



Notice of Hearing Examiner Decision

10/09/2020

To: Interested Parties and Parties of Record

RE: Project Name: Kitsap Quarry Admin Appeal
 Appellant: Chico Creek Task Force, Jack Stanfill
 2461 Northlake Way NW
 Bremerton, WA 98312
 Application: Administrative Appeal
 Permit Number: 20-02990

The Kitsap County Hearing Examiner has **DISMISSED** the land use application for **20-02990: Kitsap Quarry Administrative Appeal, subject to the conditions outlined in this Notice and included Decision.**

THE DECISION OF THE HEARING EXAMINER IS FINAL, UNLESS TIMELY APPEALED, AS PROVIDED UNDER WASHINGTON LAW.

The applicant is encouraged to review the Kitsap County Office of Hearing Examiner Rules of Procedure found at:

<https://spf.kitsapgov.com/dcd/HEDocs/HE-Rules-for-Kitsap-County.pdf>

Please note affected property owners may request a change in valuation for property tax purposes, notwithstanding any program of revaluation. Please contact the Assessor's Office at 360-337-5777 to determine if a change in valuation is applicable due to the issued Decision.

The complete case file is available for review at the Department of Community Development, Monday through Thursday, 8:00 AM to 4:00 PM and Friday 9:00 AM to 1:00 PM, except holidays. If you wish to view the case file or have other questions, please contact Help@Kitsap1.com or (360) 337-5777.

CC: Appellant: Chico Creek Taskforce – Jack Stanfill, jackstanfill@hotmail.com
 Representative: Bryan Telegin – Bricklin Newman LLP, telegin@bnd-law.com
 Property Owner: Ueland Tree Farm, craig@uelandfamily.com
 Representative: Margaret Archer – Gordon, Thomas, Honeywell Law, marcher@gth-law.com
 Authorized Agent: Mark Mauren, mauren.wa@gmail.com
 DCD:
 DCD Representative: Lisa Nickel – Kitsap Co. Pros, lnickel@co.kitsap.wa.us
 Interested Parties: None

KITSAP COUNTY HEARING EXAMINER

**Kitsap Quarry Administrative Appeal
HE Appeal 20-02990**

DECISION

October 9, 2020

I. FINDINGS

1. Background. Kitsap County elected to take no action on a request from Chico Creek Task Force and Mr. Stanfill to “issue a stop-work order to the Kitsap Quarry” and “require the quarry owner to apply for a conditional use permit.”¹ The quarry was initially established as a legal non-confirming use in the 1960s, with various permits secured from the County and state agencies over the ensuing years. The County’s Department of Community Development (“DCD”) responded to the request with this e-mail:

We received your request regarding the nonconforming use status and current zoning of the Kitsap Quarry. At this time we will not be issuing a stop work order. The quarry has been in operation since before the CUP requirement was added to code and, as such, it is allowed to continue to operate without a CUP even if other permitting requirements may apply. Please advise if you have further questions.²

Chico Creek Task Force and Mr. Stanfill appealed this e-mail to the Hearing Examiner. The County and quarry owner, Ueland Tree Farm, LLC, asserted code enforcement is discretionary, and the Examiner lacks jurisdiction over a decision to not act.

2. Parties.

Appellant Chico Creek. Chico Creek Task Force and Mr. Stanfill, represented by Mr. Telegin of Bricklin & Newman, LLP.

County or DCD. Kitsap County Department of Community Development, represented by Ms. Nickel, Kitsap County Sr. Deputy Prosecuting Attorney.

Owner of Kitsap Quarry, Ueland Tree Farm. Ueland Tree Farm, LLC, represented by Ms. Archer, Gordon Thomas Honeywell LLP.

3. Pre-Hearing Procedures. A pre-hearing conference was held to establish pre-hearing deadlines, including for filing the record; exhibit and witness lists; and pre-hearing motions.³ The parties met these deadlines, and the County and Ueland Tree Farm filed a motion to dismiss for lack of jurisdiction, which Chico Creek opposed. Wishing to hear oral argument

¹ Record Exhibit 1 (Chico Creek Code Compliance Request, June 23, 2020), p. 1.

² Record Exhibit 2 (DCD e-mail response, June 26, 2020).

³ Pre-Hearing Order (June 27, 2020).

before ruling, the Examiner deferred the jurisdictional decision to after the hearing.⁴ Before the hearing, the County and Ueland Tree Farm filed a motion in limine, asking the Examiner to strike evidence on traffic impacts as irrelevant. The Examiner allowed the evidence, but given the appeal is not a permit hearing, requested the evidence be tailored to fit the legal framework.⁵

4. Hearing. The hearing was held September 10, 2020. Due to the COVID-19 response, the hearing was held via video link, with the party representatives, witnesses, and Examiner participating remotely. The remote process worked satisfactorily, allowing the parties to present their cases while addressing COVID-19 related restrictions.

5. Witnesses. These witnesses provided sworn testimony:

- **Chico Creek:** Mr. Stanfill; Mr. Vaught; and Ms. Malkowski, citizens who live proximate to the quarry.
- **County.** Mr. Diener, DCD Manager of Development Services and Engineering; Mr. Lynam, County Fire Marshal, who oversees DCD's Code Enforcement Division; and Mr. Shea, PE, County Traffic Engineer.
- **Ueland Tree Farm.** Mr. Mauren, Ueland Tree Farm, LLC, Chief Operating Officer.

6. Exhibits. These exhibits were admitted, ultimately without objection:

- **Administrative Record:** Exhibits 1-2 (Chico Creek's Code Compliance Request and DCD's E-Mail Response).
- **Chico Creek.** Exhibits APP 1-43.
- **County.** Exhibits DCD 1-14.
- **Ueland Tree Farm.** Exhibits OWN 1-23.⁶

Chico Creek's Exhibit 43 (Mr. Gribayedoff's Declaration) and Ueland Tree Farm's Exhibit 17 (Mr. Bates's Declaration) were initially at issue, due to witness cross-examination availability. However, the parties agreed to admission with the understanding that, given the lack of cross-examination, appropriate weight be given to each.

The County asked the Examiner to take official notice of Ordinance 565-2018, Att. 10.⁷ There were no objections; the request is granted.

⁴ Order on Motions to Dismiss (August 19, 2020).

⁵ Order on Motion in Limine (September 9, 2020).

⁶ See parties' initial and rebuttal exhibit lists, and Examiner Clerk Master Lists.

⁷ See DCD's Post-Hearing Brief, p. 9, FNs 33 and 34. Official notice was discussed at the beginning of the hearing and at the end, with the parties not objecting to official notice of County official land use enactments.

7. County Permitting Structure - Overview. The County does not prohibit the use. But if proposed today it would need to obtain a conditional use permit. The County has treated the use differently over the years, from having no conditional use permit requirement at initial use establishment around 1963; to requiring an unclassified use permit in 1971; to permitting the use outright through a mineral resource overlay from 1998-2018; to as of 2018, imposing a conditional use permit requirement.⁸ Post-1990 enactments were promulgated under Washington land use laws specific to mineral resources.⁹

8. Past Permitting.

8.1 Before Ueland Tree Farm purchased the quarry in 2012, it confirmed use status with the County. In response, the County stated:

Research indicates that Kitsap Quarry has been operating an aggregate extraction and processing business in its current site since the early 1960s. Activities conducted on the site include rock crushing, retail and wholesale aggregate sales, hauling by way of Kitsap Lake Road NW, and storage of equipment used in the business. Numerous buildings also exist on the site, including office, weight scale, repair facilities and a covered area to store equipment.

Per Kitsap County Code 17.460, the Department of Community Development acknowledges that Kitsap Quarry is a historic, legal, non-conforming permitted use as long as activities remain consistent with historical uses and existing permits.¹⁰

8.2 The following year, after purchasing the site, Ueland Tree Farm requested, and the County approved, a Site Development Activity Permit, which authorized construction of a second access road. This additional access alleviated truck traffic on the original haul route, reducing impacts on the right-of-way of concern to Chico Creek,¹¹ and diverting most truck traffic to Werner Road.¹² “The primary purpose of the [32-foot wide, 3,100 lineal foot gravel access] road project is to redirect truck traffic from the Kitsap Quarry through the site, and onto Werner Road.”¹³ There was no condition in the State Environmental Policy Act, Ch.43.21C determination or in the Site Development Activity Permit that Kitsap Quarry must use only this new access road.

8.3 Kitsap Quarry continues to use the existing haul route, though testimony described the original route as not being the primary route. The new route is shorter for most

⁸ This history is detailed in DCD’s Post-Hearing Closing Brief, p. 9, with references to Exhibits DCD-1, 2, and 5; APP-28 and 35; and, Ordinance 565-2018, Att. 10.

⁹ See RCW 36.70A.050, .060, .131, and .170, requiring designation and conservation of mineral resource lands with long term commercial significance.

¹⁰ Exhibit DCD 8. The correspondence identifies the site’s five tax parcel numbers as starting with 202401, and followed by 3-004-2003, 2-025-2000, 2-024-2001, 2-012-2005, and 2-011-2006. The County’s legal non-conforming use provisions are now at Ch. 17.570 KCC.

¹¹ Exhibits DCD-9 (SDAP Decision); OWN-13 (documentations of fees, conditions, and inspections).

¹² Exhibits OWN-18 (the e-mail between Mr. Stanfill and Mr. Ueland was described in Mr. Stanfill’s testimony on cross-examination.).

¹³ Exhibit APP-13 (MDNS).

hauling, thus requiring less fuel and travel time.¹⁴ There are exceptions. For example, recently when a nearby road project was under construction and the original access was the shortest route, there was an increase in traffic on the original route. Neither the original route, nor the new haul route, is impact free as both pass residential development. Chico Creek had notice of the site development activity permit and SEPA determination, and did not appeal. Road construction has since been completed.

8.4 The Department of Natural Resources has inquired with the County on whether the use is authorized, as this confirmation is a state permitting prerequisite. The County in 2014 stated the mine has “been approved under the local zoning and land use regulations,” and again in 2018 stated the mine has “been approved under the local zoning and land use regulations.”¹⁵ The latest confirmation supported Ecology’s 2019 Surface Mining Reclamation Permit issuance.¹⁶

8.5 Permits were also issued in the 1970s. The County issued an unclassified use permit for rock crushing in 1978, calling the use “a legal nonconforming rock quarry,”¹⁷ and confirmed with DNR in 1972 that the quarry was legal under the local zoning regulations.¹⁸

8.6 Chico Creek does not dispute the use’s original non-conforming use status, but asserts there was a use expansion and the quarry ceased operations for at least two consecutive years so lost its legal status. Chico Creek asserts this period commenced sometime before the County’s 2012 letter and culminated on May 6, 2013, when Ueland Tree Farm asked Ecology to place NPDES permit coverage back on active status.¹⁹

9. Quarry Use Continuation.

9.1 There is evidence that following the recession, quarry commercial activity lessened. Before Ueland Tree Farm’s acquisition, the former property owner asked Ecology to put its Sand and Gravel General Permit on inactive status as of February 4, 2010. Inactive status does not shut the facility or mean the owner has abandoned it. Aggregate removal from existing stockpiles may continue, and the form states the facility operates year-round.²⁰ Following acquisition, Ueland Tree Farm put the facility back on active status on May 6, 2013.²¹ Mr. Gribayedoff’s declaration stated that from when he purchased his home in 2011 until 2013, he did not see large trucks traveling to or from Kitsap Quarry.²² He did not detail when these observations were made and statements that no active mining was occurring were from an unidentified quarry employee and during an unspecified time frame. Mr. Stanfill also

¹⁴ Testimony of Mr. Mauren.

¹⁵ Exhibits OWN-12 and 14, and DCD-11.

¹⁶ Exhibits DCD-11 and OWN-14.

¹⁷ Exhibit DCD -5.

¹⁸ Exhibit DCD-4.

¹⁹ Exhibit APP-8. The County’s Site Development Activity Permit, stating a land use permit was not required (“[t]his SDAP does not require a land use action.”), was issued September 11, 2013. Exhibit DCD-9, p. 1.

²⁰ Exhibit APP-7 (Kitsap Quarry’s Permit Renewal for Continued Coverage under the Sand and Gravel General Permit, submitted to Ecology in 2009).

²¹ Exhibit APP-8.

²² Exhibit APP-43. Public records indicated the conveyance deed was recorded July 25, 2011. Kitsap County Auditor File No. 201107250237. *See* Ueland’s Post-Hearing Brief, p. 9, FN 8. The Declaration does not identify the month these observations commenced.

testified he visited the site on two or three occasions during a three-month period, one of which was a Saturday. During these visits, he observed a closed gate and no activity, but did see parked trucks.

9.2 The mine's former owner, Mr. Bates, provided a declaration stating he mined and sold aggregate during his nine-year ownership, with the quarry being active each year.²³ Mr. Mauren testified that there were aggregate stockpiles on site when Ueland Tree Farm purchased Kitsap Quarry. The Department of Natural Resources informed Mr. Stanfill that Kitsap Quarry was not listed as inactive, and that the DNR permit was supported by a Form SM-6, confirming the Quarry's compliance with local zoning codes.²⁴ DNR stated in 2012, "[t]he site currently has a permit and is not listed as inactive."²⁵

9.3 The Surface Mining Act requires a reclamation permit (RCW 78.44.081), and DNR cannot issue that permit without confirming local zoning code compliance through a signed Form SM-6 (WAC 332-18-01003(1)(c)(i) (Applicant must have "[r]eceived the following approvals if required by state or local governments: (i) Approvals under local zoning and land use regulations...."). DCD confirmed with DNR in 2014, 2016, and 2018, through a Form SM-6, that Kitsap Quarry was an authorized use.²⁶ This was based on its legal non-confirming use status, though during the alleged period of abandonment, the use was permitted outright through the Mineral Resource Overlay.²⁷

9.4 Central Kitsap Fire and Rescue completed fire inspections in 2009, 2011, 2012, 2013, and 2014.²⁸ If the Quarry were abandoned, continued fire inspection is unlikely.

10. Use Expansion. Increased truck traffic can evidence use intensification, which is authorized under Washington law.²⁹ However, evidence of traffic intensification was not provided. Rather, traffic intensities are not exceeding historical levels:

Lately, quarry traffic on West Kitsap Lake Road and Northlake Way has not been extremely heavy, with approximately 20-30 trucks per day, so these additional trucks (hauling dirt for reclamation) should not cause hardship or excess traffic on these roads. During our regular "busy" months we have between 80-100 dump trucks per day (plus 20-30 private vehicles)...³⁰

Traffic ebbs and flows depending on project locations and economic restrictions on

²³ Exhibit OWN-17.

²⁴ Exhibit OWN-8.

²⁵ Exhibit UTF-8, p. 1; *see also* DNR permit language stating permit is in effect as long as applicable requirements are met. Exhibit UTF-4, p. 2 (1972 permit) and Exhibit DCD-11 (2019 permit); RCW 78.44.081 ("The reclamation permit shall be granted for the period required to deplete essentially all minerals identified in the reclamation permit on the land covered by the reclamation plan. The reclamation permit shall be valid until the reclamation is complete unless the permit is canceled by the department.").

²⁶ Exhibits OWN-12 (2014), DCD-11 (2016), and OWN-14 and 15 (2018).

²⁷ 1998 Comprehensive Plan maps which were taken official notice of, as was Ordinance 565-2018, Att. 10.

²⁸ Exhibit DCD -10.

²⁹ *City of University Place v. McGuire*, 144 Wn.2d 640, 649 (2001); *Keller v. Bellingham*, 92 Wn.2d 726, 731-32 (1979).

³⁰ Exhibit DCD-6 (1992 levels); Testimony of Mr. Mauren.

construction, so there is a fluctuation in traffic.³¹ And, the mining itself has continued within the same site,³² with mining extending downwards, consistent with the doctrine of diminishing assets.³³

11. Traffic Conditions on Original Haul Route.

11.1 Chico Creek called three witnesses, neighbors who live in the area, to describe difficulties with bicycling and walking along Kitsap Lake Road and Northlake Way NW. Chico Creek requests that quarry traffic either entirely use the quarry's eastern entrance (to Werner Avenue) or that additional safety improvements be constructed.

11.2 The County's traffic engineer also addressed traffic conditions. Kitsap Lake is a major collector; Northlake Way is a minor arterial.³⁴ The two roads interconnect, but not all traffic traveling north on Northlake Way necessarily comes from Kitsap Lake. These two roads are the type typically built for higher speeds. They tend to have wider lanes, greater sight distances, flatter curbs, and wider shoulders. However, neither have wide shoulders, though Northlake Way's is slightly wider.

11.3 The County does traffic counts on major arterials and collectors to monitor conditions. Collision history and traffic counts, including speeds, were addressed at the hearing.³⁵ There are speeding concerns, but the collision history as a percentage of vehicle miles traveled was not identified as raising concerns, with Northlake Way being below the average.

11.4 Kitsap Quarry trucks would typically be Class 6 trucks (dump trucks) or Class 10 trucks (pups). In 2019, on Northlake Way, over a 24-hour period, out of 809 trucks and 6,109 vehicles, there were 19 Class 6 trucks and zero Class 10 trucks. Three years earlier, in 2016, again over a 24-hour period, there were 12 Class 6 trucks and one Class 10 truck.³⁶ The Class 6 and 10 trucks could not be identified as all coming from Kitsap Quarry. The traffic situation involves a pre-existing road condition, with impacts from a multitude of users, not only the Quarry.

12. County Enforcement. The County's enforcement process was detailed through hearing testimony.³⁷ The process is primarily complaint driven. When a complaint is received, it is referred to the responsible department head, depending on whether the matter is a fire code, building code, or land use permitting matter. Should Code Enforcement determine a violation exists, voluntary compliance is attempted first, with formal action following only if voluntary

³¹ Testimony, Mr. Mauren.

³² Testimony, Mr. Mauren. The secondary access road is beyond challenge due to its earlier permitting, and rather than expanding the use, provided an alternative access route as mitigation. See also Exhibits DCD-4 and APP-6.

³³ See e.g., *City of University Place v. McGuire*, 144 Wn.2d 640, 651 (2001) ("The proper scope of a lawful nonconforming use in an exhaustible resource is the *whole* parcel of land and intended to be used by the owner at the time zoning ordinance was promulgated. We therefore adopted the doctrine of diminishing assets to determine the lawful scope of the nonconforming use in mining operations.").

³⁴ Testimony, Mr. Shea on cross-examination.; Exhibit DCD-13.

³⁵ Exhibits DCD-13 and DCD-14; Testimony, Mr. Shea, P.E.

³⁶ Testimony, Mr. Shea; Exhibit DCD-14.

³⁷ Testimony, Mr. Lynam.

compliance is not achieved. A violation was not identified, so a formal code enforcement process was not initiated and Code Enforcement took no action.

II. CONCLUSIONS OF LAW

1. Standard of Review.

1.1 An appellant bears the burden of proof in permit decision appeals. However, the determination appealed from was not a permit decision, but a determination on whether code enforcement was warranted. DCD elected to not take action. Assuming the Examiner has jurisdiction, the review standard would be abuse of discretion, which is highly deferential, requiring a clear showing of abuse. The discretion must be manifestly unreasonable or exercised on untenable grounds.³⁸ The decision to not enforce was based on a determination that the use was legally non-conforming, so the review standard in determining legal non-conforming uses would be considered in determining whether DCD clearly abused its discretionary authority.

1.2 Kitsap County permits nonconformities “until they are removed or discontinued.”³⁹ The use was originally legally established; that is not disputed. It is use abandonment and expansion which is at issue. “[O]nce a nonconforming use right is established, the burden shifts to the party claiming abandonment or discontinuance of the nonconforming use to prove such.”⁴⁰ Per Code, a nonconforming use is not abandoned unless “the nonconforming use ceases for a period of twenty-four months or more.”⁴¹ In determining whether there was abandonment, there must generally be, “(a) an intention to abandon; and (b) an overt act, or failure to act, which carries the implication that the owner does not claim or retain any interest in the right to the nonconforming use.”⁴²

1.3 Before addressing case substance, jurisdiction must be addressed. This is a de novo legal interpretation, though where an ordinance is ambiguous, the agency charged with administration and interpretation “is accorded great weight.”⁴³

2. Jurisdiction.

2.1 The Examiner does not direct the County’s Department of Community Development, or DCD, to enforce the code. Those determination are discretionary. The Examiner only has jurisdiction if the e-mail communicating the County’s determination to not act were a Formal Director’s Interpretation or Type 1 decision.⁴⁴

³⁸ *Hoffman v. Kittitas County*, 4 Wn. App. 2d 489, aff’d, 194 Wn.2d 217 (2019); *Coggle v. Snow*, 56 Wn. App. 499, 506-07 (1990).

³⁹ KCC 17.570.010.

⁴⁰ *Van Sant v. Everett*, 69 Wn. App. 641, 648 (1993).

⁴¹ KCC 17.570.020.

⁴² *City of University Place v. McGuire*, 144 Wn.2d 640, 652 (2001).

⁴³ See e.g., *Tahoma Audubon Soc’y v. Park Junction*, 128 Wn. App. 671, 681 (2005) (“When an agency is charged with the administration and interpretation of a statute, its interpretation of an ambiguous statute is accorded great weight in determining legislative intent.”).

⁴⁴ KCC 21.04.290; KCC 21.04.040(C)(3).

2.2 Chico Creek does not seriously contend the e-mail is a Formal Director's Interpretation, which requires payment of a filing fee and triggers a formal code interpretation process. Formal Interpretations interpret ambiguous code provisions, rather than opining on code applicability to a particular property or use, which is the focus of Informal Interpretations. The determination appealed from was a simple e-mail simply answering a question on whether a stop work order would be issued and a conditional use permit required.⁴⁵ The administrative record submitted includes just two documents, Chico Creek's written question and DCD's short, four-sentence response. The e-mail author, Mr. Diener, testified that it was not, and was not intended to be, a Formal Director's Interpretation. The response is not a Formal Code Interpretation subject to Examiner jurisdiction.

2.3 Title 21 is designed to "provide a predictable, integrated, and consolidated review and approval process for applications subject to this chapter and to establish roles and responsibilities of applicants and review authorities."⁴⁶ The Examiner may hear appeals of "final decisions regarding project permit applications subject to a Type I ... procedure."⁴⁷ A determination to not enforce is not a permit application. Had the County established mandatory enforcement requirements, or citizen suit provisions, the analysis would be different. But, because enforcement is discretionary, the Examiner was not given authority to usurp the discretionary determination to not take action. The e-mail is not a "final" decision, but simply answered a question consistent with earlier, final decisions the County had made, as addressed in paragraph 2.5.

2.4 While a land use decision related to "code compliance" could result in a Type 1 decision (KCC 21.04.100, #55), this provision could only be triggered by a compliance matter made within a final land use decision on an application or a Formal Code Interpretation. However, for enforcement, more typically the formal enforcement procedures, involving citation issuance, would be used.⁴⁸ Here, there is no permit decision related to enforcement. The e-mail is a communication to a citizen that DCD will not be taking action. As such, and as enforcement is discretionary, the code does not provide jurisdiction. This approach is consistent with long-standing County interpretation. To the extent an ambiguity is present, deference to this interpretation is appropriate.⁴⁹

2.5 Jurisdiction is also lacking because the County did not make a new decision. The e-mail documented adherence to earlier decisions, including the 2012 determination provided to Ueland Tree Farm before it purchased the property, stating that the use was a legal non-conforming use and did not require further land use permitting. Similarly, the Site Development Activity Permit stated no further land use permitting was required. Chico Creek was provided notice of the right to appeal, but did not challenge this latter decision.

⁴⁵ KCC 21.04.040(C)(3) ("The director may respond to formal inquiries regarding code provisions. The interpretation shall be in writing and will be made available by the department pursuant to this section. Formal director's interpretations are binding and may be appealed. A fee for a formal interpretation shall be assessed...").

⁴⁶ KCC 21.04.010.

⁴⁷ KCC 21.04.290(A).

⁴⁸ Ch. 2.116 KCC; KCC 17.610.010 (Order to Correct or Notice of Infraction).

⁴⁹ *Hama Hama Co. v. Shorelines Hearings Board*, 85 Wn.2d 441, 448 (1975).

These same interpretations were followed in 2014, 2016, and 2018, when the County documented use conformity to zoning with the Department of Natural Resources, by signing the SM-6 Forms.⁵⁰ Given County Code appeal limits, the Examiner cannot now revisit these core decisions through this appeal.⁵¹ Requiring further land use permitting and imposing a conditional use permit requirement, or finding one was required, would effectively reverse these earlier land use decisions.

2.6 The Examiner is being asked to second guess a discretionary enforcement matter. While the County could provide the Examiner the authority to do this, the County has not created a citizen enforcement structure.

3. As the Examiner lacks jurisdiction, the appeal should be dismissed. This does not mean there are not legitimate traffic concerns and road improvements which could address Chico Creek's concerns. The County Engineer noted that if the right of way at issue were built today, different standards would apply. Presumably, such new construction would better accommodate pedestrian and bicycle use. However, given the Examiner's limited jurisdiction, another route should be taken to address these concerns. The communication here, noting a discretionary determination to not take action, and where past, final land use decisions are determinative, does not provide the Examiner with jurisdiction.

DECISION

Based on the above Findings and Conclusions, the appeal is dismissed. Absent a timely appeal, this Decision is final.⁵²

ORDER entered October 9, 2020.



Kitsap County Hearing Examiner
Susan Elizabeth Drummond

⁵⁰ Exhibits OWN-12 (2014), DCD-11 (2016), OWN-14 and 15 (2018).

⁵¹ KCC 21.04.290(A) (14-day appeal period for Type 1 and 2 Decisions). Finality is well established in Washington land use law. *See e.g., Chelan County v. Nykreim*, 146 Wn.2d 904, 933 (2002) (failure to timely appeal boundary line adjustment decision foreclosed later appeal); *Samuel's Furniture, Inc. v. State, Dept. of Ecology*, 147 Wn.2d 440, 458-59 (2002) (city approval of construction permits in shoreline without shoreline substantial development permit necessarily indicated city was not subject to the Shoreline Management Act; Ecology needed to have appealed rather than waiting to bring its own enforcement action); *Blomenkamp v. City of Edmonds*, 199 Wn. App. 1062 (unpub. 2017), cited per GR 14.1 as nonbinding but persuasive authority (untimely challenge to land use decision in guise of a failure to enforce claim was a prohibited collateral attack).

⁵² *See* Ch. 36.70C RCW (any appeal to be filed within 21 days to superior court).