

June 18, 2012

**OFFICE OF THE HEARING EXAMINER**  
**KING COUNTY, WASHINGTON**  
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**REPORT AND DECISION**

**SUBJECT:** Department of Development and Environmental Services File No. **L09AP011**

**JAMES BITNEY AND SANDRA MILLER**  
Forest Practice Moratorium Relief Request Appeal

**Location:** 31218 SE 408th Street

**Appellants:** James Bitney and Sandra Miller  
*represented by Jim Toole*  
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Kent, WA 98031  
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**SUMMARY OF RECOMMENDATIONS/DECISION:**

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Deny appeal

**EXAMINER PROCEEDINGS**

Pre-hearing Conference:	January 12, 2010
Pre-hearing Conference:	August 24, 2010
Motion Hearing/Pre-hearing Conference:	April 14, 2011
Scheduled hearing:	July 7, 2011
Rescheduled Hearing Convened:	September 29, 2011
Hearing Continued Administratively for Briefing:	September 29, 2011
Hearing Record Closed:	October 31, 2011

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the Hearing Examiner's Office.

FINDINGS, CONCLUSIONS AND DECISION<sup>1</sup>: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. This matter involves an appeal from an administrative decision by the Department of Development and Environmental Services (DDES). Appellants Bitney and Miller applied to DDES for the lifting of a six-year development moratorium placed on their property. The moratorium was imposed because Appellants had not disclosed on a Forest Practices Permit (FPP) application that they intended conversion of the property from forest practices to other development uses.
2. The subject property is 87 acres in total area and is mostly forestland utilized in forest resources/commercial silvicultural use. A small portion of the site ("the developed area") has been converted to and developed with a residential use and a portion approximately seven acres in size has been converted to and developed with a plant nursery use.
3. The nursery use onsite is a forest nursery use, engaged in growing forest plants for replanting and seed stock. DDES has been of several code-interpretive minds as to whether the use is an ornamental nursery use or a forest nursery use. The preponderance of the credible evidence provided shows it to be a forest nursery.<sup>2</sup>
4. The classification of the nursery use is relevant here only to the use conversion disclosure requirement of the Forest Practices Act and FPA-implementing regulations, both state and county. Whether as a county zoning matter the use is permitted or not under the property's Forestry (F) zoning is not of direct relevance; it would be a misapprehension of the land use issues presented to conclude simplistically that any use permitted in the F zone by the zoning code would *per se* constitute "forest practices" as defined under the state Forest Practices Act and related administrative rule. Indeed, though the forest nursery use is permitted in the F zone as a zoning permissibility, "forest nurseries" are expressly excluded from consideration as defined "forest practices" under the Forest Practices Act. [WAC 458-30-215 (4)]
5. A requirement of an application for an FPP is the disclosure of any intended conversion of the property to development uses, i.e., non-"forest practices" uses. Since a "forest nursery" is not a defined forest practice under the Forest Practices Act, a conversion of forestry land to such use must be disclosed as a conversion in an FPP application.
6. The Appellants applied for a Type II FPP from the State Department of Natural Resources (DNR) for timber extraction and clearing on 4.5 acres of the total 87-acre parcel. The permit was approved. In their application for the FPP, the Appellants did not disclose any pending conversion of the forest land from forest practices.
7. Since development conversion of the forest land from forest practices uses was not disclosed in the FPP application, state law mandates that the county impose a six-year development moratorium on development of the property. The authority to impose a development moratorium rests with the local government development permitting agency (see Conclusions). DDES

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<sup>1</sup> Note: Any finding identified herein that is legally a conclusion is hereby deemed a conclusion, and vice versa.

<sup>2</sup> A component of such finding is that the assertions of public accessibility and inclusion of the subject nursery business in internet business listings nursery product sources cited by one DDES representative are not persuasive in this case as indicative of retail operations which would compel a finding that the use is more a retail "ornamental" nursery than a forest-related one.

- imposed the moratorium on March 15, 2007. The moratorium is for a six-year duration and thus expires March 15, 2013.
8. DDES has interpreted the state requirement of the imposition of a development moratorium as requiring that the moratorium apply to the entirety of the property for which the FPP was issued. Such interpretation was the long-standing practice of DDES in its administration of the moratorium requirement. At the time of imposition in this case there was no express provision in the state law or county code moratorium-actuating provisions regarding the applicability of the moratorium to the entirety of a permitted property or only to the discrete land area on which the pertinent forest practices were conducted. That situation changed subsequent to DDES's imposition of the moratorium in the instant case, upon enactment of a county ordinance amendment specifying that the moratorium imposed pursuant to non-disclosure apply to the entirety of a permittee's property for which the FPP was issued.
  9. DDES's imposition of the moratorium was not timely appealed.
  10. The Appellants have subsequently sought a lifting of the moratorium. King County has established a process for such lifting.
  11. DDES granted the requested moratorium lifting, subject to conditions. The conditions require a revised farm management plan; recordation of a Declaration of Covenant and Grant of Easement (essentially a pass-through condition, a reiteration of a condition imposed under separate authority in a separate action, an administrative DDES approval of a formal drainage variance under Chapter 9.04 KCC), which condition was withdrawn by DDES during the instant proceeding; and a limitation of the lifting of the moratorium to "the developed area" of the residence and the seven-acre nursery portion, therefore maintaining the moratorium on the active forestry remainder of the site.
  12. The Appellants filed an appeal of DDES's moratorium lifting. The issues accepted were the required recordation of the Deed of Covenant and Grant of Easement (as noted, since withdrawn), the jurisdiction and authority of DDES to impose a moratorium on the entirety of the property rather than the discrete portion addressed by the FPP, and the qualification of the nursery use as an F-zone permitted use for exemption from FPA regulation and/or being subject to a moratorium.
  13. The Appellants argued that DDES's interpretation that the moratorium should apply to the entirety of a permittee's property for which the FPP was issued is not founded on any legal basis. Instead, the moratorium should pertain only to the discrete land area on which the forest practices which were the subject of the FPP were conducted, in other words a limited focus of the moratorium effectiveness on only the actual ground addressed by the clearing applied for in the FPP, not the entire property when the entire property was not directly involved in the pertinent forest practices activity. Appellants also argue that in any case, DDES, and by implication King County in general as the local government entity, do not have subject matter jurisdiction over the imposition of a development moratorium in cases where the FPP was issued by the State DNR rather than by King County DDES, and therefore no authority to impose a moratorium in the instant case, and by implication, the authority to lift a moratorium as requested.

#### CONCLUSIONS:

1. On reflection since the close of hearing, the Examiner concludes that he erred in accepting the general moratorium jurisdiction and authority issue in the instant proceeding, one in which the appeal is over the *lifting* of the moratorium, *not* its imposition. An appeal of the imposition was not timely filed, and the Examiner must on that basis disallow consideration of the issue of the

original imposition of the moratorium. Timely appeal is a jurisdictional requirement; the Examiner does not have appellate jurisdiction over a matter not timely appealed.

2. In this case, even if the Examiner were to find that DDES does not have general moratorium jurisdiction, which as seen below is necessary to reach to determine whether it has jurisdiction to lift a moratorium, the Examiner would not have subject matter jurisdiction in *this* case to *void* a moratorium imposed in an action separate from the action appealed here. To put it simply, the Examiner does not have jurisdiction here to revisit the original decision to impose the moratorium, and cannot allow the desired bootstrapping of the lifting appeal into a retrospective appeal of the original imposition.
3. Appellants' argument that the county does not have jurisdiction to impose a moratorium where the FPP was not issued by the county is a misapprehension of the law. It is an erroneous mixing of apples and oranges of the permit actions involved. The forest practices permitting action is functionally and jurisdictionally distinct from the action to impose a moratorium. Merely because DNR issued the FPP has no effect on the county's authority (indeed, mandated requirement) to impose a development moratorium. In other words, the moratorium-imposing agency is not required by law or rule to be the same agency as that which issued the pertinent FPP. Here, even though DNR is the forest practices permitting agency, jurisdiction and authority to impose the six-year development moratorium due to nondisclosure is not the province of DNR but rests with King County's jurisdiction and authority. And therefore, just as King County had the authority to impose the moratorium in question (which as noted above is not an issue before the Examiner in the instant case regarding the *lifting* of a moratorium), it has the authority to lift the moratorium under its established process.
4. In summary, King County possesses sole jurisdiction and authority, indeed a state-mandated requirement, to impose a development moratorium due to nondisclosure of conversion in the FPP issued by DNR, and therefore has jurisdiction and authority to lift the moratorium as requested.
5. Though the lawful areal extent of a moratorium imposed under the FPA is not a matter under the Examiner's jurisdiction in the instant case because of the above disallowance of the original imposition from consideration here, the Examiner shall address it as it is a matter of general interest to parties other than those directly involved in this case. It is important to note that the opinion in this regard is not dispositive, as, again, the pertinent issue is not properly before the Examiner. It should also be noted that hearing examiner opinions do not form binding precedent under common law; interested persons should take care to observe the limitations of their legal effect and understand that should the issue arise anew, it would be subject to full open consideration.
6. As noted, the imposition of the moratorium was performed prior to the county's enactment of ordinance amendments which expressly specify that a moratorium of this nature is to be applied to the entirety of a forest practices permittee's property (the property as a whole for which the permit was issued). DDES's interpretation that the moratorium should pertain to the entirety of the permittee's subject property has not been shown to be unlawful or clearly erroneous. In such instances, an interpretation issued by the administrative agency charged with administering the regulations at issue should be accorded deference in the absence of clear error. Not only does its interpretation merit deference, but such deference is shown in the instant case to be fully merited, as the King County Council has in effect expressly affirmed and endorsed the interpretation by its adoption of an ordinance amendment essentially codifying the interpretation of the areal reach of the imposition of a non-disclosure moratorium.<sup>3</sup>

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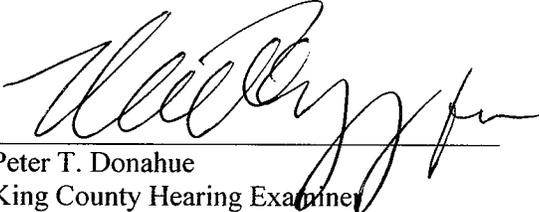
<sup>3</sup> The King County Council's enactment of ordinance amendments in this regard is an affirmation or ratification, an endorsement if you will, of DDES's administrative interpretation; it is incorrect to consider it a change in substantive effect which would not

7. From a second standpoint, the local agency legislative authority, the County Council, must be accorded great deference in its code interpretation affirming actions as it is the body with authority to make local law and regulation. The Council's enactment of express ordinance provisions codifying DDES's interpretive approach fully supports DDES's pre-ordinance interpretation of the areal effect of a moratorium as reflecting legislative intent, which is further and independently dispositive of the correctness of DDES's interpretation.
8. There has been no persuasive showing that DDES's decision not to lift the moratorium on the active forestry remainder of the site is in error. The appeal accordingly fails and shall be denied.

**ORDER:**

DDES's administrative decision lifting the six-year development moratorium for non-disclosure of conversion in the pertinent forest practices permit subject to conditions is **SUSTAINED** and the **APPEAL** is **DENIED**.

ORDERED June 18, 2012.



Peter T. Donahue  
King County Hearing Examiner

**NOTICE OF APPEAL**

The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in King County Superior Court within 21 days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

PTD/vsm