on a parcel in the former F-X zone “shall continue as conforming uses,” and again prohibited the expansion of the mining activity to adjoining or contiguous “property” without a rezone. CP 1379.

January 1995. The County adopted the Comprehensive Plan establishing matrix criteria for designating mine sites, prohibiting mining in the 100-year floodplain, eliminating the S-Overlay on the area of active mining on the Woodside property and designating only 60 acres, with the S-Overlay bordering 61st Street, CP 1374, and repealing in its entirety the “shall continue as conforming uses” language of the 1973 and 1980 ordinances, CP 1381-84.

The County characterized surface mining as a permitted, conforming use in 1973, and again designated surface mining as "conforming" when undertaken pursuant to a surface mining overlay. Not until 1995 did the County prohibit surface mining outright within the 100-year floodplain and eliminate the S-Overlay at the Daybreak Mine, and only then did the County remove all reference to existing activities as "conforming uses." This legislative history demonstrates that the County consistently understood that "conforming" and "nonconforming" are terms of art with very different meanings and different ramifications in land use law.¹⁸ These distinctions may not be disregarded or ignored simply to aid in denying Storedahl's proposed mine expansion.

¹⁸ Local governments treat conforming and nonconforming uses differently. For example, they may terminate nonconforming uses if they are deemed abandoned. *Rhod-A-Zalea*, 136 Wn.2d at 7. Local governments do not have such liberties to restrict *conforming* uses.

2. Canons of statutory construction mandate a literal reading of the 1973 Code provision.

The County erred by failing to give effect to the plain language of its code and by failing to consider related statutory provisions or the statutory scheme as a whole. Notwithstanding that certain new uses in the F-X zone, including new mining, would be prohibited unless accompanied by a zone change, the County plainly *mandated* that established uses in the former F-X zone, including mining, "shall continue as *conforming* uses."

Statutory construction is a question of law that courts review de novo. *Philippides v. Bernard*, 151 Wn.2d 376, 383, 88 P.3d 939 (2004). The primary goal of statutory construction is to ascertain and give effect to the legislature's intent and purpose. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). "If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Id.* Further, "[p]lain meaning is determined from the ordinary meaning of the language used in the context of the entire statute in which the particular provision is found, related statutory provisions, and the statutory scheme as a whole." *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007).

Had the County intended to make established uses, such as mining, *nonconforming* uses, it could have done so. Though it demonstrated elsewhere an understanding of the distinction between conforming and nonconforming uses, it expressly chose in 1973 not to characterize existing surface mines as nonconforming. "[D]eference to an agency's interpretation

is *never* appropriate when the agency's interpretation conflicts with a statutory mandate, and . . . can *never* be interpreted as permission to ignore or violate statutory mandates." 159 Wn.2d at 716 (emphasis added) (internal quotation marks and citation omitted). Here, the County Code *mandated* (using "shall") that existing uses in the F-X zone, including surface mining, were permitted to continue as *conforming* uses.

Further, where a legislative body has used one term, but chooses to use a different term in another statute, courts "*must* recognize that a different meaning was intended by each term." *State v. Roggenkamp*, 153 Wn.2d 614, 625-26, 106 P.3d 196 (2005) (emphasis added); *State v. Nelson*, 131 Wn. App. 175, 179, 123 P.3d 526 (2005) (applying *Roggenkamp*).

The Examiner and the BOCC disregarded all rules of statutory construction, ignored the plain language of the County Code, and construed "conforming" to mean its opposite. By the express and plain language of the ordinance, mining and processing of sand and gravel at the Daybreak Mine site was mandated to be treated as a *conforming* use in 1973.

3. The County's conduct shows that it did not view surface mining as a nonconforming use in 1973.

The County's subsequent administration of zoning ordinances also reveals that it intended existing uses in the F-X zone, including mining, to remain *conforming* uses at the Daybreak site.

a) **The 1980 Surface Mining Overlay and retention of "conforming" language**

In 1980 the County amended its zoning code, changing the F-X zone at the Daybreak Mine site to Agriculture-20 (AG-20), and added a "surface mining combining district" overlay (S-Overlay or AG-S Overlay) to some 270 acres the Daybreak Mine site, CP 929 (HE Ex. 40), including the area of active mining, CP 733 (1980 Zoning Map). The purpose of the S-Overlay ordinance was to "ensure the continued use of rock, stone, gravel, sand, earth, and minerals without disrupting or endangering adjacent land uses." CCC 18.329.020. The ordinance also expressly permitted "[e]xtractions from deposits of rock, stone, gravel, sand, earth, and minerals," CCC 18.329.020(A)(2), as well as "rock crushing," CCC 18.329.020(B)(4). The conclusion that mining on the Daybreak Mine site became a nonconforming use in 1973 is fundamentally inconsistent with the County's 1980 adoption of the AG-S overlay for the Daybreak Mine, which expressly permitted mining.¹⁹

Moreover, in 1980, the County retained the mandatory language that established that uses in the former F-X zones be treated as *conforming* uses:

B. All uses in existence occurring on a specific parcel of land which legally qualified as a permitted use under the provisions of the former (prior to August, 1973), F-X (Rural Use Zone), ***shall continue as conforming uses*** after the effective date of this ordinance, provided, however, in no case shall any use be allowed to expand

¹⁹ The County's own planning director agreed, stating in a 1996 Notice and Order pertaining to the Daybreak Mine site that the 1980 Code amendments' creation of AG-S zoning "permitted agricultural and surface mining uses." CP 929 (HE Ex. 40).

into adjoining or contiguous property without an approved zone change; and further, any expansion on the original parcel shall comply with the standards contained in the district within which the use is permitted.

CCC 18.411.070 (emphasis added). CP 1379.

The Examiner's and BOCC's conclusion that the 1973 ordinance made mining *nonconforming* simply does not square with the fact that while undertaking a wholesale revision of the County's zoning ordinances in 1980, the County retained the "*shall continue as conforming uses*" clause at the same time it added the S-Overlay to 270 acres of the Daybreak site, including the area of active mining. In fact, the ordinance was amended precisely to clarify that expansion was allowed on original parcels but must comply with applicable standards.

b) The 1995 Comprehensive Plan Finally Made Mining a Nonconforming Use.

Effective January 1995, in response to the Growth Management Act ("GMA"), Chapter 36.70A RCW, the County adopted a new comprehensive plan and development regulations. CP 931 (HE Ex. 40). Only at this time—the 1995 Title 18 Zoning Code recodification—did the County finally repeal the 1973 conforming use clause. And only then did the County remove the AG-S zoning from the area of active mining on the Daybreak site and reduce the S-Overlay from 270 acres to a 60-acre area of the Woodside property that had never been mined. CP 931 (HE Ex. 40) and CP 1382; *see also* AR at HE Ex. 712 Tab 15; Ex. 30 at A-9 and A-14.

Whether a nonconforming use is established is generally determined by whether the use existed prior to the time it was prohibited. *Rhod-A-Zalea*, 136 Wn.2d at 6 (defining nonconforming use).²⁰ With the repeal of the 1973/1980 conforming use clause and the removal of the S-Overlay for much of the Daybreak site, mining *only then* no longer complied with the zoning restrictions applicable to the district in which it was located. Therefore, because mining had been lawfully established prior to the zoning ordinance change in 1995, mining became nonconforming in 1995.

c) The 1996 Notice and Order

In 1996, the County planning director issued a Notice and Order ("N&O"), which interpreted the applicable ordinances in relation to the Daybreak Mine site. CP 928-950 (HE Ex. 40). Although this Notice and Order was appealed and never fully litigated and thus is not binding on any party, it reflects the pre-litigation understanding of the County's planning director. The N&O credited Storedahl and its predecessors with the intent to mine the entirety of the site prior "to the adoption of the comprehensive plan in December 1994." CP 935. If the County interpreted its ordinances such that mining became a nonconforming use in 1973, the intent to mine prior to 1994 would have been irrelevant. The N&O also reflects the County's contemporaneous conclusion that mining was permitted in 1980 and became nonconforming in 1995 rather than in 1973:

²⁰ Noting, however, that whether a use is a lawful nonconforming use in the first instance is decided by reliance on the local land use ordinance. *Id.*

With the adoption of a new comprehensive plan in 1980, the Woodside property was rezoned. . . . The vast majority of the Woodside property . . . was subject to a so-called "AG-S," a zoning category which included an "agriculture" and "surface mining combining district" overlay. ***This designation permitted agricultural and surface mining uses.***

CP 929 (emphasis added).

d) The County was aware of the substantial post-1973 expansion of the Daybreak Mine, yet did not demand additional approval.

The County's awareness after 1973 of the expanded mining operations at the Daybreak Mine further demonstrates that the County did not believe such operations were nonconforming. Between 1973 and 1980, mining activity expanded on the Woodside parcel from 2 to 50 acres. *See* CP 869-79 (HE Ex. 30). Between 1980 and 1994, mining increased from 50 acres to 71 acres. CP 880-99.

In 1975 and 1979, the mine operator submitted a proposal to amend and expand the surface mining reclamation plan for the Daybreak site. As part of its review and approval process, the County confirmed that no additional permits were needed, that it was aware that mining was expanding, and that the mine operator and land owners intended to continue expanding. CP 783, CP 2124-39. Further, the County gave no indication that continued mining over the Woodside parcel was prohibited or restricted due to zoning ordinances, maps, or standards. CP 784 (HE Ex. 30).²¹

²¹ A County memorandum noted that a shoreline permit was not required "provided that expansion beyond the limits of the . . . DNR site reclamation plan does not occur." The memorandum does not give any indication that mining

The County's contemporaneous administration of its conforming use ordinance §18.30.070, in 1975, is therefore *inconsistent* with the County's novel contention in this litigation that the 1973 provision mandating that existing uses "shall continue as conforming uses" actually meant the opposite. The new interpretation should therefore be rejected. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990 (2007) (holding that an interpretation is not "entitled to deference" where it was "not part of a pattern of past enforcement, but a by-product of current litigation").

4. The County's use of 1973 as the date of nonconformity significantly reduces Storedahl's ability to mine under the diminishing asset doctrine.

Under the so-called "diminishing asset doctrine," owners of mines that become nonconforming uses due to a zoning change may nevertheless continue mining to the extent *intended at the time* the use became nonconforming. By setting the date of nonconformity at 1973, the County materially affected Storedahl's land use rights under the diminishing asset doctrine.

Most nonconforming uses may continue and even intensify but may not "expand"—commonly considered an extension of the area occupied by the nonconforming use. *See, e.g.*, CCC 40.530.050(C)(2) (expansion of nonconforming use requires site plan approval). However, mines *must expand* in order for the nonconforming use to continue. *University Place*, 144 Wn.2d at 648.

expansion would otherwise be prohibited by the 1973 zone ordinance or maps. CP 784 (HE Ex. 30).

Mines necessarily “grow” by consuming new lands. A special exception to nonconforming use limitations, the diminishing asset doctrine, therefore developed to allow nonconforming mining operations to expand, and Washington has adopted this exception:

Courts have observed that the very nature of the excavating business contemplates the use of land as a whole, not a use limited to a portion of the land already excavated. Such a diminishing-asset enterprise is “using” all of the land contained in a particular asset; as a practical matter it must begin digging at one spot and continue from there to the boundary of its land. ***The entire tract of a diminishing-assets operation must be regarded as a “lot” within the meaning of an ordinance which permits a nonconforming use to continue on “such lot,” for to hold otherwise would be to deny the excavator his use.***

University Place, 144 Wn.2d at 649-50 (quoting from 1 Robert M. Anderson, *American Law of Zoning* § 6.52 (1986) (emphasis added)).

Thus, the focus of the diminishing asset doctrine is the extent of use intended by the owner at the time of nonconformity:

The proper scope of a lawful nonconforming use in an exhaustible resource is the *whole* parcel of land owned and ***intended to be used by the owner at the time the zoning ordinance*** [that caused the nonconformity] ***was promulgated.***

Id. at 651 (second emphasis added).

This Court should conclude that the County erred in selecting 1973 as the date on which surface mining at the Daybreak Mine became a nonconforming use. Such a conclusion begs the question of when, under the diminishing asset doctrine, the owners of the Daybreak Mine demonstrated an intent to mine the entire site. The record before this Court

contains significant evidence that Storedahl and its predecessors intended to mine the entire Woodside site. Indeed, Mr. Woodside, the then-owner of the Daybreak site submitted a mining application in 1989 that showed an intent to mine the entire acreage owned by the Woodsides (349 acres), a fact confirmed in a DNR administrative finding in 1990:

The acreage under permit for Surface Mining Permit No. 10139 is *all lands owned by yourselves in Sections 13, 18, 19, 24.*

CP 690-91 (HE Ex. 24) and CP 808-09 (HE Ex. 30) (emphasis added).

Under the diminishing asset doctrine, Storedahl is permitted to expand its operation over the entire property because the intent to mine the entire site was well established before the zoning change made the Daybreak mining operation a nonconforming use in 1995. This Court should reverse the County's erroneous conclusions, which strip Storedahl's right, under established land use law, to complete mining on the full Daybreak Mine.

D. Commissioner Stuart's Participation in This Case Violated the Appearance of Fairness Doctrine.

Finally, the County's 2-1 decision to reverse the Examiner and deny Storedahl's rezone application was tainted by the participation of Commissioner Steve Stuart. Given his role of organizing opposition to the Daybreak Mine expansion prior to his appointment to the BOCC, Mr. Stuart should have been disqualified from hearing any appeals related to the project. His participation in the appeal, over Storedahl's timely objection, violated the appearance of fairness doctrine by creating the opportunity for public suspicion that the Board's deliberation was not free of the taint of

bias. Mr. Stuart's partiality infected the entire Board, and its decision to deny Storedahl's rezone application should be declared void.

1. The appearance of fairness doctrine retains vitality in Washington.

Prior to joining the BOCC, Mr. Stuart demonstrated through his words and actions that he was committed to the goal of preventing the Daybreak Mine expansion from proceeding. Under well-established Washington case law, Mr. Stuart's subsequent participation on the BOCC necessarily undermined public confidence in the integrity and impartiality of the Board's decision. *Evergreen School Dist. v. Sch. Dist. Org.*, 27 Wn. App. 826, 831, 621 P.2d 770 (1980) (holding that the purpose of the doctrine is "to preserve the highest public confidence in governmental processes which . . . regulate land use"). Because protection of the public confidence is central to the appearance of fairness doctrine, the Board's decision should be voided. *Swift v. Island County*, 87 Wn.2d 348, 361, 552 P.2d 175 (1976) (holding that "any course of conduct reached" in violation of the appearance of fairness doctrine "should be voided").

Washington courts have mandated that governmental processes resulting in "restrictions on the free and unhampered use of property" must be performed in a manner that ensures "the highest public confidence." *Buell v. City of Bremerton*, 80 Wn.2d 518, 523, 495 P.2d 1358 (1972). The appearance of fairness doctrine has evolved as an "extension of the due process requirement that judicial officers be free of any taint of bias," *Evergreen Sch. Dist.*, 27 Wn. App. at 832, and is violated when

"deliberations are blemished by the possibility of partiality or regard to self-interest," *Fleck v. King County*, 16 Wn. App. 668, 673, 558 P.2d 254 (1977). In determining whether a quasi-judicial proceeding has been tainted by an appearance of fairness violation, courts are directed to answer a simple question:

Would a disinterested person, having been apprised of the totality of a board member's personal interest in a matter being acted upon, be reasonably justified in thinking that partiality may exist?

Swift, 87 Wn.2d at 361. "If answered in the affirmative, such deliberations, and any course of conduct reached thereon, should be voided." *Id.* As *Swift* made clear, facts sufficient to create an *opportunity* for public suspicion can violate the appearance of fairness doctrine. *Id.* at 361-62.

Courts have further held that the appearance of partiality may exist where there is evidence that a quasi-judicial decision-maker has prejudged issues of fact or has a personal bias or interest in the outcome of a matter. *Buell*, 80 Wn.2d at 524.²²

In recent years, courts have demanded actual evidence, rather than mere speculation, to support claims of appearance of fairness violations. *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172 (1992). Storedahl produced substantial evidence (discussed below) that Mr. Stuart had

²² The personal interest, either real or reasonably perceived, need not be of a pecuniary nature. *See, e.g., Milwaukee R.R. v. State Human Rights Comm'n*, 87 Wn.2d 802, 807-08, 557 P.2d 307 (1976) ("Any interest, the probable and natural tendency of which is to create a bias in the mind of the judge for or against a party to the suit, is sufficient to disqualify. . . . Pecuniary interest in the result of the suit is not the only disqualifying interest.") (internal quotation marks and citation omitted).

demonstrated partiality by publicly denouncing the Storedahl mine expansion. More importantly, he had allied himself with project opponents, including FOEF/FF, to generate public opposition to the project. These actions are sufficient to lead a disinterested person to be reasonably justified in thinking that Commissioner Stuart was partial when he cast the tie-breaking vote to deny the rezone application.

2. Commissioner Stuart's words and actions prior to joining the BOCC call his impartiality into question.

Prior to the first hearing before the BOCC, Storedahl objected that the participation of Commissioner Stuart in hearing appeals of the Daybreak Mine expansion violated the appearance of fairness doctrine. In a letter dated January 25, 2005—more than a week before the first appeal hearing—Storedahl notified the BOCC of Storedahl's concern that, prior to his appointment to the BOCC, "Mr. Stuart expressed strong opposition to the project under consideration, has prejudged the facts surrounding the project and his participation in the appeals on this matter would violate the Appearance of Fairness Doctrine." CP 199-200. Commissioner Stuart, however, declined to recuse himself and participated in the BOCC decision.

Storedahl made its 2005 request for disqualification based on reports that, in February 2004, Mr. Stuart had organized and led a meeting of opponents of the Daybreak Mine expansion. CP 202-04. The meeting was scheduled by Friends of Clark County (of which Mr. Stuart was the executive director), CP 186, and FOEF/FF, CP 202-04. Apart from Mr. Stuart, the only speakers at the meeting were officers of or attorneys for

FOEF/FF, respondents in this appeal. CP 1690-1742. Storedahl asked to participate in the meeting but was told that it would not be permitted to make a presentation or answer questions. CP 202-03. In leading the discussion, Mr. Stuart summarized the purpose of the meeting:

[W]hat we are here to talk about is . . . that the east fork of the Lewis River is in jeopardy of additional mining concerns in the area. Storedahl mines has been in place for quite some time, but they are looking at doing a lot of expansion. They are currently in the midst of trying to get a permit to do just that. ***The process has been slowed somewhat, which gives us more time to deal with it and get more information.*** . . . David McDonald is in the back. David will actually be talking about the process and the legal realities and ***the options that we have.***

CP 1693-94 (emphasis added). David McDonald, then and now attorney for FOEF and a former Board advisor to Mr. Stuart's organization, then presented the options that "we"—that is, Mr. Stuart and the other opponents of the project—have, which included filing of an appeal of the Examiner's decision should the permit be approved. CP 1695. The various speakers at the meeting discussed strategies for thwarting Storedahl's permit application. For example, Jack Kaeding, executive director of Fish First, warned attendees that "Storedahl is counting on you to do nothing. . . . And what they put down in the papers to the agencies they expect the agencies to believe and agencies believe that. . . . And if you don't respond, they have got a good chance of making everybody believe it." CP 1765-67.

Following Mr. Kaeding's diatribe, Mr. Stuart had the final word by urging attendees to contact "Friends of the East Fork, Fish First, Friends of Clark County" for additional information. CP 1768.

Mr. Stuart's pivotal role in organizing community opposition to the Daybreak Mine should alone be sufficient to cast a cloud on then-Commissioner Stuart's impartiality. However, after learning about and objecting to Mr. Stuart's role in organizing opposition to the Daybreak Mine expansion, Storedahl discovered the much broader scope of Mr. Stuart's opposition to the Daybreak Mine. As executive director of the Friends of Clark County, Mr. Stuart wrote in the organization's monthly newsletter that his organization was "partnering with . . . Fish First, Friends of the East Fork, and the Clark-Skamania Flyfishers, *to help prevent further degradation of the East Fork of the Lewis River by gravel mining operations.*" CP 318. And in case there was any doubt about which gravel mining operation was the target of their united opposition, Mr. Stuart referred readers to a companion article. CP 323. That companion article in the Friends newsletter warned readers that "J.L. Storedahl & Sons" would cause irreparable damage to the river: the Lewis River is "on the brink of being permanently damaged by a company using their huge resources to convince authorities that their proposal will not harm the habitat." CP 320.

The Friends of Clark County's campaign against the Daybreak Mine expansion continued in a December 2004 issue of the monthly newsletter, in which Mr. McDonald wrote an article describing precisely how he believed the Examiner had erred in granting Storedahl's permit application. The "many errors" identified in the article then became precisely the arguments made by Mr. McDonald and his client to Commissioner Stuart in hearings before the BOCC. CP 336.

After all of his direct leadership of an organization opposing the Daybreak Mine expansion, Mr. Stuart then joined the Board that was set to hear an appeal of that very matter. And on that Board, Commissioner Stuart cast the tie-breaking vote to overturn the Examiner's approval of the requested rezone. Commissioner Stuart sided with FOEF/FF, the very parties he had partnered with, whose attorney had outlined the legal strategies in the Friends of Clark County's monthly newsletter, and who had shared a podium with Mr. Stuart at a meeting called to galvanize public opposition to the mine expansion. By declining disqualification, Commissioner Stuart created public suspicion and tainted the integrity of the Board's decision, which this Court should declare void.

3. Not one of the statutory exceptions to the appearance of fairness doctrine applies here.

In proceedings below, the respondents argued that even if Commissioner Stuart's participation might otherwise have violated the appearance of fairness doctrine, the participation was covered by two statutory exceptions to the doctrine. Neither statutory exception applies in this case.

a) The “rule of necessity” does not avoid the appearance of fairness violation.

The so-called “rule of necessity” is codified at RCW 42.36.090 and provides as follows:

In the event of a challenge to a member or members of a decision-making body which would cause a lack of a quorum or would result in a failure to obtain a majority

vote ***as required by law***, any such challenged member(s) shall be permitted to fully participate in the proceeding and vote as though the challenge had not occurred, ***if the member or members publicly disclose the basis for disqualification prior to rendering a decision***. Such participation shall not subject the decision to a challenge by reason of violation of the appearance of fairness doctrine.

RCW 42.36.090 (emphasis added). This rule of necessity does not apply, on its face, for two independent reasons.

First, Commissioner Stuart did not disclose his full involvement in opposing the Daybreak Mine expansion prior to rendering a decision; rather, he simply denied that there was any basis for disqualification. After denying that he had expressed any personal opinion or prejudged the issues on appeal, Mr. Stuart cannot now retroactively claim the benefit of the statutory safe harbor.

Second, the rule of necessity does not apply because Commissioner Stuart's vote was not necessary or required by law for rendering a decision. The Board may hear appeals when it has a quorum, and the Board has a quorum when two members are present. RCW 36.32.010 ("each board of county commissioners shall consist of three qualified electors, two of whom shall constitute a quorum"). In addition, there is no legal requirement that the Board decide issues by majority vote. As Washington courts have held, in the absence of a contrary statutory authority a tie vote constitutes an affirmance of the Examiner's decision in all respects. *Boeing Co. v. Gelman*, 102 Wn. App. 862, 866-67, 10 P.3d 475 (2000) ("[W]hen there is a 'tie vote' or the members of an administrative board are 'evenly' or

‘equally’ divided, the party with the burden fails to meet its burden.”). Mr. Stuart’s disqualification from the decision would have resulted in the Board’s tie vote to affirm the decision of the Examiner decision of November 2004, CP 37-117 (HE Ex. 711), in all respects. CP 2431.²³

b) Commissioner Stuart’s prejudgment and personal bias were not mere campaign statements.

Second, the County argued below that because Commissioner Stuart’s statements opposing the Storedahl mine were made before he campaigned for and was appointed to public office, there can be no appearance of fairness violation under RCW 42.36.040. That statute provides:

Prior to declaring as a candidate for public office or while campaigning for public office . . . no public discussion or expression of an opinion by a person subsequently elected to a public office . . . shall be a violation of the appearance of fairness doctrine.

RCW 42.36.040 is inapplicable for two reasons.

First, RCW 42.36.040 does not apply to statements opposing site-specific projects; such statements show a prejudgment foreclosing impartial decision-making. The statutory safe harbor has never been applied to statements of declared opposition to a specific project.

Second, Mr. Stuart’s employment by Friends of Clark County and his close partnership with FOEF/FF—and their attorneys appearing in this

²³ The County Code plainly indicates other areas in which a majority vote is required by law. *See, e.g.*, CCC 2.06.050 (“Four members of the planning commission shall constitute a quorum. All actions of the planning commission **shall be determined by a majority vote** in a meeting at which a quorum is present.”) (emphasis added). There is no such provision for the BOCC.

matter—to oppose the Daybreak Mine expansion violate the appearance of fairness doctrine *independent of Mr. Stuart's statements*. Mr. Stuart's *conduct* as executive director of Friends of Clark County included organizing opposition to the Storedahl project and urging meeting attendees to contact Mr. McDonald and other representatives of project opponents. Such *conduct* goes well beyond mere *statements* of personal opinion, but demonstrates a clear advocacy role of a project opponent, coordinating with project opponents now before this Court. Such conduct is outside the policy-based safe harbor of RCW 42.36.040.

E. The Trial Court Should Have Permitted Discovery and Storedahl's Public Disclosure Request to Proceed.

Although it had already provided the BOCC with sufficient basis for the disqualification of Commissioner Stuart, Storedahl asked the trial court for leave to conduct limited discovery on communications between FOEF/FF and officials at Clark County. CP 169-75. The court denied Storedahl's request, CP 2202-06, incorrectly concluding that Storedahl was not entitled to LUPA discovery regarding grounds for disqualification. Storedahl then made a formal request under the Public Records Act ("PRA") (recodified at Ch. 42.56 RCW), for written communications between Clark County and opponents of the Daybreak Mine expansion. CP 532. Clark County responded to the PRA request by filing a motion to quash the public disclosure request. CP 532-28. Again, the court granted the County's motion and quashed Storedahl's public disclosure request. CP 2208-14.

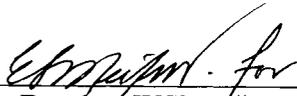
The trial court's decision to prevent Storedahl from obtaining public documents from the local government, simply because the court had ruled such documents unavailable in discovery under LUPA, is directly contrary to *O'Connor v. Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 910, 25 P.3d 426 (2001) ("The trial court nevertheless was in error in concluding that Respondent DSHS may deny the direct public records request by Petitioner and that Petitioner, as a litigant against DSHS, must seek access to the records under the Civil Rules for discovery."). Accordingly, the trial court's decision to quash Storedahl's request for documents should be reversed.

VII. CONCLUSION

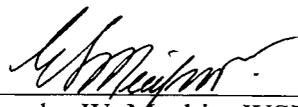
For the foregoing reasons, Appellant Storedahl respectfully asks this Court to reverse the decision of the Clark County Board of Commissioners denying Storedahl's rezone application, depriving Storedahl of the ability to mine under nonconforming use rights, permitting the participation of a commissioner tainted by an appearance of fairness violation, and the related ruling on discovery and public disclosure and to reinstate Storedahl's damages claim.

DATED: July 10, 2007

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

No. 36177-9

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

J.L. STOREDAHL & SONS, INC. and STOREDAHL PROPERTIES
LLC,

Appellants,

v.

CLARK COUNTY; FRIENDS OF THE EAST FORK; FISH FIRST –
LEWIS RIVER; and RICHARD DYRLAND,

Respondents.

CERTIFICATE OF SERVICE

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Jessica Hottell certifies and states:

I am a citizen of the United States of America and a resident of the State of Washington; I am over the age of eighteen years; I am not a party to this action; and I am competent to be a witness herein. On July 10, 2007, I caused to be served, a true and correct copy of the following:

1. Appellant Storedahl's Opening Brief; and
2. Certificate of Service.

upon the following at the addresses as stated below:

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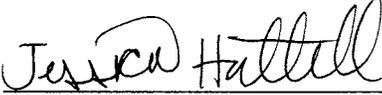
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