

BEFORE THE BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

In the Matter of the Application of Scappoose Sand)
and Gravel Co. For a Limited Exemption Mining) Final Order No. 102-2007
Certificate to Mine 10 Acres)

WHEREAS, on January 8, 2007, Scott Parker filed an application on behalf of Scappoose Sand and Gravel Co. (hereinafter referred to as the "Applicant") for a Limited Exemption Certificate to mine a 10 acre portion of a 63.9 acre parcel zoned Heavy Industrial (M-1), located on E. Crown Zellerbach Road, Scappoose, Oregon, having tax account number 3201-040-00602; and

WHEREAS, the Board of County Commissioners held a hearing in the matter on March 28, 2007, and carried the matter over for deliberations to April 11, 2007; and

WHEREAS, on April 11, 2007, having heard testimony and received evidence, the Board voted to deny the application;

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

- A. The Board of County Commissioners adopts the Findings of Fact and Conclusions of law in the Staff Report to the Board of County Commissioners, dated March 7, 2007, which is attached hereto as Attachment 1, and is incorporated herein by this reference.
- B. The Application for a Limited Exemption Certificate is Denied.

Dated this 26th day of April, 2007.

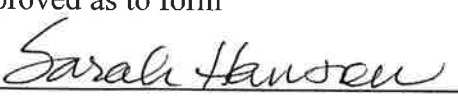
BOARD OF COUNTY COMMISSIONERS
FOR COLUMBIA COUNTY, OREGON

By: 
Rita Bernhard, Chair

By: 
Anthony Hyde, Commissioner

By: 
Joe Corsiglia, Commissioner

Approved as to form

By: 
Office of the County Counsel

ATTACHMENT 1

Columbia County
BOARD OF COMMISSIONERS STAFF REPORT
March 7, 2007

Application for a Limited Exemption Certificate #05-0015

DATE: March 7, 2007
FILE NUMBER: #05-0015-Amendment
SITE NAME: Scappoose Sand and Gravel
APPLICANT/OWNER: Scott Parker
P.O. Box AF
Scappoose, Oregon 97056
SITE LOCATION: 33485 E. Crown Zellerbach Road, Scappoose, OR
TAX ACCOUNT NUMBER: 3201-040-00602
ZONING: M-1(Heavy Industrial)
SIZE: 10 Acre Portion of 63.9 Acre Parcel
REQUEST: Limited Exemption Certificate for 10 acres of the Scappoose Sand and Gravel Mine
APPLICATION COMPLETE: January 8, 2007

COLUMBIA COUNTY
MAR 14 2007
COUNTY COUNSEL

BASIC FACTS:

The applicant, Scott Parker is requesting a Limited Exemption Certificate to mine a 10 acre portion of the 113 acre Scappoose Sand and Gravel mine in Scappoose . The subject 10 acres is located in the northwest corner of the mine. The entire area mined, or to be mined, is 113 acres. However, 103 acres was already approved under a Limited Exemption Certificate in 1993. All but approximately 2 to 3 acres of the subject 10 acres was mined prior to 1990. The portion of the requested area yet to be mined is on property over which an access easement ran. The property is 60 foot wide and runs along the site's northeast boundary and a strip of land a long West Lane Road south to the existing haul road. The Applicant recently acquired the easement area and indicates that mining will now be possible on such area.

The following is a list of items included in the application:

1. **Original Application** submitted by Scott Parker on January 8, 2007 including cover letter, application form, narrative statement, "voluntary" Reclamation Plan with attached accounts receivable statement from December 2006 and Exhibits A thru F (**Attachment 2**):

- A. Exhibit A: 1972 Application Form
 - B. Exhibit B: 1972 Mining Permit
 - C. Exhibit C: Affidavit by Dale Heimuller, Mining Operations Mgr
 - D. Exhibit D: BOC Minutes of September 15, 1993(103 Acre LE Site)
 - E. Exhibit E: Letter from Bruce Hugo, BOC Member in 1993
 - F. Exhibit F: Letter from Masogs from whom applicant acquired easement.
2. **Supplement To Application #1/Testimony Before SMAC** submitted to the Surface Mining Advisory Committee by Scott Parker et al at their meeting on January 31, 2007 including (Attachment 3) :
- A. 1970 Aerial Map of the Mining Site
 - B. 1990 Aerial of the Mining Site
 - C. 2005 Aerial of the Mining Site
 - D. Copy of 1970 Lease of Mining Site from Charles Parker to SS&G.
 - E. Transcript of oral testimony presented to SMAC.
3. **Supplement To Application #2** submitted to Land Development Services on March 6, 2007 by Larry Derr including (Attachment 4):
- A. Memo from Larry Derr dated March 6, 2007
 - B. Photo A depicting portions of mine site owned since 1942, acquired in 1965 and unmined in 1972 and the subject of this application.
 - C. Photo B: Depicting approximately 2-3 acre area yet to be mined within 10 acres which is subject of this application.

REVIEW CRITERIA/FINDINGS:

ORS 197.763 Conduct of Quasi-Judicial Hearings

The decision concerning an application for a Limited Exemption Certificate is made by the Board of Commissioners after a land use hearing. The notice of hearing was mailed to property owners within 1000 feet of the subject site and to interested agencies at least 20 days prior to the public hearing.

Surface Mining Ordinance(SMO)

The following Sections of Articles IV and V of the Surface Mining Ordinance are pertinent to this application.:

Article V Section 5.2 - Each new limited exemption certificate must be accompanied by an application fee.

Finding 1: The applicant submitted the required completed Columbia County Limited Exemption application and fee of \$970.

Article IV Section 4.1 -Exempt Lands

Except as otherwise provided in this ordinance, nothing in this ordinance requires the reclamation of lands within the surfaces and contours of surface mines in existence on July 1, 1972, or to vertical extensions of those surfaces and contours. The surfaces and contours of such exempt surface mines shall not include those areas over which the landowner or operator merely leveled terrain or cleared vegetative cover. The surfaces and contours of such exempt surface mines shall not include those areas for which there may have been an intent, a goal or proposal to surface mine on July 1, 1972, but on which no actual surface mining had taken place on that date, unless it is established as provided in Section 4.3 below that the landowner or operator had made such an investment in time, money and/or labor as to establish a vested right to surface mine such property

Finding 2:

The subject 10 acre portion of the 113 acre mine was not mined prior to 1972. The Applicant indicates that he intended to mine the 10 acre portion in 1972. However, according to Section 4.1, a mere intent, goal or proposal to surface mine is not sufficient to allow the issuance of a Limited Exemption Certificate. Rather, the Applicant must show that he, or the operator in 1972, established a vested right to mine based on a sufficient investment in time, money and/or labor on that portion of the property in 1972. Whether the Applicant has established a vested right to mine the property depends on his ability to show with substantial evidence in the record that there was a sufficient investment in time, money and/or labor in that portion of the property in 1972 to allow the proposed use under a limited exemption certificate. Vested Rights is a land use principle that has been interpreted over the years in case law. In the context of the Surface Mining Ordinance, the doctrine protects mining uses under a Limited Exemption Certificate. In determining whether the Applicant has invested enough money to make a finding of vested rights, staff finds that the Ratio Test is the primary test to use. The Ratio Test looks at the ratio of the expenses incurred in 1972 to the total cost of the completed project. Other factors that may be considered are the good faith of the landowner, whether or not he had notice of the 1972 changes before starting improvements, the type of expenditures, ie. Whether the expenditures have any relation to the completed project or could apply to various other uses of the land, the kind of project, the location, and ultimate cost. Furthermore, the acts of the landowner should rise beyond mere contemplated use or preparation such as leveling of land, or boring test holes. Staff also finds that case law suggests that in figuring the number for the expenditures side of the ratio, the purchase price of land is not counted, at least absent a showing that a premium was paid attributable to the specific planned use. Furthermore, expenditures that are equally consistent with uses of the property other than those planned by the owner are not taken into account. Finally, LUBA has found that ratios of 1/14 are good enough to establish a vested right, and ratios of 1/47 to 1/50 are insufficient.

As indicated below, staff finds that the Applicant has not demonstrated with substantial evidence in the record that there was a sufficient investment in time, money and/or labor in 1972 to create a present vested right to mine.

The following is a summary of evidence submitted in support of a finding of “vested right to mine” with related Staff findings:

Original Application(Attachment 2):

1. Exhibit A/B-1972 Application and Approved Permit for 113 Acre Site

Finding 3:

These documents confirm that the County approved a 113 acre mining site under the 1972 ordinance which included the subject 10 acre area. However, there is no evidence of the amount of time, money and/or labor spent in 1972 that would justify a vested right to mine under a Limited Exemption Certificate at this point. Furthermore, there is no indication that the equipment expenditure isn't equally consistent with the mining uses of the adjacent mine.

2. Exhibit C-Heimuller Affidavit. Submitted with application for LEC Status(1990 Ordinance)

Finding 4:

Dale Heimuller was the mining manager for SS&G and included statements that he thought the entire 113 acre site including the subject 10 acres had a vested right to mine. As evidence he referred to the lease entered into by the operator in 1970(Attachment 2, Exhibit C) and equipment purchased by SS&G which they would not have purchased if they had not intended to mine the entire property. He did not indicate the nature and amount of investment in the equipment. He also indicated that the 113 acre site permitted under the 1972 ordinance included a farmhouse which he occupied as Operations Manager of the site. Staff finds that without evidence of the amount of the expenditure for the equipment, one cannot determine the ratio of pre-1972 expenditures to the ultimate cost to mine the property, or whether the expenditures are equally consistent with other uses. Additionally, the presence of the farmhouse and barn on the subject 10 acres in 1972 does not support a finding of investment in time, money and/or labor. Staff analyses the impact of the lease, below.

2. Exhibit D-BOC Minutes-1993 Decision to Approve 103 of 113 Acre LEC site.

Exhibit E-Letter from Bruce Hugo Re: His Understanding of 1993 BOC LEC decision.

Finding 5:

The 1993 minutes give some details on testimony received and deliberations of the Board in granting 103 acres of the 113 acre LEC request by SS&G. The testimony focused primarily on water well issues and not whether or not to include the “10 acre homestead site” or whether the 10 acre site was actually vested. Well water issues were not related to any criteria regarding vested rights. Bruce Hugo, who made the motion approving the 103 acre portion of the 113 acre 1972 mining site, stated in an August 17, 2006 letter to Scott Parker (Attachment 2, Exhibit E) that the 10 acres was excluded from the LEC site at that time due to Scott's testimony that he did not intend to immediately mine the homestead site but wanted to reserve the right to do so in the future and Board concerns over the need to resolve water issues related to the mining of that portion of the site. The minutes indicate that Hugo told Parker after the Board's decision “if and when Mr. Parker wished to mine the 10 acre

homestead site, he would need to reapply for that area". Hugo clarifies in his letter that he was suggesting that SS&G "would have to submit another Limited Exemption Certificate application"(Attachment 2, Exhibit E, page 2). Staff finds that neither the 1993 BOC minutes nor Mr. Hugo's letter provide specific documentation as to whether or not "the landowner or operator had made such an investment in time, money and/or labor as to establish a vested right to surface mine.." per Section 4.1 of the SMO. Rather the documents indicate that both Mr. Hugo and the applicant understood that a future application for LEC could be submitted and reviewed under applicable SMO criteria.

3. Exhibit F-Letter from Masogs, from whom SS&G acquired easement rights to an unmined portion of the subject 10 acre area.

Finding 6:

This letter is from the parties who recently agreed to extinguish the access easement across an unmined portion of the subject 10 acre area indicating the need to follow through with terms of the agreement including relocation of a well and alternative access to the Masogs property. Staff finds that although recent acquisition of the access easement would be necessary to mine out the remainder of the 10 acre area should an LEC be granted, no additional evidence is provided documenting the vested right to mine this area in 1972. Historically, with the easement on the property the area under the easement could not have been mined. The 1970 lease reserves all easements, including the Masogs easement and the two utility easements on this portion of the proposed mine property. Therefore, staff finds that the lease demonstrates the intent to use this property for non-mine purposes in 1972, and is not supportive of vested rights to mine this area under a Limited Exemption Certificate.

4. Supplement To Application #1 /Testimony and Evidence To SMAC on 1/31/07

1970 Aerial Map of the Mining Site (Attachment 3):

Finding 7:

The Applicant used the photo to illustrate the location of the old farm house site on the subject 10 acre area. This area was occupied by the on-site Mining Manager, Dale Heimuller. As indicated above, staff finds that the existence of the old farm house and barn on the subject property does not demonstrate that there was a sufficient investment of time, money and/or labor to establish a present vested right to mine under a Limited Exemption Certificate. Rather, it establishes the intent to use the property for an unknown period for residential purposes. There is no evidence submitted indicating that the Applicant or operator invested in any mining uses of this property by 1972. The house and barn were not removed for mining purposes until after that date.

1990 Aerial of the Mining Site (Attachment 3):

Finding 8:

The Applicant used this photo to indicate that most of the 10 acre area had been mined by 1990.

Staff finds that the fact that the Applicant mined most of this acreage without a permit by 1990 is not evidence that he invested sufficient time, money and/or labor in 1972 to establish a vested right to mine the property at this point.

2005 Aerial of the Mining Site (Attachment 3):

Finding 9:

The Applicant used this photo to indicate that area of the site that had been reclaimed by 2005. Staff finds that the fact that the Applicant reclaimed much of the 10 acre area by 2005 is not evidence that he invested sufficient time, money and/or labor in 1972 to establish a vested right to mine the property at this point.

Copy of 1970 Lease of Mining Site from Charles Parker to SS&G (Attachment 3):

Finding 10:

This lease was for the 113 acre mine site acquired by SS&G of which 10 acres is the subject of this request. Under the terms of the lease SS&G was to pay a per yard royalty to the lessor with a minimum of \$15,000 each year. The lease was for five years with options to renew for an additional 45 years for a total of 50 years or to 2020. The lease was subject to all the easements that existed on the property, including a utility easement in favor of BPA, and an easement in favor of Crown Zellerbach. The lease was also subject to the access easement referenced in the letter from the Masogs. The easements were all on the subject 10 acres. The lease was for an existing mined area as well as for the residence and barn which have now been removed from the 10 acre area. Staff finds that the lease fails to demonstrate that the Applicant's lease price was based on the ultimate use of the 10 acres for mining. To the contrary, because the area the Applicant is seeking to currently mine, was subject to 3 easements and held a residential use, the lease indicates that the Applicant was aware that mining of this area may be impermissible at the time of the lease agreement. Therefore, staff finds that the lease does not demonstrate sufficient investment in time, money and/or labor in 1972 to establish a vested right to mine the property under a Limited Exemption Certificate.

Transcript SMAC Minutes-10-25/06-Testimony of behalf of Applicant(Attachment 6)

Finding 11:

During the October 25, 2006 SMAC meeting Scott Parker reviewed the above documents. He noted that a 1972 permit to mine for the entire 113 acre site included the subject 10 acres. He also indicated that the 10 acres excluded from the 113 acre site in the 1993 Board decision to grant a Limited Exempt Certificate for the SS&G mine site was not specifically described but generally included the old farm house site and was all mined except the 2 to 3 acres that SS&G wants to mine now, by 2005. Scott Parker, Attorney Larry Derr, Dale Heimuller and Bruce Hugo presented evidence previously submitted to the County in the Original Application. Scott Parker indicated that substantial investment in equipment and employees was made since 1977 when he took over with the intent to mine the entire 113 acre site. Staff finds that testimony offered in the SMAC meeting generally elaborated evidence submitted in the Original Application(see Staff findings regarding the

Original Application above). The 1971, 1990 and 2005 aerals submitted to SMAC demonstrated the progress of mining and reclamation after 1972, but do not contribute to the documentation necessary to determine 1972 vesting to mine the area. In addition the investment of money in equipment and employees in 1977 is irrelevant to a determination of whether the Applicant established a vested right in 1972.

5. Supplement To Application #2 Submitted to LDS on 3/6/07(Attachment 4)

Finding 12:

The Applicant's attorney, Larry Derr, submitted a supplemental memorandum dated March 6, 2007, summarizing evidence and arguments previously submitted to LDS and to SMAC in favor of granting a LEC to the subject 10 area. Two aerial photos were submitted which were intended to clear up confusion in the application and testimony before SMAC as to exactly where the subject 10 acre area was located. A photo(Photo A) depicts portions of mine site owned since 1942, acquired in 1965 and an area which was unmined in 1972(the subject 10 acre area). A photo(Photo B) depicts an approximately 2-3 acre area yet to be mined within the 10 acres which is subject of this application. Mr. Derr sums up the applicant's arguments in favor of a vested right to mine the subject 10 acre area, as follows:

1. Vested rights analysis under the 1990 Surface Mining Ordinance(Section 4.1)-Facts in existence in 1972. Mr. Derr notes that most of the subject site had been mined by 1990 when the first application for Limited Exempt status was filed. He stated that analysis previously submitted with the application and to SMAC proves a vested right and that the Board concurred in the 1993 decision and did not include the area in the Limited Exempt site for other reasons related to water issues.

2. Vested Rights/Estoppel Argument After 1972.

He noted that the Surface Mining Administrator(DOGAMI) recommended approval of the Limited Exemption in part because the County had permitted the area to be mined up until 1990 establishing a precedent that should not be set aside. He observed that testimony before SMAC concerning the investment of substantial resources in the mining of the 10 acre area since 1972 with knowledge and consent of the County confers a right to complete the mining of the area under the legal principle of estoppel.

Staff finds that Mr. Derr's supplement to the application referenced previously submitted information, but offered no new evidence as to a vested right in 1972 to mine the subject 10 acre area under a Limited Exemption Certificate. Staff finds that there is no evidence that the Board concurred that the 10 acres was vested in 1993. To the contrary, the Board denied Limited Exemption Status for the 10 acres in 1993. Regardless, the vested rights analysis must be made anew under the current Application. The Applicant is required to prove with substantial evidence in the record that he has a vested right that was established in 1972. Mr. Derr also offers a new estoppel argument based on County approvals and investments made in mining the area between 1972 and 1990 in reliance on the 1972 permit. Staff finds that in 1993, the Board of County Commissioners was very clear that in order to legally mine in the 10 acre portion of the property, the Applicant would have to re-apply

for a new Limited Exemption Certificate. Staff finds that at no time has the County condoned mining of property that is not subject to a valid permit. Furthermore, even if the Applicant established that the County permitted the mining to occur on the areas already mined, the County has clearly not allowed mining in the areas that are yet to be mined.

Section 4.3. Certificate Required.

Those surface mines which qualify according to the provisions of Section 4.1, which have not been abandoned, and for which a Limited Exemption Certificate is obtained from the Board will be granted limited exempt status. Such limited exempt status shall also extend to the entire surface mining site, as it existed on July 1, 1972, associated with any such exempt surface mines. Surface mining is prohibited at such surface mining sites unless the landowner or operator has a valid, current Limited Exemption Certificate.....

Finding 13:

Staff finds that the applicant has Limited Exempt status on 103 acres and must demonstrate that the requested 10 acre area meets the requirements for limited exempt status in Section 4.1. Bruce Hugo offered an argument at the January 31, 2007 SMAC meeting based on language in Section 4.3 of the SMO that Limited Exempt status shall extend to the entire surface mining site associated with any exempt surface mine. He interpreted that as meaning that the entire 113 acre SS&G surface mining site permitted under the 1972 ordinance should be granted Limited Exempt status. Staff finds that this interpretation is in error since in order for a mining site to obtain Limited Exempt status it must meet the requirements of Section 4.1; namely have been mined or be able to demonstrate vested right to mine as of July 1, 1972. For purpose of Section 4.3, the surface mining site in this case was the 103 acres granted Limited Exempt status in 1993, not the 113 acres permitted under the 1972 ordinance. Section 4.3 goes on to say that surface mining isn't allowed outside the limited exempt surface mine unless an operating permit is obtained. Staff finds that Section 4.3 does not allow the Board to grant a Limited Exemption Certificate for the remaining 10 acres if the Applicant has not established that he has a vested right to mine.

Section 4.4 Application and Review.

An application for a Limited Exemption Certificate shall be made to the Administrator using the established form...The landowner or operator must demonstrate that the site, or any portion of the site, qualifies for limited exempt status. The Administrator shall review each such application and make a recommendation to the Board based on the evidence and documentation provided, and on-site inspection if necessary. In reviewing such applications, the Administrator shall consider the advice and recommendations of the Committee. If the Administrator refuses to recommend approval of the application for a Limited Exemption Certificate he or she shall notify the landowner or operator in writing, specify the reasons for the refusal and give the landowner or operator an opportunity to supply additional documentation to support the application. If the landowner or operator cannot provide the required documentation, the Administrator shall recommend that the Board deny the application for a Limited Exemption Certificate. If the Board denies the application for a Limited Exemption Certificate, the landowner or operator must obtain an operating permit

before commencing or continuing surface mining. If the application for a Limited Exemption Certificate is denied by the Board, the landowner or operator may also request an appeal hearing before the Board pursuant to Section 2.4 of this ordinance.

Finding 14:

The Applicant has filed the necessary application form. Bob Brinkmann(DOGAMI) prepared preliminary findings and recommendations for approval of the application(See Attachment 5) which were presented to the the Surface Mining Advisory Committee. Since this application depends on a thorough legal review of evidence related to the vesting criterion in the SMO, DOGAMI's preliminary findings and recommendations were substantially revised following the SMAC meeting taking into consideration testimony at the meeting and all of the supplements to the original application submitted by the applicant .

Section 4.6 Expansion.

Expansion of surface mining under limited exempt status into previously unmined land which exceeds 2,500 cubic yards of material excavated, disturbed or sold or which affects more than one acre in any fiscal year is prohibited unless the landowner or operator applies for and receives an operating permit. An operating permit must be obtained before the expansion occurs. Expansion of a site before the operating permit is issued constitutes surface mining without a permit and is prohibited by Section 5.1 of this ordinance.

Finding 15:

Staff finds that if the Board does not grant the Applicant a Limited Exempt Certificate for the proposed 10 acres, the Applicant must apply and receive an Operating Permit for the subject 10 acres.

ATTACHMENTS:

1. (Unassigned)
2. Application; Original Application(1/8/07) with Exhibits A-F.
3. Supplement #1(1/31/07)
4. Supplement #2(3/6/07)
5. Surface Mining Administrators Report(1/24/07)
6. Transcript of SMAC meeting(1/31/07)

SURFACE MINING ADMINISTRATOR'S RECOMMENDATION:

Bob Brinkmann of DOGAMI prepared preliminary findings and recommendations to the SMAC for approval of the application(Attachment 5). He found that evidence was adequate to support vesting but did not specify what evidence he was relying on for this conclusion. He also found that vesting is supported by the fact that the applicant had mined the area between 1972 up to and beyond 1990 when the current Surface Mining Ordinance was adopted. LDS staff and County Counsel's Office reviewed the report in light of all the evidence submitted and the testimony presented at the SMAC meeting on 1/31/07 and prepared revised findings and recommendations in this report.

SURFACE MINING ADVISORY COMMITTEE(S MAC) RECOMENDATION

SMAC recommended approval of the Limited Exemption Certificate request at their meeting on January 31, 2007 with the findings and recommendations contained in DOGAMI's report with an added finding "that the applicant has shown substantial evidence that the parcel, 10.2 acres plus or

minus, in question has both been considered as vested from the 1972 ordinance on and that the applicant has shown that there has been sufficient or substantial time, effort and money invested in this parcel which was based on the entire site of 113 acres that were limited exempt”(See meeting transcript in Attachment 6)

STAFF RECOMMENDATION

Based on the above findings, Staff recommends denial of the application for Limited Exemption Certificate for the subject 10 acre area adjacent to the SS&G Mine.