

No. 36177-9

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

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

Appellants,

v.

CLARK COUNTY; FRIENDS OF THE EAST FORK; and FISH  
FIRST,

Respondents.

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STATE OF WASHINGTON  
CLARK COUNTY  
COURT OF APPEALS  
DIVISION II

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**RESPONDENTS FRIENDS OF THE EAST FORK AND FISH  
FIRST'S RESPONSE BRIEF**

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## I. INTRODUCTION

The Clark County Hearing Examiner (“Hearing Examiner”) believed – wrongly – that if he did not grant the rezone sought by Storedahl to expand the old Daybreak mine, the alternative was to allow relatively uncontrolled mining as a nonconforming use, with greater risks to the environment. As a result, he found that the rezone was in the public interest.

The Clark County Board of County Commissioners (the “Board”) found that the Hearing Examiner had incorrectly analyzed the situation: (a) the status and scope of the claimed nonconforming use had not yet been finally determined; (b) the County had the power to regulate the nonconforming use in any event; and (c) Storedahl had independent reasons for mitigating mining impacts – to avoid liability under the federal Endangered Species Act. After correcting the false choice posited by the Hearing Examiner, the Board reviewed the record and concluded that the proposed rezone was not in the public interest. The Board then remanded to the Hearing Examiner to determine the scope of the nonconforming use.

The Hearing Examiner determined that mining became a

nonconforming use of the Daybreak site in 1973, when the County revised the applicable F-X zone. The Board affirmed that reading of the County ordinances.

Storedahl appeals these land use decisions, and also claims that one of the Commissioners was unfairly biased, in violation of the appearance of fairness doctrine, because of his statements and personal associations before he became a County Commissioner.

In this LUPA case, the Court may not overturn the Board's decisions unless Storedahl demonstrates that the Board was clearly erroneous in its application of the law to the facts. As to findings of fact, Storedahl must demonstrate the findings are not supported by substantial evidence in the record, and as to questions of law, Storedahl must show the Board's interpretations of its own ordinances and the State's law were erroneous.

Storedahl cannot meet these burdens, as the relevant findings **are** supported by substantial evidence, the Board's legal interpretations were correct, and the Board's application of the law to the facts was reasonable. There also is no basis to invoke the "appearance of fairness" doctrine in this case.

## II. ASSIGNMENTS OF ERROR

1. Whether the Board properly reversed the Hearing Examiner and denied Storedahl's rezone application, where the Hearing Examiner improperly evaluated Storedahl's claimed right to mine as a nonconforming use in evaluating the "public interest" element of the rezoning criteria, and the Hearing Examiner found the application would not meet the rezone criteria, but for the claimed nonconforming use. The associated issues are:
  - (a) Whether the Board correctly interpreted Washington law on nonconforming uses;
  - (b) Whether the Board's decision was supported by the Hearing Examiner's findings of fact, as corrected by the Board; and
  - (c) Whether the Board's decision was a clearly erroneous application of the law to the facts.
  
2. Whether the Hearing Examiner and the Board correctly concluded that mining became a nonconforming use of the Daybreak Site in 1973. The associated issues are:
  - (a) Whether the conclusion resulted from an erroneous interpretation of the law, allowing deference to the County's

interpretation of its own zoning ordinances; and

(b) Whether the conclusion was a clearly erroneous application of the law to the facts.

3. Whether Commissioner Stuart's participation in the Board's actions in this case violated the appearance of fairness doctrine, based on his actions prior to becoming a member of the Board.

The issues associated with this assignment of error are:

(a) Whether, as a matter of law, actions taken prior to becoming a member of a public body can trigger the appearance of fairness doctrine;

(b) Whether, as a matter of law, the types of bias alleged by Storedahl may give trigger the appearance of fairness doctrine; and

(c) Whether the Superior Court properly denied Storedahl discovery regarding the appearance of fairness question.

### **III. STATEMENT OF THE CASE**

The Daybreak site, located between La Center and Battleground in Southwest Washington, includes old gravel pits (now ponds) on about 71 acres. The Daybreak site is located next to

the East Fork Lewis River.<sup>1</sup> The East Fork is one of the few undammed tributaries of the Lower Columbia, and is home to 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: steelhead, Chinook, chum, and coho salmon, bull trout, coastal cutthroat trout, pacific lamprey, and river lamprey.<sup>2</sup>

The historic mining area containing the old Daybreak pits was originally leased for mining in approximately 1970.<sup>3</sup> The first surface mining permit issued for the mining operation, dated January 1, 1971, states (in paragraph 1 of Ex. A) that it applies to a 71 acre area.<sup>4</sup> Storedahl acquired the company holding the lease to the original mining area in 1987.<sup>5</sup> Storedahl mined the site until mining ceased some time in the early 1990s.<sup>6</sup> Storedahl now proposes to mine in the adjacent 178-acre area (101 acres would

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<sup>1</sup> Clerk's Papers ("CP") 39 (HE Order at 3).

<sup>2</sup> CP 39, n.1 (HE Order at 3 n.1).

<sup>3</sup> CP 748 (HE Ex. 30 at Ex. D, p. 3).

<sup>4</sup> CP 751-52 (HE Ex. 30 at Ex. D, pp. 6-7).

<sup>5</sup> CP 797-98 (HE Ex. 30 at Ex. E, pp. 8-9).

<sup>6</sup> See CP 896, 899 (HE Ex. 30 at Ex. F, pp. 28, 31).

actually be mined), and it is this proposal to renew and expand mining operations that is the subject of this action.<sup>7</sup>

**A. Clark County's Land Use Actions**

Storedahl applied to Clark County to rezone approximately 100 acres for the proposed Daybreak expansion. This land is currently zoned AG-20, a zone which does not authorize surface mining. Storedahl's request to rezone the land by applying a surface mining overlay was denied by the Board, which found that a rezone would not further the public health, safety, morals, or welfare, as required by the County Code.<sup>8</sup>

The Hearing Examiner had proposed to grant the rezone, because Storedahl claimed a right to mine the whole area as a nonconforming use, and the Hearing Examiner believed that the only means of obtaining substantial mitigation of both the existing Daybreak pits and the proposed new mining area was to grant the rezone with attendant conditions.<sup>9</sup> Indeed, the Hearing Examiner

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<sup>7</sup> CP 43 (HE Order at 7).

<sup>8</sup> CP 2428-29 (Board Res. 2005-02-14 at 3-4).

<sup>9</sup> *Id.*; *See* CP 42-43, 50 (HE Order at 6-7, 14).

explained that his assumption that Storedahl could mine the whole site under a nonconforming use “drives the Examiner’s evaluation of the current proposal.”<sup>10</sup>

But the Board recognized that under Washington law, the County had the ability to require mitigation, even if mining occurred under a nonconforming use.<sup>11</sup> They also found that, even if Storedahl could mine as a nonconforming use, Storedahl had an independent motive for mitigating mining impacts: to obtain protection from liability under the Endangered Species Act for any claim that the old Daybreak pits or the proposed new pits hurt threatened and endangered fish that live in the East Fork Lewis River.<sup>12</sup> Correcting those errors, the Board concluded that the proposed rezone did not meet the “public interest” criteria. The Board also remanded to the Hearing Examiner to consider the existence and scope of Storedahl’s claimed nonconforming use.<sup>13</sup>

On remand, the Hearing Examiner found that mining became

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<sup>10</sup> CP 50 (HE Order at 14).

<sup>11</sup> CP 2428-29 (Board Res. 2005-02-14 at 3-4).

<sup>12</sup> *Id.*

<sup>13</sup> CP 2430 (Board Res. 2005-02-14 at 5).

a nonconforming use on the Daybreak site in 1973, when Clark County amended the description of the F-X zone then applicable to the property to prohibit mining uses.<sup>14</sup> The Board agreed that a nonconforming use was established in 1973, and limited that use to the original 71 acre area, because there was not substantial evidence of an intent to mine beyond that area in 1973.<sup>15</sup>

#### **IV. SUMMARY OF ARGUMENT**

On appeal from the County Hearing Examiner, the Board denied the rezone sought by Storedahl, finding that in applying the “public interest” element of the County’s rezone criteria, the Hearing Examiner had given improper weight to Storedahl’s claimed right to mine under a nonconforming use. Storedahl contends that the Board erred in denying Storedahl’s rezone request because the Board applied the wrong legal standard, and the Board’s conclusions are not supported by the Hearing Examiner’s factual findings.<sup>16</sup> Storedahl bears the burden of showing that the Board’s interpretation

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<sup>14</sup> CP 130-148 (HE Order Following Remand).

<sup>15</sup> CP 151-55 (Board Res. 2005-08-13).

<sup>16</sup> See Storedahl’s Opening Br. at 15-27.

of the criteria for a rezone was in error, and that its application of law to the facts was clearly erroneous.<sup>17</sup>

Contrary to Storedahl's claims, in its resolution the Board identified its areas of disagreement with the Hearing Examiner, and explained why the Hearing Examiner's decision was in error. The Board reversed the Hearing Examiner because his decision was predicated first, on misapplication of the non-final, non-binding 1996 Notice and Order regarding Storedahl's claimed nonconforming use right, and second, on the incorrect assumption that the County could not regulate a nonconforming use.<sup>18</sup> Indeed, the Hearing Examiner noted that these (false) premises drove his evaluation, but that if his analytical legal framework were different, he would have denied the rezone request.<sup>19</sup>

The Hearing Examiner also found that mining became a nonconforming use of the Daybreak site in 1973, when the County revised the F-X zone to exclude mining as a permitted use, and the

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<sup>17</sup> See RCW 36.70C.130(1)(b), (d).

<sup>18</sup> CP 2428-29 (Board Res. 2005-02-14 at 3-4).

<sup>19</sup> See CP 135 (HE Order on Remand at 6).

Board affirmed that decision on appeal.<sup>20</sup> Storedahl maintains that a provision of the 1973 code that allowed pre-existing uses to continue, but not expand, prevented mining from becoming a nonconforming use in 1973, and that a modified version of the same provision had the same effect when the zoning was changed again in 1980.<sup>21</sup> Storedahl bears the burden of proof on these issues.<sup>22</sup>

Storedahl's appeal presents a question of law – the meaning of “conforming” in prior versions of the County Code – which this Court reviews *de novo*, “allowing for such deference as is due the construction of a law by a local jurisdiction with expertise,”<sup>23</sup> and a question of whether the County's application of the law to the facts was clearly erroneous.<sup>24</sup> Since mining was not among the permitted uses in the new F-X zone and preexisting uses were prohibited from expanding to other areas in the zone, in 1973 the Daybreak mine fell

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<sup>20</sup> CP 139 (HE Order on Remand at 10); CP 2427 (Board Res. 2005-02-14 at 2).

<sup>21</sup> Storedahl's Opening Br. at 27-35.

<sup>22</sup> RCW 36.70C.130(1).

<sup>23</sup> RCW 36.70C.130(1)(b).

<sup>24</sup> RCW 36.70C.130(1)(d).

squarely within the definition of a nonconforming use.<sup>25</sup>

Storedahl argues that use of the word “conforming” to characterize existing uses that were allowed to continue after 1973, made the Daybreak mine a conforming use until 1995, when this code provision was repealed.<sup>26</sup> In arguing that CCC 18.30.070 (1973) left the mine as a conforming use, despite the zoning change, Storedahl ignores what it means to be a “nonconforming use,” as defined by the 1973 County Code,<sup>27</sup> and the Washington Supreme Court,<sup>28</sup> as well as the portion of CCC 18.30.070 (1973) that prohibited expansion of mining activity within the F-X zone. The County code and the common law contradict Storedahl’s reading. At best, Storedahl can argue that the apparent tension between these two provisions creates an ambiguity, in which case this Court should

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<sup>25</sup> See Clark County Code (“CCC”) 18.30.010 (listing permitted uses), .070 (barring expansion of unpermitted uses), as enacted Ord. 73-235 (1973).

<sup>26</sup> Storedahl’s Opening Br. at 32-35.

<sup>27</sup> CCC 18.02.330 (1973), *quoted in* Storedahl’s Opening Br. at 30.

<sup>28</sup> *Rhod-A-Zalea & 35<sup>th</sup>, Inc. v. Snohomish County*, 136 Wn.2d 1, 6, 959 P.2d 1024, 1027 (1998).

defer to the judgment of the County.<sup>29</sup> Storedahl's arguments from extrinsic factors, such as later County actions, also do not alter the effect of the 1973 zoning change. Storedahl cannot meet its burdens, and the Court should affirm the County's determination that mining became a nonconforming use in 1973.

Finally, Storedahl asks the Court to find that one of the County Commissioners was unfairly prejudiced against Storedahl's interests, and that Commissioners' participation in the Board's deliberations violated the appearance of fairness doctrine. Storedahl's arguments in this vein are factually and legally insufficient, and provide no basis for overturning the Board's decisions.

## V. ARGUMENT

### A. Standard of Review

The Land Use Petition Act ("LUPA")<sup>30</sup> governs judicial

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<sup>29</sup> See *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 472, 61 P.3d 11441, 1171 (2003).

<sup>30</sup> RCW Ch. 36.70C.

review of land use decisions.<sup>31</sup> A land use decision is “a final determination by a local jurisdiction’s body or officer with the highest level of authority to make the determination, including those with authority to hear appeals.”<sup>32</sup> In this case, the Board is the local body with the highest level of authority to determine land use matters.<sup>33</sup>

Under LUPA, the Court of Appeals stands in the shoes of the Superior Court and reviews the administrative land use decision on “the record before the local jurisdiction’s body ... with the highest level of authority to make final determinations,”<sup>34</sup> here the Board.<sup>35</sup> Accordingly, the Court’s review is limited to the administrative record that was before the Board.

Under LUPA, the party challenging a land use decision bears

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<sup>31</sup> RCW 36.70C.010; *Benchmark Land Co. v. City of Battle Ground*, 145 Wn.2d 685, 693, 49 P.3d 860, 864 (2002).

<sup>32</sup> RCW 36.70C.020(1)(a).

<sup>33</sup> See CCC 2.51.170.

<sup>34</sup> *HJS Development, Inc.*, 148 Wn.2d at 467-468, 61 P.3d at 1149.

<sup>35</sup> See CCC 2.51.170.

the burden of establishing the local authority's error.<sup>36</sup> Storedahl challenges the Board's land use decisions regarding denial of the rezone and the date mining became a nonconforming use, and thus it bears the burden of establishing the Board's error on both those issues. The Court may grant relief only if Storedahl meets its burden under the applicable LUPA standards for appellate relief,<sup>37</sup> three of which are relevant to this case:

- *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.*<sup>38</sup>

Courts review questions of law *de novo*<sup>39</sup> but generally defer to a local jurisdiction's reasonable interpretation of an ambiguous ordinance.<sup>40</sup>

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<sup>36</sup> RCW 36.70C.130(1).

<sup>37</sup> RCW 36.70C.130(1)(a) – (f).

<sup>38</sup> RCW 36.70C.130(1)(b).

<sup>39</sup> *City of University Place v. McGuire*, 144 Wn.2d 640, 647, 30 P.3d 453, 456 (2001).

<sup>40</sup> *See Citizens to Preserve Pioneer Park v. City of Mercer Island*, 106 Wn.App. 461, 475, 24 P.3d 1079, 1087 (2001) (deferring to a city council's reasonable interpretation of the term

*(Footnote Continued)*

- *The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court.*<sup>41</sup>

Substantial evidence is "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of [an] order."<sup>42</sup> Review for substantial evidence is deferential, and requires courts to view all the evidence and reasonable inferences "in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority."<sup>43</sup>

The Board is the highest forum below that exercised fact finding authority. The Clark County Code tasks the Hearing Examiner with the responsibility for making initial factual

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"usable signal" in a local ordinance governing the height of telecommunications towers).

<sup>41</sup> RCW 36.70C.130(1)(c).

<sup>42</sup> *City of University Place*, 144 Wn.2d at 647, 30 P.3d at 456 (2001) (quoting *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998)).

<sup>43</sup> *Peste v. Mason County*, 133 Wn.App. 456, 477, 136 P.3d 140, 151 (2006) (quoting *Freeburg v. Seattle*, 71 Wn.App. 367, 371-372, 859 P.2d 610 (1993)).

findings,<sup>44</sup> but also authorizes the Board to make its own factual determinations. The Code explicitly authorizes the Board to “accept, modify, or reject the examiner’s decision, or *any findings*.”<sup>45</sup> The Board’s authority to “accept, modify, or reject” the Hearing Examiner’s factual findings is the authority to make its own factual determinations. The Board is thus the highest forum below that exercised fact finding authority.

- *The land use decision is a clearly erroneous application of the law to the facts.*<sup>46</sup>

A court may reverse a local authority’s application of the law to facts as “clearly erroneous” only if the court is “left with the definite and firm conviction that a mistake has been committed.”<sup>47</sup> In scrutinizing a local authority’s application of the law to the facts, courts are “deferential to the factual determinations by the highest

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<sup>44</sup> See CCC 40.510.030(D)(5)(b).

<sup>45</sup> CCC 2.51.170 (emphasis added).

<sup>46</sup> RCW 36.70C.130(1)(d).

<sup>47</sup> *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123, 126 (2000).

forum below that exercised fact finding authority.”<sup>48</sup>

**B. The Board Properly Denied Storedahl’s Rezone Application**

The Board reversed the Hearing Examiner and denied the rezone sought by Storedahl because it did not meet one of Clark County’s rezone criteria. Specifically, the Board found that the requested rezone would not “further the public health safety and welfare” as required by CCC 18.503.060(3).<sup>49</sup>

Storedahl claims that in making this determination, the Board failed to identify any disagreement with the Hearing Examiner’s factual findings (and is therefore bound by his findings), and improperly applied the facts to the rezone criteria.<sup>50</sup> But Storedahl has ignored the portion of the Hearing Examiner’s decision explaining the basis for his “public interest” analysis, even though that is the portion of the Hearing Examiner’s decision that was the focus of the Board’s action. Reviewing the correct portion of the Hearing Examiner’s decision, it is readily apparent that the Board

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<sup>48</sup> *Peste*, 133 Wn.App. at 477, 136 P.3d at 151.

<sup>49</sup> CP 2428-29 (Board Res. 2005-02-14 at 3-4).

<sup>50</sup> *See* Storedahl’s Opening Br. at 15-27.

corrected the Hearing Examiner's errors of law, as well as his factual errors based on substantial evidence. Furthermore, Storedahl cannot show, as it must to prevail in this appeal, that the Board's action was a clearly erroneous application of the law to the facts.

**1. The Hearing Examiner's "Public Interest" Determination Was Driven By His Incorrect Views Regarding Storedahl's Claimed Nonconforming Use**

In approving Storedahl's rezone, the Hearing Examiner assumed that the County Planning Director's 1996 Notice and Order regarding Storedahl's claimed nonconforming use was final and effective, and so he took as a given that Storedahl could mine the Daybreak site as a nonconforming use.<sup>51</sup> This was wrong, as Storedahl now admits<sup>52</sup> (although Storedahl fails to acknowledge the Hearing Examiner's reliance on that Notice and Order in his rezone decision). Indeed, in a subsequent decision the Hearing Examiner also acknowledged that the 1996 Notice and Order was never final

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<sup>51</sup> See CP 42 (HE Order at 6).

<sup>52</sup> Storedahl Opening Br. at 36.

and was not binding on the parties.<sup>53</sup>

The Hearing Examiner also incorrectly assumed that the impact of gravel extraction and processing under the rezone proposal before him would bring about a “net reduction in environmental impact” when compared to mining under a nonconforming use,<sup>54</sup> and that as a result, river and habitat conditions would be better with the mine expansion than without it.<sup>55</sup>

The Hearing Examiner’s mistaken assumptions that Storedahl had the ability to mine the Daybreak site under a nonconforming use, and that the County had little ability to regulate that nonconforming use, dictated the outcome of his “public interest” determination under CCC 18.503.060(3):

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

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<sup>53</sup> CP 132, 145 (HE Order Following Remand at 3, 16). The Hearing Examiner did not revisit his earlier “public interest” determination on the rezone application in that later order, since the remand proceeding related only to Storedahl’s claimed nonconforming use.

<sup>54</sup> CP 42 (HE Order at 6) (emphasis in original).

<sup>55</sup> See CP 56 (*Id.* at 20).

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 acknowledgement in 1996 of the operator's vested nonconforming right to mine and process aggregate at this site (Ex. 40). The Washington Supreme Court has clearly stated that such nonconforming use rights must be acknowledged by local governments as a vested and valuable property right that cannot be taken away without compensation. *Rhod-a-zalea & 35<sup>th</sup> Inc., v. Snohomish County*, 136 Wn.2d 1, 959 P.2d 1024 (1998). ***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 right and the nature and 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 and relocation of mining under the current proposal.***<sup>56</sup>

This finding, unlike any of the ultimate conclusions that followed (the latter being the sole focus of Storedahl's Opening Brief, at 21-24), explains the Hearing Examiner's approach to the "public interest" rezone criteria in CCC 18.503.060(3).

The Hearing Examiner made it clear that he was comparing

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<sup>56</sup> CP 50 (*Id.* at 14) (emphasis added).

the impacts of mining subject to the rezone conditions to what he incorrectly assumed would occur under a nonconforming use, whereas he should have been comparing mining under a rezone to an alternative that prevented expansion of mining. Having wrongly concluded that mining under a nonconforming use would have significantly greater adverse impacts,<sup>57</sup> the Hearing Examiner held that mining under the rezone would have lower environmental impacts than under a nonconforming use, and thus the rezone would be in the public interest.<sup>58</sup>

The Hearing Examiner also made it clear that if it were not for Storedahl's claimed right to mine as a nonconforming use, the outcome would have been different. The Hearing Examiner firmly stated that, absent the claimed nonconforming use, a new mining operation "could not meet the approval criteria, and would be denied."<sup>59</sup>

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<sup>57</sup> See CP 42-44 (*Id.* at 6-8).

<sup>58</sup> See CP 54, 55-56, 67 (*Id.*, pp. 18, 19-20, 31).

<sup>59</sup> CP 44 (*Id.* at 8).

**2. The Board Reversed The Hearing Examiner's Rezone Decision Because His Public Interest Analysis Was Unduly Influenced By The Claimed Nonconforming Use**

The Board concluded that the Hearing Examiner's public interest determination under CCC 18.503.060(3) was driven by incorrect assumptions regarding Storedahl's claimed nonconforming use right, as well as mining impacts that could occur if Storedahl proceeded under that claimed use: "The Hearing Examiner erred in concluding that the 'public interest' rezone criteria was met because substantial mitigation would not occur if mining proceeded under nonconforming use rights."<sup>60</sup> The Board gave two reasons for its ruling: First, Storedahl had already committed to undertake the proposed mitigation measures as a condition of obtaining protection under the federal Endangered Species Act ("ESA"), an obligation independent of the County's rezone decision; and second, the County could regulate mining as a nonconforming use to avoid

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<sup>60</sup> CP 2428-29 (Board Res. 2005-02-14 at 3-4).

adverse impacts, so long as it does not effectively prohibit the use.<sup>61</sup>

The Board's first reason is supported by the Hearing Examiner's findings and Final Order, and the second by Washington case law.

The first paragraph of the Hearing Examiner's Final Order explains that Storedahl sought an incidental take permit from the federal agencies that administer the ESA to provide coverage against any potential violation of that Act, and that in order to obtain an incidental take permit, Storedahl had to obtain the federal agencies' approval of a habitat conservation plan ("HCP").<sup>62</sup> Based upon these facts, the Board concluded that the Hearing Examiner had set up a false choice. Regardless of whether the County rezoned the Daybreak site or not, Storedahl would have to carry out the mitigation committed to in the HCP in order to obtain protection under the ESA<sup>63</sup>

Thus, there was no factual basis for the Hearing Examiner's

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<sup>61</sup> See CP 2429 (Board Res. 2005-02-14 at 4); see also *Rhod-A-Zalea*, 136 Wn.2d at 8, 959 P.2d at 1028 (Wn. 1998) (explaining that local governments have the authority to regulate nonconforming uses under their police power).

<sup>62</sup> See CP 39 (HE Order at 3).

<sup>63</sup> CP 2429 (Board Res. 2005-02-14 at 4).

distinction between mining impacts under a nonconforming use and under a rezone. At most they would be the same, because even mining under a nonconforming use, Storedahl would have to comply with the same limits and perform the same mitigation limit in order to meet the terms of the HCP and the incidental take permits.

The Board's second reason corrects the Hearing Examiner's statement of Washington case law regarding nonconforming uses. The Hearing Examiner cited to the Washington Supreme Court's ruling in *Rhod-A-Zalea*<sup>64</sup> for the principle that nonconforming use rights cannot be taken away without just compensation.<sup>65</sup> The Board correctly countered: "[T]he county has independent authority to regulate nonconforming uses, so long as such regulation does not effectively prohibit the use."<sup>66</sup> The Board was simply restating the holding of *Rhod-A-Zalea*, that "local governments have the authority to preserve, regulate, and even, within constitutional limitations,

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<sup>64</sup> 136 Wn.2d 1, 959 P.2d 1024.

<sup>65</sup> See CP 50 (HE Order at 14).

<sup>66</sup> CP 2429 (Board Res. 2005-02-14 at 4).

terminate nonconforming uses.”<sup>67</sup>

Indeed, *Rhod-A-Zalea* favorably discusses a case from another state where local environmental regulations were imposed on an existing nonconforming quarry, and were upheld even though they would reduce the quarry’s potential excavating material by half, costing the quarry approximately twenty-six million dollars.<sup>68</sup> Under *Rhod-A-Zalea* – the very case the Hearing Examiner cited in his first order – the Hearing Examiner’s conclusion that the County could not limit the environmental impacts of mining conducted as a nonconforming use was plainly wrong. The Board was correct in reversing the Hearing Examiner’s public interest determination, which was based on that misreading of Washington law.

When the Hearing Examiner’s improper deference to Storedahl’s claimed nonconforming use was removed, the correct outcome of the public interest determination under CCC 18.503.060(3) was clear: the Hearing Examiner himself had

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<sup>67</sup> See 136 Wn.2d at 8, 959 P.2d at 1028.

<sup>68</sup> 136 Wn.2d at 11-12, 959 P.2d at 1029-30 (discussing *Dock Watch Hollow Quarry Pit, Inc. v. Township of Warren*, 142 N.J. Super. 103, 361 A.2d 12 (N.J. App. 1976).

found that, if it were not for the pre-existing nonconforming use, the mining proposal “could not meet the approval criteria, and would be denied.”<sup>69</sup>

### **3. The Board’s Actions Resulted From Proper Application Of The Law to The Facts**

Storedahl also claims the Board failed to make its own factual findings and – relying on the pre-LUPA decision in *Maranatha Mining v. Pierce County*<sup>70</sup> – is bound by the Hearing Examiner’s findings of fact because it did not make any factual findings of its own.<sup>71</sup> Actually, the Board did explain the errors the Hearing Examiner made in his factual analysis related to the “public interest” rezoning factor, as discussed at length above.

Thus, unlike the county board in *Maranatha*, the Board did identify the errors in the Hearing Examiner’s factual findings, and explained the factual basis for its ultimate conclusions.<sup>72</sup> This is sufficient, as this Court recently concluded in the factually similar

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<sup>69</sup> CP 44 (HE Order at 8).

<sup>70</sup> 59 Wn. App. 795, 801 P.2d 985 (Wn. App. 1990).

<sup>71</sup> Storedahl’s Opening Br. at 24-27.

<sup>72</sup> *Cf. Maranatha*, 59 Wn.App. at 802-803, 801 P.2d at 990.

case of *Quality Rock Products, Inc. v. Thurston County*,<sup>73</sup> where this Court rejected objections to the brevity of a County Board's decision reversing a hearing examiner. In *Quality Rock*, the Thurston County Board overturned a Hearing Examiner's approval of a special use permit to expand a gravel mine, as the proposed expansion was not consistent with the County comprehensive plan's natural environmental policies.<sup>74</sup>

Here, the Board's rezone decision rests on application of the County's rezoning criteria – specifically, the public interest element – and correct application of the law of nonconforming uses to the facts set forth in pages 3 through 21 of the Hearing Examiner's Final Order. This Court must uphold the Board's rezone decision, as Storedahl has failed to meet the burden imposed by RCW 36.70C.130 of demonstrating that the Board's decision results from a clearly erroneous application of the law to those facts.

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<sup>73</sup> 159 P.3d 1, 8 (Wn.App. 2007).

<sup>74</sup> *Id.*

**C. The Board Properly Determined That Mining Became A Nonconforming Use Of The Daybreak Site In 1973**

**1. The Daybreak Mine became a nonconforming use in 1973.**

The Washington Supreme Court defines a nonconforming use as one that “lawfully existed prior to the adoption of a zoning ordinance and which is maintained after the effective date of that ordinance, although it does not comply with the zoning restrictions applicable to the district in which it is situated.”<sup>75</sup> Nonconforming uses, despite being incompatible with zoning regulations, may continue for a period of time, but may not expand.<sup>76</sup>

Until 1973, the F-X Rural Use Zone that covered the Daybreak Mine allowed “virtually every sort of use,” including mining.<sup>77</sup> In 1973, Clark County enacted an ordinance that excluded mining from the list of permitted uses within the F-X zone.<sup>78</sup> The

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<sup>75</sup> *Rhod-A-Zalea*, 136 Wn.2d at 6, 959 P.2d at 1027 (citing 1 Robert M. Anderson, *American Law of Zoning* § 6.01 (Kenneth H. Young ed., 4th ed. 1996)).

<sup>76</sup> *Rhod-A-Zalea*, 136 Wn.2d at 7, 959 P.2d at 1027-1028.

<sup>77</sup> CP 138 (HE Order on Remand at 9).

<sup>78</sup> See CCC § 18.30.010 – 0.30 as enacted by Ord. 73-235 (1973) (enumerating “permitted,” “special,” and “conditional” uses; mining is *not* included in any of these categories).

ordinance allowed pre-existing lawful uses, including mining, to continue, but prohibited them from expanding into adjoining or contiguous property.<sup>79</sup> At the time, the County defined a nonconforming use as “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.”<sup>80</sup>

Mining thus became a nonconforming use within the F-X zone in 1973. No new mines were allowed, and existing mines were permitted to continue operating, but were not permitted to expand into adjoining or contiguous property. This treatment of mining within the F-X zone after 1973 falls squarely within both the Washington Supreme Court’s and Clark County’s definition of a nonconforming use – a use that is prohibited within a particular zone, but is allowed to continue without expansion because it predates the zoning regulations that outlawed that use. Therefore, the Daybreak Mine, located in the F-X zone, became a nonconforming use in 1973, when amendments to that zone

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<sup>79</sup> See CCC § 18.30.070 as enacted by Ord. 73-235 (1973).

<sup>80</sup> CCC § 18.02.330 (1973).

prohibited further mining.

Accordingly, the Hearing Examiner was correct in holding that the Daybreak Mine became a nonconforming use in 1973.

**2. Storedahl wrongly claims that the Daybreak Mine became a nonconforming use in 1995, rather than in 1973.**

Storedahl presents several arguments in support of its position that the Daybreak mine became a nonconforming use in 1995, not 1973, based on (1) the text of the 1973 ordinance, and (2) the County's subsequent administration of zoning and land use of the property. Both arguments are fundamentally flawed.

**3. The language of the 1973 ordinance.**

Storedahl argues that the language of the 1973 Clark County ordinance compels the conclusion that mining, although prohibited within the F-X zone, continued as a *conforming* use within that zone. Storedahl's argument is premised on the isolation of a single section of the 1973 ordinance – CCC § 18.30.070<sup>81</sup> – from all surrounding context. That section states that “all uses in existence and occurring on a specific parcel of land which legally qualified as ‘permitted

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<sup>81</sup> As enacted by Ord. 73-235 (1973).

uses' ... shall continue as conforming uses ..., but in no case shall any use be allowed to expand into adjoining or contiguous property without an approved zone change.”<sup>82</sup> Storedahl presents three reasons why its de-contextualized reading of this section is the correct one, each of which fails:

- ***“Plain meaning” of CCC § 18.30.070***

Storedahl argues that the “plain meaning” of the word “conforming” in CCC § 18.30.070 compels the conclusion that the County intended mining to continue as a conforming use within the F-X zone, and therefore the Daybreak Mine did not become nonconforming in 1973.<sup>83</sup>

Storedahl ignores the conflict between its so-called “plain meaning” of this one word and the effect of the rest of the ordinance. If CCC § 18.30.070 were truly intended to make mining and other uses “conforming” within the “plain meaning” or ordinary sense of the term, then those uses, including new uses, would have been allowed to take place *anywhere* within the zone. Yet they were not.

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<sup>82</sup> CCC § 18.30.070 as enacted by Ord. 73-235 (1973).

<sup>83</sup> Storedahl’s Opening Br. at 32-33.

The existing uses were limited in precisely the same way that nonconforming uses are circumscribed under the common law: They were confined to the areas on which they previously took place, and could not be expanded or pursued elsewhere within the zone. Mining as a new use was prohibited. Thus, Storedahl's "plain meaning" argument is groundless.

- ***Canons of construction mandate a "literal" reading of CCC § 18.30.070***

Storedahl further argues that canons of statutory construction mandate a "literal" reading of CCC § 18.30.070, and a literal reading renders mining a "conforming" use within the F-X zone. Storedahl, in support of its position, cites the Washington Supreme Court's decision in *State v. Jacobs*, in which the Court held that "[i]f [a] statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent."<sup>84</sup> However, as the Court recognized in the very same case, "[p]lain meaning is determined from the ordinary meaning of the language

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<sup>84</sup> *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281, 283 (2005).

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*.”<sup>85</sup> Thus, “plain meaning” is never discerned in a vacuum – it is discerned within a specific context.

In this instance, an examination of CCC § 18.30.070 within the context of the entire ordinance, related provisions, and the statutory scheme as a whole, makes it clear that the County intended to make mining a nonconforming use within the F-X zone. The other provisions of the ordinance, including the very next clause within this section,<sup>86</sup> expressly treat mining as a nonconforming use. The 1973 ordinance restricted mining and other existing proscribed uses in precisely the same way that nonconforming uses are restricted under the common law: They were confined to the areas on which they previously took place, and could not be expanded or pursued elsewhere within the zone. The word “conforming” in this section cannot be interpreted so that it essentially nullifies the effect

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<sup>85</sup> *Id.* (Emphases added).

<sup>86</sup> Which prevents existing uses that don’t comply with the zoning regulations from expanding into adjoining or contiguous property. CCC § 18.30.070.

of the ordinance as a whole. The word “conforming” in this section merely recognized that existing uses, despite being incompatible with the restrictions of the F-X zone, would be permitted to continue.

- ***Clark County used both “conforming” and “nonconforming” in different sections of the code***

Storedahl finally argues that because the County used both “nonconforming” and “conforming” in different sections of the 1973 code, it understood the difference between those two terms, and specifically intended to maintain proscribed uses within the F-X zone as “conforming” uses.<sup>87</sup> As explained above, reading the 1973 ordinance as a whole makes it clear that the County intended to make mining a nonconforming use within the F-X zone, its use of the word “conforming” in this section notwithstanding.

At best, Storedahl can make a case that CCC § 18.30.070 is ambiguous. The ambiguity of that section would not warrant overturning the Hearing Examiner’s interpretation of the ordinance, which was adopted by the Board. Where a local zoning ordinance is

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<sup>87</sup> Storedahl’s Opening Br. at 30-31.

ambiguous, courts generally defer to an expert local body's reasonable interpretation of that ambiguous ordinance.<sup>88</sup> This Court may overturn the Board's interpretation of the ambiguous section only if it finds that interpretation erroneous, after giving deference to the Board's interpretation.<sup>89</sup>

Reading the ordinance as a whole makes it clear that the County intended to make mining a nonconforming use within the F-X zone. The Hearing Examiner's interpretation, which treated the word "conforming" in CCC §18.30.070 as "anomalous" in light of the clear intent of the rest of the ordinance,<sup>90</sup> is reasonable, and was adopted by the Board. The Court should therefore defer to the County's reasonable interpretation of this ambiguous local ordinance.

**a. County's Administration of Zoning Ordinances.**

Storedahl argues that the County's subsequent administration of zoning ordinances reveals that it viewed surface mining as a

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<sup>88</sup> See *Citizens to Preserve Pioneer Park*, 106 Wn.App. at 475, 24 P.3d at 1087.

<sup>89</sup> See RCW 36.70C.130(1)(b).

<sup>90</sup> CP 47 (HE Order at 10).

conforming use after 1973. Storedahl points to four specific aspects of the County's administration of zoning ordinances, none of which support its contention:

- *1980 Surface Mining Overlay*

In 1980, the County rezoned parts of the Daybreak Mine site as AG-S, an agricultural use zone with a surface mining overlay ("S-Overlay").<sup>91</sup> The AG-S overlay permitted surface mining in the zone, but only if the mining satisfied specific ordinance criteria. Among other requirements, the overlay incorporated the requirements of the State Surface Mining Act, and attendant implementing regulations, and set forth specific plan requirements with which mining operations had to comply.<sup>92</sup> The 1980 code retained the provision that allowed pre-existing mines to continue operating, but prohibited their expansion to adjoining lands.<sup>93</sup>

Storedahl argues that because the 1980 S-Overlay would have allowed mines that meet certain criteria, the Daybreak Mine was a

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<sup>91</sup> See CCC ch. 18.301; CCC ch. 18.329 (1980).

<sup>92</sup> See CCC 18.329.010 (1980) (adopting by reference RCW 78.44 and WAC 332-18).

<sup>93</sup> CP 1379.

conforming use under the 1980 zoning code.<sup>94</sup> However, the Daybreak Mine did not satisfy the requirements of the 1980 AG-S overlay, and so was not converted back to a conforming use by the adoption of the 1980 code.

To satisfy the zoning requirements of the 1980 ordinance, mining operations had to devise reclamation plans for land rehabilitation within two years of completing mining<sup>95</sup> as well as detailed operating plans and specifications.<sup>96</sup> The 1980 ordinance also required mine operators to submit to the planning director plans “drawn to an engineer’s scale” that depicted in detail the pre- and post-mining topography and explained how the mine would conform to the ordinance and all other relevant laws, rules, and regulations.<sup>97</sup> Significantly, the ordinance prohibited any mining use from being established until the County Planning Director certified that the operation met all of the relevant requirements.<sup>98</sup>

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<sup>94</sup> Storedahl’s Opening Br.at 34-35.

<sup>95</sup> See RCW 78.44.090 (1980); CCC 18.329.060 (1980).

<sup>96</sup> See CCC 18.329.030, .050 (1980).

<sup>97</sup> CCC 18.329.050 (1989).

<sup>98</sup> See CCC 18.329.010, .040 (1980).

There is no evidence in the record that the Daybreak operation ever submitted the plans required by CCC 18.329.040 and .050 (1980) or that the mine ever received plan approval as required by CCC 18.329.040 (1980) or certification from the County planning director as required by CCC 18.329.010 (1980).

The fact that the mine was allowed to continue to operate, even though it had not satisfied these basic zoning criteria, demonstrates that the County continued to treat the Daybreak Mine as a nonconforming use, under the 1980 land use code, just as it had under the 1973 code. That conclusion is reinforced by the County's retention of CCC § 18.30.070 in the 1980 code.

- ***The County made mining a nonconforming use in its 1995 Comprehensive Plan***

In 1995, the County adopted a new comprehensive plan and development regulations.<sup>99</sup> At this point the County repealed the old zoning code, including CCC § 18.30.070. It also removed the S-Overlay that allowed mining in some areas of the AG-20 (formerly

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<sup>99</sup> See CP 931 (1996 Notice and Order, HE Ex. 40, at 4).

F-X) zone.<sup>100</sup> Storedahl argues that the 1995 Comprehensive Plan, by repealing the “conforming” language in CCC § 18.30.070 and removing the AG-S overlay, made mining a nonconforming use of the Daybreak site for the first time.<sup>101</sup>

Storedahl’s conclusion is a non sequitur. The County’s repeal of sections of the 1973 ordinance tells us nothing about the County’s view of the effect of that ordinance. As has been demonstrated, the effect of the 1973 ordinance was to treat mining as a nonconforming use within the F-X zone. The County’s repeal of sections of that ordinance twenty two years later does not indicate that the County understood the ordinance to have the effect of maintaining prohibited uses as “conforming” uses within the F-X zone.

- ***1996 Notice and Order***

Storedahl cites what it admits is a non-binding Notice and Order issued by the County Planning Director<sup>102</sup> in support of its contention that the County planning director viewed the Daybreak

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<sup>100</sup> CP 931, CP 1382; *see* Storedahl Opening Br. at 35.

<sup>101</sup> Storedahl’s Opening Br. at 35-36.

<sup>102</sup> *See* CP 928-950 (1996 Notice and Order, HE Ex. 40).

Mine as a conforming use prior to 1995.<sup>103</sup> Storedahl presents two quotes – shorn of all context – from the non-binding Notice and Order. Neither discusses or refers, explicitly or implicitly, to the conformity or nonconformity of the Daybreak Mine. The first quote recognizes that Storedahl and its predecessors expressed the intent to mine the entirety of the Daybreak site before the Comprehensive Plan was adopted in December 1994,<sup>104</sup> a fact which ultimately had no significance to the conclusions of the Notice and Order. The second quote describes the AG-S zoning designation that covered some portions of the Daybreak site, and notes that the AG-S designation permitted both agricultural and surface mining uses.<sup>105</sup>

There is no disagreement that Storedahl expressed an intent in 1994 to mine all of the Daybreak site. However, Clark County subsequently determined in this case, in a portion of its ruling that was affirmed by the Superior Court and has not been challenged by Storedahl on appeal, that the relevant inquiry is the owner's intent at

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<sup>103</sup> Storedahl's Opening Br., pp. 36-37.

<sup>104</sup> CP 935 (Notice and Order at 8).

<sup>105</sup> CP 929 (Notice and Order at 2).

the time mining became a nonconforming use. For the Daybreak Mine, that occurred in 1973.

Nowhere in the Notice and Order is there a finding or conclusion that the Daybreak Mine was a conforming use until 1995. Indeed, in parts of the Notice and Order that were ignored by Storedahl, the County Planning Director found that mines that predated the 1980 “surface mining combining districts,” or S overlay, were not held to the standards of that district,<sup>106</sup> and concluded that mining activities at the Daybreak site “were lawfully established uses as of 1968-70, prior to the time of the adoption of the County’s surface mining combining district ordinance in 1980.”<sup>107</sup> Those findings and conclusions suggest the County Planning Director considered the Daybreak Mine to be a nonconforming use as of 1980, not 1995. Furthermore, the Notice and Order contains no discussion of the 1973 change to the F-X zone that prohibited mining uses, and so offers no guidance on the effect of that 1973 zoning change on the status of the Daybreak operation.

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<sup>106</sup> CP 938 (Notice and Order at 11).

<sup>107</sup> CP 939 (Notice and Order at 12).

- *Clark County was aware of substantial post 1973 expansion of the Daybreak mine, yet did not demand additional approvals*

The Daybreak mine expanded in size from 1973 to 1994.<sup>108</sup> The area being mined increased from 2 to 71 acres.<sup>109</sup> Storedahl argues that this expansion, which the County was aware of, and for which it demanded no new approvals, demonstrates that the County viewed mining as a conforming use within the F-X zone, and its successor, the AG-20 or AG-S zone.

The surface mining permit issued by DNR in 1971 authorized mining on 71 acres.<sup>110</sup> It is, accordingly, not surprising that the County did not object to the expansion of the mine to fill 71 acres. The fact that the mining operation was effectively abandoned in the early 1990s also is evidence that the County was not willing to allow the mine to expand beyond those 71 acres without obtaining additional approvals.

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<sup>108</sup> See CP 869-899.

<sup>109</sup> *Id.*

<sup>110</sup> CP 751-52 (HE Ex. 30 at Ex. D, pp. 6-7).

The County's treatment of the Daybreak mining operation also is consistent with the diminishing asset doctrine, which provides that the proper scope of a nonconforming mining use is the area of land the owner intended to use for mining at the time the zoning ordinance was promulgated.<sup>111</sup> Here, when ultimately presented with the issue, the Board found that the operators of the Daybreak Mine intended to mine the relevant 71 acre area *before* mining became a nonconforming use in 1973.<sup>112</sup> Therefore, it was consistent with the diminishing assets doctrine to allow mining on the Daybreak site to expand from 2 to 71 acres. Thus, the County's acquiescence in that expansion cannot be interpreted as a sign that the County viewed the mine as a conforming use.

**D. The Superior Court Properly Held That Commissioner Stuart's Actions Did Not Violate the Appearance of Fairness Doctrine.**

Storedahl contends that Commissioner Stuart's participation in the Board's denial of the rezone application violated the appearance of fairness doctrine because – before he was named to

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<sup>111</sup> *City of University Place v. McGuire*, 144 Wn.2d 640, 655, 30 P.3d 453, 459 (2001).

<sup>112</sup> *See* CP 153 (Board Res. 2005-08-13 at 3).

the Board – he moderated a town meeting discussing mining expansion in Clark County, served as executive director of Friends of Clark County, and wrote introductory sections to the organization’s monthly newsletter that Storedahl argues were directed against its mining operations. Friends of the East Fork (“FOEF”) and Fish First expect that Clark County will fully discuss the appearance of fairness arguments in its briefing to the Court. However, FOEF and Fish First note for the Court, that under RCW § 42.36.040 and the case law developing the appearance of fairness doctrine’s notion of bias, Commissioner Stuart did not violate the appearance of fairness doctrine.

**1. Commissioner Stuart’s Actions Cannot Violate the Appearance of Fairness Doctrine Given the Plain Language of Wash. Rev. Code § 42.36.040.**

The plain language of Wash. Rev. Code § 42.36.040 prevents any of the statements, expressions, or associations that Storedahl has attributed to Commissioner Stuart from supporting an appearance of fairness claim against him. The 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, on any pending or proposed quasi-judicial actions, shall be a violation of the appearance of fairness doctrine.<sup>113</sup>

All of the statements and conduct that Storedahl points to as evidence of bias were made prior to Mr. Stuart's election to the Board. As such, they fit comfortably within the plain statutory language of § 42.36.040.

Storedahl argues that the statute “does not apply to statements opposing site-specific projects.”<sup>114</sup> Even if this were true – and Storedahl offers no authority for this proposition – Storedahl fails to point to any “site-specific” criticism of Storedahl's proposed land use actions by Commissioner Stuart. Certainly, Storedahl has failed to identify any indication of bias since he took office.

**2. Storedahl Has Failed To Show That Commissioner Stuart Stood to Gain or Lose Anything From Participating in the Decision.**

Storedahl also has not shown that Commissioner Stuart stood to gain or lose anything from his decision on the Storedahl land use actions, much less that he would “appreciably” gain from this action,

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<sup>113</sup> Wash. Rev. Code § 42.36.040.

<sup>114</sup> Storedahl's Opening Br. at 48.

as is the legal standard. As a result, Storedahl has failed to demonstrated the sort of bias needed to invoke the appearance of fairness doctrine.

In *Magula v. Dep't of Labor Indus.*,<sup>115</sup> a general contractor (Magula), was cited by an electrical inspector for performing electrical work in violation of state law. An administrative law judge found Magula in violation of state law requiring all electrical equipment to be installed by an electrical contractor.<sup>116</sup> On appeal, the Electrical Board affirmed the administrative law judge's decision. On further appeal the superior court affirmed the Electrical Board. Magula appealed again, citing appearance of fairness violations of members of the Electrical Board.<sup>117</sup> Six of the board members were either licensed electrical contractors or certified electricians. *Id.* The court held that any potential biases that the board members would bring to the proceedings because of their

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<sup>115</sup> 116 Wash. App. 966, 968–69, 69 P.3d 354 (2003).

<sup>116</sup> *Id.* at 969.

<sup>117</sup> *Id.* at 972.

personal interests in the outcome were too indirect.<sup>118</sup> The court noted that there was no showing that any of the board members had a direct financial interest adverse to Magula's "specific business dealings."<sup>119</sup>

Similar results were reached in *Org. to Preserve Agric. Lands v. Adams County* ("OPAL")<sup>120</sup> (evidence that commissioner received sixty three phone calls during the prior year from a party coming before the commission was insufficient to demonstrate actual or potential bias because the commissioner had other matters to take care of with the party unrelated to the specific proceeding) and in *State v. Post*<sup>121</sup> (court finding no appearance of unfairness where pre-sentence report was prepared by an allegedly biased person because there was no evidence that the judge was biased). Indeed, Storedahl admits that since *Post* was decided in 1992, have demanded actual evidence to support "appearance of fairness"

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<sup>118</sup> *Id.* at 973.

<sup>119</sup> *Id.*

<sup>120</sup> 128 Wash. 2d 869, 890, 913 P.2d 793 (1996).

<sup>121</sup> 118 Wash. 2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992).

claims.<sup>122</sup>

In this case, Commissioner Stuart stands to gain or lose nothing by participating in the proceeding. Just as in *Magula*, any “gain” that Commissioner Stuart seeks to obtain is an abstract or tangential one, not personal or financial. As in *OPAL*, the bias of any specific person or organization Commissioner Stuart may have associated with is not imputed upon Commissioner Stuart such that Commissioner Stuart can be said to have a specific personal bias sufficient to violate the appearance of fairness doctrine. As in *Post*, Commissioner Stuart’s mere association and dealings with parties appearing before him as a Commissioner does not violate the appearance of fairness doctrine absent a concrete showing of some specific prejudice or personal interest.

**E. The Superior Court Properly Denied Storedahl’s Public Records Act Request**

Storedahl did not appeal the Superior Court’s denial of its request for discovery under LUPA. When the discovery request was denied, Storedahl attempted to get around LUPA’s discovery

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<sup>122</sup> Storedahl Opening Br. at 42.

constraints by filing a Public Disclosure Act (“PDA”) request, and the Superior Court quashed that request. Storedahl now appeals only the Superior Court’s quashing of that request.

Storedahl’s sole argument that its PDA request should have been granted is based on *O’Connor v. Dep’t of Soc. and Health Servs.*<sup>123</sup> However, the Superior Court’s decision is easily distinguishable. In that case Petitioner sued the Washington State Department of Social and Health Services (“DSHS”) for alleged molestation of her minor son by a DSHS employee.<sup>124</sup> The Superior Court quashed Petitioner’s Public Records Act request for certain records of DSHS. On appeal the Washington Supreme Court held that public records from a public agency that are available under discovery rules against that agency are obtainable under the Act. The court relied on the “plain language” of the Act for when records are exempt from public disclosure: “Records which are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery

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<sup>123</sup> 143 Wn.2d 895, 35 P.3d 426 (2001).

<sup>124</sup> *Id.* at 898.

for causes pending in the superior courts are exempt from disclosure.”<sup>125</sup>

In this case the Superior Court found that under the discovery rules of civil procedure and LUPA, no further discovery into communications between FOEF/FF and officials of Clark County was permissible. Therefore the PDA could not be used to access any such communications, because an express exemption is made for records that “would not be available” to Storedahl “under the rules of pretrial discovery.” The Superior Court’s decision to quash Storedahl’s request for documents was therefore proper.

## **VI. CONCLUSION**

For the foregoing reasons, FOEF and Fish First respectfully urge the Court to uphold the Board’s land use decisions, as affirmed by the Superior Court.

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<sup>125</sup> *Id.* at 906; Wash. Rev. Code § 42.17.310(j), recodified as Wash. Rev. Code § 42.56.290.

August 9, 2007

Respectfully Submitted,



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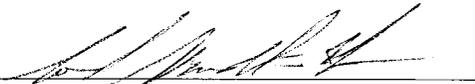
I certify that on the 9<sup>th</sup> day of August 2007, I caused true and correct copies of Respondents Friends of the East Fork; and Fish First's Response Brief to be served on the following by e-mail and first class mail:

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