

Otten, Matthew

From: Magill, Nicole
Sent: Thursday, August 06, 2020 2:51 PM
To: jstromain@karrtuttle.com
Cc: dluetjen@karrtuttle.com; ghuff@karrtuttle.com; Klein, Ken; Mock, Barb; Countryman, Ryan; Otten, Matthew
Subject: BSRE's Revised Land Use Applications
Attachments: Ltr Response to Karr Tuttle 8-6-20 .pdf

Good Afternoon,

Attached please find correspondence from Matt Otten.

Thank you,

Nicole Magill

Legal Assistant

↔↔ Snohomish County Prosecutor's Office, Civil Division

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August 6, 2020

Jacque St. Romain
Karr Tuttle Campbell
701 Fifth Avenue, Suite 3300
Seattle, WA 98104

Sent via email

Re: BSRE's Revised Land Use Applications

Dear Ms. St. Romain:

I write in response to your letter dated July 28, 2020. That letter alleges the County has not collaborated with BSRE on its revised land use applications, thus acting inconsistently with the King County Superior Court's order dated June 18, 2019. The County strongly disagrees with your assessment and assures you that PDS has reviewed BSRE's revised land use applications in good faith and with no predetermined result. Unfortunately, there simply remain significant inconsistencies between the proposed project and Snohomish County Code.

The King County Superior Court order states:

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.

Your letter indicates that you are using the term "good faith" as one would in a commercial context, where two parties negotiate to reach mutually agreeable contract terms. However, in the context of a government agency reviewing an application for land use development, "good faith" means something different. As defined in Black's Law Dictionary (11th ed. 2019), "good faith" means a "state of mind" consisting in "faithfulness to one's duty or obligation." It is the County's duty and obligation to review all applications for land use development for compliance with the Snohomish County Code. Only by adhering to the code can the County ensure all applicants will be treated equally and in a consistent manner. Judge McHale's order acknowledges the County's obligation, stating the County is to act "in good faith and in accord with the Snohomish County Code." (Emphasis added.)

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The County informed BSRE on July 19, 2019, that it would review BSRE's revised applications diligently, in good faith, and consistent with the County code. The County further advised BSRE that because the superior court had not reversed the Hearing Examiner's legal conclusions regarding applicable code provisions, it would review BSRE's revised applications consistent with the Hearing Examiner's decision. This result was not unanticipated by the superior court. The court stated "[i]t 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." The Court granted BSRE's request to reactivate its permit applications to address the inconsistencies identified by the Hearing Examiner.

However, rather than submit revised applications that resolved the inconsistencies identified by the Hearing Examiner, BSRE opted to submit new applications for variances from height and setback requirements, and a deviation request from the landslide hazard regulations. The applications for those requested variances hinge, in part, on the assertion that BSRE must have the variances to meet FAR requirements. Similarly, BSRE's landslide deviation request cites to FAR requirements for the need to locate development in landslide hazard areas. Whereas previously the County accepted BSRE's FAR calculations without question, the County determined that the significance of the FAR issue to BSRE's variance applications required the assistance of a licensed architect. The County retained a consultant, WJA Design Collaborative (WJA), to conduct an independent review of BSRE's calculations to determine whether variances were necessary to meet FAR requirements as asserted by BSRE. WJA concluded that BSRE greatly miscalculated the proposed project's FAR, based largely on the inclusion of stairs, exit corridors, and elevator stairs in its calculations, contrary to County code. Even with the variances, the proposed project *as designed* will not meet the required FAR. The result of WJA's independent review of BSRE's FAR calculations is not evidence of "bad faith" or a "predetermined position on BSRE's application." Quite the contrary, the County retained an independent consult to ensure neutrality on an issue of great relevance to the two new variance applications submitted by BSRE. The results of that objective review stem directly from the County's diligent and good faith review of BSRE's new applications.

Your letter also asserts that because PDS did not meet with BSRE's consultants in an iterative process during review of its revised applications, it violated the Court's order to review BSRE's revised applications in good faith. This assertion fails to acknowledge the numerous meetings between the County and BSRE's consultants that took place over the course of years, and the recent December 12, 2019, intake meeting, the September 10, 2019, meeting between County officials and BSRE consultants, lawyers, and ownership, and the responsive dialogue between BSRE consultants and County staff following the superior court's remand. And BSRE's assertion fails to acknowledge that the issues over which BSRE and the County disagree are central to the project's approvability. Meetings to discuss the correctness of the Hearing Examiner's decision regarding applicable code provisions most probably would not be productive. Indeed, such meetings could instead lead BSRE to the false hope that the County can disregard the Hearing Examiner's decision despite the fact it was undisturbed by the superior court except as to BSRE's ability to submit revised applications. The County is not required by the code or the concept of good faith to continue to meet with BSRE's consultants, particularly when BSRE fundamentally disagrees that it must comply with certain provisions of the County code.

It is not true that “the County will not, under any circumstances, approve of BSRE’s application.” The County does not have discretion to reject an application that is consistent with County code, if BSRE submits one. Indeed, the County welcomes a code-compliant application for the Point Wells site. It also is not true that the County opposes the conversion of the property from industrial to residential mixed use. The County rezoned the property from industrial to residential mixed use 11 years ago and has expressed no intention of changing the property’s current zoning. BSRE is disappointed that PDS again recommends denial of the project. However, such recommendation is not an expression of bad faith, but merely recognition that BSRE’s revised land use applications are still substantially inconsistent with County code.

Respectfully,



Matthew Ottens
Deputy Prosecuting Attorney

cc: Doug Luetjen, Karr Tuttle Campbell
Gary Huff, Karr Tuttle Campbell
Ken Klein, Executive’s Office
Barb Mock, PDS
Ryan Countryman, PDS