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BEFORE THE HEARING EXAMINER  
IN AND FOR THE COUNTY OF SNOHOMISH

BSRE POINT WELLS, LP,

Applicant,

vs.

SNOHOMISH COUNTY DEPARTMENT OF  
PLANNING & DEVELOPMENT  
SERVICES

Respondent.

No. 11-101457 LU

SNOHOMISH COUNTY  
DEPARTMENT OF PLANNING  
AND DEVELOPMENT SERVICES'  
PRE-HEARING BRIEF

**I. INTRODUCTION**

After nine years, multiple application extensions, a superior court order granting a final opportunity to submit a code-compliant application, and three unsuccessful attempts to delay this remand process and hearing, the Point Wells urban center development project is again before the Hearing Examiner based on unresolved substantial conflicts with the project applications (“Application”). As a result of the substantial conflicts, the Snohomish County Department of Planning and Development Services (PDS) requests denial of the Point Wells proposal under SCC 30.61.220. SCC 30.61.220 authorizes denial of a proposal without preparing an Environmental Impact Statement (EIS) under the State Environmental Policy

1 Act (chapter 43.21C RCW) when the proposal is in “substantial conflict with adopted plans,  
2 ordinances, regulations or laws.” SCC 30.61.220(2).

3 This Application is again before the Hearing Examiner under the King County  
4 Superior Court’s Order on BSRE Point Wells, LP’s LUPA Petition Remanding Per SCC  
5 30.34A.180(2)(f) (2007) (“Remand Order”). The Court ordered that the Application be  
6 remanded to the County for “a one-time reactivation opportunity” to submit materials to  
7 address the substantial conflicts with its Application. The Remand Order was the result of  
8 relief specifically sought by BSRE Point Wells, LP, (the “Applicant”) in an appeal under the  
9 Land Use Petition Act (LUPA), chapter 36.70C RCW. At the end of the six-month  
10 reactivation deadline imposed by the Court, the Applicant provided PDS with new and  
11 revised application materials. However, rather than address and resolve the substantial  
12 conflicts, the Applicant submitted materials for a development proposal that is mostly  
13 unchanged from the previous flawed development proposal and that fails to demonstrate  
14 compliance with basic application requirements and approval criteria. After diligent review,  
15 PDS determined that based on the outstanding substantial conflicts the proposal is not  
16 approvable under the Snohomish County Code.  
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19 The express purpose of SCC 30.61.220 is to prevent the Applicant and the County  
20 from expending resources on preparing an EIS for a project that cannot be approved because  
21 it substantially conflicts with code requirements. Review of the Application and materials  
22 submitted by the Applicant on remand demonstrate that SCC 30.61.220 continues to apply to  
23 the Point Wells project. PDS requests the Hearing Examiner deny the proposal.  
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## II. STANDARD OF REVIEW

The purpose of the hearing is to determine whether there are substantial conflicts between the proposal and applicable regulations justifying denial of the proposal prior to the expenditure of significant Applicant and County resources in preparing an EIS. The applicable standard of review is contained in SCC 30.61.220, which provides, in its entirety:

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

(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.

At the conclusion of the hearing, the Hearing Examiner will have two options. First, the Examiner may deny the Application, supported by express written findings and conclusions that the Point Wells proposal substantially conflicts with adopted plans, ordinances, regulations or laws. Second, the Examiner may find there is reasonable doubt that the

1 recommended grounds for denial are sufficient and remand the Application to PDS for  
2 compliance with chapter 30.61 SCC (Environmental Review (SEPA)).

3 Because any decision of denial must be supported by express written findings and  
4 conclusions of substantial conflict with adopted plans, ordinances, regulations or laws, at the  
5 hearing PDS will focus only on how the proposal substantially conflicts with County  
6 regulations.<sup>1</sup> The Hearing Examiner then must determine whether there is “reasonable doubt  
7 that the recommended grounds for denial are sufficient.” SCC 30.61.220(3)(b). The  
8 “reasonable doubt” standard generally is used in the context of criminal matters, although it  
9 occasionally is used in civil matters. *See, e.g.*, RCW 59.08.060 (standard for hearing on writ  
10 of restitution); *In re F5 Networks, Inc.*, 166 Wn.2d 229, 239-40, 207 P.3d 433 (2009) (use in  
11 demand futility standard in derivative actions). However, most useful discussions of the term  
12 arise in criminal cases.

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14 The Washington State Supreme Court directed all trial courts to use Washington  
15 Criminal Jury Instruction 4.01 (WPIC 4.01) on reasonable doubt. *State v. Bennett*, 161 Wn.2d  
16 303, 317-18, 165 P.3d 1241, 1248-49 (2007). That jury instruction provides, in relevant part:

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18 A reasonable doubt is one for which a reason exists and may  
19 arise from the evidence or lack of evidence. It is such a doubt  
20 as would exist in the mind of a reasonable person after fully,  
21 fairly, and carefully considering all of the evidence or lack of  
22 evidence. [If, from such consideration, you have an abiding  
23 belief in the truth of the charge, you are satisfied beyond a  
24 reasonable doubt.]

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26 <sup>1</sup> PDS's focus on substantial code conflicts does not mean the project complies with all other applicable code provisions, only that the standard of review emphasizes “substantial” code conflicts.

1 PDS must demonstrate that the Application substantially conflicts with applicable code  
2 provisions. PDS does not meet its burden if a reasonable doubt exists that the recommended  
3 grounds for denial are sufficient.

4 PDS bases its recommendation for denial on the *existing* substantial conflicts between  
5 the proposal and the applicable code provisions. PDS alleges that at this time, nine years  
6 after the Application was submitted, including three extensions of its Application, significant  
7 issues with the proposal remain. The standard of review is not whether under some  
8 hypothetical scenario the Applicant could comply with the code in the future. Rather, the  
9 standard of review is whether there is a reasonable doubt *today* that PDS's grounds for denial  
10 are not sufficient. A reasonable doubt must be grounded in *existing* reality and derived from  
11 *existing* evidence. A reasonable doubt cannot be based on fanciful thought, hope, future  
12 studies, or the promise of code compliance at a later date.

### 13 **III. LEGAL ISSUES**

#### 14 **A. Review of the Remanded Application Requires Consideration of the Entire 15 Project Record.**

16 In the pre-hearing conference on June 10, 2020, the Hearing Examiner asked the  
17 parties to consider whether the administrative record for the hearing on the remanded  
18 Application should include the entire project record<sup>2</sup> or a new record.<sup>3</sup> The procedural history  
19 and applicable law supports consideration of the entire project record as the administrative  
20 record for this continued hearing on the Application.  
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24 <sup>2</sup> The term "entire project record" is intended to include all exhibits from A-1 through Y-6 identified on the  
25 Hearing Examiner's website and accessible at [https://snohomishcountywa.gov/4075/Pt-Wells-Exhibits-and-  
26 Decisions](https://snohomishcountywa.gov/4075/Pt-Wells-Exhibits-and-<br/>26 Decisions), including any subsequently added exhibits.

<sup>3</sup> A new administrative record would presumably be comprised of only those application materials and  
relevant documents submitted after the June 18, 2019, Remand Order.

1 The Court's Remand Order characterized the action as a "remand" to allow BSRE "to  
2 reactivate its applications" as allowed by SCC 30.34A.180(2)(f). Ex. U-1, p. 19. In issuing  
3 the Remand Order, the Court was acting under its authority in RCW 36.70C.140 "to remand  
4 [the land use decision] for modification or further proceedings." As a remand for further  
5 proceedings, these hearings represent a continuation of the hearings held in May 2018 for the  
6 Point Wells urban center development under File No. 11-101457 LU and related files. In  
7 issuing the Remand Order, the Court relied, in part, on SCC 30.34A.180(2)(f). SCC  
8 30.34A.180(2)(f) also characterizes this action as reactivation of the original application,  
9 distinguishing it from a new application. Finally, both the Applicant in its submittal and PDS  
10 in its review have relied upon the entire project record for the remanded and revised  
11 Application.<sup>4</sup> PDS requests that the Hearing Examiner consider the entire project record.

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13 **B. The New Applications and Deviation Request Submitted by the Applicant**  
14 **on Remand Substantially Conflict with Code.**

15 On remand, the Applicant submitted four new applications: a variance from height  
16 restrictions; a variance from setback requirements; a shoreline conditional use permit; and a  
17 landslide hazard area deviation. With the two variance applications and shoreline conditional  
18 use permit application the Applicant either did not attempt to demonstrate compliance with  
19 the applicable criteria or expressly stated it did not meet the criteria. For example, the fourth  
20 criterion for a variance approval requires an applicant to demonstrate that the approved  
21 variance "will not adversely affect the comprehensive plan." The Applicant provided only a  
22 conclusory statement on both variance applications and did not cite a single comprehensive  
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25 <sup>4</sup> The Applicant's Exhibits V-1 through V-19 rely on and reference earlier submitted exhibits. PDS's review  
26 also relies on previously submitted exhibits, including the Supplemental Staff Recommendation No. 2. Ex. X-3.

1 plan goal, policy, or objective to support either variance under this criterion. Regarding the  
2 landslide deviation, the Applicant disclosed that the report supporting the request concluded  
3 the project did not satisfy the minimum threshold for factors of safety and conceded that the  
4 deviation request was not approvable.<sup>5</sup> Denial of the landslide deviation and  
5 recommendations of denial of the variance applications can be attributed to the Applicant's  
6 failure to substantively address previously-identified issues of substantial conflict with  
7 applicable code requirements.

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9 **C. The Floor Area Ratio (FAR) Issue Raised by the Applicant in Support of  
its Application Is Subject to Review.**

10 The Applicant cited the County's minimum floor area ratio (FAR) regulations as the  
11 basis for satisfying the decision criteria for its variance applications for increased heights and  
12 its request for a landslide hazard area deviation. (Exs. V-15, p.10; V-18, pp. 2, 4-6). The  
13 Applicant represented that only with a height variance and landslide deviation could it satisfy  
14 the minimum 1.0 FAR for the site. The Applicant attached to its variance applications two  
15 site diagrams and a table with FAR calculations representing the development, as proposed,  
16 with buildings up to 180 feet, and a second scheme with buildings 90 feet or under, which  
17 the Applicant has not proposed.<sup>6</sup> The Applicant, not PDS, raised the FAR issue and relied  
18 on it in an attempt to satisfy certain decision criteria for its variance application and requested  
19 landslide hazard area deviation.<sup>7</sup> Therefore, PDS was required to evaluate the FAR issue to  
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23 <sup>5</sup> "The intent of this letter is to demonstrate that that these deviation requests are feasible/approvable by the  
24 County once the final design is completed. ..... If these deviation requests are not approvable at the building  
25 what specific additional items would be needed to receive approval. Ex. V-15, p. 1. (Emphasis in original).

26 <sup>6</sup> The Applicant's diagram depicts development on the Urban Plaza as necessary by relying on the square  
footage of that portion of the site to obtain its 1.0 FAR figure. Ex. V-18, pp. 5-6.

<sup>7</sup> SCC 30.34B.100(1), (2); SCC 30.62B.340(2)(b)(i).

1 issue recommendations on the variance applications and a decision on the landslide hazard  
2 area deviation request.<sup>8</sup>

3 As further described in the Staff Recommendation, PDS engaged a third-party  
4 consultant to review the FAR issue. Ex. X-3, pp. 8-9. PDS opted to hire a third-party  
5 consultant for two primary reasons. First, PDS does not have a licensed architect on staff  
6 with expertise and training that would qualify as an expert for peer review of the FAR issue.  
7 Second, utilizing a consultant for the FAR issue provides an independent, third-party review  
8 on an issue integral to review of the Application on remand.  
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#### 10 **D. Deferring Code Compliance to Later Is Contrary to Title 30 SCC and SEPA.**

11 In its materials submitted on remand, the Applicant continues the narrative that it need  
12 not demonstrate compliance on issues of substantial conflict with the code prior to  
13 preparation of an EIS. However, the Applicant's interpretation renders SCC 30.61.220  
14 meaningless and undermines the EIS process. Under SCC 30.61.220, a proposal either  
15 substantially conflicts with the code or it does not. If the Examiner determines the Applicant  
16 is not required to demonstrate a code-compliant project nine years after submitting a complete  
17 application, the Applicant can shield itself from any exercise of authority by PDS or the  
18 Examiner under SCC 30.61.220, claiming that it can simply defer addressing issues of  
19 substantial conflict until after completion of the EIS. A reviewing court "may not interpret  
20 any part of a statute as meaningless or superfluous." *State v. Lilyblad*, 163 Wn.2d 1, 11, 177  
21 P.3d 686 (2008). Allowing applicants to defer code compliance on issues of substantial  
22 conflict prior to EIS preparation as advocated by the Applicant would have the effect of  
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26 <sup>8</sup> A project permit application that does not comply with applicable development regulations or is determined  
inconsistent under SCC 30.70.100 shall be denied. SCC 30.70.130.




1 nullifying SCC 30.61.220. Instead, the purpose of SCC 30.61.220 is to provide a mechanism  
2 to avoid incurring needless county and applicant expense to prepare an EIS when the  
3 responsible official identifies an application substantially conflicts with the County Code.

4 **IV. CONCLUSION**

5 The Application for the Point Wells urban center development continues to  
6 substantially conflict with the County Code. PDS requests that the Hearing Examiner deny  
7 the Application under SCC 30.61.220.  
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13 DATED this 2<sup>nd</sup> day of November, 2020.

14 ADAM CORNELL  
15 Snohomish County Prosecuting Attorney

16 By:   
17 MATTHEW A. OTTEN, WSBA #40485  
18 Deputy Prosecuting Attorney  
19 Attorney for Respondent Snohomish County  
20 Department of Planning and Development  
21 Services  
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**DECLARATION OF SERVICE**

I, Nicole Magill, hereby declare that I am an employee of the Civil Division of the Snohomish County Prosecuting Attorney, and that on the 2nd day of November, 2020, I caused to be delivered Snohomish County Department of Planning and Development Services' Pre-Hearing Brief and this Declaration of Service on the following parties by the methods indicated:

|   |                                     |   |
|---|-------------------------------------|---|
| Gary Huff<br>Jacque E. St. Romain<br>J. Dino Vasquez<br>Doug Luetjen<br>KARR TUTTLE CAMPBELL<br>701 Fifth Avenue, Suite 3300<br>Seattle, WA 98104<br><i>Attorneys for Applicant</i> | <input checked="" type="checkbox"/> | U.S. Mail, postage prepaid  |
|   | <input type="checkbox"/>            | Hand Delivered via Legal Messenger  |
|   | <input type="checkbox"/>            | Overnight Courier   |
|   | <input type="checkbox"/>            | Electronic Court E-file   |
|   | <input checked="" type="checkbox"/> | Electronically via email:<br><a href="mailto:dvasquez@karrtuttle.com">dvasquez@karrtuttle.com</a><br><a href="mailto:dluetjen@karrtuttle.com">dluetjen@karrtuttle.com</a><br><a href="mailto:ghuff@karrtuttle.com">ghuff@karrtuttle.com</a><br><a href="mailto:jstromain@karrtuttle.com">jstromain@karrtuttle.com</a> |
| <input type="checkbox"/>  | Facsimile                           |   |

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

DATED this 2<sup>nd</sup> day of November, 2020 at Everett, Washington.

  
\_\_\_\_\_  
Nicole Magill  
Legal Assistant