NOTICE OF DECISION

Appellant:	Avis LLC, Scott Waldal, and Skagit Hill Recycling
File Nos:	PL08-0688 and PL 10-0199
Location:	7705 State Route 9, being 7.56 acres within Government Lot 3, and Sec 7, T35N, R5E, W.M.
Zoning:	Rural Reserve (RRv)
Summary of Case:	Appellant appeals a Notice and Order to Abate, dated November 13, 2008, and a Notice and Order to Abate, dated May 5, 2010. The Orders relate to asserted violations at the subject site, including unlawful solid waste handling, building code non-compliance, drainage obstruction, and improper signs.
Public Hearing:	A trial-type hearing open to the public was held on June 18, 21, 22, 29, 30, July 1, 15, 16, 19, 20, 21, 2010 (eleven days). Appellant was represented by Sarah Mack and Brad Doll, Attorneys at Law. The County was represented by Arne Denny, Deputy Prosecuting Attorney. Witnesses testified, Exhibits were admitted.
Decision:	The Notices and Orders to Abate are affirmed in part and reversed in part.
Date of Decision:	August 23, 2010
Reconsideration/Denial:	A Request for Reconsideration may be filed with PDS within 10 days of this decision (SCC 14.06.180). The decision may be appealed to the Board of County Commissioners within 14 days of the date of decision or decision on reconsideration, if applicable. (SCC 14.06.110(13).
Online Text:	The entire decision can be viewed at: www.skagitcounty.net/hearingexaminer

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

In the Matter of the Appeal of	)	
	)	**PL08-0688 and PL10-0199**
AVIS LLC, SCOTT WALDAL, AND	)	
SKAGIT HILL RECYCLING, INC.,	)	**FINDINGS OF FACT,**
	)	**CONCLUSIONS OF LAW**
	)	**AND DECISION**
From Notices and Orders to Abate in Relation to	)	
Activities at 7705 State Route 9, Sedro Woolley	)	
_____	)	

PROCEDURE

Issuance of Notices and Filing of Appeals. Two Notices and Orders to Abate were appealed. The first Notice and Order to Abate, dated November 13, 2008, (hereinafter called NOA#1) was appealed (PL08-0688) on December 3, 2008. On Motion by the County, the Examiner dismissed this appeal as untimely. Avis LLC and Scott Waldal appealed the dismissal. The Superior Court for Snohomish County reversed the Hearing Examiner on February 5, 2010, and remanded the matter to him for a hearing on the merits. On April 7, 2010, the Hearing Examiner's Office scheduled the appeal hearing to begin on June 18, 2010. A second Notice and Order to Abate, dated May 5, 2010, (hereinafter called NOA #2) was timely appealed (PL10-0199) on May 17, 2010.

Consolidation. On May 19, 2010, the Appellant filed a Motion for Consolidation and Continuance of Hearing. The County filed a response in opposition. The Examiner, on May 26th, 2010, consolidated the appeal hearings in PL08-0688 and PL10-0199.

The Appellant's Motion also asked that the appeal hearings be consolidated with the pre-decision hearing on an anticipated application for a Special Use Permit and continued until such permit proposal was ready for hearing. The Examiner denied this request on the basis that consolidation with the pre-decision hearing on a Special Use Permit hearing is pre-mature since the County has no permit application before it to consider. The request for a continuance was denied. The June 18, 2010 commencement date was affirmed for the consolidated hearings on both appeals.

Motion in Limine. With the ruling on consolidation and continuance, the Hearing Examiner issued a Prehearing Order, providing times for the exchange of exhibit lists and witness lists and for pre-hearing motions. The Order announced that the first hearing day, June 18, would be given over to preliminary discussions of procedure. The first day of testimony was scheduled for June 21, 2010. The Order also stated the following:

> " The County shall put on its case(s) first. The Appellants' case shall follow. Cross examination will be allowed of all witnesses."

On June 10, 2010, the County filed its Staff Report relative to the consolidated appeals. On June 11, 2010, Appellant filed a Motion in Limine asking that written declarations and affidavits appended as exhibits to the Staff Report be excluded unless the declarants were made available for cross examination.

The County opposed this Motion arguing that only the person who prepared the Staff Report need be made available for cross examination. The County asserted that the declarations and affidavits were not prepared for the instant hearing and that they were admissible as official records. The County expressed an intention to call as a witness the Building Official under whose name the Staff Report was issued, as well as others from its witness list. In due course, it became apparent that certain of the declarants in documents offered as exhibits by both sides were unavailable to testify or had refused to testify when asked to do so.

The Examiner ultimately denied the Motion in Limine and admitted the challenged documents as official records, noting that he lacked subpoena powers and was therefore unable to compel the attendance of the declarants. In the hearing, cross examination was allowed for all witnesses who testified.

Advisory Ruling not to be Issued. Through the Staff Report, the County asked the Examiner to conclude that a solid waste recycling facility cannot legally be permitted in the RRv zone. During the hearing, the County, by motion, requested the Examiner not to make a ruling on this issue. The County argued that such a ruling would be advisory, pointing out that no permit application has been filed. Under the circumstances, it cannot be known what sort of use Skagit Hill Recycling would propose in any application it might submit. The Appellant concurred in the motion and the Examiner granted it.

Order of Presentation/Burden of Proof. The Examiner announced at the opening session on June 18, 2010, that the County would be obliged to present its case first and would have the burden of proof as to the existence of the violations charged. The Examiner pointed out that civil enforcement proceedings differ from permit proceedings insofar as the position of the parties is concerned.

SCC 14.44.120 states that civil enforcement appeals will be processed in accordance with Chapter 14.06 SCC. However, Chapter 14.06 SCC is directed toward the processing of permits, where the applicant, not the County, is the moving party. That Chapter applies an appellate standard of review as against the County decision-makers (i.e., they must be "clearly erroneous"). In permit cases, the applicant has the burden of proving that his proposal is consistent with the Code, commonly in an open record hearing. This is followed by an initial decision responding to the input of both applicant and government. Appeals of permit decisions are, thus, truly appellate in nature.

But, where enforcement orders are concerned, the "appeal" is actually the initial decisional level involving both citizen and government. In this situation, the Notice and Order to Abate functions like a complaint and the Notice of Appeal is analogous to an answer. In such circumstances, due process requires that the complaining party go first and carry the burden of proof. The appropriate standard is preponderance of the evidence.

Consistent with this analogy, the assertion of a legal non-conforming use by an appellant presents essentially a defense to an allegation of violation. Therefore the appropriate thing is for the defending party to carry the burden on that question. Here, the County asserted that there is

no non-conforming use and was obliged to present a prima facie case on that point. But the ultimate burden of showing that a non-conforming use exists must rest with the appellant.

The County interposed an argument of abandonment as a counter to the assertion of the existence of a legal non-conforming use. On abandonment, the burden again was on the County.

The hearing was conducted with the above concepts of burden of proof in mind

Witnesses/Exhibits. The County presented four witnesses: Britt Pffaf-Dunton, County Environmental Health Specialist; Rusty Noble, neighborhood resident; Matt Kaufman, County Environmental Health Specialists; and Tim Devries, County Building Official

The Appellants presented three witnesses: Scott Waldal, President of Skagit Hill Recycling and Managing Director of Avis LLC (the property owner); Floyd Pittman, long-time local resident and executor of the estate of Betty Eaton; Dennis Sanders, truck driver and former employee of Frank Janicki.

In total 373 exhibits, contained in six notebook volumes, were admitted, including photographs and written documents.

FINDINGS OF FACT

The Site

1. The property in question is located at 7705 State Route 9, about one-half mile north of Sedro Woolley. It comprises 7.56 acres within Government Lot 3 and the NW1/4 SW1/4 Sec. 7, T35N, R5E, W.M.

2. The property is the north parcel of two contiguous parcels that formerly belonged to John Diamond ("Diamond"). [1] Diamond retained the south parcel (P38620) and sold the subject parcel (P10465) to Avis LLC in 2006. Scott Waldal, president of Skagit Hill Recycling, is managing director of Avis LLC.

3. The property lies on the east side of SR 9. There is an area of level access from the road shoulder on the west side of lot. In the center and east portions of the parcel is a pit, historically used as a source of gravel.

4. The northern and eastern edges of the site are wooded. The pit area has been cleared. A small surface water detention pond within the pit drains southeast into a tributary of Brickyard Creek. The property slopes generally from the northwest to the southeast
.

5. The site is currently zoned Rural Reserved (RRv), but prior to the year 2000 was zoned Residential.

[1] John Diamond was originally known as John Schmid. All references to him herein use the name Diamond, notwithstanding that many exhibits were written before the name change and refer to him as John Schmid.

Brief Historical Chronology

6. Prior to the 1940's, the property was used as a sand and gravel pit. Sometime during the 1940's the site was purchased by Frank and Betty Janicki. The Janickis continued the business of extracting and selling sand and gravel from the pit and continued to do so through the 1970's.

7. During the Janickis' ownership people brought small quantities of waste to the site, including grass clippings, land clearing debris, timber from demolished barns and houses, and broken concrete from sidewalk and road repairs. Some of the timber was stacked and resold. Some on the concrete material was resold for fill or other uses.

8. In April of 1966, Skagit County adopted an interim zoning ordinance. That ordinance required a conditional use permit for excavation, and processing the removal of peat, sand, gravel, black soil, rock and other natural deposits. The ordinance also required a conditional use permit for incineration or reduction of garbage or refuse, for the storage of vehicles, junk, rags and scrap iron, and for any manufacturing, processing, commercial or industrial use which might cause nuisance-like impacts to surrounding property. There is no evidence that the County ever required any permits of the Janickis under this ordinance.

9. A 1978 aerial depicts no evidence of solid waste handling or stockpiling of solid waste. After Frank Janicki's death in 1981, there appears to have been a lull for a couple of years in the use of the site. Thereafter from time to time roofing waste and household garbage were dumped in the pit by third parties. The quantity of these items was not large, only covering a small portion of the floor of the pit in low level piles. John Diamond, Betty Janicki's son, was advised that the presence of these materials violated the County Health rules and cooperated with the Health Department (“Health”) in cleaning up these materials.

10. In 1979, the County adopted a new zoning ordinance. At that time the subject property was zoned Residential. The ordinance listed "solid waste disposal facilities" as among allowable unclassified special uses, but did not list "solid waste disposal facilities" as being permissible in Residential zones. Unclassified special uses were authorized only by permit.

11. The ordinance also amended provisions for abandonment of non-conforming uses. By the terms of the 1979 enactment, a non-conforming use was deemed abandoned if it "ceases for any reason whatsoever for a period of one (1) year or more." No hearing was required to establish the abandonment of a non-conforming use. (See former SCC 14.04.150(2).

12. In 1986, the property was acquired by Diamond. After that, for several years he accepted soils, concrete and wood waste at the site from government sources. He said his operations were similar to those conducted by the Janickis.

13. Also in 1986, the County adopted a Solid Waste Management Plan. On January 26, 1987, the County identified three landfills in the County as the "existing solid waste disposal system." The subject property was not on the list.

14. In late 1990, a complaint was received about the dumping and burning of wood waste and roofing material at the old Janicki pit. Diamond asserted that the wood waste in the pit was dumped without his permission. Other wastes noted may have originated from City and County road work. The waste was in scattered piles on the floor of the pit. In places vegetation had been allowed to grow in the pit.

15. Health then advised Diamond that woodwastes could not be landfilled under the Health rules without a permit and that he should cease landfilling activity. He cleaned up the majority of the wood waste during the summer and early fall of 1991.

16. At the time of the 1990 complaint a check of Planning Department ("Planning") [2] records did not show a fill and grade permit for the site. Therefore, on October 26, 1990, Planning issued a Stop Work Notice to remain in effect "until all required permits are obtained." Another Stop Work Notice was posted on November 14, 1990, identifying "fill and grade permit" as the type of approval required. Also on November 14, 1990 Planning wrote Diamond a letter advising that a fill and grade permit is required under the Building Code whenever filling or grading is performed. The deposit of wood and other wastes in the pit was apparently regarded as a form of filling.

17. In response, Diamond sought a fill and grade permit from Planning on December 21, 1990. The permit application stated that the existing use of the property was for a "gravel pit" and that the purpose of the grading was for "reclaiming gravel pit." The Environmental Checklist that accompanied the application through the approval process stated that the purpose of the permit was to "reclaim gravel pit, fill to natural lay of land, cover with top soil and plant grass or allow natural vegetation to return." Plus or minus ten years was estimated for the project. The application said the source of fill material would be "from various concrete road and other demolition projects such as road demolition or excavation." The current use of the site and adjacent properties was given as "Mining (gravel pit), Agricultural." A supplement to the Checklist stated, "The site is used as a gravel pit. It has more or less been mined out and is now a large pit."

18. Ultimately, a fill and grade permit was issued to Diamond on July 29, 1991. The issued permit was expressly limited by the conditions of a Mitigated Determination of Non-Significance (MDNS) which, among other things, restricted activities under the permit to landfilling of inert materials.

19. Inert waste is not defined in the Land Use Code. For purposes of the fill and grade permit limitation, Planning relied on the definition adopted in the State regulations on solid waste handling. When the 1991 permit was issued that definition was:

[2] The land use agency for the County has had various slightly different names over the years. For simplicity that agency is referred to throughout as the Planning Department or, simply, Planning.

"inert wastes" means noncombustible, nondangerous solid wastes that are likely to retain their physical and chemical structure under expected conditions of disposal, including resistance to biological attack and chemical attack from acidic rainwater. (See formerly effective WAC 173-304-100(40).

20. The 1991 fill and grade permit is the only permit related to land use that has ever been issued for activities at the subject property.

21. The limitation to inert wastes was a condition made in the interests of environmental protection. Because of the location of the pit in a Residential zone near surface and ground water sources, there was a concern about possible pollution if wastes, that could break down and produce contaminants in leachate, were deposited on site.

22. A fill and grade permit is a kind of Building Permit. As such it normally would not in itself carry approval for any particular land use. Land use approval is derived from compliance with the Land Use Code (now Uniform Development Code), not the Building code.

23. Nonetheless, it is apparent from the course of dealings between Planning and the property owner, that Planning regarded the1991 fill and grade permit as expressive of the scope of lawful landfill use on the property. No land use permit explicitly allowing a landfill, separate from the fill and grade permit, was ever requested by Planning, although arguably such a permit could have been required under the Zoning Code as adopted and amended.

24. There is no evidence that Planning considered landfilling on the site as a non-conforming use, certainly not to the extent that the pit could be filled up and leveled to the natural lay of the land. It was apparently thought that the fill and grade permit itself contained the basic land use approval for landfilling. For environmental purposes such filling was to be allowed if only to the extent that inert wastes were deposited.

25. Nothing in the Environmental Checklists submitted for the fill and grade permit disclosed any intention to use the property to sort, process, or sell solid waste. Recycling was never mentioned.

26. However, the July 10, 1991 letter from Planning which forwarded the MDNS indicated a concern that the project might go beyond the filling of the old pit. The letter said:

If you are considering recycling asphalt and concrete and hauling stumps and other wood wastes to the site for burning, other permits may be required.

27. Apart from land use approval, a separate permit for solid waste handling was and is required from the Health Department. The MDNS used for the fill and grade permit required that the applicant obtain a separate "inert landfill permit" from the County Health Department.

28. On July 12, 1991, before the fill and grade permit was issued, Health received an application for a General Solid Waste Handling facility permit which disclosed an intention to handle "inert and demolition" waste and to engage in "waste recycling," stating that such activities had been going on at the site since 1985 when County, City and State entities began depositing waste from "demolition and ditch digging" at the site. This was a request for a solid waste handling permit covering a broader range of uses than allowed in Planning's fill and grade permit. Planning at that time had received no application for a land use permit to authorize non-inert waste deposits or recycling at the site.

29. On July 25, 1991, the same day he signed off on the fill and grade permit, David Hough, Senior Planner, sent Diamond a letter outlining requirements for applying for a Special Use Permit, presumably to obtain land use authorization for a broader set of uses than landfilling inert waste. Hough stated that his letter was prompted by an inquiry from Diamond. But Diamond filed no responsive application.

30. The 1991 fill and grade permit was subject to the terms of the Uniform Building Code which then provided that such a permit would expire if the work authorized "is suspended or abandoned at any time after the work is commenced for a period of 180 days."
A new permit was required to recommence the previously authorized work. See UBC Sec. 303(d) (1988 ED.)[3]

31. After receiving the Building Permit for clearing and grading, there is no evidence that Diamond ever commenced commercial operations at the site. No tipping fee schedule was ever published. Photographs taken in February of 1993 depict grass growing in the pit. Evidence of landfilling is not discernable. No recycling activity is shown.

32. Eventually, Diamond revised his solid waste handling proposal to Health and eliminated recycling, wood waste chipping, rock crushing and the landfilling of non-inert demolition waste from the proposed operation plan. After much contention and controversy, Health issued an inert waste landfill permit to Diamond on September 13, 1993.
The permit was effective through December 31, 1993, with annual renewal required thereafter. It listed the following as appropriate for the site to accept for landfilling: concrete, asphalt, bricks, masonry, clean soils and gravel, clay products, and other materials determined by Ecology to be inert.

33. In 1995 Diamond again proposed solid waste recycling operations. Planning advised that recycling facilities were not a permitted use in the Residential zone but that storage of waste materials was allowed as a special use. Oscar Graham, Senior Planner stated that the storage provisions included recycling and advised Diamond that land use approval would require issuance of a Special Use Permit.

[3] A similar provision was included in the 1991 UBC (adopted by the County in July 1992) and the 1997 UBC. Each of these provisions was incorporated into the Skagit County Building Code.

34. Graham also noted that he had reviewed County records to determine if a Special Use Permit ever had been issued for the site. He found that no such permit had been issued, but stated that the "current use of the site has been determined to be a grandfathered or pre-existing use." He did not elaborate on what the current use of the site was or on the scope of the grandfathering.

35. Diamond appealed Graham's administrative decision that a Special Use Permit was required for recycling. In his appeal, Diamond argued that such a permit was unnecessary because recycling was an implicitly included activity in the Health Department's previously issued inert waste landfill permit. He asked that a Special Use Permit be issued to him retroactive to September 1993 or that a ruling be made that such a permit is not necessary to conduct recycling operations on the property. No argument was made that recycling was a grandfathered use.

36. The Hearing Examiner denied the appeal. The County Commissioners upheld the Hearing Examiner on September 5, 1995. The Commissioners' decision became final when an attempt by Diamond to seek further review in Superior Court was dismissed on procedural grounds.

37. In the fall of 1996, commercial sales of landscaping materials (soil, beauty bark, gravel, peat moss) were made from Diamond's property. Planning advised Diamond that he did not have a nonconforming right to such a use. A Notice and Order to Abate was issued on November 21, 1996, ordering him to cease this retail use within the Residential district or apply for a Special Use Permit. Diamond did not appeal this notice.

38. On December 18, 1996, Planning wrote to Diamond's attorney and outlined a process for determining whether "the pit" was in fact a non-conforming use. Receipts showing excavation activity were requested. The letter went on to detail land use restrictions applicable to the site, including the following:

> No imported materials may be sold from the site, i.e., bark, topsoil, gravel, sand or similar materials, which do not originate from the site.

and

> Any current or proposed use of the property which is not contained within the scope of the permitted landfill operation, or is part of a "legally" pre-existing use of the pit, must be undertaken <u>only</u> after a special use permit has been approved.

39. On March 19, 1997, Diamond was advised of Planning's determination on the nonconforming use issue. The determination was that "<u>the pit</u> is a nonconforming use" (emphasis added) regulated by the code provision applying to nonconforming uses. However, the letter went on to note that the restrictions on sales of imported materials and the scope of the landfill permit (inert waste only), as outlined in the December 18, 1996 letter, would be strictly enforced. In sum, the determination limited the grandfathered use to extraction and sales of

materials native to the site. This administrative determination of non-conforming use rights was not appealed.

40. The Health Department's inert waste landfill permit was renewed annually from 1994 through 2007. There is no evidence of landfill activity in the years 1994 through 2005. From 1996 through 2004, Diamond or his attorney filed annual reports to the Health Department about activities at the site and each year reported that there was nothing deposited into the landfill and that no landfill activity occurred.

41. The annual reports for 1997 and 1998 added that sand, gravel, peat "and other allowed material" was removed from the pit and sold for landscaping as allowed by Planning as a grandfathered use. No explanation was provided as to what "other allowed material" might be, but clearly it could not include imported materials which were beyond the scope of Planning's grandfather right determination.

42. In the report for the following year, 1999, the prior formulation morphed into the following:

> Sale of sand, gravel, peat, top soil and other allowed material was removed from the pit and sold as landscaping materials as allowed by the Planning and Permit Center as a grandfathered use of the property, as well as such activity allowed to gravel pits within the county.

43. Between September 1990 and September 2000, Health Department personnel periodically inspected the facility and did not observe any recycling of waste.

44. On July 24, 2000, the County adopted its current zoning regulations. The subject property was put into the Rural Reserve zone. Regulations for the Rural Reserve zone are set forth at SCC 14.16.320. Under those regulations neither landfilling, nor recycling nor solid waste handling of any kind is permitted outright. Uses not permitted outright can be authorized by issuance of a Special Use Permit, but again, landfilling, recycling and solid waste handling are not listed as potential special uses. Categories that are listed as special uses include "major" and "minor" utility developments, and outdoor storage of processed and unprocessed materials.

45.. Under SCC 143.16.600((2)(d) of the 2000 zoning regulations, "solid waste handling facilities" are explicitly listed as an unclassified use allowable only by permit, but allowed only in four specified zoning districts. The Rural Reserve zone is not one of them

46. On May 23, 2001, Linda Kuller, Senior Planner, wrote a letter to Diamond expressing the view of the County on his land use permit needs. She referenced the County Commissioners' 1995 decision upholding the requirement for a Special Use Permit to undertake recycling and "associated activities" on the site. She advised that the current zoning regulations still require a Special Use Permit for any such use. She stated that recycling and solid waste handling activities are by definition "utilities." Beyond land use requirements, she noted that additional permits from the Health Department would also be needed. She expressed the view

that a demolition waste landfill permit from Health might be difficult to obtain because of water contamination concerns.

47. Aerial photos taken in 2001 (Ex 152), 2003 (Ex 155), 2005 (Ex 161) and early 2006 (Ex. 164) show the pit to be almost totally covered with vegetation and no large piles of stockpiled wastes.

Skagit Hill Activities

48. In June of 2006 Waldal, through Avis LLC, purchased the pit on the northern parcel of Diamond's two parcels. Diamond retained the southern parcel which contains a dwelling and garage, but initially leased it to Waldal. Waldal thereafter went into business as Skagit Hill Recycling.

49. In September 2006, Health transferred its inert waste landfill permit from Diamond to Skagit Hill Recycling. Almost immediately Skagit Hill began importing waste material from off site. From the outset of its operations the focus was on recycling. Skagit Hill began stockpiling imported material on the flat upper portion on the west side of the property, as well as in the pit. The wastes accepted were various including concrete, asphalt from construction activities and mixed wastes from construction, demolition and land clearing (CDL waste). Some of these wastes, particularly the CDL wastes, contained non-inert materials. Waldal's opinion, then, was that his recycling of CDL wastes was exempt from solid waste handling permit requirements. He did not attempt to acquire any land use approval for his activities

50. The 2006 annual report for the inert waste facility showed the acceptance of nearly 30,000 cubic yards of waste material from offsite. This material was brought in, not for disposal, but for the purpose of recycling.

51. After some discussion of Waldal's operations, Health in March 2007 renewed Skagit Hill's landfill permit for the year 2007 with a requirement that existing piles of CDL waste be covered and then removed from the site by October. The renewed permit was restricted, as before, to the receipt of inert waste. But, in July of 2007 an inspection disclosed an increase in the amount of CDL waste at the site. That summer Skagit Hill began screening imported construction and demolition debris.

52. In 2007 non-inert material accepted at the site included partially separated CDL debris, plastics, carpeting, fiberglass, metal, asphalt shingles and rubber tires. Grinding machinery was operated at the site and piles of material containing non-inert wastes were present. In addition, in 2007 Sierra Pacific Industries delivered approximately 6,140 cubic yards of boiler ash derived from land clearing debris and other wood. The covering of CDL waste piles and their removal by October, as required by the permit, did not occur.

53. After review of the ongoing activities at the site the Health Department refused Waldal's request for another renewal of the solid waste landfill permit for the year 2008. That decision is still in litigation. Nevertheless, in 2008 similar waste as received before was accepted at the site and the activity was further increased. For 2008, Skagit Hill reported the receipt of

CDL from throughout the region and the recycling of some 17,000 tons of various waste materials.

54. Photographs taken in February, June, August, and October 2008 (Ex 207, 208, 209, 217, 220, 224, 225) show the very large piles of waste on the site and the mixture of materials imported, including metals, plastics, treated wood among the CDL wastes, as well as rubber tires.

55. Skagit Hill's operations have involved numerous trips by heavy trucks delivering waste and taking processed or sorted materials away. Heavy equipment has also been operated on site, including a rock crusher, shredding equipment, a trommel, track hoes, and earth moving and loading machinery. The level of activity on site has greatly exceeded anything that was ever observed there in the past.

56. On August 21, 2008, Planning sent a letter to Skagit Hill stating that a large amount of fill had been placed on the north side of the property and had altered the natural drainage course of surface water. Removal of the fill was requested. On September 5, 2008, Planning sent another letter this time advising of multiple code violations including recycling and the location of an unpermitted trailer on the property, as well as the alleged drainage obstruction. On September 9, 2008, a Notice of Violation was sent from Planning to Waldal detailing the violations asserted in the September 5 letter and ordering their correction. No response from Waldal to these communications was received. Subsequent inspection by Planning revealed that none of the corrections ordered had been made. This led to the issuance of NOA#1 on November 13, 2008.

57. The Examiner finds that Skagit Hill was operating a "landfill/recycling facility" when NOA#1 was issued. He finds further that no land use permit authorizing such activity had been issued at the time and that none has been issued since then.

58. A print-off from Skagit Hill's website in January of 2009 showed that the company was offering the property as a drop off site for asphalt, brick, brush, concrete, metals, new and used wood debris, pallets, railroad ties, stumps, and tires, and CDL debris.

59. Waldal scheduled a predevelopment meeting with the County on February 19, 2009 in order to review permitting requirements for a solid waste recycling facility. To date, however, no Special Use Permit or other land use permit has been applied for.

60. Photographs taken in April 2009 depict the continued existence of huge piles of waste in and above the pit. (Ex 228, 229, 230, 231, 232) As of April, the large pile of dirt in the northwest portion of the property remained in place.

61. Waldal testified to the discovery of some demolition debris on site when he acquired the property in 2006 and deposited at times unknown. There is no question, however, that he introduced vastly increased quantities of such debris to the property after he acquired it.

62. An idea of the massive increase in materials on site can readily be seen by comparing the aerial of the site in 2006 before Skagit Hill began operations (Ex 164) and aerials of the site in April of 2009 (Ex's 229-233).

63. A trailer that Skagit Hill used for an office was present on the south portion of the property (then rented by Skagit Hill) near the road when NOA#1 was issued. A building permit for a prior trailer, obtained by Diamond in 1997, had by then expired. Another trailer had been put in its place. Skagit Hill's use of the replacement office was never reviewed and approved under the building code. Subsequently, sometime between April and August 2009, Skagit Hill moved the trailer to the northwest corner of its own property. No application was made for a building permit for relocation of the office trailer and no building permit was issued for it on the new site.

64. An aerial photo taken in August 2009 (Ex 243) shows that the stockpile of material on the northwest corner of the property had been entirely removed. This was the pile alleged to have blocked drainage. The picture shows that office trailer had been moved to the location where the stockpile formerly was.

65. The obstruction of drainage issue was the outgrowth of a complaint from the property owner to the north. The preponderance of evidence is that once the stockpile in the northwest corner of the Skagit Hill property was removed, the drainage problems which prompted the complaint were cured.

66. On November 18, 2009, the County obtained an injunction against Skagit Hill based on the operation of a solid waste handling facility without a valid permit from Health. (Though the denial of renewal of the inert waste permit for 2008 is still on appeal, no stay of that denial had been entered). The Court ordered Skagit Hill to cease using the property for the acceptance of any type of solid waste without a valid solid waste permit, to cease all solid waste handling activity on the property without a valid solid waste permit, to abate all non-inert waste on the site accepted after March 14, 2008 (the date of permit denial) within 90 days, to remove all boiler ash with 75 days, and to provide proof to the Health Department of material removed.

67. On February 5, 2010, the Court modified the injunction order with respect to the ash pile, calling for it to be removed before March 8, 2010 to an impervious surface on an upland portion of the site. The orders to cease acceptance and handling of solid waste were modified to provide that in lieu of a valid permit, operations could proceed if an agency or court made a determination of exemption from solid waste permit requirements. In addition Skagit Hill was ordered to apply to the Health Department for a solid waste permit authorizing, as a minimum, handling and storage of ash on the site.

68. Skagit Hill applied to Planning for a grading permit to move the ash pile, but was advised by Planning that no permit was required to move the ash to another part of the property pursuant to Court order.

69. For 2009, Skagit Hill reported the recycling of less material -- about 7,045 tons. The amount of material on site had been significantly reduced by the end of the year, but some solid

waste remained. An inspection on January 5, 2010 found the pit area clear of demolition material but observed piles of ground demolition waste along the northern property line. Recent aerial photos show a site that has been extensively cleaned up in comparison to its condition before the injunction was issued.

70. On July 14, 2010, the Health Department requested the County Prosecutor to continue to pursue the injunctive action, based on the continuation of operations at Skagit Hill. The letter said that solid waste continues to be placed and stored at the site. The letter asserted that solid waste processed at the site had been removed to Rasar State Park and then subsequently returned to Skagit Hill's site.

71. The Rasar State Park incident involved observations by Health inspectors. An inspector followed a loaded truck from Skagit Hill to Rasar State Park on March 31, 2010. A day later, on April 1, 2010, two inspectors sampled material off-loaded at the park for use as top soil and found that ground solid waste debris had been mixed with the material used for soil. The preponderance of evidence is that the mixture containing solid waste that was brought to the park originated at Skagit Hill.

72. In late March and early April 2010, grading was observed at Skagit Hill, rearranging piles of debris in the northeastern portion of the property. Subsequently the ash pile was moved out of the pit to the north central portion of the property. Appellant asserts that the preliminary grading of debris was necessary to make room on the site for removal of the ash from the pit pursuant to the Court's order. To some degree this is true.

73. But, in addition to site preparation, the grading activity on the site appeared to be associated with removing processed waste from the site. The evidence is not convincing that the recent grading involved solid waste material newly introduced to the site. But, the loading and other activity observed at the same time does support a finding that solid waste material or landscaping products continue to be sold from the site. The Rasar Park incident reinforces such a finding.

74. NOA#2 was issued on May 5, 2010. At that time and at least up to the time of hearing there were two freestanding signs adjacent to the highway. Testimony was given that the NOA is for the green sign nearest the relocated trailer office. It says for "For Sale" in large letters, shows the recycling logo and then lists at least some material that would have to have been imported to the site.

75. After reviewing the matter, Planning determined that the 1991 fill and grade permit issued to Diamond has long since expired. Skagit Hill has never obtained a grading permit for its operations at the site. The application for a grading permit to move the ash was never acted on. Though told no permit was needed to move the ash, Planning also advised, that if Skagit Hill wanted to pursue a grading permit, the application was incomplete. There has been no follow up.

76. Any conclusion herein which may be deemed a finding is hereby adopted as such.

BACKGROUND DISCUSSION

Distinction Between Land Use Authority and Health Department Permits

1. Authority to carry on a particular type of activity in a particular place is governed by zoning law and is referred to here as land use authority. Conformity with laws governing health and safety is a separate matter governed by a set of laws and regulations distinct from the zoning code. This case involves much confusion on all sides about the relationship between these separate legal regimes.

2. Sometimes the underlying concerns of land use laws and health and safety laws overlap. But, in every case where both land use and health and safety issues are present, approval under both sets of laws is needed. Approval under one regime never, in itself, constitutes approval under the other.

3. So, possession of a solid waste handling permit of some sort from the Health Department simply cannot constitute land use approval.

4. This case is solely about land use authorization. Such authorization may be derived in three ways: (a) by legislative zoning which allows a use outright, (b) by issuance of a land use permit (such as a Special Use Permit), or (c) by continuation of non-conforming use.

5. Land use authorization generally runs with the land and lasts as long as the use is continued, even though the zoning laws may change and a particular use may cease to be allowed in a particular zone. As long as a use continues, land use approval does not have to be renewed.

6. By contrast, health and safety requirements can be imposed at any time on otherwise fully lawful uses. Compliance with such requirements can be made subject to permits which expire and require renewal after a fixed period. The permit requirements under the Health-Department-administered solid waste handling standards are a case in point.

7. Thus, a permit from the Health Department may be needed in circumstances where no land use permit is required - for example, when a use is allow outright by the zoning code, or when a lawful non-conforming use is being pursued. Commonly, however, permits from both Health and Planning will be required for a use.

Nonconforming Uses

8. Land uses that were legal when begun, but that do not conform with present law, may continue, although they are subject to abandonment. After abandonment, the revival of any use is treated like a new use and can only occur by conforming to laws in effect at the time of application.

9. The policy of the land use code towards non-conforming or grandfathered uses is to seek their eventual elimination. There are limitations on expanding or altering non-conforming uses. They are restricted to the scope of use being made at the time the law changed. Standards for abandonment are often strict.

10. The abandonment provisions in effect for non-conforming uses in Skagit County from 1979 to 2000 deemed such uses abandoned if discontinued for any reason for one year. See former SCC 14.04.270(4).

11. The scope of a nonconforming use is sometimes difficult to determine. In the case of quarries, there is a theory that, at least in Skagit County, various customary ancillary uses were included within the non-conforming mining right for purposes of defining the scope of what survived the onslaught of zoning. These purportedly include the right to a certain amount of landfilling and the right to sell some imported material for re-use.

12. On this subject, the actual history of use at a particular location is the key. It is irrelevant what might be viewed as customary activities county wide. Whatever congeries of usage were in fact associated with mining at a particular spot are the focus. If landfilling was carried on or if imported materials were sold, those activities may be part of the grandfathered right, but only to the extent that they were being pursued at the particular site when the law changed, and then only if they have been continuously pursued since then.

Definitions/Semantics

13. NOA#1 (November 13, 2008) asserts the unlawful operation of a "use, a landfill/recycling facility." Neither the term "landfill" or the term "recycling" is or has historically been defined in the Skagit County Land Use Code.

14. In the current Solid Waste Handling Standards, used by Health in administering its solid waste permit program, the definitions are as follows:

> "Landfill" means a disposal facility or part of a facility at which solid waste is permanently placed in or on land including facilities that use solid waste as a component of fill. WAC 173-350-030.

> "Recycling" means transforming or remanufacturing waste materials into usable or marketable materials for use other than landfill disposal or incineration. Recycling does not include collection, compacting, repackaging, or sorting for the purpose of transport. WAC 173-350-030.

15. Viewing the entire record, the Examiner is convinced that the term "landfill/recycle facility" was used by Planning in NOA#1 in a slightly different sense than defined in the above WAC definitions. Planning's main concerns over time have been the importation of waste materials involving either their placement on site, or the resale of such materials after some sort of processing or sorting, not necessarily involving remanufacturing or physical transformation.

This is the "use" which constitutes the violation under NOA#1. Such an operation would necessarily include the storage of imported materials while they await eventual resale in some form.

16. NOA#1 states that the operation of the landfill/recycling use is not a permitted or a special use in the Rural Reserve zone. By this the Examiner understands the Notice to mean that the use is not among those uses permitted outright in the zone, nor a use for which a Special Use Permit has been issued by Planning. This does not necessarily mean that a Special Use Permit for such a use, or some part of it, could not be obtained

CONCLUSIONS OF LAW

Preliminary issues

1. The Hearing Examiner has jurisdiction over the subject matter of this appeal. SCC 14.44.120.

2. The Notice and Order to Abate procedure may be used in the absence of prior recourse to the Notice of Violation process. Under SCC 14.44.110(2)(a) issuance of a Notice and Order to Abate is entirely discretionary "whenever the Administrative Official has reason to believe that a violation of Titles 14 and/or 15, and/or a land use statute or regulation should be addressed by a notice and order proceeding."

3. SCC 14.44.140(2) provides:

> Enforcement of any notice and order shall be stayed when appealed to the Hearing Examiner pursuant to SCC 14.44.120, except when the Administrative Official determines that the violation will cause immediate and irreparable harm and so states in the notice and order.

In neither NOA#1 or NOA#2 did the Administrative Official state that the violation will cause immediate and irreparable harm.[4] Accordingly, a stay of enforcement of the NOAs involved here is in effect until the appeals are resolved.

4. The Examiner concludes that the stay operates to suspend the assessment of civil penalties until all appeals are concluded. The assessment of civil penalties is an aspect of enforcement and thus subject to the stay.

[4] The recent letter of the County's Director of Public Health (July 14, 2010) to the County Prosecutor is not relevant to the issue of a stay in the instant proceeding.

5. Under the civil penalties section of the enforcement chapter, a person is not found to be in violation until the end of the appeal process, when a determination of violation is made and not reversed or otherwise stayed. SCC 14.44.030(4).

6. Civil penalties accrue for each day that a violation charged continues past the required compliance date. Therefore, it is possible for penalties to accumulate while an appeal is pursued and subsequently be enforced after a determination of violation is made.

7. The cure for the accrual of these penalties is simply to comply with the order. Failure to comply with a Notice and Order to Abate during the pendency of an appeal is at the appellant's risk. If it turns out that the County was wrong, appellants will owe nothing and may have other remedies against the County as well. But an appellant decides not to comply with a Notice and Order to Abate at his own peril.

8. In this case, if it ultimately develops that a final order of violation respecting any of matters charged is issued, the County, in its discretion, may elect to pursue the assessment of civil penalties or not. Some of the violations may be considered insufficiently serious for the enforcement of penalties, while others may be viewed as appropriate subjects for such monetary exactions. If the County wishes to pursue civil penalties, there should be a separate hearing devoted to the issue of when, if ever, compliance was achieved, and what the penalties should be.

NOA#1

9. The <u>first asserted violation</u> is:

> (1) SCC 14.16.320 -- Operation of a use, a landfill/recycling facility, that (1) is not a permitted use on property zoned Rural Reserve and (2) does not qualify as a nonconforming use under SCC 14.16.880

10. The Examiner concludes that the appellant was violating SCC 14.16.320 when the NOA was issued, and that this violation is ongoing so long as the appellant continues to sell solid waste products generated from material imported to the property. The Rural Reserve district regulations list neither landfill nor recycling as uses permitted outright. No land use permit has been issued that authorizes a "landfill/recycling facility" or anything substantially similar. Thus, the use is not a permitted use in the zone.

11. The Examiner concludes that operation of a "landfill/recycling facility" does not qualify as a nonconforming use under SCC 14.16.880, or, alternatively, that it does so only in the very limited sense described below.

(a) There are no customary accessory rights to accept, store or sell wastes that accrued to this site prior to the adoption of the zoning code of 1979. Any grandfathered rights are based on historic use. Uses allowed by code on Natural Resource Lands within a Mineral Resource Overlay are irrelevant to the issue of non-conforming use.

(b) The Examiner concludes that the determination of County Planning in 1997 as to the scope of the non-conforming use right on the property is correct insofar as it recognized a grandfathered right to mining consisting of the extraction and sale of products derived from the property -- sand, gravel, peat, and topsoil.

(c) If any limited grandfathered right to landfilling was created prior to 1979 (in the Janicki years), that right was clearly abandoned sometime in the 1990s when the landowner, by his own admission, failed to pursue his inert waste landfilling project. As noted, during those years the law provided that abandonment occurred after non-use for one year "for any reason whatsoever."

(d) If the 1991 grading permit is seen as conferring any land use rights, that permit expired -- again sometime in the 1990's --when grading to construct an inert waste landfill ceased. Under the relevant 1998 Building Code provision, a building permit expired when the work authorized by such permit was "suspended or abandoned" for a period of 180 days.

(e) Whether the condition limiting landfill to "inert waste" survived the expiration of the grading permit is irrelevant, because no permission for any kind of deposition of solid waste existed thereafter.

(f) Under the facts, there were no pre-existing (pre-1979) recycling activities in the the modern sense of transforming, processing or remanufacturing solid waste on the property for eventual sale.

(g) Planning's un-appealed administrative decision in 1997 determining the scope of the non-conforming use right foreclosed any further argument by Diamond that his grandfathered rights included any right to import, store, process and resell materials on the site. His annual reports reflect this understanding of the limits on the grandfathered right.

(h) The only activity beyond the scope of the 1997 administrative decision that Diamond reported was "such activity as allowed in gravel pits within the County." This was an attempt to get around the non-importation provision of the grandfathering decision. As noted in (a) above, this notion has no legal basis.

(i) The 1997 administrative decision defining the non-conforming use right should be viewed as a final land use determination affecting the property, binding on Diamond's successors in interest. The determination effectively decided that there are no "landfill/recycling" rights even to the kind of acceptance, storage, sorting and eventual resale of waste engaged in by the Janickis.

(j) Alternatively, if any rights to accept, store, sort and resell imported materials survived the 1979 zoning code, such rights are restricted to the small amount of the limited list of waste items handled during the Janickis' tenure. During the Diamond years, such importation and resale was consistently opposed by Planning which insisted that a permit was required for such activities. Diamond's activities were not subject to the grandfathering concept. Any lawful

importation, storage and resale of materials by Diamond was restricted to the scope of the Janickis' "recycling."

(k) The evidence is overwhelmingly clear that Skagit Hill vastly expanded the scale of the importation, storage and processing of wastes from that which existed in the Janickis' day. To the extent of this expansion, any grandfathered right has been exceeded and the use is not lawful absent a permit.

(l) Before Skagit Hill took over the property, the operation was nearly moribund. Skagit Hills' operations constituted an increase in volume and intensity of use of such magnitude as to effect a fundamental change in the nonconforming use.

12. The second asserted violation is:

> (2) SCC 15.04 and IBC 105.1 -- Alteration of a structure without the required County review, permit or inspections.

13. The Examiner concludes that Building Permit approval was required for Skagit Hill to use the trailer as a business. No such approval was obtained

14. The third asserted violation is:

> (3) SCC 15.04 and IBC 105.1 -- Occupying a structure not permitted for occupancy by employees or the public.

15. The Examiner concludes that occupancy of the trailer office by employees occurred without building code compliance.

16. The fourth asserted violation is:

> (4) Obstructing the natural drainage course of surface water.

17. The Examiner concludes that this violation was not proven by a preponderance of evidence. In any event, any problem there was has been cured by removing the stockpile that was alleged to be causing the difficulty.

18. The fifth asserted violation is:

> (5) SCC 15.04, IBC 105.1 Acceptance of solid waste, including demolition debris and inert wastes, in violation of a fill and grade permit issued on July 29, 1991.

19. The Examiner agrees that the acceptance of demolition debris, to the extent non-inert, would have been a violation of the 1991 fill and grade permit had such permit been in effect in 2008 when the NOA was issued. However, that permit had long since expired and thus could not be violated. The charge that inert wastes were accepted was not a violation of the 1991 permit, since it was conditioned to allow inert wastes only. Accordingly, the Examiner

concludes that the fifth asserted violation was not shown to state legal requirements that could be enforced against the appellants.

NOA#2

20. The first asserted violation is:

> (1) Grading without a valid grading permit as required by SCC 15.04 and IBC J103.1. No grading shall be performed without first obtaining a permit from the Building Official. The original grading permit for this parcel had expired due to inactivity by the previous landowner. Your recent grading and/or filling activities, including the grading of land on the north and east sides of the property without the required permit violates these code sections

21. Insofar as the grading observed in 2010 was directed toward moving the ash to another location on site, the Examiner concurs that no permit was needed. However, to the extent that such grading was associated with the sale of solid waste or for other purposes, the Examiner concludes that a permit was required and that grading without it was a violation.

22. With limited exceptions, any kind of earth moving requires a grading permit. The IBC at Section J103.2 exempts "refuse disposal sites controlled by other regulations" and "mining, quarrying" and related stockpiling. The grading in question had no connection with mining or quarrying or related activity. The Building Official, who works with the IBC daily, testified that he does not think the subject pit is what was meant by "refuse disposal sites." The Examiner concurs with this interpretation. The grading was not exempt.

23. The second asserted violation is:

> (2) SCC 15.04 and IBC 105. Construction shall not occur without first making application and obtaining the required building permit. You recently relocated the commercial coach from its previous location on parcel no. P38620 to its present location on parcel no. P101465 without the required building permit. The commercial coach is occupied and is being used as an office without an occupancy permit. The placement of the commercial coach on the property without the required permit violates these code sections.

24. The Examiner concludes that the appellants violated the building code when it relocated and re-occupied the trailer office without review and approval under the Building Code.

25. The third asserted violation is:

> (3) SCC 14.16.430 Rural Reserve. The development regulations applicable to this zoning designation do not provide for the sale of solid waste and/or landscaping products, including gravel, rock, asphalt, etc. either as a permitted or special use. The processing, sale, and or, further distribution of materials that have been

imported to the property constitute a violation of this section of the Skagit County Code.

26. This is essentially the same as the first asserted violation in NOA#1. Such violation continued through May 10, 2010, the date of NOA#2. The Examiner concludes that SCC 14.16.320 has been violated for the reasons set forth above. The use is not permitted outright; there is no land use permit. Grandfather rights do not exist for the cited activities or, alternatively, any such rights are of such limited scope as to render the appellants' uses an expansion of those rights.

27. The fourth asserted violation is:

> (4) SCC 14.16.820 Signs. On premises signs may only display advertising copy strictly incidental to the lawful use of the premises on which it is located. The present sign on the property advertises the sale of screened dirt, rock and bark. The sale of engineered soil, rock recycled from concrete and bark is not lawfully permitted uses of the property.

28. It is unclear what the terms screened dirt and rock refer to. They may relate to native materials covered within the grandfathered quarrying right. Bark, on the other hand, would be akin to the landscaping products Diamond was prevented from selling at the site. It would have to be imported for sale, not constitute waste, and therefore not be within any non-conforming use rights. There is, of course, no permit for any sales operations on this property. Thus, the sign which is the subject of the NOA is in technical violation of the code and should be removed.

Corrective Action

29. The Examiner concludes that the corrective action listed for each of the violations asserted in NOA#1 and NOA#2 is reasonable. If at any future time any of the violations asserted become final, the enforcement of sanctions, such as monetary penalties, needs to be evaluated in light of the gravity of the each.

30. Any finding herein which may be deemed a conclusion is hereby adopted as such.

DECISION

The Notice and Order to Abate, dated November 12, 2008 is affirmed in part and reversed in part:

(1) Violation 1 is affirmed.
(2) Violation 2 is affirmed.
(3) Violation 3 is affirmed
(4) Violation 4 is reversed.
(5) Violation 5 is reversed.

The Notice and Order to Abate, dated May 5, 2010 is affirmed in part and reversed in part.

(1) Violation 1. To the extent the grading was performed to comply with a Court order the violation is reversed. Otherwise the grading required a permit, and the violation is affirmed.
(2) Violation 2 is affirmed.
(3) Violation 3 is affirmed.
(4) Violation 4 is affirmed.

Should any determination of violation become final and the County elects to pursue enforcement of civil penalties, a new hearing before the Examiner shall be scheduled to deal with the matter.

SO ORDERED, this 23 day of August, 2010

Wick Dufford, Hearing Examiner

Transmitted to Appellants and County on August 23, 2010.

See Page 1, Notice of Decision, for Reconsideration and Appeal information.