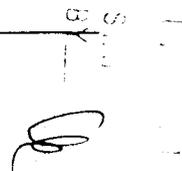


NO. 36177-9

**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.

CLARK COUNTY'S RESPONSE BRIEF

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I. INTRODUCTION

In this action, J.L. Storedahl & Sons, Inc. and Storedahl Properties, LLC, (collectively referred to as “Storedahl”) appeal the decision of the Clark County Board of Commissioner’s denying Storedahl’s request to rezone approximately 100 acres of land (hereinafter the “expansion area”) to allow surface mining. The land in question is located adjacent to the East Fork of the Lewis River.¹ The East Fork of the Lewis River is one of the few undammed tributaries to the lower Columbia River and bears eight species of fish that are listed as threatened or endangered under the federal Endangered Species Act or are species of concern under state law, including steelhead, chinook, chum and coho salmon, bull trout, coastal cutthroat trout, Pacific lamprey, and river lamprey.² The board denied the rezone because it concluded that the request did not satisfy the criteria of furthering the public health, safety, morals or welfare.

Because this rezone is site specific, it was the subject of hearing examiner proceedings. CCC 2.51.090. The hearing examiner assumed that Storedahl had nonconforming use rights to mine within the expansion area. He found the rezone to be in the public welfare because, compared

¹ CP 39 (Hearings Examiner Order at p. 3).

² *Ibid.*

to mining as a nonconforming use, mining subject to the conditions of the rezone produced “a net reduction in environmental impact”.³ Indeed, the hearing examiner explained that this assumption “drives the examiner’s evaluation of the current proposal.”⁴

The board found the hearing examiner’s decision to be erroneous for a number of reasons. First, the board recognized that mitigation measures would be required even without a rezone because Storedahl obtained an incidental take permit from the federal government to avoid “take” liability under the Endangered Species Act.⁵ Second, the board recognized that it had authority to regulate the expansion of nonconforming use activities independent of the rezone request.⁶ Finally, the board disagreed with the hearing examiner’s underlying premise that Storedahl had nonconforming use rights to mine within the expansion area.⁷ The board concluded that nonconforming use rights did not exist because they made a factual determination that, in 1973 when mining became a nonconforming use, the mine owner did not intend to mine within the expansion area.

³ CP 42 (Hearings Examiner Order at p. 6).

⁴ CP 50 (Hearings Examiner Order at p. 14).

⁵ CP 2428 -2429 (Reso. 2005-02-14).

⁶ *Ibid.*

⁷ CP 151 – 155 (Reso. 2005 – 08 – 13).

The trial court agreed with the board that there was no evidence of intent to mine within the expansion area when it became a nonconforming use in 1973.⁸ The trial court upheld the board's determination that Storedahl did not have nonconforming use rights to mine the site.⁹ The trial court noted that the board "premised their reversal based on numerous false assumptions by the HE [hearing examiner]"¹⁰ and concluded that the board did not commit clear error in determining that the rezone was not in the public interest. Thus, the trial court concluded that the board did not commit clear error in denying the rezone request. This appeal followed.

Storedahl also appeals Commissioner Stuart's participation in the board proceedings as violating the appearance of fairness doctrine and the trial court's decision denying Storedahl's request for discovery.

The trial court also dismissed Storedahl's claims for declaratory relief and damages. Storedahl's opening brief and assignments of error do not challenge the dismissal of the declaratory relief or damage claims. Thus, Storedahl has waived any claim of error related to the dismissal of those claims.

⁸ CP 2167 – 2173 (Memorandum Opinion at p. 3).

⁹ *Ibid.*

¹⁰ *Id.* at p. 4.

II. ASSIGNMENTS OF ERROR

1. Whether the board properly denied Storedahl's request to rezone the expansion area based upon their conclusion that the rezone would not be in the public interest.

The issues related to this assignment of error are:

- A. Whether the board correctly decided that Storedahl was required to mitigate the impacts of mining independent of the rezone.
- B. Whether the board correctly determined that the county had authority to regulate Storedahl's mining expansion as a nonconforming use.
- C. Whether the board correctly determined Storedahl did not have nonconforming use rights to mine in the expansion area. Related to this issue are the following issues:
 - i. Whether the board correctly determined that mining became a nonconforming use in 1973.
 - ii. Whether there is substantial evidence in the record to support the board's determination that, in 1973, there was no intent to mine the 100 acres subject to the rezone request.
 - iii. Whether the board committed clear error in their application of the law to the facts in determining that Storedahl did not have nonconforming use rights to mine the area subject to the rezone request.

2. Whether the board violated the appearance of fairness doctrine.

3. Whether the trial court abused its discretion in denying Storedahl's request to engage in discovery.

III. STATEMENT OF THE CASE

A. Facts

This appeal challenges the board's decision denying a proposal to rezone 100 acres of property to allow surface mining. These 100 acres are part of a 350-acre site referred to as "Daybreak." According to the affidavit of Mr. Woodsides, the former owner of the Daybreak site, mining was occurring when he took ownership in 1968.¹¹ Between 1970 and 1975 mining was conducted by Mr. Edwards through an arrangement with Mr. Woodsides.¹² Mr. Zimmerly conducted mining from 1975 until 1987 when Storedahl assumed mining operations.¹³ According to the last annual reclamation report in the record dated December 29, 1994, the last mining activity occurred in "approximately 1991."¹⁴

¹¹ CP 2019-2022 Exhibit D to County's Response Brief; Hearings Examiner Administrative Record ("AR") Exhibit 39.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

According to permits issued for surface mining by the Department of Natural Resources, the “Operator’s Annual Reports of Reclamation Activities” filed with that agency, and drawings of the areas where mining occurred prepared by DNR from aerial acetate photographs, all mining activities occurred within sections 19 and 24 of the Daybreak site.¹⁵ This area is frequently referred to in the party’s briefing, the hearing examiner’s orders, and the board’s resolutions as the “71 acre” area and is located on parcels 214676 and 225167 in Sections 19 and 24. The rezone proposal covers land to the north and upland of Sections 19 and 24 within Sections 13 and 18 and parcel 225167 in Section 19.¹⁶ According to Mr. Woodside’s affidavit, he did not intend to expand mining beyond the 71 acres until sometime between 1981 and 1984.¹⁷

B. Zoning.

Prior to 1973, the Daybreak site was zoned F-X and all uses were allowed, except for the uses authorized in the Heavy Manufacturing zone

¹⁵ The County’s Response Brief filed with the trial court contains a detailed review of the record relating to where and when mining occurred. *See* CP 1849-52.

¹⁶ There is a parcel map attached hereto as *Appendix A*.

¹⁷ *See* Exhibit D, “Woodside’s Affidavit,” attached to Clark County’s Response Brief. CP 2018-22.

(M-H zone).¹⁸ In 1973, the F-X zone was amended to restrict permitted uses to single-family residences, agricultural activities, parks and home occupations. Existing uses which previously qualified as “permitted uses” were allowed to continue on the “specific parcel” where they were occurring, but could not expand into adjoining or contiguous parcels without an approved zone change.¹⁹ Storedahl states that the 1973 ordinance “expressly protected existing mines.”²⁰ This is incorrect. The ordinance did not expressly refer to mining activity. Rather, it stated that “all uses in existence” that were permitted uses would be allowed to continue, but not expand.

In 1980, the County amended CCC 18.30.070 (and re-codified it as CCC 18.411.070) to further limit ongoing nonconforming uses by providing that their expansion, even within the original parcel, must comply with standards applicable within the district where the use would be permitted.²¹

¹⁸ CP 1372.

¹⁹ Former CCC 18.30.070.

²⁰ See Opening Brief at p. 9.

²¹ CCC 18.411.070 Existing uses...

- B. All uses in existence occurring on a specific parcel of land which legally qualified as a permitted use under the provisions of 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

In 1994 (effective 1995), the County repealed CCC 18.411.070 and adopted a comprehensive plan policy excluding mining from the 100-year floodplain. In so doing, the County reduced the comprehensive plan surface mining (“S”) overlay from 270 acres of the Daybreak site to only 58 acres of the site.²²

C. Procedural History.

The county accepts Storedahl’s account of the procedural history of this matter with the following clarification. While Storedahl is correct in stating that the hearing examiner was the finder of fact in an open record hearing,²³ it is incorrect in stating that the board agreed with the hearing examiner’s factual findings. Unlike the hearing examiner, the board did make the factual determination that, in 1973 when mining became a nonconforming use, there was no intent to engage in mining within the

Footnote 21 cont.:

allowed to expand into adjoining or contiguous property without an approved zone change; and further,

- C. Any expansion on the original parcel shall comply with standards contained in the district within which the use is permitted.

²² See CP 931.

²³ Opening Brief at p. 10.

expansion area²⁴ and, thus, Storedahl did not have nonconforming use rights to mine in the expansion area.

IV. SUMMARY OF ARGUMENT

The board did not commit clear error in reversing the decision of the hearing examiner. The hearing examiner approved the rezone based upon a false premise that mining could occur within the expansion area as a nonconforming use. This false premise was based upon the hearing examiner giving preclusive effect to a non-binding administrative decision. Subsequently, the hearing examiner determined that Storedahl could engage in mining within the expansion area based upon a fatally flawed diminishing assets analysis doctrine.

The board determined that Storedahl did not have nonconforming use rights to mine within the expansion area because: (1) there was no intent to mine within that area in 1973 and, thus, the diminishing assets did not apply; and (2) the pre-existing use provisions of the county code did not allow mining to occur there.

The board also held that the rezone did not satisfy the “public welfare” criterion because mitigation conditions were required, even without a rezone, by a separate federal permit and the County had the

²⁴ CP 151-155 (Reso. 2005 – 08 – 13).

authority to regulate mining occurring as a nonconforming use. Thus, granting the rezone was not necessary to obtain the mitigation conditions relied upon by the hearing examiner to satisfy the public welfare criterion.

The trial court properly determined there was no evidence of actual or potential bias to disqualify Commissioner Stuart from participating in the board proceedings. Commissioner Stuart's participation was also allowed by the rule of necessity, RCW 42.36.090. Finally, the statements relied upon by Storedahl are statements made on pending quasi-judicial actions prior to declaring as a candidate, by a person subsequently elected to office. Pursuant to RCW 42.36.040, such statements do not violate the appearance of fairness doctrine.

The trial court did not abuse its discretion by denying Storedahl's request to engage in discovery. Storedahl did not make a showing of need and its request did not fit within the narrow exceptions of RCW 36.60C.120.

V. ARGUMENT

A. Standards of Review.

The parties are in agreement that in reviewing the land use decision, the Court stands in the same position as the trial court and limits

its review to the administrative record before the board.²⁵ Storedahl bears the burden of proving that it has satisfied one of the standards set forth in RCW 36.70C.130. Quality Rock Products, Inc., v. Thurston County, _____ Wn.App _____, 159 P.3d 1 (2007). In this case, the germane standards of RCW 36.70C.130 are whether the Board's decision was an erroneous interpretation of the law, after allowing for such deference as is due the local jurisdiction; whether the decision is supported by evidence that is substantial when viewed in light of the entire record; and whether the decision is a clearly erroneous application of the law to the facts. Each of these standards will be discussed in the context of the issues raised by Storedahl in the following sections of this brief.

To prevail in its appearance of fairness challenge, Storedahl must overcome the presumption that public officials properly performed their duties by producing evidence of actual or potential bias. Nationscapital Mortgage Corp. v. Dept. of Financial Institutions, 133 Wn.App. 723, 759, 137 P.3d 78 (2006), citing, OPAL v. Adams County, 128 Wn.2d 869, 890, 913 P.2d 793 (1996).

The trial court's decision denying discovery is reviewed for an abuse of discretion. Rivers v. Wash. State Conference of Mason

²⁵ Opening Brief at p. 14.

Contractors, 145 Wn.2d 674, 684, 41 P.3d 1175 (2002); Wright v. Terrell, 135 Wn.App. 722, 741, 145 P.3d 230 (2006).

B. The Board's Denial of the Rezone was Proper.

Storedahl claims that the board summarily reversed the hearing examiner's decision without disagreeing with any of the examiner's findings of fact.²⁶ An examination of the record, the hearing examiner's decisions, and the board's resolutions show that this is not the case.

As the proponent for the rezone, Storedahl had the burden of establishing that the proposal met the criteria of CCC 18.503.060. To receive approval, a rezone request must be "consistent with comprehensive plan map designation;" be consistent with [comprehensive] plan policies and locational criteria and the purpose statement of the zoning district;" conditions must have substantially changed since the zone was applied to the property; it must further the "public health, safety, morals or welfare"; and there must be adequate public facilities available to serve the requested change.²⁷ The pivotal criterion in this case is whether the rezone "furthers public health, safety, morals or welfare."

²⁶ See Opening Brief at pp. 24-27.

²⁷ CCC 18.503.060.

The hearing examiner found that the rezone met the public welfare criteria because it would result in a “net reduction in environmental impact,” when compared to mining under a nonconforming use right.²⁸

The hearing examiner explained the basis for this conclusion by stating:

As a starting point, most of the opponents argue strongly that the County should deny this proposal and prohibit further mining in the EFLR due to the damaging effects of mining, and this operation in particular, on protected wild fish . . . The Examiner agrees with these parties about the effect of mining on fish and fish habitat, but the cessation of mining at this site is not one of the legal options . . . Clark County issued written acknowledgment in 1996 of the operator’s vested nonconforming right to mine and process aggregate at this site (Ex. 40). . . . The legal implications of the 1996 nonconforming use determination is explained above and it drives the examiner’s evaluation of the current proposal. Therefore, the analysis is a comparison of the nature and level of mining under the nonconforming use, and the nature of level of mining under the applicant’s proposal. In other words, what is more protective of the public health and welfare, as well as that of the fish: continuation of mining under the nonconforming use right, or expansion of mining and relocation of mining under the current proposal.²⁹

Indeed, the hearing examiner stated:

In light of the lawful nonconforming use acknowledged in the preceding section (Ex. 40), the question is not whether a new mining operation should be allowed to begin on a virgin site. **It is clear that a new mining operation on a**

²⁸ CP 42 (Hearings Examiner Order at p. 6 (*emphasis in original*)).

²⁹ CP 50 (Hearings Examiner Order at p. 14 (*emphasis in original*)).

virgin site adjacent to the EFLR could not meet the approval criteria, and would be denied.³⁰

As recognized by the trial court, “the Board premised their reversal on many false assumptions made by the HE [Hearing Examiner].”³¹ Storedahl notes that its rezone request complied with various comprehensive plan policies and had been found to adequately mitigate environmental impacts.³² Storedahl states, “The board took issue with only one aspect of the rezone criterion – the public welfare provision and CCC 18.503.060(3).”³³ Storedahl postulates that “such subjective grounds for land use decision-making are insufficient to warrant the denial in this case,”³⁴ citing, Anderson v. City of Issaquah, 70 Wn.App. 64, 82-83, 851 P.2d 744 (1993). In response to this argument, the county makes the following points.

First, the fact that a rezone proposal had been found to adequately mitigate its significant environmental impacts under SEPA or NEPA does not assure that the rezone will be approved. The criteria for approving a rezone set forth in CCC 18.503.060 are broader than simply mitigating

³⁰ CP 50 (Hearings Examiner Order at p. 8 (*underlined emphasis in original; bold emphasis added*).

³¹ CP 2167-2173 (Memorandum Opinion at p. 4).

³² Opening Brief at pp. 22-27.

³³ *Id.* at p. 27.

³⁴ *Ibid.*

environmental impacts. To support a rezone, “more than a finding of no adverse impact is required. The rezone must ‘bear a substantial relation to the public health, safety, morals, or welfare’.” Henderson v. Kittitas County, 124 Wn.App. 747, 756, 100 P. 3d 842 (2004), citing, Schofield v. Spokane County, 96 Wn.App. 581, 587, 980 P.2d 277 (1999).

Second, Anderson does not support Storedahl’s argument that failure to meet general standards cannot be a basis of denying a rezone. In Anderson, the applicant was not seeking a zone change. Rather, the applicant sought to build a commercial building on land zoned for general commercial use. Although the building was a permitted use, its design had to be approved by a development commission of the city. The ordinance in question required that buildings be designed to “bear a good relationship” with the valley and surrounding mountains, “have appropriate proportions”; be “harmonious,” and seldom “bright” or “brilliant”; be “interesting” and “monotony should be avoided”. Anderson at 75-76. The commission members invited the applicant to drive up and down the street to look for “good and bad examples.” Anderson at 77. The court concluded that “the ordinance provided no standards by which an applicant . . . can determine” whether it has satisfied the requirements of the ordinance. Anderson at 81. This is not to say that requiring

compliance with general standards are impermissible. In Cingular Wireless v. Thurston County, 131 Wn.App. 756, 129 P.2d 300 (2006), an ordinance regulating the placement of cellular towers included both specific criteria and a general criteria that the use be “appropriate in the location for which it is proposed.” Cingular at 763. The court noted that the ordinance clearly expressed the intent that the proposed use had to meet both the special and the general provisions. The court held that the general provisions supplemented the specific provisions and it was not error to require the applicant to satisfy both. More recently, in a surface mining expansion case, the court case upheld a board of commissioners’ decision that required compliance with general and specific standards. *See, Quality Rock, infra.*

Third, in the context of rezone applications, the requirement to establish that the rezone furthers the public health, safety, morals or general welfare has been upheld in numerous cases including Parkridge v. City of Seattle, 89 Wn.2d 454, 462-63, 573 P.2d 359 (1978); Tugwell v. Kittitas County, 90 Wn.App 1, 8, 951 P.2d 272 (1998); Henderson v. Kittitas County, 124 Wn.App747, 753, 100 P.3d 842 (2004); Citizens for Mount Vernon v. City of Mount Vernon, 133 Wn.2d 861, 874-75, 947 P.2d 1208 (1997).

Fourth, the challenge to the use of general standards in making land use decisions is premised upon a claim that such standards are vague and allow arbitrary decisions. *See, Anderson* at 78. In the area of land use, the court looks not only at the face of the ordinance, but also its application to the person who sought to comply with the ordinance to determine whether an ordinance is unconstitutionally void for vagueness. Burien Bark Supply v. King County, 106 Wn.2d 868, 871, 725 P.2d 994 (1986). In the present case, the board provided justification for its reversal of the hearing examiner's determination that the rezone request would further public health, safety, morals and welfare. The hearing examiner's decision was based on the false assumption that the alternative to the rezone was mining without the conditions imposed through the rezone. The board disagreed, finding that there were no nonconforming use rights to engage in mining within the expansion area, that the applicant would have to mitigate its impacts through the federal permits, and that the County could regulate the mining without the rezone if there were nonconforming use rights. The board's decision was not vague, arbitrary or "due to public controversy, rather than the merits," as suggested by *Storedahl*.³⁵

³⁵ Opening Brief at p. 27.

Finally, Storedahl characterizes the board's decision as a "summary determination" contrasted with the eighty page hearing examiner decision. A similar criticism was made by the mine operator in Quality Rock who complained of the "brevity" of the board's finding with respect to failing to comply with comprehensive plan policies.³⁶ This Court rejected that criticism noting that the board provided the reasons for its decision. In the present case, the board's reasons for its decision are discussed in more detail below.

1. The board correctly determined that Storedahl was obligated to mitigate the impacts of its mining as a condition of its federal permits.

As noted in the hearing examiner's initial order, Storedahl applied for an incidental take permit from the federal government because its mining expansion proposal involved a "take" of threatened and endangered species of fish.³⁷ To obtain the permit, Storedahl had to obtain the approval of a habitat conservation plan from a NOAA Fisheries and the U.S. Fish & Wildlife Service.³⁸ Given these facts, the board concluded that the hearing examiner:

...erred in concluding that the 'public interest' rezone criteria was met because substantial mitigation would not

³⁶ See Quality Rock at ____.

³⁷ CP 39 (Hearings Examiner Order at p. 3.)

³⁸ *Ibid.*

occur if mining proceeded under nonconforming use rights. . . The federally-approved Habitat Conservation Plan (which contains the bulk of mitigation measures under review) was sought by the applicant due to its decision to avoid 'take' liability under the federal Endangered Species Act.³⁹

Counsel for Friends of the East Fork accurately describes the hearing examiner's decision as having "set up a false choice."⁴⁰ That choice being, either granting the rezone to obtain mitigation measures or allowing mining to expand without mitigation under nonconforming use rights. The board did not commit clear error in applying the law to the facts or in deciding that the public interest was not furthered by the rezone proposal due to the requirement imposed upon Storedahl to undertake the mitigation measures as conditions of incidental take permit.

2. The county could regulate mining expansion undertaken pursuant to nonconforming use rights.

Even if Storedahl had the ability to expand its mining operations as a nonconforming use right, the county had the authority to regulate that expansion. Again, one of the hearing examiner's "false assumptions" was that granting the rezone was in the public interest because it was necessary to obtain the mitigation conditions imposed as part of the rezone approval.

³⁹ CP 2429 (Board Reso. 2005-02-14 at pp. 3-4).

⁴⁰ Friends of the East Fork Response Brief at p. 21.

However, the exercise of nonconforming use rights is subject to regulation. As noted by the board, “the County has independent authority to regulate nonconforming uses, so long as such regulation does not effectively prohibit the use.”⁴¹ In Rhod-A-Zalea and 35th, Inc., v. Snohomish County, 136 Wn.2d 1,8, 959 P.2d 1024 (1998), the court held that “local governments have the authority to reserve, regulate, and even, within constitutional limits, terminate nonconforming uses.” The board did not commit clear error in reversing the hearing examiner’s decision that the public interest was furthered by the rezone because the rezone was necessary to regulate the mining expansion.

3. The board correctly concluded that Storedahl did not have the right to mine within the expansion area as a nonconforming use.

a. The definition of a “nonconforming use.”

A good starting point for the analysis of Storedahl’s nonconforming use rights is the definition of what constitutes a nonconforming use. In Rhod-A-Zalea, *supra* at 7, the court defined it as:

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. *See Robert*

⁴¹ CP 2429 (Board Res. 2005-14 at p. 4).

M. Anderson, American Law of Zoning Sect. 6.01
(Kenneth H. Young ed., 4th ed. (1996).

A general statement related to the public policy behind restricting
and eliminating nonconforming uses appears in State ex rel Miller v. Cain,
40 Wn.2d 216, 221, 242 P.2d 505 (1952), where the court stated:

The ultimate purpose of zoning ordinances is to confine
certain classes of buildings and uses to certain localities.
The continued existence of those which are nonconforming
is inconsistent with that object, and it is contemplated that
conditions should be reduced to conformity as completely
and as speedily as possible with due regard to the special
interests of those concerned, and where suppression is not
feasible without working substantial injustice, that there
shall be accomplished “the greatest possible amelioration of
that offending use, which justice to that use permits.”

As stated by the Supreme Court, in Rhod-a-zalea, *supra* at 10, “for these
reasons, nonconforming uses are uniformly disfavored and this court has
repeatedly acknowledged the desirability of eliminating such uses.”

Applying the definition from Rhod-A-Zalea, mining in the
Daybreak area became a nonconforming use in 1973. It lawfully existed
prior to that date and was allowed to continue although mining didn’t
comply with the restrictions applicable to the district.

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b. The county code.

Storedahl argues that even though new mining would be prohibited by the F-X zone, its mining activity was not a nonconforming use because of the following provision of CCC 18.30.070:

All uses in existence and occurring on a specific parcel which legally qualified as “permitted uses” under the 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 the interim measure, but in no case shall any use be allowed to expand into adjoining or contiguous property without an approved zone change.

Although the code provided that existing uses on a specific parcel could continue as “conforming uses” on that parcel, it prohibited their expansion to adjoining property without a zone change. This treatment did not make the existing mining use anything other than nonconforming. That is, the use lawfully existed prior to the enactment of the zone change, and it is allowed to continue on that specific parcel although it does not comply with current zoning. Further, any expansion beyond the specific parcel is restricted by requiring a zone change. The hearing examiner appropriately characterized the code’s use of the term “conforming use” in CCC 18.30.070 as “anomalous language.”⁴²

⁴² CP 47 (Hearings Examiner *Final Order on Remand* at p. 10.)

Storedahl argues that CCC 18.30.070 would allow the expansion of mining throughout its 350.⁴³ This interpretation is in direct conflict with the terms of that ordinance and the policy disfavoring nonconforming uses. CCC 18.30.070 allows the continuation of a nonconforming use on a **specific parcel** where it occurred, but expressly prohibits the expansion of that use into adjoining or contiguous property without a zone change. According to Storedahl, the ordinance would allow the expansion of a 71-acre operation into a 350-acre operation notwithstanding the parcel boundaries. However, in 1973 mining was occurring only occurring on parcels 225167 and 214676, but not on the parcels where Storedahl now seeks to expand its operations.⁴⁴ The express language of the ordinance prohibits the nonconforming use from expanding beyond the specific parcel on which it is located. Thus, Storedahl's contention that the ordinance would allow mining to expand beyond the specific parcel where it was previously occurring is incorrect.

In an attempt to avoid the clear prohibition of expansion beyond the specific parcel where the nonconforming use is occurring, Storedahl relies on Black's Law Dictionary definition of "parcel" as a tract of land in

⁴³ See Opening Brief at p. 29, footnote 17.

⁴⁴ The County's Response Brief filed with the trial court contains a detailed review of the record relating to where and when mining occurred. See CP 1849-52.

one possession.⁴⁵ However, RCW 58.17.020(9) defines “lot” including a “parcel” as being “a fractional part of divided lands having fixed boundaries, being of sufficient area and dimension to meet minimum zoning requirements...” The parcels at issue meet this statutory definition. To the extent that the board’s decision involved an interpretation of the county ordinance, it is entitled to deference. RCW 36.70C.130(1)(b).

In 1980, the “existing uses” provision of CCC 18.30.070 was amended and re-codified as CCC18.411.070. In addition to the original requirement to obtain a rezone to expand the use beyond the specific parcel it occurred on, the amendment required “any expansion on the original parcel shall comply with the standards contained in the district within which the use is permitted.”

Also, in 1980, the county rezoned most of the site from F-X to AG-20 with an “S” (surface mining combining district overlay, CCC 18.329). This amendment allowed rock extraction as a permitted use subject to site plan review. CCC 18.329.040 required those who wished to mine within the “S” district to obtain planning director and planning commission approval of their proposal. Site plan review was also required by CCC 18.402.030 which provided that no use could be established without site

⁴⁵ Opening Brief at p. 29, fn. 17.

plan review. To the extent that Storedahl is suggesting that mining became a legal conforming use due to the 1980 rezone,⁴⁶ it is mistaken. The 1980 zoning amendment does not change the nonconforming use analysis of the mining in the Daybreak site. It was nonconforming as of 1973. It did not become conforming in 1980 because the owner did not make an application for site plan review as required by the code provisions of the surface mining combining district. Finally, effective 1995, the “S” overlay was removed from all but 58 acres of the site in 1995 and CCC 18.411.070 was repealed.⁴⁷

c. The diminishing assets doctrine.

The doctrine of diminishing assets recognizes that surface mining is intended to be conducted beyond the area where extraction is immediately taking place. University Place v. McGuire, 144 Wn.2d 640 30 P.3d 453 (2001), and Rhod-a-zalea, *supra*. In University Place, the court adopted the doctrine in order to “determine the lawful scope of the nonconforming use in mining operations.” University Place at 651. The court stated:

The proper scope of a lawful nonconforming use in an exhaustible resource is the **whole** parcel of land owned and

⁴⁶See Opening Brief at pp. 31 and 34 - 35.

⁴⁷ CP 931.

intended to be used by the owner at the time the zoning ordinance was promulgated. (*Court's emphasis.*)

What is critical to note is that the court did not hold that the proper scope of the nonconforming use was the whole **property** owned. Rather, the proper scope of the nonconforming use is the whole **parcel owned and intended to be used** by the owner at the time the zoning ordinance was promulgated. In this case, the board reviewed the record for evidence of what was intended by the owner of the Daybreak Mining site in 1973 when the county issued its zoning ordinance, making mining a nonconforming use in that area. It stated:

The Board finds that there is not substantial evidence in the record to support a factual conclusion that in 1973 there was an intent to mine outside of the 71-acre area described in the lease and DNR reclamation plan.⁴⁸

The hearing examiner did not make any factual finding to support his determination that the doctrine would allow mining beyond the 71-acre area where mining has historically occurred. Specifically, he did not make a finding or even refer to any evidence in the record related to the owner's intent in 1973 even though this factual determination is critical to deciding the proper scope of the nonconforming use. This factual finding refutes

⁴⁸ CP 151-55 (Resolution 2005-8-13 at p. 3.)

Storedahl's arguments that the board "offered no alternative findings."⁴⁹ In Quality Rock, the board's reversal of an examiner was upheld where the examiner made no findings as to the effects of the mining expansion on a river. There, the board reversed the examiner's conclusion that the proposal would not have adverse impacts in the absence of findings. Similarly, here, the board's reversal of the examiner should be upheld where the examiner failed to make a critical finding and the board made a finding supporting their decision.

Significantly, in this appeal, Storedahl does not claim that there is any evidence to mine beyond the 71-acre area as of 1973. In fact, on the issue of intent, it only references an application submitted in 1989 as the owner's intent to mine the entire Daybreak site.⁵⁰ Being faced with no evidence to support an argument that the diminishing assets doctrine would support the expansion of mining when it became a nonconforming use in 1973, Storedahl is left with having to argue that some date other than 1973 should be used. The county has already addressed why mining became a nonconforming use in 1973 in the prior section captioned "The County Code".

⁴⁹ Opening Brief at p. 25.

⁵⁰ Opening Brief at p. 40.

d. The 1996 Notice and Order.

In approving the rezone, the hearing examiner gave preclusive effect to a planning director's 1996 Notice and Order. Doing so was one of the "many false assumptions" that the trial court found justified the board's reversal of his decision.⁵¹ All of the parties acknowledge that the Notice and Order is not final and is nonbinding.⁵² In his decision, the hearing examiner noted the importance of determining the extent of Storedahl's nonconforming use rights to engage in surface mining. He stated that the extent of the nonconforming use rights "is [a] significant issue in this proceeding because many of the criteria, including the environmental analysis for the HCP, assume a particular base level of operation."⁵³ He also characterized this as "an important legal issue."⁵⁴ The importance of the extent of the nonconforming use rights was properly identified by the hearing examiner as determining whether the baseline for the review of the applications was either a "zero operation" (assuming either no nonconforming use rights or nonconforming use rights limited to areas already mined out) or an ability to mine the entire site.⁵⁵

⁵¹ See CP 2110 Memorandum Opinion at p. 4.

⁵² Opening Brief at p. 36; FF/FOEF Brief at p. 9.

⁵³ CP 42, Hearings Examiner Order at p. 6.

⁵⁴ *Id.*

⁵⁵ *Id.*

Despite recognizing the significance of the nonconforming use right issue, when approving the rezone, the hearing examiner refused to make a determination whether that right existed or its extent in his rezone decision. The hearing examiner stated that the decision “was final;” that he “was not in a position to second-guess the County planning director;” and that he took “at face value the apparent validity of the County’s 1996 nonconforming use determination that establishes the base level of operation” when evaluating the applications.⁵⁶

In essence, the hearing examiner’s refusal to engage in a determination of the important issue of the extent of the nonconforming use rights gave the 1996 Notice and Order preclusive effect. His decision to do so was an error of law and was clearly an erroneous application of the law to the facts.

Also, while Storedahl acknowledges that the Notice and Order is nonbinding,⁵⁷ it argues that the Notice and Order evidences the county’s view that mining could expand as a conforming use.⁵⁸ Storedahl is incorrect in arguing that the Notice and Order recognized any right to engage in mining outside of the 71-acre area where mining historically

⁵⁶ See Hearings Examiner Decision at p. 7.

⁵⁷ Opening Brief at p. 36.

⁵⁸ *Id.* at pages 36-7.

occurred. The Notice and Order specifically limited the determination of the nonconforming use rights to the 71 acres that had been mined by Storedahl, not to any other area of the Daybreak site. The Notice and Order is very clear as to what area the director found nonconforming use rights to apply to. It states “Storedahl may not expand surface mining and processing beyond the 71 acres already subject to mining and under a valid surface mining reclamation plan.”⁵⁹ The Notice and Order also provides that “the department concludes that Storedahl has a nonconforming right to conduct otherwise lawful mining [in] the historically-mined 71-acre portion of the Woodside property . . .”⁶⁰ This is limited to the area in sections 19 and 24; not the upland 100 acres in sections 13 and 18 that is the subject of the rezone request. The Notice and Order, if it is to be given any effect, only establishes a right to engage in mining in the 71 acres that had been historically mined. The board affirmed the determination that there was a nonconforming right to engage in mining within this 71-acre area.⁶¹ The Notice and Order does not support an argument that mining could be expanded beyond that specific area.

⁵⁹ See CP 928 – 950, AR Ex. 40, Notice and Order at p. 16.

⁶⁰ *Id.* at p. 11.

⁶¹ CP 151-55 (Resolution 2005-8-13 at p. 3.)

e. Conclusion to nonconforming use analysis.

The hearing examiner, board and trial court all agreed that mining at the Daybreak site became a nonconforming use in 1973 applying Rhod-A-Zalea. Additionally, all three agreed that the language of the county code allowing existing uses in F-X district to continue as “conforming uses” did not change the fact that those uses were, in fact, nonconforming uses. The hearing examiner did not make any finding related to where, in 1973, the owner intended to mine. His failure to do so makes his diminishing assets doctrine analysis fatally flawed. The board recognized this and found that in 1973 the owner’s intent was to mine only within the 71 acres which are not a part of the expansion area. Storedahl does not dispute this fact. Thus, the board did not commit clear error in determining that the nonconforming use right was limited to the 71 acre area.

4. Conclusion to Denial of Rezone was Proper.

The board did not commit clear error in applying the law to the facts. The board of commissioners reversed the hearing examiner’s determination that the proposal to rezone the site with the S-overlay was in the public interest. The required relationship to the public interest is not to be presumed. Fleming v. Tacoma, 81 Wn. 2d. 292, 502 P.2d 327 (1972),

reversed on other grounds, Raynes v. Leavenworth 118 Wn.2d 237, 821 P.2d 1204 (1992); and Parkridge v. Seattle, 89 Wn. 2d 454, 573 P.2d 359 (1978). The proponent for the rezone has the burden of proving that the rezone furthers the public health, safety, morals or welfare. Parkridge, supra, at 462. The board correctly concluded that the examiner erred because he: (1) incorrectly assumed that nonconforming use rights existed over the entire site; (2) incorrectly assumed that the mitigation proposed under the federal permits would not occur unless a rezone was granted; and (3) failed to take into account the county's independent authority to regulate nonconforming uses. The hearing examiner believed that granting a rezone was in the public welfare because without it, he believed mining would be allowed to expand as a nonconforming use.⁶² He acknowledged that absent the existence of nonconforming use rights the rezone would be denied.⁶³ After correcting the hearing examiner's "many false assumptions", the board did not commit clear error in finding that Storedahl failed to establish that the rezone proposal furthered the public welfare.

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⁶² CP 42 (Hearings Examiner Order at p. 6).

⁶³ CP 50 (Hearings Examiner Order at p. 8).

C. The Appearance of Fairness Doctrine.

1. Storedahl did not produce evidence of actual or potential bias.

Approximately one year before the board considered the Daybreak mining appeal, Mr. Stuart (then the executive director of Friends of Clark County) moderated an open house at which the public was invited to hear and ask questions at a presentation addressing the mining expansion proposal. Mr. Stuart did not take a position on the proposal. Rather, he made introductory comments and introduced speakers.⁶⁴ In making his opening comments, Mr. Stuart made it clear that the purpose of the meeting was to provide information to allow those attending to act however, for or against the proposal that they determined they should. He said:

Again, that's what we are here for tonight, to give you more information about what is happening, about what is going to happen and how you can all get involved in any way you choose to.⁶⁵

Storedahl notes that Mr. Stuart told attendees they could contact Friends of the East Fork and Fish First for additional information.⁶⁶ What Storedahl

⁶⁴ CP 1693-94, Transcript of public meeting.

⁶⁵ *Ibid.* This quote is the part omitted from the quote set out in Storedahl's Opening Brief at p. 42.

⁶⁶ *Id.* at p. 44.

fails to note is that Mr. Stuart also directed attendees to contact the state, federal and county governments for information.⁶⁷

Other than his innocuous introductory comments at the open house, the only other statement that is attributable to Mr. Stuart is the April, 2004, newsletter of Friends of Clark County made ten months before the first hearing in question. At the February, 2005 board hearing, Storedahl did not raise the publication as a basis to challenge Mr. Stuart. A challenge based upon a reason that “should have reasonably been known prior to the issuance of the decision” is waived if not raised before the decision. RCW 42.36.080..

Additionally, the April, 2004 newsletter does not evidence bias. It simply includes a statement that the organization (Friends of Clark County) has been partnering with river stewardship groups to prevent the degradation of the east fork of the Lewis River by gravel mining operations. The goal of preventing further degradation of the river is one shared by Storedahl and does not indicate prejudice or bias. Prejudgment and bias against a party are to be distinguished from the ideological or policy leanings of a decisionmaker. OPAL v. Adams County, *supra* at 890. The challenge must be for prejudgment of issues of fact or partiality

⁶⁷ CP 1694.

or bias signifying an attitude for or against a party as distinguished from issues of law or policy. Buell v. Bremerton, 80 Wn. 2d 518, 524 495 P.2d 1358 (1972). Decisionmakers are not required to be devoid of thought. Favoring a policy of public involvement and clean water is not a ground for disqualification.

Storedahl attempts to discredit Commissioner Stuart by referring to comments made by other individuals. They refer to comments made by Mr. Jack Kaeding; and Mr. David McDonald. The attempt to meet its burden of proof of establishing bias or prejudice on Mr. Stuart's behalf by producing evidence of comments made by other people is patently absurd.

A party asserting a violation of the appearance of fairness doctrine must produce evidence that demonstrates bias on the part of a commissioner; mere speculation is not enough to establish a violation. Bunko v. City of Puyallup Civil Service Commission, 95 Wn. App. 495 975 P.2d 1055 (1999). While acknowledging that court's have applied the "enhanced threshold" of State v. Post, 118 Wn.2d 596, 619, 826 P.2d 172 (1992), Storedahl urges that a violation can be found if there are "facts

sufficient to create an opportunity for public suspicion”.⁶⁸ Clearly, suspicion is not enough. As the Supreme Court stated in Post at 618-619:

...the appearance of fairness doctrine is directed at the evil of a biased or potentially interested judge or quasi-judicial decision maker. See Hoquiam v. Public Employee Relations Commission, *supra*...**without evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit**...past decisions of this court have applied the appearance of fairness doctrine when decision-making procedures have created an appearance of unfairness. *E.g.*, Smith v. Skagit County, 75 Wn.2d 715, 453 P.2d 832 (1969). Our decision here does not overrule this line of decisions, but reformulates the threshold that must be met before the doctrine will be applied: evidence of a judge’s or decisions maker’s actual or potential bias. This enhanced threshold is more closely related to the evil which the doctrine is designed to prevent. (*emphasis added*).

Storedahl has failed to produce evidence of Mr. Stuart’s actual or potential bias. Additionally, as discussed below, the following exceptions to the doctrine apply.

2. The rule of necessity.

Mr. Stuart’s participation in the proceedings was necessary to obtain a majority vote of the board. Accordingly, his participation was allowed by RCW 42.36.090. RCW 42.36.090 states:

In the event of a challenge to a member or members of a decision-making body which would cause a lack of a

⁶⁸ See Opening Brief at page 42.

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.

In the proceedings at question, the board would have failed to obtain a majority vote if Commissioner Stuart had not participated.

Storedahl claims that the statute does not apply because “there is no legal requirement that the Board decide issues by majority vote” (i.e., the board could have legally remained deadlocked).⁶⁹ However, such an interpretation of the statute would render it meaningless because no law prohibits a tie vote. Rather, the more sensible reading of the phrase “a majority vote as required by law” is that it is referring to the type of majority required (e.g., simple, two-thirds, etc.).

Storedahl also contends that the statute does not apply because Mr. Stuart “did not disclose his full involvement in opposing” the proposal. However, at the hearing, the challenge was based on Mr. Stuart’s participation in the February, 2004 public meeting.⁷⁰ Mr. Stuart disclosed

⁶⁹ Opening Brief at p. 47.

⁷⁰ See Verbatim Transcript of BOCC February 3, 2005 hearings at pages 2-3 attached to Storedahl’s Opening Brief filed with the trial court. CP 1279.

his participation as a moderator; stated that he “had not formed or expressed an opinion regarding the issues” before him; and that he would make his decision “solely on the facts contained in the record.”⁷¹ Mr. Stuart’s vote was necessary to obtain a majority vote and he made a full disclosure of the facts related to Storedahl’s challenge. His participation was allowed by RCW 42.36.090.

3. Statements made before declaring for office.

Mr. Stuart’s statements at the public meeting and in the newsletter were made by him on a pending quasi-judicial proposal before he declared for and was elected to office. RCW 42.36.040 provides, in relevant part:

Prior to declaring as a candidate for public office...no public discussion or expression of an opinion by a person subsequently elected to a public office, on any pending or proposed quasi-judicial actions, shall be a violation of the appearance of fairness doctrine.

The statements made by Mr. Stuart fall squarely within this exception to the appearance of fairness doctrine. His comments were made “prior to declaring as a candidate for public office” and were “public discussion or expressions” made “by a person subsequently elected to a public office” and were on a “pending or proposed quasi-judicial action.” By the very language of RCW 42.36.040, those statements cannot be a violation of the

⁷¹ *Id.* at pp. 3-4.

appearance of fairness doctrine. Storedahl claims, without citing to any authority, that this statute does not apply to statements relating to “site specific projects.”⁷² However, the statute applies to statements concerning “quasi-judicial actions” which by their very nature are site specific. RCW 42.36.010 provides in relevant part:

Quasi-judicial actions of local decision-making bodies are those actions of the legislative body, planning commission, hearing examiner, zoning adjuster, board of adjustment, or boards which determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding.

No statement fairly attributable to Mr. Stuart evidences actual or potential bias. Additionally, his vote was necessary to obtain a majority vote. RCW 42.36.090. The statements made prior to declaring and election to office cannot be the basis of an appearance of fairness challenge. RCW 42.36.040.†

D. Discovery.

A trial court’s management of discovery is reviewed for an abuse of discretion. Rhinehart v. Seattle Times Co., 98 Wn.2d 226, 257, 654 P.2d 673 (1982), aff’d 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984),

⁷² See Opening Brief at p. 48.

John Does v. Bellevue School Dist., 129 Wn.App. 832, 862, 120 P.3d 616 (2005).

In a LUPA proceeding, the trial court’s review is “confined to the record created by the quasi-judicial body or officer” unless one of the narrow exceptions of RCW 36.70C.120(1) applies. The trial court “shall not grant permission [to conduct discovery] unless the party requesting it makes a prima facie showing of need.”⁷³ Even then, the trial court “shall strictly limit discovery to what is necessary.”⁷⁴

The exception that Storedahl argued was applicable is RCW 36.70C.120(2)(a), which states:

- (2) . . . The record may be supplemented by additional evidence only if the additional evidence relates to:
 - (a) Grounds for disqualification of a member of the body or of the officer that made the land use decision, when such grounds were unknown by the petitioner at the time the record was created.

The trial court did not abuse its discretion in denying discovery for several reasons. First, to come within the exception quoted above, the party requesting discovery must have been aware of the grounds for disqualification at the time the record was created. In this case, Storedahl

⁷³ RCW 36.70C.120(5).

⁷⁴ *Ibid.*

knew of the grounds for disqualification for approximately a year prior to the hearing. According to the declaration of Ann Rivers, she attended the February 25, 2004 public meeting “on behalf of Storedahl” and observed Mr. Stuart’s conduct that Storedahl claims that evidences bias.⁷⁵ Indeed, a week prior to the hearing, Storedahl stated the grounds for Mr. Stuart’s disqualification in a letter to the Board.⁷⁶ The exception of RCW 36.70C.120(2)(a) does not apply because the grounds for disqualification were known by Storedahl at the time the record was created.

In addition to the “grounds for disqualification” exception not applying, the trial court did not abuse its discovery because Storedahl failed to make a prima facie showing of need. Storedahl failed to make this showing because, as the trial court ruled, Mr. Stuart’s conduct did not violate the appearance of fairness doctrine.

After entry of the order denying Storedahl’s discovery request, Storedahl filed a Public Disclosure Act request seeking the same information from the County. Because public agencies are inevitably a party to LUPA proceedings and public disclosure requests are a common

⁷⁵ See Declaration of Ms. Ann Rivers at CP 202-204.

⁷⁶ See Open Brief at p. 43.

method of conducting discovery, the legislature included the following provision within LUPA:

If any party, or anyone acting on behalf of any party, requests records under Chapter 42.17, RCW, relating to the matters at issue, a copy of the request shall simultaneously be given to all other parties and the court shall take the requests into account in fashioning an equitable discovery order under this section.

RCW 36.70C.120(5).

The trial court did not abuse its discretion in granting the county's motion for equitable relief from the public records request for the following reasons. As noted by the trial court, discovery in LUPA proceedings is strictly limited by RCW 36.70C.120. The County had characterized Storedahl's public records request as "back door discovery" and the court agreed "that in a sense, it seems very much that way."⁷⁷ The trial court denied discovery holding that the exception of RCW 42.17.310(1)(j) applied and quoted the following language from O'Connor v. Wash. Dept. of Social & Health Services, 143 Wn.2d 895, 906, 25 P.3d 426 (2001):

. . . A plain language of interpretation of it [RCW 42.17.310(1)(j)] is that records relevant to a controversy to

⁷⁷ CP 2220 (Ruling on public records request at p. 3).

which an agency is a party are exempt if those records would not be available to another party under the superior court rules of pretrial discovery.

The trial court noted its previous ruling denying discovery under LUPA because Storedahl had not made the showing required by RCW 36.70C.120. The court also noted that the material was not subject to discovery under CR 26(b)(1).

The trial court did not abuse its discretion in limiting discovery because Storedahl failed to make the showing required by RCW 36.70C.120 and the exception of RCW 42.17.310(1)(j) applied to the public records request.

E. Waiver of Claims of Error.

After the court entered its order affirming the decision of the board, the county moved to dismiss Storedahl's claims for declaratory relief and damages. On March 23, 2007, the court entered judgment dismissing the claims for declaratory relief and damages.⁷⁸ Declaratory relief was unavailable because LUPA is the “**exclusive** means of judicial review of land use decisions.” (*Original emphasis.*) James v. Kitsap County, 154 Wn.2d 574, 583, 115 P.3d 286 (2005). Damages were not available under

⁷⁸ CP 2195-6.

Chapter 64.40, RCW, because if the decision of the board was not clearly erroneous, it, ergo, could not have been arbitrary and capricious.

Additionally, Storedahl would be collaterally estopped from relitigating the legality of the board's decision. *See* Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 114-117, 829 P.2d 746 (1992), where a grant of certiorari declaring the county's land use decision to be arbitrary and capricious had preclusive effect in the same action preventing the county from relitigating that issue in the Chapter 64.40, RCW, damage claim.

Storedahl did not assign error to or address the court's dismissal of the declaratory relief and damage claims in its opening brief. A party waives a claim of error where it fails to include the claim in its assignments of error or address it in its opening brief. Schneider v. Forcier, 67 Wn.2d 161, 406 P.2d 935 (1965); Transamerica Ins. Group v. Pacific Ins. Co., 92 Wn.2d 21, 593 P.2d 156 (1979); and Weyerhaeuser Co. v. Commercial Union Insur. Co., 142 Wn.2d 654, 692-693, 15 P.3d 115 (2000). *See also*, RAP 10.3(a)(5) and (c) and RAP 12.1. If this matter is remanded to the trial court, it should include instructions that the claims for declaratory relief and damages are dismissed.

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F. Attorneys Fees.

In the event that this Court affirms the decisions below, the County is entitled to an award of attorney's fees and its expenses under RCW 4.84.370, pursuant to RAP 18.1. In relevant part, RCW 4.84.370 provides as follows:

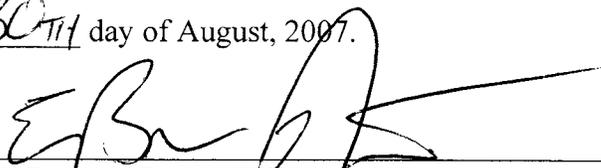
- (1) . . . Reasonable attorney's fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the Court of Appeals . . .
- (2) . . . The county . . . whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

The county's decision was upheld in the superior court. If the decision is upheld on appeal, the county requests that it be awarded its reasonable attorney's fees and costs incurred herein.

VI. CONCLUSION

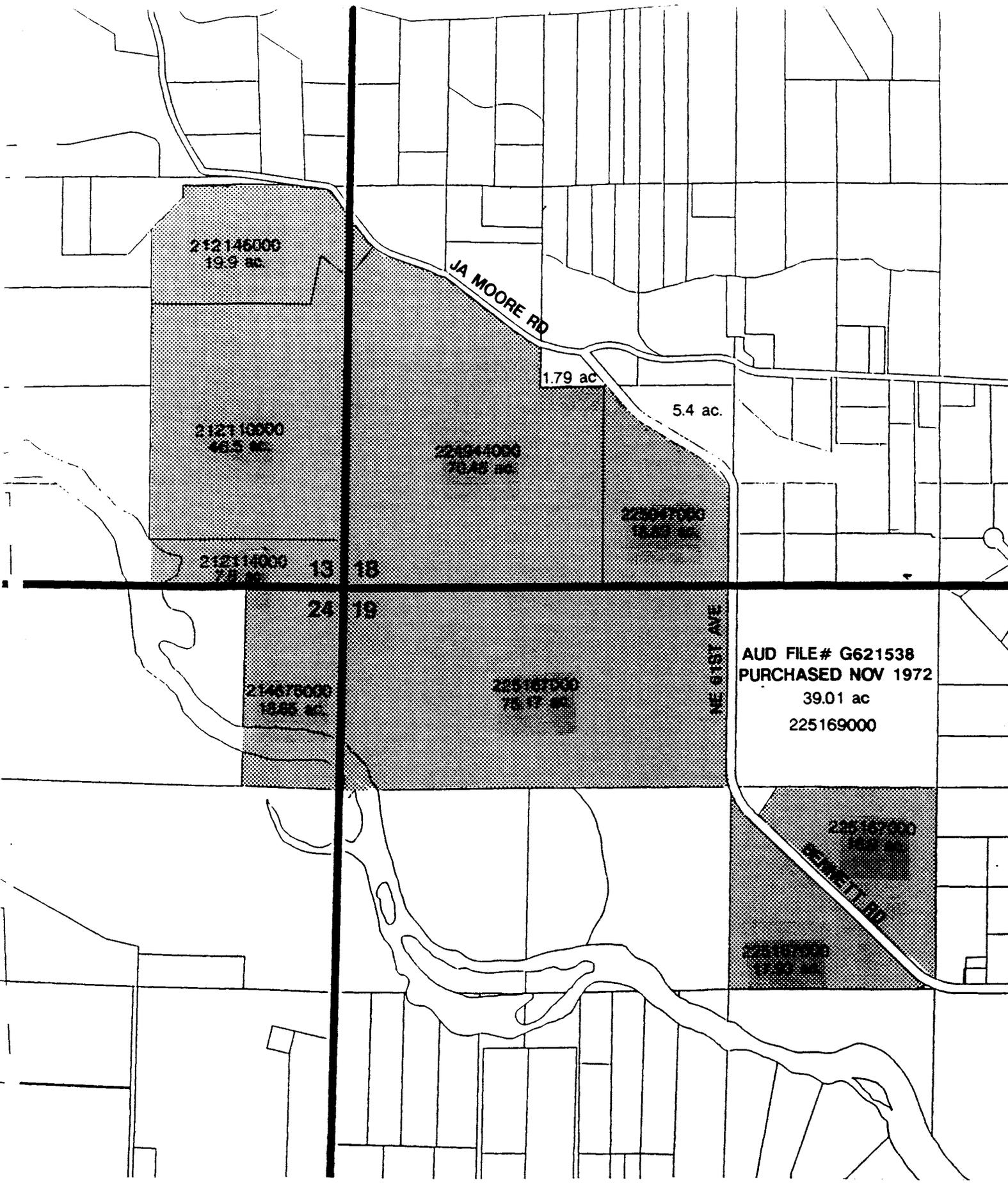
For the foregoing reasons, the county respectfully requests this Court to affirm the board's land use decisions and the trial court's decisions relating to the appearance of fairness doctrine and discovery.

DATED this 30TH day of August, 2007.



E. Bronson Potter, WSBA #9102
Senior Deputy Prosecuting Attorney
Of Attorneys for Respondent Clark County

APPENDIX A



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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

Appellants,

v.

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

Respondents.

No. 36177-9

AFFIDAVIT OF SERVICE



Thelma Kremer
Clerk of the Court

I, Thelma Kremer, being first duly sworn, upon oath, depose and state:

That I am a citizen of the United States of America and of the State of Washington, living and residing in Clark County, in said state; that I am over the age of 21 years, not a party to the above-entitled action and competent to be a witness therein;

That by Federal Express mail on this 30th day of August, 2007, affiant caused copies of *Clark County's Response Brief and Affidavit of Service* to be directed to the Clerk of the Court ; and

On this 30th day of August, 2007, affiant mailed by U.S. mail, postage prepaid, true and correct copies of *Clark County's Response Brief and Affidavit of Service* to the attorneys-of-record in this action and, in addition, copies of such were e-mailed to the parties at the e-mail addresses identified below:

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Further your affiant saith not.

Thelma Kiermer

SUBSCRIBED and SWORN to before me this 30th day of August, 2007.

Mindy Hamlerban
NOTARY PUBLIC in and for the State of
Washington, residing in Vancouver.
My commission expires: 4-1-08