

NONCONFORMING USE AND DEVELOPMENT

Local provisions, State law and Case Excerpts

A. DEFINITIONS (SJCC 18.20.010 and .140)

“Allowable uses” means the land uses that are allowed under this code, divided into five categories, as identified in SJCC 18.30.050 and Tables 3.1 and 3.2 in SJCC 18.30.030 and 18.30.040. These are uses allowed outright (“Yes”), provisional (“Prov”), discretionary (“D”), conditional (“C”), and plan amendment (“P.A.”) uses.

“Allowed outright use (“Yes” use)” means a use that is allowed outright within a land use designation, and which does not require a project permit, is identified in Tables 3.1 and 3.2 in SJCC 18.30.030 and 18.30.040 by the symbol “Yes.” All “Yes” uses are subject to and must comply with all applicable development standards of this code (see Chapter 18.60 SJCC and SJCC 18.80.070).

“Alteration, nonconforming structures” means any change or rearrangement in the supporting members of existing buildings, such as bearing walls, columns, beams, girders, or interior partitions, as well as any changes in doors, windows, means of egress or ingress or any enlargement to or diminution of a building or structure, horizontally or vertically, or the moving of a building from one location to another. This definition excludes normal repair and maintenance, such as painting or roof replacement, but includes more substantial changes.

“Alteration, nonconforming use” means the expansion, modification or intensification of a use that does not conform to the land use regulations of the UDC.

“Nonconforming” means a use, structure, site, or lot which conformed to the applicable codes in effect on the date of its creation but which no longer complies because of changes in code requirements. Nonconformity is different than and not to be confused with illegality (see “illegal use.”) Legal nonconforming lots, structures, and uses are commonly referred to as “grandfathered.”

“Nonconforming lot” means a lot which does not conform to the area, width, depth, or street frontage regulations of the land use district in which it is located.

“Nonconforming structure” means a structure which does not conform to the dimensional regulations, including but not limited to, setback, height, lot

coverage, density, and building configuration regulations of the land use district in which it is located due to changes in code requirements. (See also "alteration, nonconforming structures.")

"Nonconforming use" means a use of a structure or of land which does not conform to the regulations of the land use district in which the use exists due to changes in code requirements. (See also "Alteration, nonconforming use.")

B. UPLAND/GENERAL RULES

18.40.310 Nonconforming structures and uses.

A nonconforming use, structure, site, or lot is one that did conform to the applicable codes which were in effect on the date of its creation, but no longer complies because of subsequent changes in code requirements. Nonconformity is different than and is not to be confused with illegality (see the definitions of "nonconforming," "nonconforming use," and "illegal use" in Chapter 18.20 SJCC). Legal nonconforming structures and uses are commonly referred to as "grandfathered."

The following standards apply to all nonconforming structures and uses:

A. When a nonconforming use or structure is proposed for alteration, modification, intensification, or expansion under this section, the total impact of the nonconforming use will be considered as well as the added impact of the incremental changes being proposed and the consistency of the changes with the applicable land use designation.

B. Ordinary maintenance and repair of a nonconforming structure and its equipment or fixtures is permitted up to and including total replacement; provided, that the existing three-dimensional building envelope remains unchanged.

C. If a nonconforming use or structure is destroyed by fire or other act of God, it may be rebuilt to the configuration existing immediately prior to the time that the structure was destroyed; provided, that rebuilding is completed within 24 months of the date of destruction.

D. Nonconforming structures may be modified or altered, provided the degree of nonconformity of the structure is not increased.

E. Any nonconforming use or structure may be altered, modified, or remodeled beyond the external dimensions present on the effective date of the ordinance codified in this chapter for the purpose of providing access required under Chapter 51-20 WAC. The extent of the alteration or modifications shall be limited to the provisions of access necessary to comply with Chapter 51-20 WAC as determined by the administrator.

F. Expansion, modification, or intensification of a nonresidential nonconforming use is allowable subject to a conditional use permit, provided:

1. A nonconformance with the standards of this code shall not be created or increased;

2. The proposal shall comply with the standards of this code to maximum extent feasible; and

3. The proposal shall not have an adverse impact on an environmentally sensitive area.

If no exterior structural alterations or additions are made, a nonconforming use may be changed to another nonconforming use; provided, that the proposed use is equally or more appropriate to the district than the existing nonconforming use. Such a change of use shall be subject to conditional use permit approval. In no case shall a nonconforming use be changed to another nonconforming use which is more intensive or has greater impacts than the existing use.

G. Unless specifically provided otherwise, any nonconforming structure or use under the jurisdiction of the Shoreline Master Program shall be subject to the nonconforming use provisions in WAC 173-27-080.

H. Nonconforming uses may be relocated on the same parcel where they occur if the degree of nonconformity is not increased, and subject to a discretionary use permit.

I. No Replacement of Nonconforming Uses when Airport Hazard. No structures or obstructions of any kind or nature whatsoever constituting a nonconforming use shall be rebuilt, repaired, or replaced where such repairing, rebuilding, or replacement constitutes an airport hazard.

J. Abandonment. Nonconforming uses shall be considered abandoned if the use ceases to operate or is discontinued for 24 consecutive months. See also SJCC 18.40.350(H)(3). (Ord. 2-1998 Exh. B § 4.23)

C. SHORELINE RULES – SAN JUAN COUNTY CODE

18.50.330 Residential development.

D. Regulations – Setback Standards.

1. All structures shall be set back from water bodies and associated wetlands sufficiently to protect natural resources and systems from degradation.

a. All structures shall be set back a safe distance behind the tops of feeder bluffs, as determined by a licensed geotechnical engineer.

b. Every residential structure built at a beach site shall be located landward of the berm or bank, as dictated by the topography, to assure protection of the beach site.

2. Residential structures shall be located behind the treeline and set back a minimum of 50 feet from the OHWM, top of bank or berm, whichever is greater. Residential structures are also subject to the following:

a. Setbacks from wetlands associated with shorelines (Chapter 173-22 WAC) shall be measured from the natural edge of these features.

b. If there is no natural screening or if the shoreline area is cleared so as to preclude natural screening before a building permit application is approved, then a minimum setback of 100 feet from the OHWM or from the top of bank or berm, whichever is greater, will apply regardless of the environment designation.

c. A setback less than the minimums specified above may be authorized by the administrator only if it will result in a lesser environmental or visual impact.

d. If existing houses on adjoining waterfront lots are closer than the specified minimum setback, a lesser setback may be authorized by the administrator. This setback may be equal to the average setback of existing houses on adjacent lots, if the minimum setback would cause obstruction of views from the building site due to the location of existing houses and if consistent with other applicable regulations in this master program.

e. Nonconforming single-family residential development, made nonconforming by the above setback regulation in 1991, shall be subject to the standards contained in Chapter 173-27 WAC (Permits for Development on Shorelines of the State); provided, that:

i. A nonconforming residence of 2,000 square feet or smaller may be expanded by an amount equal to the existing floor area of the residence as long as the resulting total floor area does not exceed 2,000 square feet, or the existing floor area may be increased by an amount not to exceed 25 percent, whichever is larger. A nonconforming residence with an existing floor area in excess of 2,000 square feet may be expanded by no more than 25 percent of the total existing floor area. In no case shall any portion of the expansion be located seaward of the most seaward point of the existing residence. For the purposes of this computation, floor area shall include all areas

enclosed within the walls of the house and all attached decks and porches.

ii. Additions to nonconforming residences shall conform to all other applicable shoreline regulations as well as to other applicable County and state regulations.

iii. A nonconforming residence may be expanded incrementally if the ultimate expansion does not exceed the maximum allowable increase in floor area over that existing on the effective date of this regulation.

iv. For purposes of this section, "residence" shall mean the primary residential structure on the property. Accessory dwelling units and other accessory residential structures are not included.

3. Building setbacks from shorelines must be established as conditions of preliminary plat approval in all new waterfront subdivisions and short subdivisions. A plat restriction must specify the required setbacks and all building setbacks must be shown on the face of the plat. Once a building setback line is determined, removal of trees seaward of the setback line shall be expressly limited in plat restrictions. Tree removal restrictions in subsection (B)(8) of this section will also apply.

D. SHORELINE RULES – DEPARTMENT OF ECOLOGY (Applicable in San Juan County, except where the nonconforming setback rule of SJCC 18.50.300(D)(2) and (3) apply)

WAC 173-27-080 Nonconforming use and development standards. When nonconforming use and development standards do not exist in the applicable master program, the following definitions and standards shall apply:

(1) "Nonconforming use or development" means a shoreline use or development which was lawfully constructed or established prior to the effective date of the act or the applicable master program, or amendments thereto, but which does not conform to present regulations or standards of the program.

(2) Structures that were legally established and are used for a conforming use but which are nonconforming with regard to setbacks, buffers or yards; area; bulk; height or density may be maintained and repaired and may be enlarged or expanded provided that said enlargement does not increase the extent of nonconformity by further encroaching upon or extending into areas where construction or use would not be allowed for new development or uses.

(3) Uses and developments that were legally established and are nonconforming with regard to the use regulations of the master program may continue as legal nonconforming uses. Such uses shall not be enlarged or expanded, except that nonconforming single-family residences that are located landward of the ordinary high water mark may be enlarged or expanded in conformance with applicable bulk and dimensional standards by the addition of space to the main structure or by the addition of normal appurtenances as defined in WAC 173-27-040 (2)(g) upon approval of a conditional use permit.

(4) A use which is listed as a conditional use but which existed prior to adoption of the master program or any relevant amendment and for which a conditional use permit has not been obtained shall be considered a nonconforming use. A use which is listed as a conditional use but which existed prior to the applicability of the master program to the site and for which a conditional use permit has not been obtained shall be considered a nonconforming use.

(5) A structure for which a variance has been issued shall be considered a legal nonconforming structure and the requirements of this section shall apply as they apply to preexisting nonconformities.

(6) A structure which is being or has been used for a nonconforming use may be used for a different nonconforming use only upon the approval of a conditional use permit. A conditional use permit may be approved only upon a finding that:

(a) No reasonable alternative conforming use is practical; and

(b) The proposed use will be at least as consistent with the policies and provisions of the act and the master program and as compatible with the uses in the area as the preexisting use.

In addition such conditions may be attached to the permit as are deemed necessary to assure compliance with the above findings, the requirements of the master program and the Shoreline Management Act and to assure that the use will not become a nuisance or a hazard.

(7) A nonconforming structure which is moved any distance must be brought into conformance with the applicable master program and the act.

(8) If a nonconforming development is damaged to an extent not exceeding seventy-five percent of the replacement cost of the original development, it may be reconstructed to those configurations existing immediately prior to the time the development was damaged, provided that application is made for the permits necessary to restore the development within six months of the date the damage occurred, all permits are obtained and the restoration is completed within two years of permit issuance.

(9) If a nonconforming use is discontinued for twelve consecutive months or for twelve months during any two-year period, the nonconforming rights shall expire and any subsequent use shall be conforming. A use authorized pursuant to subsection (6) of this section shall be considered a conforming use for purposes of this section.

(10) An undeveloped lot, tract, parcel, site, or division of land located landward of the ordinary high water mark which was established in accordance with local and state subdivision requirements prior to the effective date of the act or the applicable master program but which does not conform to the present lot size standards may be developed if permitted by other land use regulations of the local government and so long as such development conforms to all other requirements of the applicable master program and the act.

[Statutory Authority: RCW 90.58.140(3) and [90.58].200. 96-20-075 (Order 95-17), § 173-27-080, filed 9/30/96, effective 10/31/96.]

E. PROCEDURES FOR NONCONFORMING USES AND STRUCTURES

18.80.120 Procedures for nonconforming uses and structures.

A. Legally established land uses and structures that have subsequently become nonconforming because of changes to County land use regulations continue to be legal. Standards governing such nonconforming structures and uses are located in SJCC 18.40.310.

B. No project permit or development permit shall be approved for any nonconforming use or structure that has been abandoned as per SJCC 18.40.310(J). Nonconforming uses or structures may not be moved to a new site nor be relocated on the same site.

C. When evaluating proposals for the alteration, modification, or expansion of nonconforming uses or structures, the decisionmaker shall consider the total impact of the nonconforming use or structure as well as the added impact of the incremental changes being proposed, and the consistency of the changes with the applicable land use designation.

D. Shoreline Nonconforming Uses and Structures. Any nonconforming structure or use under the jurisdiction of the Shoreline Master Program (Element 3 of the Comprehensive Plan and Chapter 18.50 SJCC) shall be subject to the nonconforming use provisions in WAC 173-27-080, and the applicable procedures of Chapter 18.50 SJCC and SJCC 18.80.110.

E. Procedures for Nonconforming Use or Structure not Subject to the Shoreline Master Program.

1. The procedures for provisional uses (SJCC 18.80.070) shall apply to the actions and activities described in SJCC 18.40.310(B) through (D), as limited by SJCC 18.40.310(G) through (J).

2. The procedures for conditional uses (SJCC 18.80.100) shall apply to the actions and activities described in SJCC 18.40.310(F) as limited by SJCC 18.40.310(G) through (J).

F. Illegal Use. Any use, structure, or other site improvement not established in compliance with this code and other applicable codes and regulations in effect at the time of establishment is not nonconforming; rather, it is illegal and subject to enforcement provisions of Chapter 18.100 SJCC. (Ord. 15-2002 § 12; Ord. 2-1998 Exh. B § 8.12)



Supreme Court of Washington,
En Banc.
RHOD-A-ZALEA & 35TH, INC., Respondent,
v.
SNOHOMISH COUNTY, Petitioner.
No. 64926-0.

Argued March 11, 1998.

Decided July 23, 1998.

Reconsideration Denied Nov. 16, 1988.

County required property owner, who had valid nonconforming use for peat mining, to obtain grading permit pursuant to county building code for excavation and fill activities. Owner appealed. The county hearing examiner upheld the grading permit requirement. Owner appealed by writ of certiorari. The Superior Court, Snohomish County, Thomas Wynne, J., reversed. County appealed. The Court of Appeals, Grosse, J., affirmed. County's petition for review was granted. The Supreme Court, Madsen, J., held that: (1) "vested rights doctrine" was inapplicable, and (2) owner was subject to grading permit requirement, as grading requirement was reasonable police power regulation and there was no indication that complying with grading requirement would terminate owner's existing nonconforming use.

Court of Appeals reversed; decision of county hearing examiner reinstated.

Sanders, J., dissented and filed an opinion.

West Headnotes

[1] Zoning and Planning 414 ↪1300

414 Zoning and Planning

414VI Nonconforming Uses

414k1300 k. In general. Most Cited Cases

(Formerly 414k321)

"Nonconforming use" is a use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the zoning restrictions applicable to the district in which it is situated.

[2] Zoning and Planning 414 ↪1300

414 Zoning and Planning

414VI Nonconforming Uses

414k1300 k. In general. Most Cited Cases

(Formerly 414k321)

Right to continue a nonconforming use, despite a zoning ordinance which prohibits such a use in the area, only refers to the right not to have the use immediately terminated in the face of a zoning ordinance which prohibits the use.

[3] Zoning and Planning 414 ↪1300

414 Zoning and Planning
414VI Nonconforming Uses
414k1300 k. In general. Most Cited Cases
(Formerly 414k321)

Although found to be detrimental to important public interests, nonconforming uses are allowed to continue based on the belief that it would be unfair and perhaps unconstitutional to require an immediate cessation of a nonconforming use.

[4] Zoning and Planning 414 ↪1306

414 Zoning and Planning
414VI Nonconforming Uses
414k1306 k. Continuance or change of use in general. Most Cited Cases
(Formerly 414k327)

Zoning and Planning 414 ↪1309

414 Zoning and Planning
414VI Nonconforming Uses
414k1308 Enlargement or Extension of Use
414k1309 k. In general. Most Cited Cases
(Formerly 414k329.1)

A protected nonconforming status generally grants the right to continue the existing use but will not grant the right to significantly change, alter, extend, or enlarge the existing use.

[5] Zoning and Planning 414 ↪1300

414 Zoning and Planning
414VI Nonconforming Uses
414k1300 k. In general. Most Cited Cases
(Formerly 414k321)

Zoning and Planning 414 ↪1318

414 Zoning and Planning
414VI Nonconforming Uses
414k1317 Discontinuance or Abandonment
414k1318 k. In general. Most Cited Cases
(Formerly 414k336.1)

Zoning ordinances may provide for termination of nonconforming uses by abandonment or reasonable amortization provisions.

[6] Zoning and Planning 414 ↪1300

414 Zoning and Planning
414VI Nonconforming Uses
414k1300 k. In general. Most Cited Cases
(Formerly 414k321)

Washington legislature has deferred to local governments to seek solutions to the nonconforming use problem according to local circumstances, and thus, local governments are free to preserve, limit or terminate nonconforming uses subject only to the broad limits of applicable enabling acts and the Constitution.

[7] Zoning and Planning 414 ↪1300

414 Zoning and Planning
414VI Nonconforming Uses
414k1300 k. In general. Most Cited Cases
(Formerly 414k321)

Nonconforming uses are uniformly disfavored, as they limit the effectiveness of land-use controls, imperil the success of community plans, and injure property values.

[8] Mines and Minerals 260 ↪92.8

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.8 k. State law and regulations in general. Most Cited Cases

Zoning and Planning 414 ↪1300

414 Zoning and Planning
414VI Nonconforming Uses
414k1300 k. In general. Most Cited Cases
(Formerly 414k321)

Property owner, who had valid nonconforming use for peat mining, was subject to county's grading requirement for excavation and fill activities under county building code, as grading requirement was reasonable police power regulation enacted to protect health, safety and welfare of community, and there was no indication that complying with grading requirement would jeopardize or terminate owner's existing peat mining operation.

[9] Zoning and Planning 414 ↪1300

414 Zoning and Planning
414VI Nonconforming Uses
414k1300 k. In general. Most Cited Cases
(Formerly 414k321)

Nonconforming uses are subject to subsequently enacted reasonable police power regulations enacted for the health, safety and welfare of the community, except where regulations would

immediately terminate the nonconforming use without a reasonable amortization period.

[10] Zoning and Planning 414 ↪1300

414 Zoning and Planning

414VI Nonconforming Uses

414k1300 k. In general. Most Cited Cases

(Formerly 414k321)

“Vested rights doctrine” has no bearing on the issue of whether a nonconforming use is subject to later enacted health and safety regulations, as the doctrine only applies to permit applications.

[11] Zoning and Planning 414 ↪1352

414 Zoning and Planning

414VIII Permits, Certificates, and Approvals

414VIII(A) In General

414k1350 Right to Permission, and Discretion

414k1352 k. Change of regulations as affecting right. Most Cited Cases

(Formerly 414k376)

Under “vested rights doctrine,” developers who file a timely and complete building permit application obtain a vested right to have their application processed according to the zoning and building ordinances in effect at the time of the application.

[12] Zoning and Planning 414 ↪1352

414 Zoning and Planning

414VIII Permits, Certificates, and Approvals

414VIII(A) In General

414k1350 Right to Permission, and Discretion

414k1352 k. Change of regulations as affecting right. Most Cited Cases

(Formerly 414k376)

“Vested rights doctrine” does not allow a development to operate exempt from police power regulations enacted after the development is established, as doctrine only protects a permit applicant from regulations enacted after a permit application has been completed and filed, and only serves to fix the rules that will govern a particular land use permit application.

[13] Mines and Minerals 260 ↪92.8

260 Mines and Minerals

260III Operation of Mines, Quarries, and Wells

260III(A) Statutory and Official Regulations

260k92.8 k. State law and regulations in general. Most Cited Cases

Regardless of whether grading was intrinsic to property owner's valid nonconforming use in peat mining, property owner was subject to county's grading requirement for excavation and fill activities under county building code.

[14] Mines and Minerals 260 ↪92.8

260 Mines and Minerals

260III Operation of Mines, Quarries, and Wells

260III(A) Statutory and Official Regulations

260k92.8 k. State law and regulations in general. Most Cited Cases

Fact that property owner was not required to obtain general conditional use permit from county as to peat mining, because peat mining was valid nonconforming use, did not mean owner was exempt from all other specific permitting requirements, even if they regulated some of the same operations, though owner contended that county could not indirectly regulate what it could not directly regulate.

[15] Constitutional Law 92 ↪978

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional Questions

92VI(C)2 Necessity of Determination

92k978 k. Ripeness; prematurity. Most Cited Cases

(Formerly 92k46(1))

Question of whether county's grading permit requirement, as applied to property owner who had valid nonconforming use for peat mining, violated property owner's substantive due process rights was not ripe for review, as owner had not applied for grading permit and there was no indication that applying for permit would be futile. U.S.C.A. Const.Amend. 14.

[16] Zoning and Planning 414 ↪1582

414 Zoning and Planning

414X Judicial Review or Relief

414X(A) In General

414k1580 Decisions Reviewable

414k1582 k. Finality; ripeness. Most Cited Cases

(Formerly 414k570)

Constitutional challenge to a land use regulation is ripe when the developer has received a final decision regarding how the regulation at issue will be applied to the particular land in question.

****1025 *2** James Krider, Snohomish County Prosecutor, Carol Weibel, Deputy Snohomish County Prosecutor for Petitioner.

Anderson, Hunter, Dewell, Baker & Collins, Bradford N. Cattle, Everett, for Respondent.

***3** Norm Maleng, King County Prosecutor, Cassandra Newell, Deputy King County Prosecutor, Seattle, Amicus for King County.

Brent D. Boger, Groen & Stephens, John Groen, Bellevue, Robin L. Rivett, Sacramento, CA, Amicus Curiae for Pacific Legal Foundation.

MADSEN, Justice.

Snohomish County seeks to reinstate a decision of the Snohomish County Hearing Examiner (Examiner) in which he decided that, although Rhod-A-Zalea and 35th, Inc. (Rhod-A-Zalea) established a nonconforming use under the county's zoning code to peat mine on the subject property, it was separately subject to provisions of the county's building code requiring it to obtain a grading permit for its ongoing excavation and fill activities. The trial court reversed the Examiner, **1026 finding that because Rhod-A-Zalea established a nonconforming use it was not required to obtain the grading permit. The Court of Appeals agreed. We reverse and reinstate the decision of the Snohomish County Hearing Examiner.

Statement of the Case

Rhod-A-Zalea owns property in Snohomish County on which it has conducted peat mining activities since at least 1961. In response to a complaint regarding excessive ponding on a neighboring property, the Snohomish County Department of Community Development (County) initiated an investigation resulting in issuance of a Notice and Order to Rhod-A-Zalea. The notice charged two code violations: (a) the excavation and processing of minerals without first obtaining a conditional use permit required under Snohomish County Code (SCC) 18.32.040 (the zoning code use matrix), and (b) grading without necessary permits and *4 approvals required under SCC 17.04.280 of the county building code. The Notice and Order imposed a 30-day compliance period, after which civil penalties would be assessed. Rhod-A-Zalea timely filed an appeal and the compliance schedule was stayed. No penalties were imposed.

A business attempting to establish a use prohibited by the zoning ordinance must obtain a conditional use permit unless it is a valid nonconforming use. A conditional use permit allows otherwise prohibited activities based on certain restrictions. At the hearing before the Examiner, Rhod-A-Zalea presented evidence that the peat mining operation had been conducted on the subject property since a date prior to the enactment of a zoning ordinance which prohibited the use in that area. The Examiner found Rhod-A-Zalea had established that it was a valid nonconforming use and that a conditional use permit was not required. This ruling was not challenged on appeal.

The Examiner further ruled that Rhod-A-Zalea was subject to police power regulations including the building code provisions regulating grading contained in Title 17 SCC. Under SCC 17.04.280, no one may conduct any grading (excavating and filling) without first obtaining a grading permit, with certain exceptions. Among other things, a grading permit application must include grading plans, grading quantities, erosion and sedimentation controls, and a drainage plan. SCC 17.04.295. The code sets forth operating standards for grading activities, including slope, erosion control, ground preparation, fill material, drainage, benches and terraces, and access roads. SCC 17.04.310. Also, the code specifies steps which must be taken upon completion of activities. SCC 17.04.320. Finally, fill placed on land adjacent to or under any stream or water body must be contained so as to prevent damage to other lands. SCC 17.04.330. When determining that Rhod-A-Zalea was subject to the grading permit require-

ment the Examiner explained:

Such prohibition of any requirement of a general use permit does not lift the requirement of specific operational activity *5 permits, such as the grading permit in question. Similarly, building construction in the continued operation of a nonconforming use requires a building permit; a change in the use of an existing building (without changing the overall nonconforming use, such as by relocating individual operational aspects within the nonconforming use to different structures, for example changing the location of explosives storage) would require a Certificate of Occupancy under the building code; and business license requirements are not lifted by virtue of the establishment of a nonconforming use under the zoning code.

Appellant's Br. at 190; Snohomish County's Return to Writ of Cert. at 190.

Rhod-A-Zalea appealed the Examiner's decision by writ of certiorari and the superior court ruled in favor of Rhod-A-Zalea. The court determined that Rhod-A-Zalea had a vested right to continue the peat mining operation, and since the operation by its nature involved grading, excavating, and filling, it was not subject to the County's grading regulations, which were enacted after the mining operation began. Snohomish County appealed the superior court's decision.

The Court of Appeals agreed with the superior court stating that requiring Rhod-****1027** A-Zalea to obtain a grading permit would allow the county to regulate "virtually every aspect of the peat mining operation...." *Rhod-A-Zalea v. Snohomish County*, No. 36658-1-I, slip op. at 4, 1996 WL 544391 (Wash.Ct.App. July 22, 1996). The court found that a nonconforming use "carries with it the right to the exercise of those accessory uses which are considered customary and incidental to the principal use." *Id.* at 5. The court dismissed other authority, including a Supreme Court decision which held that nonconforming uses are subject to later enacted police power regulation. The Court of Appeals stated that

[t]hese cases come from states which have adopted a majority position approving retroactive application of new zoning or development legislation. Washington State adopted and maintains a strong minority position in recognizing vested *6 property rights and the protection of those rights against subsequently adopted development regulations. *See Mercer Enterprises, Inc. v. [City of] Bremerton*, 93 Wash.2d 624, 627, 611 P.2d 1237 (1980) (retroactive effect of later zoning regulations not recognized in Washington). Here, the building code that the County seeks to apply was adopted in 1985 long after this mining operation.

Id.

Snohomish County's motion for reconsideration was denied and it then petitioned this court for review.

Discussion

It is undisputed that Rhod-A-Zalea operates a valid nonconforming use. The issue before this

court is whether Rhod-A-Zalea's nonconforming peat mining operation is subject to police power regulations subsequently enacted for the health, safety and welfare of the community. Specifically, we are asked to determine whether Rhod-A-Zalea must obtain a grading permit as required by SCC 17.04.280.

[1][2] A nonconforming use is a use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the zoning restrictions applicable to the district in which it is situated. *See* 1 Robert M. Anderson, *American Law of Zoning* § 6.01 (Kenneth H. Young ed., 4th ed.1996). The right to continue a nonconforming use despite a zoning ordinance which prohibits such a use in the area is sometimes referred to as a “protected” or “vested” right. *See Van Sant v. City of Everett*, 69 Wash.App. 641, 649, 849 P.2d 1276 (1993); *Martin v. Beehan*, 689 S.W.2d 29, 31 (Ky.Ct.App.1985); 4 Arden H. Rathkopf, *The Law of Zoning and Planning* § 51A.01 (Edward H. Ziegler ed., 1991). This right, however, *only* refers to the right not to have the use *immediately terminated* in the face of a zoning ordinance which prohibits the use. *See* 1 Robert M. Anderson, *American Law of Zoning* § 6.01; Richard L. Settle, *Washington Land Use and Environmental Law and Practice* § 2.7(d) (1983).

*7 “The ultimate purpose of zoning ordinances is to confine certain classes of buildings and uses to certain localities. The continued existence of those which are nonconforming is inconsistent with that object, and it is contemplated that conditions should be reduced to conformity as completely and as speedily as possible with due regard to the special interests of those concerned, and where suppression is not feasible without working substantial injustice, that there shall be accomplished ‘the greatest possible amelioration of the offending use which justice to that use permits.’ ”

State ex rel. Miller v. Cain, 40 Wash.2d 216, 221, 242 P.2d 505 (1952).

[3][4][5] The theory of the zoning ordinance is that the nonconforming use is detrimental to some of those public interests (health, safety, morals or welfare) which justify the invoking of the police power. *Id.* at 220, 242 P.2d 505. Although found to be detrimental to important public interests, nonconforming uses are allowed to continue based on the belief that it would be unfair and perhaps unconstitutional to require an immediate cessation of a nonconforming use. *Id.* at 218, 242 P.2d 505. A protected nonconforming status generally grants the right to continue the existing use but will not grant the right **1028 to significantly change, alter, extend, or enlarge the existing use. *Id.* Moreover, zoning ordinances may provide for termination of nonconforming uses by abandonment or reasonable amortization provisions. *See* R. Settle, *Washington Land Use* § 2.7(d).

[6] While some states' authority to terminate, alter, or extend nonconforming uses is expressly granted or withheld in zoning enabling acts, Washington's enabling acts are silent regarding the regulation of nonconforming uses. *See* R. Settle, *Washington Land Use* § 2.7(d). Instead, the state Legislature has deferred to local governments to seek solutions to the nonconforming use problem according to local circumstances. In Washington, local governments are free to preserve, limit or terminate nonconforming uses subject only to the broad limits of applicable enabling acts and the constitution. *See id.*

[7] *8 Commentators agree that nonconforming uses limit the effectiveness of land-use-controls, imperil the success of community plans and injure property values. See 1 R. Anderson, *American Law of Zoning* § 6.02; R. Settle, *Washington Land Use* § 2.7(d); Daniel R. Mandelker, *Prolonging the Nonconforming Use: Judicial Restriction of the Power to Zone in Iowa*, 8 Drake L.Rev. 23 (1958); C. McKim Norton, *Elimination of Incompatible Uses and Structures*, 20 Law & Contemp. Probs. 305 (1955); James A. Young, *The Regulation and Removal of Nonconforming Uses*, 12 W. Reserve L.Rev. 681 (1961). For these reasons, nonconforming uses are uniformly disfavored and this court has repeatedly acknowledged the desirability of eliminating such uses. See *Ackerley Communications, Inc. v. City of Seattle*, 92 Wash.2d 905, 920, 602 P.2d 1177 (1979) (“It is a valid exercise of the City’s police power to terminate certain land uses which it deems adverse to the public health and welfare within a reasonable amortization period.”); *Keller v. City of Bellingham*, 92 Wash.2d 726, 730-31, 600 P.2d 1276 (1979) (“the severity of limitations in phasing out [nonconforming uses] is within the discretion of the legislative body of the city”); *Bartz v. Board of Adjustment*, 80 Wash.2d 209, 217, 492 P.2d 1374 (1972) (“phasing out a nonconforming use ... is the desirable policy of zoning legislation” and is “within the discretion of the legislative body of the city or county.”); *State v. Thomasson*, 61 Wash.2d 425, 427, 378 P.2d 441 (1963) (“there are conditions under which a nonconforming use may be constitutionally terminated”); *State ex rel. Miller*, 40 Wash.2d at 220, 242 P.2d 505 (“It was not and is not contemplated that preexisting nonconforming uses are to be perpetual.”).

Thus, it is clear that local governments have the authority to preserve, regulate and even, within constitutional limitations, terminate nonconforming uses. Rhod-A-Zalea, however, argues that it is not subject to any police power regulations, including health and safety regulations, enacted after the existence of their facility. In particular, Rhod-A-Zalea argues that it is not subject to the grading *9 permit requirement because their peat mining facility has been in operation since 1961 and the grading permit regulation was enacted in 1985.

[8] Rhod-A-Zalea’s argument is not supported by established land use jurisprudence and is contrary to Washington’s desired policy of phasing out nonconforming uses. Moreover, it is counterintuitive to conclude that nonconforming uses which are contrary to public interests, such as health, safety and welfare, would then be exempt from subsequently enacted public health and safety regulations.

As one commentator has explained:

[a] lawful existing nonconforming use or structure may continue to be operated by virtue of the protection afforded by statutory or ordinance provisions or by constitutional vested rights doctrines. However, this protection is limited. Nonconforming uses generally are held to be subject to later police power regulations imposed by statute or local ordinances regulating the manner or operation of use. These regulatory restrictions often take the form of licensing or special permit requirements.

Arden H. Rathkopf, *The Law of Zoning and Planning* § 51A.02 (citations omitted); see also 1 R. Anderson, *American Law of Zoning* **1029 § 6.78 (“[a] nonconforming use is amenable to municipal ordinances which regulate similar uses, conforming or nonconforming.”)

[9] Courts have consistently recognized that nonconforming uses are subject to subsequently enacted reasonable police power regulations. See *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962); *Miller & Son Paving, Inc. v. Wrightstown Township*, 42 Pa. Commw. 458, 401 A.2d 392 (1979); *Watanabe v. City of Phoenix*, 140 Ariz. 575, 683 P.2d 1177 (Ct.App.1984), *Dock Watch Hollow Quarry Pit, Inc. v. Township of Warren*, 142 N.J.Super. 103, 361 A.2d 12 (1976). Only where the regulation would immediately terminate the nonconforming use have courts found the regulation to be invalid as applied to the nonconforming use. See *Township of Orion v. Weber*, 83 Mich.App. 712, 269 N.W.2d 275 (1978); *10 *Incorporated Village of Brookville v. Paulgene Realty Corp.*, 24 Misc.2d 790, 200 N.Y.S.2d 126 (1960). These rulings are consistent with the principle that a nonconforming use has a “vested” or “protected” right to continue without being subject to immediate termination. Local governments, of course, can terminate nonconforming uses but they are constitutionally required to provide a reasonable amortization period. See R. Settle, *Washington Land Use* § 2.7(d).

The leading case from the Supreme Court recognizing that a nonconforming use is subject to later enacted regulations is *Goldblatt*. *Goldblatt*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130. In *Goldblatt*, a local jurisdiction adopted an ordinance regulating dredging and pit excavations. *Id.* at 592, 82 S.Ct. 987. The owners of a nonconforming sand and gravel mining operation challenged the ordinance which allegedly would have involved an outlay of one million dollars. *Town of Hempstead v. Goldblatt*, 9 N.Y.2d 101, 172 N.E.2d 562, 565, 211 N.Y.S.2d 185 (1961). The owners argued that the regulation was not a bona fide safety measure and was instead designed to force the discontinuation of the use. *Id.* In a unanimous opinion, the Supreme Court found the regulation was reasonably related to the health, safety and welfare of the community and upheld the application of the ordinance to the nonconforming use even though it conceded the “ordinance completely prohibits a beneficial use to which the property has previously been devoted.” *Goldblatt*, 369 U.S. at 592, 82 S.Ct. 987. The Court explained that “every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional.” *Id.*

Other courts have also recognized the authority of local government to regulate the operations of a valid nonconforming use. In *Watanabe v. City of Phoenix*, landowners challenged an ordinance requiring that any lot used for parking of three or more motor vehicles be paved for dust control. *Watanabe*, 683 P.2d 1177. The landowners, who had graveled the lots for dust control, argued that the city *11 could not enforce the ordinance because it affected their existing nonconforming use. *Id.* at 1179. The Arizona Court of Appeals found the ordinance was applicable to the nonconforming use and required the landowners to pave their lots. *Id.* at 1180.

The court reasoned that the principle underlying the protection of nonconforming uses was merely to avoid the injustice of requiring their immediate termination, and, thus, while nonconforming uses could not be prohibited under new zoning ordinances, they were still subject to reasonable regulations under the city's police power to protect the public health, safety and welfare. *Id.* The court also emphasized that the regulation would not affect their ability to continue the nonconforming use and that the appellants did not argue that the regulation would

make their business economically unfeasible. *Id.*; see also *Miller & Son Paving, Inc.*, 401 A.2d 392 (the court found that a nonconforming quarry was subject to an ordinance requiring the construction of a fence around the property, noting that the ordinance was passed to safeguard the public and that it would not interfere with the owner's right to quarry the land).

Another similar case is *Dock Watch Hollow Quarry Pit, Inc. v. Township of Warren*, where the issue as framed by the court was **1030 “the extent to which a municipality may regulate by ordinance adopted pursuant to the police power a previously declared nonconforming use of land.” *Dock Watch*, 361 A.2d at 15. The court found that although the quarry's status as a nonconforming use “may protect it from later zoning restrictions, its status as such does not render it immune from reasonable regulations pursuant to the police power in the interest of the public health, welfare and safety,” including “those designed for the preservation of the environment and the protection of ecological values.” *Id.* at 20 (citations omitted).

In particular, two regulations were upheld even though evidence was presented that the restrictions would reduce the quarry's potential excavating material by half, costing *12 the quarry approximately twenty-six million dollars. *Id.* at 17. While the court recognized the impact to the quarry, it emphasized that “the welfare of the community should not be sacrificed for the purpose of permitting Dock Watch the most profitable use of that land.” *Id.* at 25.

Thus, courts agree that nonconforming uses, although protected from zoning ordinances which immediately terminate their use, are subject to later enacted regulations enacted for the health, safety and welfare of the community. See, e.g., *Mt. Bethel Humus Co. v. Department of Envtl. Protection & Energy*, 273 N.J.Super. 421, 642 A.2d 415 (1994) (nonconforming use subject to reasonable zoning restrictions which do not require the immediate cessation of such use); *Renne v. Township of Waterford*, 73 Mich.App. 685, 252 N.W.2d 842 (1977) (nonconforming use required to abandon septic tanks in favor of a public sewer system); *State ex rel. Keener v. Serr*, 53 Ohio App.2d 143, 372 N.E.2d 360 (1976) (nonconforming junkyard must comply with ordinance requiring list of material held in the yard); *Zoning Comm'n of Town of Groton v. Tarasevich*, 165 Conn. 86, 328 A.2d 682 (1973) (nonconforming use required to obtain a license); *Clouatre v. Town of St. Johnsbury Bd. of Zoning Adjustment*, 130 Vt. 189, 289 A.2d 673 (1972) (nonconforming use subject to later enacted regulation to protect the public welfare); *City of Rutland v. Keiffer*, 124 Vt. 357, 205 A.2d 400 (1964) (nonconforming use subject to licensing requirements); *City of Chicago v. Miller*, 27 Ill.2d 211, 188 N.E.2d 694 (1963) (nonconforming use subject to later enacted ordinance requiring improvements to the defendant's property); *City of Akron v. Klein*, 171 Ohio St. 207, 168 N.E.2d 564 (1960) (nonconforming use subject to time restrictions); *Hantman v. Township of Randolph*, 58 N.J.Super. 127, 155 A.2d 554 (1959) (nonconforming use subject to regulations restricting the number of months during which a business can operate); *Lyman G. Realty Corp. v. Gillroy*, 5 A.D.2d 520, 172 N.Y.S.2d 907 (1958) (nonconforming use subject to ordinance requiring a permit for roof sign).

Courts, however, have been alert to the possibility that a *13 municipal corporation may seek to terminate a nonconforming use by the imposition of regulations so onerous as to render further use impractical. A village, for example, amended its zoning ordinance in order to require a nonconforming private school to meet parking, heating, and construction standards which

would have rendered continuance of the school economically impossible. *Paulgene Realty*, 200 N.Y.S.2d at 133. Because the imposition of the ordinance would have the effect of terminating the use, the court held the ordinance invalid. *Id.* at 133-35; *see also Weber*, 269 N.W.2d 275 (court declined to apply portion of zoning permit requirement to nonconforming use because it was found to be confiscatory in nature).

Rhod-A-Zalea does not argue, nor does the record indicate, that obtaining a grading permit would terminate Rhod-A-Zalea's nonconforming right to peat extraction. Although Rhod-A-Zalea and amicus Pacific Legal Foundation offer arguments regarding potential economic impacts, these concern only the cost of applying for a permit. They note that the ordinance imposes a plan review and inspection fee of \$0.33 per cubic yard of earth movement and limits the overall fee to no more than \$23,000. SCC § 17.02.110(1)(d),(f),(2), (3). Also, they state that these costs do not include the expense of conducting soil engineering and geology reports required by chapter 70 in the appendix of the Uniform Building Code.

****1031** Rhod-A-Zalea, however, makes no particularized argument concerning economic impact. For instance, Rhod-A-Zalea does not indicate how much earth on average it moves and, therefore, how much the fee would be, nor does it provide any estimates concerning how much the additional studies would cost. Moreover, there is no evidence concerning the relative value of the business and, therefore, no way to know how, for example, a maximum fee of \$23,000 would impact its ability to continue the peat mining operation. Although Rhod-A-Zalea indicates the permitting requirements would be costly, it never argues that the regulation would have the effect of terminating the existing*14 peat mining operation. While the grading permit requirements may result in some economic impact to Rhod-A-Zalea's mining operations, this is true for all mining operations, conforming or nonconforming.

It is also clear that Snohomish County's grading permit is a reasonable exercise of its police powers. In 1985, Snohomish County amended its building code and required mining operations to obtain a grading permit. SCC § 17.04.280. There is no dispute that Rhod-A-Zalea's excavation and fill activity constitutes "grading" as defined in SCC § 17.04.290. The stated purpose of the grading and excavating regulations is "to safeguard life, limb, property and the public welfare by regulating grading on private property." Uniform Building Code, ch. 70, § 7001 (1976). Title 24 SCC, the county drainage code, which is made applicable to grading permits by operation of SCC 24.16.120(1)(e) also indicates its intent to:

promote sound practical and economical development policies and construction procedures which respect and preserve the county's watercourses; to minimize water quality degradation and control the sedimentation of creeks, streams, rivers, ponds, lakes and other water bodies; to protect the public from stormwater runoff originating on developing land; ... to maintain and protect valuable groundwater resources; to minimize adverse effects of alterations in groundwater quantities, locations and flow patterns; ... and to decrease drainage-related damage to public and private property.

SCC 24.04.080.

With regard to Rhod-A-Zalea's property, the County's enforcement officer testified that the

County's main concern was that Rhod-A-Zalea was not using acceptable fill material. The County's investigation of the site indicated that Rhod-A-Zalea was using a mixture of rock, wood, plastic, and other miscellaneous unidentifiable materials. The enforcement officer noted that the area is quite large, perhaps half the size of a football field. Another neighboring property owner testified that water is running onto his property because the backfill used by Rhod-A-Zalea does not absorb as much water as the peat does.

*15 Although a particularized finding of harm is not required for the grading permit to be applicable, it does appear that there are problems concerning current operations on Rhod-A-Zalea's property which would be cured through the application of the grading permit requirements. The County's grading code controls what kinds of materials may be used as fill and excludes plastic, rock and "similar irreducible material." SCC 17.04.310(D). The ordinance also regulates drainage. SCC 24.16.120(1).

Thus, it is clear the ordinance is reasonable and serves to safeguard the health, safety and welfare of the community. Furthermore, it appears that Rhod-A-Zalea's property is being operated in derogation to these interests and that requiring a grading permit would solve these problems.

To accept Rhod-A-Zalea's arguments and find that this later enacted regulation does not apply to their peat operation because it is a nonconforming use would have serious repercussions for all local governments attempting to regulate property. Rhod-A-Zalea does not adequately speak to this concern. From their position it follows that a nonconforming restaurant would not be subject to later enacted health codes or business license provisions; a nonconforming factory would be exempt from later enacted noise or pollution regulations; a nonconforming animal kennel would be exempt from later enacted licensing or health requirements; and **1032 a nonconforming adult entertainment facility would be exempt from later enacted licensing or public health regulations. Such a result would not be in the public interest and is contrary to law. Also, to allow nonconforming uses to continue exempt from all subsequently enacted health and safety regulations would be devastating to the community's land use planning. Finally, such an exemption would give those nonconforming uses an undeserved and substantial competitive advantage against their "conforming" competitors who are required to comply.

[10] We find that the Court of Appeals and the superior court erred in their decisions that Rhod-A-Zalea is not subject to *16 the later enacted grading permit requirement. In reaching its decision, the Court of Appeals dismissed authority to the contrary, including the Supreme Court's decision in *Goldblatt*, stating that those cases involved jurisdictions that have not recognized "vested property rights." *Rhod-A-Zalea*, No. 36658-1-I, slip op. at 5. It is true that Washington is one of only a few states that has adopted the "vested rights doctrine." However, this doctrine has no bearing on the issue of whether a nonconforming use is subject to later enacted health and safety regulations, as the doctrine only applies to permit applications.

[11] Under Washington's "vested rights doctrine" developers who file a timely and complete building permit application obtain a vested right to have their application processed according to the zoning and building ordinances in effect at the time of the application. *See West Main*

Assocs. v. City of Bellevue, 106 Wash.2d 47, 51, 720 P.2d 782 (1986). The purpose of the “vested rights doctrine” is to determine or “fix” the rules that will govern land development with reasonable certainty. *Id.* This immunity from regulations adopted subsequent to the time of vesting pertains *only* to the right to establish the development. See R. Settle, *Washington Land Use* § 2:7.

[12] Thus, pursuant to the “vested rights doctrine” a permit is considered under the rules in effect at the time of the permit application. This situation is not before the court. Here, the court is concerned with whether a nonconforming use is exempt from later enacted police power regulations. FN1

FN1. Even if the “vested rights doctrine” were at issue in this case, it would not allow a business to operate exempt from later enacted police power regulations. The “vested rights doctrine” *only* protects a permit applicant from regulations enacted after a permit application has been completed and filed and only serves to fix the rules that will govern a particular land use permit application. See *West Main Assocs. v. City of Bellevue*, 106 Wash.2d 47, 51, 720 P.2d 782 (1986). Once the development is established, it must then comply with later enacted police power regulations which are limited only by constitutional safeguards. See Richard L. Settle, *Washington Land Use and Environmental Law and Practice* § 27(c)(vi) (1983).

[13] The Court of Appeals and the superior court also indicate that because grading is intrinsic to the nonconforming use *17 it is not subject to the permitting requirements. *Rhod-A-Zalea*, No. 36658-1-I, slip op. at 2. This reasoning, however, leads to illogical results. For example, a nonconforming restaurant would not be subject to subsequently enacted regulations governing the handling and cooking of meat to prevent E.coli contamination because handling and cooking food is “intrinsic” to the restaurant business.

Additionally, case law does not support such a distinction. In *Goldblatt*, the Court required a nonconforming sand and gravel operation to obtain a later enacted permit which regulated dredging and pit excavation. *Goldblatt*, 369 U.S. 590, 82 S.Ct. 987. Under our Court of Appeals' analysis these activities would be intrinsic to their operations.

[14] The Court of Appeals and the superior court further imply that because *Rhod-A-Zalea* was not required to obtain a conditional use permit that it should not then be subject to the grading permit requirement. The Court of Appeals states that “Snohomish County cannot regulate indirectly what it has conceded is not regulable directly,” *Rhod-A-Zalea*, No. 36658-1-I, slip op. at 2, and that the County was seeking to regulate “through the back door, by applying the building code, that which it cannot regulate through the front door by applying the zoning code....” *Id.* at 4-5. However, just because *Rhod-A-Zalea* was not required to obtain a general **1033 conditional use permit (because it is a valid nonconforming use) does not mean that it is exempt from all other specific permitting requirements, even if they regulate some of the same operations.

This same argument was made and rejected by the Supreme Court in *Goldblatt*. “A successful defense to the imposition of one regulation does not erect a constitutional barrier to all other

regulation. The first suit was brought to enforce a zoning ordinance, while the present one is to enforce a safety ordinance.” *Goldblatt*, 369 U.S. at 597, 82 S.Ct. 987. Similarly, the fact that Rhod-A-Zalea does not have to obtain a conditional use permit does not operate as a shield to the grading permit requirement.

Rhod-A-Zalea also argues that Snohomish County's zoning*18 provision, which allows the continuance of nonconforming uses, precludes the application of the grading permit provision. It contends that because Snohomish County “has *not chosen* to disfavor nonconforming uses” that their use is not subject to later enacted police power regulations. Answer to Pet. for Review at 9.

SCC 18.71.010 of the Snohomish County zoning code provides that any nonconforming use may continue “subject to the provisions of this chapter.” Focusing of the words “subject to the provisions of this chapter,” Rhod-A-Zalea argues that SCC 18.71.010 does not authorize the application of the grading permit requirement contained in SCC 17 to valid nonconforming uses.

Rhod-A-Zalea is incorrect. The zoning code specifically contains a provision which requires compliance with other applicable laws and regulations. SCC 18.13.020 provides:

Any development or activity regulated herein must also comply with all other requirements of county code and of all applicable laws and regulations administered and enforced by other jurisdictions.

Additionally SCC 18.13.010 states that “[t]he provisions of this title shall be held to be the minimum requirements necessary for the promotion of public health, safety, morals, and general welfare.” Only where the provisions of the zoning code impose greater restrictions upon the use of buildings or land than is imposed by other ordinances will the provisions of that Chapter govern. SCC 18.13.010.

Thus, Title 18 of the zoning code directs nonconforming uses to comply with all other applicable regulations and laws.^{FN2}

FN2. Rhod-A-Zalea also cites Uniform Building Code § 104 as prohibiting later enacted police power regulations from applying to nonconforming uses. Section 104(c) provides:

Buildings in existence at the time of the adoption of this code may have their existing use or occupancy continued, if such use or occupancy was legal at the time of the adoption of this code, provided such continued use is not dangerous to life.

Uniform Building Code ch. 1, § 104(c), at 2 (1991). Section 104 of the Building Code, however, only relates to buildings. Since no buildings are at issue in this case, this provision is not relevant.

[15][16] Finally, we must address the superior court's determination*19 that the grading permit requirement violates Rhod-A-Zalea's substantive due process rights. The Court of Appeals

specifically declined to address this issue.

We find the superior court's decision in this regard was premature as the issue is not ripe for review. A constitutional challenge to a land use regulation is ripe when the developer has received a final decision regarding how the regulation at issue will be applied to the particular land in question. *See Herrington v. County of Sonoma*, 857 F.2d 567 (9th Cir.1988). Rhod-A-Zalea has not applied for the grading permit and, therefore, this court cannot determine if the ordinance as applied to Rhod-A-Zalea violates its substantive due process rights. *See Guimont v. City of Seattle*, 77 Wash.App. 74, 89, 896 P.2d 70 (1995) (the court could not hear the appellant's substantive due process claim regarding a relocation report requirement because the appellant had not submitted the required report).

Additionally, there has been no argument by Rhod-A-Zalea ^{FN3} nor any indication from the record that an attempt to apply for a ****1034** grading permit would be futile. *See Herrington*, 857 F.2d at 569 (“[a] landowner may avoid the final decision requirement if attempts to comply with that requirement would be futile.”).

FN3. Rhod-A-Zalea has not argued in its briefs to this court that the grading permit requirement violates its substantive due process rights.

CONCLUSION

In conclusion, we find that Rhod-A-Zalea's nonconforming use is subject to the grading permit requirement contained in SCC 17.04.280. Nonconforming uses have *only* a vested right not to have the use immediately terminated in the face of a zoning ordinance which prohibits the use. The case law overwhelmingly holds that nonconforming ***20** uses are subject to later enacted reasonable police power regulations. Finding to the contrary would lead to an illogical result whereby disfavored uses would be allowed to continue unabated without having to comply with state and local health and safety regulations. In this case, the grading permit provision is a reasonable regulation enacted to protect the health and safety of the community and there is no indication that complying with the regulation would jeopardize Rhod-A-Zalea's existing peat mining operation. Rhod-A-Zalea, like its conforming counterparts, is subject to the grading permit requirement.

We reverse the superior court's and the Court of Appeals' decisions and reinstate the decision of the Hearing Examiner that Rhod-A-Zalea is subject to the grading permit requirement contained in SCC 17.04.280. Additionally, we reverse the superior court's determination that the grading permit violates Rhod-A-Zalea's substantive due process rights because the issue is not ripe for adjudication.

DURHAM, C.J., and SMITH, GUY, JOHNSON, ALEXANDER and TALMADGE, JJ., concur.

SANDERS, Justice. (dissenting)

The majority concedes Rhod-A-Zalea has a valid vested right to continue its peat mining operation as a nonconforming use. Majority at 1027. But Snohomish County argues, and the majority concludes, the County seeks not to deny Rhod-A-Zalea its right to mine, but only to

properly utilize its local police power prerogative to regulate the manner in which the mining is conducted to protect the public health and safety. Supplemental Br. of Snohomish County at 6; Majority at 1034.

The Court of Appeals, however, disagreed, writing:

We cannot improve on the trial court's answer to this argument.

In this instance, application of the grading permit provisions of the county building code constitutes such pervasive regulation of the peat mining operation that it effectively *21 abrogates Rhod-A-Zalea's vested property rights in maintaining the nonconforming use.

Rhod-A-Zalea & 35th, Inc. v. Snohomish County, No. 36658-1-I, slip op. at 6, 1996 WL 544391 (Wash.Ct.App. Jul.22, 1996) (quoting Trial Court's Amended Mem. Decision at 4), review granted, 131 Wash.2d 120, 937 P.2d 1102 (1997). Nor can I better the observation of the trial court and would, therefore, affirm the Court of Appeals.

Rhod-A-Zalea seeks neither to expand its nonconforming use nor restart its operation after a hiatus. Rather it seeks to mine peat, an activity that, by the definition adopted by the county, is "grading." See Clerk's Papers (CP) at 322 (Snohomish County Decision of the Deputy Hearing Examiner (*hereinafter* "Hearing Examiner") (Sept. 18, 1992)). In the words of the learned trial judge: "[T]he *grading* taking place on the property is not merely an activity component of the mining process. It is the mining process." CP at 41 (Trial Court's Amended Mem. Decision at 5).

The County, as the lower courts discerned, seeks to " 'regulate through the back door, by applying the building code, that which it cannot regulate through the front door by applying the zoning code, due to the existence of a valid nonconforming use.' " *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, No. 36658-1-I, slip op. at 4-5, 1996 WL 544391 (Wash.Ct.App. Jul.22, 1996) (quoting Trial Court's Amended Mem. Decision at 4-5).

The majority opines it would be "counterintuitive to conclude that nonconforming uses **1035 which are contrary to public interests, such as health, safety and welfare, would then be exempt from subsequently enacted public health and safety regulations," Majority at 1028; noting "[t]he theory of the zoning ordinance is that the nonconforming use is detrimental to some or more of those public interests (health, safety, morals or welfare) which justify the invoking of the police power," but not immediately. Majority at 1027.

*22 The majority seems to say that while the County has no right to immediately prohibit through the zoning (pursuant to the County's police power),^{FN1} it may nevertheless presently invoke its police power to burden Rhod-A-Zalea's protected activity by simply denominating the regulation "grading" rather than zoning.

FN1. See 1 Robert M. Anderson, *American Law of Zoning* 3d § 7.03, at 690 (1986).

Such approach ignores the fundamental proposition that "[a] valid nonconforming use carries with it the right to the exercise of those accessory uses which are considered customary and

incidental to the principal use.” *Ferry v. City of Bellingham*, 41 Wash.App. 839, 844, 706 P.2d 1103, *review denied*, 104 Wash.2d 1027 (1985). In *Ferry* the court found the addition of a crematory to a funeral home (which had a nonconforming use right in a residentially zoned area) *did not* constitute any enlargement of the nonconforming use and, thus, could not be precluded because of a zoning regulation. *Id.* Here, Rhod-A-Zalea seeks nothing more than to continue the very use of the land it has rightly enjoyed for over 30 years.

In an analogous case a rock mining and crushing business was protected in its continuation of its vested nonconforming use without submitting to a permitting requirement that encompassed potential termination of the nonconforming use. *Missouri Rock, Inc. v. Winholtz*, 614 S.W.2d 734, 739-40 (Mo.App.1981). The authority to permit implies the power to prohibit.

As the Hearing Examiner noted, “[t]he subject excavation and fill constitutes ‘grading’ as such term is defined” in the Snohomish County Code. CP at 332 (Hearing Examiner at 11, conclusion 20). The subject excavation and fill is, of course, the peat mining. *See* CP at 324 (Hearing Examiner at 3).

The majority drags the red herring of undercooked food across the table where it uses this analogy: “[Rhod-A-Zalea’s] reasoning ... leads to illogical results. For example, a nonconforming restaurant would not be subject *23 to subsequently enacted regulations governing the handling and cooking of meat to prevent *E. coli* contamination because handling and cooking food is ‘intrinsic’ to the restaurant business.” Majority at 1032.

By the majority’s reasoning a valid nonconforming restaurant use could, under the guise of a police power regulation, be regulated out of existence, or at least burdened, through the prohibition of stoves, ovens, or normal restaurant fare. Cooking facilities to prepare food are intrinsic to a restaurant; however, service of contaminated food is not. This distinction is the heart of the case.

The distinction is of kind, not degree. Although a regulation banning black pepper might cost that restaurant only one customer a month, such regulation would be most problematic as it strikes at the heart of restauranting, which is the preparation of wholesome, tasty food. One need not put the restaurant out of business to compromise its vested nonconforming use.

To support the County’s asserted right to impose its will upon Rhod-A-Zalea, the majority relies upon the “purpose” of the Uniform Building Code’s grading regulations: “ ‘to safeguard life, limb, property and the public welfare by regulating grading on private property.’ ” Majority at 1031 (quoting Uniform Building Code, ch. 70, § 7001 (1976)). However the Uniform Building Code specifically exempts mining from the grading permit requirements it sets out and, therefore, by its original terms does not purport to justify any regulation whatsoever of peat mining. Uniform Building Code 1-508, app. ch. 33, § 3306.2(6) (1994).^{FN2} However **1036 Snohomish County, which adopted much of the Uniform Building Code verbatim (Snohomish County Code (SCC) 17.04.010-.330), deleted this exemption (SCC 17.04.280) while retaining the grading permit requirement. Thus the County retains the justification of the original code but imposes a contrary result.

FN2. The 1994 Uniform Building Code is substantially different from earlier versions

in terms of organization, but the relevant content remains effectively the same. The exemption for mining, for example, was present in earlier versions as § 7003(6).

*24 It is illogical on the one hand to rely upon the policy arguments of the Uniform Building Code to support the necessity of the County's regulation while, on the other hand, ignoring the objectives of its drafters. The very first sentence of the Uniform Building Code sets out exactly why its provisions should not apply here: "The *Uniform Building Code* is dedicated to the development of better building construction and greater safety to the public by uniformity in building laws." Uniform Building Code, *Preface* at 1-iii (1994). The grading regulations of the Uniform Building Code are justified as reasonable requirements pertaining to *building*, not *mining*; hence, the exemption for mining makes perfect sense while the application of the code's grading permit requirements to mining makes no sense.

The majority, with near religious fervor, also invokes the spirit of *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962), to justify its conclusion that the County may apply its grading permit requirements to Rhod-A-Zalea. See Majority at 1026, 1028, 1029, 1031, 1032, 1033. Yet, as one commentator has rightly noted, what *Goldblatt* really does is "underline the difficulty of determining whether a particular regulation, onerous to a user, is an unlawful attempt to destroy the use, or a legitimate means of regulating it." 1 Robert M. Anderson, *American Law of Zoning 3d* § 6.78, at 680 (1986).^{FN3} The majority's flaw is its failure to make the distinction between continuation of a nonconforming use which is exempt from police power regulation on the one hand, and imposition of the police power without exemption, subject only to the usual requirements of due process, on the other. If the latter be the rule, the nonconforming use doctrine is robbed of its reason for existence, and is no more than the usual due process test.

FN3. The Supreme Court has recently criticized *Goldblatt*, noting that the case assumed that when examining property regulations, the standards for takings challenges, due process challenges, and equal protection challenges are identical. "[T]hat assumption is inconsistent with the formulations of our later cases." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835 n. 3, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987).

The majority notes courts "have been alert to the possibility*25 that a municipal corporation may seek to terminate a nonconforming use by the imposition of regulations so onerous as to render further use impractical." Majority at 1030.^{FN4} And the majority then complains of Rhod-A-Zalea's alleged failure to make any "particularized argument concerning economic impact." *Id.* at 1031.^{FN5} Apparently the majority invites the conclusion that it is the degree, not fact, of imposition which is determinative. I disagree.

FN4. See also 1 Anderson, *supra*, § 6.06 at 462 (Noting general disapproval of retroactive zoning regulations: "Thus, one court ... remarked: 'Retroactive legislation is so offensive to the Anglo-Saxon sense of justice that it is never favored.'" (quoting *Appeal of Sawdey*, 369 Pa. 19, 22, 85 A.2d 28 (1951))).

FN5. Rhod-A-Zalea did, in fact, argue both the general impact and the specific impact that imposition of the grading permit would have on its operations. See generally

Resp't's [Rhod-A-Zalea] Br. to the Court of Appeals Division I at 34-38 (discussing due process implications of County's action) and 38-40 (discussing specific damages to Rhod-A-Zalea from imposition of grading permit).

Placing this requirement of a "particularized argument" upon Rhod-A-Zalea is *exactly* what we should not do. If the regulation is consistent with the vested nonconforming use, it is valid no matter how prohibitory (assuming it satisfies due process); whereas, if it is *inconsistent* with the vested use, it is invalid no matter how slight its burden.

In any case the burden of proof properly rests on the County to establish that its regulation does not burden a vested nonconforming use but rather is a legitimate effort to protect from a recurring harm not incident to the very nature of the nonconforming use. ****1037** See *State v. Thomasson*, 61 Wash.2d 425, 428, 378 P.2d 441 (1963) (requiring facts that establish a nuisance or "circumstances showing a condition substantially detrimental to the public health, safety, morals or welfare" before a municipality may attempt to abolish existing nonconforming use without violating due process of law). See also *Orion Township v. Weber*, 83 Mich.App. 712, 269 N.W.2d 275, 278-79 (1978) (nonconforming vested sand and gravel business not subject to retroactive burdensome regulation).

While the majority requires a "particularized argument" from Rhod-A-Zalea, the majority adopts the opposite view ***26** when dealing with the County: "[A] particularized finding of harm is not required for the grading permit to be applicable...." Majority at 1031. Nonetheless, the majority, relying on the testimony of the County's enforcement officer and a neighboring property owner (testimony this court did not hear), concludes "it does appear that there are problems concerning current operations on Rhod-A-Zalea's property which would be cured through the application of the grading permit requirements." Majority at 1031. The "problem" noted by the majority is the fact that Rhod-A-Zalea replaces peat with other materials. *Id.* This is the nub of the County's complaint. Rhod-A-Zalea is indeed replacing peat with fill, which is to say Rhod-A-Zalea is peat mining. Were it the County's prerogative to "permit" the mining, it would equally be its prerogative to withhold the permit. However the permit could be withheld only at the expense of the protected use.

The trial court and the Court of Appeals correctly discerned the distinction between that which is intrinsic to the privileged use and that which is not. However the majority overlooks it. I therefore dissent.

DOLLIVER, J., concurs.
Wash., 1998.
Rhod-A-Zalea & 35th, Inc. v. Snohomish County
136 Wash.2d 1, 959 P.2d 1024

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