

JEFFERSON COUNTY HEARING EXAMINER

|   |   |                         |
|---|---|-------------------------|
| Re: Appeal of Unified Development Code Interpretation | ) | DECLARATION IN SUPPORT  |
| File No: <del>MLA07-00638, ZON07-00098</del>          | ) | OF IRON MOUNTAIN QUARRY |
| Applicant: Iron Mountain Quarry                       | ) | APPEAL OF CODE          |
| Applicant's Attorney: Keith Moxon, GordonDerr         | ) | INTERPRETATION          |
| <u>County's Representative: Michelle Farfan</u>       | ) | Hearing: March 14, 2008 |

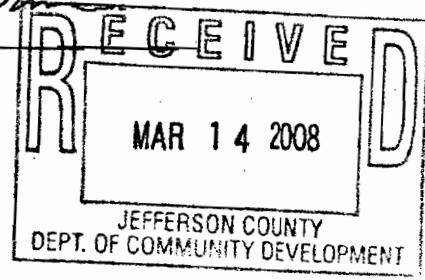
DAVID L. NUNES declares as follows:

1. I am over the age of 18, I have personal knowledge of the facts stated in this declaration, and I am competent to testify regarding these facts.
2. I am the President and Chief Executive Officer of Pope MGP, Inc., Managing Partner of Pope Resources, a Delaware limited partnership that is the owner of the land that is the subject of this code interpretation appeal - approximately 142 acres of land adjacent to the existing Shine Quarry on the north side of SR 104 about 4 miles west of the Hood Canal bridge.
3. Pope Resources has entered into an agreement with Iron Mountain Quarry to lease this 142-acre area for expansion of hard rock mining at this location.
4. I wrote a letter to Mr. Al Scalf, the Director of Jefferson County's Department of Community Development, dated May 21, 2007. A copy of this letter is attached. By this declaration, I affirm that the facts stated in my May 21, 2007, letter to Mr. Scalf are true and correct and that the letter and this declaration may be submitted to the Hearing Examiner and relied upon as evidence in support of Iron Mountain Quarry's code interpretation appeal.
5. As further clarification of the landowner's intent regarding the extent of non-conforming mineral use rights at this location, Pope Resources confirms that the total area that is subject to the diminishing asset doctrine at this location is 182 acres - 142 acres that is the subject of Iron Mountain Quarry's appeal and 40 acres that is the expansion granted to the Shine Quarry operation at this location in 2004.

The foregoing is made under penalty of perjury under the laws of the state of Washington and is true and correct.

DATED this 12<sup>th</sup> day of March, 2008.

By David L. Nunes  
David L. Nunes



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| Re: Appeal of Unified Development Code Interpretation | ) | DECLARATION IN SUPPORT         |
| File No: MLA07-00638, ZON07-00098                     | ) | OF IRON MOUNTAIN               |
| Applicant: Iron Mountain Quarry                       | ) | QUARRY APPEAL OF CODE          |
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| County's Representative: Michelle Farfan              | ) | <b>Hearing: March 14, 2008</b> |

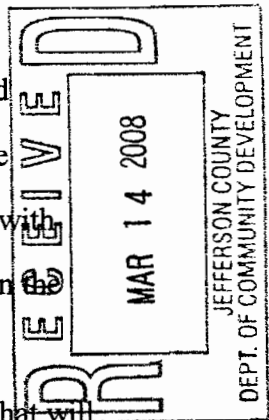
JAMES E. BURNETT declares as follows:

1. I am over the age of 18, I have personal knowledge of the facts stated in this declaration, and I am competent to testify regarding these facts.

2. I am one of the owners of Iron Mountain Quarry, LLC, ("IMQ") a Washington Limited Liability Company. IMQ holds an option to lease from Pope Resources approximately 142 acres of land adjacent to the existing Mason Quarry on the north side of SR 104 about 4 miles west of the Hood Canal Bridge in Jefferson County, Washington. IMQ's proposal for hard rock quarry operations is an expansion of previous and existing mineral use operations at this location.

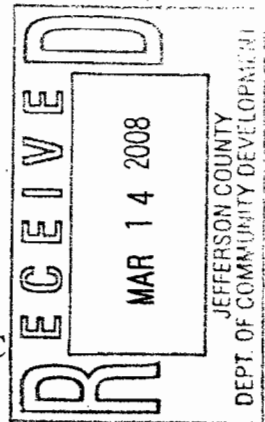
3. As recently as September of 2006, I observed the storage of mining-related materials at the original Shine Quarry site that were being used for on-going mining at the neighboring Mason Quarry portion of this mineral use location. IMQ intends to proceed with mining activities within the 142-acre portion of this mineral use site, all of which is within area owned and intended for mineral use operations since the 1970's.

4. IMQ intends to proceed with a quality mineral use operation in a manner that will protect the interests of the citizens of Jefferson County. In that regard, IMQ understands and intends to abide by its obligations under the Washington State Surface Mining Act. IMQ intends to employ best management practices for drainage, erosion and sedimentation control, buffer zones, and other precautionary measures as appropriate to protect adjoining lands, surface and groundwater quality and quantity, natural drainage systems, environmentally sensitive areas, wildlife habitat, and scenic resources, from adverse impacts that may result from the proposed extraction operations.



5. I have more than 28 years of experience in mineral resource extraction and processing operations ranging from hard rock to sand and gravel. Based upon my experience, a state-of-the-art hard rock mining operation of the type proposed by IMQ cannot be commenced in an area of 10 acres or less. A land area larger than 10 acres is needed to meet all applicable environmental performance standards. A ten-acre parcel is wholly inadequate to accommodate the shop building and scale house areas, stockpiling areas, roads, and storm water pond areas, all of which are necessary for IMQ's proposed operations. These areas alone, without any actual mining or processing of minerals, will comprise over 20 acres. This is before considering the land area that is required for the actual mineral extraction and processing. Accordingly, a ten acre restriction will have the effect of an outright prohibition of IMQ's proposed mineral resource activities.

6. On May 11, 2007, I met informally with Al Scalf, the Jefferson County Director of Community Development, to discuss a number of regulatory issues related to IMQ's proposal to expand quarry operations within the subject lease area. Pursuant to a number of communications with Community Development staff after that meeting, IMQ submitted a request for a pre-application conference regarding IMQ's proposal. A pre-application conference was held on August 23, 2007. I, Pat Hughes, and my attorney, Keith Moxon, attended on behalf of IMQ. Al Scalf and Michelle Farfan attended for Jefferson County.



7. At the pre-application conference, Mr. Scalf and Ms. Farfan noted that JCC 18.20.240 would limit to ten acres the total area of mineral extraction, mining and quarry activities outside of an approved mineral resource land (MRL) overlay designation. I and other IMQ representatives explained IMQ's position that the diminishing asset doctrine adopted by the Washington Supreme Court in 2001 must be considered and applied by Jefferson County in determining the land use rights to engage in mineral resource activities. I and other IMQ representatives stated that the lawful scope of such mineral resource use rights protected under the diminishing asset doctrine includes all of the 142-acre lease area that is the subject of IMQ's proposal.

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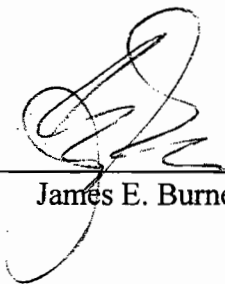
8. Community Development staff (Al Scalf) informed IMQ representatives at the August 23, 2007, pre-application conference that the County will deny IMQ's application for a storm water permit for the proposed mineral resource use and will require a Comprehensive Plan amendment to expand the 1995/1998 MRL designation into Section 29 at this location. Mr. Scalf specifically stated that the County's development regulations required this approach, even if contrary to a Washington Supreme Court case, and that the Community Development Department would "not recognize" IMQ's non-conforming use rights at this location unless told to do so by the County's attorney.

9. In subsequent communications between IMQ and Jefferson County, the County maintained that, despite the Washington Supreme Court's decision in the *McGuire* case adopting the diminishing asset doctrine, the County had the right to require IMQ to obtain approval of a comprehensive plan amendment prior to proceeding with permitting of IMQ's proposed mineral use activities at this location.

10. To my knowledge, the County has not explained why, in 2004, it allowed an expansion of over 10 acres into an area that was not designated Mineral Resource Land near the existing Mason Quarry, yet the County now insists that IMQ must seek a Comprehensive Plan amendment for a similar expansion over 10 acres into Section 29 (not currently designated as Mineral Resource Land).

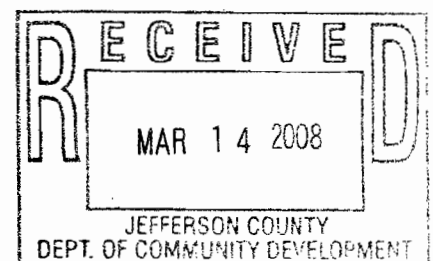
The foregoing is made under penalty of perjury under the laws of the state of Washington and is true and correct.

DATED this 14 day of March, 2008.

By   
James E. Burnett

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March 14, 2008

*Sent Via Email c/o Al Scalf*

STEPHEN CAUSSEAU, Jefferson County Hearing Examiner  
McCarthy Causseau & Hurdelbrink Inc, P.S.  
902 S. 10<sup>th</sup> Street  
Tacoma, WA 98405-4537  
253-272-2206

RE: MLA 07-00638; ZON07-00098

Dear Mr. Causseau:

I am writing this letter to testify in opposition to the code interpretation requested to recognize the Iron Mountain Property as a nonconforming use associated with the Mason Quarry under the doctrine of diminishing assets. My office is remote from Port Ludlow. I have not had the opportunity to review the file. This response is based on the Jefferson County Department of Community Development staff report (the "Staff Report") and independent research that I have conducted.

I. The Plan. The Staff Report discloses that the subject property lies contiguous to the existing Mason Quarry. The Mason Quarry is situated on a forty acre parcel leased to Mason from Pope Resources. In 1995 when Ordinance 09-0525-95 was adopted, twenty acres of the site was developed as the Shine Quarry. It immediately became an allowed nonconforming use because it operated in a commercial forest zone that did not permit quarries of more than ten acres in size. In 2004, the Washington Department of Natural Resources (the "DNR") permitted Mason in the remaining twenty acres and Jefferson County recognized the extension of the nonconforming use thereto under the doctrine of diminishing assets recently recognized by the Washington Supreme Court in City of University Place v. McGuire, 144 Wn.2d 640, 649-51 (2002). Giving Mason's argument fails. The diminishing assets doctrine only applies to qualify effect to the doctrine, such a determination was consistent with the Jefferson County Comprehensive Land Use Plan (the "Comprehensive Plan") which protected mineral areas under permits, in this case a DNR permit.

Recently, Mason apparently leased an additional contiguous 140 acres from Pope Resources. The additional acres were contiguous to the Shine Quarry, now called the

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Mason Quarry. The boundary of the additional acreage was within 1,800 feet of the Port Ludlow Master Planned Resort. In 1995, the Port Ludlow Master Planned Resort was identified as an interim urban growth area, a designation only lost in October, 1995. It was an interim urban growth area at the time Ordinance 09-0525-95 was adopted. Based thereon, the Iron Mountain Property was in part within one half mile of an urban growth area and could not qualify for as a mineral overlay zone under Subsec. 4(2) of Ordinance 09-0525-95. To avoid the bar to mineral overlay zone classification arising from the proximity of the property to the MPR, Mason argues that it is an extension of the Mason Quarry and an extension of the Mason Quarry's nonconforming use arising as a result of Ordinance 09-0525-95.

II. Potential Effects of the Plan. When the Mason Quarry was developed there was no residential development in the proximity thereof. Most of such residential development took place after 1990 and is continuing. There is one incomplete subdivision, Olympic Terrace I and one new subdivision that is in the initial stage of development, Olympic Terrace II, that together with lots, now developed around the golf course are immediately effected by the Mason Quarry and together with the golf course will be substantially impacted by the proposed quarry development at Iron Mountain. The golf course is one of the few public amenities supporting the master planned resort status of the Port Ludlow Master Planned Resort ("MPR"). While it continues to be owned and operated by Port Ludlow Associates, LLC, the current developer, it is open to the public. Its financial future will be substantially and adversely affected by the expansion of quarrying that will result from the expansion of the quarry from the Mason Quarry to Iron Mountain. Noise, traffic, and dust from the quarrying operation cannot but impact the operation of the golf course and the marketability of new residences in the affected subdivisions. Who would want a residence less than half mile from a major source of noise and dust pollution?

Not only is there an economic impact to the golf course and local residential developments, but, more important there is a necessary health impact. Dust from quarries is associated with silicosis and other pulmonary diseases. Dust results both from drilling and shooting but also from loading, grinding and other aspects of the operation of quarries. The resulting aggregate must be ground to specifications useable in concrete and perhaps asphalt. These operations are done on site. They create dust. Wind will deposit resulting dust over the residential communities located at Olympic Terrace I and II, the golf course and throughout that part of South Bay that lies north of the golf course. The dust is not benign. Studies show that it results in silicosis and pulmonary disease. Considering that many of the MPR's residents are retired and prone to such disease or have other diseases such as heart disease affected thereby, the expansion of the Mason Quarry to the Iron Mountain property has the potential and likelihood to cause significant health problems.

The Iron Mountain proposal has further potential impact on the Shine Aquifer, the source of the potable water for Port Ludlow and surrounding areas. Drilling and shooting is not a precise science. There are a significant number of instances where these activities have

affected local aquifers and have resulted in dry wells. The MPR currently has insufficient water to support the existing community. There are various demands on the Shine Aquifer other than the MPR. The Shine Aquifer does not have capacity to handle unlimited demands. For several years it has suffered from salt water intrusion associated with the withdrawal of water to serve the MPR and other needs. If drilling and shooting adversely affects the Shine Aquifer it could affect a development that the Jefferson County Comprehensive Plan (the "Comprehensive Plan") projects will have a permanent population of four thousand residents, currently and under that projection the second largest populated center in Jefferson County. There is no engineering that proves the expansion will not adversely affect the Shine Aquifer.

These and other similar problems were outlined in a similar situation in California involving the expansion of a quarry at San Rafael after residential development changed the demographics of the vicinity. Attached hereto as Exhibit A is an illustrative set of minutes from a scoping session associated with the evaluation of an expansion of that quarry.

III. Legal Issues Created by the Plan and its Proposed Method of Adoption.

A. The Proposal. The applicant proposes to approve the Iron Mountain project through a code interpretation. As noted, Director of DCD has rejected this proposal and it is now on appeal to the Hearing Examiner. The rejection should be upheld. The extension of the nonconforming use permitting the Mason Quarry cannot be justified under the diminishing asset doctrine as proposed by the Applicant.

B. The Diminishing Asset Doctrine. The diminishing asset doctrine justifies the extension of a nonconforming use resulting in a change of zoning to other portions of an affected parcel if such use was previously a conforming use, was rendered nonconforming by the change in zoning, and contemplated the development of the remainder of the parcel or a portion thereof consistent with such use.

For the purpose of identifying the parcel to a lessee, the parcel is the parcel initially subject to the lease. See Board of Adjustment of City of San Antonio v. Wende, 92 S.W.3d 424, 431 (2001), 27 S.W.3d 162 (2000) cited by the Court in McGuire, supra. The diminishing asset doctrine may have permitted the extension of the nonconforming use to the remaining twenty (20) acres under lease; it did not extend to an additional one hundred forty (140) acres not under lease at the time of the promulgation of Ordinance 09-0525-95.

What is key is that at the time Ordinance 09-0525-95 issued, Iron Mountain was in a commercial forest zone. Its use within that zone was perfectly legal. It did not permit quarries of ten (10) or more acres. To obtain relief from that limitation, the applicant cannot rely on a nonconforming use in 1995 that is clearly not the case with respect to the subject property. It must show that the intended use requires the reclassification of the subject property as a mineral resource zone. Given the location of the subject property

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within a half mile of the MPR, the issuance of a mineral resource overlay is clearly improper. In short, realizing that the Iron Mountain property can never qualify independently as a mineral resource zone, the applicant attempts to attach the subject property that allows the quarry under a nonconforming use. Since that nonconforming use cannot be transferred to the subject property, a property that was not initially leased from Pope Resources to Mason, the application under a code interpretation must fail.

The interests of the public are protected by rejecting Mason's attempt to obtain a rezone of Iron Mountain for mineral extraction purposes. Mason is urging the approval of a major quarry scheme under the ruse of an extension of a nonconforming use under the diminishing assets doctrine. This means that there has never been hearing on the merits. Without the County's decision not to approve the application, the application would have been approved by DCD as a code interpretation. There would have been no public involvement in the process. Due process would not have been served. Only because DCD rejected this application is there any kind of scrutiny. Mason urges that it be ignored.

C. Lack of SEPA Compliance. A "code interpretation" is not generally subject to SEPA compliance. See JCC 18.40.040. Here, DCD has confirmed that there was no SEPA review, not even a review sufficient to issue a determination. Yet the direct proposal of the same project as an application for a mineral overlay zone over the subject property would clearly have required SEPA review. The propriety thereof is graphically shown in Exhibit A.

As noted, the extension of the quarry to the Iron Mountain property creates a series of new health hazards. These are not addressed in the application. These include silicosis and other pulmonary illnesses caused by exposure to the mining operation and its handling of air quality issues. A further issue is raised as to the effect of the drill and shoot regimen and the integrity of the Shine Aquifer. No adequate engineering studies have been made about these issues. These issues should have been discussed in full SEPA compliance. They are all issues that are identified in WAC 197-11-444. Yet there was no SEPA compliance, not even a review by DCD sufficient to issue a determination of nonsignificance.

Apparently the view is that SEPA compliance can be delayed until the specific mining permit applications. I believe that this decision is fraught with risk. A review of the expansion of the Mason Quarry to cover the remaining twenty (20) acres under lease with Pope Resources was apparently accomplished by treating the entire forty acres as subject to the original nonconforming use and relying upon the WDNR's permit process to cover all other review. The WDNR's interest in the application, without substantial public input, is limited and does not necessarily address the local impacts of the expansion of the Mason Quarry on the adjacent MPR and its residents. If the decision whether to issue a mineral overlay, a decision that is subject to review under the comprehensive plan cycle, would require SEPA compliance, even more a decision to allow the very same

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development and use under a code interpretation request should require such SEPA compliance.

D. The Deficiency in Code Interpretation as a Decision Process. The use of a decision process associated with code interpretations that provides only limited notice, a decision initially made by the Director of DCD subject to appeal to the hearing examiner does not provide adequate opportunity for governmental oversight and public input as required by Chapter 36.70A, RCW. The approach is calculated to avoid the comprehensive plan amendment process and cycle that otherwise applies. The comprehensive plan amendment process is a carefully articulated process that assures the opportunity for full public notice and participation and ultimate oversight first by the Jefferson County Board of County Commissioners and then by the Washington Department of Community Development. See RCW 36.70A.035(1) and 36.70A.130. As to review of mineral resource zones, RCW 36.70A.131 contains special requirements governing the development regulations applicable to mineral resource properties and requires that they be tailored in accordance with a model approved by Washington State. Obviously, a code interpretation will not assure that these goals and requirements are met. Further, the GMA assures that SEPA compliance issues are evaluated and resolved by DCD, the responsible agency, subject to an administrative review process. It assures concern about the environmental effect of the proposal and that it be reviewed by the process. See RCW 36.70A.020(10); RCW 36.70A.035(2)(b)(i). It assures that parties other than agencies engaged in the oversight of the exploitation of natural resources ultimately play a meaningful role in shaping and conditioning the use of the subject process with a view to the local public health, safety and transportation concerns that are obviously raised by an expansion of a quarry contiguous to or in the immediate vicinity of a residential development. These issues cannot be meaningfully addressed by a process that has only the most limited public notice, even at the appeal level, and is designed to restrict appeals to dissatisfied applicants and not the public or other agencies with interests in the subject matter.

I attach to this letter a scoping memorandum prepared in connection with a similar quarry project in San Rafael, California, Exhibit A hereto. The scoping letter identifies numerous health, safety, transportation, water availability and other concerns raised by the proposed expansion of the San Rafael Quarry. That expansion was proposed after the vicinity of the San Rafael Quarry had changed from rural to residential, a situation that is identical to the situation here. A review of the various concerns is a beginning checklist for issues that should be publicly raised and discussed, subject to legislative disposition, and subject to the involvement of County and State Agencies with interests in the health and welfare of the community. That review is painfully absent in the code interpretation process here proposed.

IV. Conclusion. Jefferson County DCD has properly concluded that a code interpretation process is not proper and completely inadequate to evaluate the proposed expansion of quarrying activities to the Iron Mountain property. The decision of DCD should be upheld.

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Stephen Causseaux  
Jefferson County Hearing Examiner  
March 14, 2008  
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Please place this in the record for the Iron Mountain Quarry proposal and include me as an interested party hereafter. I have not had the opportunity to review the entire file. By this comment, I further request that the public record remain open for an additional week so that I will have that opportunity. The file has been sent but has yet to arrive.

Sincerely yours,



LESLIE A. POWERS

LAP/dms  
Enclosure(s)

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