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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

1 specific grounds for recommendation of denial of the Point Wells proposal.¹ The Hearing
2 Examiner held an open record public hearing that commenced on May 16, 2018, and went
3 through May 24, 2018. The seven days of Type 2 open public hearing on PDS's
4 recommendation of denial included presentations by the Applicant and PDS on the
5 proposal, public testimony, the introduction of exhibits, and witness testimony.

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

11 **II. STANDARD OF REVIEW**

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

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

- 20 (1) The proposal is one for which a DS has been issued or for which early
21 notice of the likelihood of a DS has been given;
- 22 (2) Any such denial or recommendation of denial shall be supported by
23 express written findings and conclusions of substantial conflict with adopted
24 plans, ordinances, regulations or laws; and
- 25 (3) When considering a recommendation of denial made pursuant to this
26 section, the decision-making body may take one of the following actions:
 - (a) Deny the application; or

¹ Ex. N-1 & N-2.

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

3 The Examiner now must determine whether to deny the Application, supported by express
4 written findings and conclusions that the Point Wells proposal substantially conflicts with
5 adopted plans, ordinances, regulations or laws, or find there is reasonable doubt² that the
6 recommended grounds for denial are sufficient and remand the Application to PDS for
7 compliance with chapter 30.61 SCC (Environmental Review (SEPA)).

8
9 Throughout the hearing, the Applicant's representatives and witnesses referred to
10 the proceeding as one to determine project "feasibility." Project feasibility is determined
11 before an application is submitted to the County, not seven years later. The Applicant's
12 misunderstanding of the purpose of this hearing and the applicable legal standard was
13 captured in remarks made by the Applicant's legal counsel, Gary Huff, in the Applicant's
14 opening presentation on May 16, 2018. Mr. Huff asserted that "the bottom line, the most
15 important thing, is that we have made substantial progress."³ In addressing the standard of
16 review in SCC 30.61.220, Mr. Huff offered his interpretation of the term "substantial
17 conflict: "To me substantial means unresolvable. Major and unresolvable. There aren't any
18 unresolvable conflicts."⁴ This misunderstanding of the standard of review likely set the
19 tone for numerous references to the "feasibility" stage of the project by the Applicant's
20 witnesses and legal counsel.
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25 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.

26 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.

1 Ryan Countryman, PDS Planner Supervisor, offered a more precise definition of the
2 term “substantial conflict.”

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

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

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

18 PDS first notified the Applicant of this code compliance issue in its April 12, 2013,
19 Review Completion Letter.⁶ Five years later, on April 27, 2018, the Applicant submitted a
20 deviation request for development located in the landslide hazard area and its setback.⁷
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25 ⁵ Ryan Countryman Testimony, May 17, 2018, 9:10:12 – 9:10:32 a.m.

26 ⁶ Ex. K-4, p. 7.

⁷ Ex. C-27, supplemented by Ex. A-37 on May 15, 2018.

1 However, the Applicant failed to demonstrate that there is no alternate location for the
2 Urban Plaza buildings on the property, except for the secondary access road.⁸

3 PDS asserts a deviation cannot be granted because the code criteria for granting one
4 are not met. John Bingham, the Applicant's consultant who authored the deviation request,
5 stated that he relied on the variance request regarding building heights to address the "no
6 alternate location" criterion, but admitted that he never actually read the variance request.⁹
7 The variance request contains no discussion regarding the "no alternate location"
8 criterion.¹⁰ To the contrary, the author of the variance request, Carsten Stinn, testified that
9 it is possible to design the site to avoid locating the residential structures and bus facilities
10 on the upper bench.¹¹ Mr. Stinn's testimony was corroborated by his colleague, Dan Seng,
11 who testified that possible alternatives were considered but rejected for design reasons.¹² It
12 is uncontested that the "no alternate location" criterion is not met, and cannot be met.

13
14 The location of residential towers, a first responder building, commercial
15 development, and transportation facilities on the upper bench is a significant component of
16 the Application. These development activities constitute nearly all of Phase 2 of the
17 proposed project. The proposal to locate these structures with a landslide hazard area and
18 its setback is a "substantial conflict" with code requirements. Yet despite being informed
19 of this major obstacle to development in 2013, the Applicant refused to address it. This
20 issue provides a textbook example of why PDS has the authority to recommend, and the
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⁸ See Ex. A-37 at 6.

24 ⁹ John Bingham Testimony, May 23, 2018, 9:10:44 – 9:10:59 a.m.

25 ¹⁰ See Ex. A-29.

26 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.

¹² Dan Seng Testimony, May 23, 2018, 2:33:46 – 2:35:35 p.m.

1 Hearing Examiner has the authority to grant, denial of a proposal under SCC 30.61.220
2 prior to preparation of an EIS. This is the exact type of situation SCC 30.61.220 was
3 intended to address.

4 **III. APPLICATION REVIEW**

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

10 **A. Applications Are Reviewed for Compliance with Applicable Development 11 Regulations, Not “Feasibility.”**

12 Among other permit applications, the Applicant submitted a land use permit for an
13 Urban Center site plan. An Urban Center site plan application must comply with the
14 development standards in the Urban Center development code, chapter 30.34A SCC.¹³ An
15 application also must comply with other applicable provisions of the county code. In no
16 uncertain terms, SCC 30.71.130 provides “[a] project permit application that does not
17 comply with applicable development regulations ... shall be denied.” SCC 30.70.100
18 further provides that the county must review all project permit applications for consistency
19 with applicable county development regulations. Thus, in addition to chapter 30.34A SCC,
20 the application for the Urban Center site plan must demonstrate compliance with critical
21 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
26 applying for any required permit and for buildings in this zone.”)

1 other applicable regulations of the Unified Development Code, Title 30 SCC. The
2 Application fails to reach this bar.

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

5 (1) A proposed project's consistency with a local government's development
6 regulations adopted under chapter 36.70A RCW, or, in the absence of
7 applicable development regulations, the appropriate elements of the
8 comprehensive plan adopted under chapter 36.70A RCW shall be decided by
9 the local government during project review by consideration of:

- 10 (a) The type of land use;
- 11 (b) The level of development, such as units per acre or other measure
12 of density;
- 13 (c) Infrastructure, including public facilities and services needed to
14 serve the development; and
- 15 (d) The characteristics of the development, such as development
16 standards.

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

22 The Applicant indicates all that is needed at this time is enough information to
23 conduct environmental review of the project. Contrary to Applicant's assertion, SEPA
24 review and project review are integrated under state law. RCW 36.70B.050 provides that
25 each local government shall "[c]ombine the environmental review process, both procedural
26 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

1 application and supporting materials that PDS and the Hearing Examiner must review for
2 substantial conflict with Title 30 SCC. It is not the application that the Applicant could
3 have submitted, should have submitted, or promises to submit in the future.

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

5 In PDS's opening presentation, the Hearing Examiner asked Mr. Countryman to
6 address how PDS proceeded to a recommendation of denial under SCC 30.61.220. The
7 dialogue between the Hearing Examiner and Mr. Countryman proceeded as follows:
8

9 Hearing Examiner:

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

14 Mr. Countryman:

15 I wouldn't attribute the thought process to the Applicant. We have had seven
16 years, more than seven years, three extensions, and still receiving, even in
17 the last week, documents from the Applicant suggesting that the plans can be
18 revised at a later date to comply with code requirements after the project has
19 received its entitlement. But that gets the process backwards. The project
20 cannot receive an entitlement until it complies, or substantially complies
21 with county code.¹⁴

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

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

¹⁴ Ryan Countryman Testimony, May 18, 2018, 9:23:30 – 9:24:28 a.m.

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

3 According to the Applicant, it need not demonstrate code compliance at this stage,
4 prior to preparation of an EIS. However, the Applicant's interpretation would render
5 SCC 30.61.220 meaningless. Under SCC 30.61.220, a proposal either substantially
6 conflicts with the code or it does not. If the Examiner determines the Applicant is not
7 required to demonstrate a Code-compliant project seven years after submitting a complete
8 application, the Applicant can shield itself from any exercise of authority by PDS or the
9 Examiner under SCC 30.61.220, claiming that it can simply defer addressing issues of
10 substantial conflict until after completion of the EIS. A reviewing court "may not interpret
11 any part of a statute as meaningless or superfluous." *State v. Lilyblad*, 163 Wn.2d 1, 11,
12 177 P.3d 686 (2008). Allowing applicants to defer code compliance and excusing them
13 from addressing substantial conflicts with their applications prior to EIS preparation as
14 advocated by the Applicant would have the effect of nullifying SCC 30.61.220. Instead, the
15 purpose of SCC 30.61.220 is to provide a mechanism to avoid incurring needless county
16 and applicant expense when the responsible official determines an application substantially
17 conflicts with the County Code prior to preparation of an EIS.

20 Moreover, the purpose of SCC 30.61.220 is to focus on substantial conflicts
21 between the proposed project and code. The Applicant's complaints about the level of
22 detail requested by PDS is not relative to this proceeding. This proceeding is not about
23 whether the Applicant has identified the right species of shrubbery for landscaping, the
24 precise size of rock to be used in restoring the beach, or the exact size of pipes for surface
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1 water drainage. Rather, this hearing is about whether “important or material” aspects of the
2 project conflict with code. Must the Urban Plaza development (Phase 2) be relocated from
3 a landslide hazard area and its setback? Will high capacity transit be available to serve the
4 project? At this stage of project review, the Applicant must, at the very least, provide
5 enough information to PDS to determine whether the project is consistent with “important
6 or material” aspects of the code. The Applicant does not meet that threshold.
7

8 IV. VARIANCE

9 The Applicant submitted a request for a zoning code variance on April 27, 2018.¹⁵
10 Due to its late submission, the request could not be processed pursuant to code. However,
11 PDS provided an analysis of the request against the applicable decision criteria in its
12 supplemental staff recommendation.¹⁶

13 The Examiner is being asked to deny the Application because it substantially
14 conflicts with code requirements. PDS is not asking the Examiner to deny the Application
15 because a variance has not been granted. Rather, PDS is asking the Examiner to deny the
16 Application because it substantially conflicts with SCC 30.34A.040(2)(a), and because a
17 variance cannot be granted because it does not meet the criteria for granting a variance
18 under SCC 30.43B.100. PDS would make the same recommendation to the Examiner for
19 any other permit application if granting the application depended on also granting a
20 variance that does not meet the criteria of SCC 30.43B.100. However, PDS may
21 recommend approval of an application if granting the application was premised on granting
22 a variance that does meet the variance criteria. Because the variance request does not meet
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15 Ex. A-29.

26 16 Ex. N-2.

1 the criteria in SCC 30.43B.100, it cannot be granted, and the Application substantially
2 conflicts with SCC 30.34A.040.

3 **V. PERMIT EXPIRATION**

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

6 If the project is not denied, it must be remanded to PDS for completion of
7 environmental review under SEPA. However, no meaningful amount of work could be
8 conducted on remand before the Application is set to expire on June 30, 2018. Therefore,
9 the Applicant is asking the Examiner to grant a fourth extension of the permit application
10 expiration date. The Examiner has the authority to do so under SCC 30.70.140(2)(b).
11

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

- 15 • *The number of extensions previously granted to the Applicant, and the*
16 *cumulative extension period.* Extensions were granted in March 2014, April
17 2015, and March 2016.¹⁷ In granting the Applicant an extension in March
18 2016, PDS informed the Applicant that no further extensions would be
19 granted absent "extraordinary circumstances."
- 20 • *The duration of the Application to date, minus the length of time application*
21 *review was stayed by the King County Superior Court.* The County was
22 enjoined from processing the application for roughly 13 months, from
23 November 23, 2011, through January 7, 2013.¹⁸
- 24 • *The level of effort demonstrated by the Applicant in responding to issues*
25 *raised by the County.* This consideration is subjective. However, PDS
26 refers the Examiner to the number and type of documents submitted by the

¹⁷ Ex. G-1, G-2, P-11, G-5, K-13.

¹⁸ Ex. N-1, p. A-1 (project chronology).

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

- 3 • *The number and severity of issues that have yet to be resolved, and the
4 likelihood they will be resolved in a reasonable timeframe.* For example, the
5 site will need to be redesigned to remove development from the upper bench
6 (with the possible exception of the secondary access road).
- 7 • *The degree to which local regulations have changed since the Application
8 vested.* As set forth in PDS's proposed findings of fact, regulations related
9 to critical areas, shorelines, drainage, and urban centers have been
10 substantially revised since 2011. Case law dictates that continuation of a
11 vested application must be weighed against the public's interest in have an
12 application evaluated against regulations that currently are in effect.
13 *Erickson & Associates, Inc. v. McClerran*, 123 Wn.2d 864, 873-74, 872 P.2d
14 1090 (1994).
- 15 • *The amount of communication the Applicant has had with municipalities and
16 agencies involved in permitting the project.* For example, despite testimony
17 provided by the Applicant's traffic engineer, testimony provided by multiple
18 representatives of the City of Shoreline painted a very different picture
19 regarding the extent of disagreement between the Applicant and the City
20 over the mitigation of traffic impacts. Additionally, the Applicant did not
21 present evidence of communications with other permitting authorities such
22 as the Department of Natural Resources, the U.S. Army Corps of Engineers,
23 or the Department of Ecology, or recent communications with Sound Transit
24 or Burlington Northern Santa Fe.

25 The Examiner also offered that PDS may suggest an extension length should the
26 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, 2018.¹⁹ 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

¹⁹ Ex. K-40.


1 environmental review and prepare a recommendation for the Examiner speculative. The
2 fact the Applicant submitted numerous reports and information requested in 2013 only at
3 the end of April of this year prior to the commencement of this hearing indicates the
4 difficulty of receiving timely but necessary materials from the Applicant. PDS is concerned
5 that it will be held responsible for the Applicant's actions if it suggests a timeframe to the
6 Examiner that, if granted, ultimately is not met. That being said, PDS will continue to
7 process the Application in a professional and timely manner should the extension request be
8 granted.
9

10 VI. CONCLUSION

11 As the findings of fact and conclusions of law proposed by PDS demonstrate, the
12 Application as it exists today substantially conflicts with the Snohomish County Code.
13 PDS requests the Examiner deny the proposal under SCC 30.61.220(2) "to avoid incurring
14 needless county and applicant expense."
15

16 DATED this 1st day of June, 2018.

17 MARK K. ROE
18 Snohomish County Prosecuting Attorney

19
20 By: 
21 MATTHEW A. OTTEN, WSBA #40485
22 LAURA C. KISIELIUS, WSBA #28255
23 Deputy Prosecuting Attorney
24 Attorney for Respondent Snohomish County
25 Department of Planning and Development
26 Services

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BEFORE THE HEARING EXAMINER
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BSRE POINT WELLS, LP,

Appellant,

vs.

SNOHOMISH COUNTY DEPARTMENT
OF PLANNING & DEVELOPMENT
SERVICES

Respondent.

No. 11-101457 LU
DECLARATION OF SERVICE

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:

Gary Huff
Jacque E. St. Romain
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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