

WHATCOM COUNTY HEARING EXAMINER

Administrative Appeal of)	File No. APL2008-0032
)	
<i>Nielsen Brothers, Inc.</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 as a result of obtaining two Department of Natural Resources (DNR) Class III Forest Practices Application Permits without completing a 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: Nielsen Brothers, Inc.

Owner: Nielsen Brothers, Inc.

Property Location/Address: 6200 Reese Hill Road
Whatcom County

Legal Description: APN: 400503-198350
GOVT LOTS 2-3-4-SE NW-LESS RDS-EXC W 1/5 PTN
OF SE NW LY SLY OF REESE HILL RD

Zoning: Rural 1DU/10AC (R10A) and Rural Forestry (RF)

Comprehensive Plan: Rural and Rural Forestry

Subarea: Foothills

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

Legal Notices: Published – April 13 and September 3, 2009
Mailed – August 23, 2009
Posted – September 2, 2009

Hearing Date: September 16, 2009

Parties of Record:

Aubrey Stargell
Nielsen Brothers, Inc.
P.O. Box 2789
Bellingham, WA 98227

Cassandra Schoenmakers
Planning and Development Services

Exhibits

- 1 Land Use Application
 - 1-1 Moratorium Removal Summary of Information for Tax Parcel
 - 1-2 Supplemental Application
 - 1-3 Receipt
 - 1-4 Vesting letter, dated October 20, 2008
 - 1-5 Moratorium Removal Submittal Requirements
 - 1-6 Agency Distribution List'
 - 1-7 Distribution Appeal Application Review Notice
 - 1-8 Letter of Complete Application, dated January 14, 2009
 - 1-9 Mailing Labels
 - 1-10 Real Property Info Sheet
 - 1-11 List of surrounding parcel numbers associated with distribution
 - 1-12 SEP2008-00130 Distribution List
 - 1-13 Agreement and Understanding in lieu of Surety Bond
 - 1-14 Conservation Easement

- 2 Staff Report, dated September 3, 2009
- 3 Cantrell & Associates, Letter dated April 21, 2009, with Wetland & Stream Buffer Mitigation Plan, dated December 23, 2008 attached
- 4 SEPA, DNS, dated April 13, 2009
- 5 DNR Forest Practices Application/Notification: Notice of Decision, Approved
- 6 Assessor's Parcel Records
- 7 Aerial Maps
- 8 Site Plans for Removal of Forest Practices Moratoriums
- 9 Zoning Map
- 10 Legal Notice, dated April 13, 2009
- 11 Certificate of Mailing, dated August 28, 2009
- 12 Certificate of Posting, dated September 2, 2009
- 13 Legal Notice, dated September 3, 2009
- 14 Memorandum of Agreement [proposed]

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 an approximately 127-acre site located in split-zones, Rural Forestry and Rural 10 Acres 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 September 3, 2009, 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 either in writing or 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 Nielsen Brothers, Inc. from an approximately 127-acre site located on Assessor's Parcel No.400503 198350, 6200 Reese Hill Road, Whatcom County, Washington, subject to the following conditions:

1. Receipt of an Informal Conference Note from DNR stating the site complies with applicable DNR regulations.
2. 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.
3. At the time of recording the Memorandum of Agreement, associated mitigation fees shall be paid to Whatcom County. The fees owing for the mitigation project include \$600.00 for the Mitigation Plan Development and \$600.00 for the Mitigation Plan, As-built, Maintenance and Monitoring; both totaling \$1,200.00.
4. Mitigation must be installed in accordance with the approved mitigation plan submitted by Cantrell and Associates, dated December 23, 2008. 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.
5. 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 16th day of September 2009.

Michael Bobbink, Hearing Examiner

WHATCOM COUNTY
Planning & Development Services
5280 Northwest Drive
Bellingham, WA 98226-9097
360-676-6907, TTY 800-833-6384
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David Stalheim
Director

J.E. "Sam" Ryan
Assistant Director

September 3, 2009

WHATCOM COUNTY PLANNING AND DEVELOPMENT SERVICES
STAFF REPORT

The application of
Neilson Bros. Inc.
For removal of six-year development
moratorium

APL2008-00032
FINDINGS, CONCLUSIONS,
AND DETERMINATIONS

I. SUMMARY OF APPEAL AND RECOMMENDATIONS

Application: The applicant is requesting the removal of a six-year development moratorium that was placed on the parcel as a result of obtaining a Department of Natural Resources (DNR) Class III Forest Practice Application Permit without completing a 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: Aubrey Stargell
Nielson Bros. Inc.
P.O. Box 2789
Bellingham, WA 98227

Owner: Nielson Bros, Inc.
P.O. Box 2789
Bellingham, WA 98227

Property Location/Address: 6200 Reese Hill Rd.
Whatcom County

Legal Description: APN: 400503-198350
GOVT LOTS 2-3-4-SE NW-LESS RDS-EXC W 1/5 PTN
OF SE NW LY SLY OF REESE HILL RD

Zoning: Rural 1DU/10AC (R10A) and

Rural Forestry (RF)

Comprehensive Plan: Rural and Rural Forestry

Subarea: Foothills

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

III. FINDINGS AND CONCLUSIONS

The subject property is approximately 127 acres and split-zoned Rural 1DU/10AC (R10A) and Rural Forestry (RF). The property is intersected by Reese Hill Road and Heady Road. The previous property owner obtained two Class III Forest Practice Applications (FPA's) from the Department of Natural Resources (DNR). The first Class III FPA (FPA 2806084) was issued on July 16, 2003 to harvest approximately 18 acres of the parcel located south of Reese Hill Rd. The second Class III FPA (FPA 2808342) was issued on May 13, 2006 to harvest the remainder of the property. The property owner did not receive an approved Conversion Option Harvest Plan (COHP) from Whatcom County. In accordance with WCC 20.80.738, six-year development moratoriums shall be placed on any property that has been harvested under a DNR forest practice application or notification without an associated COHP approval. When a harvest occurs and a forest practice permit is issued without an associated COHP, the six-year development moratorium shall extend to the harvest area including roads indicated in the forest practice application. The six-year development moratorium associated with FPA 2806084 has terminated.

The current property owner requests the removal of the six-year development moratorium resulting from FPA 2808342 to submit an application for a short subdivision in the future.

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. Whatcom County staff and the wetland biologist verified the replanting has occurred on the subject parcel. As a condition of approval of the removal of the six-year development moratorium, DNR must supply an Informal Conference Note (ICN) verifying the parcel is in compliance with the Forest Practice regulations. Whatcom County records indicated the property is also in compliance with the permit conditions associated with the Revocable Encroachment Permits for the construction of access roads adjoining the county right of way.

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

A critical areas assessment was submitted on December 2, 2008. Critical Areas staff conducted a site inspection with the applicant and identified two non-fish bearing streams and one associated wetland as indicated in the assessment. In accordance with WCC 16.16.740, non-fish bearing streams are protected with a 50-ft. buffer. Approximately 7,000 square feet of the northwestern stream were impacted during the timber harvest. In addition, approximately 122,400 square feet of buffer associated with the northeastern stream was impacted during the harvest.

Using the Department of Ecology's rating system, the wetland consultant determined the wetland is a Category III, palustrine, scrub-shrub, seasonally flooded, sloped-depressional, flow-through wetland. Pursuant to WCC 16.16.630, Category III wetlands with low habitat function and a moderate impact are protected with a 60-ft. buffer. Approximately 9,700 square feet of wetlands and buffers were impacted during the harvest.

As there were impacts to critical areas and associated buffers during the harvest, the applicant submitted a replanting plan on December 2, 2008. Per Whatcom County staff request, a critical areas mitigation plan was then submitted on December 30, 2008. 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. In addition, the applicant has provided an assignment of savings in the amount of \$19,312.50.

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

As stated in section (ii), the applicant has submitted an assignment of savings for the estimated costs of the mitigation project. The cost estimate was provided by the wetland specialist and is based on the installation, maintenance and monitoring costs of the project. The total estimate that was posted in the assignment of savings is \$19,312.50.

(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.

The applicant indicated the site was in compliance and reforested to DNR standards. Whatcom County staff and the wetland biologist verified the replanting had occurred. As a condition of approval of the moratorium removal, DNR shall supply an Informal Conference Note (ICN) verifying the conditions of the FPA, including reforestation, have been met.

(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. According to Whatcom County Planning and Development Services records, all fees and penalties have been paid. All fees associated with the removal of six-year development moratorium and SEPA reviews have been paid. The mitigation fees shall be paid upon approval of the removal of the six-year development moratorium.

(vi) All permit conditions have been addressed.

The applicant indicated all conditions of FPA 2808342 have been met. Whatcom County staff observed replanting of timber while conducting the initial site inspection. An Informal Conference Note (ICN) shall be completed by a DNR forester to verify the conditions of the FPA were met.

All permit conditions associated with the Revocable Encroachment Permits for the construction of access roads were completed and the permits were finalized by the Whatcom County right of way inspector.

(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

The applicant conducted the timber harvest activity in accordance with Chapter 222-24 WAC, Road Construction and Maintenance, Chapter 222-30 WAC, Timber Harvesting. In addition, any applicable Whatcom County permit conditions were adhered to. There is no evidence of the applicant intending to circumvent regulations.

(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 State Environmental Policy Act (SEPA) determination. A Determination of Non-Significance was issued on April 13, 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 did not receive any comments regarding the proposed action.

(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 rural forestry. 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 did not provide any comments.

(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 April 13, 2009. Whatcom County did not receive any comments resulting from the SEPA distribution and comment period.

(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 and Rural Forestry 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

There were no public or agency comments 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. Receipt of an Informal Conference Note from DNR stating the site complies with applicable DNR regulations.
2. 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.
3. At the time of recording the Memorandum of Agreement, associated mitigation fees shall be paid to Whatcom County. The fees owing for the mitigation project include \$600.00 for the Mitigation Plan Development and \$600.00 for the Mitigation Plan, As-built, Maintenance and Monitoring; both totaling \$1,200.00.
4. Mitigation must be installed in accordance with the approved mitigation plan submitted by Cantrell and Associates, dated December 23, 2008. 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.
5. 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