

ISLAND COUNTY HEARING EXAMINER

RE: Appeal	)	File No. APP 242/09
Appellant: PENN COVE, INC.	)	FINDINGS OF FACT
	)	CONCLUSIONS OF LAW
	)	AND DECISION
	)	

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**SUMMARY OF APPEAL AND DECISION**

APPEAL: Penn Cove, Inc. has appealed a decision by Island County Planning & Community Development to deny CZC 325/08. The appellant, Penn Cove, Inc. is seeking to expand their current surface mine excavation boundaries from approximately nineteen acres to fifty-three acres. Island County Planning & Community Development (Planning) has issued a formal determination denying the request for a Certificate for Zoning Compliance on the grounds that it was not the proper process to follow in order to obtain County approval allowing surface mining on the subject parcels.

DECISION: The decision of Island County Planning and Community Development is upheld.

**FINDINGS OF FACT**

INTRODUCTION

The following Findings of Fact and Conclusions of Law are based upon consideration of the exhibits admitted herein and evidence presented at the public hearing on November 5, 2009.

I.

PRELIMINARY INFORMATION

Appellant: Penn Cove, Inc.

Property Location: 23674 SR 20, Coupeville, WA

Assessor Parcel Numbers: R13232-034-0520, R13232-086-0620, R13232-101-0230, R13231-100-4960, R13231-158-4350, R13231-196-4230, R13231-143-5200, R13231-152-5200

Publication: October 21, 2009

Mailing of Notice to Appellant: September 29, 2009

Mailing of Staff Report: October 26, 2009

Date of Appeal: September 8, 2009

Date of Comprehensive Statement: September 15, 2009

Hearing Date: November 5, 2009

Exhibit Log:

1. Staff Appeal Response
2. Staff Report
3. Land Development Permit Application, received 11/18/08
4. Letter from Larry Kwarsick with attached map legends, received 11/18/08
5. Memo from Gregory Cane to Residents within 500 feet of project, received 2/9/09
6. Site data, dated 12/5/08
7. Letter of notice of complete application from Andreana Richardson to Larry Kwarsick, dated 12/5/08
8. Letter from Brandon Sweezea to Parties of Record, dated 1/23/09
9. Letter from Brandon Sweezea to Larry Kwarsick, dated 1/29/09
10. Letter of notice of complete application from Andreana Richardson to Larry Kwarsick, dated 4/10/09
11. Letter from Brandon Sweezea to Parties of Record, dated 4/17/09
12. Letter from Aneta Hupfauer to Brandon Sweezea, dated 4/30/09
13. Letter from Mark Preiss to Keith Higman and Brandon Sweezea, received 5/7/09
14. Letter from John Bertrand to Brandon Sweezea, dated 5/26/09
15. Memorandum from Andrew Hicks to Brandon Sweezea, dated 7/16/09
16. Email with attach map from Steve Kitch to Ginger Burgess, dated 12/27/09
17. Letter from Laura McDonald to Jeff Tate, received 12/29/08
18. Email from Jeff Tate to Tim McDonald in response to the attached documents, dated 12/30/08
19. Email with attach letter from Penny Cannon to Jeff Tate, dated 12/31/08
20. Email with attach letter from Onkor to Jeff Tate, dated 12/31/08
21. Email from Lurene Richards to Jeff Tate, dated 12/31/08
22. Email with attach letter from Thomas Cannon to Jeff Tate, dated 12/31/08
23. Email from John Dean to Jeff Tate and Paula Bradshaw, dated 1/22/09
24. Email from Jeff Tate to John Dean, dated 1/22/09
25. Email from Glenn Holst to Brandon Sweezea, dated 2/16/09
26. Email from Malcolm Ferrier to Keith Higman and Brandon Sweezea, dated 5/3/09
27. Letter from Steve Erickson with Whidbey Environmental Action Network to Keith Higman and Brandon Sweezea, received 5/4/09
28. Email from Margaret Storer to Keith Higman and Brandon Sweezea, dated 5/4/09
29. Email from Buell Neidlinger to Keith Higman, Brandon Sweezea and John Dean, dated 5/4/09
30. Email from Ann Cheryl Dannhauer to Keith Higman and Brandon Sweezea, dated 5/4/09
31. Letter from Mrs. C.D. Kitch to Board Members, received 5/5/09
32. Letter from Steve Kitch to Board Members, received 5/5/09
33. Email from Janice Pickard to Brandon Sweezea, dated 5/5/09

34. Email forwarded from Ann Cheryl Dannhauer to Brandon Sweezea, dated 5/5/09
35. Email from Steve Erickson to Keith Higman and Brandon Sweezea, dated 5/5/09
36. Email from Paula Bradshaw to Brandon Sweezea, dated 5/5/09
37. Email from Paula Bradshaw to Brandon Sweezea, dated 5/6/09
38. Letter from Leslie Wright to Brandon Sweezea, received 8/5/09
39. Island County Notice of Application, dated 12/17/08
40. Affidavit of Publication, received 12/23/08
41. Affidavit of Posting the Public Notice Sign, received 12/29/08
42. Affidavit of Posting the Public Notice Sign, received 4/21/09
43. Island County Notice of Application with SEPA, dated 4/22/09
44. Affidavit of Publication, received 4/28/09
45. Letter of acknowledgement of notice of appeal from Andreana Richardson to Larry Kwarsick, dated 9/8/09
46. Letter scheduled hearing from Paula Bradshaw to Larry Kwarsick, dated 9/29/09
47. Affidavit of Mailing, dated 9/29/09
48. Notice of Statement of Appeal, received 9/8/09
49. Comprehensive Statement of Appeal, received 9/15/09
  - a) Email with substitution of page 7 for the Comprehensive Statement of Appeal, dated 10/08/09
50. Letter fro Jeff Tate to Ginger Burgess, dated 12/26/08
51. Email from Jeff Tate to Helen Price Johnson, dated 12/26/08
52. Email with attachment from Jeff Tate to Ginger Burgess, dated 12/26/08
53. Email from Jeff Tate to Brandon Sweezea, dated 1/15/09
54. Email from Jeff Tate to Brandon Sweezea, dated 1/15/09
55. Email with attachment from Larry Kwarsick to Brandon Sweezea, dated 2/4/09
56. Email with attachment form Brandon Sweezea to Greg Cane, dated 2/9/09
57. Email from Greg Cane to Brandon Sweezea, dated 2/10/09
58. Email from Brandon Sweezea to Larry Kwarsick, dated 2/11/09
59. Email from Larry Kwarsick to Brandon Sweezea, dated 2/11/09
60. Email from Brandon Sweezea to Larry Kwarsick, dated 2/13/09
61. Email from Brandon Sweezea to Jeff Tate, dated 2/13/09
62. Email from Greg Cane to Brandon Sweezea, dated 2/28/09
63. Email with attachment from Greg Cane to Karl Construction, Don Krieg Chuck Krieg, Larry Kwarsick, Jason Fields, Doug Kelly and Brandon Sweezea, dated 2/28/09
64. Email from Greg Cane to Brandon Sweezea, dated 3/2/09
65. Email from Larry Kwarsick to Brandon Sweezea, dated 3/30/09
66. Email from Larry Kwarsick to Brandon Sweezea, dated 3/31/09
67. Memorandum from Larry Kwarsick to Brandon Sweezea, dated 4/3/09
68. Email from Larry Kwarsick to Brandon Sweezea and Keith Higman, dated 4/3/09
69. Email from Brandon Sweezea to Larry Kwarsick, dated 5/13/09
70. Email from Brandon Sweezea to Larry Kwarsick, dated 5/13/09
71. Email from Brandon Sweezea to Larry Kwarsick, dated 5/13/09
72. Email from Larry Kwarsick to Brandon Sweezea, dated 5/13/09
73. Email with attachment from Larry Kwarsick to Brandon Sweezea, dated 5/13/09
74. Email with attachment from Larry Kwarsick to Brandon Sweezea, dated 5/14/09

75. Email from Larry Kwarsick to Brandon Sweezea and Keith Higman, dated 5/18/09
76. Email from Larry Kwarsick to Brandon Sweezea, dated 5/21/09
77. Email from Larry Kwarsick to Brandon Sweezea, dated 5/21/09
78. Memorandum from Larry Kwarsick to Keith Higman, received 6/23/09
79. Additional Information submitted: Memorandum from Larry Kwarsick to Brandon Sweezea, dated 3/27/09
80. Libbey/Central Pit-Submittal Documents Table of Contents, received 3/27/09
  - a) Application for Certificate of Zoning Compliance
  - b) Notice of Complete Application
  - c) Applicant Response to Staff Comments
  - d) Mining and Reclamation-Project Narrative
  - e) Environmental Checklist
  - f) Reclamation Plans
  - g) Backfill Specification
  - h) Washington State Department of Natural Resources - Form SM-8a
  - i) Washington State Department of Natural Resources – Form SM-6
  - j) Washington State Department of Ecology – Sand and Gravel Permit Documentation
  - k) Required Field Manual – Sand and Gravel Permit
  - l) Material Reconnaissance Report
  - m) Hydrogeologic Evaluation
  - n) Visual Analysis
  - o) Noise Study
  - p) Community Meeting Documentation
  - q) Northwest Clean Air Agency – Registration Certificate
  - r) Memorandum Regarding Eagles – Dated March 9, 2009
81. Affidavit of Publication, dated 10/23/09
82. Letter from Paula Bradshaw to Larry Kwarsick, dated 10/26/09
83. Affidavit of mailing Staff Report, dated 10/26/09
84. Public comment from WEAN, received 10/29/09
85. Public comment from Elaine S. Kitch, received 11/4/09
86. Supplemental comment from WEAN, received 11/4/09 with photo disc
87. 10 pages of photos provided by Brandon Sweezea at the 11/5/09 hearing
88. Printed version of PowerPoint presentation given by staff at the 11/5/09 hearing
89. Argument Points brief, provided by Larry Kwarsick at the 11/5/09 hearing
90. Libbey Pit Community meeting documentation provided at the 11/5/09 hearing by Larry Kwarsick
91. Libbey Pit submittal to Island County March 25, 2009 (binder)
92. Declaration of Karl Krieg on behalf of Penn Cove Inc.
93. Original Conditional Use Permit, dated 1969
94. Letter from Island County to Tom Roehl, dated 1/28/07
95. Copy of CZC 69/86, Findings of Fact
96. Copy of RCW 78.44.050
97. Copy of RCW 78.44.091

## HEARING TESTIMONY

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Brandon Sweeza  
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## II.

Penn Cove, Inc. is the owner of the eight contiguous parcels which are the subject of the CZC application and this appeal. The parcels together cover an area of about fifty-three acres. All of the parcels are in the Rural Zone and are within the current mineral resource lands overlay to the Island County Zoning Ordinance.

Sand and gravel mining and processing has been going on, on this site, at least on an intermittent basis. The record indicates that initial mining started in the 1940's, prior to the adoption of Island County's first Zoning Ordinance.

On March 5, 1969 Wayne Libbey obtained a Conditional Use Permit from the Board of Adjustment approving the commercial excavation and processing of gravel, sand, and rock from the site.

On November 6, 1986 the owner submitted an application for a Certificate of Zoning Compliance, CZC 69/86, pursuant to the requirements in the Island County Zoning Ordinance, ICC 17.02, which replaced the Interim Zoning Ordinance in 1984. This Certificate of Zoning Compliance was approved on March 15, 1993.

The Conditional Use Permit originally issued by the Board of Adjustment and the Certificate of Zoning Compliance approved in 1993 both covered two ( R13232-034-0520 and R13232-036-0620) of the eight parcels now in the ownership of Penn Cove, Inc. These two parcels cover approximately nineteen to twenty acres and have been heavily mined over the years. Some mining operations have extended beyond the two parcels which had County approval for mining and processing. The expanded mining operations on the site are the subject of a current enforcement action which has been stayed by Planning until the current application process to expand the operation to fifty-three acres has been completed.

### III.

On November 18, 2008 the applicant Penn Cove, Inc. submitted a Certificate of Zoning Compliance (CZC) application requesting the County determine through the Certificate of Zoning Compliance process, that mining is allowed on all fifty-three acres.

During the period of time from the application date until the decision from Planning denying the CZC on August 28, 2009 the Applicant and the Planning Department were in regular communication; the Applicant submitted significant amounts of additional material as requested by Planning; and the Applicant agreed to hold, and held a community meeting regarding the proposed surface mine expansion even though no such meeting is mandatory under the current Code.

On August 28, 2009 Planning issued a decision denying the Certificate of Zoning Compliance based on Planning's determination that a CZC application was not the appropriate procedural mechanism to expand an approved surface mine on two parcels encompassing nineteen acres to one on eight parcels encompassing fifty-three acres.

### IV.

Penn Cove, Inc. filed a timely appeal of the Planning Department's decision on CZC 325/08, filed a timely Comprehensive Statement of Appeal, and the record was prepared and the matter heard by the Island County Hearing Examiner on November 5, 2009.

### V.

Stated simply Island County Planning & Community Development believes that the proper process under Island County Ordinances for the expansion of this mine from the originally approved two parcels to the contiguous eight parcels now sought is through a Type III public hearing process as a Conditional Use or Site Plan Review application. The Appellant believes that the CZC process is the appropriate way for the County to review the proposed surface mining

expansion onto the fifty-three acres, resulting in a review of the proposed expansion through the Type II administrative process, not requiring a public hearing.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following:

## CONCLUSIONS OF LAW

### I.

The ultimate legal issue raised by this appeal requires the Hearing Examiner to determine whether the proposed expansion of the Libbey Mine by Penn Cove, Inc. or their assigns requires approval through a Type II or a Type III process, as those processes are defined in ICC 16.19.

While it is easy to state the ultimate issue to be resolved the actual complexity of the issue is reflected by the extensive disagreement about interpretation of a number of sections of Island County Ordinances, interpretation of the minerals overlay goals and policies of the Island County Comprehensive Plan and the relationship between the Zoning Ordinance. The appellant argues that the proposed expansion of the Libbey Mine from approximately nineteen to fifty-three acres comes under the purview of ICC 17.03.230. The Planning Director is authorized to make decisions on applications for Certificates of Zoning Compliance pursuant to this Zoning Ordinance section by using the Type II process as set forth in ICC 16.19.

The purpose section, paragraph A of ICC 17.03.230 states in relevant part as follows:

- A. **“Purpose.** This section provides a simple and expeditious process for establishing, upon the request of a property Owner, that a ... Use ... lawfully existed prior to the effective date of the Chapter. In addition, this section establishes the terms and conditions for continuing Existing Uses, ... which were lawfully established prior to the effective date of this Chapter and to allow Existing businesses and uses to continue to operate even though the Use is no longer permitted in the zone in which the Use is located.”

Pursuant to ICC 17.03.230.H ... “A legally established Existing Use may be expanded, enlarged, or extended ... provided the expansion conforms to land Use standards set forth in ICC 17.03.180 for parking and Setbacks; the height restriction of the applicable Zone; and the applicable Critical Area standards of Chapters 17.02 ICC. ...”

ICC 17.03.230.I reads as follows:

**Discontinuance of Existing Use.** All legally established Existing Uses shall be encouraged to convert to a conforming Use whenever possible and conformance shall be required when:

1. The Use or Structure(s) within which the Use is conducted is moved to another Lot or Structure unless the move is due to a County, municipal, state or federal project; or
2. The Use is terminated or discontinued for more than three (3) years.

Paragraph I sets forth the goal of encouraging conformance with current Ordinances and sets forth two separate sets of circumstances that require a Non-conforming Use to comply with the current Zoning Ordinance. Conformance with the existing Zoning Ordinance is required if a Use is moved to another lot under paragraph 1 above or the Use is terminated or discontinued for more than three years.

The Hearing Examiner concludes that the proposed expansion of the Libbey Mine to six additional contiguous lots is subject to 17.03.230.I(1) ICC and that any expansion beyond the two parcels already permitted under the original Conditional Use Permit must be done in conformance with the existing Island County Zoning Ordinance.

The original Conditional Use approval of the Libbey Mine and its continuing legal existence as determined by the Certificate of Zoning Compliance issued in 1986 were both approvals allowing mining and processing on two lots which total nineteen acres. The Hearing Examiner concludes that any expansion beyond the boundaries of these two lots requires approval under, and in conformance with, the current version of ICC 17.03, including both applicable development standards and the Process applicable to new surface mining proposals.

The Planning Department and interested parties have also suggested that the right of the applicant to expand the mine as an Existing Use was terminated pursuant to ICC 17.03.230.I(2) based on discontinuance of the Use for more than 3 years. The evidence in the record on this issue is conflicting. The record does indicate rather clearly that no actual mining activities took place on the site for a period in excess of three years. However there may have been processing that took place during that period. Because the Hearing Examiner's decision in this matter requires conformity with the current Zoning Ordinance, as if the expansion of the mine was a new use, based on a number of other grounds the issue of whether or not the Use is required to become conforming because it was terminated or discontinued for more than 3 years is moot. The Hearing Examiner would point out that Non-conforming Uses have some constitutional protections based on Case law. The constitutional issues have not been briefed by anyone. The Hearing Examiner is unwilling, to resolve this without full legal briefing and concludes it is unnecessary to do so at this time.

## II.

The goals and policies of the Island County Comprehensive Plan for mineral resource lands are set forth in the Island County Comprehensive Plan at pages 136 – 138. As pointed out by the Planning Department in their staff report, Policy A.4 and Policy F. indicate the development standards to be applied to mineral resource land operations apply to both new and expanding operations. Policy M. indicates that mining is not considered to be a permanent use of the land and should be allowed based on performance standards which could allow the land to be utilized

consistent with the long-term plans of the community (meaning after mining sites are depleted and reclaimed).

Additionally Policy N. in the mineral resource overlay section of the Comprehensive Plan indicates that conflicts in policy statements or development regulations are to be resolved by applying the more stringent or restrictive policies and/or regulations.

The Comprehensive Plan clearly anticipates applying the current development regulations to both new and to existing, expanding surfacing mining operations. The standards for surface mining are set forth in ICC 17.03.180.U. Based on the Comprehensive Plan Policies, the Hearing Examiner concludes the Board of Island County Commissioners intended that the development standards applicable to mining set forth in ICC 17.03.180.U to apply to both existing expanding mines and to new mines. Even if the Appellants argument that their proposal is just an expansion of an existing mine was accepted, all of the development regulations set forth in ICC 17.03.180.U would still apply. The application requirements of ICC 17.03.180.U(1) require surface mining applications to be reviewed through the Site Plan Review process as a Type III application. The Hearing Examiner concludes that the Comprehensive Plan anticipates both new and expanded mines will be regulated under the current policies, process and development regulations in ICC 17.03. Since new mines are required to go through the Type III public hearing process the Comprehensive Plan policies require expanding mines to go through the same process.

As pointed out in ICC 17.03.030.B, the Zoning Code is required under state law to be consistent with and implement the Comprehensive Plan and if there are conflicts between the Plan and the Zoning Code the Plan policies control. Having concluded that the Plan requires the same process and development standards for new and expanding surface mines, the proposed expansion of the Libbey Mine must be in full compliance with ICC 17.03.180.U.

A careful reading of the mineral lands regulations under ICC 17.03.180.U in their entirety shows that the Board of Commissioners intended the Hearing Examiner to be implementing the development standards applicable to surface mining. Three times in the Reclamation Standards section decisions are referred to as being within the authority of the Hearing Examiner. In the section setting forth Operation Standards the Hearing Examiner is twice named as having the authority to make certain determinations. Under the paragraph dealing with the reclamation bond the Hearing Examiner is identified three times as having the decision making authority. Additionally there are two references to the Hearing Examiner authority in ICC 17.03.180.U(6) dealing with the Hearing Examiners authority to place and to modify time limits on the Site Plan.

The Comprehensive Plan anticipates that expanding existing surface mines and new surface mines will be subject to the same set of regulations. The surface mining regulations themselves clearly indicate that the Hearing Examiner will be the authority making the decisions applying the surface mining regulations of ICC 17.03.180.U. The only process that brings matters before the Hearing Examiner is the Type III process requiring a public hearing. The Application to expand the Libby surface mine must be processed as a Site Plan Review through the Type III process set forth in ICC 16.19.

### III.

The parties have raised a number of other arguments in support of their position. The record is extensive. The Hearing Examiner has not found it necessary to address or resolve every argument or issue raised to resolve the issue raised by this Appeal.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following:

### **DECISION**

The decision of the Island County Planning Department denying CZC 325/08 is upheld. Any expansion of this existing surface mine outside of the two parcels for which approval was originally obtained must obtain a Site Plan Approval through the Type III process in full compliance with the surface mining regulations, requirements, and standards as set forth in ICC 17.03.180.U.

Entered this 12<sup>th</sup> day of November, 2009, pursuant to authority granted under the laws of the State of Washington and Island County.

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MICHAEL BOBBINK  
Island County Hearing Examiner

#### APPEAL PROCESS:

APP (Administrative Decision)

Appeal Process: This land use decision is a final determination which may be appealed by filing a land use petition in Island County Superior Court within twenty-one (21) days of its issuance. Specific requirements for the petitions contents, time and service of process, and payment of the cost of the transcription of the record of the hearing may be found in Chapter 70C of Title 36 RCW