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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'
POST-HEARING BRIEF

I. INTRODUCTION

The Point Wells Urban Center development application (“Application”) is again before the Hearing Examiner based on substantial conflicts. The substantial conflicts between the Application and county code are not new. The Snohomish County Department of Planning and Development Services (PDS) first notified the applicant, BSRE Point Wells, LP, (BSRE), of the conflicts in 2013. After years of inaction by BSRE, the Application was denied in 2018 based on substantial conflicts between the Application and code. On appeal, BSRE was granted “a one-time reactivation opportunity” to submit materials to PDS to address the substantial conflicts. Despite this final opportunity, BSRE’s reactivated Application represents a nearly identical proposal from the previous design and includes the same unresolved substantial conflicts that were the basis for denial in 2018.

The Application is unchanged regarding buildings above 90 feet without access to high-capacity transit and taller than allowed buildings in the residential setback area. Similarly, BSRE continues to propose substantial development in the landslide hazard area,

1 including the secondary access road, the entire urban plaza portion of the development, and
2 the proposed Sounder station. Instead of re-designing its development proposal to satisfy
3 code, BSRE submitted two variance applications and a landslide hazard deviation seeking to
4 excuse compliance from significant code requirements. BSRE represented that, if
5 approvable, the variances and landslide hazard deviation would resolve the substantial
6 conflicts with its Application. However, after diligent review of the Application, including
7 peer review by a third-party consultant, PDS determined that both variances failed to satisfy
8 the approval criteria and recommended that they be denied. Similarly, the County’s Chief
9 Engineering Officer determined that BSRE failed to satisfy the landslide hazard deviation
10 approval criteria and denied the deviation request.

11 As a result, the Application remains in substantial conflict with the code and PDS
12 recommends denial of the Point Wells proposal without first preparing an Environmental
13 Impact Statement (EIS) under the State Environmental Policy Act (chapter 43.21C RCW).
14 PDS’s recommendation is based on SCC 30.61.220, which allows denial of a proposal
15 without preparing an EIS when the proposal is in “substantial conflict with adopted plans,
16 ordinances, regulations or laws.” SCC 30.61.220(2). The purpose of this provision is “to
17 avoid incurring needless county and applicant expense.” SCC 30.61.220. The PDS staff
18 recommendation, the administrative record, and public and witness testimony, including
19 testimony provided by BSRE’s own witnesses, support the conclusion that the Point Wells
20 proposal continues to substantially conflict with code requirements. PDS requests that the
21 Hearing Examiner deny the proposal under SCC 30.61.220.

22 **II. RELEVANT FACTS¹**

23 Upon receiving BSRE’s reactivated Application on December 12, 2019, PDS
24 commenced review. With the reactivated Application, BSRE elected not to re-design its

25 ¹ For purposes of brevity, PDS incorporates the factual background provided in PDS’s Response to BSRE
26 Motion to Stay the Hearing. Ex. Y-3, pp. 2-7.

1 development proposal to resolve the substantial conflicts. Rather than re-design the proposal
 2 to comply with code, BSRE selected a different approach. BSRE elected to submit two
 3 variance applications, which if approved, would allow buildings up to 180 feet in height
 4 without high capacity transit and taller than allowed buildings adjacent to low-density
 5 residential zones. In addition, BSRE submitted a deviation request from the landslide hazard
 6 area and setback regulations. With the deviation request, BSRE sought approval to locate
 7 the secondary access road, the Sounder commuter rail station, and entire urban plaza portion
 8 of the development in the landslide hazard area and setback. By selecting this approach over
 9 re-design of the development, BSRE needed to demonstrate to PDS and the Hearing
 10 Examiner that both variance applications and the deviation request satisfied the approval
 11 criteria. The following chart illustrates the issues of substantial conflict and BSRE's
 12 proposed resolution to each issue of substantial conflict:

Issues of Substantial Conflict²	BSRE's Proposed Resolution
1. Failure to document code compliance of second access road	Landslide hazard area and setback deviation request
2. Failure to document code compliance with critical areas, including geologically hazardous areas	Landslide hazard area and setback deviation request
3. Failure to document evidence of access to high capacity transit for building heights over 90 feet, and failure to satisfy decision criteria for a variance from SCC 30.34A.040(1)	Variance application from SCC 30.34A.040(1) – building height and high capacity transit
4. Failure to provide appropriate building setbacks for taller than allowed buildings from lower density zones, and failure to satisfy decision criteria for a variance from SCC 30.34A.040(2)(a)	Variance application from SCC 30.34A.040(2)(a) – height adjacent to low density zones

24 _____
 25 ² After review of the Application submitted on December 12, 2019, PDS is no longer pursuing the following
 26 issues of substantial conflict: failure to address the buffer from the ordinary high water mark; and failure to
 comply with innovative development design for the critical areas regulations. Ex. X-3. p. 3.

1 As illustrated above, BSRE is relying exclusively on approval of the two variance
2 applications and landslide hazard deviation to address the substantial conflicts. Therefore, if
3 BSRE is unable to demonstrate compliance with the approval criteria of any one of its three
4 requests, the Application substantially conflicts with the code and is subject to denial under
5 SCC 30.61.220.

6 To determine whether BSRE resolved the substantial conflicts, PDS staff diligently
7 reviewed the Application. PDS's review of BSRE's resubmittal was comprehensive and
8 included staff review of the two variance applications and landslide deviation, assessment of
9 other new documents provided with the Application, and consideration of the numerous
10 public comments. In addition, PDS's Chief Engineering Officer reviewed the geotechnical
11 report and other application materials relating to BSRE's landslide hazard deviation request
12 and issued a detailed landslide hazard deviation decision.³ Lastly, PDS hired a third-party
13 architectural consultant to provide independent peer review of the floor area ratio (FAR) issue
14 raised by BSRE.⁴ PDS completed review of the Application and issued *Supplemental Staff*
15 *Recommendation No. 2* on May 27, 2020.⁵ PDS concluded that the Application substantially
16 conflicted with the code and recommended denial under SCC 30.61.220.

17 **III. STANDARD OF REVIEW**

18 The Hearing Examiner is tasked with determining whether PDS met its burden under
19 SCC 30.61.220. That provision contains the applicable standard of review.

20
21 When denial of a non-county proposal can be based on grounds which are
22 ascertainable without preparation of an environmental impact statement, the
23 responsible official may deny the application and/or recommend denial
24 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:

25 ³ Ex. X-2.

⁴ Ex. X-1.

26 ⁵ Ex. X-3.

- 1 (1) The proposal is one for which a DS has been issued or for which early
2 notice of the likelihood of a DS has been given;
- 3 (2) Any such denial or recommendation of denial shall be supported by
4 express written findings and conclusions of substantial conflict with adopted
5 plans, ordinances, regulations or laws; and
- 6 (3) When considering a recommendation of denial made pursuant to this
7 section, the decision-making body may take one of the following actions:
8 (a) Deny the application; or
9 (b) Find that there is reasonable doubt that the recommended
10 grounds for denial are sufficient and remand the application to the
11 responsible official for compliance with the procedural requirements
12 of this chapter.

13 The Examiner now must determine whether (1) to deny the Application, supported by express
14 written findings and conclusions that the Point Wells proposal substantially conflicts with
15 adopted plans, ordinances, regulations or laws, or (2) find there is reasonable doubt⁶ that the
16 recommended grounds for denial are sufficient and remand the Application to PDS for
17 compliance with chapter 30.61 SCC (Environmental Review (SEPA)).

18 Similar to the May 2018 hearing, BSRE’s witnesses throughout the November 2020
19 hearing referred to this stage of the process as needing to only demonstrate “feasibility.”
20 However, the criteria in the code provides thresholds for code compliance not feasibility.
21 Project feasibility is determined before an application is submitted to the County, not nine
22 years later. When pressed on whether the Application satisfied code criteria, BSRE’s
23 witnesses stated they had only submitted drafts and had not intended for the revised
24 Application to be reviewed against the approval criteria at this stage. However, the purpose
25 of this remand and reactivation process is to provide BSRE one final opportunity to address
26 the substantial conflicts between its Application and the code.

⁶ In its Pre-Hearing Brief, PDS provided a detailed description of the “reasonable doubt” standard included in SCC 30.61.220(3)(b). Ex. Y-10, pp. 3-5.

1 Pursuant to the review process, PDS reviewed the Application against relevant code
2 criteria to determine whether BSRE resolved the substantial conflicts with its Application.
3 The PDS permitting manager, Mr. Countryman, testified that based on diligent review of the
4 Application, PDS determined that BSRE had not resolved the substantial conflicts with its
5 Application and recommended denial under SCC 30.61.220. Mr. Countryman further
6 testified that review of supplemental application documents BSRE submitted days before
7 hearing also did not resolve the substantial conflicts. Even BSRE's witnesses, both through
8 their written material and testimony, appeared to concede that the Application was
9 incomplete and inadequate to demonstrate compliance with the approval criteria for both
10 variance applications and the landslide deviation request.⁷ As a result, BSRE did not
11 demonstrate that there was reasonable doubt with the grounds for denial of the Application
12 under SCC 30.61.220.

13 **IV. SUBSTANTIAL CONFLICTS WITH THE APPLICATION**

14 **A. The FAR issue raised by BSRE does not support the variance applications or** 15 **the landslide deviation request.**

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17 BSRE first raised the FAR issue, claiming that the need to satisfy the minimum 1.0
18 FAR for an urban center development justified its variance applications for increased heights
19 and its request for a deviation that would allow development in landslide hazard area and
20 setback.⁸ In its variance applications, BSRE specifically claimed that to satisfy the minimum
21 1.0 FAR it needed additional building height up to 180 feet and taller than allowed buildings
22 in the setback from lower density zones. In addressing the variance criteria of SCC
23 30.43B.100(2), BSRE represented that achieving the minimum 1.0 FAR was necessary in

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25 ⁷ Exs. V-15, p.1, Z-6, p. 6 (Hart Crowser report defers compliance until building permit stage); Seng
26 Testimony, November 6, 2020, Tape 1. 1:38:30 – 1:38:42 (BSRE's architect concedes that variance likely
does not satisfy code criteria).

⁸ Exs. V-15, p.10; V-18, pp. 2, 4-6.

1 order to develop an urban center and “preserve and enjoy a substantial property right.” BSRE
2 went so far as to claim “[i]f the County will not allow building heights over 90 feet, the
3 County will have necessarily rendered the property undevelopable by designating it is an
4 urban center under the zoning code.”⁹ With regard to the landslide hazard deviation request
5 for development in the urban plaza, BSRE similarly cited the need to meet the 1.0 minimum
6 FAR as grounds for satisfying the no alternative location requirement.¹⁰

7 To determine whether BSRE resolved the substantial conflicts with its Application,
8 PDS evaluated whether the variance applications and deviation request satisfied the approval
9 criteria. In evaluating those applications, it was necessary for PDS to look at the FAR issue
10 since BSRE presented the minimum 1.0 FAR as its sole justification for demonstrating
11 compliance with SCC 30.43B.100(2), the substantial property right decision criteria for the
12 variances, and for satisfying the no alternative location criteria for the landslide deviation
13 request. Given the significance of this issue to review of the Application and BSRE’s
14 previous complaints regarding objectivity of review, PDS utilized a third-party architectural
15 consultant to provide peer review and independent analysis of BSRE’s FAR calculations.

16 The FAR consultant concluded that BSRE’s FAR calculations were grossly
17 inaccurate, overrepresenting the FAR by 25% – 30%, or the equivalent of BSRE adding an
18 extra central village to the total site square footage.¹¹ The FAR consultant testified that
19 BSRE’s architect appeared to include building area that is explicitly excluded by the County’s
20 FAR definition.¹² BSRE’s architect conceded during the hearing that BSRE’s approach was
21 in direct conflict with code, resulting in erroneous FAR calculations.¹³ When notified of the
22 deficiency, BSRE’s lead architect elected not to provide corrected FAR figures to support its
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24 ⁹Ex. V-18, p. 2.

¹⁰Ex. V-15, pp. 10-11.

¹¹ Brajcich Testimony, November 5, 2020, Tape 2: 18:40 – 20:15.

¹² Brajcich Testimony, November 5, 2020, Tape 1: 24:20 – 25:50.

¹³ Seng Testimony, November 6, 2020, Tape 1. 2:52:00 -2:54:54.

1 variances and deviation.¹⁴ Thus, the uncontroverted evidence demonstrates that even if both
2 variances and the deviation request were approved, BSRE would not achieve a 1.0 FAR.¹⁵

3 BSRE's FAR deficiency has significant implications. It means BSRE has not
4 resolved the substantial conflicts with its Application. BSRE's lead architect admitted the
5 FAR issue may negate its variance requests, and BSRE's ability to satisfy code.¹⁶ Because
6 BSRE's FAR rationale does not demonstrate that "a variance is necessary for the preservation
7 and enjoyment of a substantial property right," the variance applications do not satisfy the
8 approval criteria. SCC 30.34B.100(2). Since BSRE does not demonstrate that its variance
9 applications can be approved, BSRE's continued adherence to a proposal with buildings over
10 90 feet without high capacity transit and taller than allowed buildings adjacent to low-density
11 residential zones means the Application remains in substantial conflict with SCC
12 30.34A.040(1) and SCC 30.34A.040(2)(a).

13 **B. BSRE's two variance applications fail to satisfy the decision criteria.**

14 A fundamental requirement for obtaining a variance is that the variance must be
15 "necessary for the preservation and enjoyment of a substantial property right." SCC
16 30.34B.100(2). BSRE has represented that both variances, and the landslide deviation, are
17 necessary for it to satisfy the 1.0 minimum FAR so it can develop an urban center at Point

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19 ¹⁴ Seng Testimony, November 6, 2020, Tape 1. 2:55:43 - 2:56:10:

20 Otten: And you were notified of this issue in May of 2020, correct. The discrepancy with the FAR issue?

21 Seng: Yes

22 Otten: And it has been six months from that date, and you provided application material just a week ago, did
23 you provide any additional calculations to address this issue?

24 Seng: No, I didn't.

25 ¹⁵ Brajcich Testimony, November 5, 2020, Tape 2: 18:40 – 20:15; 30:09 – 30:40; 39:10 – 39:48.

26 ¹⁶ Seng Testimony, November 6, 2020, Tape 1. 1:36:36 – 1:37:15:

Vasquez: Does the County's interpretation of the FAR calculation have any effect on our, BSRE's application
at all?

Seng: Yeah, definitely. This suggestion to use a weighted average calculation, it does impact our ability to
meet code. That does change things.

Seng Testimony, November 6, 2020, Tape 1, 1:38:30 – 1:38:42:

Vasquez: Would it negate the variances request you have made to the County?

Seng: We haven't done a detailed analysis to determine that for certain. But I do think that is a possibility,
yes.

1 Wells. However, not only does BSRE's FAR calculations not result in a 1.0 FAR as
2 explained above, but an urban center project can be developed at Point Wells with a much
3 lower minimum FAR, without the need for variances or deviations.

4 As explained in PDS's staff recommendation and during the hearing, the code
5 provides for a weighted average method of calculating minimum FAR.¹⁷ In addition, the
6 urban center code also allows urban center projects with only one use, such as residential
7 development, to qualify for a much lower minimum FAR of 0.5.¹⁸ Under either of these
8 approaches, an urban center project can be developed with a much lower FAR. As a result,
9 the variances cannot be approved because BSRE cannot demonstrate the variances are
10 necessary to preserve a substantial property right. Failure to satisfy this criterion alone, is
11 fatal to the variance applications.

12 However, the staff recommendation and evidence provided at the hearing detail how
13 both variance applications fail to satisfy the remaining variance criteria.¹⁹ For example,
14 BSRE's failure to demonstrate the variances will not adversely affect the comprehensive plan
15 is particularly significant. Even with an infinite amount of additional time or supplemental
16 application materials, BSRE cannot demonstrate that waiving essential and defining elements
17 of the urban center designation, such as access to high capacity to transit and compatibility
18 with adjacent neighborhoods, does not adversely affect the comprehensive plan.²⁰ In sum,
19 BSRE has not demonstrated that its variance applications can be approved, and as a result,
20 its Application substantially conflicts with Code.

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24 ¹⁷ Ex. X-3, pp. 6-9; Countryman Testimony.

25 ¹⁸ BSRE's development is almost exclusively residential, with 95% of the square footage dedicated to
residential uses. Ex. X-3 citing Ex. V-6.

26 ¹⁹ Ex. X-3, pp. 10-26.

²⁰ Ex. X-3, pp. 18-20, 25-26.

1 **C. BSRE does not satisfy the “no alternative location” requirement for the landslide**
2 **hazard deviation request.**

3 In order for the Chief Engineering Officer to grant a landslide hazard area and setback
4 deviation request, an applicant must demonstrate “there is no alternative location for the
5 structure on the subject property.”²¹ In ruling on the landslide hazard area deviation request
6 in 2018, the Hearing Examiner concluded:

7 BSRE did not show the lack of alternate location. To the contrary, BSRE’s
8 architects considered alternative locations but apparently decides (*sic*) to
9 discard the alternates because, in part, of urban design principles that were
10 not explained.²²

11 BSRE chose not to address this conclusion in its reactivated Application.

12 For its renewed deviation request, BSRE repeated its conclusory urban design
13 rationale that the Hearing Examiner ruled was insufficient to demonstrate compliance with
14 the deviation criteria in 2018. BSRE again justified its proposal to locate buildings in the
15 landslide hazard area and setbacks on design preferences. This time, BSRE specifically cited
16 a preference to improve views on the project site and a preference to locate the emergency
17 facilities at the entrance to provide “visual access” to residents as justification for its deviation
18 request.²³ However, design preference is not the applicable criterion. An applicant seeking
19 a deviation from this life-safety standard must demonstrate, absolutely: “There is **no**
20 **alternate location** for the structure on the subject property.” SCC 30.62B.340(1)(a)
21 (emphasis added). That is, an applicant must show that it is **impossible** to locate a structure
22 elsewhere on the site, not that locating a structure elsewhere is undesirable, inconvenient, or
23 unattractive. Landslide hazard regulations exist to protect lives and property, and they cannot
24 be waived under the code based on aesthetics or design principles.

25 ²¹ SCC 30.62B.340(2)(b)(i); SCC 30.62B.340(1).

26 ²² Ex. R-4, pp. 25, 26 (C.54, C.62).

²³ Ex. V-15, pp. 10-11.

1 BSRE's deviation request provides but one conclusory statement that "BSRE has
2 reviewed alternate solutions from what is proposed here and found no alternative to locating
3 some building components at this location."²⁴ However, BSRE provides no demonstrable
4 evidence or alternative designs to support this conclusory statement. This omission is
5 particularly glaring given that two of BSRE's project architects testified earlier that the
6 project could be designed to avoid development in the urban plaza and still satisfy the
7 minimum FAR. The author of the 2018 variance request, Carsten Stinn, testified that it is
8 possible to design the site to avoid locating buildings on the upper bench.²⁵ Mr. Stinn's
9 testimony was corroborated by his colleague, Dan Seng, who testified that possible
10 alternatives were considered but rejected for design reasons.²⁶

11 At a minimum, one would expect that BSRE would provide a schematic design to
12 support the conclusion that no other alternative designs are possible for the site.²⁷ Instead,
13 BSRE's lead architect admitted he had prepared a design schematic that demonstrated FAR
14 could be satisfied with 90-foot buildings only located on the lower bench, but acknowledged
15 that BSRE did not submit for PDS review.²⁸ Finally, BSRE's lead architect conceded it was
16 possible for an urban center to be developed on the site if designed differently than what had
17 been proposed by BSRE.²⁹

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20 ²⁴ Ex. V-15, p. 10.

21 ²⁵ Ex. T-6, Stinn Testimony, May 23, 2018, 11:32:08 – 11:32:48 a.m.; *see also* Stinn Testimony, May 23,
22 2018, 11:33:30 – 11:34:52 a.m.

23 ²⁶ Ex. T-6, Seng Testimony, May 23, 2018, 2:33:46 – 2:35:35 p.m.

24 ²⁷ BSRE's geotechnical engineer conceded that the materials for the deviation request was deficient with
25 regard to alternative location criteria but deferred demonstrating compliance until some later date. Ex. Z-6, p.
26 6 ("We think the Exhibit V-15 and V-15 can be revised to better describe the reasons described above [no
alternative location for the urban plaza] and provided in a future submittal.")

²⁸ Seng Testimony, November 6, 2020, Tape, 2:48:40 - 2:49:10.

Otten: Didn't you submit a project schematic, probably 8 or 9 years ago, that showed the 90-foot building,
like pretty much uniform 90-foot buildings on the lower bench that met FAR but was not selected for design
considerations?

Seng: We did study that. We did not submit for County review.

²⁹ Seng Testimony, November 6, 2020, Tape 1, 2:56:50 - 2:57:41.

1 There is no reasonable doubt that the denial of the landslide hazard deviation by the
2 County's Chief Engineering Officer was in accord with the county code. Since BSRE did
3 not obtain approval of its landslide hazard deviation, BSRE's proposal to locate the urban
4 plaza portion of its proposal in a landslide hazard area and setback means the Application
5 remains in substantial conflict with the code.

6 **D. BSRE has not demonstrated compliance for the secondary access road or with**
7 **the code requirement for geologically hazardous areas.**

8 Aside from the no alternative location criteria, BSRE failed to demonstrate
9 compliance with other criteria for developing in geologically hazardous areas. BSRE failed
10 to demonstrate its design provided equal protection to that which would be provided by not
11 locating the development in the landslide hazard area, including compliance with the code
12 required factors of safety.³⁰ The Application and deviation request also failed to demonstrate
13 compliance with the requirements regarding stormwater and groundwater, under which
14 BSRE must demonstrate no increased risks to property or persons from development in the
15 landslide area. Surprisingly, many of the issues identified by Hearing Examiner as conflicts
16 in the 2018 Denial Decision were left unresolved, including drainage methods,³¹ equal or
17 better protection for the road, and conflicts with phasing of the development. A significant
18 example is BSRE's failure to confirm the site is suitability for development after disclosing
19 the site's highly susceptibility to liquefaction. BSRE again declined to provide any
20 geotechnical analysis to satisfy this requirement, instead electing to defer this analysis until
21 building permit stage.³² BSRE's failure to demonstrate code compliance for the development
22 in the landslide hazard area is a substantial conflict.

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24 ³⁰ Ex. X-2; Slight Testimony, November 5, 2020, Tape 2. 1:27:25 – 1:28:40.

25 ³¹ Davies Testimony. November 12, 2020. Tape 2. 1:24:41 – 1:26:16

26 BSRE's drainage engineer testified that he had not reviewed any plans for the Sounder station, which is included in the deviation request. He also admitted that he was not knowledgeable about project phasing despite it having a significant impact on drainage design and safety.

³² Ex. V-16, p. 9; See also Denial Decision, p. 27 (Conclusions C.67 – C.70).

1 **V. ADDITIONAL ISSUES**

2 **A. The Hearing Examiner should rule on all issues of substantial conflict.**

3 BSRE requested that the Hearing Examiner reserve ruling on issues related to
4 building heights over 90 feet without high capacity transit and building height setbacks from
5 lower density zones until after the Court of Appeals issues its decision on the BSRE partial
6 appeal of the Superior Court’s Remand Order. BSRE claims that reserving ruling on these
7 two issues until the Court of Appeals addresses the statutory interpretation questions raised
8 by BSRE will “promote efficiency, justice and fairness, and ... reduce the chances of
9 receiving conflicting decisions.”³³ The Hearing Examiner should deny the BSRE’s request
10 to reserve ruling.

11 BSRE’s request that the Hearing Examiner reserve ruling is a de-facto renewal of its
12 previous Motion to Stay the hearing.³⁴ The Hearing Examiner, in a well-reasoned decision,
13 denied the Motion to Stay.³⁵ BSRE has cited no new grounds to support its request to reserve
14 ruling and the reasoning that supported the Hearing Examiner’s denial of the Motion to Stay
15 applies equally to this request.³⁶ Further, the issues before the Court of Appeals regarding
16 statutory interpretation are separate and distinct from the issues before the Hearing Examiner,
17 which concern whether the new variance applications submitted by BSRE resolve the
18 substantial conflicts with the Application. As a result, the claims about conflicting decisions
19 are unfounded.

20 Lastly, both the City of Shoreline and the County submitted briefing to the Court of
21 Appeals that the Remand Order was not a final judgment or a “decision determination
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24 ³³ Nov. 11, 2020, Email from Jacque St. Romain to Hearing Examiner Clerk.

25 ³⁴Ex. Y-2.

26 ³⁵Ex. Y-5.

³⁶ The Hearing Examiner’s Order Denying the Motion to Stay analyzed the request under RAP 8.1(3), and concluded that the lack of debatable issues and comparison of injury attributable to the delay in the proceedings did not support the Applicant’s Motion to Stay.

1 action,” and therefore not ripe for review.³⁷ The potential dismissal of BSRE’s appeal on
2 procedural grounds also weighs against its request that the Hearing Examiner reserve ruling.
3 The Hearing Examiner should deny BSRE’s request to reserve ruling on these issues.

4 **B. If the Application is remanded for EIS preparation, the Hearing Examiner**
5 **should establish permit application expiration dates.**

6 If the Hearing Examiner determines that there is reasonable doubt to each of the four
7 issues of substantial conflict, the Application should be remanded to PDS for completion of
8 an EIS for the project.³⁸ In the event of a remand for EIS preparation, PDS requests that the
9 Hearing Examiner establish new permit application expiration dates.

10 The Application expired June 30, 2018, after the Applicant’s request for a fourth
11 extension was denied by both PDS and the Hearing Examiner.³⁹ On appeal, the King County
12 Superior Court’s Remand Order granted the Applicant a “one-time reactivation opportunity”
13 but did not address the substantial conflicts with the Application or the denial of the
14 extension.⁴⁰ Thus, the Hearing Examiner’s denial of the extension stands, as does the June
15 30, 2018, expiration date. The County Code is silent on the time period that applies when an
16 urban center application is reactivated after denial without prejudice under SCC
17 30.34A.180(2)(f) [2010].

18 PDS requests that the Hearing Examiner establish permit application expiration dates
19 based on the application expiration periods set forth in SCC 30.70.140, which were adopted
20 by the County Council through Amended Ordinance No. 16-004. Washington State case law
21 establishes that the vested rights doctrine applies only to land use control ordinances that
22 exert a restraining or directing influence over land use.⁴¹ In *Graham Neighborhood*

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24 ³⁷ Ex. Y-3, Attachment 6.

³⁸ SCC 30.61.220(3)(b).

³⁹ Ex. K-40; Ex. R-4, pp. 17-20.

⁴⁰ Ex. U-1, pp. 18-19.

⁴¹ *Graham Neighborhood Association v. F.G. Associates*, 162 Wn. App. 98, 115, 252 P.3d 898 (2011), citing
26 *Westside Bus. Park, LLC v. Pierce County*, 100 Wn. App. 599, 606-07, 5 P.3d 713 (2000).

1 *Association*, the Court held that a Pierce County ordinance applying new expiration
2 provisions to pending applications was not a “land use control ordinance” subject to
3 Washington’s vested rights doctrine. As a result, the Court applied the newly adopted
4 expiration regulations to the developer’s pending preliminary plat application.⁴² The holding
5 in *Graham Neighborhood Association* applies equally here, and expiration periods codified
6 in SCC 30.70.140 apply to the reactivated applications submitted on December 12, 2019, and
7 December 16, 2019. The Hearing Examiner has authority to specify procedures in the event
8 of a remand, which would include establishing applicable expiration dates.⁴³ In the event of
9 a remand for completion of an EIS, PDS recommends that the Hearing Examiner establish
10 application expiration dates consistent with SCC 30.70.140 as follows:

11 Preliminary Short Plat Application	December 12, 2023	
12 Shoreline Conditional Use Permit Application	December 12, 2022	
13 Urban Center Development Application	December 12, 2022	
14 Variance – Building Height & High Capacity Transit	December 12, 2022	
	Variance – Height Adjacent to Low Density Zones	December 16, 2022 ⁴⁴

15 In conclusion, applying the application expiration dates listed above is consistent with
16 Washington State’s vested rights doctrine and the County Code.

17 **C. The Application should be denied with prejudice.**

18 The Application should be denied by the Hearing Examiner with prejudice. An urban
19 center development application is a type 2 development application.⁴⁵ For a type 2
20 development application, the Examiner is authorized by Code to “grant, grant in part, return
21 to the applicable department and applicant for modification, deny without prejudice, deny, or
22 grant with such conditions or modifications as the hearing examiner finds appropriate based
23

24 ⁴² *Graham Neighborhood Ass’n* at 116.

25 ⁴³ SCC 2.02.155.

26 ⁴⁴ The application dates provided in SCC 30.70.140 and recommended here would also be subject to
suspension during EIS preparation as provided for in SCC 30.70.140(2)(a).

⁴⁵ SCC 30.72.060(3) [2010]; SCC Table 30.70.025 citing SCC 30.34A.180(2).

1 on the applicable decision criteria.”⁴⁶ The Superior Court’s Remand Order authorized the
2 Applicant to pursue reactivation of its Application, but imposed the following limitation:

3 The Court sees reactivation as allowed by SCC 30.34A.180(2)(f) (2007) as a
4 one-time reactivation opportunity rather than as avenue for future
5 reactivation requests.⁴⁷

6 The Superior Court was explicit that the Applicant had only “a one-time reactivation
7 opportunity.” If the Hearing Examiner concludes substantial conflicts remain, there is no
8 third bite at the apple. The Application must be denied with prejudice.

9 **D. PDS’s review of the application was conducted in good faith and according to**
10 **code.**

11 BSRE’s hearing presentation focused largely on process rather than how its
12 Application was consistent with code. BSRE’s witnesses suggested that PDS did not process
13 its reactivated Application in good faith because PDS did not schedule additional meetings
14 with BSRE’s consultants or issue additional review completion letters after submittal of the
15 revised Application in December of 2019. These claims, of course, do not relate to the task
16 before the Hearing Examiner to determine whether substantial conflicts exist between the
17 Application and the code. Rather, BSRE is trying to build a record designed to prejudice the
18 County in the event the matter is returned to Judge McHale, whose order requires the parties
19 to “act diligently, in good faith and in accord with the Snohomish County Code and all other
20 applicable statutory provisions in completing the application review process.”⁴⁸ BSRE’s
21 claims regarding PDS’s lack of good faith are unfounded.

22 The general purpose of a review letter and a review meeting is to provide an applicant
23 notice of issues with its application and to answer questions that an applicant has raised with
24

25 ⁴⁶ SCC 30.72.060(3).

⁴⁷ Ex. U-1, p. 19.

26 ⁴⁸ Ex. U-1.

1 PDS. In this case, the lengthy administrative record demonstrates that BSRE is acutely aware
2 of the conflicts between its Application and the code. BSRE was provided actual notice of
3 conflicts seven years ago.⁴⁹ In addition, PDS notified BSRE of the conflicts in multiple
4 review letters dating back to 2013.⁵⁰ The same conflicts with its Application were further
5 detailed in the 2018 PDS staff recommendations and the 2018 Hearing Examiner's Denial
6 Decision.⁵¹ Lastly, PDS provided BSRE with detailed notice of the standards that would be
7 applied to its reactivated Application:

8 Application materials submitted by BSRE to PDS will be reviewed under all
9 applicable laws and regulations, and consistent with the Snohomish County
10 Hearing Examiner's Amended Decision and Reconsideration Decision
11 Regarding your questions concerning residential setback regulations, bonus
12 heights associated with high capacity transit, and landslide hazard area
13 deviations, please refer to the Hearing Examiner's Decisions which address
14 those issue in detail.⁵²

13 Given PDS's robust efforts over the years to notify BSRE of the conflicts with its Application,
14 BSRE cannot in good faith claim ignorance of these conflicts. BSRE's disagreement with
15 PDS's application of the code to its proposal does not equate to a lack of good faith. BSRE
16 has cited no evidence that a fourth or fifth review letter or additional meeting with PDS would
17 provide any constructive benefit or further the application process. Moreover, there is no
18 code provision requiring PDS to provide a review letter or meet with an applicant after
19 application submittal.

20 Throughout the application process when notified of code compliance issues, BSRE
21 responded in one of two ways. First, when asked to revise its Application, BSRE repeated
22 the same refrain from 2018 that it need only demonstrate feasibility and details to demonstrate
23 code compliance are not required. However, in the hearing BSRE's consultants conceded

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⁴⁹ Ex. K-4.

⁵⁰ Exs. K-4, K-17, K-18, K-20, K-22, K-24, K-29, and K-31.

⁵¹ Exs. N-1, N2, R-4.

⁵² Ex. Z-27.

1 that PDS’s request for additional details was reasonable.⁵³ Second, BSRE elected to adhere
2 to its own interpretation of code, interpretation in direct conflict with PDS’s application of
3 the plain language of the code.⁵⁴ But when asked directly “[d]o you believe PDS’s
4 application of the county code to this project is reasonable?,” BSRE’s lead architect
5 responded, “Yes, I do.”⁵⁵ Finally, BSRE admitted it had no evidence of any improper effort
6 by PDS to terminate its Application.⁵⁶ Thus, the requests for continuing review letters and
7 meetings are futile when BSRE continues to refuse to demonstrate actual code compliance.

8 The evidence demonstrates that PDS’s application of the regulations to the project
9 has been reasonable, consistent with code, and conducted in good faith. Mr. Countryman
10 described how PDS has provided BSRE with a “roadmap” for compliance with its review
11 letters and comments, but BSRE has repeatedly declined to make the revisions to its
12 Application to resolve conflicts.⁵⁷ Mr. Countryman further described the current situation as
13 the parties being at an impasse over the code requirements.⁵⁸ Redundant review letters and
14 *ad nauseum* review meetings would serve no purpose and are not intended to resolve such an
15 impasse.

16 Instead, PDS followed standard review procedures. PDS diligently reviewed the
17 Application, utilized an independent consultant for peer review, documented the continuing
18 substantial conflicts, issued a staff recommendation, and requested review by the Hearing
19 Examiner. There is no evidence that PDS acted in bad faith.

21 _____
22 ⁵³ Davies Testimony, Nov. 12, 2020, 1:24:41 – 1:26:25; 1:39:33 – 1:40:59; 1:40:53 – 1:41:03.
23 Otten: Is it reasonable for Mr. Sleight to ask for these details [drainage and phasing details]?
24 Davies: Yes, yeah sure. I think he might have some more concerns.

25 ⁵⁴ Seng Testimony re FAR; Ex. Z-7 (FAR conflict); *See also* SCC 30.34A.040(1) (high capacity transit); SCC
26 30.34A.040(2)(a) (setback from lower-density zones).

⁵⁵ Seng Testimony, November 6, 2020, Tape 1, 3:01:39 – 3:01:53.

⁵⁶ Seng Testimony, November 6, 2020, Tape 1, 3:01:55 – 3:02:07; Countryman Testimony, November 6,
2020, Tape 1. 26: 06 – 26:24.

⁵⁷ Countryman Testimony, November 6, 2020, Tape 2: 4:22:10 – 4:25:01.

⁵⁸ Countryman Testimony, November 6, 2020, Tape 2: 4:22:10 – 4:25:01.

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VI. CONCLUSION

The PDS staff recommendation, testimony and public comment provided at the hearing, and evidence in the record demonstrates the Application as it exists today substantially conflicts with the Snohomish County Code. PDS requests the Hearing Examiner deny the proposal under SCC 30.61.220(2).

DATED this 18th day of December, 2020.

ADAM CORNELL
Snohomish County Prosecuting Attorney

By: 
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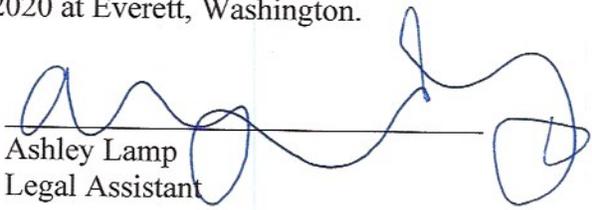
DECLARATION OF SERVICE

I, Ashley Lamp, hereby declare that I am an employee of the Civil Division of the Snohomish County Prosecuting Attorney, and that on the 18th day of December, 2020, I caused to be delivered Snohomish County Department of Planning and Development Services' Post-Hearing Brief and this Declaration of Service on the following parties by the methods indicated:

Gary Huff Jacque E. St. Romain J. Dino Vasquez Doug Luetjen KARR TUTTLE CAMPBELL 701 Fifth Avenue, Suite 3300 Seattle, WA 98104 <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: dvasquez@karrtuttle.com dluetjen@karrtuttle.com ghuff@karrtuttle.com jstromain@karrtuttle.com
<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 18th day of December, 2020 at Everett, Washington.


Ashley Lamp
Legal Assistant