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Via Electronic and Regular Mail

Matthew Otten
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Everett, WA 98201-4046
Matthew.Otten@co.snohomish.wa.us

Re: Expiration Date for Point Wells Urban Center and Related Applications

Dear Matt:

In concluding that the Director may withhold approval of an extension request in our circumstance, the County relies on the current version of SCC 30.70.140. Further review of the various ordinances which have controlled the term of BSRE's applications and the extension(s) thereof leads us to a contrary conclusion.

BSRE's applications were filed in February and March of 2011. Under the version of this code provision in effect at that time, SCC 30.70.140(1) simply provided that an "application shall expire one year after the last date that additional information is requested if the applicant has failed to provide the information" SCC 30.70.140(1)(a) went on to state that PDS may grant one or more extensions pursuant to subsections (2) and (3) of this code provision. Subsection (2) provides that the applicant "may request an extension to a date certain prior to the expiration of the application." Subsection (3) then sets forth the criteria which must be met for such an extension to be granted. Within this set of criteria, subsection (3)(b) states that an extension may *only* be granted when specific criteria are met, including that "the applicant demonstrates that circumstances beyond the control of the applicant prevent timely submittal of the requested information[.]"

The fact that three extension requests were granted under the prior version of the ordinance is proof that the extension criteria were necessarily met in each circumstance. Factors beyond BSRE's control included, among other things, the 3 years spent litigating the vesting of our project application and the injunction against the County, prohibiting it from processing our application during the pendency of that litigation, and the work with the County to adopt the new Urban Village Code.

The previously granted extensions, granted under these prior code provisions, proves that at least until March 31, 2016, when the most recent extension was granted, *all* criteria had by definition been met. Thus, the only facts at issue in the current extension request are those occurring on or after April 1, 2016--the effective date of the new ordinance provisions.

The current version of SCC 30.70.140 takes a different approach to the term of various types of applications. SCC 30.70.140(2) now provides *for the first time* that SCC Table 30.70.140(1) establishes the expiration period for applications, which is 36 months for Urban Center Developments, except that:

- (a) When an EIS is required, the expiration of an application *will be suspended* until the FEIS is issued. The suspension of the expiration period for an application shall not exceed 18 months unless approved by the director; and
- (b) When otherwise modified by the Hearing Examiner.

SCC 30.70.140(2) (emphasis added).

These 2016 amendments represent the first establishment of a specific term for an Urban Center application. The question unanswered by these amendments is from when should this new time limitation be measured?

The retroactive application of newly adopted regulations is generally disfavored. Under the facts in this instance, the only logical interpretation is that our specific application was given a new 36-month term *as measured from the effective date of the legislation*. Any attempt to apply the 36-month time frame retroactively fails in part because the prior versions of these ordinance provisions explicitly exempted applications where: (1) an EIS is being proposed; or (2) where the Applicant agreed in writing to a waiver of the then-applicable time limit. Both of those criteria are present here. More importantly, if applied retroactively, the application would have been terminated *before* the effective date of the new ordinance and despite the fact that any delays prior to March 31, 2016 are conclusively deemed not to be BSRE's fault.

As a result, on April 1, 2016, the amendments to SCC 30.70.140 by their express terms had the effect of extending the life of BSRE's application by 36 months from April 1, 2016 to at least April 1, 2019. This "extension" occurred wholly independent of any action (or inaction) on the part of the Director in response to our request of January 24, 2018.

We note that the current expiration date of April 1, 2019 may be further extended pursuant to the terms of the 2016 ordinance, although we see no reason to expect that such a further extension should be necessary if PDS dutifully allows the review process to continue.

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Based on the foregoing analysis, we will ask that the Hearing Examiner confirm that either (a) the current version of SCC 30.70.140 is inapplicable to our application, or (b) that the current expiration date is no sooner than April 1, 2019.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary D. Huff", with a long horizontal flourish extending to the right.

Gary D. Huff
Jacque E. St. Romain

cc: BSRE Point Wells, LP
Project Team