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SNOHOMISH COUNTY HEARING EXAMINER

BSRE POINT WELLS, LP,)	
)	NO. 11-101457 LU
Appellant)	
)	OPENING BRIEF OF BSRE POINT
v.)	WELLS, LP
)	
SNOHOMISH COUNTY PLANNING AND)	
DEVELOPMENT SERVICES,)	
)	
Respondent.)	
)	
)	

BSRE POINT WELLS, LP (“BSRE”) hereby submits this Opening Brief in advance of the Hearing Examiner proceeding continuing on November 4, 2020 (continuing from the hearing which commenced on May 16, 2018).

I. Description of the Project.

The Snohomish County Council in 2009 and 2010 revised its comprehensive plan, adopted Chapter 30.34A SCC (the “Urban Center Code”) and designated the land owned by BSRE (“Point Wells”) as an Urban Center. These combined actions satisfied, at least in part, the County’s obligation pursuant to the Growth Management Act to plan for the accommodation of future population growth within unincorporated portions of the County. The designation of Point Wells as an Urban Center largely satisfied the County’s density allocation obligation.

1 Following the Council’s action, BSRE’s predecessor submitted a complete Urban Center
2 Development Application (and other related supporting applications, collectively, the “Land Use
3 Applications”) for the development of a mixed use Urban Center including approximately 3,000
4 residential units, approximately 100,000 square feet of commercial space and a large public access
5 beach.
6

7 **II. The County’s Attempt to Terminate.**

8 BSRE began working with Snohomish County (the “County”) on submitting and revising
9 its applications to develop Point Wells in 2011. In January of 2018, the County took a drastic turn
10 in its approach to the Point Wells development project. The parties had been working together
11 previously to satisfy the Snohomish County Code (the “Code”) requirements, but in January of
12 2018, despite the significant progress that had been made, and statements by the County that
13 projects typically go through seven or eight iterations, the County suddenly and unexpectedly
14 sought to have the Land Use Applications terminated. In May of 2018, the County recommended
15 denial of the Land Use Applications without preparation of an Environmental Impact Statement
16 (an “EIS”) pursuant to SCC 30.61.220, and scheduled a hearing to have the Hearing Examiner rule
17 on the County’s termination request. The County, in its request for termination, identified eight
18 issues in the Land Use Applications which it believed to be of substantial conflict with the Code.
19

20 *See Exhibit N-2.*
21

22 After a hearing, the Hearing Examiner issued two decisions which had the effect of
23 terminating the Land Use Applications without preparation of an EIS: The Decision Granting in
24 Part and Denying in Part BSRE’s Motion for Reconsideration and Clarification (the
25 “Reconsideration Decision”) (Exhibit R-3) and the Amended Decision Denying Extension and
26 Denying Applications Without Environmental Impact Statement (Exhibit R-4). In issuing these
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1 decisions, the Hearing Examiner found that six issues of substantial conflict existed. *See* Exhibit
2 R-4. These issues are: (1) application of a residential zoning setback under SCC 30.34A.040(2)(a);
3 (2) building height allowances based on access to high capacity transit under SCC 30.34A.040(1);
4 (3) application of shoreline setback requirements; (4) landslide regulations impacting the proposed
5 secondary access road; (5) landslide regulations impacting the Upper Plaza (the entrance to Point
6 Wells); and (6) the use of Innovative Development Design (collectively, the “Conflict Areas”).
7 Exhibit R-4.

8
9 After an appeal to the County Council and an appeal to the King County Superior Court,
10 BSRE was granted the opportunity to resubmit the Land Use Applications in December of 2019
11 to resolve Conflict Areas. *See* Exhibit U-1. The parties were instructed to work in good faith to
12 resolve the Conflict Areas. *Id.*

13 **III. BSRE’s Appeal.**

14
15 The King County Superior Court, while issuing a determination that allowed BSRE to
16 submit revised applications, refused to issue any legal interpretations on the six Conflict Areas (the
17 “Superior Court Decision”). *Id.* BSRE timely appealed the Superior Court Decision to the Court
18 of Appeals on July 31, 2019. BSRE specifically sought clarification on two of the Conflict Areas.
19 The first conflict relates to whether a residential setback ordinance applies to the development
20 contemplated by the Land Use Applications under SCC 30.34A.040(2)(a) and the second conflict
21 relates to whether BSRE is entitled to build buildings up to 180 feet high based on proximity to a
22 high capacity transit station under SCC 30.34A.040(1) (the two issues together are referred to
23 herein as the “Appeal Issues”).
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1 The Court of Appeals briefing by BSRE, the County and the City of Shoreline was
2 completed on February 12, 2020. The parties are now waiting to receive a hearing date or ruling
3 without oral argument from the Court of Appeals.

4 The two Appeal Issues have a tremendous impact on the design of the proposed
5 development at Point Wells. It is imperative that BSRE be entitled to build up to 180 feet and
6 within the Upper Plaza area in order to achieve the minimum floor area ratio (the “FAR”) which
7 is required by the County under the Urban Center zoning designation.

8
9 **IV. BSRE’s Resubmittals.**

10 Pursuant to the Superior Court Order, BSRE was required to file its revised applications
11 no later than December 18, 2019 (the “Reactivation Deadline”). Despite not having a ruling on
12 the appeal in front of the Court of Appeals, BSRE had no choice but to prepare and submit its
13 revised land use applications in December of 2019, before the Reactivation Deadline.

14
15 After receiving the Superior Court Order, BSRE’s consultants spent six months preparing
16 the revised Land Use Applications in order to submit them by the Reactivation Deadline. In
17 December of 2019, BSRE submitted revised applications to address the six Conflict Areas.
18 Exhibits V-1–V-9. The revised Land Use Applications propose a mixed-use development with
19 approximately 2,800 units (reduced from over 3,000 in the prior iteration). After BSRE submitted
20 its revised Land Use Applications in December of 2019, the County failed to issue any response
21 until May 27, 2020, when BSRE received the County’s Supplemental Staff Recommendation #2,
22 stating that the County was again seeking denial of the Land Use Applications without preparation
23 of an EIS under SCC 30.61.220. BSRE worked in good faith to address the County’s requirements
24 and the County failed to provide BSRE with any meaningful chance to respond to any questions
25 or concerns noted by the County.
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1 The County now alleges four areas of substantial conflict (the “Revised Conflict Areas”):
2 (1) failure to document feasibility and code compliance of secondary access road; (2) failure to
3 document evidence for access to high capacity transit for building heights over 90 feet and failure
4 to demonstrate compliance with the decision criteria for a variance from SCC 30.34A.040(1);
5 (3) failure to provide appropriate building setbacks for tall buildings from lower density zones and
6 failure to demonstrate compliance with the decision criteria for a variance from SCC
7 30.34A.040(2)(a); and (4) failure to comply with code provisions regarding critical areas,
8 including geologically hazardous areas. Two of the four Revised Conflict Areas identified by the
9 County (issues 2 and 3 listed above) are the exact same issues that are on appeal before the Court
10 of Appeals.¹ As part of its request for termination, the County has brought forth entirely new
11 comments which have never been raised before, including arguing for the first time that BSRE’s
12 FAR calculations are incorrect. BSRE has never seen this comment prior to the May 2020
13 Supplemental Staff Recommendation #2, and thus has never been given a chance to revise the
14 plans to respond to this new comment. There are a number of other issues which have also been
15 raised for the first time in the May 2020 Supplemental Staff Recommendation #2. Overall, the
16 County has failed to meet its burden under SCC 30.61.220, which requires a showing of substantial
17 conflict with the Code. Without meeting this burden, the County cannot show that the Hearing
18 Examiner should take the extraordinary step of prematurely terminating the Land Use Applications
19 without allowing the preparation of an EIS.
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26 ¹ The variance requests submitted with those two identified issues (issues 2 and 3 listed above) were only
27 submitted as a “belt and suspenders” approach while the Court of Appeals matter was pending. BSRE maintains that
the variances are unnecessary as it is entitled to build up to 180 feet based on the clear language of SCC 30.34A.040(1)
and it is entitled to build within the Upper Plaza based on the clear language of SCC 30.34A.040(2)(a).

1 **V. Hearing Testimony Should be Limited to the Adequacy of the December 2019**
2 **Revisions and Whether they Addressed the Six Conflict Areas.**

3 The Superior Court Order directed the parties to work in good faith to resolve the Conflict
4 Areas. New comments received from the County for the first time in the May 2020 Supplemental
5 Staff Recommendation #2 demonstrate the County’s ongoing attempts to terminate BSRE’s Land
6 Use Applications without providing BSRE with a meaningful opportunity to engage in revisions.
7 This is outside the scope of the Superior Court Order’s remand and demonstrates a failure on the
8 part of the County to act in good faith. Therefore, the only issues which should be addressed at
9 this hearing are the original comments raised before the Hearing Examiner in May of 2018, so that
10 the Hearing Examiner may assess whether BSRE has resolved those conflicts.
11

12 In addition, the Appeal Issues should be reserved for ruling until the Court of Appeals has
13 issued its decision. The Hearing Examiner has ample discretion to withhold a ruling on particular
14 issues when the circumstances warrant. “[I]n the event that an unanticipated situation arises which
15 does not lend itself to the full, literal compliance with a rule, the Examiner reserves the right to
16 exercise discretion to address such circumstances.” Rules of Procedure 1.7. “The Examiner also
17 reserves the right to vary from the normal sequence of events in order to ensure due process and/or
18 for convenience or efficiency.” Rules of Procedure 5.5(e). The Code also grants the Hearing
19 Examiner authority and discretion to act in a way that best administers justices. SCC 2.02.090
20 states, “The examiner shall have the power to adopt and amend rules governing the scheduling and
21 conduct of hearings and other procedural matters related to the duties of his or her office.”
22

23 Here, the parties have all briefed the statutory interpretation question of the Appeal Issues
24 before the Court of Appeals and are waiting to receive either the date for oral argument or a written
25 ruling. In the interest of justice and efficiency, BSRE should be given its opportunity to have its
26 appeal heard before the Hearing Examiner issues a potentially contrary decision on the Appeal
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1 Issues. Thus, the Hearing Examiner reserving its ruling on the Appeal Issues will best serve the
2 interests of the parties.

3 Similarly, public interest in BSRE's application is understandably great. Many members
4 of the public will likely seek to testify on the merits of the overall project or on prior submittals,
5 not understanding the limited purpose of this proceeding. Significant public testimony was
6 provided at the hearing in May of 2018 over a whole range of topics. This hearing, as a
7 continuation of that prior hearing, should have limited public comments which pertain only to the
8 latest round of application submittals. The appropriate time for public comment on the merits of
9 the proposal as a whole is at an open record hearing to be held on the project *after* the completion
10 of the SEPA review process. Thus, BSRE respectfully requests that the Hearing Examiner advise
11 the public that testimony at this proceeding should be limited to the question of whether the current
12 iteration of BSRE's application resolved the previously identified six Conflict Areas. Public
13 testimony on any other topics should be disregarded at this stage.

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16 The testimony of the County's witnesses should similarly be limited to matters responsive
17 to the current iteration of the project, based on the December 2019 revisions and whether they
18 resolved the six Conflict Areas previously identified. However, because the Appeal Issues are
19 currently pending before the Court of Appeals, those topics should also not be addressed by
20 County's witnesses and should be reserved for discussion after the Court of Appeals issues its
21 ruling.
22

23 **VI. Response to the County's Revised Conflict Areas.**

24 In its May 2020 Supplemental Staff Recommendation #2, the County lists what it labels as
25 the Recommendations. These Recommendations are of grave concern in that they raise entirely
26 new issues not previously raised in County comments and which are outside the scope of the
27

1 remand which directed the parties to work in good faith to resolve the Conflict Areas. The County
2 has shown a lack of good faith by failing to provide BSRE with even one opportunity to make
3 revisions after the December 2019 revisions and instead immediately seeking a premature
4 termination of the Land Use Applications. Further, none of the comments raised by the County in
5 the Revised Conflict Areas show a substantial conflict with the Code.
6

7 In their upcoming testimony in this proceeding, BSRE's consultants will show how they
8 have fully responded to each matter raised and will demonstrate how each concern has been
9 addressed. Each of the County's Revised Conflict Areas are listed below with a description of
10 how the application has addressed this issue and/or why it is not a substantial conflict with the
11 code, as required for early termination under SCC 30.61.220.
12

13 A. Floor Area Ratio Calculations.

14 For the very first time, the County claims in the May 2020 Supplemental Staff
15 Recommendation #2 that BSRE has incorrectly calculated the FAR for the development project.
16 BSRE has been using the same FAR calculation for all of the Land Use Applications since 2011,
17 so it is blatantly unfair for the County to claim, for the first time in the May 2020 Supplemental
18 Staff Recommendation #2, that the FAR calculations should have been calculated differently and
19 that this amounts to a substantial conflict with the Code justifying the termination of the Land Use
20 Applications under SCC 30.61.220.
21

22 The parties have always acted with the understanding that the minimum FAR for the
23 project, because it is a mixed-use project, is 1.0. BSRE has previously calculated a FAR for the
24 proposed project of .907 and has stated that the ability to build buildings up to 180 feet tall and
25 within the Upper Plaza are necessary in order to reach the required minimum FAR of 1.0. This is
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1 especially true because of the constraints of the Point Wells Site, including the shoreline, wetlands
2 and other critical areas which prohibit development in certain areas.

3 The County now claims, for the very first time, that the FAR calculations were done
4 incorrectly because BSRE included area for elevator shafts, exit corridors and stairways within the
5 floor area and thus the actual FAR is much lower than 1.0, even with buildings of up to 180 feet
6 tall and buildings within the Upper Plaza. The County has used this logic to request denial of
7 BSRE's variance requests and to deny the landslide hazard deviation request. This new comment
8 would be a proper comment to provide in a review letter to determine whether the developer can
9 alter the plans to address this comment. However, the County has never previously claimed the
10 FAR calculations were incorrect and has never provided BSRE with any chance to respond.
11

12 Furthermore, the County's recommendations and claims regarding the FAR are illogical
13 and do not support the County's termination attempts. First, the County claims that BSRE could
14 simply get rid of the commercial use in the project and instead have an entirely residential project
15 in order to have a lower FAR requirement of only .5 instead of 1.0. However, this is not a
16 legitimate option for BSRE. The most significant complaint that the County and neighboring
17 jurisdictions have had about the Point Wells Development project is the amount of traffic that will
18 be generated. In order to reduce the traffic impacts on neighboring jurisdictions, BSRE must
19 include commercial uses within the Point Wells Development so that the residents can stay within
20 the area for certain commercial activities, such as grocery shopping and dining out. The amount
21 of traffic which will be reduced by the presence of commercial uses within the development is
22 known as the "internal capture rate" and it is relied on heavily in predicting daily trips to and from
23 the development site. *See* Exhibit C-28. The amount of traffic which would be generated daily
24 would be significantly greater without any commercial uses within the development. Thus, it is
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1 not possible to remove the commercial uses from the development to reduce the FAR requirement.
2 The County is well aware of this.

3 The County states it recommends denial of the Land Use Applications because the FAR
4 has been overstated and that BSRE cannot achieve 1.0 minimum FAR even with the variances and
5 the landslide hazard deviation. However, the County also notes that there is an alternative method
6 for calculating the minimum FAR provided in SCC 30.34A.030, note 3. Utilizing this method, the
7 testimony will demonstrate that BSRE can still only satisfy the minimum FAR of 1.0 if the
8 variances are granted.² Thus the County's attempts to terminate the Land Use Applications based
9 on the FAR calculations should be rejected.
10

11 B. Failure to Document Feasibility and Code Compliance of Secondary Access Road.

12 The May 2020 Supplemental Staff Recommendation #2 again requests denial because it
13 alleges additional information for the secondary access road proposed by BSRE is required. This
14 is just one example of the County's changing requirements for the project as a whole and the
15 secondary access road in particular. In initial discussions, BSRE was informed that so long as
16 acceptable means of egress from the site were available in emergency situations, then a secondary
17 access road would not be necessary. Later, BSRE was informed that so long as the lanes of the
18 railway line overpasses were separated so as to allow emergency vehicles to travel either direction
19 on each overpass, then a secondary access road would not be required. The County's position then
20 changed to require a secondary access for *emergency use only*. Finally, a full secondary access
21 road for use by the public was required.
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25 ² This is assuming, for arguments' sake, that the variances are even necessary to allow buildings to be built up
26 to 180 feet and within the residential setback. BSRE disputes that the variances are necessary and maintains that (1)
27 it is entitled to build up to 180 feet because of its proximity to a high capacity transit route under SCC30.34A.040(1)
and (2) it is not subject to the residential setback limits because the adjacent zoning is not listed in
SCC 30.34A.040(2)(a).

1 BSRE continued to redesign the project with each increasing demand of the County. The
2 road is along property owned by BSRE but it is located entirely within the Town of Woodway.
3 Initially the County agreed that approval of the road was within Woodway's jurisdiction and that
4 the plans submitted to the County would show the road but note that it was not subject to the
5 County's review authority. In the comments received from the County in May of 2018, the County
6 demanded significantly more information regarding the road as if it was within its own jurisdiction.
7 Despite the fact that the County's requests with respect to the secondary access road are
8 overreaching and exceed the County's authority, BSRE has nonetheless satisfied the County's
9 overly broad demands.

10
11 The road has been designed to be in compliance with SCC 30.53A.512, as required by the
12 County, and BSRE agreed to have the approval of the Project be conditioned on having a full
13 access secondary access road. BSRE has satisfied the County's requests and has provided
14 sufficient information about the secondary access road to show that it is feasible. The County
15 itself has agreed that there is no alternative location for the secondary access route and that the
16 deviation will be necessary for its construction.

17
18 C. Denial of Landslide Hazard Deviation.

19 When the County sent its May 2020 Supplemental Staff Recommendation #2, it provided
20 BSRE with notice that it had also denied BSRE's landslide hazard deviation request. There was
21 no feedback provided by the County to BSRE prior to this denial decision – instead the County
22 unilaterally rejected it. This is contrary to the typical process, as stated by Randy Sleight himself
23 in the earlier portion of the hearing. *See* Exhibit T-5, p. 545. He testified previously that he would
24 typically work with the applicant to determine whether the landslide hazard deviation was
25 necessary and whether it could be granted. *Id.* Yet he failed to engage with BSRE in this instance.
26
27

1 The testimony provided by BSRE during the hearing will show that the County has issued
2 new comments in this May 2020 Supplemental Staff Recommendation #2 which have never been
3 provided to BSRE previously, in what is a clearly orchestrated attempt to prevent BSRE from
4 developing the Point Wells Site. However, these new comments do not show a substantial conflict
5 with the Code. In fact, the testimony by BSRE's consultants will show that BSRE has satisfied
6 the requirements for a landslide hazard deviation and the denial is unjustified. The proposed
7 construction techniques for building within the landslide hazard area setbacks provide more than
8 sufficient factors of safety and provide significant stabilization of the upper slope. No substantial
9 conflict with the Code has been demonstrated by the County with respect to the proposed
10 construction within the landslide hazard setback areas.
11

12
13 D. Failure to Provide Appropriate Building Setbacks for Tall Buildings from Lower
14 Density Zones and Failure to Document Evidence of Access to High Capacity Transit
for Buildings Over 90 Feet.

15 BSRE maintains that it has satisfied the criteria set forth in SCC 30.34A.040(1) because of
16 its proximity to a high capacity transit route, and thus is entitled to build up to 180 feet. Similarly,
17 BSRE maintains that SCC 30.34A.040(2)(a) is not applicable to the project because the adjacent
18 areas are not zoned under one of the zoning designations enumerated in the statute.
19

20 BSRE recognizes that SCC 30.34A.040(1) and (2) limit building heights in certain
21 described situations. SCC 30.34A.040(1) limits building heights to 90 feet *except* where the
22 additional height is documented as being desirable; when the project is located near a high capacity
23 route or station; and when an EIS is prepared which addresses certain enumerated items.

24 The project EIS will address the desirability of increased height and the other items
25 required for EIS analysis. The required view analysis to be included in the project EIS has already
26 been completed.
27

1 BSRE is committed to having a high capacity transit station at the Point Wells Site. This
2 is well documented in prior submittals. Sound Transit has confirmed its willingness to allow a
3 commuter rail station at Point Wells if BSRE commits to finance its construction, which it is
4 willing to do.

5
6 However, the requirement related to a high capacity transit specifically allows for an
7 increase in height “when the project is located near a high capacity *route or station . . .*” SCC
8 30.34A.040(1) (2010) (emphasis added). BSRE has committed to providing a high capacity
9 station at Point Wells but, even if no such station is present, there is no question that the Project
10 will be located “near a high capacity route.” Therefore, even if BSRE did not provide a high
11 capacity station at Point Wells, the proximity to the high capacity route alone would satisfy this
12 criterion under SCC 30.34A.040(1) (2010). This is the exact subject of the current appeal before
13 the Court of Appeals, and thus the Hearing Examiner should reserve ruling on this issue until the
14 Court of Appeals has issued its order.

15
16 SCC 30.34A.040(2)(a) limits building heights where the location is adjacent to certain
17 residentially zoned properties. In an October 2017 comment letter, PDS stated for the first time:
18 “While SCC 30.34A.040 (2010) is silent on the matter of zoning in incorporated areas, Snohomish
19 County finds that it is appropriate to treat the Town of Woodway areas with R-14,500 or UR
20 zoning as equivalent to the lower density zones listed in (2)(a).” This was an expansive reading
21 of SCC 30.34A.040(2)(a) which goes well beyond the plain language of the statute.

22
23 However, in response to this new issue, BSRE submitted a variance request which
24 demonstrated that the site’s characteristics dictate the location of tall structures at the rear of the
25 site and which requested a variance from the height limits of SCC 30.34A.040(2). In addition,
26 BSRE included in the April 2018 Revisions an alternative (undesirable) plan which strictly
27

1 complies with the limits imposed by SCC 30.34A.040(2). BSRE has considered the
2 comprehensive plans of the Town of Woodway and the City of Shoreline and maintains that the
3 variance is in alignment with these plans. BSRE submitted a revised variance request with the
4 resubmittals in December of 2019. The interpretation of SCC 30.34A.040(2)(a) is also the subject
5 of the current appeal before the Court of Appeals, and thus the Hearing Examiner should reserve
6 ruling on this issue until the Court of Appeals has issued its order.
7

8 Further, the County should not be permitted to simultaneously argue that the density is too
9 low to satisfy the FAR requirements (and thus the variances should be denied) and yet also try to
10 reduce the density at the Site. This is contrary to the goals of the Growth Management Act and
11 contrary to designating the Site as an Urban Center. It is also blatant evidence of the County's
12 failure to act in good faith. Either the County has created an undevelopable Site by designating
13 the property as an Urban Center or the County has determined that the Point Wells Land Use
14 Applications should be denied at all costs. Either way, the County is violating its obligation to act
15 in good faith and is acting in an arbitrary and capricious manner.
16

17 E. Failure to Comply with Code Provisions Regarding Critical Areas, Including
18 Geological Hazardous Areas.

19 The current Point Wells site is a contaminated property which does not permit any public
20 access to the beach. In addition, toward the Upper Bluff, there is a significant amount of space
21 which has been designated as landslide hazard areas. The Point Wells development will resolve
22 all of these issues. The site will be cleaned up prior to beginning construction on the urban center,
23 the design includes a large public beach, and BSRE will provide significant slope stabilization,
24 increasing the safety of the overall site. The testimony of BSRE's consultants will show that BSRE
25 has more than satisfied the County's Code provisions regarding critical areas, including
26 geologically hazardous areas. The December 2019 revisions to the Land Use Applications
27

1 provided substantial additional critical area analysis which addressed the County's prior concerns
2 raised in its May 2018 Supplemental Staff Recommendation. The County has failed to
3 demonstrate that there is a substantial conflict with the Code with respect to the critical areas and
4 thus, the County has failed to satisfy its burden under SCC 30.61.220.

5
6 **VII. BSRE Has Demonstrated Feasibility.**

7 BSRE has spent significant resources and time addressing the County's six Conflict Areas
8 and submitted its revised Land Use Applications before the Reactivation Deadline as directed to
9 do by the Superior Court Order. If the County believes additional information is necessary to be
10 able to proceed with the EIS, it should have worked in good faith with BSRE (as directed to do by
11 the Superior Court Order) to provide comments on the Land Use Applications and request
12 revisions. Instead, the County again took the extraordinary step of requesting a premature denial
13 of the Land Use Applications without preparation of an EIS. The County has failed to act in good
14 faith and has further failed to satisfy the burden required under SCC 30.61.220. Overall, BSRE
15 has demonstrated more than sufficient feasibility for the project to proceed to the EIS phase.

16
17 **VIII. The County Again Fails to Recognize that a Project Can be Approved**
18 **Conditionally.**

19 The County has taken the extreme position that every possible issue must be resolved prior
20 to proceeding with the EIS process. This is contrary to the general rule that an application can be
21 approved conditionally. It's further contrary to the typical process with a large development
22 proposal, which, as Ryan Countryman himself has testified, would include seven or eight
23 iterations. There are numerous aspects of Title 30 SSC which allow a development to be approved
24

1 subject to “preconditions” to approval.³ In fact, the Hearing Examiner Rules of Procedure
2 specifically address this:

3 Rule 8.1: Applicability. Certain provisions of Title 30 SSC require
4 an Applicant to take certain actions before a land use permit or
5 approval can be approved. . . . These actions are known as
6 “preconditions” to approval. This rule applies to any Hearing
7 Examiner decision where the decision cannot become effective until
8 the applicant has completed one or more preconditions. . . .

9 Rule 8.2: Effect of Precondition on Decision. A decision subject to
10 one or more precondition(s) is binding but will not become legally
11 effective until the stated precondition(s) have been fulfilled and such
12 fulfillment is certified by the Director on a full copy of the decision.
13 Failure to timely fulfill the precondition(s), or to timely request and
14 receive an extension of time for fulfillment as provided in Rule
15 8.4[sic], shall render the Hearing Examiner decision null and void.

16 Rule 8.3 states that the deadline for fulfillment of the preconditions is to be set by the
17 Hearing Examiner based on “a realistic estimate of the amount of time necessary for a prudent and
18 reasonable person to complete the required action(s).” To the extent that BSRE has not taken a
19 step that the Hearing Examiner finds to be a necessary precondition to the development at Point
20 Wells, the approval of the project should be conditioned on those preconditions being satisfied.

18 IX. Conclusion.

19 The continued attempts by the County to bring about the premature termination of the Land
20 Use Applications should be rejected. BSRE has demonstrated its commitment to resolving any
21 issues raised by the County and has addressed all of the six Conflict Areas. The County should
22 not be permitted to create new issues and seek termination before creation of an EIS when BSRE
23 has not yet received any meaningful opportunity to respond to those comments. BSRE has
24 provided ample documentation at this stage of the application review process to show that the
25 project is certainly feasible. BSRE has provided more than sufficient information to proceed with
26

27 ³ See, e.g., SCC 30.66B.440, SCC 30.65.130; SCC 30.66B.540.

CERTIFICATE OF SERVICE

I, Heather L. Hatrup, affirm and state that I am employed by Karr Tuttle Campbell in King County, in the State of Washington. I am over the age of 18 and not a party to the within action. My business address is: 701 Fifth Ave., Suite 3300, Seattle, WA 98101. On this day, I caused to be filed with Snohomish County Planning and Development Service a true and correct copy of the foregoing document. I caused the same to be served on the parties listed below in the manner indicated.

Snohomish County Hearing Examiner
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- Via U.S. Mail
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- Via U.S. Mail
- Via Hand Delivery
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- CM/ECF via court’s website

Executed on this 2nd day of November, 2020, at Seattle, Washington.

/s/ Heather L. Hatrup

Heather L. Hatrup
Assistant to J. Dino Vasquez
and Jacque E. St Romain