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SUPERIOR COURT OF WASHINGTON
FOR KITSAP COUNTY

IRON MOUNTAIN QUARRY,
LLC, a Washington Limited Liability
Company, and POPE RESOURCES,
a Delaware Limited Partnership;

Petitioners/Plaintiffs,

v.

JEFFERSON COUNTY, a
Washington Municipal Corporation,
acting through its Department of
Community Development; and
STACIE L. HOSKINS, Planning
Manager, Jefferson County
Department of Community
Development;

Respondents/Defendants.

AND

PORT LUDLOW VILLAGE
COUNCIL;

Intervener.

NO. 10-2-00181-5

MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
OF MOTION TO INTERVENE

TO: CLERK OF THE COURT;

AND TO: Dale N. Johnson and Keith Moxon at GordonDerr LLP, Attorneys for
Plaintiffs.

AND TO: Kenneth W. Harper and Quinn N. Plant at Menke Jackson Beyre Ehlis &
Harper, LLP, Attorneys for Defendants.

1 I. FACTS.

2 The Port Ludlow Village Counsel (the “PLVC”) is a nonprofit Washington
3 corporation informally representing the interests of the residents and property owners in
4 the Port Ludlow Master Planned Resort (“Port Ludlow”). The PLVC’s governing body
5 is elected by vote of the property owners in Port Ludlow. There are approximately 1,650
6 property owners and 2,500 residents in Port Ludlow; it has the second largest urban-
7 density population in Jefferson County. The Port Ludlow MPR’s developments and
8 residences also represent the single largest source for property taxes available to
9 Jefferson County. The protection of the value of those developments and residences is
10 critical to Jefferson County and even more so to the owners who made substantial
11 investments therein in reliance upon the MPR and its associated natural amenities as
12 promised by Pope Resources.

13 Port Ludlow is unincorporated but has the status of the only active Master
14 Planned Resort (“MPR”) currently active in Jefferson County. The Port Ludlow MPR is
15 recognized by Jefferson County Ordinance issued pursuant to RCW 36.70A.360 and
16 RCW 36.70A.362. It was granted MPR status pursuant to petitions filed by Pope
17 Resources, one of the petitioners in the instant litigation- MPR status, which allows
18 urban density outside a recognized urban growth area, is based upon the provision of
19 transient accommodations and outdoor recreational activities in a largely undisturbed
20 natural setting.

21 The PLVC currently is recognized by and represents the interests of the residents
22 and property owners in the Port Ludlow MPR in matters before Jefferson County. (See
23 Simpson Declaration [para. 1, item 4, p. 3](#)). The Superior Court for Jefferson County has
24 officially permitted the PLVC to intervene in other land use issues in petitions before it
25 under the Land Use Petition Act, Chapter 36.70C, RCW. (See Simpson [paras. 2 and 3,](#)
26 [item 5, p. 3](#)). The PLVC’s standing was recognized by Judge Verser in the underlying

1 litigation concerning IMQ's and Pope Resources' quarry under a nonconforming legal
2 use arising from an extension of the Old Shine Pit extant in the 1970s. [There is a
3 continuing issue whether the use of the Old Shine Pit was continuous, as needed to
4 justify its classification as a legal nonconforming use. (See [paras. 1 to 8, Ex. B\(42\), p.](#)
5 [44, paras. 1 to 4, Ex. B\(42\), p. 45, para. 7 \(bottom\), Ex. A, sec. 5, p. 15, and paras. 1 to](#)
6 [3, Ex. A, sec. 5, p. 16](#).)] The permit that is the basis for Jefferson County's
7 determination of significance is associated with such extension.

8 Under an agreement with Pope Resources, the PLVC has general oversight
9 authority over certain common amenities that serve the Port Ludlow MPR. Such
10 oversight extends to the trail system that was initially dedicated by Pope Resources and
11 serves as a justification for MPR status. The trail system extends to areas that are
12 contiguous to the proposed quarry site and will be directly affected thereby.

13 Without the representation of the PLVC in governmental matters that affect its
14 residents and property owners, those residents and property owners would have no
15 means collectively to have their concerns heard and their interests recognized. This is
16 particularly the case in land use issues such as the gravamen of this petition. The PLVC
17 is the only organization uniquely situated to represent the interests of the residents and
18 property owners in the Port Ludlow MPR.

19 To qualify Port Ludlow as an MPR, the parties, including Pope Resources
20 dedicated a trail system and a golf course as well as a marina, inn, and associated
21 recreational opportunities. The trail system is immediately affected by the proposed
22 quarry of IMQ and Pope Resources. The amenities include the trail system as well as
23 the natural setting that is associated with the forest reserve classification of the area
24 around the Port Ludlow MPR. This forest was and has at all relevant times been a
25 dedicated tree farm of Pope Resources and was a basis upon which Pope Resources sold
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1 lots and residences to the property owners and residents of Port Ludlow and by which
2 Pope Resources persuaded Jefferson County to grant MPR status to Port Ludlow.

3 To support Port Ludlow and the Port Ludlow MPR, Pope Resources developed a
4 water delivery system and sewage treatment system now owned by Olympic Water &
5 Sewer, Inc. (“OWSI”). Initially, Pope Resources owned the undeeded property in the
6 Port Ludlow MPR but transferred it to Port Ludlow Associates, LLC, an unrelated
7 party, in 2001, together with the ownership of OWSI. IMQ’s and Pope Resources’
8 statement in their filings with Jefferson County in support of the storm-water permit that
9 is the subject matter of their petition incorrectly identifies OWSI as owned by Pope
10 Resources, one of numerous inaccuracies contained in the filings.

11 The water utility draws from wells in an aquifer that is perched on or lies in the
12 sand overlying the basalt deposit that IMQ and Pope Resources now wish to quarry.
13 (See Simpson [para. 2 and 3, sec. B\(a\), p. 9](#)). The water right and the capacity of the
14 water utility is currently less per household than Washington State design standards and
15 is not adequate without additional water rights and additional wells to satisfy the Port
16 Ludlow MPR at projected build-out. (See Simpson [paras. 3 and 4, sec. B\(e\)\(ii\), p. 12](#)).
17 In addition to the Port Ludlow MPR, Pope Resources seeks to use the OWSI water
18 system to support its proposed residential development on the south side of Ludlow
19 Bay. The proposed quarry will also draw on water but not the delivery system from the
20 same formations. The quantity of the domestic water resource currently available to the
21 residents and property owners of the Port Ludlow MPR, the projected demands thereon,
22 the lack of alternative domestic water source, and the vulnerability to damage due to the
23 proximity of the project to the geologic formations that provide the source of domestic
24 water thereto, must be considered. The residents and property owners of Port Ludlow
25 are directly affected by the proposed project as to their domestic water supply and the
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1 projected further use of water there from by the project (See Simpson [para. 5, sec. \(f\), p.](#)
2 [13](#)).

3 Port Ludlow is served by a road system that is anchored in Oak Bay Road and
4 Paradise Bay Road. Oak Bay Road intersects Highway 19 about 1.6 miles north of the
5 intersection of Highway 19 and Highway 104. Paradise Bay Road intersects Highway
6 104 five miles south of Port Ludlow a few hundred yards beyond the westerly end of the
7 Hood Canal Bridge and intersects Oak Bay Road at the commercial center of the Port
8 Ludlow MPR. Thus, access of the Port Ludlow MPR residents and property owners to
9 Highway 104, their only roadway across Hood Canal, competes directly with the
10 proposed access of the IMQ quarry to Highway 104.

11 IMQ and Pope Resources have erred in claiming their right to access Highway
12 104 in their response to the Environmental Questionnaire. The access right was granted
13 by the Washington State Department of Transportation (the “WSDOT”), limited to use
14 of the roadway for tree farming purposes. (See [paras. 2 and 3, Ex. B\(25\), p. 1](#)). A quarry
15 is an industrial use. The WSDOT has raised objection to the proposed use in a filing
16 responding to the proposed permit. It continues to deny the right to such use. The
17 alternative access, which could be granted, would be on Highway 19. That access would
18 place the traffic from the quarry two miles closer to Oak Bay Road, the major arterial
19 through the Port Ludlow MPR.

20 Concern is raised that IMQ and Pope Resources have omitted description of the
21 proposed use of the roadway system for the transportation of product by any trucks
22 owned by IMQ, by independents and subcontractors, by regular customers, by
23 transshipping customers, etc. Their filings omit actual knowledge of where the markets
24 for their products are and where the quarried materials will be transported. Moreover,
25 IMQ and Pope Resources propose to quarry an amount that exceeds the current all
26 countywide use of quarried material in Jefferson County. Yet the amount in their plan is

1 too small to justify a quarry of the size proposed by IMQ and Pope Resources.
2 Moreover, the quarry has greater production potential than their plan covers. One
3 possible use of the quarried material that has not been articulated is shipment via barge
4 to other markets such as California. The only docks available for such purpose are the
5 proposed Hood Canal dock of Fred Hill or its successor south of the Hood Canal
6 Bridge, the dock at Port Gamble, and the dock at Mats Mats that formerly served the
7 quarry located there and is currently fully operational. Any docks south of the Hood
8 Canal Bridge are contested and may conflict the Navy Base at Bangor. Port Gamble
9 Bay is extremely shallow and the use of the dock therein, formerly used for logs by
10 Pope & Talbot, would be subject to scrutiny by the S'Klallum Tribe. The remaining
11 dock at Mats Mats was previously used for barging aggregate, the use to which IMQ
12 and Pope Resources would place it. However, such use would result in multiple
13 truckloads daily of heavy aggregate bearing trucks on Oak Bay Road through the heart
14 of the Port Ludlow MPR. (See Simpson [paras. 2, 3, and 4, sec. \(c\)\(iii\), p. 8](#)).

15 Currently, IMQ's and Pope Resource's filings with Jefferson County are elusive
16 as to the scope of operations and the roadways that will be impacted. They
17 underestimate the amount of traffic along those roadways by reference to a selected
18 timeframe for testing and by ignoring WSDOT's data thereon (See [paras. 4 and 5, Ex. B\(22\), items 1 and 2, p. 1, para. 1, Ex. B\(22\), item 3, p. 2, and para. 1, Ex. B\(23\), p. 6](#)).
19 The statements in the filing are insufficient to determine the scope of operations and the
20 effect thereof on the marketing of the quarried products and the roadway system that
21 will be affected thereby.
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23 The use of the roadway must be understood from the standpoint of the Port
24 Ludlow MPR. It currently has approximately 1,650 property owners and 2,500 residents
25 as well as a commercial inn, golf course, and marina that are served by Oak Bay Road,
26 Highway 19 and Highway 104. The lack of specificity for industrial use of the roadway

1 system in association with a major industrial quarry and its operation cannot be seen
2 other than having a likely major negative effect on the transportation network serving
3 the Port Ludlow MPR.

4 The Port Ludlow MPR was approved at the instance of Pope Resources as an
5 allowed urban development outside an urban growth area. In connection with its
6 development of Port Ludlow, Pope Resources has represented in its property reports
7 that it had no plans to activate quarrying at the Shine site. (See [paras. 2 to 5, Ex. A, sec.](#)
8 [5, p. 17](#)). Clearly, Pope Resources' representations were confusing.

9 Prior to the approval of Port Ludlow as a master planned resort, Pope Resources
10 had been denied urban growth area status for Port Ludlow in Loomis v. Jefferson
11 County and Pope Resources, a Growth Management Hearings Board decision in
12 September, 1995. As a result, Pope Resources was limited in development to one
13 residence for each five acres. To permit urban density at Port Ludlow, Pope Resources
14 undertook a plan to qualify Port Ludlow as a master planned resort. In connection with
15 such plan and to meet the conditions of a master planned resort, Pope Resources made
16 express and implied representations to the Washington Legislature, Jefferson County,
17 and the residents and owners of property in the Port Ludlow MPR to develop the
18 contiguous area in a manner consistent with the Port Ludlow MPR. The development of
19 a major industrial quarry utilizing the same roadway system as a major residential
20 community would be inconsistent. Likewise inconsistent would be the development of a
21 major industrial use that competes with and may directly affect the domestic water
22 system of OWSI serving the Port Ludlow MPR. Likewise inconsistent is the
23 development of a major industrial quarry that directly affects the trail system and golf
24 course and indirectly affects the natural environment of Port Ludlow MPR that was
25 promised by Pope Resources when it sought and received MPR status for Port Ludlow
26 in 1999.

1 The area that Pope Resources seeks with IMQ to develop as a quarry is part of
2 commercial forest reserve. As noted, its access roadway to Highway 104 limits use to
3 uses consistent with a tree farm. While the area directly impacted by the quarry is less
4 than one hundred fifty acres, it places an industrial use in the midst of a commercial
5 forest. That use conflicts with the environmental and growth management purposes
6 served by commercial forests. The commercial forest use has been recognized by
7 Jefferson County in its overlay and by Jefferson County and the State of Washington in
8 special real estate tax treatment allowing Pope Resources to pay real estate taxes at a
9 very low rate in recognition of the status of the property as commercial forest.
10 Obviously, the right of access to Highway 104 was based on the commercial forest
11 status. The impact of industrial uses in a commercial forest is not adequately discussed
12 in the response to the Environmental Questionnaire. It is not simply a question of the
13 flora and fauna of the site itself but also of the flora and fauna of the contiguous
14 commercial forest. Moreover, as noted, the commercial forest was a function of the
15 qualification of Port Ludlow as a master planned resort. It abuts and protects the master
16 planned resort and its emphasis upon outdoor recreational opportunities. The
17 commercial forest contains a portion of the trail system that is part of the recreational
18 amenities of the Port Ludlow Master Planned Resort. These promises and uses are
19 largely ignored in the responses of Pope Resources and IMQ.

20 In the underlying administrative hearing and LUPA appeal, both the hearing
21 examiner and the Court permitted the proposed quarry to go forward under conditions.
22 Both required and made it clear that the interest of Port Ludlow would be protected by
23 SEPA compliance. The administrative and judicial disposition in favor of IMQ and
24 Pope for the extension of the quarry must be understood to require a determination of
25 significance and the issuance of an environmental impact statement. (See Simpson [para.](#)
26 [5 \(bottom\), item 9, p. 4](#) and [para. 1, item 9, p. 5](#)). Otherwise, the condition is

1 meaningless because general SEPA compliance is always required unless the project is
2 categorically exempt. The extension of the Old Shine Pit is not categorically exempt.

3 II. ANALYSIS.

4 A. Right of Intervention. An intervener has a legal right to intervene when it
5 has an interest relating to the transaction which is the subject of the action and when the
6 intervener is so situated that the disposition of the action may as a practical matter
7 impair or impede the intervener's ability to protect that interest unless the intervener is
8 adequately represented by existing parties. CR 24(a). The language confirms that
9 intervention should be allowed if the intervener has a legally protectable interest
10 affected by the litigation and that interest is not or may not be adequately represented in
11 the litigation. Here, the PLVC has a direct interest that is affected by the project, the
12 Port Ludlow trail system. Indirectly, the PLVC has been recognized as the
13 representative of the residents and owners in Port Ludlow and granted standing in other
14 land use matters, including the underlying LUPA case on the extension of the Old Shine
15 Pit. Judge Verser's opinion confirms that the PLVC has standing. This case deals with a
16 permit that is associated with the extension of the quarry. Finally, no substantive
17 decisions have been rendered in the case. The application is timely.

18 The right of intervention is to be liberally granted. Columbia Gorge Audubon
19 Society v. Klickitat County, 98 Wn.App. 618, 623, 989 P.2d 1260 (1999); Fritz v.
20 Gorton, 8 Wn.App. 658, 660, 509 P.2d 83 (1973). Intervention is timely if filed before
21 commencement of trial. Columbia Gorge, supra, p. 623; American Discount Corp. v.
22 Saratoga West, Inc., 81 Wn.2d 34, 43, 499 P.2d 869 (1972); Colburn v. Spokane City
23 Club, 20 Wn.2d 412, 414-5, 147 P.2d 504 (1944). The rule of timeliness is mechanically
24 applied. A factor in granting intervention is the absence of dispositive rulings. That
25 factor is here present. Columbia Gorge, supra, p. 627. An additional factor is the
26 absence of prejudice to the parties. Here, as in Columbia Gorge, supra, the intervener

1 seeks no damages; it seeks the same remedy as Jefferson County but for different
2 reasons. The PLVC filed comments with Jefferson County; there is no surprise. There is
3 no statute of limitation issues. There is accordingly no prejudice to any party. Columbia
4 Gorge, supra, p. 628, 829; Kreidler v. Eikenberry, 111 Wn.2d 828, 832-3, 766 P.2d 438
5 (1989).

6 American Discount, supra, pp. 40, 41, sets the standard for the showing of an
7 interest. The determination is fact specific. As the court in Columbia Gorge, supra, p.
8 629, stated, “not much of a showing is required, however, to establish an interest. And
9 insufficient interest should not be used as a factor to deny intervention.” A minimal
10 showing is sufficient. There, even though the Court found that the Yakama Nation’s
11 interest was parallel to that of the Audubon Society, the fact that it had different reasons
12 for its position was held to state a sufficient interest to support intervention.

13 The Court reasoned, if the intervener could have participated in the underlying
14 administrative action, then it has a right to act as a party in the resulting legal action.
15 The Court said “the intervention rules entitle an interested party to legal standing as a
16 party...with the right to define, explain and defend its own interests directly. There is no
17 more reason to suppose the Audubon Society can advocate effectively for the Yakama
18 Nation than that the Yakama Nation, however willing, could adequately present the
19 concerns of the Audubon Society. Columbia Gorge, supra, p. 630. Based on Coggle v.
20 Snow, 56 Wn.App. 499, 504, 784 P.2d 554 (1990), the Court held there were no tenable
21 grounds to deny intervention and granted same.

22 In this case, the petitioners, IMQ and Pope Resources are attempting to reduce or
23 eliminate the review of the proposed project that is offered through full SEPA
24 compliance under the requirement of a determination of significance by the lead agency,
25 Jefferson County Planning Department. IMQ and Pope Resources seek to avoid scoping
26 meetings with residents and owners in the Port Ludlow MPR that would permit the

1 former to question IMQ and Pope Resources about the planned quarry, the scope of its
2 operations, potential impacts on the aquifer and domestic water system, impacts on the
3 natural surrounding environment that protects the Port Ludlow MPR, and impacts on
4 the trail and other amenities in the Port Ludlow MPR. Such questions are disposed of in
5 generalities and without specifics in the filings of IMQ and Pope Resources. IMQ and
6 Pope Resources further ignore that the hearing examiner and Judge Verser each
7 conditioned the extension of the Old Shine Pit to full SEPA compliance and the
8 issuance of an EIS.

9 B. Impacts Not Adequately Addressed. Substantively, the PLVC draws the
10 attention of the Court to the serious deficiencies in IMQ's environmental compliance. In
11 contrast to the environmental compliance associated with Mats Mats, the responses to
12 the Environmental Questionnaire offered by IMQ and Pope Resources are general, lack
13 critical information, and in many cases are simply inaccurate. They remind one of the
14 British Petroleum contingency plan for oil well failures in the Gulf of Mexico that made
15 reference to saving walrus. It was obviously the same plan as the oil industry
16 generally used in Alaska offshore drilling that had not even been edited. Mistakes such
17 as the nature of the access easement and the identity of the owner of the utility serving
18 Port Ludlow are consistent with this superficial treatment. (See Simpson [para. 1, sec.](#)
19 [A\(a\), p. 6](#) and [para. 3 \(bottom\), sec. B\(a\), p. 9](#)).

20 Of more concern is the incompleteness of actual business plan and its actual
21 impact on the transportation element. The plan makes no substantial economic sense
22 unless it includes shipment of product by barge. The only barge dock that is reasonably
23 available is that at Mats Mats which compels the use of Oak Bay Road. Clearly this
24 directly impacts Port Ludlow. (See Simpson [para. 2, sec. A\(c\), p. 7](#)).

25 Also of concern is the generic treatment of hydro-geologic features. As noted
26 above, these concerns were adequately treated in the Mats Mats EIS. They are

1 dismissed by IMQ's experts without reference to the detailed underlying geology and by
2 opinion on the basis of distance from existing wells but without attention to the well
3 drilling plans or the geology. Reference is further made to a failure to disclose IMQ's
4 and Pope Resources' drilling logs for boreholes that they drilled. (See Simpson [para. 1,](#)
5 [and 2, sec. B\(c\), p. 11](#)).

6 Also of concern is the generic treatment of flora and fauna. While the area
7 impacted may be relatively small in relation to the entire forest, it converts commercial
8 forest to industrial use and has affects far beyond the actual area that is directly
9 impacted. Those impacts are not adequately treated.

10 Also of concern is the need to address inevitable cumulative impacts involving
11 essential organizations beyond IMQ, Pope Resources, and Jefferson County. Some
12 examples of such organizations are the several quarries accessing SR-104, Washington
13 State DOT, OWSI and others that draw water from the aquifer, several organizations
14 responsible for maintaining the water quality of the Shine watershed, the PLVC and
15 organizations that represent residents in Paradise Bay and Mats Mats, etc. Such
16 cumulative impacts are generally known to Jefferson County and are properly addressed
17 by an EIS, which gives the Lead Agency the authority it will need to organize their
18 proper participation, and without which their participation is likely to be impeded or
19 neglected entirely. (See [paras. 1 to 3, Ex. A, sec. 17, p. 45,](#) [paras. 5 and 6, Ex. A, sec.](#)
20 [17, p. 45,](#) [paras. 2 to 8, Ex. A, sec. 17, p. 46,](#) [para. 9 \(bottom\), Ex. A, sec. 17, p. 46,](#)
21 [paras. 1 to 3, Ex. A, sec. 17, p. 47,](#) [WAC 197-11-060\(4\)\(e\),](#) Simpson [para. 4 \(bottom\),](#)
22 [sec. A\(a\), p. 6,](#) and [para. 2, sec. B\(e\)\(iv and v\), p. 13](#)).

23 Finally, the environmental responses ignore the relationship between the
24 impacted area, the commercial forest and the Port Ludlow MPR that relies upon these
25 natural areas. Both the trail system and the golf course are directly affected. These are
26 core natural amenities to Port Ludlow used by Pope Resources, one of the applicants, to

1 persuade Washington State and Jefferson County to grant MPR and its concomitant
2 right to urban density at Port Ludlow otherwise denied Pope Resources.

3 C. Basis to Dismiss IMQ and Pope Resources. Legally, IMQ's and Pope
4 Resources' claims against Jefferson County are without merit and should be dismissed.
5 They fail to take into consideration Jefferson County's long familiarity with this project
6 through litigation on the underlying right to extend the Old Shine Pit. The permit upon
7 which the determination of significance issued was a Type I storm-water permit
8 required in the development of the New Shine Pit. Jefferson County participated in the
9 administrative proceedings and the LUPA proceedings on the extension of the Old
10 Shine Pit. It was aware of the arguments proposals and information filed therein. It was
11 further aware that the hearing examiner and Judge Verser had conditioned extension of
12 the Old Shine Pit to permit the development of the New Shine Quarry on full SEPA
13 compliance. Its issuance of a determination of significance must be seen in the context
14 of such knowledge including knowledge of its legal duty under the hearing examiner's
15 decision and Judge Verser's decision.

16 The legal conditions to the extension of the Old Shine Pit that require full
17 environmental compliance of IMQ and Pope Resources must be seen as a complete
18 defense to the petition for writ of certiorari and to the claim for damages under Chapter
19 64.40, RCW. It is clear from the language of those opinions that both the hearing
20 examiner and Judge Verser envisioned the issuance of an EIS as discussed above. (See
21 Simpson [para. 5 \(bottom\), item 9, pp. 4 and 5](#)). Specific reference was made to
22 protecting the interests of Port Ludlow. This would not be achieved by any
23 determination less than a determination of significance and requiring an EIS with
24 associated scoping meetings, hearings and public input. Jefferson County requires no
25 justification beyond the language of the hearing examiner's opinion and the opinion of
26 Judge Verser to issue a determination of significance herein.

1 IMQ and Pope Resources both failed to respond administratively to the
2 environmental issues that they knew here existed and misstated the effects of a
3 determination of significance that actually issued. IMQ and Pope Resources had every
4 reason to know that both the hearing examiner and Judge Verser expected that an EIS
5 would be required. (See Simpson [para. 1, item 9, p. 5](#)). That is clear from the language
6 of the decisions. Neither IMQ nor Pope Resources then objected. Further, IMQ and
7 Pope Resources failed to make inquiry of Jefferson County whether it intended to issue
8 a determination of significance as was their administrative right to do. Had they done
9 so, Jefferson County would have been required to respond and to identify the issues that
10 it viewed as justifying an EIS. IMQ and Pope Resources then would administratively
11 have had the right to meet those issues with proposed mitigation proposals. If the
12 proposals adequately mitigated, a determination of non-significance or a mitigated
13 determination of non-significance could have issued by Jefferson County. Failing to
14 exhaust this administrative remedy placed IMQ and Pope Resources at risk of the
15 determination of significance that actually issued. See JCC 18.40.760(3)(c).

16 Even after the issuance of the determination of significance, IMQ's and Pope
17 Resources' administrative rights to limit the EIS or to have it withdrawn were not
18 curtailed. With the determination of significance, DCD issued a thirty-day request for
19 scoping comments. Those comments were designed to assist DCD in determining the
20 scope of the EIS it would require. See JCC 18.40.760(7)(a). Should the comments have
21 justified the withdrawal of the determination of significance, DCD could have
22 withdrawn same. Even thereafter, the determination of significance can be withdrawn or
23 amended based on further information from the applicant or others. See JCC
24 18.40.780(1)(f), (5), and (6). Here, IMQ and Pope Resources, rather than avail
25 themselves of adequate administrative remedies and notice seeking advice on the scope
26 of the EIS filed an untimely petition for writ of certiorari and claim for damages.

1 To be entitled to a writ of certiorari, the petitioner must show that there was no
2 remedy available at law that it had or forwent in connection with the underlying
3 proceeding. Saldin Sec., Inc. v. Snohomish Co. 134 Wn.2d 288, 296, 949 P.2d 370
4 (1998).

5 Here, that is not true. Petitioner clearly forwent the procedure allowing for initial
6 advice from DCD coupled with the opportunity to mitigate the basis for DCD's intent.
7 This remedy of invoking predetermination review is parallel to the remedy of asking for
8 a continuance to respond. Asking for a continuance has been recognized as an adequate
9 legal remedy precluding the issuance of a writ of certiorari. Pacific Rock Environmental
10 Enhancement Group v. Clark Co., 92 Wn.App. 777, 782, 964 P.2d 1211 (1998),
11 distinguishing Saldin, supra.

12 As a condition to a writ of certiorari there must be no adequate remedy at law
13 and the decision must have been illegal, arbitrary, or capricious. Illegality is a function
14 of the jurisdiction or authority of the agency to make the decision. Arbitrary and
15 capricious is established by reference to a decision without legal or factual basis upon
16 which no conflicting conclusion would have been available. Saldin, supra, p. 296. Here,
17 the authority of the Department of Community Development as the lead agency to issue
18 a determination of significance requiring the preparation of an EIS is not at issue. As
19 shown above by reference to DCD's knowledge of the underlying facts of the case and
20 the information actually presented by IMQ and Pope Resources, there is serious
21 question whether DCD could have reached a conclusion other than the determination of
22 significance under the facts. Among the facts that it knew was the result of the
23 underlying litigation concerning the extension of the Old Shine Pit. The issues of
24 vibration, dust, traffic and the like were at least tangentially raised in those proceedings
25 and resulted in directives from the hearing examiner and Judge Verser to protect the
26 interests of Port Ludlow through formal SEPA compliance. Completing the

1 Environmental Questionnaire, even when accompanied by self serving, erroneous, and
2 vague reports that neither disclose nor deal with the substantive issues identified by the
3 hearing examiner and Judge Verser do not constitute meeting the conditions of the
4 hearing examiner or Judge Verser. Moreover, the condition of SEPA compliance is not
5 addressed by IMQ, Pope Resources, or their experts. How then could it not be seen that
6 DCD could reasonably have concluded that a determination of significance could issue
7 on the facts?

8 Even the substantive facts, including those identified in Mr. Simpson's
9 declaration, were generally known to Jefferson County. Issues relating to the hydraulics
10 and well capacity had been explored in an appeal to the WUTC of OWSI's water permit
11 proposal. Jefferson County was involved. The issues relating to the trail system and the
12 outdoor recreational amenities associated with a master planned resort were reviewed
13 by DCD in connection with the initial application and more than four years of
14 administrative and judicial appeals of proposed changes thereto sub nomine Powers et.
15 al. v. Port Ludlow Associates. Issues relating to the lack of legal right to use Highway
16 104 were raised within the thirty-day scoping period by the Washington Department of
17 Transportation. They were also raised in connection with a proposed construction of a
18 timeshare project within Port Ludlow that addressed traffic on Oak Bay Road and
19 Paradise Bay Road, both likely implicated by this project. Thus it is not the case that
20 DCD was without knowledge of facts that would support its determination of
21 significance.

22 Writs of Certiorari are discretionary to the Court. They are not awarded as a
23 matter of right. Here, IMQ and Pope Resources are clearly attempting to avail
24 themselves of writ of certiorari to avoid the very real potential impacts of their project
25 on Port Ludlow and Jefferson County. They seek to foreclose any meaningful review of
26 the project by failing to address the specific concerns with Jefferson County prior to the

1 issuance of the determination of significance and thereafter by petitioning for a writ of
2 certiorari rather than seeking to mitigate issues supporting the determination of
3 significance. Considering the complete inadequacy of the SEPA filings of IMQ and
4 Pope Resources, filings that have bulk but little substance and do not adequately provide
5 for public comment by the community most affected by the proposal, a Court should not
6 exercise jurisdiction to issue such a writ or to award damages. It is noteworthy that
7 Saldin, supra, discussed the legal requirements of a writ in the context of a decision that
8 denied the writ on the basis of the arbitrary and capricious standard. It is also
9 noteworthy that Saldin, supra has not been followed by the Supreme Court in any land
10 use case thereafter and has been limited by lower court cases where any administrative
11 or judicial review was available and was foregone.

12 Here, IMQ and Pope Resources are not without remedy. They can seek the
13 amendment of the scope of the EIS or the withdrawal of the determination of
14 significance by addressing the concerns upon which the determination of significance
15 was based. They have chosen to seek a judicial remedy and to threaten Jefferson County
16 for requiring public notice to a use that has substantial impact as seen by the declaration
17 here attached and exhibit thereto submitted in response to the notice of determination of
18 significance by the PLVC. Their petition for writ of certiorari and accompanying
19 damage claim under Chapter 64.40 should be dismissed.

20 III. CONCLUSION.

21 The PLVC has an obvious interest in this matter both direct and derivative as
22 representative of Port Ludlow and its 2,500 residents. It is clear that Jefferson County
23 represents neither such interest directly. The PLVC's standing has been recognized in
24 the case below by Judge Verser. As to each interest, the PLVC is immediately affected
25 by the decision on the determination of significance and the right of public comment it
26 requires in connection with the EIS procedures. The PLVC has moved to intervene

1 timely before any substantive rulings have issued in the matter. Under CR 24(a), the
2 PLVC is entitled to intervene in this matter to protect its interests and those of Port
3 Ludlow that it represents. As can be seen in Ex. A to the Declaration of Mr. Simpson,
4 the PLVC has participated in the underlying administrative proceedings. A
5 determination against Jefferson County would prevent the PLVC from pursuing its
6 administrative rights with respect to the ongoing environmental review of the project.

7 It is also the case that IMQ and Pope Resources are circumventing the appeals
8 process under Jefferson County Code and LUPA, RCW 36.70C It is consistent with
9 Pope Resources' decision not to disclose that it intended to quarry the site when it
10 sought approval by Jefferson County and the residents of Port Ludlow for its residential
11 development plans. Now that it has received this substantial benefit, it seeks to
12 withdraw from its concomitant representation to the detriment of the very community it
13 developed and from which it profited handsomely. (See Simpson, [para. 8 \(bottom\)](#), [Ex.](#)
14 [A, sec. 5, p. 17](#)).

15 IMQ and Pope Resources seek to avoid scrutiny of the project by Jefferson
16 County and by Port Ludlow. They realize that such scrutiny was intended by the hearing
17 examiner and Judge Verser in approving the extension of the Old Shine Pit. The
18 Declaration of Mr. Simpson and Exhibit A which was filed with Jefferson County in
19 response to the thirty day scoping notice associated with the determination of
20 significance give graphic notice of the deficiencies in IMQ's and Pope Resources'
21 disclosure and the issues from which they wish to deflect public attention. A
22 comparison of the faulty and shallow environmental responses of IMQ and Pope
23 Resources in response to the Environmental Questionnaire with the substantive and
24 detailed presentation in the Mats Mats Environmental Impact Statement highlight the
25 attempt of IMQ and Pope Resources to gain approval of Jefferson County on the cheap
26 without adequate attention to the requirements of Judge Verser and the hearing

1 examiner in the underlying case. A careful examination of the legal rights of IMQ and
2 Pope Resources cast in serious doubt their entitlement to the remedy they seek. They
3 had a remedy, the equivalent of a continuance, and did not pursue it. Having failed to
4 avail themselves of that remedy with DCD, they should be foreclosed from the judicial
5 remedy they here seek. Their petition should be dismissed.

6 DATED this 26th day of August 2010.

7 POWERS & THERRIEN, P.S.
8 Attorneys for Plaintiff

9 By 
10 Leslie A. Powers, WSBA #6103
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