KING COUNTY SUPERIOR COURT

BSRE POINT WELLS, LP, a Delaware Limited Partnership Petitioner, v. SNOHOMISH COUNTY, Defendants.	No.: 18-2-57804-3 SEA ORDER ON BSRE POINT WELLS, LP'S LUPA PETITION REMANDING PER SCC 30.34A.180 (2)(f) (2007)

I. INTRODUCTION

This matter is before the Court under the Land Use Petition Act, RCW 36.70C.030. Petitioner, Point Wells, BSRE LP, hereinafter "BSRE" asks the Court to reverse the Snohomish County Hearing Examiner's August 3, 2018 denial "without prejudice" of its "Urban Center Development" land use applications that were subsequently approved by the Snohomish County Council on October 9, 2018. In considering this matter, the Court is, in form, reviewing the Snohomish County Council's approval, but in substance reviewing the specific issues addressed by the Hearing Examiner in the lengthy record provided. The Court under RCW 36.70C.140 may affirm or reverse the land use

decision under review or remand the decision for modification or further proceedings.

The Court considered the Opening Brief of Petitioner, Respondent Snohomish County's Response Brief, Intervenor, City of Shoreline's Response Brief and the Reply Brief of Petitioner along with all associated declarations and the entirety of the official record produced. Additionally, the Court heard oral argument on May 10, 2019.

II. FINDINGS OF FACT

1. This Land Use Petition Act ("LUPA") action arose from the denial of land use applications by the Snohomish County Hearing Examiner on August 3, 2018 that were largely affirmed by the Snohomish County Council in a written decision of October 9, 2018.[1] The applications at issue were initially filed on February 14, 2011 and March 4, 2011. This project was to be developed under the Snohomish County Code, specifically, Chapter 30.34 (the Urban Center Development) code.
2. The proposed development is on 61 acres of waterfront property at Point Wells in Snohomish County, Washington. The site was used previously as a petroleum facility and is reported to be currently in use as an asphalt processing plant.[2] As an "urban center" development, BSRE indicated that it would include approximately 3,000 residential units and provide

[1] Applications at issue were filed under numbers 11-01457 LU/VAR, 11-101461 SM, 11-101464 RC, and 11-101007 SP.

[2] No evidence has been presented as to remediation work having been started on the property.

approximately 100,000 square feet of commercial space. BSRE has also indicated that its development would allow for large public beach access.

3. To the east of the property is a 200-foot bluff. The Town of Woodway and the City of Shoreline abut the property with primarily single-family homes.

4. From the beginning, it was clear to Snohomish County and to BSRE that the project was complex and that it faced many hurdles.[3] In fact, a major hurdle arose in 2010 and 2011 when the Town of Woodway and Save Richmond Beach, Inc. successfully challenged the county's designation of the Point Wells site as an "urban center" before the Growth Management Hearing Board as not compliant with the State Environmental Policy Act ("SEPA").

5. The Growth Management Hearing Board determination led to a second, significant hurdle when The Town of Woodway and Save Richmond Beach, Inc. filed an action in King County Superior Court seeking a declaration that BSRE's project permit applications had not vested because ordinances enacted within the "urban center" code were void under SEPA and the Growth Management Act. This litigation initiated in September, 2011 included an injunction that delayed processing of BSRE's applications as the case proceeded through the Washington State Court system. Division One of the Court of Appeals invalidated the injunction on January 7, 2013. The Washington State Supreme Court

[3] BSRE references a predecessor in interest in the property, but this entity was unnamed. Accordingly, the Court will refer to BSRE as the interested developer throughout this order.

affirmed the Division One decision on April 14, 2014 and confirmed that BSRE had a vested right to permit applications that were filed under the Snohomish County Urban Center Code provisions even though the "urban center" regulations had been determined to be non-compliant with SEPA.

6. After the Court of Appeals decision, Snohomish County recommenced its review of BSRE's applications and issued a 14-page review completion letter on April 12, 2013. This letter referenced not less than 42 issues of code noncompliance and requested that BSRE provide additional information to address the noted issues. BSRE responded in a letter dated March 21, 2014 in which it requested an extension to April 15, 2015, in part due to the above referenced then pending Washington State Supreme Court case. This request was granted.

7. On April 15, 2015, BSRE requested a second application extension to June 30, 2016. This request was also granted.

8. In a letter dated March 30, 2016, BSRE requested a third extension of two years. In this letter, BSRE "reserved" argument that it remained vested under the code provisions that were in effect when its applications were filed such that recently adopted code provisions would not apply to its applications. This extension request was granted in a letter of March 31, 2016 through which the new application deadline was set for June 30, 2018. In the letter granting this extension, Snohomish County responded to BSRE's "reserved" vesting argument and directly informed BSRE of Snohomish County Amended Ordinance 16-004 which it asserted, applied

new application expiration regulations to pending applications, including BSRE's applications. Snohomish County clearly disagreed with BSRE's vesting argument.

9. On April 17, 2017, BSRE provided an application resubmittal, nearly a month ahead of a Snohomish County requested May 15, 2017 deadline. Snohomish County acknowledged receipt of the resubmittal by letter on May 2, 2017 and stated that if an additional extension was to be requested, that a request should be presented before May 30, 2018. A second letter acknowledging receipt of the resubmittal and providing preliminary comments was sent from Snohomish County on May 10, 2017. This letter referenced the May 2, 2017 letter and reiterated that the project would expire on June 30, 2018 unless BSRE requested and the PDS director granted a further extension.

10. On October 6, 2017, Snohomish County provided a 389-page review completion letter to BSRE. In this letter, Snohomish County recognized that BSRE had resolved 13 issues, but noted that many of the deficiencies recognized in its April 2013 review letter had not been addressed. This detailed letter went through all applicable code provisions with direct reference to actions of BSRE. This letter again referenced the approaching, application expiration date of June 30, 2018 and indicated that it was possible that the applications could be transferred to the Hearing Examiner with a recommendation of denial if deficiencies were

not addressed. At relevant part with regard to timing, this letter, at page 3, stated:

> **Timing:** The current permit applications have previously been the subject of three previous requests for extension, all of which have been granted. The most recent was a 24-month extension extending the expiration date of the applications to June 30, 2018. Under County Code, no additional extensions are permitted absent extraordinary circumstances.
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> Accordingly, Snohomish County asks that the additional information/revisions set forth below be provided within a reasonable period of time to allow completion of SEPA review and submission of the applications for hearing or decision by June 30, 2018. Even if the applicant does not wish to revise the application submittal, we would request that the applicant identify an "alternative" project proposal on the site capable of demonstrating compliance with the County's regulations, including those for critical areas, parking, and fire protection for purposes of SEPA review. If a revised submittal or alternative information addressing the above is not received on or before January 8, 2018, PDS will assume that the applicant wishes the County to proceed with concluding environmental review under SEPA and processing the permit applications for hearing or decision based on the current application submittals. Please be advised that this may result in a recommendation of denial without further preparation of an EIS in accordance with SCC 30.61.220, if PDS concludes that the permit applications as submitted evidence a substantial conflict with applicable County Code and development regulations.

11. A second one-page letter from Snohomish County was sent with the 389-page letter on October 6, 2017. This letter again referenced the June 30, 2018 due date and directed BSRE to provide another application resubmittal by January 8, 2018.

The records indicate that BSRE continued to work to address issues referenced and in that direction, representatives of BSRE and Snohomish County met in person on November 13, 2017. In this meeting, BSRE

asserts that it indicated that it needed additional time beyond January 8, 2018 to complete requested work and that Snohomish County representatives stated that the January 8, 2018 resubmission was a target and not a statutorily prescribed deadline. BSRE also contends that it was encouraged to submit a letter request for more time and that it was told that there was no reason to expect that an additional extension request would not be approved.

12. On December 29, 2017, BSRE wrote Snohomish County explaining that work was ongoing, but could not be finished by January 8, 2018 and that upon receipt of updates from consultants it would provide a new target date when materials would be submitted. In response, Snohomish County sent a letter of January 9, 2019 stating that supplemental materials had not been provided in time, and that the county intended to move onward to the Hearing Examiner for application review. At relevant part, this letter stated:

> At this time, PDS will complete final review and processing of the application materials it has received. Further, PDS will make a recommendation to the Hearing Examiner on the Applications and schedule a public hearing on the Applications with enough time for the Hearing Examiner to render a decision by June 30, 2018. Please note that if PDS concludes that the Applications as submitted substantially conflict with the applicable plans, ordinances, regulations or laws, this process may result in a recommendation of denial without further preparation of an EIS under SCC 30.61.220.

13. In response, BSRE wrote Snohomish County on January 12, 2018 and January 24, 2018 requesting reconsideration of the decision to

proceed ahead and an additional 18-month extension. BSRE also wrote Snohomish County on January 19, 2018 indicating that supplemental materials would be provided by April 30, 2018.

14. Despite these letters from BSRE, Snohomish County proceeded onward on the path to Hearing Examiner consideration. A hearing was scheduled to begin on May 16, 2018.

15. On April 17, 2018, Snohomish County issued a staff recommendation to the Hearing Examiner recommending denial of the applications under SCC 30.61.220. The staff recommendation was based on eight separate issues of "substantial conflict" with Snohomish County Code requirements.

16. BSRE provided additional materials to Snohomish County on April 27, 2018. Snohomish County conducted an expedited review of these materials and on May 9, 2018 submitted a supplemental staff recommendation to the Hearing Examiner in which it concluded that three of the eight areas of "substantial conflict" had been resolved, but that five remaining areas of "substantial conflict" remained upon which it recommended denial.

17. The Snohomish County Hearing Examiner commenced an open record hearing on May 16, 2018. At the beginning of the hearing, Snohomish County informed the Hearing Examiner that BSRE had submitted additional materials the day beforehand and requested a week-long continuance. The request was denied and the hearing

moved onward a seven-day hearing. The parties submitting closing briefs and proposed findings of fact and conclusions of law after testimony concluded.

18. On June 29, 2018, the Hearing Examiner issued a Decision Denying Extension Request and Denying Applications Without an Environmental Impact Statement per SCC 30.61.220.

19. On July 9, 2018, BSRE filed a motion for reconsideration and clarification of the Hearing Examiner's decision.

20. On August 3, 2018, the Hearing Examiner issued two decisions: (1) a Decision Granting in Part and Denying in Part BSRE's Motion for Reconsideration and Clarification ("Reconsideration Decision") and (2) an Amended Decision Denying Extension and Denying Applications Without an Environmental Impact Statement ("Amended Decision").

21. The "Reconsideration Decision" confirmed that the denial of the applications was "without prejudice" per SCC 30.72.060(3) (2013) and further indicated that as a "Type 2 decision" the next appellate step appeared to be consideration by the Snohomish County Council rather than through appeal to the Snohomish County Superior Court. Other than addressing these issues, the Hearing Examiner denied the overall motion for reconsideration because he believed his initial decision was correct and that reconsideration was futile because the expiration period expired.

22. BSRE appealed the Hearing Examiner's Decision of August 3, 2018 to the Snohomish County Council. A closed record hearing was held on October 3, 2018 and the Council adopted Motion No. 18-360 which affirmed the Hearing Examiner's Amended Decision with minor modifications on October 8, 2018.

23. On October 9, 2018, an official Notice of Council Decision was signed by the Clerk of the Council indicating that upon a unanimous vote, the County Council approved a motion affirming the August 3, 2018 Amended Decision of the Hearing Examiner with modifications, as set forth in Council Motion No. 18-360. From this decision, BSRE timely appealed to this Court under the Land Use Petition Act, Chapter 36.70C RCW.

III. ANALYSIS

A. BSRE has a vested right to reactivate its applications under SCC 30.34A.180 (2)(f) (2007).

The Court carefully examined the record and applicable code provisions to assess whether BSRE's application materials as submitted were in "substantial conflict" with code provisions in the five areas at issue. However, upon broad review of the history of this project through the record presented, the paramount issue became whether BSRE has a vested right under the vested rights doctrine to proceed under Title 30.34A of the Snohomish County Code which relates to "Urban Center Development" in the form in which it existed when BSRE's

applications were deemed to have been properly presented on February 14, 2011 and March 4, 2011.

The vested rights doctrine generally provides that certain land development applications must be processed under the land use regulations in effect when the application was submitted, regardless of subsequent changes to those regulations. *Town of Woodway v. Snohomish County,* 180 Wn.2d 165, 172- 173, 222 P.3d 1219 (2016). Development rights "vest" on a date certain—when a complete development application is submitted. *Id.* The purpose of the vested rights doctrine is to provide certainty to developers and to provide some protection against fluctuating land use policy. *Noble Manor Co. v. Pierce County,* 133 Wn.2d.2d 269, 278, 943 P.2d 1378 (1997). The doctrine recognizes that development rights are valuable property interests and ensures that new land use regulations do not interfere with those rights. *Town of Woodway,* 180 Wn. 2d at 173.

The critical vesting issue before the Court is whether BSRE has a vested right to the process set forth in SCC 30.34A.180(2)(f) (2007) which was in place when the applications were submitted. SCC 30.34A.180(2)(f) (2007) at pertinent part provides:

> The hearing examiner may deny an urban center development application without prejudice pursuant to SCC 30.72.060. If denied without prejudice, the application may be reactivated under the original project number without additional filing fees or loss of project vesting if a revised application is submitted within six months of the date of the hearing examiner's decision. In all other cases a new application shall be required.

It is undisputed that SCC 30.34A.180(2)(f) (2007) was repealed in 2013 per Amended Ordinance No 13-007, made effective October 3, 2013 and that developer rights vesting is now addressed in the Snohomish County Code at SCC 30.70.300 which does not allow for a six-month reactivation option. Snohomish County relies on this repeal and argues that BSRE lost the ability to reactivate its applications within six months of the hearing examiner's "without prejudice" decision even though it has a vested right to rely on other provisions of SCC 30.34A. Snohomish County asserts that developer vested rights only apply to ordinances that exercise a restraining of directing influence over land use, such as regulations about sidewalk widths, structure height restrictions or types of uses allowed, i.e. residential, commercial or industrial. *See New Castle Investments v. City of LaCenter,* 98 Wn. App. 224, 232-233, 989 P.2d 569 (1999); *Snohomish County v. Pollution Control Hearings Board,* 187 Wn.2d 346. 361, 386 P.3d 1064 (2016); *Westside Business Park, LLC. v, Pierce County,* 100 Wn. App. 599, 607, 5 P.3d 713 (2000) and *Graham Neighborhood Association v. F.G. Associates,* 162 Wn. App. 98, 252 P.3d 898 (2011).

Snohomish County correctly relies on these cases to support its position. However, the record indicates that Snohomish County specifically informed BSRE that the above referenced six-month reactivation process was available to BSRE in its critically important 389 Review Completion letter dated October 6, 2017. This letter, signed by Paul MacCready, the Principal Planner/Project Manager handling the project at page 79 included the following language:

Urban Center Development (Chapter 30.34A SCC)

> Review of Chapter 30.34A SCC refers to the Land Use permit for an urban center site plan, 11-101457 LU, unless otherwise noted. **The review is per the code in effect when 11-101457 LU was submitted, i.e. the March 4, 2011, version of code, unless explicitly identified otherwise.**[4]

The letter goes on in great detail addressing all provisions of SCC 30.34A as they relate to BSRE's application submissions. Discussion of the Urban Center Development code provisions of Chapter 30.34A continued onward from page 79 to page 98 where it specifically addressed SCC 30.34A.180(2)(f) (2007) and states:

> **Subsection (2)(f)** allows the Hearing Examiner to deny the project without prejudice and, if this happens, allows the applicant to reactivate the project.

It is perplexing that Snohomish County now argues that SCC 30.34A.180(2)(f) (2007) reactivation is unavailable because the letter of October 6, 2017 was written four years after the repeal upon which it relies and nowhere in the letter did Snohomish County "explicitly identify" that this provision of SCC 30.34A was no longer applicable.

Moreover, the record indicates that Snohomish County supported BSRE in establishing its vested rights throughout the litigation process in *Town of Woodway v. Snohomish County and BSRE, Point Wells, LP,* all the way through consideration by the Washington Supreme Court. Although the Washington Supreme Court's consideration in *Town of Woodway* addressed BSRE's vested

[4] Emphasis added for clarity.

rights in the context of whether BSRE and Snohomish County could proceed with application processing despite a determination that Snohomish County's Urban Center plans and regulations were not compliant with SEPA, BSRE and Snohomish County remained allied in asserting the importance of vested developer rights. Like the situation in *Town of Woodway* in which our Washington Supreme Court determined that BSRE's development rights were a valuable property right for which BSRE was entitled to have its applications processed under the law in place at the time when its applications were completed, BSRE's development rights in 2019 remain sufficiently valuable.

The Court understands Snohomish County's reliance on *Graham Neighborhood Association.* However, the facts differentiate its holding from the situation at bar. Unlike the situation at bar, in *Graham Neighborhood Association,* Pierce County did not oppose utilization of the vested rights doctrine after indicating clearly in writing to the developer that the code provisions in effect at the time of application submission would remain in effect throughout the review process. Additionally, in *Graham Neighborhood Association,* the developer appeared neither sincere nor serious in its initial application, and even inappropriately and flippantly answered application questions in submission documentation. Inappropriate, joking responses to serious application questions indicated that the submission was merely a placeholder designed to secure a development right position five days before regulations were to change that were to prohibit certain commercial uses. Additionally, the *Graham Neighborhood*

Association developer appeared disinterested in pursuing the project for thirteen years before submitting an additional environmental review worksheet.

In determining that the *Graham Neighborhood Association* developer did not have a vested right, the Court of Appeals looked to *Erickson and Associates v. McLerran, et al.* 123 Wn.2d 864, 872 P.2d 1090 (1994) and referenced the need to balance the private property and due process rights of a developer against the public interest by selecting a vesting point which prevents permit speculation and which demonstrates substantial commitment by the developer such that good faith of the applicant is generally assured. Despite delays here, evidence indicates that BSRE is substantially committed to the Point Wells project and there is no evidence of bad faith on the part of BSRE.

Graham Neighborhood Association also relies on *Erickson* in recognizing that while development rights are a valuable and protected property right, protection of these rights come at a cost to the public interest. The detrimental effect on the public interest occurs when vested rights are granted too easily, as the public interest can be subverted through sanctioning of non-conforming uses. *See Graham Neighborhood Association* at 112 – 113 citing *Erickson* at 873 – 874.

Here balancing the property and due process rights of BSRE against the public interest, the Court must consider Snohomish County's October 6, 2017 letter providing BSRE with written confirmation that reactivation remained an option if a Hearing Examiner denial was "without prejudice" and BSRE's reliance on this provision as shown through BSRE's pursuit of a denial "without prejudice.

The Court is aware of the significant public interest in the outcome of this application process. The record is beyond replete with demonstrated public interest through submitted comments and testimony in opposition to the development and great public interest was demonstrated in the briefing and eloquent oral argument presented by the City of Shoreline as an intervening party. Presented public interest carries great weight in the balance of vested right consideration, but BSRE also carries great weight in the form of its property interest and in its right to due process in the consideration of its applications.

The heavy weight of due process is felt in BSRE's receipt of the October 6, 2017 letter indicating that review will be "per the code in effect when 11-101457 LU was submitted, i.e. the March 4, 2011, version of code, unless explicitly identified otherwise" and in seeing no evidence that Snohomish County ever "explicitly identified otherwise." In conclusion, the Court sees the public interest as still well protected in the continuation of the application review process, if BSRE opts to reactivate is applications to address the five issues of "substantial conflict" brought to its attention by Snohomish County. The Court has no doubt that public interest and input will continue to be presented.

B. BSRE did not miss its window to reapply under SCC 30.34A.180(2)(f).

Snohomish County argues that even if the six-month reactivation process was available, BSRE missed its window of opportunity by not taking steps to reactivate within six-months of the Hearing Examiner's decision. However, the record indicates that there was no way for BSRE to reactivate its applications after the Hearing Examiner issued his Decision Granting in Part and Denying in

Part BSRE's Motion for Reconsideration and Clarification. In this decision, the Hearing Examiner explained clearly that while he had the authority to deny the application without prejudice under SCC 30.72.060(3), he did not believe he had the authority to deny the application without prejudice under SCC 30.34A.180(2)(f) (2007) because his authority to do so had been revoked by the adoption of Ord. 13-007 Section 28 (adopted September 11, 2013, eff. October 3, 2013). Additionally, reactivation was not possible after the Snohomish County Council's October 9, 2018 approval of the Hearing Examiner's August 3, 2019 decisions because the Council approved the Hearing Examiner's conclusion as to his authority despite argument from BSRE before Council regarding its asserted vested right to reactivate its applications. Moreover, taking expensive reactivation steps when faced with decisions that indicated that there was no authority to allow for reactivation would have been futile. BSRE appropriately addressed this issue with the Court as part of its LUPA appeal.

IV. CONCLUSIONS OF LAW

Based on the above analysis, the Court enters the following Conclusions of Law.

1. BSRE had a vested right to proceed under SCC 30.34A, in its entirety in the form and substance of its language in place at the time of its application submissions on February 14, 2011 and March 4, 2011.
2. BSRE's vested right includes the right to proceed under SCC 30.34A.180(2)(f) (2007) which allows for reactivation of applications

within six months of the Hearing Examiner's denial of its applications without prejudice.

3. The Hearing Examiner erred in determining that he did not have the authority to allow BSRE to reactivate its applications as authorized in SCC 30.34A.180(2)(f) (2007) because BSRE had a vested right to proceed under SCC 30.34A.180(2)(f) (2007).
4. BSRE was unable to reactivate its applications as authorized by SCC 30.34A.180(2)(f) (2007) after the Hearing Examiner rendered his Decision Granting in Part and Denying in part BSRE's Motion for Reconsideration and Clarification and after approval of this decision by the Snohomish County Council on October 8, 2018.
5. BSRE relied on Snohomish County's October 6, 2017 letter in asserting that it had the ability to reactivate its applications as authorized under SCC 20.34A.180(2)(f) (2007).
6. Based on the Court's decision regarding BSRE's ability to reactivate its applications, consideration of the grounds for denial and failure to grant an extension of the application process is unnecessary because through this decision the Court is affording BSRE an opportunity to reactivate its applications. It is possible that the issues of substantial conflict and failure to grant an extension may come before the Court in the future depending on what happens with the reapplication process allowed by this ruling.
7.

V. ORDER

1. This matter is remanded to Snohomish County to proceed with consideration of BSRE's reactivation of its applications previously denied "without prejudice" by the Hearing Examiner on August 3, 2018 and approved by the Snohomish County Council on October 8, 2018.[5]

2. BSRE has six-months from the date of entry of this Order on June 18, 2019 to reactivate its applications, if it chooses to pursue reactivation.

3. The parties are to act diligently, in good faith and in accord with the Snohomish County Code and all other applicable statutory provisions in completing the application review process.

4. The Court sees reactivation as allowed by SCC 30.34A.180(2)(f) (2007) as a one-time reactivation opportunity rather than as an avenue for future reactivation requests.

DATED this 18th day of June, 2019.

Judge John F. McHale

[5] This assumes that BSRE will pursue reactivation as requested.