

WHATCOM COUNTY HEARING EXAMINER

RE: Administrative Appeal ) APL2014-0003  
Application for ) APL2014-0014  
Daniel Brocker )  
 ) FINDINGS OF FACT,  
 ) CONCLUSIONS OF LAW,  
 ) AND DECISION

---

**SUMMARY OF APPEAL AND DECISION**

Appeal: Daniel Brocker has appealed a decision made by Whatcom County Planning and Development Services, denying his application to establish a Nonconforming Use Status for an existing commercial motocross track, located at 400 West Hemmi Road in Bellingham Washington.

Decision: The Whatcom County Hearing Examiner concludes that a low impact personal use of the subject property was established prior to July 19, 1979. The use consisted of motorcycle trail riding on the subject parcel by a family member of the owners of the parcel and a few friends. Any use of the parcel for motocross or motorcycle riding beyond the scope that existed in 1979 is beyond the scope of the Nonconforming Use established prior to the requirement that racetracks and outdoor recreational facilities required a Conditional Use Permit. The expansion of the track, including the widening of the trails and the establishment of jumps and other motocross types of improvements done after 1979, required a Conditional Use Permit and, likely, other permits, including Land Clearing and Grading Permits, and, after 1986, Critical Areas Review and Approval.

The Appeal is upheld to the degree that it allows ongoing limited personal use of the property for motorcycle trail riding as a personal noncommercial use by

the owner and a limited number of friends or family on the limited trail system that existed prior to July 19, 1979.

## FINDINGS OF FACT

### I. Background Information

Appellant: Daniel Brocker

Site Location/Address: 400 West Hemmi Road  
Bellingham, Washington

Zoning: Rural [R10A]

Total Acreage: 19.85 acres

Assessor's Parcel Number(s): 390213 115108

Hearing Date: February 25, 2015

Authorizing Codes, Policies, Plans, and Programs  
The Official Whatcom County Zoning Ordinance, Title 20

### Exhibits

- 1 Administrative Appeal Application, 2014-0003, dated February 20, 2014 with attachments  
1-1 Notice of Penalty, dated February 6, 2014, with Appeal Rights  
1-2 Cover letter to Appeal, from Lesa Starkenburg-Kroontje, dated February 20, 2014  
1-3 Customer Receipt, dated February 20, 2014, Title 20  
1-4 Notice of Violation, dated February 6, 2014, with Appeal Rights, Titles 15 / 20  
1-5 Letter dated April 22, 2014 from Suzanne Bosman to Lesa Starkenburg-Kroontje re:  
Determination of Completeness Application, NON2014-0001, Nonconforming Use  
1-6 Letter dated June 18, 2014 from Suzanne Bosman to Daniel Brocker re: Notice of  
Additional Requirements, NON2014-0001: Intent to Deny Nonconforming Use  
1-7 Letter dated October 27, 2014 from Suzanne Bosman to Daniel Brocker re:  
NON2014-0001 – Nonconforming Use Denied, Motocross Track
- 2 Administrative Appeal Application, 2014-0014, dated November 11, 2014, with attachments  
2-1 Appeal Statement  
2-2 Letter dated October 27, 2014 from Suzanne Bosman to Daniel Brocker re:  
NON2014-0001 – Nonconforming Use Denied, Motocross Track  
2-3 Customer Receipt, November 10, 2014  
2-4 Description of the Nonconforming Use, with Affidavit of Nonconforming Use, date of

Commencement of Nonconforming Use: prior to 1978, signed by Daniel Brocker, on April 7, 20(not eligible), with Declarations attached from Daniel Ingram, March 31, 2014; John Nestle, March 24, 2014; Brian Thompson, March 26, 2014; Todd Bunker, March 28, 2014; Richard Beck, March 25, 2014; Jake Billings, March 25, 2014; Shannon Ingram, March 26, 2014

2-5 Customer Receipt, April 7, 2014

3 Staff Report, dated February 6, 2015

- 3-1 Appendix A Notice of Violation, September 24, 2012
- 3-2 Appendix B General Protection District Conditional Uses (.150) Amended 10-16-78
- 3-3 Appendix C Notice of Violation, February 5, 2014 [ENF2012-0039] – Title 20
- 3-4 Appendix D Letter dated June 18, 2014 from Suzanne Bosman to Daniel Brocker re: NON2014-0001 – Notice of Additional Requirements: Intent to Deny Nonconforming Use
- 3-5 Appendix E Letter dated October 27, 2014 from Suzanne Bosman to Daniel Brocker re: NON2014-0001 – Nonconforming Use Denied: Motocross Track
- 3-6 Appendix F Letter dated October 23, 2012 from Deborah Moldenhauer re: Concerns with neighboring usage of track, with attached neighbors' petition
- 3-7 Appendix G Appellant's Facebook posting
- 3-8 Appendix H An Adult Waiver, titled, "Honda Land MX – 400 West Hemmi Road, Bellingham, WA 98226"
- 3-9 Appendix I Before and After Site Photos taken from neighbor's boundary
- 3-10 Appendix J Letter of concern, dated February 1, 2015 from Bob McWhorter to Director of PDS, with enclosed copy of Attorney Dannon Traxler's letter to Whatcom County Council, August 9, 2013
- 3-11 Appendix K Letter of concern, dated Feb 4, 2015 from John and Yvette Murphy
- 3-12 Appendix L Letter of concern, no date, from Russ Lambert
- 3-13 Appendix M Email of concern, dated February 3, 2015 from Doug and Brenda Nilsen, to PDS; Jack Louws; Suzanne Bosman
- 3-14 Appendix N Letter of concern, dated February 5, 2015, from Mark and Debbie Moldenhauer to Whatcom County Council Representatives re: Motorcycle Track
- 3-15 Appendix O Letter of concern, dated January 30, 2015, from Sharon Lambert

4 Letter dated February 16, 2015, from Lesa Starckenburg-Kroontje to Whatcom County PDS and Hearing Examiner re: APL2014-0003, withdrawing Appeal in regard to operation of commercial business, with intent of applying for a cottage industry permit

5 3-Aerial Site [8.5 x 11] Photos, created April 23, 2013 and modified April 29, 2013, with attached Vicinity Map and (8) Large Aerial Site Basemaps: (5-1) 1975; (5-2) 1986; (5-3) 1991; (5-4) 1995; (5-5) 2004; (5-6) 2008; (5-7) 2010; (5-8) 2013

6 Public Comment Letters received by the Hearing Examiner's Office

- Email from Mark Moldenhauer dated February 5, 2015 to Council re: Motorcycle racetrack, with attached Letter dated February 5, 2015
- Letter, stamped received by PDS February 9, 2015, from Steve Carter with attached YouTube – Roost Factory site, dated January 17, 2014

- 7 Staff emails, dated Feb 6, 7, 9, 10, clarifying type of Administrative Appeals
- 8 Legal Notice of Open Record Hearing, published February 12, 2015
- 9 Certificate of Posting Notice of Open Record Hearing, dated February 12, 2015
- 10 Email dated Feb 9, 2015 from Sheriff Bill Elfo to Council; Jack Louws; PDS Sam Ryan re: receipt of Noise complaints for 400 West Hemmi Road, with 73 pages of incident history for 400 West Hemmi Road police reports, submitted to Hearing Examiner by PDS on February 19, 2015
- 11 Bocker's Hearing Brief, prepared by Lesa Starckenbug-Kroontje, dated February 23, 2015, with attachments:
  - 11-1 Email from Suzanne Bosman, dated October 19, 2012 re: motor cycle track
  - 11-2 Email from Suzanne Bosman, dated April 10, 2013 to Jack Louws re: 400 W.
  - 11-3 Hemmi Road-Notice of Violation-Motocross Track
  - 11-4 Email from Jack Louws to Council, dated April 19, 2013 re: Hemmi Road motocross site
  - 11-5 (1) Aerial Site Photo, dated 2013  
(2) Aerial Site Photo, dated 2010  
(3) Aerial Site Photo, dated 2008  
(4) Aerial Site Photo, dated 2004  
(5) Aerial Site Photo, dated 1995  
(6) Aerial Site Photo, dated 1991  
(7) Aerial Site Photo, dated 1986  
(8) Aerial Site Photo, dated 1975
  - 11-6 Declaration of Daniel Bocker, dated February 23, 2015, with attachments  
(1) Email from Suzanne Bosman to Danny Bocker, dated October 10, 2012 re: County Fines-Remission Forms  
(2) Aerial Site Photo, dated 1975  
(3) Aerial Site Photo, dated 1986
  - 11-7 Declaration of Service, prepared by Kelsey Wemp, dated February 24, 2015
- 12 Declaration of Wayne Egerdal, dated February 24, 2015, re: motocross track
- 13 Letter dated February 15, 2015 from Ruth and Rich Hunt re: 400 W. Hemmi Road, 911call, with attached police report
- 14 Police Report document – 73 pages
- 15 Email dated February 24, 2015 from Royce Buckingham re: Additional Exhibits [DVD of YouTube video, January 17, 2014, and link address]
- 16 Email dated February 24, 2015 from Richard Fleming re: Track on 400 Hemmi Road
- 17 County's Response Brief, prepared by Royce Buckingham, dated February 25, 2015
- 18 List of Riders Who Have Paid Thru January 2013, submitted at hearing by Mr. Bocker

- 19 Letter [submitted at hearing, not dated] from John Nestle re: dirt bike riding at 400 West Hemming Road
- 20 Calendar [submitted at hearing by Steven James Carter] showing days riders/bikes on property in 2013, 2014, and Jan/Feb 2015
- 21 Photos and photo album submitted at hearing by Mr. Carter
- 22 Post-hearing Memorandum re: Effect of Nonconformity and Partial Proposed Findings, prepared by Royce Buckingham, Mar 4, 2015, with attached Certificate of Mailing, Mar 4, 2015
- 23 Declaration No. 2 of Daniel Brocker, dated March 9, 2015, with attached Certificate of Service, delivery dated March 10, 2015
- 24 Letter, dated March 3, 2015, from Lesa Starkenburg-Kroontje re: submitting additional information after review of Exhibit 21 [photos and photo album submitted by Mr. Carter at hearing]
- 25 Post-hearing Memorandum re: Nonconformity and Partial Proposed Findings, prepared by Lesa Starkenburg-Kroontje, dated March 11, 2015, with Certificate of Service, delivery dated March 12, 2012

**Parties of Record**

Daniel Brocker  
2035 Coyote Lane  
Bellingham, WA 98226

Lesla Starkenburg-Kroontje, Attorney-at-Law, P.S.  
PO Box 231  
Lynden, WA 98264

Richard Beck  
964 Colony Court  
Bellingham, WA 98226

Mark Moldenhauer  
239 West Hemmi Road  
Bellingham, WA 98226

Steven James Carter  
376 West Hemmi Road  
Bellingham, WA 98226

Royce Buckingham  
Civil Deputy Prosecuting Attorney

Suzanne Bosman, Senior Planner  
Planning and Development Services

## II.

The property in question is an approximately 20-acre parcel zoned Rural (R10A), located at 400 West Hemmi Road, Bellingham, Washington.

The current owner, Daniel Brocker, purchased the property on March 6, 2012. He purchased the property because he had used it for a number of years as a motocross riding site and he wished to invest in and expand both the quality of the track, and its commercial use. It is probably true that Mr. Brocker did not understand that the track, as it existed at the time of purchase, was illegal under zoning regulations.

## III.

Since Mr. Brocker purchased the track, there has been an increase in the amount of ridership use of the track, and the use of heavy equipment to modify and expand the track, including clearing and grading activity which likely required permits, and all of which was clearly evidenced by photographs, and eye witness testimony. No permits have ever been obtained for modification of the site for motocross purposes or for clearing and grading activity.

Since the site includes two streams and a significant area of floodplain associated with the streams, it is likely that work was done within critical areas, or their buffers, without Critical Area Evaluation and Approval.

The increase use of the track for motocross activities, including parties, and associated land disturbance activities, has resulted in numerous complaints to the Whatcom County Sheriff and to Whatcom County Planning and Development Services.

The Staff Report in this matter, prepared by Whatcom County Planning and Development Services, listed on page 3 the following facts, as determined by Staff:

## Facts

- The appellant owned the property at 400 W. Hemmi Road for at least two years before opening the business the Roost Factory. The business licenses for the Roost Factory were not obtained until 2013.
- A Bellingham General Business License was issued on 4/10/2013 to Daniel Mark Brocker.<sup>1</sup>
- Evidence from the State of Washington Business Licensing Service shows Daniel Mark Brocker as the sole proprietor with an active license for Brock's Speed-N-Sport with the registered trade name of Roost Factory, UBI #602389822. The location of this business as registered with the State of Washington (09/03/2013) is 400 W. Hemmi Road.
- The Washington State Department of Revenue, State Business Records Database shows Daniel M. Brocker as the sole proprietor for a business at 400 W. Hemmi Road. The definition of the business is: motorcycle, ATV, and all other motor vehicle dealers. The permit was issued on May 13, 2013.
- A website at [www.hookit.com](http://www.hookit.com) shows The Roost Factory as a "Motocross spot in Bellingham, WA."
- The Roost Factory was not in operation when the County began enforcement action against the appellant for the commercial use of the motocross track.
- A site inspection was conducted on February 5, 2014. Three signs were on the property: 1) A sign advertising the business name, "The Roost Factory" with an image of a motocross rider and a telephone number of (360) 393-4162; 2) An illuminated sign reading "Open"; and 3) A dry erase board indicating the hours of operation as Tuesday-Saturday, 9:00AM to 6:00PM with Monday's optional.
- The last known address on the tax roll shows the legal property owner as Daniel Brocker whose mailing address is 2035 Coyote Lane in Bellingham, WA. His mailing address (for tax purposes) is on Coyote Lane not W. Hemmi Road. The owner does not live where the business is located. Mr. Brocker verified to Staff that he does not live

---

<sup>1</sup> A Bellingham General Business License is required for businesses operating within the city limits of Bellingham, including those businesses that are located outside the city limits but perform services for customers inside the city limits.

at the site. Therefore, the business does not constitute a Home Occupation.

- On February 6, 2014, the appellant told staff that only he and his father worked at the business and that neither one of them lived at the site.

#### IV.

As a result of the complaints and actions taken by Planning, including enforcement action by Planning for alleged violations of the Zoning Ordinance on this property in 2014, the Appellant herein sought a Nonconforming Use Status to establish that at least some of the current uses predated zoning regulations, and therefore were a Legal Nonconforming Use.

The nonconforming use affidavit describes the use as follows:

The real property located at 400 West Hemi Rd., Bellingham, WA 98226 has been utilized as a commercial motocross and off-road riding facility since prior to 1978...

The only information supporting this claim consisted of declarations from persons who claimed to have used the track prior to 1978, and to have made a payment for this use. None were in the proper form, as set forth in State statute for a Declaration Under Penalty of Perjury [All lack the required identification of the location they were signed at]. After review of the Nonconforming Use Affidavit and supporting documentation, the Planning Department concluded that the information was insufficient to support the request to be identified as a Legal Nonconforming Use, and formally requested additional information from the Appellant on June 18, 2014. The Notice of Additional Requirements informed the Appellant that Planning had insufficient information, requested certain specific information, and informed the Appellant that, if the information was not received within 90 days, the Planning Department would deny the Nonconforming Use Application. The formal Notice of Request for Additional Information was not appealed. The Appellant provided no further information and a Decision, Denying the Nonconforming Use Request, was issued on October 27, 2014, resulting in this Appeal.



## V.

The history of the use of this parcel for recreational motorbike trail riding shows an ongoing expansion, over 30-40 years, from a few friends riding small trails in the woods on the property to the much larger and more intensely used professional motocross track on the site today. This has resulted in a major expansion of the trail system, removal of much of the forest canopy on the site, and utilization of the track as a for profit business. For example, the Appellant has used at least three sources for online advertising since his purchase of the property in 2012. This has apparently been a successful business move since all of the evidence points to a significant increase in ridership and in required payments for everything from individual rides to longer-term rights to use the site for a set amount, for a set period of time.

The record indicates there were two major periods of expansion. The first was undertaken by Mr. Wayne Egerdal, starting in the 1990s, over a period of approximately 20 years. The second major expansion took place after the Appellant purchased the property in 2012. These expansions are clearly identified in the evidence and are consistent with the aerial photographs in the record which show the reduction of tree canopy and the increase in trails on the site from the mid 1970's to the present.

Prior to 1990, use of the track mainly consisted of use by Mr. Egerdal and a few friends or acquaintances. Mr. Egerdal undertook the first expansion in the 1990s. This included, over a period of many years, an ongoing removal of tree canopy and the creation of new and larger tracks for the motorbikes.

At some point, Mr. Egerdal started charging friends and acquaintances a fee for unlimited use of the track for motorbike purposes. It appears that this fee was in the neighborhood of \$500 per year, per person, and that he received the fee from around 12 people at the time the Appellant purchased the property in 2012.

There are claims that people have been paying to ride on the track from every year since 1978 to the present. These claims are made in the "Declarations" submitted by the Appellant, Mr. Brocker, in support of his Application for Nonconforming Use Status for his current commercial motocross track. Only one of the persons who signed the Declarations, Richard Beck, testified (under oath) at the hearing and his hearing testimony changed significantly from his statements in his Declaration. Mr. Beck's hearing testimony is mostly consistent with the Declaration of Wayne Egerdal, as to the intensity of the use of the track, both before and after Mr. Brocker purchased the property in 2012. The main disagreement, between Mr. Beck's hearing testimony and Mr. Egerdal's recollection, is in regards to when the property was first used for motorcycle use. Mr. Beck claims he first used it prior to 1978 and Mr. Egerdal states that motorcycle use started in 1985. Mr. Beck's 12<sup>th</sup> birthday was on October 15, 1977. Both indicated that payments made were for gas money for the tractor used to maintain the track. Mr. Beck specifically testified that the track is much different now than it was in 1978 as a result of clearing, wider tracks, longer jumps, and a changed layout. Even though Mr. Egerdal claims motorcycle use started in 1985, there is enough evidence in the record to weakly support a conclusion that there was limited personal recreational use of this site, west of Ten-mile Creek, for motorcycle trail riding, prior to it being zoned for Land Use purposes in 1979.

There is very little credible evidence that people were paying to ride on the tracks prior to the 1990s. The Hearing Examiner finds no convincing, credible evidence that the payments were being made for the right to ride on the parcel prior to 1980.

The affidavits submitted in support of the Nonconforming Use Application do not appear to the Hearing Examiner to be credible. They were challenged by Mr. Egerdal, who developed the track and controlled its use until 2012. They all use the same language to describe the intensity of the use, language which was apparently written by one person and put into each Declaration. While there is conflicting evidence about the type and intensity of the motorbike use in the late 1970s, the Hearing Examiner has concluded that, on a more likely than not basis, that prior to 1979, there was a low intensity recreational use, mostly by

a few teenagers and controlled by Wayne Egerdal. This use was with the permission of the owners and allowed their son, Wayne Egerdal, and friends to ride motorbikes on small trails in the woods that were most likely created by animals. The use appears to be mainly seasonal and to consist of small groups riding a few days a week, during the heaviest use times. That is the extent of use for motorbike related recreational purposes which can be considered a legally established nonconforming use prior to the requirement to obtain a Conditional Use Permit (1979) for facilities of the type which currently exist.

## **VI.**

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following

### **CONCLUSIONS OF LAW**

#### **I.**

This Appeal was filed in a timely manner. Necessary notices have been given. The Hearing Examiner has jurisdiction to hear and decide this Appeal of Whatcom County Planning and Development Services' Denial of Nonconforming Use Status, by the Appellant.

#### **II.**

Prior to July 19, 1979, the subject property was in the Unclassified Zone. On July 19, 1979, the property was zoned General Protection. After that date, a Conditional Use Permit was required for racetracks and commercial recreational facilities, pursuant to WCC 2.24.510, as it read on that date.

On July 19, 1979, the limited recreational use of motorbikes by a member of the owner's family, and friends and acquaintances on the parcel, as it existed on that date, became a Legal Nonconforming Use. The Appellant's request for Nonconforming Use Status should be granted only to the extent that allows personal noncommercial use by the

existing owner and friends or acquaintances on a trail system consistent with the limited one that existed on July 19, 1979, and to the use intensity that existed at that time.

The current large, loud, and heavily used commercial motocross riding facility existing on the site at this time far exceeds the use established as a personal recreational use prior to July 1979. To the extent the current use exceeds the allowed Nonconforming Use it now requires a Conditional Use Permit.

Enforcement of this requirement lies with Whatcom County Planning and Development Services. As noted above, Planning has served two violation notices on the Appellant for activities on that site. Neither of these violation notices was appealed to the Hearing Examiner. Enforcement issues are not before the Hearing Examiner as a result of this Appeal by Mr. Brocker of Whatcom County's Denial of Nonconforming Use Status.

The Whatcom County Hearing Examiner should enter a Decision acknowledging a very limited Nonconforming Use Status for personal motorbike use on trails on the site as they existed on July 19, 1979.

### III.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following

#### **DECISION**

The Whatcom County Hearing Examiner concludes that a low impact personal use of the subject property was established prior to 1979. The use consisted of seasonally limited, occasional motorcycle trail riding on the subject parcel by a family member of the owners of the parcel, and a few friends. Any use of the parcel for motocross or motorcycle riding beyond the scope that existed in 1979 is beyond the scope of the Nonconforming Use established prior to the requirement that racetracks and outdoor recreational facilities require a Conditional Use Permit. Additionally, any expansion of the track, including the

widening of the trails and the establishment of jumps and other motocross types of improvements done after 1979, requires a Conditional Use Permit and, likely, other permits, including Land Clearing and Grading Permits.

The Appeal is upheld to the degree that it allows ongoing limited personal use of the property for motorcycle trail riding, as a personal noncommercial use by the owner and a limited number of friends, on the limited trails that existed on July 19, 1979.

NOTICE OF APPEAL PROCEDURES FROM FINAL DECISIONS OF  
THE WHATCOM COUNTY HEARING EXAMINER

This action of the Hearing Examiner is final. The following review procedure is available from this Decision and may be taken by the Applicant, any Party of Record, or any County Department.

Appeal to County Council. Within ten business days of the date of the Decision a written Notice of Appeal may be filed with, and all required filing fees paid to, the Whatcom County Council, Courthouse - 1st Floor, 311 Grand Avenue, Bellingham, WA 98225. The Appeal Notice must state either:

- 1) The specific error of law which is alleged, or
- 2) How the Decision is clearly erroneous on the entire record.

More detailed information about appeal procedures is contained in the Official Zoning Ordinance at Section 20.92.600 thru.830. A copy of this document is available for review at the County Council Office. After an Appeal has been filed and the Council Office has received the hearing record and transcript of the public hearing, the Parties will be notified of the time and date to file written arguments.

DATED this 21<sup>st</sup> day of April 2015.

  
\_\_\_\_\_  
Michael Bobbink, Hearing Examiner