



Kitsap County Hearing Examiner

COUNTY COURTHOUSE, 614 DIVISION STREET MS-36
http://www.kitsapgov.com/dcd/lu_env/he/

PORT ORCHARD WASHINGTON 98366-4682
(360) 337-7181 FAX (360) 337-4925
kashcraf@co.kitsap.wa.us

NOTICE OF HEARING EXAMINER RECONSIDERATION DECISION

April 20, 2011

To: Interested Parties and Parties of Record

RE: Project Name: **Ueland Tree Farm Mineral Resource Development**
Applicant: **Craig Ueland**
16419 Maplewild Avenue SW
Seattle, WA 98166
Application: **Central Kitsap County, Commissioner District #3**
Reconsideration of Conditional Use Permit Appeal
Case Number: **091008-021 (242401-4-008-1005; 007-1006;006-1007, etc.),**
LIS#07 44975

Enclosed is the Decision issued by the Kitsap County Hearing Examiner in the above-referenced matter.

THE DECISION OF THE HEARING EXAMINER IS FINAL, UNLESS APPEALED, AS PROVIDED UNDER WASHINGTON LAW AND BY KCC 21.04.120 OF THE KITSAP COUNTY LAND USE AND DEVELOPMENT PROCEDURES.

The complete case file will be available for review at the Department of Community Development, Monday through Thursday, except holidays, 10:00 a.m. to 3:45 p.m. by calling me at (360) 337-4487 for an appointment.

If you have questions, please contact me at (360) 337-4487.

Sincerely,

A handwritten signature in cursive script, appearing to read "Karen Ashcraft".

Karen Ashcraft
Clerk of the Examiner

C: Craig Ueland, 16419 Maplewild AVE SW, Seattle, WA 98166 craigueland@comcast.net
Craig Jones, 175 Parfitt WY SW Suite S140, Bainbridge Island, WA 98110
cjones@pinnaclelaw.com

Interested Parties:


**BEFORE THE HEARING EXAMINER
FOR KITSAP COUNTY**

In the Matter of the Appeal of)	NO. 091008-021
)	
Concerned Citizens of Chico Creek Water Basin (CCCCWB))	
)	
<u>Of a Final Environmental</u>)	<u>Ueland Tree Farm</u>
<u>Impact Statement (FEIS)</u>)	<u>Mineral Resource Development</u>
)	
)	
In the Matter of the Application of)	RESPONSE TO REQUEST FOR
)	RECONSIDERATION OF
Ueland Tree Farm, LLC)	HEARING EXAMINER DECISION
)	
<u>For Approval of a Conditional Use Permit</u>)	

RESPONSE

The Appellant's request for reconsideration of the Hearing Examiner decision, received April 7, 2011, is **DENIED**. Thus, the decision, with addendum, is now a final decision, in accord with Hearing Examiner Rules of Procedure 1.10.1.

Issued this 13th day of April 2011.



KIMBERLY A. ALLEN
Hearing Examiner
Sound Law Center

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KITSAP COUNTY DEPT. OF
COMMUNITY DEVELOPMENT

*Addendum to April 26, 2010 Hearing Examiner Decision
Kitsap County Hearing Examiner
Ueland Tree Farm Mineral Resource Development
SEPA FEIS Appeal and CUP, No. 091008-021*

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KITSAP COUNTY

CONCERNED CITIZENS OF
CHICO CREEK WATER BASIN,

Petitioner,

v.

KITSAP COUNTY, CRAIG UELAND and
UELAND TREE FARM, LLC,

Respondents.

No. 10-2-01308-5

STIPULATION AND ORDER

I. STIPULATION

COMES NOW Petitioner Concerned Citizens of Chico Creek Water Basin ("CCCCWB"), and Respondents Kitsap County, Craig Ueland and Ueland Tree Farm LLC, by and through their undersigned attorneys, and hereby stipulate and respectfully request the Court to enter the subjoined Order.

II. AGREED ORDER

THIS MATTER came before the Honorable Leila Mills on the petition of Petitioner CCCCWB pursuant to the Land Use Petition Act, RCW 36.70C ("LUPA"), appealing the Hearing Examiner decision, dated April 26, 2010, to approve a Conditional Use Permit ("CUP") for the Ueland Tree Farm aggregate extraction site project. A LUPA hearing was held on December 20, 2011; Petitioner CCCCWB appearing by and through its attorney, Ryan Vancil of the Vancil Law Offices, PLLC; Respondent Kitsap County appearing by and



1 through its attorney, Shelley Kneip, Kitsap County Deputy Prosecuting Attorney; and
2 Respondents Craig Ueland and Ueland Tree Farm, LLC, appearing by and through their
3 attorney, Craig Jones of Pinnacle Real Estate Law Group, PLLC. The Court having
4 considered the record on appeal, the pleadings filed by the Parties, and oral arguments of
5 counsel, and the Court having issued an oral opinion in open court on February 17, 2011, a
6 true and accurate transcript of which is attached hereto as **EXHIBIT A** to this Order and
7 incorporated herein by reference;

8 **NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND**
9 **DECREED AS FOLLOWS:**

10 1. Pursuant to Kitsap County Code ("KCC") 17.421.030(a)(1)-(4), the Hearing
11 Examiner, in approving the Conditional Use Permit for the Ueland Tree Farm, LLC Project
12 (hereafter "UTF Project"), was required to determine that the following criteria had been met:

- 13 A. The proposal is consistent with the Comprehensive Plan;
14 B. The proposal complies with applicable requirements of the Kitsap
15 County Code;
16 C. The proposal will not be materially detrimental to existing or future
17 uses of the property in the immediate vicinity; and
18 D. The proposal is compatible with and incorporates specific features,
19 conditions or revisions that ensure it responds appropriately to the
20 existing character, appearance, quality or development, and physical
characteristics of the subject property and the immediate vicinity.

21 2. Petitioner has not challenged the consistency of the UTF Project with the
22 Kitsap County Comprehensive Plan.

23 3. Petitioner failed to meet its burden of proof under RCW 36.70C.130(b) that the
24 Hearing Examiner's determination that the UTF Project is compliant with the KCC was an
25 erroneous interpretation of the law, after allowing for such deference as is due the

1 construction law by the local jurisdiction with expertise. This Court holds that the Hearing
2 Examiner did not commit error as a matter of law in determining that the UTF Project, and the
3 integral components associated therewith, including the rock crushing and washing facilities,
4 topsoil facility and concrete batch plant, as conditioned, is permitted with CUP approval as an
5 aggregate extraction site and compliant with Kitsap County Code, Title 17 (Zoning). This
6 Court further holds that the UTF Project is compliant with KCC, Title 19 (Critical Areas
7 Ordinance). Petitioner's contention to the contrary is without merit.

8 4. Petitioner failed to meet its burden of proof under RCW 36.70C.130(c) that the
9 Hearing Examiner's factual determination that the UTF Project, as conditioned, will not be
10 materially detrimental to existing or future uses of the property in the immediate vicinity was
11 clearly erroneous and not supported by substantial evidence viewed in light of the whole
12 record before the Court. This Court holds that the Hearing Examiner's factual determination
13 is supported by substantial evidence in the record and was not clearly erroneous.


14 5. Petitioner has met its burden of proof under RCW 36.70C.130(d) that the
15 Hearing Examiner erred by failing to include in her decision a conclusion of law with regard
16 to whether the UTF Project is compatible with and incorporates specific features, conditions
17 or revisions that ensure it responds appropriately to the existing character, appearance, quality
18 or development, and physical characteristics of the subject property and the immediate
19 vicinity (referred to hereafter as the "compatibility criteria"). The Court holds that the
20 Hearing Examiner's failure to include a conclusion of law regarding the compatibility criteria
21 in her decision constitutes a clearly erroneous application of the law to the facts. While the
22 Hearing Examiner did issue conclusions based on findings as to the other criteria for CUP
23 approval, she did not include a conclusion of law with regard to the compatibility criteria. As
24
25

1 such, the Hearing Examiner did, indeed, err, and has failed to deal fully and properly with the
2 issues, as required under KCC 17.41.030(a)(4). However, contrary to Petitioner's position,
3 such error does not warrant reversal of the Hearing Examiner's decision on the CUP. Instead,
4 this Court REMANDS to the Hearing Examiner this single issue so that she might fully
5 address the compatibility criteria by issuance of an amended decision incorporating a
6 conclusion of law with regard to the compatibility criteria. Remand shall be on the record,
7 with no further hearing(s) or argument(s).

8 6. The Hearing Examiner's decision is AFFIRMED in all respects, except for
9 REMAND of the single issue requiring the Hearing Examiner to amend her decision to
10 include a conclusion of law regarding the compatibility criteria.

11 7. Respondents Kitsap County, Craig Ueland and Ueland Tree Farm, LLC, are
12 the substantially prevailing parties in this matter. By stipulation, no costs and/or statutory
13 attorney's fees pursuant to RCW 4.84.080 and/or RCW 36.70C.110(4) are awarded to any
14 Party.
15

16 8. Review is hereby terminated and this matter dismissed with prejudice.

17 DONE this  day of March, 2011.

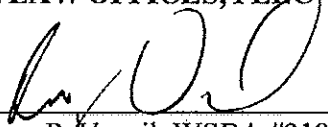
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20 JUDGE LIELA MILLS

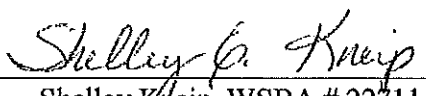
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STIPULATED AND APPROVED FOR ENTRY BY:

VANCIL LAW OFFICES, PLLC

By: 
Ryan P. Vancil, WSBA #31913
Attorney for Petitioner

KITSAP COUNTY PROSECUTING ATTORNEY

By: 
Shelley Kneip, WSBA # 22711
Attorney for Respondent Kitsap County

PINNACLE REAL ESTATE LAW GROUP, PLLC

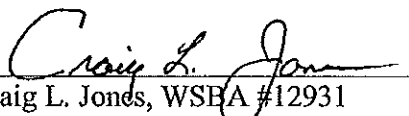
By: 
Craig L. Jones, WSBA #12931
Attorney for Respondents Ueland

Exhibit A

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITSAP

CONCERNED CITIZENS OF THE)
CHICO CREEK WATER BASIN,)

Petitioners,)

v.)

No. 10-2-01308-5

KITSAP COUNTY, CRAIG UELAND,)
and UELAND TREE FARM, LLC,)

Respondents.)

JUDGE'S DECISION

Before the Honorable Leila Mills

February 17, 2011
Port Orchard, Washington

ORIGINAL

APPEARANCES:

For the Plaintiffs : RYAN P. VANCIL
Attorney at Law
For Defendants UTF : CRAIG L. JONES
Attorney at Law
For Defendant Kitsap County: LISA J. NICKEL
Deputy Prosecuting Attorney

Andrea Ramirez, RPR, CCR#2293
Official Court Reporter
614 Division Street, Port Orchard, WA 98366
(360)337-4461

P R O C E E D I N G S

* * *

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3 THE COURT: All right. Taking up the matter of
4 Concerned Citizens of Chico Creek Water Basin v. Kitsap
5 County, Craig Ueland and Ueland Tree Farms.

6 I see that Mr. Vancil is present.

7 Good morning.

8 MR. VANCIL: Good morning.

9 THE COURT: Mr. Jones, good morning.

10 MR. JONES: Good morning.

11 MS. NICKEL: And I'm Lisa Nickel on behalf of
12 Shelly Kneip.

13 THE COURT: Are you with the Kitsap County
14 Prosecutor's Office?

15 MS. NICKEL: Yes, I am.

16 THE COURT: We're here today for me to issue a
17 decision in this case.

18 As we all recall, this matter came on for
19 hearing in December. I allowed for further briefing on
20 the issue of accessory uses, which I have considered. And
21 I'm now prepared to give a decision on the appeal, as it
22 was presented by the Citizens group.

23 This is a lengthy decision, so please bear with
24 me, because my goal here is to communicate with the
25 parties as to how I come to my conclusions. And so it

1 will take me some time to get through the various issues,
2 of which there are plenty.

3 And so having said that, this is an appeal of
4 the Hearing Examiner decision to allow a conditional use
5 permit for the Ueland Tree Farm project. And that's how
6 I'm going to refer to this, during this decision. I'm
7 often going to refer to UTF or the UTF project, in short
8 form, as opposed to referencing the parties in their
9 entirety each time.

10 A conditional use permit is required for an
11 aggregate extraction site in a rural wooded, RW, and
12 forest resource lands, otherwise referred to as FRL.
13 Pursuant to Kitsap County Code 17.421.030(a)(1) through
14 (4), approval outright or approval of a project such as
15 this with conditions may be granted when various criteria
16 are met. And four listed criteria are included in the
17 ordinance. One, the proposal must be consistent with the
18 comprehensive plan. Two, the proposal complies with
19 applicable requirements of the Kitsap County code. Three,
20 the proposal will not be materially detrimental to
21 existing or future uses of the property in the immediate
22 vicinity. And fourth, the proposal is compatible with and
23 incorporates specific features, condition, or revisions
24 that ensure it responds appropriately to the existing
25 character, appearance, quality, or development and

1 physical characteristics of the subject property and the
2 immediate vicinity.

3 Now, the Petitioner, in this case, challenges
4 the second and fourth criteria. There is no challenge
5 that the UTF project is consistent with the comprehensive
6 plan. And that would be the first criteria. So I would
7 like to, first of all, address whether the proposed
8 project complies with the applicable requirements of the
9 Kitsap County code.

10 Now, the Appellant challenges the Hearing
11 Examiner's decision on two grounds. The first challenge
12 claims that the project, as approved by the Hearing
13 Examiner, does not comply with the zoning designation for
14 the subject properties. The second challenge to the Code
15 is that the project does not comply with the critical
16 areas ordinance. And I'm going to address these in that
17 same order.

18 So firstly, did the Hearing Examiner commit
19 reversible error in her determination that the project
20 complied with the zoning designation for the subject
21 properties?

22 The project property consists of multiple
23 parcels that are zoned either rural wooded or forest
24 resource lands. The Hearing Examiner concluded that the
25 aggregate extraction site for the UTF project, together

1 with conditions, is compliant with the Kitsap County code,
2 specifically Title 17. The Petitioner does not challenge
3 the permitted use of the aggregate extraction site, which
4 is outright permitted in the FRL zone and conditionally
5 permitted in the RW zone, provided it is used solely for
6 that use.

7 Pursuant to the Kitsap County code, aggregate
8 extraction sites are permitted in the FRL zones and
9 conditionally permitted in the RW zones. The Petitioner
10 does challenge, however, the Examiner's decision in that
11 she approved three activities within the project,
12 additional activities, namely rock crushing and washing
13 facilities, top soil production facility, and the concrete
14 batch plant. The Petitioner contends that these three
15 uses are disallowed under Title 17 of the Kitsap County
16 code. And so this Court has looked to the code to
17 determine whether each of these proposed activities are
18 permissible.

19 First of all, I considered whether they are
20 permissible as stand-alone uses. Firstly, rock crushing
21 is conditionally permitted in the RW and FRL zones but
22 only for the purpose of construction and maintenance of a
23 timber management road system. Because rock crushing is
24 not proposed by UTF for purposes of construction or
25 maintenance of timber management road system, the rock

1 crushing activity is a stand-alone activity which would
2 not be permitted as a stand-alone activity. Second, the
3 top soil production is specifically not permitted in the
4 RW and FRL zones. Third, the concrete batch plant is not
5 a listed use, as defined in the allowed uses under Kitsap
6 County Code 17.100.040. Pursuant to Kitsap County Code
7 17.381.030(c), if a use is not listed in the use column,
8 it is deemed a prohibited use in the FRL and RW zones,
9 unless it has been allowed under Kitsap County Code
10 17.100.040.

11 Now, that section specifically provides, when a
12 use is not specifically listed in this title, it shall be
13 understood that the use may be allowed, if it is
14 determined by the Director that the use is similar to
15 other uses listed. It is further recognized that every
16 conceivable use cannot be identified. In anticipation
17 that new uses will evolve over time, this section
18 establishes the Director's authority to compare a proposed
19 use and measure it against those listed in this title for
20 determining similarity.

21 In determining similarity, as well as when
22 considering all other uses, the Director shall make all of
23 the following findings: A) the proposed use shall meet
24 the intent of and be consistent with the goals,
25 objectives, and policies of the Kitsap County

1 comprehensive plan; b) the proposed use shall meet the
2 stated purpose and general intent of the comprehensive
3 plan use designations and zoning classification in which
4 the use is proposed to be located; c) the proposed use
5 shall not adversely impact the public health, safety, and
6 general welfare for the residents of the county; and d)
7 the proposed use shall share characteristics in common
8 with and not be of greater intensity, density, or generate
9 more environmental impact than those uses listed in the
10 land use zone in which it is to be located. If determined
11 similar, the unspecified use shall meet all of the code
12 requirements and follow the approval process prescribed
13 for the listed use.

14 So as applied to the instant case, the Hearing
15 Examiner did not develop findings to address the
16 above-stated requirements. As such, with the record as it
17 exists below, the batch plant is not permitted as a
18 stand-alone activity in the RW and FRL zones. So based
19 upon the foregoing, the Petitioner is accurate that the
20 stand-alone permit would not be approved for rock crushing
21 and washing, a top soil production facility, or a concrete
22 batch plant on the property.

23 However, UTF is not proposing that these uses be
24 stand-alone uses but rather that they be conditionally
25 permitted as integral uses to the aggregate extraction

1 site. Kitsap County, through its officials, has
2 determined that these uses with their accompanying
3 facilities are permissible not as stand-alone uses but as
4 facilities that are inclusive and appropriate within the
5 aggregate extraction site classification, as permitted
6 with a conditional use permit in rural areas. The County
7 determined that since the project qualifies as an
8 aggregate extraction site, the associated activities are
9 integral components which may be approved in conjunction
10 with the conditional use permit. In this vein, Kitsap
11 County determined, through its officials, that the
12 aggregate extraction site involves a range of customary
13 industry uses. This was reviewed by the Hearing Examiner
14 in the conditional use permit process. The applicant put
15 forward how the rock crushing and washing facility, top
16 soil production facility, concrete batch plant, office,
17 maintenance facility, and scales are all integral
18 components of the UTF project.

19 Dennis Oost, the senior planner for Kitsap
20 County, provided uncontroverted testimony that the
21 aggregate mining operation is not limited only to the
22 extraction of raw material but always encompasses other
23 uses. No contradictory testimony was provided by the
24 Petitioner through experts, and no cross examination of
25 Mr. Oost was conducted to challenge the conclusions that

1 additional uses were customary to aggregate extraction
2 sites. To disallow these customary uses would limit the
3 aggregate extraction site activity to solely mining of raw
4 material with all other associated uses having to occur
5 off site.

6 Now, whether a particular use is permitted
7 within a zoning classification is a question of law. This
8 Court must apply the correct legal standard when called
9 upon to review the Hearing Examiner decision in applying
10 the law to the facts in this instance. The Petitioner has
11 the burden to show that the Hearing Examiner's decision is
12 an erroneous interpretation of the law, after allowing for
13 such deference as is due the construction of law by the
14 local jurisdiction with expertise.

15 As applied to this case, there is no dispute
16 that the aggregate extraction site is not specifically
17 defined under the County's code. Where an ordinance is
18 ambiguous and cannot be clearly ascertained from the
19 dictionary definitions, this Court is called upon to apply
20 rules of statutory construction. The essential and
21 foremost goal is to effectuate the purpose and intent of
22 the legislative body. And where there is doubt, the Court
23 should give great weight to the construction applied by
24 the official charged with enforcement.

25 In those instances where a zoning classification

1 is reasonably and fairly debatable, the interpretation
2 given by the enforcement agency shall not be overturned.
3 And that is based upon our state's case law. Provided
4 that the agency's interpretation is plausible and not
5 contrary to legislative intent, then the interpretation
6 shall be upheld.

7 There is no dispute that the Kitsap County code
8 does not define aggregate extraction site. Further, there
9 is no single definition -- single dictionary definition
10 for aggregate mining site. The County has referred to the
11 three words aggregate, extraction, and site as set forth
12 in specialty definitions in the Webster's dictionary.

13 The County has submitted that when these
14 definitions are taken as a whole -- and this is, also,
15 UTF, of course, takes this position, as well -- that when
16 these definitions are taken as a whole, aggregate mining
17 site includes operations for the removal of raw materials,
18 its processing and conversion of refined products for
19 market. Albeit that UTF provided the Webster's dictionary
20 definition of the component parts of the term aggregate
21 extraction site, it is, nevertheless, a phrase which is
22 open to interpretation. So, yes, there are dictionary
23 definitions, but there's still dispute as to how the term
24 aggregate extraction site ought to be interpreted.

25 So that's when this Court looks to the County's

1 officials. And the County's officials have taken the
2 position, as demonstrated in the testimony, that these
3 uses, these additional uses, are, in Mr. Oost's words,
4 always associated with extraction functions of aggregate
5 extraction sites. The County has interpreted and
6 supported, through testimony of their senior planner, that
7 the cement batch plant, top soil, and rock crushing
8 facilities are all uses commonly associated with such
9 mining operations.

10 In his testimony before the Hearing Examiner,
11 Mr. Oost discussed baseline assumptions incorporated into
12 the County's conclusions of impacts and mitigations
13 explaining, "Top soil, asphalt, concrete, cement, those
14 are always, always associated with gravel mines, always.
15 Maintenance, any maintenance of this resource, any use of
16 this resource, is not just the aggregate. It's always in
17 value-added products, in asphalt, in the cement. And the
18 reason they're commonly associated with existing
19 operations is those mitigations are normally in place when
20 the operation opens. They normally have some distance and
21 some mitigations that are done for the operation so that
22 these value-added things can be permitted with the
23 operation itself, and they're commonly associated with
24 it."

25 The Appellant takes issue with the County's

1 interpretation of the aggregate extraction site, asserting
2 that inclusion of the stated uses is too expansive.
3 Recognizing that the County has applied its own
4 interpretation of the ordinance term aggregate extraction
5 site, pursuant to case law, the interpretation of its own
6 ordinance is entitled to great weight and deference by the
7 Court. That is the direction the case law has directed
8 superior courts and lower courts to take. Again, this is
9 consistent with case law, which holds that if a zoning
10 classification is fairly debatable, the County's
11 interpretation is entitled to great deference.

12 In the case of Milestone Homes v. City of
13 Bonney Lake, there was reference to the deference
14 required. And there's also reference here, as well, to
15 Mall, Inc. v. City of Seattle. But I'm going to reference
16 the language out of the court cases, reading, "In any
17 doubtful case, the Court should give great weight to the
18 contemporaneous construction of an ordinance by the
19 official charged with its enforcement. This is consistent
20 with the proposition that judicial deference should be
21 accorded to the expertise of administrative agencies. As
22 stated in Mall, Inc. v. City of Seattle, 108 Wn.2d at 378,
23 where the Court held that such expertise is often a
24 valuable aid in interpreting and applying an ambiguous
25 statute in harmony with the policies and goals the

1 legislature sought to achieve in its enactment, we have
2 heretofore recognized that it is an appropriate function
3 for administrative agencies to 'fill in the gaps' when
4 necessary to the effectuation of the general statutory
5 scheme."

6 As applied to this case, the County's planner
7 has considered the general statutory scheme. This Court
8 finds that the interpretation by the County is reasonable.
9 And because it is subject to varying interpretation, this
10 Court is required to defer to the expertise of the County
11 officials and accept their interpretation. As such, this
12 Court finds that the Hearing Examiner did not commit error
13 as a matter of law in upholding the Department's
14 determination that the activities of the concrete batch
15 plant, top soil production, and rock crushing and washing
16 are allowable uses within the definition of aggregate
17 extraction site and, subject to conditions set forth in the
18 conditional use permit.

19 I would like to take a moment and address the
20 issue of the accessory use structures. And that was the
21 subject that was allowed to be further expanded upon
22 through further briefing following the last hearing. It
23 should be noted that the Respondent, UTF, addressed for
24 the first time on appeal before this Court the uses of
25 concrete batch plant, rock crushing and washing, as well

1 as top soil operations as uses commonly associated with
2 aggregate mining operations and deemed accessory uses or
3 structures and, therefore, permitted under the Kitsap
4 County Code, Title 17. At the conclusion of argument in
5 Superior Court, UTF was provided additional time to
6 identify where within the record below UTF presented this
7 theory or argument to the Hearing Examiner on accessory
8 uses.

9 The Respondent, UTF, has failed to locate within
10 the record where it preserved the issue of accessory use
11 structure. Even if the Respondent had preserved the issue
12 on appeal, this Court does not find that the additional
13 uses are accessory uses or structures. As defined under
14 the code, accessory use or structure means an activity or
15 structure that is commonly associated with but subordinate
16 to any principle use or structure. Whilst Mr. Oost
17 testified that these additional activities are commonly
18 associated with the aggregate mining operations, there was
19 inadequate and insufficient testimony in the record to
20 support a finding that these activities were, indeed,
21 subordinate to the aggregate mining operations.

22 In conclusion, the issue of accessory use was
23 not properly before the Hearing Examiner and, therefore,
24 has not been preserved on appeal. And even if it were
25 preserved, this Court does not find that the uses comply

1 with the definition of accessory use or structure.

2 The next issue I'm going to address is whether
3 the Hearing Examiner committed reversible error in her
4 determination that the project will not be materially
5 detrimental to existing or future uses of the property in
6 the immediate vicinity.

7 The Hearing Examiner made a factual
8 determination that the UTF project, as conditioned, will
9 not be materially detrimental to existing or future uses
10 of the property in the immediate vicinity. The legal
11 standard on review of the Hearing Examiner decision is
12 whether there is substantial evidence in the record to
13 support the decision.

14 Substantial evidence is evidence of sufficient
15 quantity to persuade a fair-minded person of the truth or
16 correctness of the statement asserted. Moreover, courts
17 must give great deference to factual determinations and
18 view the evidence and all reasonable inferences therefrom
19 in the light most favorable to the prevailing party before
20 the Hearing Examiner, accepting the Hearing Examiner's
21 views regarding the credibility of the witnesses and the
22 weight to be given reasonable but competing inferences.

23 Courts may only overturn facts determined by the
24 Hearing Examiner only if they are clearly erroneous. In
25 order to determine if the Hearing Examiner's decision was

1 clearly erroneous, this Court must have a definite and
2 firm conviction that the Hearing Examiner has committed a
3 mistake. So that is the legal standard on review.

4 And the reason I take time to identify the legal
5 standard in these issues is to, as best as I can, explain
6 the function of this Court's role. We are an appellate
7 function. We are not the Hearing Examiner itself. And so
8 the Superior Court doesn't review the facts as if it were
9 before the Hearing Examiner. And that's why I'm giving a
10 fair amount of time explaining these various legal
11 standards.

12 So applying the legal standard on review in this
13 case to this issue, the Court considers the project as it
14 was described at the lower level. Surface mining projects
15 will almost, by definition, always have unavoidable
16 adverse impacts. Each of the impacts in this case have
17 been thoroughly evaluated and mitigated to the level of
18 non-significance through the imposition of approximately
19 160 conditions.

20 The facts demonstrated that albeit that
21 infrastructure development will be required, such
22 development will improve and will benefit the local
23 community, including intersection improvements, sides of
24 shoulders for pedestrians and bicyclists, and construction
25 of sidewalks for pedestrian and school safety.

1 The Hearing Examiner considered the current uses
2 and condition of the property in the vicinity of the
3 project and considered the current deficiencies in the
4 areas. The Hearing Examiner identified the impacts of the
5 uses and whether these would be detrimental. She
6 specifically found that the location of the residences are
7 located across the U.S. Navy railroad track and separated
8 from the project by a forested buffer. Also, many of the
9 closest residences are owned by UTF. Third, that the
10 mining would be located at least 600 feet away from the
11 nearest residences; and that blasting activities would be
12 about 4000 feet from the nearest residence. She
13 determined that an urban berm would be constructed to
14 provide additional buffer from the mining operations.
15 Furthermore, it was determined that only 10 acres of
16 quarry and 10 acres of sand and gravel mine will be
17 actively mined at any one time and then reclaimed.
18 Following reclamation, there would be revegetation, and
19 then the property would continue as a commercial forest.

20 As regards the traffic and transportation
21 impacts, the Hearing Examiner found that the potential
22 impacts surrounding the noise, dust, emissions and traffic
23 impacts and determined that the conditions of the approval
24 were necessary to assure streets are able to absorb
25 impacts of development. And therefore, it was required

1 that the road improvements would occur. She also found
2 that noise and air emissions will not exceed regulatory
3 standards, and mitigation conditions were imposed to
4 control dust.

5 As to other environmental concerns, the
6 development was found to occur outside of wetlands,
7 streams, steep slopes and buffers, with the exception of
8 the wetland buffer averaging involving wetlands one and
9 three. The project would provide storm water management
10 to control drainage on the property and in the vicinity.
11 And mitigation conditions would ensure monitoring,
12 reporting, and remediation of unforeseen impacts on
13 drainage patterns, ground water, and surface water in the
14 surrounding area of the UTF project. Moreover, water
15 would be obtained through the City of the Bremerton, and
16 there would be no need to draw or impact ground water. As
17 for sewage, on-site septic systems would be used with
18 conditions of approval to assure proper use.

19 Consistent with the environmental impact
20 statement, the Hearing Examiner found that the unavoidable
21 wildlife impact -- found that there would be unavoidable
22 wildlife impact. There would be SEPA mitigation
23 conditions imposed; and that these mitigations would bring
24 these impacts below the level of significance.

25 In providing this summary that was determined by

1 the Hearing Examiner's findings, it is evident that the
2 review of detrimental impacts was thorough and supported
3 by the record below. Consistent with the legal standard
4 for review by Superior Court, this Court finds that there
5 is substantial evidence in the record to support the
6 approval of this criteria and that there can be no finding
7 that the Hearing Examiner's determination was clearly
8 erroneous. In conclusion, the Hearing Examiner did not
9 err in her determination.

10 I'd like to now go on to the next issue, which
11 is concerning the approval of the CUP and whether or not
12 this complied with the critical areas ordinance. The
13 Appellant asserts that the project as approved does not
14 comply with the critical areas ordinance. And to support
15 this contention, the Appellant points to Kitsap County
16 code, suggesting that there must be a prior determination
17 of compliance with the critical areas ordinance prior to
18 issuance of the CUP.

19 This Court finds that the Appellant's position
20 is without merit. Preliminarily, it is important to note
21 that the UTF fulfilled all the requirements of the EIS.
22 Within EIS, a habitat management plan was submitted,
23 together with the wetlands delineation and buffer plan.
24 Originally, the Appellant challenged the EIS but later
25 abandoned the EIS appeal. The substantive findings of the

1 EIS are no longer subject to challenge.

2 At the hearing on the conditional use permit,
3 the Appellant did not challenge the habitat management
4 plan nor the wetlands delineation and buffer plan. As
5 such, any challenge to these issues has not been preserved
6 and are not subject to the Court's review, at this time.
7 Albeit that the issues surrounding the habitat management
8 plan and the wetlands delineation and buffer plan have not
9 been preserved for appeal, even if they had, there is no
10 merit to the Appellant's arguments on these issues.

11 Appellant argues that provision 77 and 78 of the
12 Hearing Examiner decision demonstrates that there was a
13 failure to comply with the requirements of Kitsap County
14 Code 19.10.110(a). The Hearing Examiner's decision on
15 provision 77 reads, "A final habitat management plan,
16 including maps showing the specific wetlands, streams, and
17 buffers to be included, shall be developed in cooperation
18 with Kitsap County to fulfill Kitsap County requirements."
19 Provision 78 reads, "Final calculations of buffer areas
20 reduced and added to fulfill averaging requirements in the
21 Kitsap County code shall be made following a final
22 determination of required buffer widths by Kitsap County
23 staff." Kitsap County Code, 19.10.110(a) reads, "Kitsap
24 County shall not grant any permit, license, or other
25 development approval to alter the condition of any land,

1 water, or vegetation or to construct or alter any
2 structure or improvement, nor shall any person alter the
3 condition of any land, water, or vegetation or construct
4 or alter any structure or improvement for any development
5 proposal regulated by this title, except in compliance
6 with the provisions of this title. Failure to comply with
7 the provisions of this title shall be considered a
8 violation and subject of enforcement procedures, as
9 provided for in this title."

10 This Court does not find that inclusions of
11 provision 77 and 78 are contrary to the mandate of Kitsap
12 County Code 19.100.110(a). As to provision 78, it is
13 uncontroverted that a habitat management plan has been
14 completed and included in the EIS. The habitat management
15 plan was not challenged either in the SEPA review or the
16 CUP process. The Petitioner does not claim that anything
17 is missing or insufficiently evaluated.

18 The EIS determined that all buffer averaging
19 exceeded the minimum critical area requirements, and the
20 total buffer area exceeded the area that would have been
21 buffered using standard buffers. Provision 78 is a
22 condition that was requested by Kitsap County to assure
23 that once the preliminary construction and engineering
24 plans were submitted, the County could adjust the buffer
25 averaging in the final plans, if it needed to do so. By

1 allowing for the ability to refine the buffer averaging,
2 it is not feasible to draw the conclusion that the buffer
3 averaging included within the EIS was anything but
4 adequate and compliant with the critical areas ordinance.
5 The same is true as to provision 77 of the decision, in
6 that the habitat management plan was incorporated and
7 accepted within the EIS.

8 The additional provision incorporated by the
9 Hearing Examiner provides some latitude to adjust pursuant
10 to the Kitsap County code. There is nothing in these
11 provisions that are contrary to the requirements of the
12 code. And there is nothing within the provision of the
13 Code that mandates a specific finding of compliance with
14 Kitsap County Code 19.100.110(a) prior to issuance of the
15 CUP. Moreover, Appellant's reliance upon Kitsap County
16 Code 19.300 is misplaced, as this section of the code
17 pertains to a habitat conservation area. The area in
18 question is not a conservation area. And therefore,
19 Kitsap County Code 19.300 is not applicable. Therefore,
20 the Appellant's request to reverse the Hearing Examiner's
21 decision on these grounds is denied.

22 The last area to address is where the Appellant
23 asserts that the Hearing Examiner committed error in that
24 she failed to conclude that the project is compatible with
25 the existing character and physical characteristics of the

1 project's immediate vicinity. In support of this, the
2 Appellant maintains that the failure to issue conclusions
3 based upon findings is a clearly erroneous application of
4 the law to the facts. As set forth in the Kitsap County
5 code, Title 17, 17.421.030(a)(1) through (4), approval of
6 a conditional use permit may only be granted when the four
7 listed criteria are met.

8 The fourth criteria to be met is a determination
9 that the proposal is compatible with and incorporates
10 specific features, conditions, or revisions that ensure it
11 responds appropriately to the existing character,
12 appearance, quality, or development and physical
13 characteristics of the subject property and the immediate
14 vicinity. For ease of reference, I will refer to this as
15 the compatibility criteria.

16 While the Hearing Examiner did issue conclusions
17 based on findings as to the first three criteria, she did
18 not address the fourth compatibility requirement.
19 According to Weyerhaeuser v. Pierce County, 124 Wn.2d 26,
20 findings must be made on matters which establish the
21 existence or nonexistence of determinative factual
22 matters. Further, the case reads, "The process used by
23 the decision-maker should be revealed by findings of fact
24 and conclusions of law. Clearly, case law anticipates
25 that findings and conclusions are required so that the

1 appellate court may be fully informed as to the basis of
2 the decision." The Respondent, UTF, argues that
3 Weyerhaeuser stands for the proposition that findings are
4 required but conclusions themselves are not. Moreover, it
5 argues that while Weyerhaeuser requires findings,
6 conclusions are not mandated but rather should be set
7 forth.

8 This Court is not persuaded by UTF's analysis of
9 Weyerhaeuser and finds that the "should" language is in
10 reference to the substance of the findings and
11 conclusions, in that they should be sufficient enough to
12 reveal the process used by the decision-maker, not that
13 the decision-maker should but is not required to make
14 conclusions.

15 This Court is not persuaded that substantial
16 findings alone without accompanying conclusions would
17 satisfy the requirements of the Weyerhaeuser case, as it
18 leaves in question which findings are applicable to which
19 conclusion, thus leaving the parties uncertain about the
20 ultimate conclusions of the Hearing Examiner.

21 Therefore, the Hearing Examiner did, indeed, err
22 in failing to make conclusions based on findings as to
23 this fourth criteria and, therefore, has failed to deal
24 fully and properly with the issues, as required under the
25 Kitsap County Code 17.41.030(a)(4). Whilst the Respondent

1 has demonstrated that there are a number of mitigation
2 conditions and that the Hearing Examiner apparently
3 considered the compatibility component, there must be a
4 conclusion of law concerning this criteria.

5 Contrary to the Appellant's position, such error
6 does not warrant reversal of the Hearing Examiner's
7 decision on the conditional use permit. However, this
8 Court directs remand to the Hearing Examiner so that she
9 might fully address the fourth criteria, pursuant to the
10 findings of fact and conclusions based upon those
11 findings. And so on that basis, this decision of the
12 Hearing Examiner is remanded for that single issue.

13 I believe I've addressed everything.

14 MR. JONES: One clarification, Your Honor?

15 THE COURT: Yes.

16 MR. JONES: With regard to the compatibility
17 issue, presumably, that should be on the record, no
18 further hearing, just have it submitted to the Hearing
19 Examiner for making a final conclusion --

20 THE COURT: That's correct.

21 MR. JONES: -- and amending her decision?

22 THE COURT: That is my intention. This is not
23 going back for further argument. It's intended that the
24 Hearing Examiner would receive my decision, at which time
25 she would be directed to draw conclusions, whatever those

1 might be, as to the fourth criteria. It's an incomplete
2 record, at this time, from the Hearing Examiner.

3 MR. JONES: Thank you, Your Honor.

4 THE COURT: So what I would like to do is to
5 direct Mr. Jones to draw up some final paperwork to
6 incorporate the substance of my decision.

7 MR. JONES: I'm happy to do that, Your Honor.

8 And what I typically do in these cases, because
9 findings and conclusions are not part of the record in a
10 LUPA action, is that I've already ordered the transcript
11 of your decision today. And I'll attach that to a -- an
12 order and circulate it and then try to have an agreed
13 order back to you.

14 THE COURT: And if it's not agreed, it can come
15 back on my departmental calendar. I am going to put a
16 timeline on it so that I will know that it's finalized in
17 some form. So I would suggest that we schedule between
18 two and three weeks.

19 What would work for both parties?

20 MR. JONES: I'm fine on any of those timelines.

21 THE COURT: Mr. Vancil?

22 MR. VANCIL: We're open.

23 THE COURT: Okay. So given that we're almost at
24 the 18th, I'd like to propose April 1. And if for some
25 reason you're still speaking between yourselves, you can

1 call my law clerk. And the latest I would want to see it
2 would be the 8th, if you need more time. Otherwise, it
3 can be the 1st. And if there's dispute, then it can be on
4 my departmental calendar.

5 MR. VANCIL: And just for clarification, Your
6 Honor, that's to get you an agreed order by April 1, the
7 goal is?

8 THE COURT: Right. And if we don't have it by
9 the 8th -- well, I'm proposing that we have a hearing on
10 the 1st, if there's dispute. But if you're still
11 negotiating, you think you almost have a decision, then no
12 later than the 8th would I want to see it on my
13 departmental. That's at 1:30, if I need to make any
14 further decisions on the final order.

15 MR. VANCIL: So if we were in dispute on it, we
16 should let you know well in advance of the 1st so we can
17 schedule that hearing?

18 THE COURT: Please, yes. That would be great.

19 MR. JONES: As soon as we can get the decision,
20 I'll get it out within the day or two.

21 THE COURT: Okay. I believe that's everything.
22 I can't think of anything else to address, unless --
23 anything from the parties?

24 MR. JONES: No further.

25 MR. VANCIL: No. Thank you, Your Honor.

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1 THE COURT: Thank you very much, Counsel.

2 MR. JONES: Thank you.

3 THE COURT: And we're adjourned. Thank you.

4 (Matter concluded)

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