

November 19, 2007

Via E-Mail and first Class Mail

Ms. Juelane Dalzell
Jefferson County Prosecuting Attorney
Jefferson County Courthouse
P. O. Box 1220
Port Townsend, Washington 98368

RE: Iron Mountain Quarry

Dear Ms. Dalzell:

This responds to your email dated November 16, 2007. Discussions between my client, Iron Mountain Quarry, and Jefferson County Department of Community Development (DCD) staff and your office have been taking place over the last six months. Your email appears to be an abrupt termination of these communications that were intended by both sides to avoid litigation.

Mr. Alvarez's letter dated October 8, 2007, expressly stated: "The County has asked for additional information from you and does want to continue to discuss this matter with you rather than have lawsuits immediately resorted to." Iron Mountain Quarry promptly provided all additional information, by letter dated October 12, 2007, and requested confirmation from the County that the 10-acre restriction found in JCC 18.20.240 on mineral resource uses outside of designated Mineral Resource Land does not apply to property to which the diminishing asset doctrine applies.

Your November 16th email states: "What you have requested from my office is very much like an 'advisory opinion.' We are unable by law to provide legal advice to private entities. Please pursue whatever application you need through DCD."

In fact, we are not seeking an advisory opinion. Iron Mountain Quarry has presented a proposal for a mineral resource use exceeding the 10-acre limit of JCC 18.20.240. As Mr. Scalf confirmed in his separate November 16, 2007 email, Iron Mountain Quarry has completed the pre-application conference. At this pre-application conference on August 23, 2007, Mr. Scalf informed Iron Mountain Quarry that DCD interpreted 10-acre limit in JCC 18.20.240 to be an absolute limit, regardless of whether the diminishing asset doctrine applies, and that DCD would certainly deny approval of Iron Mountain Quarry's proposed project on this basis, unless the County's attorney determined that as a matter of law the diminishing asset doctrine could be applied to over-ride this 10-acre limit.

Thus, the County has informed us that the proposed project will be denied unless (1) Iron Mountain Quarry seeks a comprehensive plan amendment to expand the Mineral Resource Land designation to include the project area in Section 29 and (2) the County approves the proposed comprehensive plan amendment. Such approval would not be granted until the end of 2008. Because DCD has determined that a comprehensive plan amendment is required, the County has effectively denied Iron Mountain Quarry property rights protected under the diminishing asset doctrine established in *McQuire v. City of University Place*, 144 Wn.2d 640, 30 P.3d 453 (2001). Imposing a requirement to obtain approval of a comprehensive plan amendment violates the non-conforming use rights protected under *McQuire* just as much as if the County were to require a conditional use permit.

The County has unambiguously communicated to Iron Mountain Quarry that it will not recognize the applicant's non-conforming use rights under the diminishing asset doctrine. Mr. Scalf stated this clearly at the pre-application conference. Your office did the same in Mr. Alvarez's letter dated October 8, 2007. Despite Mr. Alvarez's representations that this matter was going to be reviewed by the County Commission, this apparently has not occurred. At this point, my client should not be compelled to go through the futility of submitting to further permit processes, since the County has made it abundantly clear that it will not recognize the diminishing asset doctrine to protect my client's non-conforming use property rights to exceed the 10-acre limit of JCC 18.20.240.

My client has acted in good faith and relied on the County's representations that it wished to avoid litigation. We now conclude that the County has not been acting in good faith and is simply seeking to obstruct and delay my client's project to the considerable financial detriment of my client. We intend to do everything possible to protect the rights and interests of Iron Mountain Quarry regarding this proposed mineral resource use project.

I think that on reflection you will agree that this is not a matter of the County issuing an "advisory opinion." Instead, this matter is reviewable under Washington's Uniform Declaratory Judgment Act, RCW Ch. 7.24. That statute provides:

A person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

RCW 7.24.020.

The statute further provides:

This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

RCW 7.24.120.

The County has refused to confirm that a party with non-conforming use rights under the diminishing asset doctrine is not subject to the 10-acre limit of JCC 18.20.240. This is a justiciable controversy under Washington law:

(1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

To-Ro Trade Shows v. Collins, 144 Wash.2d 403, 411, 27 P.3d 1149 (2001).

Only when a controversy fails to meet these four requirements is there an argument that a party is seeking an advisory opinion. *Walker v. Munro*, 124 Wash.2d 402, 411-12, 879 P.2d 920 (1994).

If Jefferson County does not confirm in writing that the 10-acre limit in JCC 18.20.240 is subject to the diminishing asset doctrine and that Iron Mountain Quarry will not be required to submit a comprehensive plan amendment to expand the Mineral Resource Land designation for the area of proposed mineral resource use in Section 29, Iron Mountain Quarry intends to file a Declaratory Judgment Action against Jefferson County in Snohomish County Superior Court to establish its non-conforming use rights to undertake the proposed mineral resource use project without having to obtain approval of a comprehensive plan amendment.

To avoid litigation, the County's written confirmation of Iron Mountain Quarry's rights under the diminishing asset doctrine is requested by Monday, November 26, 2007.

Thank you for your attention to this matter.

Very truly yours,

GORDONDERR LLP



Keith E. Moxon

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