

WHATCOM COUNTY HEARING EXAMINER

Administrative Appeal of)	File No. APL2009-0027
)	
<i>A. Jeff Leghorn</i>)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
)	AND DECISION

SUMMARY OF APPEAL AND DECISION

Appeal: The Applicant is requesting that Whatcom County remove a six-year development moratorium that was imposed on the subject property after obtaining a Class III Forest Practices Application Permit from the Department of Natural Resources (DNR) without completing an approved Conversion Option Harvest Plan (COHP) through Whatcom County.

Decision: The requested Appeal to Remove the Six-Year Development Moratorium is granted.

FINDINGS OF FACT

INTRODUCTION

The following Findings of Fact and Conclusions of Law are based upon consideration of the exhibits admitted herein and evidence presented at the public hearing.

I.

PRELIMINARY INFORMATION

Applicant: A. Jeff Leghorn

Owner: A. Jeff Leghorn

Property Location/Address: 2692 H Street Road
Blaine, WA 98230

Legal Description:
Assessor's Parcel No. 410136 292238
N 1587.41 FT OF TR DAF-W 40 ACRES OF E 1/2-LESS RD

Zoning: R10A Rural 1DU/10AC

Comprehensive Plan: Rural

Subarea: Birch Bay-Blaine

Authorizing Ordinances: WCC 20.80.738 Development Moratoria
 WCC 20.84.240 Appeals
 WCC 20.92 Hearing Examiner

Applicable Whatcom County Zoning Codes: WCC 20.80.738

SEPA Review: Determination of Non-Significance, issued December 30, 2009

Legal Notices: Published – December 30, 2009 and February 4, 2010
 Mailed – December 31, 2009 and January 29, 2010
 Posted – February 1, 2010

Hearing Date: February 17, 2010

Parties of Record:

A. Jeff Leghorn
2231 H Street Road
Blaine, WA 98230

Cassandra Schoenmakers
Planning and Development Services

Exhibits

- 1 Land Use Application
 - 1-1 Supplemental Application
 - 1-2 Fee Sheet
 - 1-3 Letter of Complete Application, dated December 11, 2009
 - 1-4 Moratorium Removal Submittal Requirements
 - 1-5 Project Description Letter, dated December 2, 2009, from Jeff Leghorn
 - 1-6 Customer Receipt
 - 1-7 Email from Cassandra Schoenmakers to Jeff Leghorn dated October 19, 2009
 - 1-8 Easement, Declaration of Protective Covenants, Statutory Warranty Deed
 - 1-9 Property Owner Mailing Labels
 - 1-10 Property Owner Assessor Records
 - 1-11 Email from Cassandra, dated January 20, 2010 requesting hearing date

- 2 Staff Report, dated February 1, 2010 with attachments
 - 2-1 Fire Marshal “No Comment” Email Memo, dated 12/31/2009
 - 2-2 Memorandum of Agreement Form
 - 2-3 Conservation Easement, dated August 21, 2009, with Wetland & Stream Buffer Mitigation Map, dated July 13, 2009 and Exhibit A – Legal Description
 - 2-4 Performance and Maintenance Bond Agreement, dated August 21, 2009

- 3 Letter of Objection to lifting of moratorium, dated January 12, 2010
- 4 SEPA Distribution and DNS, dated December 30, 2009
- 5 Wetland and Stream Buffer Impact Map, dated July 13, 2009
- 6 Vicinity Map
- 7 Survey Map
- 8 Aerial Photo
- 9 Zoning Map
- 10 Critical Areas Assessment Report: Wetland and Stream Buffer Mitigation Plan, dated July 17, 2009, by Cantrell and Associates
- 11 Critical Areas Assessment Report: Wetland and Stream Delineation, dated September 18, 2006, by Cantrell and Associates
- 12 Washington State DNR Forest Practices Application Office Review Checklist, dated July 10, 2007
- 13 Mailing Certification of Application Notice, dated December 31, 2009
- 14 Legal Notice of Application, dated December 30, 2009
- 15 Certificate of Mailing for Public Hearing, dated January 29, 2010
- 16 Certificate of Posting for Public Hearing, dated February 1, 2010
- 17 Legal Notice of Public Hearing, dated February 4, 2010

II.

The Land Use Services Division of Whatcom County Planning and Development Services recommended approval of the Request to Remove the Six-year Development Moratorium from a 20-acre site located in the Rural zone of Whatcom County, Washington, subject to conditions. The Findings of Fact and Conclusions of Law of the Division are set forth in a Staff Report, Exhibit #2, dated February 1, 2010, a copy of which is attached hereto and incorporated herein by this reference.

The Applicant indicated there were no factual inaccuracies in the Staff Report. The Applicant indicated no objection to the Conditions of Approval requested by Staff. There was no public comment on this matter at the public hearing.

III.

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.

The proposed Removal of a Six-year Development Moratorium can be approved if it is consistent with the Criteria of WCC 20.80.738. Subject to the Conditions of Approval attached to the granting of this permit, the proposal is consistent with the Development Criteria. The Removal of the Six-year Development Moratorium should be granted, subject to conditions.

II.

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 requested Removal of the Six-year Development Moratorium is hereby granted to A. Jeff Leghorn for a 20-acre site located on Assessor's Parcel No. 410136 292238, 2692 H Street Road, Blaine, Washington, subject to the following conditions:

1. A Memorandum of Agreement between Whatcom County and the property owner must be recorded with the Auditor's office that identifies the parcel is not subject to the six-year development moratorium.
2. Mitigation must be installed in accordance with the approved mitigation plan submitted by Cantrell and Associates, dated July 17, 2009. Included in the plan is the submission of an as-built report to Whatcom County in the next available wet season (October through March). Once the as-built is received and approved, the applicant shall receive a portion of the assignment of savings for the cost of installation. The five-year monitoring period begins once the as-built report has been approved and continues until successful completion of all performance standards outlined in the approved mitigation plan. Monitoring reports shall be submitted annually for the first three years as well as the fifth year after the as-built report.
3. The Encroachment Permit must be issued prior to final inspection of the single-family residence (SFR2009-00317).
4. Any future development proposals associated with this property must be reviewed and approved by Whatcom County.

NOTICE OF ADMINISTRATIVE 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 26th day of February 2010.

Michael Bobbink, Hearing Examiner



February 1, 2010

WHATCOM COUNTY PLANNING AND DEVELOPMENT SERVICES

STAFF REPORT

The application of A. Jeff Leghorn For removal of six-year development moratorium	APL2009-00027 FINDINGS, CONCLUSIONS, AND DETERMINATIONS
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I. SUMMARY OF APPEAL AND RECOMMENDATIONS

Application: The applicant is requesting the removal of a six-year development moratorium that was the placed on the property after of obtaining a Department of Natural Resources (DNR) Class III Forest Practice Application Permit without an approved Conversion Option Harvest Plan (COHP) through Whatcom County.

Recommendation: Whatcom County staff recommends approval of the request for removal of the six-year development moratorium.

II. PRELIMINARY INFORMATION

A. BACKGROUND INFORMATION

Applicant: A. Jeff Leghorn

Owner: A. Jeff Leghorn

Property Location/Address: 2692 H Street Rd.
Blaine, WA 98230

Legal Description: APN: 410136-292238
N 1587.41 FT OF TR DAF-W 40 ACRES OF
E 1/2-LESS RD

Zoning: R10A Rural 1DU/10AC

Comprehensive Plan: Rural

Subarea: Birch Bay-Blaine

B. PROCEDURAL INFORMATION

Authorizing Ordinances:

WCC 20.92	Hearing Examiner
WCC 20.84.240	Appeals
WCC 20.80.738	Development Moratoria

Applicable Whatcom County Zoning Codes:

WCC 20.80.738

SEPA Review:

Determination of Non-Significance (DNS) Issued on
December 30, 2009

III. FINDINGS AND CONCLUSIONS

On August 8, 2007 a Class III (non-conversion) Forest Practices Permit (FPA/N #2089349) was issued for the subject 20-acre parcel. Per WCC 20.80.738, harvesting a parcel with a Class III Department of Natural Resources (DNR) permit without an approved Conversion Option Harvest Plan (COHP) is subject to a six-year development moratorium.

On February 19, 2009 the current landowner, Jeff Leghorn, submitted a complete application for a Land Disturbance Permit to clear his property for future development. Through review of the Land Disturbance Permit application, staff determined the parcel was subject to the six-year development moratorium. The property owner submitted a request for a single-family one-acre exception per WCC 20.80.738 (3) on May 12, 2009. The Director of Planning and Development Services approved the request for a single-family one-acre exception and a Memorandum of Agreement was filed on August 21, 2009.

Associated with the review of the single-family one-acre exception, DNR issued an Informal Conference Note (ICN) stating that all reforestation requirements associated with FPA/N# 2809349 have been satisfied.

Currently, the property owner requests the removal of the entire six-year development moratorium for the option of submitting a short subdivision application.

Basis for Appeal

WCC20.80.738 Review Criteria:

Review Criteria. The examiner shall consider the removal of a development moratorium when the following criteria are met:

- (i) The forest practices conducted on the site comply with requirements of Chapter 222-24 WAC, Road Construction and Maintenance, Chapter 222-30 WAC, Timber Harvesting, and any applicable county codes or regulations. When more than one**

rule, regulation, or code can be applied to a harvest, then the more stringent requirements shall be adhered to.

The property is in compliance with Chapter 222-24 WAC, Road Construction and Maintenance, Chapter 222-30 WAC, Timber Harvesting. DNR issued an Informal Conference Note on June 17, 2009 that stated the timber harvest was completed and in compliance with the requirements of FPA/N# 2809349. Whatcom County records indicated the property is also in compliance with the permit conditions associated with the Land Disturbance Permit (LDP2009-00025) issued on August 21, 2009 for the forest conversion. Staff did not identify any outstanding issues associated with the forest practices.

(ii) Any required mitigation plan has been completed or the performance thereof has been adequately bonded.

A critical areas assessment was submitted on March 30, 2009. Critical Areas staff conducted a site inspection with the applicant and identified numerous streams and wetlands indicated in the assessment. Two of the fish-bearing streams and associated wetlands have an intact 100-ft. buffer. However, approximately 110,900 square feet of critical areas and buffers were impacted during the timber harvest.

During the review of the single-family one-acre exception, a compensatory mitigation plan was submitted on July 17, 2009 and approved by staff. The mitigation plan includes replanting the critical areas and buffers with appropriate plant species as well as installation requirements, monitoring performance standards, mitigation surety and site protection.

Per the approved mitigation plan, the applicant has submitted a recorded conservation easement that includes all critical areas and associated buffers. Prior to issuance of the current Land Disturbance Permit (LDP2009-00025) the applicant has provided an assignment of savings in the amount of \$12,531.25.

(iii) Any bonding required as part of a mitigation requirement has been established to county satisfaction.

In accordance with the requirements for the one-acre single-family exception, the assignment of savings for the approved mitigation project was submitted on August 21, 2009 in the amount of \$12,531.25. The amount was based on the cost estimate provided by Cantrell and Associates with the approved mitigation plan including estimates for the installation, maintenance and monitoring costs of the project.

(iv) The site, when required by WCC 20.80.736(3)(c)(i)(A) or 20.80.739, shall have been reforested in accordance with the requirements set forth in Chapter 222-34 WAC.

A DNR Forest Practice Forester completed an Informal Conference Note on June 17, 2009 to verify the parcel was in compliance with the reforestation requirements listed in Chapter 222-34 WAC.

(v) Payment has been made of all other fees, penalties, liens, or taxes owed to the county which have been assigned to the subject parcel including reimbursement of any county expenses incurred relating to enforcement and/or preparation for the waiver hearing.

The Whatcom County Treasurer's Office and Auditor's Office do not have record of any taxes or liens owed on the property. All fees associated with the removal of six-year development moratorium and SEPA reviews have been paid.

According to Whatcom County Planning and Development Services records, fees in the amount of \$75.00 are due for an encroachment permit that is associated with the construction of the single-family residence. The encroachment permit must be issued prior to final inspection of the single-family residence.

(vi) All permit conditions have been addressed.

All permit conditions associated with the Class III FPA from DNR have been addressed and adhered to by the property owner. An Informal Conference Note (ICN) was completed on June 17, 2009 that verified the conditions of the FPA 28080020 had been met. The conditions listed in the Land Disturbance Permit (LDP2009-00025) and Single-family Residence (SFR2009-00317) have also been met thus far. Currently, both permits are active and under construction.

(vii) Neither the applicant nor any person who acted in privity with the applicant:

(A) Intended to circumvent any requirement of this section or the Forest Practice Act or regulations by taking the actions for which the moratorium was imposed; or

According to Whatcom County records the property owner, Mr. Leghorn, purchased the property in September 2008. At the time of purchase, the property had been harvested. Mr. Leghorn stated he was unaware of the six-year development moratorium at the time of purchasing his property. Considering these circumstances, the property owner was not attempting to circumvent the regulations associated with the timber harvest on the subject parcel.

(B) Has engaged in a pattern or practice of violations of any applicable regulations.

According to Whatcom County records, the property owner has not engaged in a pattern or practice of violations of applicable regulations.

Required Written Findings and Determinations. Removal of a development moratorium may be approved by the examiner if the following findings can be made regarding the proposal and are supported by the record:

(i) The removal of the six-year development moratorium will not be detrimental to the public health, safety and general welfare.

The application for removal of the six-year development moratorium included a SEPA determination. A Determination of Non-Significance was issued on December 30, 2009 from Whatcom County PDS. The SEPA checklist is a mechanism for ensuring the proposed activity will not be detrimental to the public health, safety and general welfare.

The property owners within 1,000-ft. were notified of the application for the removal of the six-year development moratorium. Whatcom County received one public comment with regard to retaining the rural character of the county.

(ii) The removal of the six-year development moratorium will not be injurious to the property or improvements adjacent to and in the vicinity of the property.

The surrounding land uses include single-family residential development and mineral resource activities. The removal of six-year development moratorium is consistent with the current land uses in the vicinity.

As stated above, surrounding property owners within 1,000-ft. of the subject parcel were notified and one comment was received regarding the protection of rural character in this area. The current zoning allows for one dwelling per 10 acres (R10A). This zoning designation is considered rural in character and prevents further division that would not exhibit the rural nature of the surrounding properties.

(iii) The removal of the six-year development moratorium will not result in significant adverse environmental impacts.

Due to the critical areas impacts identified through the critical areas assessment, a mitigation plan has been submitted and approved. The mitigation project has been protected in perpetuity through a recorded conservation easement as well as bonded through an assignment of savings.

The mitigation and protection of these areas shall result in greater environmental protection.

In addition to the mitigation plan, a State Environmental Policy Act (SEPA) Determination of Non-Significance was issued on December 30, 2009. Whatcom County received one public comment regarding the protection of rural character.

(iv) The removal of the six-year development moratorium is consistent with the review criteria established in subsections (2)(b)(i) through (vii) of this section.

As outlined above, the removal of the six-year development moratorium is consistent with the review criteria provided in subsections (2)(b)(i) through (vii) of the applicable section.

(v) The removal of the six-year development moratorium is consistent and compatible with the goals, objectives and policies of the Comprehensive Plan, appropriate community plans or subarea plans, and the provisions of this section.

The parcel is located within the Rural comprehensive plan designation. The Rural designation encourages low-density residential development with the flexibility to

practice agriculture and forestry. Removal of the six-year development moratorium would be consistent with the goals established in the Comprehensive Plan.

The criterion listed above in sections WCC 20.80.738 (2)(b)(i) through (vii) substantiates the removal of six-year development moratorium would be consistent with the provisions of this section.

Public and Agency Comments

Staff received one public comment from Keith and Sylvia Moul that stated the following:

“We oppose the development of the subject parcel of land. The present moratorium serves a legitimate purpose to retain and encourage the rural nature of the area.”

No agency comments were received.

IV. DETERMINATION

As the applicant achieves all criteria listed in the Findings and Conclusions, Whatcom County staff recommends approval of the request to remove the six-year development moratorium subject to the following conditions:

1. A Memorandum of Agreement between Whatcom County and the property owner must be recorded with the Auditor’s office that identifies the parcel is not subject to the six-year development moratorium.
2. Mitigation must be installed in accordance with the approved mitigation plan submitted by Cantrell and Associates, dated July 17, 2009. Included in the plan is the submission of an as-built report to Whatcom County in the next available wet season (October through March). Once the as-built is received and approved, the applicant shall receive a portion of the assignment of savings for the cost of installation. The five-year monitoring period begins once the as-built report has been approved and continues until successful completion of all performance standards outlined in the approved mitigation plan. Monitoring reports shall be submitted annually for the first three years as well as the fifth year after the as-built report.
3. The Encroachment Permit must be issued prior to final inspection of the single-family residence (SFR2009-00317).
4. Any future development proposals associated with this property must be reviewed and approved by Whatcom County.

Report prepared by:

Cassandra Schoenmakers
Planner I – Critical Areas