

BEFORE THE HEARING EXAMINER
IN AND FOR THE COUNTY OF SNOHOMISH

In Re Point Wells Urban Center,

No. 11-101457 LU/VAR
11-101461 SM
11-101464 RC
11-101008 LDA
11-101007 SP
11-101457 FHZ
11-101457 SHORE
11-101457-002-00 VAR
11-101457-003-00 VAR
11-101457-000-00 WMD
11-101457-001-00 WMD
18-116078 CI

BSRE Point Wells LP,

Applicant,

Order Denying Motion for Stay

Snohomish County Planning and
Development Services Department,

Respondent.

1 **I. SUMMARY**

2 BSRE moved to stay these proceedings pending completion of its appeal in the Washington
3 State courts. Snohomish County Planning and Development Services Department (PDS)
4 objects. The Hearing Examiner denies the request for a stay because the issues on appeal
5 were mooted by the denial of the landslide hazard area deviation and because any injury to
6 BSRE caused by the lack of a stay does not outweigh the injury to the public due to a stay
7 from continued uncertainty and expenditure of public and private resources to respond to
8 the development application.

9 **II. PROCEDURAL BACKGROUND**

10 BSRE appealed Snohomish County's final decision on its urban center development
11 application to the King County Superior Court. The Superior Court did not rule on the merits
12 of the appeal, except to hold that BSRE could resubmit a revised development application
13 within six months as allowed by a since-repealed county ordinance.¹ BSRE appealed two

¹ Ex. U.1.

1 undecided substantive issues to the Washington State Court of Appeals: (1) setback rules²
2 applicable to the urban center application and (2) whether BSRE may double the allowed
3 height of buildings.³

4 BSRE submitted 19 development application documents in December 2019.⁴ In addition to
5 a new master permit application for an urban center development, BSRE requested a
6 deviation from the landslide hazard areas regulations,⁵ a deviation from Engineering
7 Development and Design Standards for private roads,⁶ and variances from building height
8 limits.⁷ BSRE continues to premise its development application on building heights
9 exceeding the standard building heights and setbacks from adjacent low density zones.⁸
10 The development application assumes the Court of Appeals will interpret the setback and
11 height requirements as BSRE does, but requests variances in the event the Court of
12 Appeals rules against BSRE.

13 PDS recommends denial of the resubmitted application for several reasons. Most
14 importantly, PDS contends the lack of a landslide hazard area deviation prevents any
15 development in the landslide hazard area, irrespective of setback and building height
16 requirements.⁹

17 BSRE notes that an ability to build within the landslide hazard area and to exceed the 90
18 foot building height is fundamental to the viability of the proposal.¹⁰ BSRE seeks a stay of
19 these proceedings, arguing that a stay would be appropriate in the interests of efficiency
20 and preservation of resources.¹¹ PDS disagrees, arguing that the issues before the Court of
21 Appeals are distinct from the issues here and resources will not be wasted.¹²

22 III. DISCUSSION

23 The Superior Court's order¹³ is a final judgment not stayed either by the Superior Court or
24 the Court of Appeals. It is therefore entitled to effect.¹⁴ The Hearing Examiner understands

² SCC 30.34A.040(2).

³ SCC 30.34A.040(1).

⁴ Exhibits V.1 through V.19.

⁵ Ex. V.15.

⁶ Ex. V.17.

⁷ Exhibits V.18 and V.19.

⁸ BSRE submitted variance requests in the event the Court of Appeals does not rule in BSRE's favor on the building height issues.

⁹ Ex. X.3.

¹⁰ Ex.Y.4, 2:8-9.

¹¹ Ex. Y.2, 7:21 *et seq.*

¹² Ex. Y.3.

¹³ Ex. U.1.

¹⁴ RAP 8.1(b) ("A trial court decision may be enforced pending appeal or review **unless** stayed pursuant to the provisions of this rule.") (emphasis added).

1 this effect to include processing BSRE's resubmitted development application. BSRE seeks
2 a stay.

3 Analyzing BSRE's request through the lens of RAP 8.1(3),¹⁵ the issues are

- 4 (i) Whether BSRE can demonstrate that debatable issues are presented on appeal; and
5 (ii) Comparison of the injury that would be suffered by BSRE if a stay were not imposed
6 with the injury that would be suffered by PDS and the public if a stay were imposed.

7 RAP 8.1(3)(i) and (ii).

8 **A. DEBATABLE ISSUES**

9 The Hearing Examiner assumes, *arguendo*, that the substance of BSRE's assignments of
10 error on appeal are not frivolous.¹⁶ In other words, BSRE's arguments about the setback
11 and height requirements are not so tenuous as to justify refusal of a stay if otherwise
12 warranted.¹⁷

13 This does not end the inquiry, however, because PDS responds that the setback and height
14 disputes are mooted by the denial of a landslide hazard area deviation. PDS argues that
15 even if BSRE succeeds in its appeal, nothing can be built in the landslide hazard area, no
16 matter how far set back or how low.¹⁸ The denial of the landslide hazard area deviation
17 request moots the issues of setback requirements and building heights for the landslide
18 hazard areas. If these issues are moot, then they are debatable only in an academic sense
19 and not debatable for the purposes of a stay.

20 The issues of setback requirements and building height are not debatable because they are
21 mooted by the denial of the landslide hazard area deviation.¹⁹ The lack of debatable issues
22 is sufficient to deny the requested stay.

¹⁵ RAP 8.1 is not binding on the Hearing Examiner, but he finds its analytical framework useful in the context of these proceedings.

¹⁶ See *Advocates for Responsible Development v. W. Washington Growth Management Hearings Board*, 170 Wn.2d 577, 580, 245 P.3d 764, 765 (2010) (citation omitted) ("An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal.").

¹⁷ A Court of Appeals decision on the merits of the setback and height issues is not a foregone conclusion. The Court of Appeals is faced with an appeal from a Superior Court decision that did not decide the merits of these issues. Possible appellate outcomes include remand to the Superior Court to decide the neglected issues or dismissal because the original development application (and the appeal) is superseded and therefore mooted by the 2019 urban center application.

¹⁸ Ex. Y.3, 8:10-16.

¹⁹ See *Matter of Marriage of Greenlee*, 65 Wn. App. 703, 710-11, 829 P.2d 1120, 1124-25 (1992), rev. denied 120 Wn.2d 1002, 838 P.3d 1143 ("Appellant's appeal presents no debatable issues. Appellant appealed the refinancing relief granted as well as the award of attorney fees. He concedes that the refinancing relief became moot before the appeal was perfected.")

1 **B. COMPARISON OF INJURY**

2 The second element of stay is the comparison of injury suffered by BSRE by proceedings
3 with the injury suffered by PDS and the public if a stay is imposed. BSRE argues it will
4 suffer needless expense if a stay is not granted. BSRE claims that if the Court of Appeals
5 finds for it on the setback and building height issues, those issues can no longer be
6 contested.

7 The Hearing Examiner disagrees. If the Court of Appeals upholds BSRE's appeal, BSRE
8 still must wrestle with the denial of the landslide hazard area deviation, without which
9 BSRE's hoped-for appellate decision will be of no consequence. BSRE requests variances
10 if the Court of Appeals denies BSRE's appeal, but variances do not cure the lack of a
11 deviation.

12 A stay will cause injury to PDS and the public. The public and BSRE are both entitled to a
13 final decision as expeditiously as possible. Delays also cost the public and affected local
14 governments. Approval or denial of land use applications should occur as promptly as
15 reasonable in the circumstances. Prompt disposition benefits the public and BSRE. The
16 public is injured by continuing uncertainty, and others²⁰ expend more resources because of
17 the delay.

18 Based on his familiarity with the record and proceedings and having considered the
19 arguments, the Hearing Examiner finds the injury to the public and local governments
20 caused by a stay outweighs any injury to BSRE caused by the lack of a stay.

21 **IV. CONCLUSION**

22 The Hearing Examiner cannot find on this record that proceeding would interfere with the
23 appellate proceeding or that proceeding would be utterly wasteful in the event of an
24 appellate ruling in favor of PDS. The setback and building height issues are not debatable
25 because the denial of the landslide hazard area deviation renders them moot. The burden
26 on the public of continued uncertainty and the expense to the county, interested residents,
27 the city of Shoreline, and the town of Woodway outweigh the expense to BSRE from denial
28 of a stay.

29 The Hearing Examiner exercises his discretion to deny BSRE's motion to stay the open
30 record hearing.

31 DATED this 15th day of September, 2020.

Peter B. Camp

Peter B. Camp,
Snohomish County Hearing Examiner

²⁰ E.g., the City of Shoreline.
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1 **RECONSIDERATION AND APPEAL PROCEDURES**

2 This is an interim decision from which no right of appeal lies. As a decision on a motion for
3 reconsideration, it is not subject to a further motion for reconsideration.

4 Staff Distribution:

5 Department of Planning and Development Services: Ryan Countryman

6 The following statement is provided pursuant to RCW 36.70B.130: “Affected property
7 owners may request a change in valuation for property tax purposes notwithstanding any
8 program of revaluation.” A copy of this Decision is being provided to the Snohomish County
9 Assessor as required by RCW 36.70B.13

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Subject: RE: 11-101457 Pt. Wells - Order Denying Motion To Stay
Date: Tuesday, September 15, 2020 11:27:00 AM
Attachments: [Exhibit Y-5 Order Denying Stay issued 9-15-20.pdf](#)

Hello,

Attached please find the Hearing Examiner's Order Denying Motion To Stay. The hearing dates of November 5th, 6th, 12th, and 13th remain scheduled and the Hearing Examiner will prepare a proposed schedule for the parties to disclose witnesses, further exhibits and briefs which will be sent out in a couple of days.

Please let me know if you have any questions.

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