



Sno-King Environmental Protection Coalition

Appeal Hearing Completed

BSRE's appeal hearing before Judge McHale took place on May 10th in the King County Courthouse. BSRE was appealing the Snohomish County Hearing Examiner's decision, later upheld by the Snohomish County Council, to deny BSRE's development application for constructing 3000+ housing units and over 100,000 square feet of commercial and retail space at Point Wells.

The Point Wells site includes Puget Sound shoreline, landslide hazard areas, and is currently served by a single two lane residential street. These characteristics brought into play regulations concerning shoreline development, development in hazardous areas, and transportation access requirements. These issues were all prominently mentioned during the hearing.

Shoreline development

The County has regulations controlling what kind of development can happen along shorelines, and how close to the shoreline any development is allowed. The key regulation in this case is a County requirement that any development not dependent on access to water be set back 150 feet from the Ordinary High Water Mark (OHWM). The OHWM is defined as the highest location on a beach where, due to consistent tidal action, the character of the beach is distinct from areas further inland.

The County described how BSRE failed to identify the OHWM in their initial application submitted in 2011 and did not correct that mistake until early 2018, just prior to the hearing before the Hearing Examiner. As a result of not identifying the OHWM, BSRE placed several of their buildings within the 150 foot buffer area, creating a substantial conflict with County regulations.

Hazardous areas

The eastern edge of the site includes steep slopes with a large landslide hazard area at the foot of the slope. County regulations do not permit any development inside landslide hazard areas unless there is no other place on the property to place those parts of the

development, and unless the landslide hazard can be mitigated so that any part of the development inside the hazard area is as safe as if it were placed outside the area (this is usually done with retaining walls and other means of stabilizing the slope). BSRE's application showed what they labeled the Upper Village, including multiple tall buildings, a transit center, and police and fire stations, was to be constructed in the landslide hazard area.

The County argued that BSRE had admitted that there were other places on the property to place the buildings included in the Upper Village, but that BSRE preferred the site in the hazard area. The County further stated that while BSRE did present some plans to mitigate the potential hazards, the information was not complete enough to determine whether the mitigation was sufficient to make the Village safe. BSRE's failure to make use of other non-hazardous areas on the site for the Upper Village, and their incomplete plans for hazard mitigation both created a substantial conflict with County regulations.

Transportation access

The Urban Center regulations allowed BSRE to build up to a maximum of 180 feet (double to normal 90 foot limit) if the site was near a mass transit station or route and if BSRE demonstrated the additional height was necessary and desirable. The route for Sounder commuter rail does go right through the property, but Sound Transit has no plans to stop at Point Wells so the mere presence of the route would not allow any passengers to board the train.

The County argued that a route without a station violated several other provisions of the County Code that required Urban Centers to include mass transit access, that BSRE had not shown a good faith effort to get Sound Transit to agree to stop at a station should one be built, and in any case, BSRE had not submitted any documentation showing that the additional height was either necessary or desirable. The missing station and the missing documentation made any building over 90 feet in height a substantial conflict with County regulations.

Vesting question

BSRE presented one other claim that could end up outweighing all the other claims. BSRE argued that their vesting rights included the right to resubmit their application to the County within 6 months of the denial and preserve their right to develop under the old 2011 Urban Center regulations.

The County argued that the right to resubmit the application was repealed in 2013, that this right was not vested because it is an application processing regulation not a land use

regulation (vesting only applies to land use regulations), and most importantly, the 6 month window ran out in February, 2019 without the County receiving a resubmitted application.

What's next?

Judge McHale promised to issue a decision by June 10, 2019. It's almost certain that no matter what the decision, it will be appealed to the State Court of Appeals; that will guarantee at least one more hearing.

If BSRE loses that appeal, they can then ask the State Supreme Court to review the case, but the Supreme Court is not required to review all appeals and tends to ignore cases where the decision is obvious and there are no new legal issues at question. The County probably believes there is no reason for the Supreme Court to get involved, but that remains to be seen.

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