BEFORE THE HEARING EXAMINER
IN AND FOR THE COUNTY OF SNOHOMISH

BSRE POINT WELLS, LP,

Appellant,

vs.

SNOHOMISH COUNTY DEPARTMENT OF PLANNING & DEVELOPMENT SERVICES

Respondent.

No. 11-101457 LU

SNOHOMISH COUNTY DEPARTMENT OF PLANNING AND DEVELOPMENT SERVICES’ POST-HEARING BRIEF

I. INTRODUCTION

Snohomish County Department of Planning and Development Services (PDS) recommends denial of the Point Wells proposal without first preparing an Environmental Impact Statement (EIS) under the State Environmental Policy Act (chapter 43.21C RCW).

PDS’s recommendation and request that the Hearing Examiner deny the Point Wells proposal is based on SCC 30.61.220, which allows denial of a proposal without preparing an EIS when the proposal is in “substantial conflict with adopted plans, ordinances, regulations or laws.” SCC 30.61.220(2). The purpose of this provision is “to avoid incurring needless county and applicant expense.” SCC 30.61.220.

PDS transmitted to the Hearing Examiner its Staff Recommendation dated April 17, 2018, and a Supplemental Staff Recommendation dated May 9, 2018, identifying the
specific grounds for recommendation of denial of the Point Wells proposal. The Hearing
Examiner held an open record public hearing that commenced on May 16, 2018, and went
through May 24, 2018. The seven days of Type 2 open public hearing on PDS’s
recommendation of denial included presentations by the Applicant and PDS on the
proposal, public testimony, the introduction of exhibits, and witness testimony.

The PDS staff recommendations, the administrative record, public and witness
testimony, including the testimony provided by the Applicant’s own witnesses, supports the
conclusion that the Point Wells proposal substantially conflicts with code requirements.
PDS requests that the Hearing Examiner deny the proposal under SCC 30.61.220.

II. STANDARD OF REVIEW

The Hearing Examiner is tasked with determining whether PDS met its burden
under SCC 30.61.220. That provision contains the applicable standard of review.

When denial of a non-county proposal can be based on grounds which are
ascertainable without preparation of an environmental impact statement, the
responsible official may deny the application and/or recommend denial
thereof by other departments or agencies with jurisdiction without preparing
an EIS in order to avoid incurring needless county and applicant expense,
subject to the following:

(1) The proposal is one for which a DS has been issued or for which early
notice of the likelihood of a DS has been given;

(2) Any such denial or recommendation of denial shall be supported by
express written findings and conclusions of substantial conflict with adopted
plans, ordinances, regulations or laws; and

(3) When considering a recommendation of denial made pursuant to this
section, the decision-making body may take one of the following actions:

   (a) Deny the application; or

1 Ex. N-1 & N-2.
(b) Find that there is reasonable doubt that the recommended grounds for denial are sufficient and remand the application to the responsible official for compliance with the procedural requirements of this chapter.

The Examiner now must determine whether to deny the Application, supported by express written findings and conclusions that the Point Wells proposal substantially conflicts with adopted plans, ordinances, regulations or laws, or find there is reasonable doubt\(^2\) that the recommended grounds for denial are sufficient and remand the Application to PDS for compliance with chapter 30.61 SCC (Environmental Review (SEPA)).

Throughout the hearing, the Applicant’s representatives and witnesses referred to the proceeding as one to determine project “feasibility.” Project feasibility is determined before an application is submitted to the County, not seven years later. The Applicant’s misunderstanding of the purpose of this hearing and the applicable legal standard was captured in remarks made by the Applicant’s legal counsel, Gary Huff, in the Applicant’s opening presentation on May 16, 2018. Mr. Huff asserted that “the bottom line, the most important thing, is that we have made substantial progress.”\(^3\) In addressing the standard of review in SCC 30.61.220, Mr. Huff offered his interpretation of the term “substantial conflict: “To me substantial means unresolvable. Major and unresolvable. There aren’t any unresolvable conflicts.”\(^4\) This misunderstanding of the standard of review likely set the tone for numerous references to the “feasibility” stage of the project by the Applicant’s witnesses and legal counsel.

\(^2\) In its Pre-Hearing Brief, PDS provided a detailed description of the “reasonable doubt” standard included in SCC 30.61.220(3)(b). Ex. 0-4, pg. 4-5.
\(^3\) Gary Huff Testimony, May 16, 2018, 3:03:08 – 3:03:13 p.m.
\(^4\) Gary Huff Testimony, May 16, 2018, 3:04:14 – 3:03 p.m.
Ryan Countryman, PDS Planner Supervisor, offered a more precise definition of the term “substantial conflict.”

Merriam Webster defines substantial conflict as “an important or material matter.” For Planning and Development Services, this means a substantial conflict is an important or material issue of noncompliance with code or other requirements.\(^5\)

Unlike the Applicant’s interpretation, PDS’s interpretation of substantial conflict is consistent with SCC 30.61.220 and is the standard which the Hearing Examiner must apply in this matter.

Describing what constitutes a substantial conflict with county code and whether there is reasonable doubt as to a particular grounds for denial is best illustrated with an example from the hearing. PDS identified the Applicant’s proposal to construct buildings in the Urban Plaza as inconsistent with SCC 30.62B.340. That provision of county code prohibits development activities in a landslide hazard area or its setback unless a deviation is granted by PDS. A deviation request must demonstrate: (1) there is no alternate location for the structure on the property; and (2) “alternative setbacks provide protection which is equal to that provided by the standard minimum setbacks.” SCC 30.62B.340(2)(b).

PDS first notified the Applicant of this code compliance issue in its April 12, 2013, Review Completion Letter.\(^6\) Five years later, on April 27, 2018, the Applicant submitted a deviation request for development located in the landslide hazard area and its setback.\(^7\)

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\(^5\) Ryan Countryman Testimony, May 17, 2018, 9:10:12 – 9:10:32 a.m.
\(^6\) Ex. K-4, p. 7.
However, the Applicant failed to demonstrate that there is no alternate location for the Urban Plaza buildings on the property, except for the secondary access road.\textsuperscript{8}

PDS asserts a deviation cannot be granted because the code criteria for granting one are not met. John Bingham, the Applicant’s consultant who authored the deviation request, stated that he relied on the variance request regarding building heights to address the “no alternate location” criterion, but admitted that he never actually read the variance request.\textsuperscript{9}

The variance request contains no discussion regarding the “no alternate location” criterion.\textsuperscript{10} To the contrary, the author of the variance request, Carsten Stinn, testified that it is possible to design the site to avoid locating the residential structures and bus facilities on the upper bench.\textsuperscript{11} Mr. Stinn’s testimony was corroborated by his colleague, Dan Seng, who testified that possible alternatives were considered but rejected for design reasons.\textsuperscript{12} It is uncontested that the “no alternate location” criterion is not met, and cannot be met.

The location of residential towers, a first responder building, commercial development, and transportation facilities on the upper bench is a significant component of the Application. These development activities constitute nearly all of Phase 2 of the proposed project. The proposal to locate these structures with a landslide hazard area and its setback is a “substantial conflict” with code requirements. Yet despite being informed of this major obstacle to development in 2013, the Applicant refused to address it. This issue provides a textbook example of why PDS has the authority to recommend, and the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{8} See Ex. A-37 at 6.
\item \textsuperscript{9} John Bingham Testimony, May 23, 2018, 9:10:44 – 9:10:59 a.m.
\item \textsuperscript{10} See Ex. A-29.
\item \textsuperscript{11} Carsten Stinn Testimony, May 23, 2018, 11:32:08 – 11:32:48 a.m.; see also Carsten Stinn Testimony, May 23, 2018, 11:33:30 – 11:34:52 a.m.
\item \textsuperscript{12} Dan Seng Testimony, May 23, 2018, 2:33:46 – 2:35:35 p.m.
\end{itemize}
\end{footnotesize}
Hearing Examiner has the authority to grant, denial of a proposal under SCC 30.61.220 prior to preparation of an EIS. This is the exact type of situation SCC 30.61.220 was intended to address.

III. APPLICATION REVIEW

Throughout the hearing, the attorneys and witnesses for the Applicant took the position that compliance with code requirements is not required at this time, which it labeled the “feasibility” phase of the project. The Applicant’s position is without support and contrary to the county code.

A. Applications Are Reviewed for Compliance with Applicable Development Regulations, Not “Feasibility.”

Among other permit applications, the Applicant submitted a land use permit for an Urban Center site plan. An Urban Center site plan application must comply with the development standards in the Urban Center development code, chapter 30.34A SCC.13 An application also must comply with other applicable provisions of the county code. In no uncertain terms, SCC 30.71.130 provides “[a] project permit application that does not comply with applicable development regulations … shall be denied.” SCC 30.70.100 further provides that the county must review all project permit applications for consistency with applicable county development regulations. Thus, in addition to chapter 30.34A SCC, the application for the Urban Center site plan must demonstrate compliance with critical area regulations, shoreline management regulations, landslide hazard regulations, and all

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13 See SCC 30.34A.010 [2010] ("This chapter sets forth the procedures and standards to be followed in applying for any required permit and for buildings in this zone.")
other applicable regulations of the Unified Development Code, Title 30 SCC. The
Application fails to reach this bar.

In addition to the requirements set forth in Title 30 SCC, chapter 36.70B RCW sets
forth the elements required for project review. RCW 36.70B.040 provides, in relevant part:

(1) A proposed project’s consistency with a local government’s development
regulations adopted under chapter 36.70A RCW, or, in the absence of
applicable development regulations, the appropriate elements of the
comprehensive plan adopted under chapter 36.70A RCW shall be decided by
the local government during project review by consideration of:
(a) The type of land use;
(b) The level of development, such as units per acre or other measure
of density;
(c) Infrastructure, including public facilities and services needed to
serve the development; and
(d) The characteristics of the development, such as development
standards.

The statute further provides that nothing in the section “limits a city or county from asking
more specific or related questions with respect to any of the four main categories listed in
subsection (1)(a) through (c)”. RCW 36.70B.040(4). RCW 36.70B.030 states that
“[p]roject review shall be used to identify specific project design and conditions relating to
the character of the development, such as details of site plans.” (Emphasis added).

The Applicant indicates all that is needed at this time is enough information to
conduct environmental review of the project. Contrary to Applicant’s assertion, SEPA
review and project review are integrated under state law. RCW 36.70B.050 provides that
each local government shall “[c]ombine the environmental review process, both procedural
and substantive, with the procedure for review of project permits.” Thus, the Applicant’s
refrain that it need not demonstrate code compliance seven years into project review is
contrary to the county code and state law. Under SCC 30.61.220, it is the current
application and supporting materials that PDS and the Hearing Examiner must review for substantial conflict with Title 30 SCC. It is not the application that the Applicant could have submitted, should have submitted, or promises to submit in the future.

B. **Deferring Code Compliance Is Contrary to SCC 30.61.220.**

In PDS’s opening presentation, the Hearing Examiner asked Mr. Countryman to address how PDS proceeded to a recommendation of denial under SCC 30.61.220. The dialogue between the Hearing Examiner and Mr. Countryman proceeded as follows:

Hearing Examiner:
So, in other words, are you saying that, that you basically lost patience with them, they have had three shots at it, and they don’t appear to be willing to, match the project, as you say, to the code, and therefore, there is no point in continuing. Is that, do I have that right?

Mr. Countryman:
I wouldn’t attribute the thought process to the Applicant. We have had seven years, more than seven years, three extensions, and still receiving, even in the last week, documents from the Applicant suggesting that the plans can be revised at a later date to comply with code requirements after the project has received its entitlement. But that gets the process backwards. The project cannot receive an entitlement until it complies, or substantially complies with county code.\(^{14}\)

In his response, Mr. Countryman captured the Applicant’s misunderstanding of the application process, which may explain how the Applicant has failed to address substantial conflicts with its Application after seven years and three application extensions.

Throughout the hearing, the Applicant continued to assert that it can put off providing application materials and addressing substantial conflicts with the County Code until after

the SEPA process and entitlement of the project. But, as Mr. Countryman explained, the
Applicant has the process backwards.

According to the Applicant, it need not demonstrate code compliance at this stage,
prior to preparation of an EIS. However, the Applicant’s interpretation would render
SCC 30.61.220 meaningless. Under SCC 30.61.220, a proposal either substantially
conflicts with the code or it does not. If the Examiner determines the Applicant is not
required to demonstrate a Code-compliant project seven years after submitting a complete
application, the Applicant can shield itself from any exercise of authority by PDS or the
Examiner under SCC 30.61.220, claiming that it can simply defer addressing issues of
substantial conflict until after completion of the EIS. A reviewing court “may not interpret
any part of a statute as meaningless or superfluous.” State v. Lilyblad, 163 Wn.2d 1, 11,
177 P.3d 686 (2008). Allowing applicants to defer code compliance and excusing them
from addressing substantial conflicts with their applications prior to EIS preparation as
advocated by the Applicant would have the effect of nullifying SCC 30.61.220. Instead, the
purpose of SCC 30.61.220 is to provide a mechanism to avoid incurring needless county
and applicant expense when the responsible official determines an application substantially
conflicts with the County Code prior to preparation of an EIS.

Moreover, the purpose of SCC 30.61.220 is to focus on substantial conflicts
between the proposed project and code. The Applicant’s complaints about the level of
detail requested by PDS is not relative to this proceeding. This proceeding is not about
whether the Applicant has identified the right species of shrubbery for landscaping, the
precise size of rock to be used in restoring the beach, or the exact size of pipes for surface
water drainage. Rather, this hearing is about whether "important or material" aspects of the project conflict with code. Must the Urban Plaza development (Phase 2) be relocated from a landslide hazard area and its setback? Will high capacity transit be available to serve the project? At this stage of project review, the Applicant must, at the very least, provide enough information to PDS to determine whether the project is consistent with "important or material" aspects of the code. The Applicant does not meet that threshold.

IV. VARIANCE

The Applicant submitted a request for a zoning code variance on April 27, 2018.\textsuperscript{15} Due to its late submission, the request could not be processed pursuant to code. However, PDS provided an analysis of the request against the applicable decision criteria in its supplemental staff recommendation.\textsuperscript{16}

The Examiner is being asked to deny the Application because it substantially conflicts with code requirements. PDS is not asking the Examiner to deny the Application because a variance has not been granted. Rather, PDS is asking the Examiner to deny the Application because it substantially conflicts with SCC 30.34A.040(2)(a), and because a variance cannot be granted because it does not meet the criteria for granting a variance under SCC 30.43B.100. PDS would make the same recommendation to the Examiner for any other permit application if granting the application depended on also granting a variance that does not meet the criteria of SCC 30.43B.100. However, PDS may recommend approval of an application if granting the application was premised on granting a variance that does meet the variance criteria. Because the variance request does not meet

\textsuperscript{15} Ex. A-29.
\textsuperscript{16} Ex. N-2.
the criteria in SCC 30.43B.100, it cannot be granted, and the Application substantially conflicts with SCC 30.34A.040.

V. PERMIT EXPIRATION

The issue of permit expiration is relevant only if the Examiner does not deny the project under SCC 30.61.220.

If the project is not denied, it must be remanded to PDS for completion of environmental review under SEPA. However, no meaningful amount of work could be conducted on remand before the Application is set to expire on June 30, 2018. Therefore, the Applicant is asking the Examiner to grant a fourth extension of the permit application expiration date. The Examiner has the authority to do so under SCC 30.70.140(2)(b).

There are no criteria contained in SCC 30.70.140 for the Examiner’s consideration. The Examiner requested the parties recommend such criteria. PDS recommends the Examiner consider the following:

- *The number of extensions previously granted to the Applicant, and the cumulative extension period.* Extensions were granted in March 2014, April 2015, and March 2016. In granting the Applicant an extension in March 2016, PDS informed the Applicant that no further extensions would be granted absent “extraordinary circumstances.”

- *The duration of the Application to date, minus the length of time application review was stayed by the King County Superior Court.* The County was enjoined from processing the application for roughly 13 months, from November 23, 2011, through January 7, 2013.

- *The level of effort demonstrated by the Applicant in responding to issues raised by the County.* This consideration is subjective. However, PDS refers the Examiner to the number and type of documents submitted by the

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Applicant on April 27, 2018, and May 15, 2018. Several of these documents were requested in 2013.

- *The number and severity of issues that have yet to be resolved, and the likelihood they will be resolved in a reasonable timeframe.* For example, the site will need to be redesigned to remove development from the upper bench (with the possible exception of the secondary access road).

- *The degree to which local regulations have changed since the Application vested.* As set forth in PDS’s proposed findings of fact, regulations related to critical areas, shorelines, drainage, and urban centers have been substantially revised since 2011. Case law dictates that continuation of a vested application must be weighed against the public’s interest in having an application evaluated against regulations that currently are in effect. *Erickson & Associates, Inc. v. McClerran*, 123 Wn.2d 864, 873-74, 872 P.2d 1090 (1994).

- *The amount of communication the Applicant has had with municipalities and agencies involved in permitting the project.* For example, despite testimony provided by the Applicant’s traffic engineer, testimony provided by multiple representatives of the City of Shoreline painted a very different picture regarding the extent of disagreement between the Applicant and the City over the mitigation of traffic impacts. Additionally, the Applicant did not present evidence of communications with other permitting authorities such as the Department of Natural Resources, the U.S. Army Corps of Engineers, or the Department of Ecology, or recent communications with Sound Transit or Burlington Northern Santa Fe.

The Examiner also offered that PDS may suggest an extension length should the Examiner determine to grant an extension. PDS declines to suggest an extension length for several reasons. First, PDS was asked by the Applicant to grant a fourth extension on January 12, 2018. The PDS Director denied that request for the points set forth in her letter dated January 24, 2018. Those points continue to be valid, and PDS recommends the Examiner not grant the Applicant a fourth extension. Second, PDS can only account for its own actions, which makes estimating how much time is necessary to complete

environmental review and prepare a recommendation for the Examiner speculative. The fact the Applicant submitted numerous reports and information requested in 2013 only at the end of April of this year prior to the commencement of this hearing indicates the difficulty of receiving timely but necessary materials from the Applicant. PDS is concerned that it will be held responsible for the Applicant’s actions if it suggests a timeframe to the Examiner that, if granted, ultimately is not met. That being said, PDS will continue to process the Application in a professional and timely manner should the extension request be granted.

VI. CONCLUSION

As the findings of fact and conclusions of law proposed by PDS demonstrate, the Application as it exists today substantially conflicts with the Snohomish County Code. PDS requests the Examiner deny the proposal under SCC 30.61.220(2) "to avoid incurring needless county and applicant expense."

DATED this 1st day of June, 2018.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: ________________________

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DECLARATION OF SERVICE

I, Cindy Ryden, hereby declare that I am an employee of the Civil Division of the Snohomish County Prosecuting Attorney, and that on the 1st day of June, 2018, I caused to be delivered Snohomish County Department of Planning and Development Services’ Proposed Finding of Fact and Conclusions of Law, Post-Hearing Brief, and this Declaration of Service on the following parties by the methods indicated:

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I certify under penalty of perjury under the laws of the state of Washington that the
foregoing is true and correct.

DATED this 1st day of June, 2018 at Everett, Washington.

Cindy Ryden, Legal Assistant