

**DECISION OF THE HEARING EXAMINER
CITY OF BAINBRIDGE ISLAND**

In the Matter of the Appeal of

Nelson Wood and Glass

BLD14930/COD575

From a decision by the Code Enforcement Officer
On a Building Permit

Introduction

Nelson Wood & Glass, by William Nelson, appealed the Stop Work Order issued by the Code Enforcement Officer for not operating consistent with the approved filling and grading permit for property at the intersection of Lynwood Center and Bucklin Roads.

A public hearing was held September 5, 2008. Robert F. Cousins and Peter Buck, Buck Law Group, PLLC, represented the appellant and Rodney Kaseguma, Inslee Best Doezie & Ryder, represented the Department of Planning and Community Development.

All section numbers in the decision refer to the Bainbridge Island Municipal Code, unless otherwise indicated.

After due consideration of all the evidence in the record consisting of the testimony at the hearing and the documentary evidence admitted at the hearing, the following shall constitute the findings, conclusions, and decision of the Hearing Examiner in this matter.

Findings

1. The subject site, the "Triangle" site, consists of two parcels that form a triangle surrounded by Bucklin Hill Road on the north, Fletcher Bay Road on the west and Lynwood Center Road on the easterly side. The site is being used as a "borrow" source for sand for development of a second, nearby site, "Blossom Hill." The site is zoned 0.4-R, a single family residential zone. The "mining and quarrying" use is permitted in this zone as a conditional use. Section 18.36.030.
2. The testimony and photos showed that as early as 1963, a portion of the site, appearing to be approximately a third, was being mined for its sand. Mr. Nelson remembered his father getting loads of sand in the '60s. Appellant's geotechnical consultant used a 1965 photograph from Department of Natural Resource's records and the survey of the site to calculate the area of disturbed area at that time. These calculations showed that approximately 242,240 sq. ft., or 5.5 acres, of the area was disturbed by mining activity by that time. By 1977, more of the site was being utilized.

3. There were no zoning regulations in place in 1963 as Kitsap County adopted its first zoning in 1969. The City of Bainbridge Island was incorporated in 1991 and adopted its zoning ordinance in 1992.
4. An application for a building permit for the two parcels for filling and grading was made on July 12, 2007. A Notice of Mitigated Determination of Nonsignificance for the sand borrow site and reclamation was issued April 10, 2008, with a series of mitigation measures. The permit was issued on May 9, 2008, subject to those mitigating conditions.
5. The approved activity and location of activity on the approved plan (Exhibit 26) was the export of approximately 20,000 cubic yards of sand to the Blossom Hill site and approximately 30,000 cubic yards of fill returned from that site to the subject site for reclamation. The area of the approved activity was a rectangular area of approximately 88,000 sq. ft. in the central part of the site and a soil stockpile area of approximately 22,000 sq. ft. to the east of that, plus construction roadway entrances and exits.
6. In response to complaints about operations on-site, a site inspection was conducted on June 27, 2008, by City and Department of Natural Resources (DNR) representatives. Representatives of the appellant were also present. The inspection found that additional areas of the site had been disturbed. A stockpile of topsoil was created north of the excavation area and clearing of vegetation had occurred in the southern tip of the site. The DNR representative determined that the site was a surface mine under the state's definition because the historically disturbed area amounted to approximately 4.2 acres, according to his measurements, which exceeds the three acre exemption from regulation and requires a Surface Mine Reclamation permit under the Surface Mining Reclamation Act, RCW 78.44. DNR issued its inspection report and a notice of correction. (Exhibit 24) The appellant was preparing to apply for the permit at the time of the hearing.
7. The City representatives determined that activity exceeded the limits of the area permitted to be disturbed by the building permit, violating Condition 1 of the MDNS that all construction activities be in accordance with the approved "SWPPP," grading plans, and the recommendations of the geotechnical evaluations, and issued a Stop Work Order pursuant to Section 1.26.050. The City was also concerned that the topsoil stockpile contained organic matter, because the site is in an aquifer recharge area. Appellant submitted a revised site plan for approval for the topsoil stockpile and the vegetation removal area. The Department determined that a conditional use permit would now be required as the larger site constitutes a non-exempt "surface mine" as defined by DNR's interpretation of RCW 78.44.030(17), to which the City deferred.
8. The Stop Work Order was issued because the topsoil storage was not included in the original permit application and raised environmental concerns from the storage and future use of organic materials due to potential harm to the aquifer and because of the precedent that could be created if the expanded area of activity were not halted.
9. The contractor had scraped the area south of the excavation area between the two roads to remove vegetation to improve visibility for security. The area had contained scrub brush such as Scotch Broom. The operators had observed evidence of trespass on the site and because of the equipment and activity, the police were patrolling the site from the public roads but could not see all areas because of the vegetation in the southerly portion.

10. Except for the use of the area for topsoil stockpiling and the vegetation removal, the activities are consistent with the permit. The appellant's geotechnical consultant, John Peterson, a geotechnical engineer, did not find that the two areas of expansion raised any concerns about slope stability or erosion.

11. The topsoil is being stockpiled for reclamation. The glacial till materials that will fill the excavation site do not promote growth so the topsoil will be used to overcover the fill and sand and be seeded as part of the reclamation. The topsoil does contain organic materials that should not be buried as organics breaking down in the absence of oxygen produce products that can contaminate ground water. The aerobic rotting of organics on the surface does not have the same effect.

12. "Nonconforming use" is defined as

...a use of land that was lawfully established and has been lawfully continued, but does not conform to the regulations of the zone in which it is located as established by this title or amendments thereto.

Section 18.06.770.

13. Section 18.87.020 provides:

A nonconforming use of land may be continued; provided, that:

A. The use is not enlarged, increased, or extended to occupy a greater area of land or structure than was occupied on the date of adoption of this code;

B. The use is not moved in whole or in part to any other portion of the lot or parcel; and

C. If the use ceases for a period of more than 180 days, the subsequent use of the land shall be conforming.

14. Section 18.108.015B provides exemptions from the requirement of conditional use permit for:

* * *

2. Any activity that does not expand the square footage of an existing use by more than 25 percent.

3. Notwithstanding subsection B.2 of this section, a use that was lawfully established prior to March 1, 1992, without a conditional or special use permit may increase its square footage up to an accumulative 100 percent without securing a conditional use permit.

* * *

Conclusions

1. The Hearing Examiner has jurisdiction to hear and decide this appeal pursuant to Sections 15.04.130 and 2.16.130.

2. The Hearing Examiner is required to give substantial weight to the decision of the Director. Section 2.16.130F2. The "substantial weight" requirement means that the decision must be reviewed under a "clearly erroneous" standard. *Norway Hill Pres. & Prot. Ass'n v. King County Council*, 87 Wn.2d 267, 275, 552 P.2d 674 (1976), *superseded by statute on other grounds as recognized in Moss v. City of Bellingham*, 109 Wn. App. 6, 21, 31 P.3d 703 (2001). A finding is clearly erroneous when, although there is evidence to support it, the reviewer is left with the definite and firm conviction that a mistake has been made. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).
3. The evidence shows, and the appellant concedes, that the activity on the site exceeded that approved in the issued permit. Section 1.26.050 authorizes a stop work order if a continuing violation would materially impair the director's ability to secure compliance or when it would threaten the environment. The director found those circumstances present at the time of issuance. Though the record shows that the activities were not in fact threatening the environment, the potential damage from the precedent of allowing work to continue provided a legitimate basis for the order and the Hearing Examiner must affirm.
4. Whether a conditional use permit (CUP) is required to continue the work on the site is the chief issue of this case. A CUP is not required if the activity comes within the exemptions in Section 18.108.015B, or is otherwise a nonconforming use of the property. The evidence shows that the mining use was established prior to the adoption of Kitsap County's zoning code, Bainbridge Island's zoning ordinance, and the Surface Mining Reclamation Act. Therefore, it was legal when the use began.
5. The City's position is that it lost its legal nonconforming status through disuse or abandonment, pursuant to Section 18.87.020. Abandonment requires both the failure to act and intention. *University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3rd 453 (2001). Though the department director's determinations are normally entitled to substantial weight, the burden shifts to the City to establish abandonment. *University Place, supra*, at 647 citing *Van Sant v. Everett*, 69 Wn.App. 641, 652, 849 P.2d 1276 (1993) for the proposition that nonconforming uses may not be abandoned easily and those asserting abandonment bear a high burden of proof of the existence of the two elements. Here, the department argues that the lack of evidence about continuing activity is evidence of discontinuance, but the burden to show the use has ceased is not met by the absence of evidence regarding activity, especially where the nature is different from other activities in that it is often based on need so sporadic. Further, no evidence of intent to abandon was adduced by the department and both lack of activity and the intention to discontinue must be shown.
6. Even if the use is a legal nonconforming use that has not been shown to have been discontinued prior to or after March 1, 1992, the City urges that remand is necessary to determine if the area now to be mined exceeds that which is permitted by the exceptions in Section 18.108.015 that otherwise established by its legal nonconformity. The Court in *University Place, supra*, adopted the "diminishing asset" doctrine for mining operations. In a factual setting much like that considered here, the Court said that the use extends to the entire parcel, even though not all used at the time of establishment. The Court recognized that due to the nature of the mining, reserve areas are maintained. The Court did not address whether a municipality could explicitly exclude application of the doctrine in its codes, but the City has not done that. Even without application of the doctrine, the record shows use of approximately 5.5 acres in 1965 to the current

use of approximately 4.2 acres, so the site would qualify for either of the exceptions from the requirement of a conditional use permit.

Decision

The decision to issue the Stop Work Order is AFFIRMED. The appeal is GRANTED as to the requirement of a conditional use permit.

Entered this 16th day of September 2008.

/s/ Margaret Klockars

Margaret Klockars
Hearing Examiner *pro tem*

Concerning Further Review

NOTE: It is the responsibility of a person seeking review of a Hearing Examiner decision to consult applicable Code sections and other appropriate sources, including State law, to determine his/her rights and responsibilities relative to appeal.

The decision of the hearing examiner shall be final in this matter unless, within 21 days after issuance of a decision, a person with standing appeals the decision in accordance with Chapter 36.70 RCW.