

# Tools for Handling the “Nonconformist”



## A Case Study

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# Today's Presentation

- Law of Nonconforming Uses
- Site History and Background
- City Goals and Vision
- NCU Issues
- Enforcement Action and Approach
- Outcome

# Roadmap of Law Overview

- What is a nonconforming use ("NCU")
- Relationship of NCUs to planning
- Local government authority over NCUs
- Types of NCUs: legal and illegal
- Legality of terminating NCUs
- Amortization period for legal NCUs
- Is NCU termination a regulatory taking?

# What is a Nonconforming Use?

- A nonconforming use is a land use which existed prior to the enactment or amendment of a zoning ordinance, and maintained after the effective date of the ordinance or amendment even though not in compliance with the zoning restrictions applicable to the district in which it is situated.

*Rhod-A-Zalea & 35<sup>th</sup> Inc. v. Snohomish County*, 136 Wn.2d 1 (1998) (citing Anderson, American Law of Zoning).

# What is a Nonconforming Use (cont.)

- Nonconforming status grants the right to continue existing use (usually temporarily) but does not grant the right to significantly change, alter, extend or enlarge the existing use.

*Rhod-A-Zalea*, 136 Wn.2d 1 (1998).

# Relationship of NCU's to Planning

- Nonconforming use frustrates achievement of the community land use plan.
- Nonconforming use often exists for long time because develops into local monopoly.
- The law and public policy contemplate that nonconforming uses will eventually be eliminated for the sake of the general zoning scheme, which implements the comprehensive plan.

# Why allow nonconforming uses?

- Treat landowners fairly by mitigating harsher aspects of zoning
- Avoid unconstitutional taking of property (inverse condemnation)

# Local Government Authority

- Washington's zoning enabling statutes are silent regarding nonconforming uses
- Thus, local governments are free to preserve, limit or terminate nonconforming uses, subject only to constitutional constraints

# Washington Case Law on NCUs

- Washington Case Law Strongly Supports Termination of Nonconforming Uses
  - “Nonconforming uses limit the effectiveness of land-use-controls, imperil the success of community plans and injure property values.” *Rhod-A-Zalea*, 136 Wn.2d 1 (1998).
  - “The case law overwhelmingly holds that nonconforming 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.” *Rhod-A-Zalea*.

# Legal and Illegal NCU's

- Nonconforming Uses May Be Legal or Illegal
  - Legal Nonconforming Use
    - Use must be vested and operated without an interruption that shows intent to abandon; and
    - Lawful at the time the new zoning ordinance or amendment takes effect.
  - Illegal nonconforming use
    - Never legally established under former code, e.g., use never allowed in zoning district, or owner never obtained required permits under old code, or not continuous use.

# NCU Termination Legal Principles

- Legal NCU: A city or county may terminate a legal nonconforming use only after a reasonable amortization period or if the use is voluntarily abandoned with intent to abandon.
- Illegal NCU: Upon adoption of new zoning ordinance, a city or county may immediately terminate an illegal nonconforming use.

# Amortization

- Continued operation of a nonconforming use for a period sufficient for the owner to recoup the investment in the use.
- Required to terminate legal nonconforming use.
- Case Law: Amortization period to terminate a legal nonconforming use must be “*reasonable*.”

# What is a reasonable amortization?

- Legal Test: Balance the hardship to the user against the benefit to the public from the termination of the nonconforming use.
- Washington courts apply case-by-case balancing test. In other words, it depends....
- Not many cases in Washington applying balancing test.

# Reasonable Amortization Period: Washington Cases

- *Seattle v. Martin*, 54 Wn.2d 541, 542, 343 P.2d 602 (1959) (upheld ordinance requiring outdoor nonconforming construction company repair yard to terminate one year from the effective date of ordinance).
- *Northend Cinema v. City of Seattle*, 90 Wn.2d 709, 720, 585 P.2d 1153 (1978) (upheld 90-day amortization period for a nonconforming adult theatre).

# Amortization Cases From Other States

- Cases from other states have amortization periods for NCU's that usually range from 1 to 7 years.

# Taking of Property

- “No private property shall be taken or damaged for public or private use without just compensation having been first made.”

Washington Constitution, Art. 1, Sec. 16.

# Taking of Property (cont.)

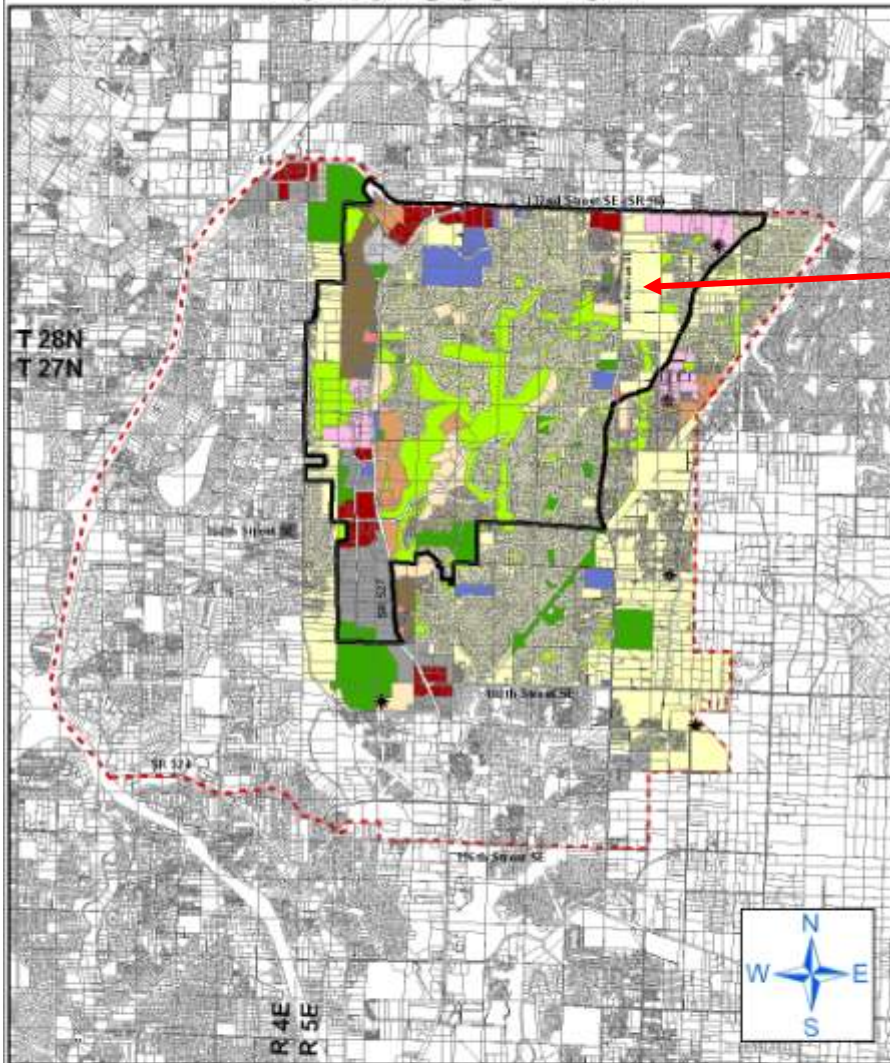
- Is termination of a nonconforming use a regulatory taking (inverse condemnation) of a vested right?
  - If illegal nonconforming use: No inverse condemnation (assuming another viable use is allowed) even if immediately terminated.
  - If legal nonconforming use: To avoid inverse condemnation, use must be given a reasonable amortization period to keep operating before termination.

# Review

- What is a nonconforming use
- Relationship of nonconforming use to planning
- Local government authority over NCUs
- Legal NCUs and Illegal NCUs
- Termination principles (legal NCU amortization; illegal may immediately terminate)
- Takings law and relationship to NCUs

# Site History / Background

# Land Use Plan



## Vicinity Map

PTI Site

Size: 65 acres

Planned/Zoned :  
Low Density  
Residential

### Land Use Designations

- ★ Planned Neighborhood Park
- Unincorporated Parcels
- Low Density Residential
- Medium Density Residential
- High Density Residential
- Mixed Use/High Density Residential
- Open Space - Private

- City Limits
- - - Municipal Urban Growth Area Boundary
- Open Space - Public
- Community Business
- Neighborhood Business
- Town/Village Center
- Business Park
- Office Park
- Public & Quasi Public

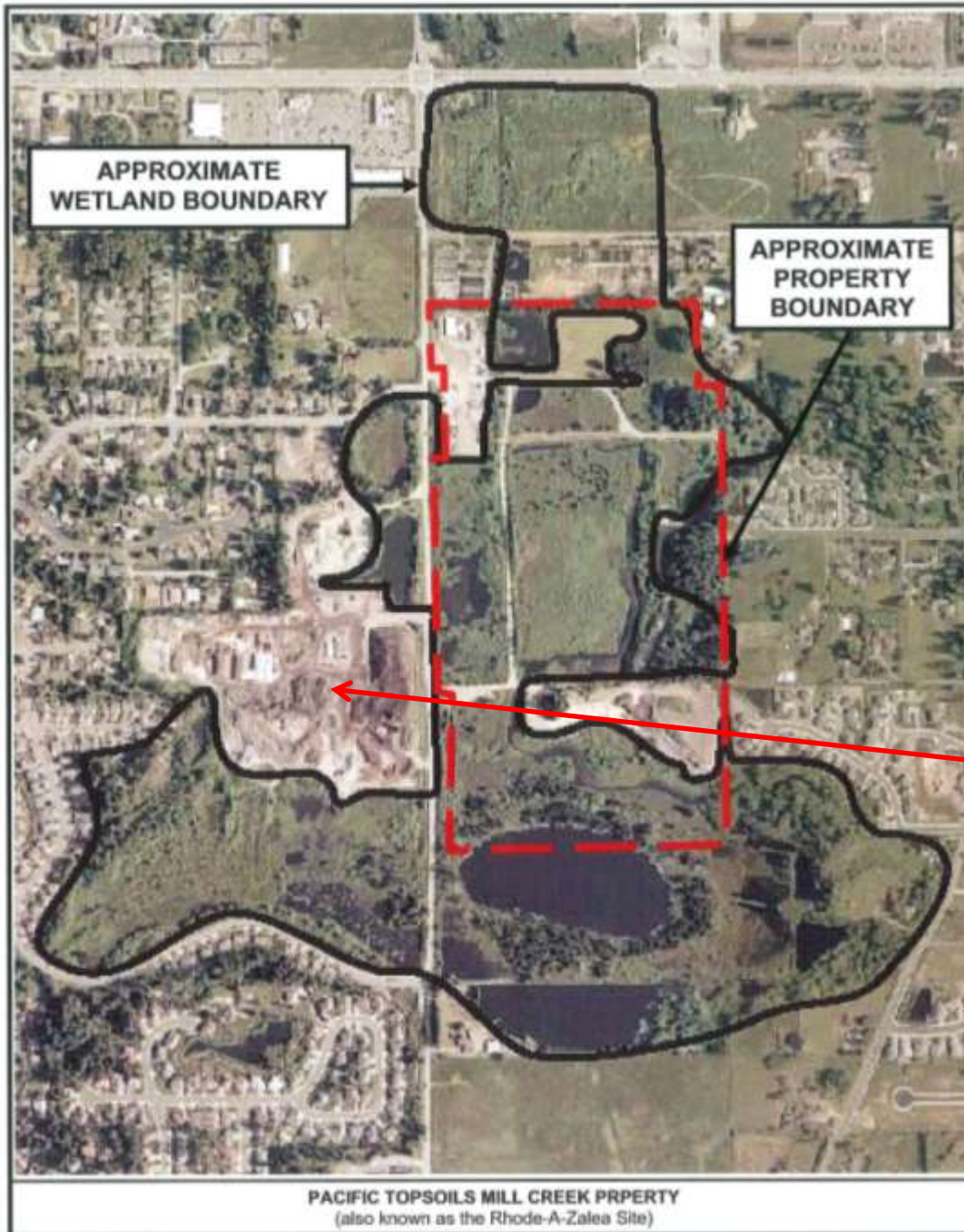
Adopted: November 5, 2004, Ordinance #2004-257  
Effective November 5, 2006, Ordinance #2006-703



# Site Photo



# Wetland Boundary



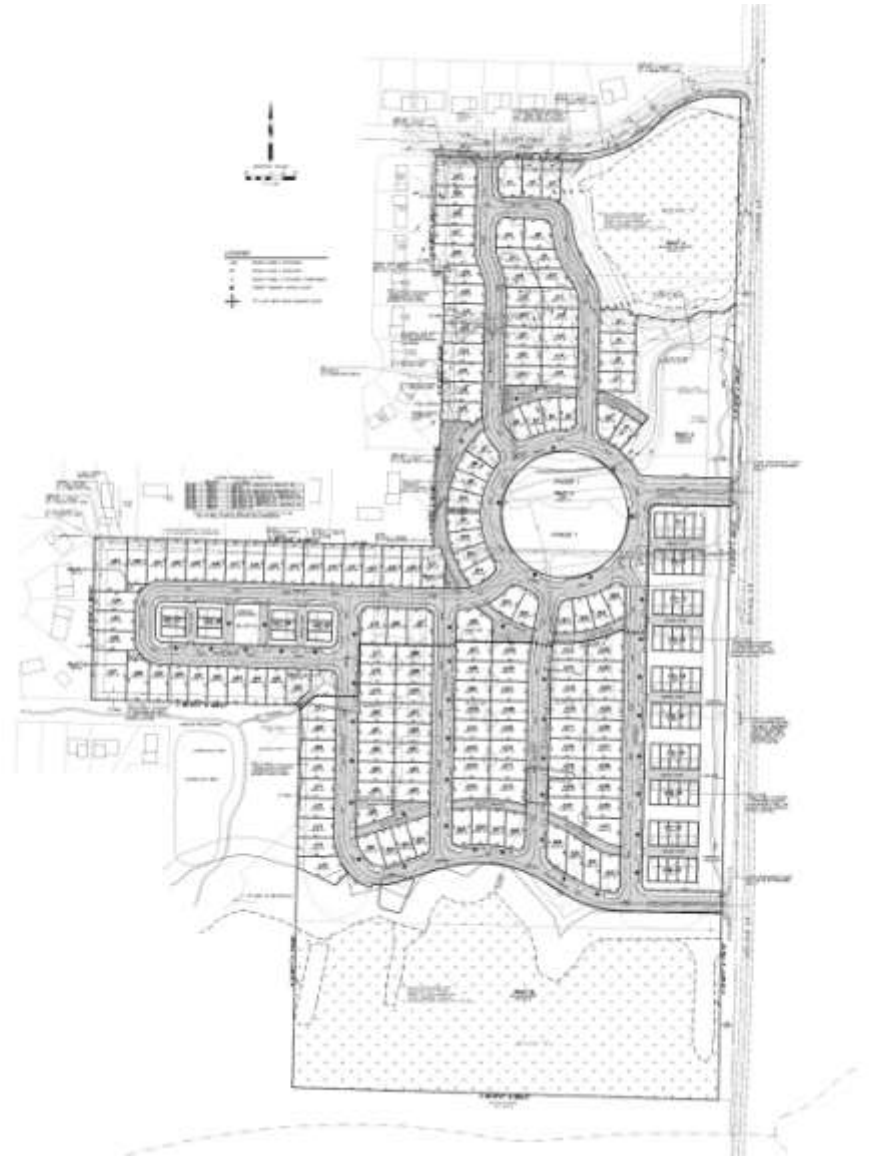
# Early Site History

- 1950s
  - Peat Mining Commences (Early 50's)
  - County Zoning 1<sup>st</sup> Adopted (1957)
- 1960s – 1970s
  - Peat Mining Expands
  - Property Rezoned 1967; NCU Status Starts
- 1980s – 1990s
  - County Enforcement
  - *Rhod-A-Zalea v. Snoh. Co.*, 136 Wn. 2d 1 (1998)

# Recent Site History

- 2000s
  - 2001 – 2002: Site Operations Shift Location
  - December 1, 2005: Annexation
  - July 25, 2006: Mill Creek East Plat Approved
  - May 24, 2007: NOV Issued
  - June 2007: Site Operations Stopped
  - Limbo Ensues

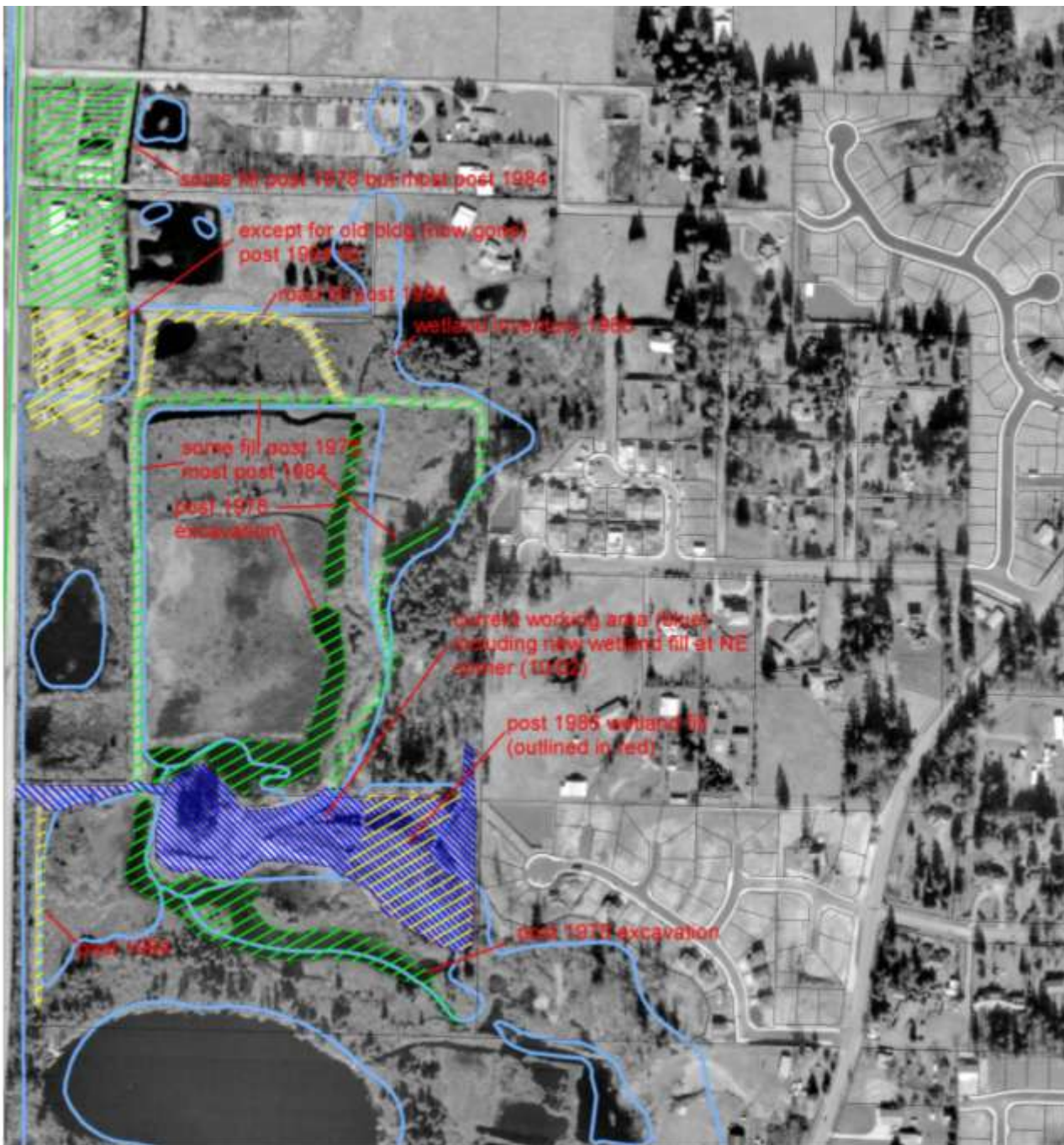
# West Side Site Reclamation/New Neighborhood



# East Side Site Activities

- Peat Mining
- Grading, Excavation, Filling
- Dewatering and Pumping
- Soil Processing & Bagging
- Retail Sales
- Rock, Concrete & Pallet Crushing
- Yard Waste Composting & Mixing

# Historical Site Disturbances (East Side Site)



Source: DOE



PTI Site Activity – looking south, 4-20-07

Source: DOE





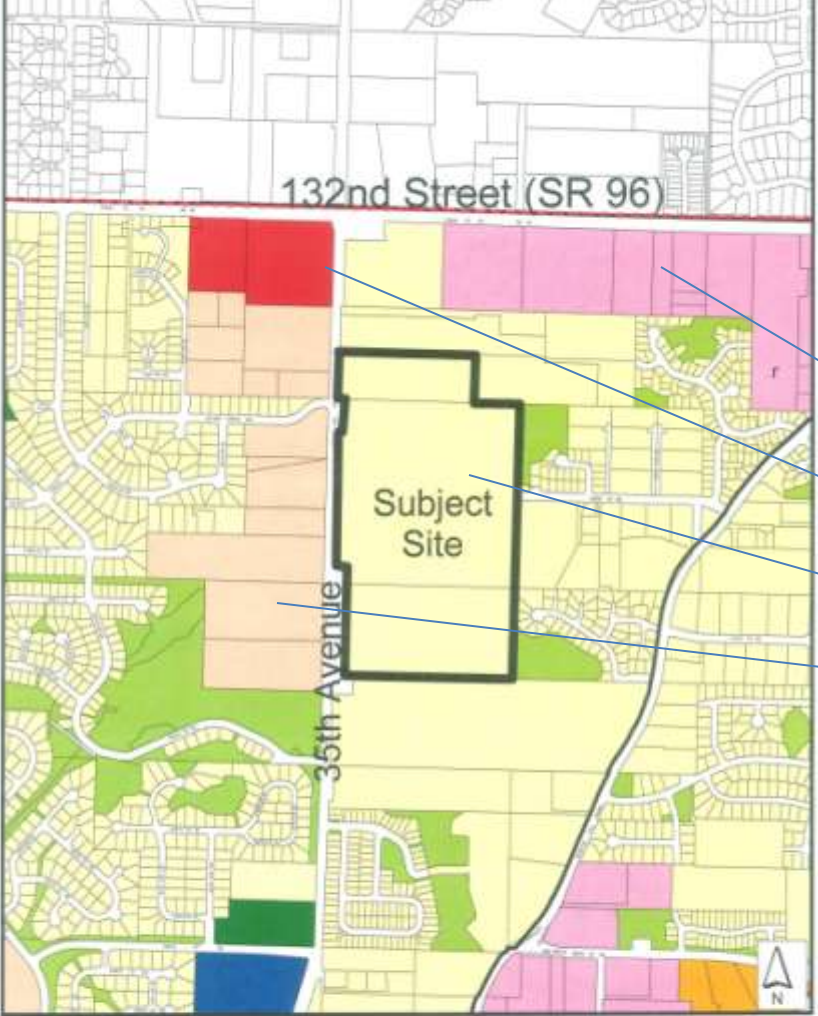


# Citywide Goals and Vision

- Promote well-designed cohesive residential neighborhoods w/ walkable connections to services.
- Integrate new development with the natural landscape while preserving/enhancing critical areas.
- Ensure economic viability of all uses that enhances the City's revenue base.



# Comprehensive Plan Map



Land Use Designations

- Mixed Use Urban Village
- Commercial Business
- Low Density Residential
- Medium Density Residential

**CITY OF MILL CREEK**  
  
 DEPARTMENT OF  
 COMMUNITY  
 DEVELOPMENT

Revised: November 9, 2016. Ordinance # 2016-007  
 Richard West, Jr., Mayor. Ordinance # 2004-072.

**CITY OF MILL CREEK  
 LAND USE PLAN**

Community Business	Low Density Residential
Neighborhood Business	Medium Density Residential
Town/Village Center	High Density Residential
Business Park	Mixed Use/High Density Residential
Office Park	Open Space - Private
Public & Quasi Public	Open Space - Public
Planned Neighborhood Park	

# Enforcement Goals

- Stop Illegal Uses
- Regulate Legal Uses
- Conform Legal Uses to Land Use Regs.
- Eventual Termination of All NCUs
- Recover Enforcement Costs

# NCU Regulatory Issues



# Law of Nonconforming Uses

- State Statutes
- City Regulations
- Case Law
  - State Decisions
  - Federal Constitutional Decisions

# City NCU Regulations

- Key Provision

Discontinuance. All nonconforming uses not conducted in structures (outside uses) on the same lot shall be discontinued within three years of the date the nonconformity was established or adoption of this title, whichever is later.

- Requires Termination (i.e., Conformance)
- Establishes Amortization (i.e., Value)

# *Rhod-A-Zalea v. Snohomish Co.*

- “Nonconforming uses are uniformly disfavored and this court has repeatedly acknowledged the desirability of eliminating such uses.”
- “It is clear that local governments have the authority to preserve, regulate, and even, within constitutional limitations, terminate nonconforming uses.”
- “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.”

# Enforcement Approach

- Formal notice to all newly annexed properties
  - 3 year grace period to abate NCUs
- Numerous letters, notices and personal contacts with PTI
  - Response: Expanded NCUs (Concrete/Pallet Crush)
  - Result: Neighborhood complaints abound
- Build solid case

# Process & Due Process

- Continual Communication with City Council
- Requested Scope and Proof of Claimed NCUs
  - Additional Notice
  - Consistent with NCU Law
  - Assumed Submission of Best Evidence
  - Definition of NCUs
- Further Discussions Re Cessation

# Notice Of Violation

- Extended Drafting & Legal Analysis
- Issued May 24, 2007
- Strategy / Components
  - Avoid Factual Disputes
  - Immediate Cessation of Illegal NCUs
  - “Legalize” Legal NCUs
  - Civil Fines for Noncompliance
  - Start Formal NCU Cessation Clock

# Immediate Response

- Cessation of Most Site Activities
- Removal of Illegal Structures
- Site Cleanup
- Continued Discussions
  - Permits Required
  - Critical Area Regulations
  - SEPA Questions
  - Future Long Term Uses / Master Plan

# Enforcement & Negotiations

- City Position
  - Reasonably Abate/Amortize NCUs
  - Avoid Protracted Legal Proceedings
  - Position for Long Term Future Uses
  - Recover Enforcement Costs
- PTI Position
  - Delay and Obfuscate
  - Outlast City
  - Prove Compensable Taking

# Negotiation Highlights

- Unmediated Negotiation Meetings
- Continual Backsliding; Revisionist History
- Negotiating Team / Client Control Issues
- Administrative Hearing Pressure
- Threats of Expanded Litigation
- Role of Outside Counsel

# Conceptual PTI Proposal

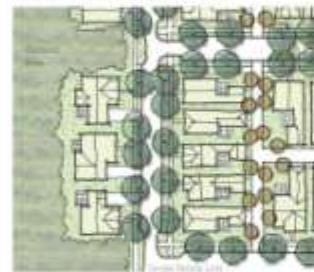


CONCEPTUAL LAND USE PLAN  
Pacific Topsoils, Inc. - Mill Creek Facility

Community P-Patch



Future Single Family Residential



Soil Processing Area



Retail Sales Area



Potential Park Site



Note: Soil processing activities are a low density, outdoor activity and will require a paved area. The paved area will be used for parking and storage of equipment. The soil processing area will be located near the pond.

# Final Settlement Components

- Termination of All NCUs
  - All but 3 Immediately Ended
  - 2 Ended Over Time with Conditions
  - Legitimize Retail / Clean Green Use
- Rezone Property to MDR
- Phased Dismissal of All Claims / Fines
- Property & Access Transfer
- Detailed Implementation Plan

# Final Approved Site Plan



2 Acre Parcel

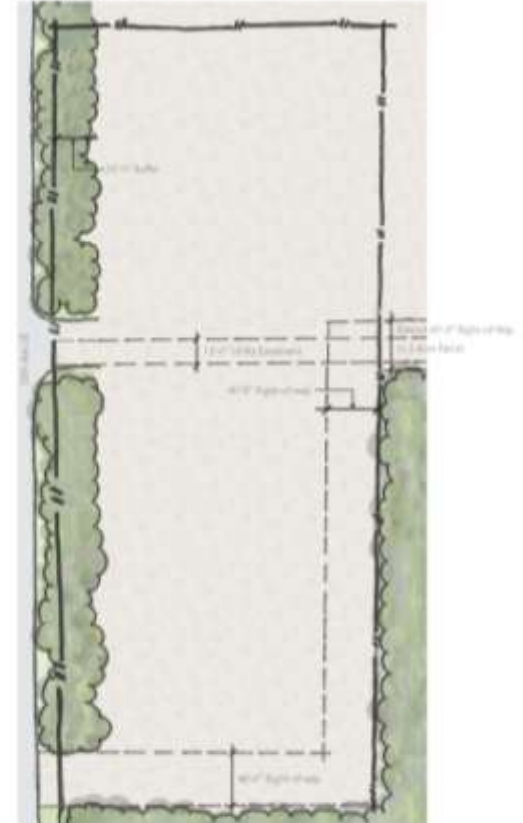


Soil Processing Area



Note: Subplotting provided each for allowing materials from outside and filling with material on site. The areas outlined are areas allocated for existing uses. The only shop area on site will be used on the

Retail Sales Area



CONCEPTUAL LAND USE PLAN

Pacific Topsoils, Inc. - Mill Creek Facility

# PTI Today



# Lessons Learned

- Know Your Goals
  - Comprehensive Plan Goals
  - Legal/Procedural Goals
- Stay Focused at All Levels / All the Time
- Players Must Be Rational
- Create Win–Win Solutions
- Be Persistent
- Adopt Amortization Regulations

Questions?