

From: Tom McCormick <tommccormick@mac.com>
Sent: Tuesday, August 15, 2017 4:35 PM
To: Countryman, Ryan
Cc: MacCready, Paul; Mock, Barb; McCrary, Mike; Dobesh, Michael; Matt Otten; Uddin, Mohammad; Olson, Erik; Brown, Mark A.; Eastin, Darryl; Debbie Tarry; Kendra Dedinsky; Eric Faison; Bill Trimm; Bill Willard; John John; Tom Mailhot; Jerry Patterson; Phil Thompson
Subject: Transit compatibility does not satisfy SCC 30.34A.040(1)'s building height exception
Attachments: SKMBT_C45414100815590.pdf.pdf

Ryan,

The Department of Public Works (DPW) is in the process of determining whether the proposed Point Wells Urban Center project meets the County's transit compatibility requirements. See Erik Olson's May 23, 2017 memorandum to Paul MacCready.

Whether or not the Point Wells developer is able to satisfy the DPW requirements for transit compatibility (including the "access to public transportation" requirement of SCC 30.34A.085), there is a separate, elephant-in-the-room issue that Planning and Development Services (PDS) needs to address without further delay.

Issue: Whether, for purposes of the maximum building height exception in SCC 30.34A.040(1) (2011 vested version), "the project is located near a high capacity transit route or station."

SCC 30.34A.040(1) provides that "the maximum building height for buildings in the Urban Center zone is 90 feet," but an additional 90 feet may be approved if "the project is located near a high capacity transit route or station."

As explained below, satisfying DPW's transit compatibility requirement does not satisfy SCC 30.34A.040(1)'s proximity requirement. Even if DPW determines that the project is transit compatible (perhaps accepting the use of vanpooling), the fact remains that the Point Wells project is not located near a high capacity transit route or station. **Because the project does not satisfy SCC 30.34A.040(1)'s proximity requirement, buildings taller than 90 feet at Point Wells are prohibited.**

I. The Point Wells project is not located near a high capacity transit route or station. Don't just take my word for it. DPW has reached the same conclusion, saying:

"The project site is located more than 1/2 mile from any existing or planned stops or stations for high capacity transit routes such as light rail or commuter rail lines or regional express bus routes or transit corridors that contain multiple bus routes." (Source: Erik Olson's June 15, 2011 memorandum to Darryl Eastin, referenced in and attached to Mr. Olson's May 23, 2017 memorandum to Paul MacCready.)

The GMHB reached a similar conclusion about a month before DPW's June 15, 2011 memorandum. In the GMHB's May 17, 2011 decision (*City of Shoreline, et al., v. Snohomish County*, CPSGMHB Coordinated Case Nos. 09-3-0013c and 10-3-0011c, Corrected Final Decision and Order, page 21), the GMHB said that,

"a 'highly efficient transportation system linking major centers' is not satisfied by providing van pools to a Metro park-and-ride two and a half miles away. Nor is 'high capacity transit' satisfied by an urban center on a commuter rail line without a stop."

II. Vanpooling to/from Point Wells does not satisfy the requirement that the project be located near a high capacity transit route or station.

There is no high capacity transit at Point Wells. Vanpooling is not high capacity transit. With or without vanpooling, the Point Wells project is not located near a high capacity transit route or station.

Vanpooling is one method for a developer to satisfy the "access to public transportation" requirement of SCC 30.34A.085 (a part of transit compatibility), which reads as follows:

"30.34A.085 Access to public transportation.

Business or residential buildings within an urban center either:

- (1) Shall be constructed within one-half mile of existing or planned stops or stations for high capacity transit routes such as light rail or commuter rail lines or regional express bus routes or transit corridors that contain multiple bus routes;
- (2) Shall provide for new stops or stations for such high capacity transit routes or transit corridors within one-half mile of any business or residence and coordinate with transit providers to assure use of the new stops or stations; or
- (3) Shall provide a mechanism such as van pools or other similar means of transporting people on a regular schedule in high occupancy vehicles to operational stops or stations for high occupancy transit."

The mere existence of the subsection (3) vanpooling provision, drafted and proposed by the developer "to avoid a potential trap where appropriate high occupancy travel may not be immediately available," (see Gary Huff's April 28, 2010 email to Peggy Sanders (copy attached)), establishes that vanpooling is not high capacity transit. If vanpooling to a far-away high capacity transit route or station satisfied the subsection (1) requirement that buildings within an urban center be located within one-half mile of existing or planned stops or stations for high capacity transit routes, there would have been no need to add subsection (3) to SCC 30.34A.085.

The developer's vanpooling provision was adopted virtually word-for-word by the Council. Importantly, the developer did not submit a vanpooling amendment to the high capacity transit provision in the 90-foot building height exception of SCC 30.34A.040(1), nor did Council adopt any such amendment on its own. Had the Council intended to allow buildings taller than 90 feet

to be constructed far away from a high capacity transit route or station if vanpooling or a similar mechanism were arranged, then the Council would have amended SCC 30.34A.040(1) to say so, BUT IT DID NOT. The Council would have amended SCC 30.34A.040(1) to read something like the following passage, BUT IT DID NOT DO SO (my hypothetical addition is underlined for emphasis; compare SCC 30.91U.085, where Council added text to the definition of "Urban Center" that is almost identical to my hypothetical text):

SCC 30.34A.040 Building height and setbacks.

(1) The maximum building height in the UC zone shall be 90 feet. A building height increase up to an additional 90 feet may be approved under SCC 30.34A.180 when the additional height is documented to be necessary or desirable when the project is located near a high capacity transit route or station or the project provides access to public transportation as set forth in SCC 30.34A.085, and the applicant prepares an environmental impact statement . . .

Unfortunately for the developer, SCC 30.34A.040(1) is very clear: Buildings taller than 90 feet may not be approved unless located near a high capacity transit route or station. Vanpooling to a far-away high capacity transit route or station, or other arrangements set forth in SCC 30.34A.085, might satisfy the access to public transportation requirement of SCC 30.34A.085, but none satisfy 30.34A.040(1)'s proximity requirement that buildings be located near a high capacity transit route or station.

III. A high capacity transit route or station that is in use near Point Wells must exist prior to constructing buildings taller than 90 feet.

A "planned" route or station does not meet the SCC 30.34A.040(1) criterion to get an extra 90 feet of building height. SCC 30.34A.040(1) requires that the high capacity transit route or station be an existing route or station, and it must be in use (see, for example, GMHB's May 17, 2011 decision: "'high capacity transit' [is not] satisfied by an urban center on a commuter rail line without a stop").

"A building height increase up to an additional 90 feet may be approved . . . when the project is located near a high capacity transit route or station . . ." SCC 30.34A.040(1). This text doesn't say, when the project is located near an "existing or planned" high capacity transit route or station. It is significant that in other sections of the County's Urban Center Development Code, the words "existing or planned" are used, but not so in SCC 30.34A.040(1). See, for example, SCC 30.91U.085:

“ 'Urban center' means an area with a mix of high-density residential, office and retail uses with public and community facilities and pedestrian connections located within one-half mile of existing or planned stops or stations for high capacity transit routes such as light rail or commuter rail lines, regional express bus routes, or transit corridors that contain multiple bus routes or which otherwise provide access to such transportation as set forth in SCC 30.34A.085.” (Underlining added for emphasis; see also SCC 30.21.025(f).)

If the County Council had intended to permit buildings taller than 90 feet near “planned” transit routes or stations in addition to existing routes or stations, the phrase “existing or planned” would be found in SCC 30.34A.040(1). It is significant that Council did not include the phrase “existing or planned” in SCC 30.34A.040(1), while it did include the phrase in other sections such as SCC 30.91U.085 (above), SCC 30.21.025(f), and SCC 30.34A.085(1). Under the presumption of meaningful variation, different statutory wording (for example, the phrase “existing or planned” in one section, but not in another section) suggests different statutory meaning. See, e.g., *Lopez v. Gonzalez*, 549 U.S. 47, 55 (2006) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion”) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). As the Court in *Russello* said, “We would not presume to ascribe this difference to a simple mistake in draftsmanship.” 464 U.S. 16, 23.

Even if the developer could demonstrate (which it hasn’t done) that it has plans in place and has secured commitments and approvals from all necessary parties to build a high capacity transit station at Point Wells and assure its usage, because the word “planned” is not found in SCC 30.34A.040(1), the development fails to meet the SCC 30.34A.040(1) criterion permitting buildings to exceed 90 feet.

IV. PDS to advise the developer that buildings taller than 90 feet are not permitted.

The time to act is now. PDS has an obligation to convey the 90-foot height restriction to the Point Wells developer without further delay, just like PDS has been conveying other restrictions and Code requirements to the developer. See, for example: (1) PDS’s original review completion letter dated April 12, 2013; (2) PDS’s supplemental letter to the developer dated November 15, 2016, identifying six areas of “necessary revisions” and four areas of “recommended revisions” needed in order to continue with further preparation of the DEIS; and (3) PDS’s May 10, 2017 letter to the developer conveying preliminary review comments on the developer’s April 17, 2017 re-submittal of its site plan and other elements.

Once PDS advises the developer of the 90-foot building height limitation, the developer will need to revise its submission accordingly. The 90-foot building height limitation will have significant impacts on the development, for example, location of parking facilities, number of units, visual and aesthetic issues, facades, etc. All alternatives, including a new alternative responsive to the County’s review comments, must incorporate the 90-foot limitation.

V. Resubmit as Urban Village to construct buildings taller than 90 feet.

If the developer wants buildings taller than 90 feet, one option would be for it to withdraw its Urban Center application and then submit an application to develop Point Wells as an Urban Village. SCC 30.31A.115(2) provides as follows, for Urban Villages:

The maximum building height shall be 75 feet. The director may recommend a height increase in appropriate locations within the Urban Village of up to an additional 50 feet

beyond that otherwise allowed when the applicant prepares an environmental impact statement pursuant to chapter 30.61 SCC and where such increased height in designated locations does not unreasonably interfere with the views from nearby residential structures.

Note that, unlike the SCC 30.34A.040(1) Urban Center rule, under the above SCC 30.31A.115(2) rule for Urban Villages, buildings as tall as 125 feet can be approved even if the project is not located near a high capacity transit route or station.

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Could you please email me to confirm that the County will be advising the Point Wells developer that the maximum height for buildings at Point Wells is 90 feet.

Thank you.

Tom McCormick

Attachment: Gary Huff's April 28, 2010 email to Peggy Sanders

Sanders, Peggy

From: Gary Huff [GHuff@karrtuttle.com]
Sent: Wednesday, April 28, 2010 12:17 PM
To: Sanders, Peggy
Cc: Douglas A. Luetjen; Steve Ohlenkamp (E-mail); Wells, Mark (E-mail); Dennis Derickson (E-mail)
Subject: UC code clean up
Attachments: Proposed revisions to UC Code 427_v1.DOC

Peggy--Hopefully the attachment will make your job a little easier. It contains our suggestions to clean up some inconsistencies in the current draft (at least as we understand it). More importantly, we've included our suggestion as to how to "prune" the process requirements.

First, some explanation. We've reworded Note 3 re ground floor retail and the definition of mixed use. The next paragraph isn't proposed code text but a suggestion as to where the ground floor retail FAR bonus might fit better.

With respect to building heights and setbacks, there appears to be some language missing in all of the amendments. I've added language in 30.34A040(2)(a) so that it reads in the manner I think was intended. Without the addition, the example involving 45 and 90 feet doesn't make sense. You will also see that I reordered the language slightly to clarify what I think was the intent--that these requirements should not apply in either instance where the UC zoned property abuts a critical area.

The access to public transportation language is revised to avoid a potential trap where appropriate high occupancy travel may not be immediately available.

Our "process" proposal may take some explanation. You will recall that the language in Executive 2 and Council 7B were early attempts to define the proper role for cities. I can't believe that Woodway, for example, envisioned that those amendments would remain if their development agreement proposal, or a reasonable facsimile thereof, became part of the code. Thus, I've removed 2 and 7B and then expanded on Councilman Gossett's suggestion about alternative processes depending on whether a development agreement is successfully negotiated.

This may still be very confusing. I'm available to talk about this at any time. Hopefully this helps.

Gary

KARR ▾ TUTTLE ▾ CAMPBELL

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Floor Area Ratio/Ground Floor Retail

Table 30.34A.030(1) Note 3:

3. “Mixed-use” means residential and non-residential uses located within the same building. For urban centers comprised of multiple lots and/or buildings, “mixed-use” means that both residential and non-residential uses must be included within the urban center, but not necessarily within the same building. For such urban centers, FAR shall be calculated for the entire property and not for each individual building.

If the intent of the new “Ground Floor Retail” FAR range is to provide an incentive for the provision of that use, then perhaps this requirement fits better in Table 30.34A.030(2) as a floor area ratio bonus. If so, it may be useful to include a minimum depth requirement for street level commercial uses. The Seattle code requires a minimum depth of 30 feet.

30.34A.040 Building Height and Setbacks (Council 8E)

(2)(a) Building heights must be scaled down for buildings located on the edge of UC zoning and abutting R-9600, R-8400, R-7200, T or LDMR zoning and limited in height to that equal to twice the distance of such land from the zoning line (e.g. a building that is 45 feet from R-9600, R-8400, R-7200, T or LDMR zoning may not exceed 90 feet in height.

(2)(b) For buildings that are not located on the edge of the UC zoning but are located within 100 feet of the R-9600, R-8400, R-7200 shall be limited in height to two times the height limit in the R-9600, R-8400 or R-7200 zone; and buildings between 100 feet and 200 feet of an R-9600, R-8400 or R-7200 zone to three times the height limit in the R-9600, R-8400 or R-7200 zone.

(2)(c) Where the UC zoning line abuts a critical area protection area and buffer or utility, railroad, public or private road right-of-way, building heights shall not be subject to the limitations in sections (2)(a) and (2)(b) if the critical area protection area and buffer or utility, railroad, public or private road right-of-way provides an equal or greater distance between the building(s) and the zoning line than would be provided in subsections (2)(a) or (b).

30.34A.085 Access to public transportation. (Council 10B)

Business or residential buildings within an urban center must either (1) be constructed with one-half mile of existing or planned stops or stations for high capacity transit routes such as commuter rail lines, regional express bus routes or transit corridors that contain

multiple bus routes, (2) provide for new stops or stations for such high capacity transit routes or transit corridors within one-half mile of any business or residence and work with transit providers to assure use of the new stops or stations, or (3) provide a mechanism such as van pools or other similar means of transporting persons on a regular schedule in high occupancy vehicles to operational stops or stations for high occupancy transit routes.

“Process” Issues.

Executive 2 (SCT proposal) and Council 7B are redundant and have been superceded by the following amended language. Recommend deletion of Executive 2 and Council 7B.

30.34A.180 Review process and decision criteria.

(1) Review of an urban center development shall be as follows:

(a) Following the submittal of an urban center application, the applicant, Snohomish County, any city whose municipal urban growth area includes the urban center and any city whose public utilities or services must be used by the proposed urban center development shall attempt to negotiate and reach agreement upon a development agreement which would control the design, extent and appropriate mitigation for the urban center. In the event no agreement has been achieved within __ days of the date of application, or if the parties acknowledge in writing at any time that the terms of a development agreement are not likely to be agreed upon within said time frame, then Snohomish County shall waive this requirement and may enter into a development agreement with the applicant alone. Nothing herein shall preclude the parties from agreeing to extend the time frame for entry into the development agreement.

(b) If the terms of a development agreement are agreed upon pursuant to subsection (a) above, then the development agreement shall be reviewed pursuant to the procedures established in SCC 30.75.010-.300. If the County Council approves the development agreement pursuant to SCC 30.75.020, the development agreement shall control the manner in which the urban center shall be developed. An approved development agreement is the final decision of the county and may be appealed to superior court within 21 days of the issuance of the decision in accordance with chapter 36.70C RCW and SCC 30.71.130

(c) In the event the terms of a development agreement have not been agreed upon pursuant to either subsections (a) or (b) above within __ days of application, or if sooner requested by the applicant, a design review board established by SCC 30.34A.185 shall review and submit a recommendation regarding the initial urban center development plan to the hearing examiner based on urban center design guidelines adopted by Snohomish County. Nothing herein shall be preclude the

parties from agreeing to extend the time frame for entry into the development agreement.

(d) The hearing examiner shall consider the recommendation from the design review board under the Type 2 decision procedures set forth in SCC 30.72.025 through SCC 30.72.065.

(e) Except as otherwise provided in subsections (a) or (b) above, the hearing examiner's decision on an urban center application is the final decision of the county and may be appealed to superior court within 21 days of the issuance of the decision in accordance with chapter 36.70C RCW and SCC 30.71.130.