

Notice to Parties of Record

Project Name: Yacolt Mountain Quarry Expansion

Case Number: OLR-2019-00072

The attached decision of the Land Use Hearing Examiner is final unless a motion for reconsideration is filed or an appeal is filed with Superior Court.

See the *Appeals* handout for more information and fees.

Motion for Reconsideration:

Any party of record to the proceeding before the hearings examiner may file with the responsible official a motion for reconsideration of an examiner's decision within fourteen (14) calendar days of written notice of the decision. A **party of record** includes the applicant and those individuals who signed the sign-in sheet or presented oral testimony at the public hearing, and/or submitted written testimony prior to or at the Public Hearing on this matter.

The motion must be accompanied by the applicable fee and identify the specific authority within the Clark County Code or other applicable laws, and/or specific evidence, in support of reconsideration. A motion may be granted for any one of the following causes that materially affects the rights of the moving party:

- a. Procedural irregularity or error, clarification, or scrivener's error, for which no fee will be charged;
- b. Newly discovered evidence, which the moving party could not with reasonable diligence have timely discovered and produced for consideration by the examiners;
- c. The decision is not supported by substantial evidence in the record; or,
- d. The decision is contrary to law.

Any party of record may file a written response to the motion if filed within fourteen (14) calendar days of filing a motion for reconsideration.

The examiner will issue a decision on the motion for reconsideration within twenty-eight (28) calendar days of filing the motion for reconsideration.

Mailed on: September 5, 2019

DS1333

Revised 7/15/13



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For an alternate format,
contact the Clark County
ADA Compliance Office.
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**BEFORE THE LAND USE HEARINGS EXAMINER
OF CLARK COUNTY, WASHINGTON**

Regarding an appeal by J.L. Storedahl and Sons of)
an administrative decision refusing to accept an)
application for mining at 18601 NE Yacolt Mtn.)
Road in unincorporated Clark County, Washington)

FINAL ORDER
OLR-2019-00072
(Yacolt Mountain
Quarry Expansion)

A. SUMMARY

1. In April 2019, J.L. Storedahl and Sons (the applicant) filed a request for a pre-application conference (PAC-2019-00052) proposing to expand the existing Yacolt Mountain Quarry onto two adjacent parcels located south of 18601 Yacolt Mountain Road, known as Parcels 230061-000 and 230301-000 (the site). The site was recently added to the County's Surface Mining Overlay ("SMO") zone (SPC2018-00001). The applicant proposed to use the site to stockpile overburden from the existing Yacolt Mountain Quarry and to conduct surface mining operations on the site in the future, after the existing quarry has been mined out. The site is subject to a covenant that allows the storage of overburden but prohibits extraction on the site until December 7, 2028 (Exhibit 5). Therefore, the director's May 16, 2019, final pre-application conference report stated that the County would not accept an application for mining on the site until after December 7, 2028 (Exhibit 8).

2. The applicant filed a written appeal of the director's decision on May 29, 2019. (Exhibit 1).

3. Hearing Examiner Joe Turner (the "examiner") conducted a *de novo* public hearing to receive testimony and evidence about the appeal. At the hearing, County staff recommended that the examiner deny the appeal and affirm the director's decision. See the August 7, 2019, "Appeal, Staff Report & Recommendation to the Hearings Examiner" (the "Staff Report"). Representatives of the applicant testified in support of the appeal. Two other persons testified orally in support of the appeal. Eight persons testified orally in opposition and/or with questions and concerns. Other persons testified in writing. Disputed issues or concerns in the case include the following:

a. Whether the applicant is prohibited from submitting an application for mineral extraction on the site during the ten year period set out in the Covenant;

b. Whether the examiner can consider the legislative history in interpreting the Covenant;

c. Whether the Code authorizes the County to refuse to accept an otherwise complete application, based on the County's determination that the use proposed in the application is prohibited in the location proposed; and

d. Whether concerns about the potential adverse impacts of surface mining activities on the site are relevant to this appeal.

4. Based on the findings provided or incorporated herein, the examiner grants the appeal, reverses the director's decision, and orders the County to accept an application for extraction activities on the site, when and if the applicant submits such an application.

B. DISCUSSION

1. The examiner received testimony at a public hearing about this appeal on August 22, 2019. That testimony and evidence, including a videotape of the public hearing and the casefile maintained by the Department of Community Development ("DCD"), are included herein as exhibits. A list of the exhibits is attached to and incorporated into this final order. The exhibits are filed at DCD. The following is a summary by the examiner of selected testimony and evidence offered at the hearing.

2. County planner Jan Bazala summarized the Staff Report, the director's decision and his PowerPoint presentation, Exhibit 34. He noted that the Clark County Council (the "Council") approved an application to expand the SMO zoning onto the site, subject to a covenant that only allows the applicant to use the site to store overburden material removed from the Yacolt Mountain Quarry and other ancillary uses. The Covenant prohibits the applicant from extracting material from the site for ten years, until December 7, 2028. Therefore, the County refused to accept an application for extraction activities on the site prior to the expiration of the Covenant on December 7, 2028. The County agreed to accept an application for stockpiling and other ancillary uses allowed by the Covenant.

a. The County considers the timeframe in the Covenant to be equivalent to the effective date of the SMO overlay zone. The Covenant delays the effective date of the SMO zoning designation as it relates to extraction activities. Therefore, extraction is not a permitted use on the site until the Covenant expires on December 7, 2028.

b. The Covenant is silent regarding whether the applicant may submit an application for extraction prior to the expiration of the Covenant. However, the Council discussed whether the Covenant would allow the applicant to submit an application for extraction during the ten year period set out in the Covenant, citing pp. 51-52 of Exhibit 7. The Council discussed the applicant not even applying for a conditional use permit for extraction for ten years, citing p. 42 of Exhibit 7. The applicant stated that mining may not occur on the site for 15 to 30 years, citing p. 45 of Exhibit 7 and pp. 76 and 82 of Exhibit 6.

c. The Code sections listed in the pre-application conference report allow the placement of overburden on the site during the ten year period of the Covenant. These Code sections do not allow extraction activities during this period.

d. Stockpiling and material storage on the site may be interrelated with future extraction activities on the site, but that does not allow the applicant to avoid the restrictions in the Covenant. The pre-application conference report expressly allows for

modifications of the existing Conditional Use Permit (“CUP”) if proposed stockpiling impacts operations at the existing surface mine on the adjacent property.

e. Approving an application nine years before extraction activities can occur would allow the application to vest under potentially outdated regulations and future property owners in the area may be unaware of future extraction activities on the site.

f. Staff agree that any application is for future activities. However, the terms of the Covenant, interpreted in light of the legislative history set out in the minutes of the Council meetings, prohibit the County from accepting an application for extraction activities during the period of the Covenant.

g. The County’s decision is consistent with the terms of the Covenant and the applicant’s statements to the Council, that extraction activities will not occur on this site for ten years or more.

3. Attorney William Lynn, geologist Eric Staley, and mine operator Bo Storedahl appeared on behalf of the applicant, J.L. Storedahl and Sons.

a. Mr. Lynn summarized his hearing brief, Exhibit 25 (later replaced by Exhibit 32).

i. The Covenant only prohibits extraction activities on the site. It does not prohibit the submittal of an application for extraction. The County cannot “read into” the covenant language that is not included.

ii. The Code requires the County to process an application for extraction activities on the site. Upon receiving an application, the County must review the application for completeness or notify the applicant of any deficiencies. Nothing in the Code authorizes the County to refuse to accept an application. The County can impose a condition of approval prohibiting extraction prior to December 7, 2028. Failure to accept the application is a due process violation.

iii. The site is currently subject to the SMO overlay zone. It is not a “future designation” as alleged by the County. Therefore, the applicant has a current right to submit a CUP application for extraction activities.

iv. CUP approval is necessary to allow the applicant to stockpile materials on the site. It makes no sense to submit and review two separate applications, one for stockpiling and a second for extraction, as the two activities are interrelated. Such a requirement is contrary to SEPA, which requires that related proposals be evaluated in a single environmental document. SEPA prohibits piecemeal environmental review.

v. It may take a significant period of time to prepare and process an application for extraction activities on the site, especially given the potential for appeal of any decision approving extraction on the site. Therefore, the County’s refusal to accept an

application for extraction activities on the site until December 7, 2028, effectively extends the ten year prohibition on extraction.

vi. It is customary for mining operations to plan for the future. The County can impose conditions of approval on the CUP approval to address changing conditions on the site.

vii. Nothing in the plain language of the Code, the Ordinance, or the Covenant prohibits the applicant from submitting an application for extraction activities on the site prior to December 7, 2028. The applicant is only prohibited from undertaking extraction activities on the site during this period. If the County had intended to prohibit the submittal of an application during that period, it would have said so.

viii. He noted that the version of the Covenant included in his brief is not the version that was actually recorded. He requested the examiner hold the record open for one day to allow the applicant an opportunity to submit a corrected copy of his brief.

b. Mr. Staley submitted maps illustrating the proposed project area on the site and the existing Yacolt Mountain Quarry, Exhibit 23 . In Figure 1, the yellow polygon adjacent to the existing quarry shows the extent of the SMO overlay on the site. The overlay only covers a portion of the 40-acre site. Figure 2 illustrates the proposed maximum fill on the site. Figure 3 shows the maximum excavation at the existing Yacolt Mountain Quarry. With the exception of the area abutting the site where fill will be placed, all of the slopes will be excavated to a 1:1 slope. The portion of the existing mine abutting the site where fill will be placed will be excavated at a 2:1 slope to maintain the stability of the site. Figure 4 He also submitted plans illustrating the cross-section slopes after the quarry and the site are fully excavated, Exhibit 24

i. The Washington Department of Natural Resources (“DNR”) will require the applicant to obtain a permit for any expansion of mining activities onto the site, whether for the storage of overburden or extraction.

4. Dick Leeuwenburg, president of the East Fork Community Coalition, summarized his written testimony, Exhibit 28. He argued that the proposed application for extraction on the site is inconsistent with the applicant’s testimony at the rezone hearing before the County Councilors. The applicant sought the SMO zoning on the site solely to allow storage of overburden. The Covenant prohibits extraction activities on the site for ten years. At the Council hearing the applicant testified that mining on the site may not begin up to 30 years. There is no evidence that the applicant must obtain approval of a CUP for extraction on the site at this time, when extraction may not begin until far in the future.

5. Jerry Sauer testified in support of the appeal on behalf of the Southwest Washington Contractor’s Association.

6. Charlie Crisafulli noted that the reclamation plan for the existing quarry states that the overburden currently being stored on the existing quarry site will be used to reclaim the existing quarry after all of the gravel has been removed. There is no need to move the overburden to the site. It can be used to reclaim areas of the existing quarry that have already been mined. He also submitted written testimony, Exhibit 18.

7. Kathryn Roach read a written statement submitted by Mark Rose, Exhibit 20. Mr. Rose argued that the Council only approved the SMO on the site to allow for storage of overburden, not for extraction. Extraction is prohibited on the site for ten years.

8. Marie Ogier submitted a transcript of the December 11, 2018, hearing before the County Council, Exhibit 11. Testing performed after the County approved the SMO expansion determined the existence of naturally occurring asbestos in the soils in the area. Mining activities, whether moving existing overburden or extraction, could pose a health hazard for area residents.

9. Andrea Smith testified in support of the appeal; the County should accept and review an application for extraction on the site.

10. Chris Turner argued that the applicant testified before the Council that the sole purpose of the SMO overlay was to allow the storage of overburden on the site and to buffer the existing quarry. A CUP application for mining activities on the site is subject to the regulations in effect when the application is filed. The Covenant currently prohibits extraction activities on the site. Therefore, the current regulations prohibit extraction and the County was correct in refusing to accept an application for extraction.

11. Stan Green testified in support of the County's decision to refuse to accept the application. He agreed with the prior testimony in support of the director's decision. The applicant testified before the Council that it had no intention to mine the site, that the sole purpose of the SMO expansion was to allow the storage of overburden on the site, giving the impression that no mining would occur on the site. By adopting the Covenant, the Council intended to limit extraction for a minimum ten years and to prohibit the applicant from submitting an application during that ten year period. Approving an extraction application at this time would vest the application under current law, ignoring potential changes in technology, the environment, health, and safety that may occur before mining is allowed on the site.

12. Jim Byrne summarized his written testimony, Exhibit 17. He supported the County's decision to refuse to accept an application for extraction. The Covenant should be construed to prohibit extraction and the submittal of an application for extraction during the ten year life of the Covenant.

13. Katie Jarvis questioned the review process if the County is required to accept a CUP application for extraction on the site.

14. County deputy prosecuting attorney Taylor Hallvik argued that the director's decision to refuse to accept a CUP application for extraction on the site is supported by

the language of the Covenant and the ordinance that incorporates the Covenant. The Ordinance and the Covenant both prohibit extraction on the site until 2028. The County will not accept applications for activities that are not permitted under the zoning applicable to a particular property.

a. One of the purposes of the land use districts is to, “[t]o stabilize expectations regarding future development, thereby, timely and reasonable administration respecting the due process set forth in this title and other applicable laws...,” citing CCC 40.200.010. It would be inconsistent with the purpose of the Code to review an application for a use that cannot occur for ten years or more. The submittal requirements must be interpreted in light of the purpose statement.

b. Pursuant to CCC 40.500.010.B, a CUP approval expires after seven years, unless an extension is approved.

c. The Ordinance applied the SMO zone to the site, but the Covenant prohibits extraction on the site for ten years. Therefore, extraction is not a permitted use on the site until December 7, 2028. The County cannot accept an application for a use that is not permitted on the site.

d. The director’s interpretation of the Covenant is consistent with the statements of the County Councilors and witnesses at the hearings regarding the adoption of the SMO zoning. The Covenant is both a contract and part of the adopting ordinance. Paragraph 1 of the Ordinance states that the Ordinance is contingent upon the Covenant. The Ordinance is a local statute. Therefore, the legislative history is relevant to interpreting the Covenant.

15. Bo Storedahl argued that the quotations from the hearings before the County Councilors are being taken out of context. The applicant purchased a large area of land. However, the applicant has no intention to expand the quarry on the site beyond the current SMO boundaries. The applicant must expand the SMO in order to store overburden from the existing quarry. The applicant will not conduct any extraction activities on the site until the stored overburden is removed. The applicant has no intention to mine the site until the overburden has been removed. A CUP is needed to store the overburden and to mine the site. Storage activities can and will begin within less than seven years. Therefore, the seven year expiration date noted in CCC 40.500.010.B is inapplicable.

16. At the end of the hearing the examiner held the record open one day, until 3:00 p.m. on August 23, 2019, to allow the applicant an opportunity to submit a corrected copy of Mr. Lynn’s Hearing Brief and to allow the public to submit additional testimony and evidence. The record in this case closed at 3:00 p.m. on August 23, 2019.

C. DISCUSSION

1. CCC 40.510.020.H(3) authorizes the examiner to hear appeals of planning director decisions as a *de novo* matter. The applicant shall have the burden of proving by

substantial evidence compliance with applicable approval standards. Where evidence is conflicting, the examiner shall decide an issue based upon the preponderance of the evidence. CCC 40.51.020.H(3)(b).

2. The examiner finds that the County has no authority to refuse to accept an application for a conditional use permit for mineral extraction on the site.

a. The Covenant prohibits the applicant from extracting material from the site for ten years from the date of the Covenant. The Covenant limits use of the site for “the storage of materials removed from the Yacolt Mountain Quarry and for such ancillary uses as may be necessary to support that use, such as haul roads and storm drainage improvements.” However, nothing in the plain language of the Covenant prohibits the applicant from submitting an application for extraction. The submittal of a CUP application is not a “use” of the site that is regulated by the language of the Covenant.

b. The examiner is prohibited from considering legislative history related to the Covenant. As Mr. Hallvik noted, the Covenant is both a contract and part of the adopting ordinance. The Ordinance is a local statute. Therefore, it is subject to the rules of statutory interpretation. Legislative history and circumstances surrounding the ordinance may only be considered if the ordinance is ambiguous. If the plain meaning of an ordinance is unambiguous, any inquiry ends. *Energy v. State*, 158 Wash.App. 616, 621, 248 P.3d 1043 (2010). In this case, the language of the Covenant is clear and unambiguous. The Covenant expressly regulates the use of the site and prohibits extraction for the ten year duration of the Covenant. However, nothing in the plain language of the Covenant prohibits the submittal of an application during this ten year period.

i. Even if the Ordinance and Covenant are construed in light of the legislative history, the Covenant cannot be interpreted to prohibit the submittal of an application for mineral extraction on the site. Councilor Quiring stated his belief that the applicant agreed to not submit an application for CUP approval for ten years. P. 42 of Ex. 7. However, Councilor Blum expressly questioned whether the Covenant prohibits the applicant from submitting an application. p. 51 of Ex. 7. Deputy Prosecuting Attorney Christine Cook noted that Covenant prohibits extraction for ten years, but the Covenant is silent on whether applicant can submit an application. P. 52 of Ex. 7. Given these conflicting statements, the examiner cannot find that the Council intended to prohibit the applicant from submitting an application prior to expiration of the Covenant. The Council was clearly aware that the Covenant did not expressly prohibit the submittal of an application. If the Council had intended to prohibit applications for extraction, it could have modified the Covenant to include such a prohibition. The Council did not adopt such a prohibition.

c. Nothing in the plain language of the Code authorizes the County to refuse to accept an otherwise complete application. An application must be accepted and processed if it includes the information required by Section 40.510.030(C)(3). CCC 40.510.030(B)(3) and 40.510.030(C)(7). The County seems to argue that it cannot accept

an application for a use that the County believes is not permitted in the proposed location, in this case because extraction activities are prohibited on the site until 2028. However, the language of the Code does not support this position. The applicant is only required to “address” how the application meets or exceeds the approval criteria and standards and how the issues identified in the pre-application conference have been addressed. A determination of whether or not the use is allowed must occur through the review process. The County can advise an applicant that it believes that the use proposed in the application is not permitted in the location planned and therefore, the application may be denied through the applicable review procedure. But the Code does not authorize the County to refuse to accept an otherwise complete application.

3. Acceptance of an application for review does not in any way ensure approval of the application. The County can deny the application if the use is not permitted where or when proposed, or if the application does not comply with one or more applicable approval criteria. But it cannot merely refuse to accept an otherwise complete application. The applicant is entitled to submit an application, pay the application fee, and make its argument that the proposed use is allowed and does comply with the applicable approval criteria for the application. If the application is denied, the applicant has the right to appeal that denial. By refusing to accept an application, the County is preventing the applicant from presenting its arguments that the proposed use is allowed under the applicable regulations.

4. Several witnesses expressed concerns about the potential adverse impacts of surface mining activities on the site. However, those concerns are not relevant to this appeal. The only issue before the examiner is whether the County is required to accept an application for mineral extraction on the site. Those concerns will be relevant if and when the applicant submits an application for any type of surface mining activity on the site, whether for the storage of overburden or extraction of minerals. Such an application will be subject to Type III review, with notice and opportunity to comment at a public hearing, as well as SEPA review. The County will consider all of the relevant concerns raised by area residents as part of its review of such an application.

D. ORDER AND DECISION

Based on the above findings and discussion, the examiner grants the appeal, reverses the director’s decision, and orders the County to accept a CUP application for extraction within the SMO overlay area on the site if and when the applicant submits such an application.

DATED this 5th day of September 2019.



Joe Turner, AICP, Hearings Examiner

Role	Company Name	Name	Address 1	Address 2	City	State	Zip Code	Email Address
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	Hardcopy mailed email returned	Bill Lynn	PO Box 1157		Tacoma	WA	98401	wlynn@gth-law.com
		David Kemper	21707 NE Basket Flat Rd		Battle Ground	WA	98604	



EXHIBIT LIST

Project Name: **YACOLT MT. QUARRY EXPANSION PRE-APP APPEAL**

Case Number: **OLR-2019-00072**

EXHIBIT NUMBER	DATE	SUBMITTED BY	DESCRIPTION
1		Applicant	Application Package
2	6/18/19	CC Land Use	Notice of Appeal and Public Hearing
3	6/15/19	CC Land Use	Affidavit of Mailing - Exhibit 2
4	7/5/19	Dick Leeuwenburg	Public Comment- East Fork-Community Coalition letter
5	12/7/19	CC Land Use	Covenant restricting mining for 10 years
6	11/27/18	CC Land Use	Minutes of County Council 11/27/18 hearing
7	12/11/18	CC Land Use	Minutes of County Council 12/11/18 hearing
8	5/16/19	CC Land Use	PAC-2019-00052
9	8/7/19	CC Land Use	Staff Report and Recommendation
10	8/7/19	CC Land Use	Affidavit of Mailing - Exhibit 9
11	8/8/19	Marie Ogier	Public Comment/transcripts of 12/11/18 hearing- East Fork-Community Coalition letter
12	8/16/19	CC Land Use	Affidavit of Publication - The Reflector
13	8/19/19	Kimberley O'Hara	Public Comment
14	8/19/19	Margaret Stroebe	Public Comment
15	8/20/19	Iris Wellman	Public Comment
16	8/20/19	Patricia Marinier	Public Comment
17	8/20/19	Sue Marshall Friends of Clark County	Public Comment
18	8/21/19	Charlie Crisafulli	Public Comment
19	8/20/19	Sue Marshall Friends of Clark County	Public Comment from SMO hearing, December 11, 2018
20	8/22/19	Mark Rose	Public Comment
21	8/22/19	Gary Ogier	Public Comment
22	8/22/19	Marieke Kemper	Public Comment
23	8/22/19	Applicant	GeoDesign Terrain Models

Copies of these exhibits can be viewed at:
 Department of Community Development
 Development Services Division
 1300 Franklin Street
 Vancouver, WA 98666-9810

EXHIBIT NUMBER	DATE	SUBMITTED BY	DESCRIPTION
24	8/22/19	Applicant	GeoDesign Site plan
25	8/22/19	Applicant	Legal Brief
25.a	8/22/19	Applicant	Legal Brief
26	8/22/19	Chris Turner	Public Comment
27	8/22/19	Jann Leeuwenburg	Public Comment
28	8/22/19	Dick Leeuwenburg	Public Comment
29	8/22/19	CC Land Use	Sign in sheet 1
30	8/22/19	CC Land Use	Sign in sheet 2
31	8/22/19	CC Land Use	ORD2019-02-02
32	8/23/19	Applicant	Revised Legal Brief
33	8/26/19	CC Land Use	Hearing Transcript
34	8/26/19	CC Land Use	Hearing Presentation
35	8/23/19	Stan Greene	Public Comment
36	8/29/19	CC Land Use	Re-open Motion and Memo
37	8/19/19	CC Land Use	Affidavit of Mailing - Exhibit 36
38	9/5/19	CC Land Use	Hearing Examiner Final Order
39	9/5/19	CC Land Use	Affidavit of Mailing - Exhibit 38

Copies of these exhibits can be viewed at:
Department of Community Development
Development Services Division
1300 Franklin Street
Vancouver, WA 98666-9810