

**SKAGIT COUNTY PLANNING & DEVELOPMENT SERVICES
BEFORE THE ADMINISTRATIVE OFFICIAL**

**ADMINISTRATIVE DECISION
AOI 2023-03**

Findings, Conclusion and Decision

Hearing Authority: Skagit County Planning Director

Application Number: PL23-0070

Applicant & Owner: Wilder Construction Company
c/o Granite Construction Company
1525 E. Marine View Drive
Everett, WA 98201

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1. SUMMARY OF DECISION

Wilder Construction Company requested an Administrative Official Interpretation of SCC 14.16.880, which governs pre-existing non-conforming uses. In particular, Wilder asks the County to recognize that the Conway Quarry has been used as a commercial surface mine since the 1940's and as such is a legal nonconforming use and that under the diminishing asset doctrine that use may extend to the parcel boundaries.

Based on the information provided to the County the Conway Quarry is a legal nonconforming use and the scope of that use would be determined pursuant to the diminishing asset doctrine.

2. AUTHORITY

Administrative Official Interpretations are authorized by SCC 14.06.040(3), which grants the administrative official the authority to issue decisions "as to the meaning, application, or intent of any of the provisions of SCC Title 14." SCC 14.06.040(3)(a); *see also* SCC 14.16.020(2) ("it shall be the responsibility of the Administrative Official, or designated representative, to interpret and apply the provisions of this Chapter pursuant to SCC 14.06.040."); SCC 14.06.040(1) ("The Administrative Official is responsible for administering the provision of SCC Title 14").

An Administrative Official Interpretation is a Level I decision. SCC 14.06.050(1)(a)(xii).

3. BACKGROUND

The Conway Quarry is located on parcel P17162, a 196.7-acre lot owned by Wilder¹ and is located at 21368 State Route 534. Mining operations currently occupy about 18 acres of the property although the current DNR reclamation permit is for 30 acres. This property is currently zoned Secondary Forest-Natural Resource Land (“SF-NRL”) and is within the Mineral Resource Overlay. Surface mining is permitted within the SF-NRL zone with a hearing examiner special use permit. SCC 14.16.420(4)(d).

Wilder filed the Request of Administrative Interpretation on January 30, 2023. The request asks the County to recognize:

1. Mining operations began in the 1940’s;
2. Conway Quarry was a commercial mining operation when zoning was first enacted in 1966;
3. That this operation has not been discontinued or abandoned since 1966;
4. That the mining and processing operations at the Conway Quarry are a legal nonconforming use; and
5. The continued mining operations within the parcel will not constitute an enlargement, alteration or expansion of the nonconforming use.

Along with the request form Wilder filed a narrative and eleven exhibits, which contained aerial photos dating back to 1941, agreements related to the mining of the pit, documents pertaining to state tests of the gravel, and reclamation permits from the Department of Reclamation, among other documents.

A Notice of Application was published on February 23, 2023.

A public comment period was open between February 23, 2023, and March 10, 2023. The County received no comments.

4. DISCUSSION

1.1. Background Facts

Mining operations at the Conway Quarry are currently a nonconforming use because it does not possess a special use permit as required by SCC 14.16.420(4)(d).

It is not clear when exactly mining began. Wilder asserts it began by 1944. (AOI Req., Nar. at 3). This appears to be based on an aerial photograph from 1941, a Department of Highways report stating the site has been mined by the English Lumber Company (which

¹ Wilder is the owner per Auditors records, although Granite has acquired their interest in 2008. Req. for Admin. Interp. at 3.

sold the parcel in 1948), and a notation in 1951 documents that a sample was taken from an existing 80-foot face.

This evidence is something less than definitive, and certainly is insufficient to say with any degree of certainty exactly when mining began (and the nature of that mining). But the information reviewed by the County makes clear that commercial mining operations were well established by the early 1950's.

In 1951 the state Department of Highways conducted tests of a sample taken from the site, with the associated paperwork indicating the sample was taken from the existing 80-foot face of the quarry. (AOI Req., Nar., exh. G). In 1954 a Borrow Pit Lease was signed by State, the County, and Wilder's predecessor in interest, Puget Sound Pulp and Timber Company. (AOI Req., Nar., exh. H). This lease was for 10 years and was "for the purpose of excavating and removing highway materials consisting of rock, gravel, sand and/or earth" along with other accessory uses. *Id.* The mine is clearly visible in the aerial photograph of the site taken in 1957. (AOI Req., Nar., exh. B).

Mining operations in support of state highway projects continued through the 60's. The borrow pit lease was extended to 1970 (albeit without the County as a party). (AOI Req., Nar., exhs. I & J). In 1973 a reclamation permit for the mine was obtained, and the County recommendation noted the "operation is a pre-existing non-conforming use and as such, is exempt from zoning requirements. (AOI Req., Nar., exh. M & N). The aerial photo from 1976 shows the mining operations had expanded. (AOI Req., Nar., exh. E).

Not much is known about mining operations in the 1980's and 90's. Wilder did not provide any information for this time, other than the fact that the reclamation permit was transferred from Georgia Pacific Corp. to Wilder in early 1993. (AOI Req., Nar., exh. O). Google Earth Timelapse² suggests not much activity occurred, but given the low resolution it's difficult to see much (although it certainly shows an increase in activity in the mid-aughts).

Nevertheless, Wilder filed for a special use permit in 1990 for "the expansion of a Gravel Pit, the operation of a Rock Crusher, and to allow the operation of an Asphalt Plant". *In re SUP App. for Wilder Constr.*, No. SP-90-041, Findings of Fact/Entry of Order at 1. (Aug. 5, 1991) (Auditor File No. 3708050020). Although the Department recommended approval, the hearing examiner denied the application. *Id.* at 5. This decision was upheld on appeal to the Board of County Commissioners. Res. 14072. And upheld again by the Superior Court. *Wilder Constr. Co. v. Skagit County*, No. 91-2-00751-1 (Judg. & Ord. Dismissing Compl./Pet. for Writ of Cert. & Rev.) (Sup. Ct., June 29, 1992). It was further appealed, but Wilder voluntarily dismissed the appeal.³ A second application for a special use permit was ultimately withdrawn.

² <https://earthengine.google.com/timelapse#v=48.33159,-122.28453,11.522,latLng&t=0.56&ps=25&bt=19840101&et=20201231&startDwell=0&endDwell=0>.

³ The County did not review any documents filed with the Court of Appeals, but did review the list of documents in the file as available of the Court's website.

Notably, there is nothing in the records the County has reviewed that the nonconforming use was an issue in the special use permit process or litigated in the judicial action that followed. Wilder's non-conforming use is not mentioned in the County's recommendation to the Hearing Examiner, nor the decisions of the Hearing Examiner, Board of County Commissioners, and the Superior Court.

It appears the understanding at that time (which pre-dated the decision in *McGuire v. City of University Place*, 144 Wn.2d 640 (2001)) was that the proposed plan for an asphalt plant exceeded the scope of any rights to continue the nonconforming use. In particular, when withdrawing the second SUP application Wilder's CEO and President wrote a letter to the County to clarify:

The proposed use as an asphalt batch plant is the part of the special use permit that we decided not to pursue. In order to avoid any confusion, it is not our intent nor has it even been our intent to forgo the use of the property for surface mining purposes nor are we abandoning, discontinuing or ceasing any right that we have surface mine the property by way of our pre-existing nonconforming right to surface mine the property.

(Letter from R. Helsell to D. Hough, Nov. 22, 1995).

As mentioned above, since the turn of the millennium there is clear evidence in the aerial photos that the mine has been active. The reclamation permit was transferred to Granite Construction Company in May 2009. (AOI Req., Nar., exh. O).

1.2. Nonconforming Uses

Nonconforming uses are governed by SCC 14.16.880. A nonconforming use is "[a]ny lot, building, structure, or use of land, legally permitted or established at the time" the regulation the use does not conform to was adopted. SCC 14.16.880(1). Although a nonconforming use is permitted to continue, SCC 14.16.880, the County may "regulate or even terminate the nonconforming use, subject to constitutional limits." *McGuire*, 144 Wn.2d at 648 (citing *Rhod-A-Zalea & 35th v. Snohomish County*, 136 Wn.2d 1, 8 (1998)). A nonconforming use may not be enlarged, altered, or expanded except as set forth in the Code. SCC 14.16.880(2)(a). And once a nonconforming use is abandoned, any future use must be in compliance with the current zoning regulations. SCC 14.16.880(5). As is applicable here, the County has not enacted any ordinance to end nonconforming mines, but nonetheless does not encourage the survival of nonconforming uses. SCC 14.16.880(1)(a).

1.2.1. Doctrine of Diminishing Assets

A nonconforming use cannot expand, be altered, or reconstructed except as allowed by the Code. SCC 14.16.880(1)(c). The scope of the preexisting nonconforming use is then critical to determine whether any alteration or expansion has occurred. The Washington Supreme Court determined the scope of lawful nonconforming mining of an exhaustible resource is

determined under the doctrine of diminishing assets. *McGuire v. City of University Place*, 144 Wn.2d 640, 651 (2001) Under the diminishing asset doctrine, the scope of a lawful nonconforming mining of an exhaustible resource is the whole parcel of land owned and intended to be used by the owner at the time the contrary zoning law was enacted. *Id.* This doctrine accounts for the fact that mining is a unique land use in that the very use consumes the asset. In a gravel operation the land itself is a material or resource. It constitutes a diminishing asset and is consumed in the very process of use.

MsGuire clearly provides a baseline for defining the scope of a nonconforming use, but explicitly leaves open “whether a local government could explicitly *not* allow the use of the diminishing asset doctrine to define the scope of a non-conforming use.” *McGuire*, 144 Wn.2d at 652 n.5 (emphasis in original). The County has not attempted to define the scope of a nonconforming mine in a manner different from the diminishing asset doctrine. Consequently, the scope a lawful pre-existing nonconforming mining operation under SCC 14.16.880 is defined by the diminishing asset doctrine as set forth in *McGuire*.

Here the Conway quarry is a nonconforming use as set forth in SCC 14.16.880(1), since its use as a commercial mining operation predates the County’s enactment of regulations requiring a conditional or special use permit. As the scope of this nonconforming use is defined by the diminishing asset doctrine, the mining operations are permitted, as a nonconforming use under SCC 14.16.880, on the whole of the parcel.

1.2.2. Abandonment

Wilder has also asked for the County to conclude mining operations have not been abandoned. A nonconforming use is abandoned if there is “[a]n intention to abandon” and “[a]n overt act, which carries the implication that the owner does not claim or retain any interest in the right to the nonconforming use.” SCC 14.16.880(4). Any right to continue the nonconforming use is forfeited if the “nonconforming use of [the] land ... ceases for any reason whatsoever for a period of 1 year or more”. SCC 14.16.880(5).

Section 14.16.880(6) sets forth a process for determining that a nonconforming use has been abandoned “[w]hen the Department obtains information indicating that a nonconforming use ... has or may have been abandoned”. This process begins with notifying the owner of the concern and allowing them to state whether they have or have not abandoned the use. *Id.* If they state it has not been abandoned and the Department disagrees the issue is treated as Level II application and the Hearing Examiner determines if an abandonment has occurred. *Id.*

Given that a specific process is set forth to make this fact dependent determination and that an administrative interpretation under SCC 14.06.040(3) is meant to answer legal questions, it would be improper to make a preclusive determination as to abandonment. However, it should be noted that the County has not initiated the process set forth in SCC 14.16.880(6) and currently does not currently possess “information indicating that [the] nonconforming use ... has or may have been abandoned.”

5. CONCLUSIONS

1. Although the County cannot determine based on the information known to when exactly the Conway Quarry started operations, it clearly began commercial mining operations prior to the adopted of the Zoning Ordinance in 1967 and thus constitutes a preexisting nonconforming use.

2. The diminishing assets doctrine determines the scope of a nonconforming gravel mine, as such a nonconforming gravel mine, such as the Conway Quarry, may be mined to the parcel boundaries subject to compliance with current environmental and other applicable regulations.

3. This decision is limited to the application of the diminishing asset doctrine and does not address the application of any other regulations or laws to the Conway Quarry.

ADMINISTRATIVE OFFICIAL

Jack Moore
Director
Skagit County Planning & Development Services

Date of decision: March 27, 2023

Notice of this decision will be published in the newspaper of record and will be posted on the Skagit County's website. The applicant or a party of record may appeal the decision of the Administrative Official to the Skagit County Hearing Examiner pursuant to the provisions of SCC 14.06.040(3)(d) and SCC 14.06.110(7). An appeal must submit the appeal form and appeal fees to Planning and Development Services within 14 calendar days of the date the Notice of Decision was issued.

Appeals must be submitted by: April 10, 2023

Appendix

SCC 14.16.880—Nonconforming Uses and Structures

(1) **Intent.** Any lot, building, structure, or use of land, legally permitted or established at the time of the adoption of the ordinance codified in this Chapter, shall be permitted to continue. A change in occupancy or ownership shall not affect such right to continue such use, building, or structure. It is the intent of the ordinance codified in this Chapter:

(a) To permit these nonconformities to continue until they are removed, but not to encourage their survival, except as expressly provided in this Section; and

(b) That nonconformities shall not be used as grounds for adding other structures or uses prohibited elsewhere in the same zoning district; and

(c) That nonconforming uses or structures not be allowed to expand, be altered or reconstructed except as otherwise outlined in this Section.

(2) **Enlargement, Alteration, Expansion or Change of Nonconforming Uses.**

(a) Nonconforming Uses. No nonconforming use shall be permitted to be enlarged, altered, or expanded, except that a nonconforming use may be extended throughout any part of the building which was designed for its use prior to the time of the adoption of this Chapter. This extension is allowed; provided, that no structural alterations, except those required by law, are made therein, and that no expansion of the structure or parking requirements occurs.

(b) No nonconforming use shall be allowed to be reestablished after abandonment. Thereafter, the use of the building, structure or site shall be in conformity with the regulations for the district in which it is located.

(c) A nonconforming use shall not hereafter be changed to any other nonconforming use, regardless of the conforming or nonconforming status of the building in which it is housed.

(3) **Enlargement, Alteration, Reconstruction of Nonconforming Buildings and Structures.** Subsections (3)(a) and (b) of this Section outline requirements for routine maintenance, reconstruction/replacement after damage by fire, natural disaster, or other calamity, and structural repairs needed to maintain a building or structure in a safe structural condition:

(a) Routine maintenance and repairs may be performed on a nonconforming structure or building.

(b) When a nonconforming building or structure is damaged, said building or structure may be restored or replaced provided:

(i) A complete application for reconstruction or replacement is submitted within 1 year of the damage, and

(ii) That the restoration or replacement shall be made to conform to the regulations of the zoning district in which the building or structure is located, or if such regulations cannot physically be met without reducing the size of the building, the restoration shall not extend any nonconformity that existed prior to the damage.

(4) Abandonment. For the purposes of this Subsection, abandonment shall mean:

(a) An intention to abandon; and

(b) An overt act, which carries the implication that the owner does not claim or retain any interest in the right to the nonconforming use.

(5) Conformance after Abandonment. If any nonconforming use of land and/or building or structure ceases for any reason whatsoever for a period of 1 year or more, any future use of such land, building or structure shall thereafter be in conformity in the zoning district in which it is located. The mere presence of a structure, equipment or material shall not be deemed to constitute a continuance of a nonconforming use unless the structure, equipment, or material are actually being occupied or employed in maintaining such use.

(6) Procedure for Verifying Abandonment. When the Department obtains information indicating that a nonconforming use, building or structure has or may have been abandoned, the Department shall send a letter by certified mail return receipt requested to the property owner requesting confirmation of either abandonment or non-abandonment. Documentation that the nonconforming use, structure, or building has been occupied, used, or maintained within the last year shall be required. After proper notification, if the owner fails to respond to the request within 60 days, the building, structure, or use shall be deemed abandoned. If the owner replies that the building, structure, or use is not abandoned, the Department may treat this as a Level II permit application, in which case the Hearing Examiner will make a determination regarding the abandonment status, or the Department may determine that abandonment has not occurred.