

WHATCOM COUNTY HEARING EXAMINER

RE: Administrative Appeal) APL2015-0006
Application for)
Daniel Brocker) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
) AND DECISION

SUMMARY OF APPEAL AND DECISION

Appeal: The Appellant, Daniel Brocker, filed an Appeal of a Notice of Violations issued by Whatcom County on July 15, 2016, alleging violations of the Whatcom County Critical Areas Ordinance and Official Zoning Ordinance.

Decision: The Administrative Decision regarding the Violations for continued use of the motocross track without a Conditional Use Permit and the \$4,200 in Penalties assessed for these specific Zoning Ordinance Violations is upheld.

No specific Critical Areas Violations have been proven by a preponderance of the evidence and no penalties are imposed for the specific Critical Areas Violations alleged.

The Appellant is ordered to submit the required Critical Areas Assessment by a qualified professional to Whatcom County Planning and Development Services within 40 days of the date of this Decision unless Planning agrees to an extension. Violations of the timeframe shall be penalized at the rate of \$100 per day for the first 30 days and \$250 a day thereafter, until this required Critical Areas Assessment has been submitted.

The Appellant is ordered to allow his Critical Areas Specialist to co-operate

with an Interdisciplinary Critical Areas Review of the subject property as authorized by WCC 16.16.245.

FINDINGS OF FACT

I.

Background Information

Appellant: Daniel Brocker

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

Assessor's Parcel Number(s): 390213 115108

Zoning: Rural (R10A)

Total Acreage: 19.85 acres

Authorizing Codes, Policies, Plans, and Programs

The Official Whatcom County Zoning Ordinance, Title 20

Legal Notice of Open Record Hearing, October 9, 2015

Certificate of Posting Notice of Open Record Hearing, October 15, 2015

Hearing Dates: October 28, and continued to December 16, 2015. Record remained open for Post-hearing Briefs: Mr. La Rocco's Brief due January 27 and Mr. Buckingham's Response Brief due Feb 5, 2016, with a hearing date to be determined for review in mid-February.

Exhibits

- 1 Administrative Appeal Application, 2015-0006, dated August 11, 2015 with attachments
 - 1-1 Appeal Statement and Customer Receipts, dated August 11, 2015
- 2 Staff Report, dated October 12, 2015 with attachments:
 - 2-1 Appendix A Notice of Violation, Staff Report, Title 16.16 and Title 20, dated July 15, 2015, with Appeal Rights
 - 2-2 Appendix B Notice of Penalty for Seven Separate Offenses, Title 16.16: Critical Areas Penalty, dated July 15, 2015, with Appeal Rights
 - 2-3 Appendix C Notice of Penalty for Seven Separate Offenses, Title 20: Zoning Code Penalty, July 15, 2015, with Appeal Rights
 - 2-4 Appendix D Certified Mail Envelope to Daniel Brocker from PDS, return to Sender, Refused, dated July 24, 2015

- 2-5 Appendix E PDS Site Photos (5), dated July 28, 2015
 - 2-6 Appendix F PDS Site Photos (6), dated August 7, 2015
 - 2-7 Appendix G hand written request for pre-deprivation (sic) hearing, August 11, 2105, signed by Danny Brocker
 - 2-8 Appendix H Letter dated August 24, 2015 from Sam Ryan, PDS Director, to Daniel Brocker re: Post Deprivation Meeting, Letter of Determination
 - 2-9 Statement of Concern, signed JER received, August 28, 2015, submitted by Daniel Mark Brocker
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- 3 Email string from Suzanne Bosman, dated August 4 re: Critical Areas Violations – 400 West Hemmi Road, with response from Susan Meyer (Dept of Ecology), dated August 10, with reply from Bosman dated August 10, 2015
 - 4 Site Photos (5) taken July 29, 2015
 - 5 Email from Suzanne Bosman to Danny Brocker, dated August 14, 2015 re: Post Deprivation Hearing
 - 6 Calendar [April, May, June, July 2015] with handwritten notes
 - 7 Email string, from and to Suzanne Bosman, Carole Magner, and Royce Buckingham, Sept 9 and 10, 2015 re: Brocker Appeal Hearing Date
 - 8 Email from Carole Magner to Lesa Starkenburg-Kroontje, Royce Buckingham, Suzanne Bosman, dated April 21, 2015 re: Brocker Decision attached, with mailing to Mr. Brocker, Mr. Beck, Mr. Moldenhauer, and Mr. Carter
 - 9 Legal Notice, Open Record Hearing, dated October 9, 2015
 - 10 Posting Notice, dated October 15, 2015
 - 11 Calendar from July to December 13, 2015
 - 12 Site photos showing CAT work and/or track use between Nov 21 and Dec 5, 2015
 - 13 Email string from Royce Buckingham to Hearing Examiner, February 2, 2016, noting the date for the Appellant's Attorney's post-hearing submission, due January 27, had expired and requested a decision based upon the evidence and arguments made at the hearing. On February 3, 2016, the Hearing Examiner closed the record.
 - 14 Daniel Brocker, Administrative Appeal, APL2014-0003, entire file, with the following 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 Feb 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; Tod 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, Feb 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, Oct 27, 2014, 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, and 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 February 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, January 30, 2015, from Sharon Lambert
- 4 Letter dated February 16, 2015, from Lesa Starkenburg-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 Feb19, 2015
 - 11 Bocker's Hearing Brief, prepared by Lesa Starckenbug-Kroontje, Feb 23, 2015, with attachments:
 - 11-1Email from Suzanne Bosman, Oct 19, 2012 re: motorcycle track
 - 11-2Email from Suzanne Bosman, dated April 10, 2013 to Jack Louws re: 400 W. Hemmi Road-Notice of Violation-Motocross Track
 - 11-3Email Jack Louws to County Council, April 19, 2013 re: Hemmi Road motocross site
 - 11-4(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
 - 11-5Declaration of Daniel Bocker, Feb 23, 2015, with attachments
 - (1)Email from Suzanne Bosman to Danny Bocker, dated Oct 10, 2012 re: County Fines-Remission Forms
 - (2)Aerial Site Photo, dated 1975
 - (3)Aerial Site Photo, dated 1986
 - 11-6Declaration of Service, prepared by Kelsey Wemp, Feb 24, 2015
 - 12 Declaration of Wayne Egerdal, dated February 24, 2015, re: motocross track
 - 13 Letter, Feb 15, 2015 from Ruth and Rich Hunt re: 400 W. Hemmi Rd, 911- call, 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 Hemmi 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
- 23 Declaration No. 2 of Daniel Brocker, dated March 9, 2015, with attached Certificate of Service, delivery date 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 date March 12, 2012

Parties of Record

Danny Brocker
400 West Hemmi Road
Bellingham, WA 98226

Robert Joseph La Rocco
The La Rocco Law Firm, P.C.
1313 East Maple Street, Suite 201-531
Bellingham, WA 98225

Steven Carter
376 West Hemmi Road
Bellingham, WA 98226

Royce Buckingham
Whatcom County Civil Deputy Prosecutor

Suzanne Bosman, Senior Planner
Ryan Ericson, Natural Resources Supervisor
Planning and Development Services

II

This Appeal involves Violation Notices and Civil Penalties imposed upon the Appellant by Whatcom County Planning and Development Services for alleged ongoing violations on the subject property. In order to understand this Appeal, it is necessary to recapitulate the history.

Much of the history and background factual information is contained in the Hearing Examiner file for a prior Brocker Administrative Appeal, APL 2014–00014. The Hearing Examiner is taking Judicial Notice of the Decision in this file and has incorporated the Decision and the entire file as exhibits herein.

Daniel Brocker purchased the property that is the subject of the Violation Notices and this Administrative Appeal on March 6, 2012. Later in 2012, Whatcom County Planning and Development Services began to receive citizen complaints about the noise and disruptive behavior associated with the operation of a motocross track on the property. The track existed on the property and had been used as a motocross track prior to the purchase by Mr. Brocker. However no complaints to Whatcom County Planning and Development Services were apparently received until approximately six months after Mr. Brocker's purchase of the property.

In response to the citizen complaints, Planning issued a Notice of Violation on September 24, 2012, to Mr. Brocker, alleging that the motocross track was operating without a required Zoning Conditional Use Permit. Mr. Brocker was notified that as a corrective action, he was required to apply for a Zoning Conditional Use Permit to operate the motocross track. He was advised to cease operations, and that he was facing potential fines and a Stop Work Order. He was also notified that he may be subjected to fines of up to \$1,000 per day for each violation in the future. Mr. Brocker was notified of his appeal rights. Mr. Brocker did not appeal the Violation Notice, did not cease using the motocross track, and did not apply for a Zoning Conditional Use Permit.

As a result of continued use of the property as a motocross track and as a result of continued complaints, Planning filed a Second Notice of Violation on February 5, 2014. The Violation Notice alleged continuing use of the property as a motocross track without a required Zoning Conditional Use Permit. The Notice further listed and documented ongoing citizen complaints and the use of the track for motocross purposes on an ongoing basis. It also provided documentation of clearing activity on the site without a Clearing and Grading

Permit, operation of a business on the site without required permits, and alleged that the use had required a Conditional Use Permit since the adoption of the Whatcom County Interim Zoning Ordinance on July 19, 1979.

The Violation Notice, again, required a number of corrective activities including applying for a Conditional Use Permit or establishing that the ongoing use was a Legal Nonconforming Use, established prior to the adoption of the Interim Zoning Ordinance on July 19, 1979.

This Violation Notice, also, noted that there were regulated shorelines onsite [Ten Mile Creek and its floodplain]. The Notice again threatened future imposition of fines and at the end contains an Official Notice of Intent to Issue a Stop Work Order. No fines were imposed and the Stop Work Order was never issued.

This Violation Notice included notification of the Right to Appeal the Violation Notice to the Whatcom County Hearing Examiner. Mr. Brocker did appeal the Violation Notice and did apply to establish Legal Nonconforming Use Status for the operation of a motocross bike track. The Appeal of this Violation Notice was given file number, APL 2014–00013. The Violation Notice Appeal was on hold while the Application for Legal Nonconforming Use Status was reviewed by Planning.

Ultimately, Planning denied the petition to establish a Legal Nonconforming Use and Mr. Brocker appealed this Administrative Decision. This was the subject of Administrative Appeal, APL2014–00014.

Both Appeals were set for hearing. Prior to the hearing, Mr. Brocker, represented by an Attorney, withdrew the Appeal of the Violation Notice and went forward with the Appeal of the Denial of Nonconforming Use Status.

The Hearing Examiner established a record and heard the Appeal. The Examiner issued a Decision on the Appeal of the Denial of Legal Nonconforming Use Status on April 21, 2015. In summary, the Hearing Examiner concluded that, prior to July 19, 1979, there was a small-scale limited use of motorcycles on the existing trails, probably created by animals, on the site. However the Hearing Examiner concluded that the now existing track was built illegally, during a time when a Zoning Conditional Use Permit was required for the use [starting in July 1979], over a period of 25 years, starting approximately in 1990. The Decision also concluded that continuing illegal expansion of the track, and illegal clearing and grading had taken place on the property since it was purchased by Mr. Brocker. The Decision also noted that a Critical Areas Review and Approval was required for the expansion work, all of which took place after the adoption of the original Whatcom County Critical Areas Ordinance in 1986.

The Hearing Examiner noted that since the matter before him was not an Appeal of a Violation Notice or Penalties, ongoing enforcement was the responsibility of Whatcom County Planning and Development Services. In the Conclusions of Law, the Hearing Examiner stated, "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 that the current use exceeds the allowed nonconforming use, it now requires a Conditional Use Permit."

III.

Mr. Brocker did not appeal the Hearing Examiner's Decision, which in fact denied the allowed Legal Nonconforming Use Status for the currently existing motocross track on the parcel. The Decision in Administrative Appeal, APL2014-00014, became a Final Decision and the law of the case. The existing motocross track requires a Zoning Conditional Use Permit.

IV.

After receiving continuing complaints and documenting of ongoing activities that the

Whatcom County Code Enforcement Officer felt were in violation of the Hearing Examiner's Decision in APL2015-0014, denying Nonconforming Use Status to the existing motocross track, two Notice of Violations and two Notices of Penalties were issued by the Planning Department on July 15, 2015. Mr. Brocker filed this timely Appeal.

The Violation Notices allege ongoing, continuing use of the expanded motocross bike track on the parcel since the Hearing Examiner's April 21, 2015, Decision; that this use was not a Legal Nonconforming Use; and that a Zoning Conditional Use Permit was required. The Violation Notices allege no Conditional Use Permit was applied for; that there were ongoing clearing and grading activities on the site without a required permit; that there was ongoing activity on the site which violated Whatcom County's Critical Areas Ordinance; and contained a list of corrective actions, including requiring the hiring of a qualified professional to prepare a Critical Areas Assessment.

The Notice also informed Mr. Brocker that a Stop Work Order would be issued and advised him of his rights to a pre-depravation hearing, prior to the issuance of the Stop Work Order. Mr. Brocker did not request a pre-depravation hearing. Thereafter a Stop Work Order was issued. Mr. Brocker requested a post-depravation hearing, which was held. The Order was left in place unchanged. The Stop Work Order was not appealed, and is not currently before the Hearing Examiner.

For the first time, Whatcom County imposed penalties on Mr. Brocker. The County alleged seven separate violations of the Zoning Ordinance for continuing to use the track between May 3 and July 5, 2015, without a Zoning Conditional Use Permit, and imposed a total assessed penalty of \$4,200. The Notice of Penalty included a recitation of the Defendant's rights to request remission or mitigation of the fine imposed or to appeal the penalty to the Whatcom County Hearing Examiner. Mr. Brocker did not request a remission or mitigation hearing, did not pay the penalty, did not specifically appeal the imposition of a penalty or the amount of the penalty to the Hearing Examiner, and did not discuss the penalty or fines in his Statement on Appeal.

Mr. Brocker's property is encumbered by two streams and their habitat conservation area buffers, and a floodplain associated with Ten Mile Creek. Ten Mile Creek has historically provided, and may currently provide, habitat for Chinook salmon, and Endangered Species. It is highly likely that there are extensive wetland areas regulated under the Critical Areas Ordinance on this site. The extent of the critical areas onsite is significant, but the exact boundaries are unknown at this time. There can be little doubt that the track construction and associated clearing and grading, done from around 1990 to the present, have in part taken place without permits in critical areas and/or their buffer.

Mr. Brocker agreed to obtain a Wetland or Critical Areas Assessment to identify the scope of regulated critical areas on his property. However he has not followed through and no assessment currently exists. Staff reports that the specialist, hired by Mr. Brocker to do the Critical Areas Assessment, has informed Staff that Mr. Brocker refuses to let him onsite to do an assessment and refuses to allow him to work with an Interdisciplinary Team to determine the extent and location of the critical areas on his property.

The Notice of Violation and Penalty for Critical Areas Violations on the site, dated July 15, 2015, alleges use of an excavator on the property without a Clearing and Grading Permit on a site which contains a significant area regulated by the Whatcom County Critical Areas Ordinance. No land disturbance activity is allowed within critical areas or their protective buffers without permits. The Critical Areas Technical Administrator is empowered under the Critical Areas Ordinance to require a Critical Areas Assessment where the Administrator determines it is likely that critical areas exist and/or where the extent of their boundaries and buffers is unknown. Mr. Brocker is aware of these requirements.

V.

Mr. Brocker filed an Appeal on August 11, 2015.

Thereafter Mr. Brocker filed a Statement of Appeal outlining the reasons he felt the Decisions he was appealing were in error. The Statement, setting forth the grounds for Mr. Brocker's Appeal, Exhibit 1-1 in the Hearing Examiner file, listed as grounds, the hardship on Mr. Brocker by not being able to use the track to prepare for his professional motocross events; the failures of his Attorney in reference to the prior Hearing Examiner Decision, issued in Administrative Appeal, APL2014-0014, on April 21, 2015; the reasons he failed to appeal the prior Decision in a timely manner; and a number of reasons why he felt the prior un-appealed Hearing Examiner Decision, APL2014-0014, was issued in error.

At no point does Mr. Brocker's Statement of Grounds for Appeal deny or even discuss the alleged violations of the Whatcom County Zoning Ordinance resulting from use of the existing track without a Conditional Use Permit, nor the Critical Areas Violations alleged as a result of ongoing clearing and grading activity done on the site, through the use of heavy equipment, without a Critical Areas Assessment and permission from the Critical Areas Technical Administrator. The Statement for Grounds for Appeal also failed to mention or challenge the penalties.

The Violation Notices also informed Mr. Brocker that a Stop Work Order would be issued and advised him of his rights to a Pre-depravation Hearing prior to the issuance of the Stop Work Order.

The Appeal Statement does not discuss the Stop Work Order. The Post-depravation Hearing Decision Stop Work Order was finalized on August 24, 2015, after this Appeal was filed. There has been no Appeal of the Stop Work Order and it remains in place.

VI.

The Notice of Violation and Penalty regarding Critical Areas Violations alleges seven separate dates between May 3 and July 6, 2015, where heavy equipment was being used onsite for land disturbance activities. The record establishes that, on a more likely than not

basis, land disturbance activities resulting from the use of the excavator took place on the site on six of these dates: May 3, 2015; May 13, 2015; June 24, 2015; June 26, 2015; June 27, 2015; and July 5, 2015. However, there is little evidence establishing that the specific work done on those dates was within a regulated critical area or its buffer.

The record does not support a finding, by a preponderance of the evidence, that land disturbance activity took place on May 20, 2015.

VII.

A separate Notice of Violation and Penalty, also issued July 15, 2015, alleges seven violations of the Whatcom County Zoning Ordinance. The violations consist in each case of a number of motocross bikes using the existing non-permitted track located on Mr. Brocker's property. All of the violations were testified to under oath by an eyewitness. None of the alleged violations were denied and there is nothing in the record to indicate that they did not take place.

Each of these violations, as set forth in the Violation Notice, Exhibit 2–3 in the Hearing Examiner file, is found, by a preponderance of the evidence, to have been committed.

VIII.

Any Findings of Fact deemed to be Conclusions of Law are hereby adopted as such. Based on the foregoing Findings of Fact now are entered the following Conclusions of Law.

CONCLUSIONS OF LAW

I.

The Hearing Examiner concluded in the Decision issued in Administrative Appeal, APL2014–0014, on April 21, 2015, that the existing motocross track on the subject parcel was created illegally, without a required Zoning Conditional Use Permit. Mr. Brocker has

not applied for a Zoning Conditional Use Permit, but still continues to allow use of the track which was illegally constructed. Each separate use is a violation of the Whatcom County Zoning Ordinance, as alleged in the Violation Notice. Whatcom County has established by a preponderance of the evidence that seven such violations occurred during May and June 2015. Mr. Brocker has not contested the fact that the violations took place and has not contested or requested mitigation, or remission of the penalty, or appealed the imposition of penalties to the Hearing Examiner.

The penalties imposed for violations of the Whatcom County Zoning Ordinance, in the amount of \$4,200, are appropriate and are upheld.

III.

WCC 16.16.225 Regulated Activities, reads, in relevant part, as follows:

- A. The following activities shall be subject to the provisions of this chapter when they occur within critical areas or their buffers:
 - 1. Clearing, grading, dumping, excavating, discharging, or filling with any material. This includes creating impervious surfaces.
 - 2. Constructing, reconstructing, demolishing or altering the size of any structure or infrastructure, subject to the provisions for a nonconforming structure pursuant to WCC 16.16.275, Chapter 20.83 WCC, and WCC 23.50.070.
 - 3. Any other activity for which a county permit is required, excluding permits for interior remodeling.

These activities also require, at least in most cases, a Clearing and Grading Permit. Normally, Critical Areas Assessments are done in response to a permit application. The Applicant has undertaken on-going clearing and grading activities on the site, containing large areas of regulated critical areas and buffers, without a permit and without obtaining Critical Areas Approval. All activity within critical areas requires Critical Areas Approval even if a permit is not otherwise required. The record clearly establishes a pattern of ongoing Critical Areas Violations from 1990 into 2015.

Pursuant to WCC 16.16.225, the Technical Administrator is authorized to require a Critical Areas Assessment Report if the Administrator determines that a proposed activity "is within, abutting, or is likely to adversely affect a critical area or buffer" A Critical Areas Assessment has been required and that requirement is upheld. Continued failure to comply with the requirement to obtain a Wetland Assessment will be an on-going violation of the Enforcement Order. The Appellant should be required to obtain a professional Wetland Assessment, and to the extent the existing track was constructed within regulated critical areas, prepare a Mitigation and Monitoring Plan to address the work illegally done within Critical Areas and/or their buffer.

IV.

The Critical Areas Violations alleged in the Penalty Document specify that on specific dates between May 3 and July 5, 2015, the Critical Areas Ordinance was violated by the use of an excavator on the property. The record shows that the excavator was working on the illegally established track and, on one occasion, in the vicinity of the "swamp area." However, the record does not establish that any of this work took place within regulated critical areas. Since the penalties have been imposed for specific violations on specific days, it requires a showing that the violation took place within a regulated critical area. Since there is no proof that these specific violations took place within a regulated critical area, the penalties imposed for these specified Critical Area Violations should be set aside.

V.

The Appellant failed to identify on the Appeal paperwork or in his Statement of Grounds for the Appeal what Decisions were being appealed. For this reason, it is appropriate to find that no timely Appeal of any of the Decisions has been filed. As an alternative basis for denying the Appeals, the Hearing Examiner could dismiss the Appeals because no timely Appeal, identifying the Decision being appealed, has been filed.

The Grounds for Appeal set forth in the Appellant's Statement of the Reasons for the Appeal make it clear that the real Decision being appealed was the Hearing Examiner

Decision issued in Administrative Appeal, APL2014–0014. A Decision of the Hearing Examiner cannot be appealed to the Hearing Examiner and the timeframe to appeal that Decision to the Whatcom County Council has run.

VI.

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 Administrative Decision regarding the Violations for continued use of the motocross track without a Conditional Use Permit and the \$4,200 in Penalties assessed for these specific Zoning Ordinance Violations is upheld.

No specific Critical Areas Violations have been proven by a preponderance of the evidence and no penalties are imposed for the specific Critical Areas Violations alleged.

The Appellant is ordered to submit the required Critical Areas Assessment by a qualified professional to Whatcom County Planning and Development Services within 40 days of the date of this Decision unless Planning agrees to an extension. Violations of the timeframe shall be penalized at the rate of \$100 per day for the first 30 days and \$250 a day thereafter, until this required Critical Areas Assessment has been submitted.

The Appellant is ordered to allow his Critical Areas Specialist to co-operate with an Interdisciplinary Critical Areas Review of the subject property as authorized by WCC 16.16.245.

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-.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 24th day of February 2016.



Michael Bobbink, Hearing Examiner