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**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.

STOREDAHL'S REPLY BRIEF

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I. INTRODUCTION

With its collective 100 pages of briefing, Friends of the East Fork and Fish First (“FOEF/FF”) and Clark County (the “County”) have failed to adequately address, let alone refute, Storedahl’s principal arguments:

(1) that the Board of County Commissioners (“Board”) offered no *relevant* basis for concluding that approval of Storedahl’s rezone application would not further the public welfare, and (2) that neither the Board nor this Court may disregard the plain language of the Clark County Code and construe “conforming” to mean the opposite, “nonconforming.” Instead, respondents simply invite blind deference to the local agencies, even though their decisions wholly ignored controlling legal standards.

First, Storedahl has shown that in granting the rezone, the Examiner did precisely what the Board failed to do: he applied the statutory rezone criteria to the vast record in the case, concluded that the rezone would further the public welfare, and supported that decision with many findings of fact. The Board is required to enter its own findings or to identify errors of law, or both, when it reverses a decision of the Examiner; here, the Board did neither. Instead of determining whether Storedahl had satisfied the rezone criteria, the Board answered an irrelevant question no one had asked: whether the County would be able to regulate mining as a nonconforming use, even though Storedahl had not applied to mine the site as a nonconforming use. As explained below, respondents’ argument that the Board’s decision was necessary to correct the Examiner’s dicta about mining as a nonconforming use is a red herring offered solely to distract

from the fact that the Board could not and therefore did not justify its decision.

Second, Storedahl's mining activities plainly did not become nonconforming until 1995, and by that time Storedahl had a right to mine the entire site under the diminishing asset doctrine. The materially identical 1973 and 1980 Code provisions expressly stated that existing lawful uses "shall continue as conforming uses." Respondents' argument for construing "conforming uses" to mean "nonconforming uses" is that the County Code used "anomalous language" that meant the opposite of what it actually said. This Court, however, must construe the County Code as written and should decline respondents' invitation to rewrite the Code to suit respondents' view of what the Code ought to have said. The 1973 and 1980 Code provisions, as written, unambiguously made the existing mining operation a conforming land use until 1995, when the conforming use language was repealed and the surface mining overlay, the designation which permitted mining outright, was removed from the area of active mining.

Finally, this Court should reject respondents' effort to downplay Commissioner Stuart's extensive involvement in community opposition to the Daybreak Mine, as well as their effort to prevent Storedahl from using discovery or the Public Records Act to obtain documents about that involvement.

Storedahl has proposed to expand its existing gravel mine, a land use that is valuable to Storedahl but also to a community that relies on high-quality gravel to support construction demand. *See* RCW 78.44.010 (recognizing that "the extraction of minerals by surface mining is an

essential activity making an important contribution to the economic well-being of the state”). Moreover, Storedahl voluntarily combined its mining proposal with a conservation plan that would create, enhance, and preserve fish and wildlife habitat and park use over the entire 300-acre site and provide net environmental benefits.¹ Storedahl’s marathon two-decade permit process, CP 666, 677, to proceed with the mine expansion has been stymied not by a failure to satisfy the requirements of the Code, or by the County’s lawful exercise of discretion in protecting the public welfare. In fact, every agency that has reviewed and issued project permits has concluded that Storedahl’s proposal would result in a net benefit to the environment or would otherwise meet environmental protection objectives.² The Board disregarded these conclusions and ignored the Examiner’s detailed findings in support of the proposal. And it did so in a process tainted by the participation of a Board member who had prejudged the project before joining the Board. Storedahl therefore respectfully asks this Court to reverse the decisions below.

¹ As Kimball Storedahl testified, the company’s goal was “to develop an integrated mining and habitat enhancement program” that would be recognized as “the model for a wet mine in the entire state of Washington.” AR at HE Ex. 580 at 43-44.

² Among the many resource agencies that have reviewed and approved of Storedahl’s proposal are the Washington Department of Fish & Wildlife, AR at HE Ex. 712, Tab 19; the Department of Ecology, CP 521-522 (approving shoreline conditional use permit), CP 385-429 (concluding that the project would result in “overall improvement in water quality and quantity”); the Department of Natural Resources, AR at HE Ex. 712, Att. 20; the Federal Emergency Management Agency (commending the proposal for “restoring and enhancing the natural and beneficial functions of the floodplain”); and the U.S. Fish & Wildlife Service (“USFWS”) and the National Marine Fisheries Service (“NMFS”), AR at HE Exs. 276, 277, 278, 279, 410, 414, 415 (finding net environmental benefits). In addition, the Washington Shoreline Hearings Board considered an appeal of the shoreline substantial development permit and found that Storedahl’s proposal met all requirements of the Shoreline Management Act, Ch. 90.58 RCW. CP 347-83.

II. ARGUMENT AND AUTHORITY

A. The Board Offered No Relevant Justification for Denying Storedahl's Rezone Application.

In arguing that the Board properly reversed the Examiner's rezone decision, respondents notably omit any discussion of the only relevant portion of the Examiner's 81-page decision, the portion entitled "Rezone Application." See CP 57-67.³ The Examiner's decision shows that he set forth the applicable statutory criteria for reviewing rezone applications and entered detailed findings of fact supporting his determination for each criterion. Instead of focusing on the Examiner's rezone decision, CP 57-67, respondents focus on the Examiner's unrelated statements about mining under a nonconforming use. From this nonconforming use discussion, respondents elaborate on a supposed "false premise" that simply had to be corrected by the Board.⁴ Yet nowhere do respondents explain what nonconforming uses have to do with Storedahl's application for a rezone. Because the Examiner considered the relevant statutory criteria in granting

³ The Examiner's initial 81-page decision addressed a broad range of land use permitting issues. One of the issues addressed was Storedahl's application for a rezone, but other issues were before the Examiner, including site plan review, a conditional use permit, a shoreline substantial development permit, a shoreline conditional use permit, wetland and habitat permits, and appeals under the State Environmental Policy Act ("SEPA"), Chapter 43.21C RCW. All of these permits were approved and are not before this Court.

⁴ As respondents argue it, the Examiner's "false premise" was the "mistaken assumption" that "Storedahl had the ability to mine the Daybreak site under a nonconforming use, and that the County had *little ability to regulate the nonconforming use.*" FOEF/FF Br. at 19 (emphasis added). Respondents contend that central to the Examiner's decision approving the rezone was a belief that mining under the alternative nonconforming use right would deprive the County of the ability to impose the same level of mitigation as is available under a rezone. What is striking about respondents' argument, however, is that *nowhere* in the Examiner's decision did he say, or even hint, that the County had "little ability to regulate" mining as a nonconforming use. Respondents' argument about the Examiner's "false premise" is entirely an after-the-fact mischaracterization concocted to make sense of the Board's decision.

the rezone, and because the Board did not do so in denying the rezone, the Board's decision should be reversed.

1. The Examiner's detailed findings supported his conclusion that the rezone furthered the public welfare.

The County Code provides four criteria against which applications for a rezone must be evaluated.⁵ The Examiner assessed Storedahl's rezone application against all four criteria, CP 57-67, and concluded that Storedahl had satisfied them all, *id.* On review, the Board reversed based solely on its determination that Storedahl had failed to satisfy the third criterion: the zone "change does not further the public health, safety, morals or welfare." CP 121. In making that crucial determination, however, the Board did not assign error to any of the Examiner's findings supporting the public welfare determination, nor did the Board enter its own findings. Instead, the Board erroneously ruled that the County would also be able to further the public welfare if the mining proceeded as a nonconforming use, *a proposal not even before the Board.*

In measuring Storedahl's application against the public welfare criterion, *see* CP 64-67, the Examiner made a number of detailed findings, each of which demonstrated that a rezone would further the public welfare:

- Valuable Construction Rock "There is substantial evidence in the record that the resource proposed for extraction at this mine meets the

⁵ There is no dispute about the applicable criteria, which include: (1) the zone change "is consistent with the comprehensive plan map designation," (2) it is "consistent with the plan policies and locational criteria and the purpose statement of the zoning district," (3) "conditions have substantially changed since the zone was applied to the property and the rezone furthers the public health, safety and welfare," and (4) there are "adequate public facilities and services to serve the requested zone change." CCC 18.503.060(1-4) (now codified at CCC 40.560.020(H)).

specifications for construction rock that would provide a *valuable resource to the county* and have a *benefit to the public welfare.*” CP 65 (emphasis added).

- Minimal or No Impacts to Wells “[T]he Examiner concludes that *impacts to near-by wells and groundwater will be minimal, if they occur at all*, and that any impacts that might occur will be corrected by the mine operator.” CP 66 (emphasis added).
- Air Quality Standards Are Satisfied “[T]he Examiner finds that this operation *will comply with the applicable air quality requirements.*” CP 66, 70 (emphasis added).
- Aesthetic Impacts are Mitigated “[T]he site will be substantially revegetated and that *the revegetation will improve aesthetics.*” CP 66, 71 (emphasis added).
- Conservation Measures Will Benefit Species “[T]he site would be reclaimed and restored to provide *significant habitat benefits,*” which “will *add to the public welfare.*” CP 67 (emphasis added).

The Board did not reverse these findings and they have not been appealed to this Court. As unchallenged findings, they “are treated as verities on appeal.” *State v. Stenson*, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997). The Examiner’s public welfare analysis identified the precise factors the Examiner considered and explained why, based on the record, a

rezone would further the public welfare. The Examiner's review of Storedahl's rezone application was therefore a textbook land use determination that left no doubt about the standards applied or the factors considered.

2. In reversing the Examiner's rezone decision, the Board failed to enter its own findings or to correct a legal error.

Juxtaposed against the Examiner's textbook analysis is the Board's order reversing the Examiner and denying the rezone. Instead of entering its own findings of fact or identifying errors of law, the Board simply changed the subject and asked the irrelevant question of whether the County could regulate the land use proposal before it as a nonconforming use.

When the Board reverses the Examiner's decision on a rezone application, the County Code *requires* that the Board provide a "statement of the facts that the board finds show the appealed decision does not comply with applicable approval criteria or development standards."

CCC 40.510.030.H.3.b(3)(b). The Board failed to provide such a statement. In fact, it is impossible to determine what public welfare factors, if any, the Board disputed. FOEF/FF contend that "the Board reviewed the record and concluded that the proposed rezone was not in the public interest."

FOEF/FF Br. at 1. Yet respondents would be hard-pressed to identify any relevant or objective factor that the Board considered. Unanswered by respondents is what *criteria* the Board applied or how the Board met its burden in reversing the Examiner's decision. *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn.2d 782, 797-98, 903 P.2d 986 (1995)

(holding that, in the absence of adopted criteria, “the decision-making body [has] the burden to justify its decision”).

Instead of addressing how the rezone proposal would affect the public welfare—which was, after all, the basis for the Board’s reversal—the Board latched onto a passage in the Examiner’s 81-page decision that was separate from and unrelated to the Rezone Application decision. Eight pages before the Examiner’s decision on the Rezone Application, the Examiner included gratuitous dicta noting Storedahl’s potential right to mine the site as a nonconforming use. CP 50. The Examiner’s dicta indicated that mining would be more protective of the environment if the project proceeded under a rezone, as proposed, than if the project proceeded as a nonconforming use. *Id.*⁶ The Examiner’s reasons were clear: Storedahl had voluntarily committed to undertake significant conservation measures at the site as part of the Endangered Species Act review process, including, among other things, the eventual donation of the entire property to a nonprofit park organization and creation of a \$1 million fund to pay for the management of the property as a wildlife sanctuary. CP 67. The Examiner correctly recognized that these and other commitments (1) were voluntary, (2) were conditioned on approval of the rezone application, and (3) could be relinquished by Storedahl if the rezone application were

⁶ Specifically, the Examiner stated that “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.” CP 50. The Examiner repeatedly stated, however, that the “merits of the applicant’s nonconforming use claim are not before the Examiner . . . , nor are the opponents’ assumptions and assertions that the nonconforming use right does not exist.” CP 42.

denied. *See* Section II.A.4.a below. These voluntary commitments thus provided a significant benefit to the community, but were conditioned on granting of the rezone. CP 67.

Critically, while these dicta in the Examiner's 81-page decision evaluated the comparative benefits of mining under a rezone versus mining under a nonconforming use right, the *rezone decision* itself focused exclusively on the statutory rezone criteria.⁷ The Examiner's rezone decision applied the rezone criteria objectively and without reference to nonconforming uses.⁸ He measured the proposal against the applicable criteria and found that they were met. CP 57-67. The Examiner concluded, for example, that the public welfare would be furthered by continued extraction of valuable mineral resources, by the substantial conservation measures proposed by Storedahl, and by the comprehensive mitigation of noise, air quality, groundwater, or other impacts, if any, of the mining operation. CP 64-67.

Yet even though the Examiner's decision to grant the rezone was not based on any premise (false or otherwise) about Storedahl's ability to mine under a nonconforming use right, the Board acted as if that issue were somehow relevant to Storedahl's rezone proposal and the Examiner's application of the rezone criteria. It was not. As is clear from the rezone

⁷ The Examiner expressly noted that the rezone criteria, and not extraneous considerations, governed his decision: "Land use permit applications are judged against the approval criteria in effect at the time a complete application is filed." CP 44. In fact, the purpose of the legislative land use reforms enacted in RCW 36.70B.030 was to bind local decision makers to adopted criteria: "At a minimum, such applicable regulations or plan *shall be determinative* of the . . . uses that may be allowed . . . if the criteria for their approval have been satisfied." *Id.* at (2) (emphasis added).

⁸ In fact, the Examiner's evaluation of the public welfare criterion does not include the term "nonconforming use."

decision itself, the Examiner approved the rezone based solely on his determination that Storedahl's proposal, as modified by the Examiner, satisfied the applicable criteria. CP 57-67.

3. The Board's only explanation for denying the rezone focused on the County's ability to regulate mining as a nonconforming use.

In denying the rezone, the Board held that the proposal would not further the public welfare, but the Board did not discuss any of the Examiner's findings supporting the public welfare determination. Rather than focusing on relevant criteria, the Board reasoned that the "Examiner erred in concluding that the 'public interest' rezone criteria was [sic] met because substantial mitigation would not occur if mining proceeded under nonconforming use rights." CP 121-22. The Examiner's public welfare conclusion, however, did not rest on the availability or unavailability of mitigation if mining proceeded under nonconforming use rights. CP 64-67.⁹ The Examiner concluded that a rezone would further the public

⁹ On this point, respondents incorrectly state that "the Examiner himself had 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.'" FOEF/FF Br. at 26. The Examiner said no such thing. His statement was that "a *new mining operation on a virgin site* adjacent to the [East Fork Lewis River] could not meet the approval criteria and would be denied." CP 43-44 (emphasis added). First, the proposal was not for mining adjacent to the EFLR, nor was it in the riparian areas, the floodway, or 100-year floodplain but in uplands above the 500-year flood plain. CP 97 (Examiner noting that "FEMA determined that most of the new mining proposed in these consolidated applications will be above the 500-year floodplain"). Second, contrary to respondents' misleading quotation, the Examiner *never* indicated that his rezone decision was based in any way on the alternative availability of mining under a nonconforming use right. The Daybreak Mine is *not* a new mining operation on a virgin site. Until 1995, it was an active mine that began operations in 1968, and Storedahl's proposed conservation measures will restore much of the site's habitat and other environmental features in a way that will improve on the current conditions. *See, e.g.,* AR at HE Ex. 415 at 4 (USFWS finding that Storedahl's proposal provides "net benefits compared to current conditions").

welfare objectively and without reference to mitigation under nonconforming use rights.

Nevertheless, after ignoring the Examiner's actual decision, the Board provided further irrelevant justification for its reversal:

First, the federally approved Habitat Conservation Plan (which contains the bulk of mitigation measures under review) was sought by the applicant due to its business decision to avoid "take" liability under the federal Endangered Species Act. Nothing in the record suggests that the applicant would alter its commitment to a federal safe sanctuary depending upon whether county approvals are premised upon a conforming zone change or nonconforming mining rights. Second, the county has independent authority to regulate nonconforming uses, so long as such regulation does not effectively prohibit the use.

CP 122.

The Board's explanation is irrelevant. It utterly omits any explanation of how the rezone would fail to further the public welfare. Where is the Board's explanation or statement of facts regarding how the "appealed decision does not comply with applicable approval criteria," as is required under CCC 40.510.030.H.3.b(3)(b)? Moreover, the Board's assumption is not supported by the record.¹⁰ The Board failed fundamentally to explain its decision by reference to relevant standards.¹¹

¹⁰ In fact, the USFWS and NMFS noted: "Implementation of the HCP, in the view of the Services, would result in little, if any, take and would minimize and mitigate the impact of the take both in the short-term and long-term. Further, the HCP would also address *existing* conditions that are present on the site and which could, unless addressed, have the potential for adverse consequences to covered species." AR at HE Ex. 415, App. C, RR-45 at 21. NMFS also noted: "No take is expected to result from Storedahl's mining and processing activities." AR at HE Ex. 439 at 92.

¹¹ Respondents mistake Storedahl's objection as one focused on the "brevity" of the Board's decision. See FOEF/FF Br. at 27; County Br. at 18. Respondents cite to

4. Even if the County's ability to regulate the Daybreak Mine as a nonconforming use were relevant to the rezone application, the Board's analysis was incorrect.

Apart from being irrelevant, the Board's reasoning was also wrong. The record makes very clear that Storedahl's voluntary conservation commitments are entirely premised on approval of the rezone. The conservation measures were voluntarily offered and may be voluntarily relinquished if a rezone is not approved. While the County may certainly regulate mining as a nonconforming use, the proposal before the Board was not to mine as a nonconforming use, and the record does not support a conclusion that the County may deny the rezone on the mistaken belief it may extract the kinds of generous and perpetual commitments offered by Storedahl.

a) Storedahl's HCP conservation measures were conditioned on approval of the rezone application.

Even if the Board's analysis were relevant to the public welfare criterion, the Board fundamentally misapprehended the ESA's conditional conservation process.

Quality Rock Prods., Inc. v. Thurston County, 139 Wn. App. 125, 159 P.3d 1 (2007), for this Court's rejection of a challenge based on brevity. In *Quality Rock*, the appellant challenged "the brevity of the Board's finding." *Id.* at 140. This Court rejected appellant's brevity argument, concluding that "the Board's decision lists several of the hearing examiner's factual findings that show inconsistencies between the proposed project and the comprehensive plan's policies on the natural environment." *Id.* Storedahl's complaint, however, is not that the Board's analysis was overly brief, *but that it utterly failed to address any relevant factors*. Storedahl was deprived of precisely the type of findings, grounded in the record, that the court was able to rely on in *Quality Rock*.

The ESA generally prohibits actions that result in the “take” of species listed as endangered. 16 U.S.C. § 1538(a)(1)(B), (C).¹² Should an otherwise lawful action by private parties have the potential for resulting in a take of listed species, the parties may obtain an incidental take permit (“ITP”), which, as its name suggests, permits the incidental take of species. A habitat conservation plan (“HCP”) is required in order to obtain an ITP, and the HCP evaluates how incidental take may occur and offers voluntary measures to ensure that any take is mitigated. 16 U.S.C. § 1539(a)(1)(B), (2). Once the reviewing federal agencies determine that the HCP meets the approval criteria, they and the private party execute a binding implementation agreement (“IA”), which incorporates the HCP, and the ITP is issued. *See* 16 U.S.C. § 1539(a)(2)(B). The private party’s conservation obligations under the IA are predicated and contingent on proceeding with the proposed action, and conservation or mitigation measures are required for the specific level of “take” that may occur under the proposal. *See* 50 C.F.R. § 17.22(b)(7).¹³

¹² The ESA prohibits the take of endangered species, 16 U.S.C. § 1538(a)(1), and the agencies have the ability to determine whether to extend this prohibition to threatened as opposed to endangered species. *See, e.g.*, 50 C.F.R. § 17.40-.44 and 50 C.F.R. Pt. 223. Contrary to statements made by the County and FOEF/FF, none of species addressed in the Daybreak HCP are listed as “endangered.” *See* AR at HE Ex. 276. “Take” is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to [do so].” 16 U.S.C. § 1532(19); 50 C.F.R. § 17.3 (further defining “harm”).

¹³ The HCP’s conservation measures are calibrated to mitigate the incidental take resulting from a specific proposal and may become unnecessary if the proposed action is changed. In fact, the USFWS and NMFS, the agencies with ESA jurisdiction noted: “Should the project, in whole or substantial part, fail to be implemented due to the failure of other federal, state, or local agencies to issue necessary permits, then Storedahl will, in consultation with the Services, *implement those measures that are commensurate with the level of take that occurred as a result of the project* and for which Storedahl received incidental take coverage under the permits. *If no mining takes place, it is likely that none*

Because issuance of the ITP is a federal action that may affect the quality of the environment, the federal agencies must also prepare an environmental impact statement (“EIS”) pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*

Here, Storedahl’s application for an ITP and the EIS demonstrate that Storedahl’s voluntary HCP/ITP commitments were conditioned on mining under a rezone. The HCP provides, for example, that “Storedahl has submitted to Clark County an application to change zoning from AG-20 to AG/S (Surface Mining Combining District Zoning) to those portions of parcels that are now known to be located outside of the 100-year floodplain.” AR at HE Ex. 276, ch. 2 at 14. The EIS similarly explains that “[a]pplication is pending to restore the surface mining combining district [i.e., the rezone] to the portions of the site currently outside the regulatory floodplain.” CP 1066.

Storedahl’s conservation measures are premised on Storedahl’s use of the property as spelled out in the federal reviewing documents. In fact, the IA expressly permits Storedahl to relinquish all conservation obligations under the HCP and ITP if it relinquishes the underlying action. AR at HE Ex. 415 (“Storedahl may elect to relinquish the Permit, or each of them, in whole or in part, as to specified covered activities or as to certain species, or both.”). “At the time of the relinquishment, Storedahl will have no post-relinquishment requirement to continue mitigation measures *developed specifically for a relinquished activity.*” *Id.* at 7 (emphasis added).

of the CMs will occur since the project is predicated on mining.” AR at HE Ex. 415 (Biological Opinion) at 8 (emphasis added).

Storedahl's substantial and costly mitigation obligations were therefore conditioned on the mining operations proceeding as substantially set forth in the rezone application. Should the County substantially modify Storedahl's proposal as set forth in the rezone and other applications, Storedahl may relinquish its obligations under the HCP. Obviously some mitigation may be required if Storedahl were to proceed with mining under a nonconforming use, but Storedahl's voluntary conservation measures might well be less comprehensive and less environmentally beneficial.

The Board's assertion that "[n]othing in the record suggests that the applicant would alter its commitment to a federal safe sanctuary depending upon whether county approvals are premised upon a conforming zone change or nonconforming mining rights," CP 122, thus ignores not only the actual rezone criteria, but also the evidence in the record regarding the contingent nature of the HCP conservation commitments.

b) While the County may regulate nonconforming uses, it may not require the substantial commitments made in the HCP.

The Board's second purported justification for denying Storedahl's rezone application was that the County has "independent authority to regulate nonconforming uses, so long as such regulation does not effectively prohibit the use." CP 122. Presumably, although the Board did not explain this, it meant that Storedahl's rezone application should be denied because mitigation of environmental impacts could be obtained by regulating the Daybreak Mine as a nonconforming use.

This basis for denying the rezone is erroneous for several reasons. First, the fact that the County may regulate nonconforming uses is not a

relevant basis for denying Storedahl's rezone application, which must be evaluated solely against legislatively adopted criteria. *See* CCC 18.503.060(1-4) (rezone criteria); RCW 36.70B.030(2) (adopted regulations "shall be determinative of the . . . uses that may be allowed . . . if the criteria for their approval have been satisfied"). In fact, the County was statutorily prohibited from examining the availability of "alternatives" to the proposed action. RCW 36.70B.030(3). Second, even if the County's ability to regulate nonconforming uses were a relevant factor, nothing in the Examiner's decision suggested the County could *not* regulate nonconforming uses, and so it is unclear why the Board felt compelled to address this point at all.¹⁴ Third, because the Examiner found that all environmental impacts were fully mitigated, CP 94, and the Board did not disturb those findings, there was no reason for the Board to ask whether mining under a nonconforming use would also mitigate environmental impacts. And finally, while the County may regulate nonconforming uses, the County has no authority to require the types of mitigation voluntarily offered by Storedahl through the HCP process. Storedahl volunteered, for example, to provide net benefits for both listed and unlisted species and make the conservation benefits permanent. AR at HE Ex. 276, ch. 2 at 22. While the County may require mitigation for probable adverse impacts, the

¹⁴ On this issue, respondents' again mischaracterize the Examiner's decision. The Examiner noted that nonconforming uses "cannot be taken away without compensation." CP 50 (citing *Rhod-A-Zalea & 35th Inc. v. Snohomish County*, 136 Wn.2d 1, 959 P.2d 1024 (1998)). Respondents contort this straightforward summary of *Rhod-A-Zalea* by arguing that "the Hearing Examiner's conclusion that the County *could not limit* the environmental impacts of mining conducted as a nonconforming use was plainly wrong," and therefore had to be corrected by the Board. FOEF/FF Br. at 25. Not only did the Examiner not say this, but it clearly was not pivotal in his determination that Storedahl had met its burden of showing that a rezone furthered the public welfare. CP 64-67.

County may not require Storedahl to impose a perpetual conservation easement on the entire property or create a \$1 million endowment to cover the costs of managing the conservation easement as a wildlife sanctuary, in perpetuity, precisely the measures that the Examiner found would further the public welfare. CP 67 (“The property will be donated with a conservation easement in fee simple” with a “\$1 million endowment. . . . This will add to the public welfare.”).

5. The Board provided no explanation of how the rezone would fail to further the public welfare.

In short, the Board provided no germane explanation for its decision. It did not explain how the Examiner got his public welfare determination wrong. Did the Board believe high-quality gravel would *not* benefit the community? Did it believe that, contrary to the Examiner’s findings, mining under the rezone proposal would not benefit the public by fully mitigating any environmental, noise, groundwater, aesthetic, air quality, or other impacts?¹⁵ If the Board believed the rezone would not further the public welfare, where are the Board’s findings? In what ways did the Board disagree with the Examiner’s detailed analysis? Specifically, with regard to the rezone decision, what facts in the record showed that the Examiner committed error in evaluating the statutory criteria?

The Board provided no relevant or objective justification for concluding that the rezone failed to further the “public health, safety, morals or welfare.” Under these circumstances, the Board simply failed to apply

¹⁵ Notably, environmental issues cannot be the basis of the Board’s rezone denial because the Examiner held that the EIS adequately analyzed environmental effects and that all probable significant environmental effects were mitigated. CP 113. Unchallenged, these findings are “verities on appeal.” *Stenson*, 132 Wn.2d at 697.

the applicable criteria or to carry the burden of justifying its decision. *Sunderland*, 127 Wn.2d at 797; RCW 36.70B.030(2)(a). The Board’s summary rejection of the rezone application must be reversed.

B. The Daybreak Mine Was a Conforming Use Until 1995.

This Court should also reverse the County’s conclusions as to the scope of Storedahl’s nonconforming use rights. In spite of respondents’ concerted efforts to inject confusion and ambiguity into the County Code, the Code is clear. The 1973 and 1980 versions of the County Code stated *unambiguously* that “[a]ll uses in existence and occurring on a specific parcel of land which legally qualified as ‘permitted uses’ under provisions of the former F-X Rural Use Zone *shall continue as conforming uses* after the effective date of the ordinance codified herein.” CP 1378 (emphasis added). There is no dispute that the Daybreak Mine was a “permitted use” in the “former F-X Rural Use Zone.” The County was therefore mandated to permit the Daybreak Mine to continue as a conforming use. In spite of the clarity of this provision, respondents argue that this Court should disregard the provision’s “anomalous language” and conclude that the Daybreak Mine became a nonconforming use in 1973. Storedahl asks this Court to reject respondents’ newly minted “anomalous language” theory of statutory construction and apply the County Code as written.

1. The Code’s “Conforming Use” language should be applied as written.

Until 1995, the Daybreak Mine was, by definition, a conforming use. A nonconforming use is one that “is not a permitted use in the zone in which it is located.” CCC 18.02.330 (1973 Code definition of

“nonconforming use”). Because the 1973 (and 1980) zoning ordinance expressly mandated that prior uses *were permitted* to continue as conforming uses, it defies logic for respondents to argue that existing uses were *not permitted* and were therefore nonconforming. While it is true that inconsistent *new* uses were no longer permitted and thus nonconforming, the Code expressly provided that prior lawfully existing uses “shall continue as conforming uses.”

The County Code’s statement that existing uses “shall continue as conforming uses” must be applied as written. *Applied Indus. Materials Corp. v. Melton*, 74 Wn. App. 73, 79, 872 P.2d 87 (1994) (“Courts must . . . construe statutes as they are written. They may not rewrite them to suit their views of what they think the statutes ought to say”) (internal citation omitted). Legislative bodies are presumed not to have used superfluous words, and courts must, if possible, accord meaning to every word in a statute. *State v. Lundquist*, 60 Wn.2d 397, 403, 374 P.2d 246 (1962).

Further, “[w]here a statute *uses plain language and defines essential terms*, the statute is not ambiguous.” *City of Olympia v. Thurston County Bd. of Comm’rs*, 131 Wn. App. 85, 93, 125 P.3d 997 (2005) (emphasis added) (adding that “if the statutory language is clear, the court may not look beyond the language or consider legislative history, but should glean the legislative intent through the language of the statute itself”).

Here, the Code’s provision stating that existing uses “shall continue as conforming uses” is plain and unambiguous,¹⁶ its terms are defined in the County Code, and the County legislature must be presumed to have intended exactly what it said. Respondents would have this Court revise the language and substance of the statute, and this Court may not do so.

2. The “context” of the Code does not alter the “conforming use” language.

Respondents urge this Court to rewrite the County Code to omit the mandate that existing uses shall “continue as conforming uses” and instead to read the remainder of the Code provision—which limits expansion of the uses onto adjoining or contiguous properties—as effectively creating a nonconforming use that overrides the provision’s express and mandatory language directing that existing uses “shall continue as conforming uses.” FOEF/FF Br. at 33; County Br. at 23. This argument should fail.

The 1973 Code provision states that, though existing uses shall continue as “conforming uses,” “in no case shall any use be allowed to expand into adjoining or contiguous property without an approved zone change.” CCC 18.30.070. The question is whether this provision may be reconciled with the Code’s recognition of prior-existing “conforming uses,” or whether it truly reflects a contrary intent by the County to make prior lawfully existing uses nonconforming. Respondents argue that this additional language “proscribed uses in *precisely the same way that nonconforming uses are restricted under the common law*.” They were

¹⁶ Even if it were ambiguous, any ambiguity in “land-use ordinances must be strictly construed in favor of the landowner.” *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643 n.4, 151 P.3d 990 (2007).

confined to the areas on which they previously took place, and could not be expanded or pursued elsewhere within the zone.” FOEF/FF Br. at 33 (emphasis added). This statement is obviously inaccurate.

Under the common law, a nonconforming use may not be expanded *at all*, even on the parcel on which it is located. *Keller v. City of Bellingham*, 92 Wn.2d 726, 731-32, 600 P.2d 1276 (1979). By contrast, the 1973 and 1980 Code provisions did not prohibit expansion of existing uses on the same parcel on which the use was located. The Daybreak Mine was located on a 350-acre property, and under the 1973 and 1980 Code provisions, the lawful prior-existing use could expand throughout that parcel, so long as it did not expand onto “adjacent or contiguous property.” Contrary to respondents’ contention, the Code’s limitation is not “precisely the same” as restrictions on nonconforming uses. In fact, it allows *expansion* of the prior-existing use within the parcels on which it was established. The statute is therefore directly at odds with ordinary common law restrictions on nonconforming uses.

Respondents insist that this Court must construe the County Code in context, yet they misstate that context. That context provides not only that existing permitted uses *shall* continue as conforming uses, but that they may even expand, so long as the expansion does not cross property boundaries. Respondents’ contention—that this Court should impose a disfavored nonconforming use status that can only be justified by a

misreading of the statute's express language and context—should be rejected.¹⁷

C. Storedahl Has Met Its Burden of Producing Evidence to Support an Appearance of Fairness Claim Against Commissioner Stuart.

In response to Storedahl's objections to the participation of Commissioner Stuart in the Board proceedings, the County and FOEF/FF have consistently sought to dull the full impact of Mr. Stuart's prior opposition to the Daybreak Mine by distorting the record. They continue that pattern here by suggesting that Mr. Stuart had merely "moderated an open house at which the public was invited" and written articles about "partnering with river stewardship groups to prevent degradation of the east fork of the Lewis River by gravel mining operations." County Br. at 33, 34. Similarly, FOEF/FF downplay Mr. Stuart's prior involvement by arguing:

[Mr. Stuart] moderated a town meeting discussing mining expansion in Clark County . . . and wrote introductory sections to the organization's monthly newsletter. . . .

¹⁷ The County argues that the Daybreak Mine was limited under the 1973 and 1980 Codes to the "parcels" on which the use was located, and the County relies on RCW 58.17.020 for its definition of "lot," which is a "fractional part of divided lands." County Br. at 24. RCW 58.17.020(9)'s definition of "lot" is not relevant to "parcels" as used in the County Code. Further, the County neglects to inform this Court that, even if the statute defined "parcel," which it does not, it appears to have been enacted *after* the 1973 and 1980 ordinances at issue. In addition, the Daybreak Mine expanded from 1968 to 1995 to the full extent of the DNR reclamation plan, so the covered parcels expanded significantly. CP 665-66, AR at HE Ex. 712 and attachments thereto. See also CP 1332-33 for extensive discussion of interpretation of the term "parcel."

The County takes further liberty with statutory construction of the 1980 surface mining combining district ordinance, Ch. 18.329 CCC. The County claims that it "required those who wished to mine within the 'S' district to obtain planning director and planning commission approval of their proposal." County Br. at 24-25. However, the certificate of compliance referred to applied solely to the establishment of new uses. AR at HE Ex. 712, Tab 5. Here, the County admits that the Daybreak Mine was established long before the 1980 ordinance. County Br. at 5 ("mining was occurring . . . in 1968"). Because mining was already established, the County did not require a certificate of compliance.

FOEF/FF Br. at 44.

These statements are gross distortions of the record. Mr. Stuart did not “moderate a town meeting” or “open house” on the topic of “mining expansion”: he organized a meeting that specifically addressed *Storedahl’s application to expand the Daybreak Mine*—the subject of this litigation—and permitted only speakers who were FOEF/FF leaders and their lawyers. CP 199-204. If this were an informational meeting for the general public, surely the project proponent would have been permitted to speak, but it is undisputed that meeting organizers would not even grant Storedahl’s simple request to answer questions about the project. CP 202.

Similarly, the record shows that Mr. Stuart’s articles in the Friends of Clark County’s newsletter were not about “partnering with river stewardship groups” to promote the health of the Lewis River. They were about partnering with respondents, FOEF/FF, the parties who would later appear before Commissioner Stuart, to prevent approval of the Daybreak Mine rezone application. CP 188-90, 212, 214.

These distortions are telling. They indicate respondents’ concern that the record on its face supports a prima facie appearance of fairness claim because it would cause a reasonably disinterested person to be justified in believing that partiality may exist. *Swift v. Island County*, 87 Wn.2d 348, 361, 552 P.2d 175 (1976).¹⁸

¹⁸ Respondents’ further efforts to rely on various statutory exceptions to the appearance of fairness doctrine to excuse Mr. Stuart’s prejudgment of the mine expansion should also fail. Storedahl directs this Court to arguments thoroughly presented before the trial court. See CP 80-83.

D. Discovery and Public Records Act

1. The Court Wrongly Denied Discovery.

The Court below abused its discretion in ruling that Storedahl was not entitled to *any* discovery on the basis that “Storedahl was well aware of the grounds for disqualification” of Commissioner Stuart when the record was created. CP 2203.¹⁹ As the record makes clear, Storedahl did not know and had no duty to learn of the extent of Mr. Stuart’s involvement in opposing the project at the time the record was created. *See* Storedahl’s discussion and citations at CP 169-75, 253-61.

The trial court’s ruling guts LUPA’s discovery provision by putting project applicants in an impossible bind: either they fail to object to potential bias and thereby waive their objection or they object and thereby forgo any opportunity for discovery. The trial court’s ruling was clearly erroneous and should be reversed.

2. The Court Wrongly Denied Access to Public Records.

The trial court also erroneously quashed Storedahl’s request for documents under the Public Records Act (“PRA”), Chapter 42.17 RCW, effectively ruling that any litigant in a LUPA proceeding surrenders the right to obtain public documents. CP 2218-22. The court ruled that the PRA’s exemption for documents that would otherwise be unavailable “under the rules of pretrial discovery,” RCW 42.17.310(1)(j), incorporates limitations on discovery under LUPA, RCW 36.70C.120. This is plainly

¹⁹ RCW 36.70C.120(2) allows discovery “only if the additional evidence relates to . . . [g]rounds 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.*” (Emphasis added.)

incorrect. As the Washington Supreme Court has held, the “pretrial discovery rules” exempt under the PRA are “those set forth in the civil rules for superior court, CR 26.” *Limstrom v. Ladenburg*, 136 Wn.2d 595, 609, 963 P.2d 869 (1998). Absent some other “very specific exemption,” Storedahl is entitled to public documents kept by public agencies. *See O’Connor v. DSHS*, 143 Wn.2d 895, 905, 25 P.3d 426 (2001).

III. CONCLUSION

For the foregoing reasons, Storedahl respectfully requests that this Court reverse the decisions below.²⁰

DATED: October 1, 2007

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²⁰ The County argues that Storedahl has waived claims of error related to the trial court’s dismissal of Storedahl’s claims for declaratory relief and damages. County Br. at 43-44. The County is wrong. Storedahl did not assign error to the trial court’s dismissal of those claims because those claims retain their validity principally if Storedahl prevails on its appearance of fairness claim. Storedahl acknowledges that its damages claim is viable only if Storedahl prevails on the issues currently before this Court. If this Court voids the Board’s denial of the rezone based on the improper participation of Commissioner Stuart, the predicate to Storedahl’s claim for damages, Storedahl’s damages claim should be reinstated. However, Storedahl does not assign error to dismissal of its declaratory judgment and damages claims if the decisions below are affirmed.

No. 36177-9

**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; FISH FIRST –
LEWIS RIVER; and RICHARD DYRLAND,

Respondents.

CERTIFICATE OF SERVICE

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Jessica Hottell certifies and states:

I am a citizen of the United States of America and a resident of the State of Washington; I am over the age of eighteen years; I am not a party to this action; and I am competent to be a witness herein. On October 1, 2007, I caused to be served, a true and correct copy of the following:

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

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