

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

**ARNIE PIPKIN and MICHELLE
PIPKIN, husband and wife,**

Appellants,

v.

**COUNTY OF DOUGLAS, a
Washington state municipality,**

Respondent.

No. 28698-3-III

Division Three

UNPUBLISHED OPINION

Sweeney, J. — This is a land use case. The landowners applied to the county for a conditional use permit (CUP) for mineral extraction. The hearing examiner concluded that long-term mineral extraction was not harmonious with the comprehensive plan, was inconsistent with zoning in the area, and would generate excessive noise, vibration, and dust. The superior court affirmed the ruling. We conclude that the decision to deny the landowners' CUP application was well within the legislative authority of the county and supported by applicable law and fact. We, therefore, affirm the superior court.

FACTS

Arnie and Michelle Pipkin own Pipkin Construction,¹ an excavation company based on a bluff east of Bakers Flat in East Wenatchee, Washington. In December 1997, the Pipkins applied for a site plan development permit to excavate rock from the bluff and grade the excavated area for future industrial use. In February 1998, Douglas County issued the Pipkins a five-year permit to excavate rock for site preparation.

The Pipkins did not complete the excavation within five years. They, therefore, applied for a three-year extension of their site preparation permit in January 2003. The county granted the extension in November 2003. Again, the Pipkins did not complete the project in those three years. In April 2008, they applied for a CUP for mineral extraction, other than for site preparation. The application was complete on July 1.

Douglas County held a hearing on the application on June 18, 2009. A hearing examiner heard the matter, entered findings of fact and conclusions of law, and denied the CUP application. The hearing examiner applied the Douglas County Code's (DCC) evaluation criteria for conditional uses (DCC 18.80.030) to the Pipkins' proposed use (mineral extraction). He concluded that this proposed use did not meet three criteria—it did not comply with the comprehensive plan, was not consistent with the character of the

¹ They also appear to own Pipkin Premium Rock. Clerk's Papers at 481 (Finding of Fact 35). The record does not say whether it is a subdivision or subsidiary of Pipkin, Inc. or a separate corporation entirely.

general area, and would produce dust, noise, and vibration. Administrative Record (AR) at 479, 482.

The Pipkins petitioned the superior court to review the hearing examiner's decision. The superior court denied the petition.

DISCUSSION

The Pipkins challenge the hearing examiner's conclusions that their proposed use did not comply with DCC 18.80.030(A), (B), (F), and (H).² In pertinent part, the examiner denied the application for the CUP by concluding as a threshold matter that the use would:

1. not be harmonious and in accordance with the general and specific objectives of the comprehensive plan and all the subarea plans. AR at 479 (Finding of Fact (FF) 26).
2. not be harmonious and appropriate in appearance with the existing or intended character of the general vicinity of the area. AR at 479 (FF 24).
3. not be suitable because it would create excessive noise, vibration, and dust.

² These subsections require, in relevant part, that the proposed use will be harmonious with the comprehensive plan; will be designed, constructed, operated and maintained to be appropriate in appearance with the character of the general area; will not involve uses that produce excessive noise, smoke, fumes, vibration, glare, or odors; and will have adequate buffering devices to protect adjacent properties from potential adverse impacts.

AR at 479 (FF 26).

The Pipkins assign error to a number of the examiner's findings and conclusions. Appellant's Br. at 2-4; Appellant's Reply Br. at 7-8. Those assignments of error and the county's response generate a number of issues. But we need address only three of those issues to answer this appeal. Specifically, we must decide whether the examiner had the authority to conclude and was correct as a matter of law when he concluded that mineral extraction was not "harmonious and in accordance with the general and specific objectives of the Comprehensive Plan and all subarea plans." AR at 479. We also must decide whether the examiner erred when he concluded that the Pipkins' use of their property was "inconsistent with the character of the General Industrial zoning district." AR at 479. And we must decide whether the county is estopped to deny the CUP application based on earlier findings, conclusions and a decision to allow mineral extraction incidental to site preparation.

In Douglas County, a proposed conditional use must comply with a list of evaluation criteria before the use is permitted. *See* DCC 18.80.020(A). DCC 18.80.030 sets out the criteria. The pertinent provisions are:

- "The proposed use will be harmonious and in accordance with the general and specific objectives of the comprehensive plan and all subarea plans."
- "The proposed use will be designed, constructed, operated, and

maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity of the area.”

- “The proposed use will not involve uses, activities, processes, materials, equipment and conditions of operation that will be detrimental to any persons, property or general welfare by reasons of excessive production of traffic, noise, smoke, fumes, vibration, glare, or odors.”

DCC 18.80.030(A), (B), (F). The Pipkins argue that the criteria cannot be applied without also considering the mitigation standards in DCC 18.80.040.

We, like the trial judge, review the hearing examiner’s decision in an appellate capacity. *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 415, 225 P.3d 448 (2010). We give substantial deference to both the legal and factual determinations of a hearing examiner as the local authority with expertise in land use regulations. *Id.*; see RCW 36.70C.130 (standards for granting relief). We review the evidence and any inferences in a light most favorable to the party that prevailed in the highest forum exercising fact-finding authority (here, Douglas County). *Lanzce G. Douglass, Inc.*, 154 Wn. App. at 415. The Pipkins, then, must show that the hearing examiner made a mistake of law, that the hearing examiner’s decision is not supported by substantial evidence, or that the decision was clearly erroneous. *Id.* at 416.

We are particularly deferential to the county’s refusal to issue a CUP. The very nature of this legislative decision “is that of a use allowed at the discretion of local government, subject to those conditions that

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are deemed appropriate by local decision makers.” *Timberlake Christian Fellowship v. King County*, 114 Wn. App. 174, 181, 61 P.3d 332 (2002). “Thus, when reviewing such decisions, we recognize the broad range of discretion counties have in determining whether to grant a particular application and the conditions that are appropriate in each case.” *Id.* Like the hearing examiner, then, we do not analyze the mitigation conditions (DCC 18.80.040) that might have been necessary or already in place for the proposed conditional use without a threshold decision that permits the use in the first place. That is a legislative decision that we defer to because the Pipkins have not shown that it is an erroneous interpretation of the law. RCW 36.70C.130(1)(b).

Use Harmonious with the General Vicinity’s Character

The Pipkins challenge the hearing examiner’s conclusion that mineral extraction is inconsistent with the character of the general area. That conclusion is based on the finding that “mineral extraction is prohibited in [the General Industrial] district.” AR at 479 (FF 24). The Pipkins say insufficient evidence supports the finding because the only evidence of the finding is a conclusory statement in the county’s staff report. But the law supports the finding. The record shows the proposed project site is on land zoned Rural Resource 20 and next to land that is zoned General Industrial. AR at 30, 53, 364-65. The Pipkins’ property is in both zones.

The DCC prohibits mineral extraction in the General Industrial district:

Uses other than those identified or described in this chapter are prohibited including but not limited to:

...
D. Mineral extraction.

DCC 18.60.050(D). The examiner's conclusion, then, is correct as a matter of law. And it alone supports the examiner's decision to deny the CUP here. DCC 18.80.020(A).

The Pipkins claim the hearing examiner also misapplied the General Industrial district prohibition to their proposed project site because it is not in the General Industrial district. What the hearing examiner did was rely on the prohibition as support for his conclusion that mineral extraction is inconsistent with the character of the general area. That was an appropriate legislative action to which we defer. *Lanzce G. Douglass, Inc.*, 154 Wn. App. at 415.

Excessive Dust, Noise, and Vibration

The Pipkins also challenge the finding that the proposed mineral extraction project produces excessive dust, noise, and vibration. The challenged finding is imbedded in a conclusion of law and states:

[T]he proposed use will involve uses, activities, processes, materials, equipment and conditions of operation that will be detrimental to persons, property and the general welfare by reason of excessive production of noise, vibration and dust.

AR at 479 (FF 26). The Pipkins argue that only conclusory statements in the county's staff report support this finding.

The staff report, in relevant part, has this to say about this question:

The nature of the site does not shield the operation and its impacts from the surrounding uses or visual corridors. Conversely, the effects of the operation on the bluffs are magnified and are impossible to reclaim or naturally blend in. [Washington State Department of Natural Resources] in both its referral comments and [State Environmental Policy Act, ch. 43.21C RCW] comments has expressed concern about the stability of the slope. The instability of the slope has not been sufficiently analyzed to ensure no further impact to the bluff. If any impact to the bluff occurs (sluffing, landslide etc.) these effects (dust, etc.) will be directed out towards the agricultural area.

AR at 427-28. The comment letter from the department of natural resources that this staff report refers to says that the proposed project area might be part of "an older, deep-seated landslide." AR at 367. And there is testimony by Bob Thompson, the Operations Manager for Pipkin Premium Rock, that "dust is controlled by water" and that "noise impacts would be four weeks or less a year during the crushing operations." CP at 481 (FF 35). Also the project's environmental checklist says this mineral extraction project would result in "some dust," AR at 98, and "[m]inor short term increase[s] in noise." AR at 101. An owner of an orchard situated northwest of Pipkin Construction told the county, "At one time [the Pipkins] set off a blast on the side of the mountain that resulted in the entire flat being covered with a cloud of dust." AR at 363. Photographs show the Pipkins' operation is currently sited on a

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west-facing bluff, east of homes and orchards that sit on flatland. AR at 326, 329, 342-44, 346, 349.

Reasonable inferences from this evidence suggest that, in the past, the Pipkins' extraction project has produced (and has the potential to produce) dust, noise, and vibration. This is substantial evidence to support the examiner's finding on dust, noise and vibration.

Buffering

In Douglas County, a proposed conditional use must have "[a]dequate buffering devices such as fencing, landscaping, or topographic characteristics . . . in place in order to mitigate, and protect adjacent properties from potential adverse impacts of the proposed use, including visual or auditory effects." DCC 18.80.030(H). The Pipkins contend the hearing examiner erroneously found that buffering for their proposed use was inadequate to mitigate potential adverse impacts to adjacent property. The hearing examiner made no such finding. We, therefore, need not address this contention any further.

Collateral Estoppel

The Pipkins argue that the county should be collaterally estopped from denying their application based on the findings, conclusions and the county's earlier decision to

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grant and extend a permit for site preparation. First, this challenge should have been made to the examiner or the superior court, not to us for the first time. *Spokane County v. City of Spokane*, 148 Wn. App. 120, 124, 197 P.3d 1228 (2009). But regardless, application of the doctrine of collateral estoppel would not require a different result here.

Collateral estoppel prevents the same parties from revisiting issues decided in an earlier suit. *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 31, 891 P.2d 29 (1995); *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983).

Application of the doctrine requires that the issue decided in the earlier action be identical to the issue in the current action. *Rains*, 100 Wn.2d at 665.

The Pipkins argue that their proposed use has always been to “remove rock from the site and develop it for industrial use.” AR at 49. But the DCC recognizes two types of rock removal: one incidental to site preparation and one for mineral extraction alone. “Mineral extraction” is “the removal of topsoil, gravel, rock, clay, sand or other earth material, including accessory activities such as washing, sorting, screening, crushing and stockpiling.” DCC 14.98.540. “Mineral extraction” specifically excludes from its definition “[t]he leveling, grading, filling, or removal of materials during the course of normal site preparation for an approved use.” DCC 14.98.540(A). Mineral extraction, as used here, is long-term rock removal. “Site preparation,” on the other hand, is short-term

rock removal. It includes “mineral extraction, provided it is of a temporary nature and conducted solely for the purpose of preparing and leveling the site.” DCC 18.60.030(F).

In 1997 and 2003, the Pipkins’ proposed use was to prepare and level the site for industrial development—site preparation. The hearing examiner concluded that site preparation was consistent with the comprehensive plan, was compatible with the character of the neighborhood, and would not adversely impact nearby land uses. He also passed on whether site preparation was compatible with the comprehensive plan and the adjacent properties.

But this current application for a CUP is for mineral extraction (or long-term rock removal). So now the questions are whether long-term mineral extraction is harmonious with the general vicinity and whether long-term mineral extraction will adversely affect adjacent properties. The current questions differ from the questions before the examiner in 1997 or 2003. Collateral estoppel, then, does not apply.

Due Process Challenge

The Pipkins contend the hearing examiner violated their due process rights by arbitrarily (1) ignoring zoning ordinances that allowed mineral extraction as a conditional use in Rural Resource 20 districts, (2) finding that the proposed use would adversely impact and be inconsistent with the general vicinity (inconsistent with earlier decisions on

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the same project), (3) disregarding Washington case law dictating the hierarchy of local regulations, (4) adopting unsupported conclusory statements from the county's staff report, and (5) engaging in ad hoc rulemaking to reach the conclusion he wanted.

Whether a decision violates due process of law is a question of law, which we review de novo. *Post v. City of Tacoma*, 167 Wn.2d 300, 308, 217 P.3d 1179 (2009). Manifest constitutional errors may be raised for the first time on appeal. RAP 2.5(a)(3). But the Pipkins offer no analysis showing manifest constitutional errors. And, more importantly, we have already concluded that the examiner's decision is supported by both law and fact.

The hearing examiner did not ignore the ordinance that allows mineral extraction as a conditional use in the Rural Resource 20 district. He considered the Pipkins' application for a CUP. And he was not bound by his decisions on earlier applications for permits for site preparation. He, then, did not engage in ad hoc rulemaking. The Pipkins' proposed use had to comply with all the evaluation criteria in DCC 18.80.030. And the record and a finding support the hearing examiner's conclusion that the proposed use did not comply with DCC 18.80.030(B). That conclusion is enough to support the hearing examiner's decision to deny the Pipkins' application for a CUP.

Attorney Fees

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Douglas County requests fees and costs under RCW 4.84.370. That statute entitles a county to reasonable attorney fees and costs if its decision on a CUP application is upheld. RCW 4.84.370(1), (2). We, then, grant the county's request.

We affirm the decision of the trial court.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Sweeney, J.

WE CONCUR:

Korsmo, A.C.J.

Siddoway, J.