From: casperdenn
To: Davis, Kris
Subject: Hearing Examiner Memo BSRE v Snohomish County 05.22.2018.doc - Word
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MEMORANDUM

To: Mr. Peter Camp
Hearing Examiner
Snohomish County, via Hearing.Examiner@co.snohomish.wa.us

From: Denis Casper
20235 Richmond Beach Dr. NW
Shoreline, WA 98133

Date: 22 May 2018

Subj: Additional Comment
BSRE v. Snohomish County, Planning and Development Services

I write to provide additional observations on the above litigation before you over the last few days, and which I request that you will use in your decision making.

1). Breach in the Retaining Wall System Specific to the Secondary Egress Road. I've heard much of the testimony related to the secondary accesses road as well as the proposal for a retaining wall protection system for the instability of the slope above Pt. Wells. For example, A-37, Fig. 22A depicts the retaining wall below the road. However, there is no retaining wall system shown which would protect pedestrians, cyclists and motorists on the secondary access road above the road in the event of a landslide 'slip' as shown in 37-A, Fig 22A. Assuming that the below development can be protected, there is nothing shown that will protect people on the road above the retaining wall in the event of a slip. Moreover, in any retaining wall system, in order for a road to go bottom to top, there must be some kind of breach in the wall in order to open up space for the road to proceed further up the hill. Either one has a full protective retaining wall with no road breach;, or, one has a partial retaining wall with a breach for cycle lanes, motorist lanes, sidewalks, and other associated amenity strips. I suggest that without a switchback around the wall north or south, the retaining wall does not provide full protection below due to the breach. BSRE has not shown how this issue can be resolved in their pre hearing submissions.

2). Additional Retaining Wall(s) on the Property of Others Due to Light Rail Train Station. It is my understanding, based upon testimony by BSRE, that should a light rail station be required in Phase I, that they intend to build it north of the development. Part of that northern property is owned by others (City of Woodway). Thus, a protective retaining wall would have to be built on land currently owned by others due to testimony related to the instability of the uplands slope. From my observations, neither detailed plans to protect the rail station with a retaining wall, nor documentation that acquisition of the land necessary to build these protective retaining walls, has been submitted for approval by Snohomish County as of the date of this hearing.

3). Setting New Precedent Related to Snohomish County's Denial of a DEIS Time Extension. As I mentioned in my public comment, I just completed construction of a house about 500' from the entrance of point wells. I was able to move in last year. During construction and planning, I was told that I was not allowed to miss one deadline, or I would be required to reapply for my permit. There would be no extensions. Given the complexity of the Pt. Wells proposal, I understand that an extension or two might be necessary. However, everyone should be treated equally. Snohomish County PDS has gone way beyond what was fair and equitable in treating everyone the same. I strongly submit that further time extensions for the DEIS would mean that equal treatment would not exist in this case—compared with all those others before BSRE that had gone before them, and complied with the reasonable deadlines that the County had imposed. Setting a new extension precedent in this case, I would argue, would not be fair, equitable, and would be venturing into unknown legal territory.

4). Case Law. Please note the following which I argue bear directly upon the present case:

--In Maytown Sand and Gravel LLC, Respondent/Cross Appellant v. Thurston County, Appellant/Cross Respondent,395 P. 3d 149, 160 (2017), 198 Wn App. 560, the court stated "LUPA is generally the exclusive remedy for land use decisions. RCW 36.70.030. Under LUPA, a superior court may grant relief from a land use decision only if the party seeking relief has shown:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record of the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority of jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief."

BSRE has not shown that any of the above (6) standards apply to their appeal to you that they should be given additional time per another DEIS submittal time extension, which the County denied. (See also Wenatchee Sportsmen Assoc, v. Chelan County 4P.3d 123, 126 (2000), 141 Wash. 2d 169)

Maytown further identifies RCW 36.70C.020(2) as "defin[ing] a lad use decision as 'a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals,, on: (a) [a}n application for a project permit.'" Snohomish County PDS made the decision to deny any further DEIS submission extensions after (4) years of prior extensions, and to deny the project itself as failing to comply with County land use regulations. Snohomish County PDS had the authority as "a final determination by a local jurisdiction's body or officer", and they made that decision under their authority. Absent evidence that Snohomish County PDS erred in their decision making of bending over backward to give prior extension after extension, the denial for both the project incompatibility with Snohomish County land use code and the denial for any further time extensions for DEIS submittals, should be affirmed. Snohomish County PDS testified that not since at least 2000 have they taken the grave step of denying a project. Obviously, the problems with compatibility with land use codes, and with the total absence of appropriate submissions of necessary documentation, have been grevious.

--In Concerned Organized Women and People Opposed to Offensive Proposals, Inc v. The City of Arlington, Et Al, 69 Wn. App. 209,216 (1993), 847 P.2d 963, the Court stated "It is well established that in the absence of such specific time limit, the court supplied a limit by analogy to other similar proceedings" (See also The City of Bothell, Et al, v. King County, 46 Wn App. 4 (1986), 723 P. 2d 547). In their discussion in Concerned Women and in Bothell v King Cy, the only analogies identified were (30) days and (90) days related to appeals from local decisions denying or approving preliminary plats, or a (90) day period pursuant to RCW 43.21C.080 within which actions under SEPA had to be commenced. At almost (4) years and multiple extensions, clearly we are beyond any analogous (30) or (90) day periods for extensions.

In Yoshio Akada, et al, v. Park 12-01 Corporation, et al, 103 Wn.2d 717, 718 (1985), 695 P.2d 994, the court stated that "applying the rule that where the statute authorizing the appeal designates no specific appeal period, the longer of analogous appeal periods should apply. Again, Snohomish County PDS is well within their authority to deny any further extensions, based upon the above court discussions.

--In Knedlik v. Central Puget Sound Regional Transit Authority, at the King County Superior Court level (case # 11-2-43234-3), that court affirmed the denial in an administrative decision on the final (EIS) for East Link, a light rail project. The superior court dismissed Knedlik's appeal as a sanction for his failure to comply with the EIS case schedule—specifically for failing to respond after Sound Transit repeatedly contacted Knedlik in order to determine which documents he intended to designate for review. The Court of Appeals, Division One, affirmed the lower court's decision of denial in an unpublished opinion filed January 27, 2014, case No. 70306-4-I. Knedlik provided incomplete documentation or failed to respond appropriately.

--In The Polygon Corporation v. City of Seattle, 90 Wn 2d 59 (1978), 578 P.2d 1309, the the Court reviewed the case, and agreed that City of Seattle had done an appropriate review of the EIS submitted by the applicant, and further agreed that there were adverse environmental impacts of varied significance. The Supreme Court affirmed the lower court's ruling denying the project based upon significant environmental impacts which count not be resolved.

--In the case of Norway Hill Preservation and Protection Assoc. v. King County Council, et al, 87 Wn. 2d 267, 275 (1976), 552 P2d 674, King County reached a decision of non significance related to a proposed housing development requiring no EIS. Norway appealed. The Superior Court affirmed. The Supreme Court reversed remanding the case for compliance with a full and comprehensive EIS. "SEPA requires in appropriate cases a detailed environmental impact statement before decisions are made".

--In Virgil L. Adams, et al v. Thurston County, 70 Wn App. 471, 476 (1993), 855 P.2d 284, the court stated: *476 Before a local government takes any major action with a probable significant and adverse environmental impact (*e.g.,* approval of a building permit or plat application), it must prepare an EIS. RCW 43.21C.030(2)(c), .031. An EIS must analyze a proposal in light of its significant adverse impacts and consistency with local environmental policies and discuss alternatives to the proposal, mitigation measures, and unavoidable impacts. RCW 43.21C.030(2)(c), (d), .031; WAC 197-11-440; *Victoria Tower* I, 49 Wn. App. at 758.

A local government may condition or deny a proposal based on adverse environmental impacts which make the action inconsistent with previously adopted local SEPA policies, even if the project complies with local zoning and building codes. RCW 43.21C.060; *Polygon Corp. v. Seattle,* 90 Wn.2d 59, 64-66, 578 P.2d 1309 (1978); *Victoria Tower* II, 59 Wn. App. at 597; *West Main* I, 106 Wn.2d at 53; *West Main Assocs. v. Bellevue,* 49 Wn. App. 513, 525-26, 742 P.2d 1266 (1987) (*West Main* II), *review denied,* 112 Wn.2d 1009 (1989)..

I urge, Mr. Hearing Examiner, that you deny the project on the grounds that:

A). Too many prior extensions have been issued as the County waits year after year for the applicant to provide the necessary documents and proposals to comply with Snohomish County PDS code.
B). The project has far too many items of significance, any one of which are sufficient to deny the project—items which the County has repeatedly requested that the applicant resolve, and which remain un resolved. In fact, the County's determination that the project as currently designed, cannot be built at this site without violating Snohomish County PDS land use codes, should be upheld,
C). And, there is ample legal precedent for denying the project as currently designed, for denying the project due to the dalliance of the applicant over (9) years of discussions, and almost (4) years of extensions, and on the basis that the project hasn't resolved items of significance, examples such as: shoreline setbacks, various levels of instability on the slope above, and no light rail operating at the site.

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