

Countryman, Ryan

From: Tom McCormick <tommccormick@mac.com>
Sent: Wednesday, September 02, 2015 3:51 PM
To: Deputy Mayor Chris Eggen; Chris Roberts; Doris McConnell; Keith McGlashan; Jesse Salomon
Cc: Debbie Tarry; Margaret King; Countryman, Ryan; Eric Faison
Subject: Vesting - Point Wells

To: Non-Recused Members of the Shoreline City Council

BSRE desperately needs the City of Shoreline to repeal and increase the 4,000 average daily trip (ADT) limit that the Council adopted for Richmond Beach Drive in 2011. The Council is not obligated to repeal and increase the 4,000 ADT limit. BSRE knows this.

Below I discuss the following: (1) Impact of 4,000 ADT Limit on Point Wells Development, (2) Vesting and the 4,000 ADT Limit (a complex issue), (3) 4,000 ADT Limit Applies Even if Growth Management Hearing Board Invalidates It, and (4) Why all this Matters.

I. Impact of 4,000 ADT Limit on Point Wells Development

BSRE is worried about the City's 4,000 ADT limit for Richmond Beach Drive. BSRE will likely abandon its Point Wells project if the 4,000 ADT limit applies, as a 4,000 ADT limit could force BSRE to downsize its development to an unacceptable 800 units or less. (See Gary Huff's Sept. 24, 2009, letter to the Snohomish County Council: "[A]n 800 unit development will result in substantial financial losses. Paramount [(BSRE's predecessor)] will abandon the project if [an 800-unit] limitation is adopted.")

II. Vesting and the 4,000 ADT Limit

On Feb. 14, 2011, in a race to the finish line, BSRE filed with Snohomish County a short plat application to subdivide its Point Wells property. Later that day, during its evening session, the City Council adopted Ordinance 596, imposing a 4,000 ADT limit on Richmond Beach Drive.

BSRE summarizes the events as follows:

"Shoreline clearly hoped to impose [its 4,000 ADT] limit before BSRE might submit a vested development application to the County. To that end, Ordinance 596 provides in part that "immediate passage is necessary under Washington's vested rights doctrine to preserve the status quo and protect the public safety and welfare . . ." The ordinance was, however, adopted *after* the submittal earlier that day of the short plat application which vested BSRE's development plans pursuant to RCW 58.17.033." (See BSRE's Jan. 30, 2015, Memorandum in Opposition to Motion to Intervene, BSRE Point Wells, LP, v. City of Shoreline, CPSGMHB Case No. 11-3-0007 (case pending).)

The above-referenced short plat vesting rule in RCW 58.17.033 reads as follows:

"A proposed division of land, as defined in RCW 58.17.020, shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect on the land at the time a fully completed application for preliminary plat approval of the subdivision, or short plat approval of the short subdivision, has been submitted to the appropriate county, city, or town official." (Underlining added for emphasis.)

BSRE contends that it vested under RCW 58.17.033 before the City adopted the 4,000 ADT limit, so the 4,000 ADT limit does not apply to its proposed Point Wells development (note that it follows from BSRE's argument that if the 4,000 ADT limit does not apply, then the City's prior 8,250 ADT limit for Richmond Beach Drive *does* apply). BSRE apparently recognizes how tenuous its vesting argument is, for shortly after the City adopted the 4,000 ADT limit, BSRE filed a petition with the Growth Management Hearing Board challenging the City's 4,000 ADT limit, seeking "an order from the Board declaring Ordinance 596 to be invalid" Petition for Review, BSRE Point Wells, LP, v. City of Shoreline, CPSGMHB Case No. 11-3-0007 (case pending).

BSRE is wrong when it contends that its short plat application vested BSRE under RCW 58.17.033 before the City adopted the 4,000 ADT limit. Among other things, we believe that a court would conclude that the City's 4,000 ADT limit is not, under RCW 58.17.033, a "short subdivision ordinance, [or] zoning or other land use control ordinance[], in effect on the land." Hence, BSRE's short plat application does not protect BSRE from the 4,000 ADT limit adopted by the City just hours after BSRE filed its short plat application. Short plat and other ordinances in effect on the land are ordinances that prescribe how land can be used, minimum lot sizes, and the like — not ordinances of neighboring jurisdictions that prescribe level of service standards and ADT limits for its roads.

About a month before BSRE filed its short plat application, Snohomish County advised BSRE that the earliest date that BSRE would vest to a wider array of land use rules would be the date that it files a completed Urban Center application with the County. (Snohomish County Code 30.34A.170(6) (2011 version) provides the vesting rule for Urban Center applications: "A complete application for urban center approval meeting requirements of this section is deemed to have vested to the zoning code, development standards and regulations as of the date of submittal.") As stated in Darryl Eastin's January 13, 2011, email to Gary Huff, BSRE's attorney:

"Gary, ... Regarding your question about vesting. I have consulted with PDS management and the position of PDS is that submittal of a short plat application that is deemed complete would vest to the short plat requirements of UDC Chapter 30.41B SCC and applicable regulations and development standards. However, a complete short plat application would not vest to the urban center code provisions of UDC Chapter 30.34A SCC."

BSRE filed its Urban Center application with the County on March 3, 2011, several weeks after the City adopted its 4,000 ADT limit. The reason why BSRE did not file its Urban Center application before the City adopted its 4,000 ADT limit is that it couldn't. As stated by Gary Huff in his Jan. 12, 2011, email to Tom Rowe: "As you know, the Urban Center application cannot be submitted until at least 30 days following the required community pre-application meeting now scheduled for January 27, 2011, but is expected to be submitted in a timely manner thereafter." Given the detailed requirements for filing an Urban Center application, including a community pre-application meeting, it would be contrary to law if a short plat application would vest BSRE to the wide array of Urban Center and other rules.

The City's 4,000 ADT limit was not rendered inapplicable under RCW 58.17.033 by BSRE's Feb. 14 short plat application. The earliest vesting date (if any) that might apply to the City's level of service standards and ADT limits for its roads is March 3, 2011.

BSRE will argue that the holding of *Noble Manor v. Pierce County*, 133 Wn.2d 269 (1997), is controlling, and vests BSRE to all land use rules in effect when its short plat application was filed. *Noble Manor* is distinguishable and does not apply here. In *Noble Manor*, a developer applied for a short plat to divide its property into three lots with the expressed intent of building a duplex on each lot. Pierce County subsequently changed its code requirements in a way that allowed only one duplex. The court held that,

"Not all conceivable uses allowed by the laws in effect at the time of a short plat application are vested development rights of the applicant. However, when a developer makes an application for a specific use, then the applicant has a right to have that application considered under the zoning and land use laws existing at the time the completed plat application is submitted."

Noble Manor is basically a case about minimum lots sizes. The court concluded that the minimum lot size rules in effect when the short plat application was filed are the ones that apply, and not the minimum lot size rules adopted by Pierce County (the permitting agency) after the short plat application was filed. As Snohomish County must have recognized (see Darryl Eastin's January 13, 2011, email to Gary Huff, above), *Noble Manor* is of no help to BSRE. BSRE did not vest to the Urban Center rules when it submitted its short plat application; instead, BSRE vested on March 3, 2011, when it submitted its Urban Center application.

Unlike minimum lot size laws at issue in *Noble Manor*, ordinances of neighboring jurisdictions that prescribe level of service standards and ADT limits for its roads, are not the sort of "short subdivision ordinance, [or] zoning or other land use control ordinance[], in effect on the land," that are within the vesting reach of RCW 58.17.033, the short plat vesting statute.

III. 4,000 ADT Limit Applies Even if Growth Management Hearing Board Invalidates It

As discussed above, the earliest date that BSRE might possibly vest to the City's level of service standards and ADT limits for its roads is March 3, 2011, the date that BSRE filed its Urban Center development application.

As noted earlier, shortly after the City adopted the 4,000 ADT limit, BSRE filed a petition with the Growth Management Hearing Board challenging the City's 4,000 ADT limit, seeking "an order from the Board declaring Ordinance 596 to be invalid" Petition for Review, BSRE Point Wells, LP, v. City of Shoreline, CPSGMHB Case No. 11-3-0007 (case pending).

If BSRE's vesting date is March 3, 2011, then it doesn't matter whether or not the GMHB invalidates the 4,000 ADT limit. Even if the GMHB invalidates the 4,000 ADT limit, BSRE's development application will nonetheless be subject to the 4,000 ADT limit — BSRE will be bound by the 4,000 ADT limit. See *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 322 P.3d 1219 (2014)(rules in effect on vesting date apply even if those rules are later invalidated by the GMHB).

IV. Why all this Matters

If, as discussed above, the City's 4,000 ADT limit applies and is not rendered inapplicable by the vesting doctrine, and if Snohomish County must honor the 4,000 ADT limit, then the City should negotiate accordingly with BSRE from a posture of strength. The City could insist on a traffic level closer to 4,000 ADTs than 11,587 ADTs.

(Next month, I will send another email to explain why Snohomish County must honor the City's ADT Limit for Richmond Beach Drive. For now, it's worth noting that BSRE must have been concerned enough about the 4,000 ADT limit, and the very real possibility that Snohomish County would be compelled to honor it, that it petitioned the GMHB to invalidate it.)

Thank you.

Tom McCormick