BEFORE THE HEARING EXAMINER
IN AND FOR THE COUNTY OF SNOHOMISH

BSRE POINT WELLS, LP, Appellant, vs. SNOHOMISH COUNTY DEPARTMENT OF PLANNING & DEVELOPMENT SERVICES Respondent.	No. 11-101457 LU SNOHOMISH COUNTY DEPARTMENT OF PLANNING AND DEVELOPMENT SERVICES' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FINDINGS OF FACT

A. FAILURE TO DOCUMENT FEASABILITY AND CODE COMPLIANCE OF SECOND ACCESS ROAD

No Site Plan Depicting Entirety of Second Access Road

PDS originally identified the lack of a site plan depicting the entirety of the second access road as an issue of substantial conflict with the County Code under SCC 30.61.220. (Ex N-1, p. 22). PDS explicitly dropped this as an issue of substantial conflict at the public hearing. (Ryan Countryman Testimony, May 18, 2018, 9:45:30 – 9:46:02 a.m.).[1]

[1] Ryan Countryman Testimony, May 18, 2018, 9:45:30 – 9:46:02 a.m.
"And on the topic of the second access road, the original staff recommendation had, kind of two separate issues relating to the second access road. One of which has been resolved to the point where it is no longer a substantial conflict. And that is the failure to provide an adequate site plan. Which is no longer an issue of substantial conflict. But compliance with geotechnical reports and geological hazards remains an issue of substantial conflict with the County Code with respect to the second access road."

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Failure to Comply with Code Provisions Regarding Critical Areas

Refer to Section F below for findings relating to conflicts between the project application and relevant critical areas regulations.

B. FAILURE TO PROVIDE APPROPRIATE BUILDING SETBACKS FOR TALL BUILDINGS FROM LOWER DENSITY ZONES

The Applicant submitted a land use permit application for an urban center site plan on March 4, 2011. (Ex. A-40, pp. 5-13). The proposed Urban Center development consists of an Urban Plaza, North Village, Central Village, and South Village. (Ex. A-40, pp. 5-13). The Urban Plaza portion of the development is located east of the Burlington Northern Santa Fe railroad tracks on the portion of the site referred to as the upper bench, and identified in the revised phasing drawing as Phase 2. (Ex. A-39, A-40).

The Urban Plaza portion of the development is comprised of three residential towers (UP-T1, UP-T2, and UP-T3) and two service buildings (Service Building 1 and Service Building 2). (Ex. A-39, A-40). The Application identifies the building heights for buildings located in the Urban Plaza as follows: UP-T1 – 180'; UP-T2 – 170'; UP-T3 – 150'; Service Building 1 – 35'; and Service Building 2 – 35'. (Ex. A-40, p. 10).

The PDS Review Completion Letter dated April 12, 2013, provided:

> Several proposed buildings will be located near adjacent residential properties in the Town of Woodway that are zoned R-14.5 and R-9600. These buildings will need to comply with the building height and setback requirements of SCC 30.34A.040.

(Ex. K-4, p. 4, Urban Center Development Comment (v)).

The Application is vested to former SCC 30.34A.040(2)(a), which provides:

> Building or portions of buildings that are located within 180 feet of adjacent R-9600, R-8400, R-7200, T or LDMR zoning must be scaled down and limited in building height to a height that represents half the distance the building or that portion of the building is located from the adjacent R-9600, R-8400, R-7200, T or LDMR zoning line (e.g. a building or portion of a building that is 90 feet from R-9600, R-8400, R-7200, T or LDMR zoning may not exceed 45 feet in height).

The Urban Plaza portion of the development abuts the Town of Woodway zones of R-14,500 and Urban Restricted (UR). (Ex. N-1, p. 9). On the dates of application, February 1, 2011, and March 4, 2011, the UR-zoned property,which has subsequently been annexed

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into the Town of Woodway, was located in unincorporated Snohomish County and zoned R-9600. (Ex. N-2, at pp. 1, 11).

The Town of Woodway zoning categories of R-14,500 and UR are functionally similar to the Snohomish County zoning categories of R-9600, which represents the least dense urban residential zone for single-family homes in Snohomish County. (Ex. N-2, p. 11; SCC Table 30.21.020).

On April 26, 2018, the Applicant submitted to PDS a zoning code variance request from SCC 30.34A.040(2) for three of the planned Urban Plaza buildings (UP-T1, UP-T2, UP-T3). The zoning code variance request did not identify or include information for the two service buildings in the Urban Plaza, identified as Service Building 1 and Service Building 2. (Ex. K-29, K-37). The Applicant did not submit a separate variance request for Service Buildings 1 and 2. (Ex. K-29 and K-37 do not specifically identify the Service Buildings in the discussion of the variance criteria or in the diagrams and illustrations that follow).

According to the Applicant's Plan Diagram for the Urban Plaza, Service Building 1 and Service Building 2 appear to be roughly 20 feet from the Town of Woodway zoning category of R-14,500. (Ex. A-29, p. 2). The PDS Staff Recommendation dated April 17, 2018, identify the same two buildings (identified as Retail -1 and Retail -2) as approximately 30 feet from the Town of Woodway R-14,500 zoning category. (Ex. N-2, p. 30). According to SCC 30.34A.040(2), the heights of these buildings are limited to half the distance from the adjacent low-density residential zoning. Regardless of whether the buildings are 20 feet or 30 feet from the R-14,500 zoning category, the building heights of 35 feet are not consistent with SCC 30.34A.040(2)(a). (Ex. A-40, p. 10).

Due to the timing of the Applicant's variance request on April 27, 2018, PDS was unable to provide public notice in advance of the May 16, 2018, Type 2 public hearing in order to consolidate the variance request with the underlying permits. (Ex. N-2, pp. 10-11).

In the PDS Supplemental Staff Recommendation, dated May 9, 2018, PDS provided analysis of the Applicant's variance request for buildings UP-T1, UP-T2, and UP-T3. In the Supplemental Staff Recommendation, PDS determined that the Applicant had not demonstrated compliance with the decision criteria for a variance. (Ex. N-2, pp. 11-12).

In hearing testimony, the Applicant's Senior Project Designer, Carsten Stinn, conceded that the variance request that he drafted for buildings UP-T1, UP-T2, and UP-T3 did not satisfy certain variance criteria. (Carsten Stinn Testimony, May 23, 2018, 11:22:28 - 11:23:38 a.m. (preferred design is not a "substantial property right" under variance criterion #2)).

The Applicant's Senior Project Designer, Carsten Stinn, also clarified that the current design in the site plan is not the only design that can satisfy the County's minimum floor area ratio requirement for Urban Centers. Mr. Stinn confirmed that there are other design possibilities that can meet the minimum floor area ratio requirement for Urban Centers.

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(Carsten Stinn Testimony, May 23, 2018, 11:36:10 – 11:36:25 a.m; May 23, 2018, 11:37:17 – 11:37:33 a.m.)[2]

The five buildings (UP-T1, UP-T2, UP-T3, Service Building 1, and Service Building 2) proposed in the Urban Plaza portion of the development constitute a substantial element of the Application and include every building proposed for Phase 2 of the development. (Ex. A-40, p. 6, 10, 32-34; Ex. A-39).

C. FAILURE TO DOCUMENT EVIDENCE FOR ACCESS TO HIGH CAPACITY TRANSIT FOR BUILDING HEIGHTS OVER 90 FEET

The Applicant submitted a land use permit application for an Urban Center site plan on March 4, 2011. (Ex. A-1). The proposed Urban Center development consists of an Urban Plaza, North Village, Central Village, and South Village. (Ex. A-40, pp. 5-13). The Application proposes 46 buildings in the Point Wells Urban Center. (Ex. A-40, pp. 10-13; Ex. B-7, Sheet A-050 (Overall Site Plan); Ex. P-3). Of the 46 buildings, the Application proposes 21 buildings over 90 feet in height (Urban Plaza – 3; North Village – 5; Central Village – 7; and South Village – 6). (Ex. A-40, pp. 10-13; P-3 (The Applicant's materials identify 21 buildings over 90', while PDS identifies 20 buildings over 90')).

Of the 46 buildings proposed in the Application, 21 of those buildings being proposed are over 90 feet in height. (Ex. A-40 at 10-13; P-3). Those 21 buildings are a substantial element of the Point Wells development as they represent nearly half of the structures proposed in the development and include hundreds of residential units. (Ex. A-40 at 10-13).

The Application is vested to former SCC 30.34A.040(1), which provides, in relevant part:

> 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 and the applicant prepares an environmental impact statement

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[2] Carsten Stinn Testimony, May 23, 2018, 11:36:10 – 11:36:25 a.m.
Mr. Otten: Is this the only site design that can meet the minimum floor area ratio for an urban center at this site?
Mr. Stinn: No
Mr. Otten: So there is other possibilities that can meet the floor area ratio?
Mr. Stinn: Correct

Carsten Stinn Hearing Testimony, May 23, 2018, 11:37:17 – 11:37:33 a.m.
Mr. Otten: You can't say that there is no alternative design that satisfies the floor area ratio?
Mr. Stinn: There is no, there are alternate designs that satisfy the floor area ratio …

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pursuant to chapter 30.61 SCC that includes an analysis of the environmental impacts of the additional height on …

In its Revised Urban Center Development Plan Project Narrative, the Applicant states that an additional 90 feet of building height may be approved under specific conditions. The Applicant provides that "[t]he Point Wells Urban Center Plan assumes full use of [SCC 30.34A.040]." (Ex. A-40, p. 19). The Applicant has included a proposed Sound Transit commuter rail station, which, as of a May 14, 2018, modification to its proposal, includes the station in Phase 1 of the development. (Ex. A-40, p. 6; Ex. H-24, p. 4-8).

The Applicant relies upon the following to satisfy SCC 30.34A.040(1) [2010]: a letter from Sound Transit dated April 13, 2010 (Exhibit H-24, p. 9-10); Appendix A of a Final SEIS which included a Sounder station in the vicinity of Shoreline/Richmond Beach as a "representative project" (Exhibit H-24, p. 1); a letter from Gary Huff of Karr Tuttle to Sound Transit dated July 28, 2014 (Exhibit H-24, p. 1-3); a paragraph in the Revised Supplement to UC Application (Ex. A-38, p. 4); and a description of the proposed station in the Revised Urban Center Development Plan Project Narrative (Ex. A-40, p. 6).

The Applicant's legal counsel, Mr. Huff, represented that the Applicant has not obtained commitments from Sound Transit and BNSF for the Sound Transit commuter rail station because those entities told the Applicant it was too early because there was not an approved project. Mr. Huff claims that this project can be approved without these agreement, and be addressed as a condition of approval. (Gary Huff Testimony, May 16, 2018, 2:32:28 – 2:33:22 p.m.).[3] Mr. Huff also represented that "we reinforced our commitment to fund the Sound Transit station on our property." (Gary Huff Testimony, May 16, 2018, 2:48:48 – 2:48:58 p.m.). Mr. Luetjen, legal counsel for the Applicant, testified about discussions the Applicant had with Sound Transit regarding the possibility of a station. Mr. Luetjen testified that they believed the 2010 letter and 2014 EIS Appendix are sufficient and "we have received no information to tell us that it is not possible" to have a commuter rail station at Point Wells. (Doug Luetjen Testimony, May 24, 2018, 10:57:52 – 10:58:25 a.m.; 11:00:50 – 11:01:05 a.m.).[4] Aside from the April 13, 2010, letter from Sound Transit and

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[3] Gary Huff Testimony, May 16, 2018, 2:32:28 – 2:33:22 p.m.
"But the County's approach takes the form of saying that all issues must be resolved now. That there can't be things like, an agreement to provide Sound Transit service, finance a station, and have that available as a condition of approval. The County wants letters from Sound Transit, it wants letters from Burlington Northern about usage of the tracks. These are all things that we have worked on, but we were told it's too early, come back to us when you have an approved project so that we know that this is real, and we won't be wasting our time. So that's the approach we have taken, that is the only approach we can take. But that doesn't mean, that without these now, that the project can't be approved."

[4] Doug Luetjen Testimony, May 24, 2018, 10:57:52 – 10:58:25 a.m.
"Really, once we received the letter in 2010, and from Sound Transit with the statements they made regarding the feasibility of the project, the possibility of our project having a Sound Transit station. And the fact we were included in the 2014 EIS Appendix. We do not believe that any further work needed to be done at this time because we are not aware of any changes that occurred, in a sense that Sound Transit is still operating a route from Seattle to Everett …."

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one line in Appendix A to a 2014 FSEIS, the Applicant has provided no additional evidence from Sound Transit regarding a Sounder commuter rail station at Point Wells.

To support its proposal for buildings over 90 feet and in an effort to satisfy the requirement of SCC 30.34A.040(1), the Applicant relies on one letter from Sound Transit. (Ex. H-24). The letter is from David Phillip Beal, Planning and Project Development Manager for Sound Transit, to Mark Wells of Paramount Petroleum Corp., dated April 13, 2010. The letter provides a response to Paramount Petroleum concerning the potential for Sounder commuter rail service at the Point Wells site. In the letter, Mr. Beal recognizes that it is part of Sound Transit's mission to provide services to Urban Centers. Mr. Beal also indicates that "[w]hile your property may have adequate room to integrate a station … there are other issues and constraints that would affect our ability to provide commuter rail service in that location." Mr. Beal identifies that he has provided Paramount Petroleum with information regarding Sound Transit's design guidelines for rail stations. The letter provides:

> It would be critical for us to work with the adjoining jurisdictions prior to determining feasibility of such a station and service in the future, and with the BNSF Railway to establish the Sounder Everett-to-Seattle line's capacity to accommodate an additional station. It is important to note that BNSF would also need to approve the design and location of any new station and platform.

The letter provides that a "provisional" station located in the Point Wells/Richmond Beach area was part of Sound Transit's original Ten Year Regional Transit System Plan, known as Sound Move. In addition, the letter indicates that if Paramount Petroleum were to fund the commuter rail station without requiring Sound Transit funding, that could influence the review and timing of a development of a station at Point Wells. (Ex. H-24, pp. 9-10).

The letter from Sound Transit indicates that the agency's policies support providing services to Urban Center. The Sound Transit letter also indicates that other issues and constraints impact Sound Transit's ability to provide commuter rail service at Point Wells and need to be addressed "prior to determining feasibility of such a station and service in the future." Those issues and constraints include: cooperation with adjoining jurisdictions, cooperation with BNSF to determine the rail line's capacity to accommodate an additional station, and BNSF approval of the design and location of a new station and platform. (Ex. H-24, pp. 9-10). The Applicant has not provided information in the application materials that it has addressed the issues or constraints identified by Sound Transit in April 2010. In fact, the Applicant has conceded that they cannot and will not address these issues until after they get approval of their development. (Gary Huff Testimony, May 16, 2018, 2:32:28 – 2:33:22 p.m.; Doug Luetjen Testimony, May 24, 2018, 10:57:52 – 10:58:25 a.m.)

David Killingstad, Principal Planner with the Long Range Planning Division of PDS, testified to his experience working with local transit agencies and his familiarity with long range planning for local transit agencies, including Sound Transit. (David Killingstad

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Hearing Testimony, May 21, 2018, 1:36:53 p.m.). Mr. Killingstad described the progression of Sound Transit's long-range high-capacity transit packages from Sound Move, Sound Transit 2, and Sound Transit 3. Mr. Killingstad explained the significance of Sound Transit 3 – Regional Transit System Plan (Ex. H-27, p. 6), Sound Transit 3 – Appendix A (Ex. H-28, p. 11), and Sound Transit Long Range Plan FSEIS Appendix A (Ex. H-26, p. 10).

Mr. Killingstad testified that Sound Transit 3 includes only Sounder North Parking, which encompasses parking improvements at Edmonds and Mukilteo commuter rail stations, as the sole improvements listed under Sounder commuter rail in the Snohomish County Subarea. Mr. Killingstad testified that the exclusion a Sounder commuter rail station at Point Wells in Sound Transit 3 – Appendix A (Ex. H-28) means that Sound Transit is not doing any planning, design, engineering, or construction for a station at Point Wells. Mr. Killingstad testified that the Sound Transit 3 planning horizon extends out to 2041. (David Killingstad Testimony, May 21, 2018, 1:46:40- 1:49:45 p.m. (regarding Ex. H-28)).

Mr. Killingstad testified regarding the significance of Sound Transit Long Range Plan FSEIS – Appendix A (Ex. H-26). Mr. Killingstad testified that the inclusion of projects in Appendix A, including the inclusion of a Sounder station at Shoreline/Richmond Beach, provides the Sound Transit Board with a detailed list of projects and provides the Board with additional information from which to render a decision about which projects should, or should not, be included in the Sound Transit 3 package. Mr. Killingstad testified that the inclusion of the Point Wells station, and other stations listed in Appendix A is "merely intended to provide the Board with more information from which to render a decision. It does not imply that it is, or isn't, going to be constructed. Rather, it's, here as additional environmental information from which, for the Board to make a more informed decision." (David Killingstad Testimony, May 21, 2018, 1:53:14 – 1:53:33 p.m. (regarding Ex. H-26, p. 10)). Mr. Killingstad testified that Appendix A is part of the programmatic-level SEPA conducted by Sound Transit. (David Killingstad Testimony, May 21, 2018, 1:52:00 – 1:52:15 p.m.).

Mr. Killingstad testified that the stations or improvement that Sound Transit has committed to constructing are located in H-28, which is the Appendix to H-27. (David Killingstad Testimony, May 21, 2018, 1:54:10 - 1:54:57 p.m.).

With regard to the letter from Sound Transit dated April 13, 2010, Mr. Killingstad testified that since the 2010 letter the Applicant is relying upon, Sound Transit has moved forward with Sound Transit 2 and Sound Transit 3 long range capital improvement plans, which do not include a station at Point Wells. (David Killingstad Testimony, May 21, 2018, 2:28:31 – 2:29:13 p.m.).[5]

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[5] David Killingstad Testimony, May 21, 2018, 2:28:31 – 2:29:13 p.m.
"Yes, but again the other context of this letter is that it is from 2010. The decision on Sound Transit 3 was in 2016. So certainly, we all know, the passage of time, can lead to a lot of different decisions, and post-2010 was Sound Transit 2 and then ultimately Sound Transit 3. So yes, Sound Transit made the statement in 2010

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The April 13, 2010, letter from Sound Transit to the Applicant indicates Sound Transit provided the Applicant information regarding Sound Transit's design guidelines for rail stations. (Ex. H-24, p. 9). The Applicant has not provided documentation in the application file that its proposed Sound Transit commuter rail station satisfies Sound Transit's design guidelines for rail stations. The Applicant's depictions of the station and testimony provided at the hearing indicates that the Applicant's proposed Sound Transit commuter rail station does not provide parking for users of the proposed commuter rail station. (Ex. H-24, pp. 4-8).

The Applicant provided a letter dated July 28, 2014, from Gary Huff of Karr Tuttle to Sound Transit, requesting inclusion of a Sounder station be addressed in the Sound Transit 3 Final EIS and requesting that it eventually be included in the long range service plan. (Ex. H-24, pp. 1-3). In the letter, the Applicant recognizes that construction of a Sounder rail station would be contingent on the Applicant committing to fund construction of the station. (Ex. H-24, p. 2). The Applicant requests that a station at Point Wells be included in the final EIS. (Ex. H-24, p. 3). The letter is authored by Mr. Huff, and excerpts only portions of the April 13, 2010, letter from Sound Transit. The July 28, 2014, letter does not provide any information to satisfy the requirements of SCC 30.34A.040(1).

PDS included a more recent communication in the record in the form of an email communication, dated May 8, 2018, from Kamuron Gurol, the North Corridor Development Director for Sound Transit. (Ex. H-30). The communication provides:

> Sound Transit staff are not aware of additional recent contact between BSRE and the agency since the Long Range Plan FEIS. The ST3 package approved by voters in 2016 does not include a station at Point Wells. To construct a station there (or any other additional location along that corridor) would require an additional easement from Burlington Northern Railroad, something that likely would be very challenging to obtain.

In the letter, the Sound Transit representative indicated he is not aware of additional recent communications from the Applicant since 2014 and points out that the Sound Transit 3 package did not include a station at Point Wells. The Sound Transit representative also mentioned that a station along the Sounder North corridor would require an additional easement from Burlington Northern Railroad, which would be challenging to obtain. (Ex. H-30). The email communication indicates that from Sound Transit's perspective, the Applicant has not taken any additional steps with the agency to plan for a commuter rail station at Point Wells.

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but their correspondence since then lead them to draw a different conclusion or there is a different process in which to consider adding a station to the line. Which mentioned earlier, still require Board approval and working with Burlington Northern Santa Fe."

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Mr. Countryman testified that the language in SCC 30.34A.040(1) regarding being "located near a high capacity transit route or station" would include SWIFT bus rapid transit service operated by Community Transit under the SCC 30.91H.108 definition of "high capacity transit." Mr. Countryman testified that the Applicant has not proposed satisfying SCC 30.34A.040(1) with bus rapid transit. (Ryan Countryman Testimony, May 22, 2018, 9:08:55 – 9:10:45 a.m.).

In *City of Shoreline v. Snohomish County*, Coordinated Case Nos. 09-3-0013c and 10-3-0011c, Corrected Final Decision and Order (May 17, 2011), the Growth Board ruled on the validity of County's comprehensive plan polices regarding transit access criteria for the Point Wells Urban Center. The Board agreed that "high capacity transit" is not satisfied by an urban center on a commuter rail line without a stop. (Ex. O-4a, p. 46).

Mr. Countryman testified regarding the Central Puget Sound Growth Board's decision in *City of Shoreline v. Snohomish County*, Coordinated Case Nos. 09-3-0013c and 10-3-0011c, Corrected Final Decision and Order (May 17, 2011). (Ex. O-4a, pp. 36-87). Mr. Countryman testified that PDS would not take a position on "high capacity transit" that is directly in conflict with the Growth Board's decision on similar language in the County's comprehensive plan policies concerning Point Wells. (Hearing Testimony Ryan Countryman, May 22, 2018, 9:12:50 – 9:12:59 a.m.). The Applicant's assertion that it satisfies the high capacity transit requirement because the site is bisected by the Sounder commuter rail line is not consistent with Growth Board reasoning, PDS's position or SCC 30.34A.040(1).

The Applicant has not provided a binding legal document or memorandum of understanding between the Applicant and Sound Transit regarding funding of a commuter rail station at Point Wells in the application file. The Applicant also has not provided a document in the application file under which Sound Transit commits to providing high-capacity transit service to a proposed station at Point Wells on the Sounder North commuter rail line.

Record evidence indicates that Sound Transit would not provide service to a proposed station at Point Wells until a sufficient density was achieved on the site. In his testimony, Mr. Huff noted that Sound Transit will not serve a site until a certain demand is established. Mr. Huff provided that "We have been told that we need about 1,000 occupants on site to justify a stop there. We can reach that fairly early in the project, certainly in phase 2, if not phase 1." (Gary Huff Testimony, May 16, 2018, 2:57:00 – 2:57:17 p.m.). The Applicant's Revised Supplement to the UC Application provides Sound Transit would not be interested in providing service until "a sufficient on-site population is achieved." (Ex. A-38, p. 4). As of May 15, 2018, the Applicant has moved construction of the proposed commuter rail station to Phase 1, but has not addressed the issue that Sound Transit will not serve a development without sufficient density. (Ex. A-40, p. 6; Ex. H-24, p. 4-8).

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The Applicant has not proposed a development or phasing plan that would only allow for buildings over 90 feet after Sound Transit had established high capacity transit service at the site. In discussing compliance with SCC 30.34A.040(1), Mr. Huff stated that "there are many ways that this can be handled. We could say that no buildings over 90 feet could be built until there is a binding commitment for service at the station. We could, we could re-phase the project such that the first phase only includes buildings up to 90 feet. That still provides a substantial amount of density." (Gary Huff Testimony, May 16, 2018, 2:59:07 – 2:59:31 p.m.).

However, the Applicant did not submit application materials that includes a proposal not to construct buildings over 90 feet until a binding commitment is in place for Sound Transit service. The Applicant also has not provided a phasing plan that includes only construction of buildings under 90 feet in the first phase.

The Applicant included in its Review Completion Letter Response that until the Applicant enters into a binding contract for the construction of a Sounder station at Point Wells, "BSRE shall provide and operate a water taxi for service between the project and the Edmonds Sounder Station." (Ex. G-14, p. 32). The Applicant provides that this method fulfills the requirement that Point Wells be served by high capacity transit. (Ex. G-14, p. 32). The Applicant's UC Project Narrative dated April 24, 2018, described the pier on the project site as including "a potential docking location for a local ferry service." (Ex. A-32, p. 31). The Applicant's Revised UC Project Narrative dated May 14, 2018, described the pier on the project site but the reference to a local ferry service was removed. (Ex. A-40, p. 31). A passing reference to a potential water taxi or passenger ferry with no additional information cannot be considered part of the project proposal.

Testimony provided by Ryan Countryman on May 21, 2018, referenced Exhibit D-11, an Aquatic Lands Lease. The Washington State Department of Natural Resources owns the aquatic lands adjacent to the Point Wells development proposal and the land on which the pier is located. The Aquatic Lands Lease between the Washington State Department of Natural Resources and Chevron U.S.A. Inc. describes the Permitted Use as "[t]enant shall use the Property for Commercial ship/barge berthing and loading, off-loading, and bunkering of cargo (The 'Permitted Use'), and for no other purpose." (Ex. D-11, p. 1). Passenger ferry service or water taxi are not uses currently allowed under the Aquatic Lands Lease that applies to the usage of the pier at Point Wells.

If a water taxi of ferry service is considered commercial, it is prohibited under the SMMP. (Ex. P-12, p. F-29, Commercial Development, Conservancy Environment Regulation #1). If the water taxi service is not a commercial operation, under the SMMP Compatibility Matrix (Ex. P-12, p. F-2), it is not identified as a use. Shoreline use activities not specifically identified and for which policies and regulations have not been developed are conditional uses. (Ex. P-12, p. F-1). The Applicant has not applied for a shoreline conditional use permit. The Applicant cannot operate a water taxi service or ferry service under the current proposal.

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The Applicant did not indicate or provide evidence of other permits, approvals, agreements, or memoranda of understanding that would be required to operate such a service, or identify the agencies with regulatory authority over passenger ferry service or water taxis.

D. FAILURE TO PROVIDE ADEQUATE PARKING

The Applicant submitted a land use permit application for an urban center site plan on March 4, 2011. (Ex. A-1). The Application is vested to the Urban Center parking regulations in effect at the time of March 4, 2011, application submittal.

The Urban Center parking regulations are set forth in SCC Table 30.34A.050(1). Residential units of less than 1000 square feet require a minimum of 1 parking stall per unit. Senior Housing units require a minimum of 0.5 parking stalls per unit. SCC Table 30.34A.050(1). The term "Senior Housing" was not a defined term in Title 30 SCC at time of application submittal.

On October 3, 2013, the Urban Center parking requirements were recodified in SCC Table 30.26.032(1), and the undefined term "Senior Housing" was replaced in the Table with the defined terms "Retirement apartments" and "Retirement housing." Snohomish County Amended Ord. 13-007, Sept. 11, 2013, Eff. Date Oct. 3, 2013.

The Applicant's Revised Supplement to UC Application identifies that "not less than 1,093 units are planned to be designated as Retirement Apartments (as defined in SCC 30.91R.180) or Senior Housing (SCC 30.91D.190) [sic] (herein 'Senior Units')." (Ex. A-38, p. 3). Based on the oral representations made by the Applicant's legal counsel, Mr. Huff, at the hearing on May 23, 2018, the reference to Senior Housing at SCC 30.91.D.190 was an inadvertent error and the Applicant intended to reference Retirement Housing, which is defined at SCC 30.91R.190.

On May 23, 2018, the Applicant's legal counsel, Mr. Huff, agreed to PDS's definition of Senior Housing for the purpose of parking, which means the Senior Units identified in the Application will comply with Retirement Apartments as defined in SCC 30.91R.180 or Retirement Housing as defined in SCC 30.91R.190. Mr. Huff agreed to provide additional information in the application file reflecting this agreement. (Hearing Testimony, May 23, 2018, 11:17:33 – 11:17:56 a.m.).[6]

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[6] Hearing Testimony, May 23, 2018, 11:17:33 – 11:17:56 a.m.
Hearing Examiner: So, what I hear, is that BSRE has just acceded to the County's definition of Senior Housing for the purpose of parking. And the units cannot be changed in the future, which would then change the parking requirement. So that's where we are?
Mr. Huff: Yes
Hearing Examiner: Mr. Huff says yes.
Hearing Examiner: Mr. Otten, says yes?
Mr. Otten: Yes, it would be nice to have that information in the application file, though.
Mr. Huff: We'll provide that.

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In addition, the Applicant's Revised Supplement to UC Application provided that "[i]f the projected Project Trips are 90% or less than the applicable Project Trips for that phase of development, BSRE may lessen the number of Senior Units so long as the projected Project Trips remain less that [sic] the applicable Trip Limit." (Ex. A-38, pp. 3-4). On May 23, 2018, the Applicant's legal counsel, Mr. Huff, agreed that the Applicant will not change the number of Senior Units in the Urban Center in the future. Mr. Huff agreed to provide additional information in the application file reflecting this agreement. (Hearing Testimony, May 23, 2018, 11:17:33 – 11:17:56 a.m (testimony provided above)).

On May 23, 2018, PDS's legal counsel, Mr. Otten, agreed that as the result of the Applicant's agreement to use PDS's definition of Senior Units, as being comprised of Retirement Apartments as defined in SCC 30.91R.180 or Retirement Housing as defined in SCC 30.91R.190, and the Applicant's agreement not to change the number of Senior Units in the Urban Center in the future, that PDS no longer identified parking as an issue of "substantial conflict" with County Code. (Hearing Testimony, May 23, 2018, 11:17:33 – 11:17:56 a.m. (testimony provided above)).

E. FAILURE TO ADDRESS SHORELINE MANAGEMENT REGULATIONS

The Applicant submitted an application for a shoreline substantial development permit on March 4, 2011. (Ex. A-1). The application identified a dock and small marina as "project amenities." A revised permit application was submitted on May 15, 2018, a day before the hearing in this matter began. (Ex. A-40). The revised application identified shoreline enhancement and construction of an esplanade to provide enhanced public access to the shoreline, but removed the dock and small marina as project amenities. In neither document are residential structures described as part of the shoreline substantial development permit application.

The Applicant has not submitted an application for a shoreline conditional use permit or a shoreline variance.

The regulations applicable to the shoreline substantial development permit application are the Shoreline Management Act (chapter 90.58 RCW), the Snohomish County Shoreline Management Master Program (SMMP) as updated June 1993 (Ex. P-12), chapter 30.44 SCC as it existed on March 4, 2011, and chapter 30.62A SCC as it existed on March 4, 2011.

The Applicant submitted a narrative to describe how the proposed project was consistent with Shoreline Management Act policies in June 2010. (Ex. A-24). The Applicant submitted a revised narrative, dated May 11, 2018, to PDS. (Ex. A-36). Neither document identifies the policies from the Shoreline Management Master Program (Ex. P-12) that

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Hearing Examiner: He will provide that.

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apply to the proposed project and whether the proposed project is consistent with those applicable policies.

Shoreline jurisdiction for marine waters is determined by measuring 200 feet in all directions as measured on a horizontal plane from the Ordinary High Water Mark (OHWM). RCW 90.58.030(2)(d) & (e). The Applicant does not accurately depict the boundary of shoreline jurisdiction for the project, as indicated in Ex. B-7, sheet C-203. The Applicant measures the boundary of shoreline jurisdiction for the project from Mean Higher High Water rather than the OHWM, as required by statute.

The proposed project is within two environment designations, pursuant to the SMMP. From the OHWM shoreward, the project is in the Urban Environment. From the OHWM waterward, the project is in the Conservancy Environment. (Randy Middaugh Testimony, May 22, 2018, 9:44:10 – 9:44:30 a.m.).

Shoreline Stabilization Not Allowed for New Residential Structures; Residential Development Dependent on Shoreline Protection Measures Is Not Allowed Without a Variance

The SMMP provides: "Residential development shall not be approved for which flood control, shoreline protection measures, or bulkheading will be required to protect residential lots unless a variance is obtained." (Ex. P-12, p. F-60, Residential Development, General Regulation #5). Similarly, SCC 30.62A.330(2)(a)(i) provides: "Projects shall be sited and designed to prevent the need for shoreline or bank stabilization and structural flood hazard protection measures."

The proposed project contains two features that could be considered shoreline stabilization or flood hazard protection. The first is a concrete wall to be placed below grade at the edge of the proposed esplanade. (Ex. C-25). The second is the esplanade itself.

The Applicant submitted a Coastal Engineer Assessment to PDS on April 27, 2018. (Ex. C-25). The assessment was prepared by the firm Moffatt & Nichol. The assessment provides two figures titled "Recommended shoreline protection for proposed modifications" at two different shoreline locations. (Ex. C-25, p. 49). The figures depict the concrete wall. The concrete wall is described as follows: "Finally, a concrete wall is recommended to be placed below grade at the edge of proposed esplanade extending down at least 1 foot deeper than Layer 2 to prevent undermining of esplanade if erosion occurs over time under repeated extreme storms." (Ex. C-25, p. 48). On its face, the assessment describes the concrete wall as "shoreline protection" for the purpose of preventing undermining of the esplanade "if erosion occurs over time." PDS Principal Environmental Planner Randy Middaugh testified that the concrete wall supporting the esplanade is a type of shoreline stabilization. (Randy Middaugh Testimony, May 22, 2018, 9:59:28 - 9:59:49 a.m.).

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In the Applicant's opening presentation, Dan Seng stated the esplanade would serve "as a levy." (Dan Seng Testimony, May 16, 2018, 3:31:30 – 3:32:00 p.m.) The elevation of the top of the proposed esplanade was recommended to be set to +16.0 feet, NAVD88 "to prevent overtopping for 50-year return period storms." (Ex. C-25, p. 51).

Further testimony was provided by Dan Seng on May 23, 2018, where he stated that his "understanding" was that the esplanade and the wall designed to support the esplanade did not constitute flood protection or shoreline protection. (Dan Seng Testimony, May 23, 2018, 2:24:50 – 2:26:20 p.m.).

The Applicant submitted a Response to Point Wells Urban Center Supplemental Staff Recommendation to PDS on May 15, 2018. (Ex. G-24). The response was authored by Bill Gerken, a Senior Coastal Engineer at Moffatt & Nichol. It stated: "The proposed shoreline modifications eliminate the need for typical shore protection by design. The esplanade is set back from the shore far enough, and placed at a sufficient elevation, to allow for the creation of an expanded beach area capable of dissipating wave energy like a natural beach." (Ex. G-24, p. 2). Regarding the concrete wall, the response stated: "A concrete edge beam/below grade separation wall is included as an integral part of the shoreside esplanade edge. This thickened edge beam/separation wall will provide structural support and separation between the sub-grade under the promenade and the beach fill material and is not considered a shoreline stabilization measure." (Ex. G-24, p. 3).

On May 24, 2018, Mr. Gerken testified that "the intent of the design wasn't to provide shoreline protection" but rather "a stable expanded enhanced shoreline with a sufficient crest elevation and crest setback to prevent overtopping" (Bill Gerken Testimony, May 24, 2018, 9:12:29- 9:12:50 a.m.).

The original statement of Mr. Seng during testimony on May 16, 2018, is inconsistent with his subsequent statement during testimony on May 23, 2018. Mr. Seng is an architect and not an engineer. (Dan Seng Testimony, May 23, 2018, 2:20:07 – 2:20:33 p.m.).

The original Coastal Engineering Assessment specifically proposed "recommended shoreline protection," including a concrete wall designed to "prevent undermining of esplanade if erosion occurs over time." (Ex. C-25, pp. 48-49). Mr. Gerken subsequently authored a report stating the concrete wall "is not considered a shoreline stabilization measure" (G-24, p. 3) and testified there was a misunderstanding between the terms "shoreline stabilization" and a "stable shoreline," and that the project is not providing any "conventional" or "traditional shoreline protection." (Bill Gerken Testimony, May 24, 2018, 9:14:25 – 9:14:37 a.m. & 9:16:05 – 9:16:47 a.m.). The proposed shoreline modifications were not changed between Mr. Gerken's original and subsequent statements. The change in characterization of the concrete wall is not supported by any corresponding change in design of the esplanade. The design of the esplanade to include a concrete wall to prevent erosion is considered shoreline stabilization and is inconsistent with the SMMP

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(Ex. P-12, p. F-60, Residential Development, General Regulation #5) and SCC 30.62A.330(2)(a)(i).

Commercial Uses on Pier Not Allowed Except Certain Low Intensity Recreational Developments

The pier is located in the Conservancy Environment. (Ex. N-2, p. 19; Randy Middaugh Testimony, May 22, 2018, 9:44:10 – 9:44:30 a.m.).

The SMMP provides: "Commercial development shall be prohibited on conservancy shorelines EXCEPT for those low intensity recreational developments which do not substantially change the character of the Conservancy Environment." (Ex. P-12, p. F-29, Commercial Development, Conservancy Regulation #1). The SMMP also provides: "Any commercial structure, except one which requires or is dependent on direct, contiguous access to the water, shall be set back from the ordinary high water mark by a minimum of 100 feet. The removal of natural vegetation and the alteration of topography shall be kept to a minimum. The need for such activities shall be documented in the permit application." (Ex. P-12, p. F-29, Commercial Development, Conservancy Regulation #2).

The most current project narrative for the proposed project, dated May 14, 2018, provides the following description of activities on the pier: "Pier will incorporate water dependent uses utilizing the existing renovated structures, which could include small water craft rental, fishing supplies, café, public art walk, and access to a floating dock used by non-motorized watercraft." (Ex. A-40, p. 31). The need for any of these activities is not documented in the permit application, which is not consistent with SMMP Commercial Development, Conservancy Regulation #2.

On May 23, 2018, Dan Seng testified that it was not his intent to have "commercial uses to generate profits" on the pier and that such uses should be removed from the proposed project. (Dan Seng Testimony, May 23, 2018, 2:23:40 – 2:24:43 p.m.).

Testimony from Dan Seng indicated all commercial uses were meant to be removed from the project narrative. This narrative is the most complete description of the project. Until all commercial activities are removed from all project application materials, or demonstrated to be necessary, water-dependent *and* low intensity recreational developments which do not substantially change the character of the Conservancy Environment, they are inconsistent with SMMP Commercial Development, Conservancy Regulations #1 and #2.

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F. FAILURE TO COMPLY WITH CODE PROVISIONS REGARDING CRITICAL AREAS

The regulations applicable to review of the project's compliance with critical areas regulations are chapters 30.62A and 30.62B SCC as they existed on March 4, 2011.

The first Critical Areas Report submitted by the Applicant is dated January 2011. (Ex. C-37). The most recent Critical Areas Report was submitted by the Applicant on April 27, 2018. (Ex. C-30).

Development Activities in a Landslide Hazard Area or Its Setback Not Allowed Without a Deviation

SCC 30.62B.340(1) provides: "Development activities, actions requiring project permits and clearing shall not be allowed in landslide hazard areas or their required setbacks unless there is no alternate location on the subject property."

Structures must be set back from landslide hazard areas unless PDS approves a deviation request. Setbacks are established in SCC 30.62B.340(2). For the purpose of the proposed development, the applicable setback is the height of the slope divided by two. Partially in response to the Oso landslide, the applicable setback was modified by Amended Ordinance No. 15-035 and is now two times the height of the slope. (Ex. N-2, p. 22). The supplemental staff report of PDS states that although the proposed project is not subject to the new setback requirement, the new requirement "emphasizes the importance of strictly adhering to the deviation criteria" applicable to development vested to the less restrictive setback requirement. (Ex. N-2, p. 22).

Deviations from setback requirements are allowed only when an applicant demonstrates the following: (1) there is no alternate location for the structure on the subject property; and (2) a geotechnical report meeting the requirements of SCC 30.62B.320 demonstrates that the alternative setbacks provide protection which is equal to that provided by the standard minimum setbacks. SCC 30.62B.340(2)(b).

The project site contains landslide hazard areas on the east side of the railroad tracks. The landslide hazard areas and their setbacks are depicted on Sheet A-051 of Exhibit B-7. The proposed secondary access road, retaining wall, and the entire Urban Plaza phase of the development are all within a landslide hazard area or its setback.

In its April 2013 project review letter, PDS informed the Applicant that development activities were not allowed within a landslide hazard area or its setback. The letter asked the Applicant to address this issue. (Ex. K-4, p. 7).

John Bingham, an engineer with HartCrowser, was not asked until April 2018 by the Applicant to prepare a deviation request from landslide hazard area requirements. (John Bingham Testimony, May 23, 2018, 9:06 50 – 9:07:13 a.m.). On April 27, 2018, the

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Applicant submitted a deviation request to PDS prepared by John Bingham. (Ex. C-27). The request relies on a Subsurface Conditions Report also submitted on April 27, 2018. (Ex. C-33). The deviation request addressed why there is no alternative location for a secondary access road. (Ex. C-33, p. 3). It did not address why there was no alternative location for any other development proposed in the landslide hazard area and its setback.

The supplemental staff report submitted by PDS identified several concerns with the deviation request and the Subsurface Conditions Report supporting the request. (Ex. N-2, pp. 21-22). To address those concerns, the Applicant submitted a revised deviation request to PDS on May 15, 2018, the day before the hearing commenced. (Ex. A-37).

A deviation to landslide hazard area requirements is granted by PDS. SCC 30.62B.340(2). That authority is delegated to the Chief Engineering Officer, Randolph Sleight. (Randolph Sleight Testimony, May 22, 2018, 11:05:35 – 11:06:15 a.m.). Mr. Sleight authored a memo regarding the original deviation request. (Ex. K-39). He also provided oral testimony at the hearing.

Since 2007, Mr. Sleight has granted only three or four deviation requests, and those requests were for single family residences. (Randolph Sleight Testimony, May 22, 2018, 11:06:26 – 11:08:08 a.m.). The sum of Mr. Sleight's testimony is that he cannot grant the deviation request for any of the proposed development.

The first criterion that must be met to grant a deviation request is whether there is "no alternate location" for the proposed structures. SCC 30.62B.340(2)(b)(i). Both PDS and the Applicant appear to divide the deviation request into two components to analyze this criterion, one component being the secondary access road, and the second component being all other development within the landslide hazard area and its setback.

The original deviation request briefly addressed alternate locations for the secondary access road. (Ex. C-27, p. 3). The revised deviation request expanded on that discussion. (Ex. A-37, pp. 3-4). Mr. Sleight agrees the required secondary access road will need to be located in the landslide hazard area, and that this criterion is met for the secondary access road. (Randolph Sleight Testimony, May 22, 2018, 11:14:22 – 11:15:55 a.m.).

The original deviation request did not address alternate locations for other development in the landslide hazard area or its setback at all. (Ex. C-27). The revised deviation request briefly touched on this issue (in two sentences). However, it only addressed the multi-modal transportation center, and no other proposed structures in the Urban Plaza phase of the project. The revised deviation request deferred to the project architect (Perkins + Will) and the Urban Center Zoning Code Variance Request submitted by the Applicant on April 27, 2018. (Ex. C-27, p. 6). John Bingham, the author of the deviation requested, stated that he never read the variance request. (John Bingham Testimony, May 23, 2018, 9:10:44 – 9:10:59 a.m.).

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The Urban Center Zoning Code Variance Request referenced in the deviation request was submitted to PDS on April 27, 2018. (Ex. K-37). The purpose of the variance request was to demonstrate compliance with the variance criteria contained in SCC 30.43B.100 to receive a variation to building height and setbacks contained in SCC 30.34A.040. The variance request does not contain a discussion pertaining to whether alternate locations are available for the development activities in the Urban Plaza phase of the project. The variance request does not indicate it was submitted for the purpose of satisfying the first criterion in SCC 30.63B.340(2)(b) for a deviation request.

Carsten Stinn, one of the project architects with Perkins + Will, testified regarding the Urban Center Zoning Code Variance Request. Mr. Stinn conceded that there are alternate locations for the structures proposed in the Urban Plaza phase of development:

> Mr. Otten: Mr. Stinn, is it possible to design the site to avoid locating the residential structures and bus facilities on the upper bench?
>
> Mr. Stinn: It's possible.
>
> Mr. Otten: I think before you said it's not practicable but you didn't say it was impossible, right?
>
> Mr. Stinn: I hope I didn't say it was impossible.
>
> Mr. Otten: No, you didn't. Have you attempted to design the site to avoid locating residential structures and bus facilities on the upper bench?
>
> Mr. Stinn: We have in the beginning of the project in the design process.
>
> Mr. Otten: Did you submit those application materials to the County?
>
> Mr. Stinn: We did not.

(Carsten Stinn Testimony, May 23, 2018, 11:32:08 – 11:32:48 a.m.; *see also* Carsten Stinn Testimony, May 23, 2018, 11:33:30 – 11:34:52 a.m.).

Mr. Stinn's colleague, Dan Seng, also confirmed the possibility of locating development proposed for the upper bench (Urban Plaza) elsewhere on the project site. He testified that alternative locations for the residential and commercial development on the upper bench were considered. However, such alternatives were rejected by the design team and the Applicant based primarily on urban design considerations. Mr. Seng did not say such alternatives were not possible. (Dan Seng Testimony, May 23, 2018, 2:33:46 – 2:35:35 p.m.).

Based on testimony provided by the Applicant's witnesses, there are alternative locations on the subject property for the proposed Urban Plaza structures. The deviation request does not meet the first criterion under SCC 30.62B.340(2)(b)(i) for any development activities other than the secondary access road. The development activities consisting of the Urban Plaza phase of the project are significant and material to the entire proposal.

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The second criterion that must be met to grant a deviation request is that a geotechnical report meeting the requirements of SCC 30.62B.320 must demonstrate that the alternative setbacks provide protection which is equal to that provided by the standard minimum setbacks. SCC 30.62B.340(2)(b)(ii). The analysis for this criterion would be the same for both the secondary access road and the remaining development activities proposed for the upper bench (Urban Plaza). (Ex. A-37, p. 6; Ex. K-39, p. 2).

The hillside on which the secondary access road will be located contains soils with a low cohesion factor. Those soils are "very bad" for construction. (Randolph Sleight Testimony, May 22, 2018, 11:21:40 –11:23:16 and 11:31:48 – 11:32:20 a.m.).

In Snohomish County, development must be designed to meet certain factors of safety. For static conditions, the factor of safety is 1.5; the factor of safety for overturning and sliding for retaining walls is also 1.5. For pseudo-static conditions (simulated seismic event that is modeled), the factor of safety is 1.1. (Randolph Sleight Testimony, May 22, 2018, 11:27:10 – 11:29:35 a.m.). Figures 22a and 23b in Exhibit A-37, the May 18, 2018, revised deviation request, depict a retaining wall that achieves the required factors of safety. The figures were intended to demonstrate that the second criterion for granting a deviation request is satisfied. (Randolph Sleight Testimony, May 22, 2018, 11:40:27 – 11:40:45 a.m.).

After reviewing the Applicant's revised deviation request, Mr. Sleight's issues regarding the retaining wall fell into three categories: (1) the retaining wall will be constructed in Phase 1 of project while the Urban Plaza building foundations supporting the retaining wall will not be constructed until Phase 2 of the project; (2) there are no plans for collection and distribution of groundwater; and (3) the deviation request does not "show its work" for the retaining wall. (Randolph Sleight Testimony, May 22, 2018, 11:41:20 – 11:45.30 a.m.).

On the first issue, Figures 22a and 23b of Exhibit A-37 indicate that the building basement floors will support lateral earth pressures below existing grade. The building basement floors will be constructed in Phase 2 of the project, while the retaining wall will be constructed in Phase 1 of the project. This was an inconsistency that Mr. Sleight could not reconcile to determine that the second criterion for granting a deviation request was met. (Randolph Sleight Testimony, May 22, 2018, 12:03:20 – 12:04:17 p.m.). John Bingham, the author of Exhibit A-37, provided testimony on May 22, 2018, regarding how earth would provide lateral support for the retaining wall until it was excavated for Phase 2 construction. Mr. Bingham also testified that he prepared a report dated May 18, 2018, that addressed this issue, among others. (John Bingham Testimony, May 23, 2018, 9:17:55 – 9:20:28 a.m.). This report was never provided to PDS.

On the second issue regarding groundwater, Figures 22a and 23b of Exhibit A-37 depict with the letter "W" where seeps and springs are coming out on the hillside where the secondary access road will be located, in this case off-site. According to Mr. Sleight, "it's very important in a situation of landslides to try to intercept the groundwater prior to this

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potential introducing of groundwater and surface water , you don't want to have surface and groundwater going over the slope and you also want to be able to dewater the hillside to make it more stable." (Randolph Sleight Testimony, May 22, 2018, 11:32:44 –11:33:37 a.m.). The Applicant is not proposing to intercept groundwater off-site. Rather, groundwater will be intercepted at the proposed retaining wall. (Ex. A-37, Figures 22a and 23b). Neither the Subsurface Conditions Report (Ex. C-33) nor the deviation request (Ex. A-37) provide a plan regarding how this will be accomplished. A geotechnical report is required to contain the "proposed method of drainage and locations of all existing and proposed surface and subsurface drainage facilities and patterns." SCC 30.62B.140(2)(j). Because the Subsurface Conditions Report does not address this requirement, the deviation request is not supported by a geotechnical report that complies with SCC 30.62B.140. The failure to comply with the requirement to depict the proposed method of drainage and locations of all subsurface drainage facilities and patterns also does not provide the information Mr. Sleight needs to verify the retaining wall will function as intended. (*See* Randolph Sleight Testimony, May 22, 2018, 11:56:00 – 11:57:06 a.m.).

The most recent Targeted Stormwater Site Plan Report for the proposed project was submitted to PDS on April 27, 2018. (Ex. C-32). The purpose of this report was only to demonstrate how surface water will be collected and distributed. It does not address the collection and distribution of groundwater sources, such as subsurface flows at the location of the proposed retaining wall. (Mark Davies Testimony, May 23, 2018, 10:12:45 – 10:13:13 a.m.).

On the third issue, Mr. Sleight was provided, on May 15, 2018, new figures intending to demonstrate the proposed retaining wall would operate as intended. The new figures only had pieces of the information Mr. Sleight believed necessary to determine whether the second criterion for granting a deviation was met. The figures contain a number representing the resisting force of the retaining wall (78000.00 lbs/ft), as well as factors of safety for the wall that met code requirements for static (1.966) and pseudo-static (1.109) conditions. (Ex. A-37, Figures 22a & 23b). Although the figures contained what might be correct "answers" to the issue of what resisting force of the wall was required to achieve the required factors of safety, there was no corresponding demonstration to Mr. Sleight of how the answers were obtained. The figures raised many questions for Mr. Sleight. For example, Mr. Sleight could not determine whether the model used to generate the figure took into account all relevant surcharges, such as hydrostatic surcharge, traffic surcharge, fill surcharge, rain on snow surcharge, and potential landslide surcharge. (Randolph Sleight Testimony, May 22, 2018, 12:07:15 – 12:12:10 p.m.). John Bingham testified that he did not factor in a traffic surcharge. (John Bingham Testimony, May 23, 2018, 9:23:25 – 9:23:35 a.m.).

Mr. Bingham testified that it is not unreasonable for Mr. Sleight to ask for additional information or to see calculations before making a decision to allow the Applicant to deviate from safety standards. He stated: "I think if I were in his position I probably would

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have a similar response." (John Bingham Testimony, May 23, 2018, 9:53:20 - 9:53:47 a.m.).

Mr. Sleight has authority to grant a deviation from landslide hazard area requirements under SCC 30.62B.340. He testified that he cannot grant such a deviation because he does not have enough information to verify the second criterion for granting a deviation (SCC 30.62B.340(2)(b)(ii)) has been met. Mr. Sleight's concerns are well-founded. Without the deviation, all development within the landslide hazard area and its setback is inconsistent with SCC 30.62B.340 and SCC 30.62B.320(1)(b).

The retaining wall was designed to protect structures and people located behind the retaining wall, and to stabilize the hillside for the purpose of locating a secondary access road there. There are no design measures to protect people on the road in the event of a smaller slide. (Randolph Sleight Testimony, May 22, 2018, 12:19:16 – 12:21:15 p.m.). The lack of protective measures for people on the secondary access road results in an inconsistency between the proposed project and SCC 30.62B.320(1)(b)(i), as it results in an increased risk of death or injury.

Failure to Submit an Adequate Geotechnical Report

A geotechnical report is required to contain the "proposed method of drainage and locations of all existing and proposed surface and subsurface drainage facilities and patterns." SCC 30.62B.140(2)(j). Neither the Subsurface Conditions Report (Ex. C-33) nor the deviation request (Ex. A-37) provide a plan regarding how this will be accomplished. Because the Subsurface Conditions Report does not contain this requirement, it does not comply with the requirements of SCC 30.62B.140.

In its April 2013 project review letter, PDS informed the Applicant that development activities within 200 feet of a seismic hazard area were allowed only with an approved geotechnical report that confirmed the site was suitable for the proposed development and that met the International Building Code and chapter 30.51A. SCC. The review letter requested the geotechnical engineer confirm the site was suitable for the proposed development. (Ex. K-4, p. 7).

The Subsurface Conditions Report identifies areas of liquefiable soils, but does not address the issue of whether the site is suitable for the proposed development. (Randolph Sleight Testimony, May 22, 2018, 12:22:50 – 12:23:14 p.m.). Virtually the entire site is subject to high liquefaction. (Ex. B-7, Sheet 051). The Subsurface Conditions Report defers characterization of the liquefaction hazard for proposed buildings until design (Ex. C-33, p. 36), which would be after the project is approved and when building permit applications are submitted. This defers a determination of whether the site is suitable for the proposed development until after project approval. This is inconsistent with SCC 30.62B.350, which requires submittal of a geotechnical report that "confirms the site is suitable for the proposed development" prior to project approval.

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Does Not Comply with Critical Areas Buffer Requirements for Wetlands, Streams, or Marine Shorelines

Critical areas include wetlands, streams, and marine waters. These critical areas are regulated under chapter 30.62A SCC. As a general matter, development is prohibited within critical areas and their buffers. SCC 30.62A.310(2). Mitigation sequencing is set forth in SCC 30.62A.310(3). Avoiding impacts altogether is preferred. *Id.*

Buffer requirements for wetlands, streams, and marine waters are set forth in SCC 30.62A.320. The project site contains streams, wetlands, and marine shorelines. The Critical Areas Report prepared by David Evans and Associates for the project identifies several streams on site. The streams are depicted in the Critical Areas Report with 50-foot buffers, which means they are typed either Np or Ns. (Ex. C-30, p. 33, Figure 10; SCC 30.62A.320). The project site contains extensive wetlands on the properties east of the BNSF tracks and around the second access road. (Ex. C-30, p. 32). The wetlands were typed Category III systems and provided a 110-foot buffer under SCC 30.62A.320 (Table 2b). (Ex. C-30, p. 32 & p. 33, Figure 10).

All marine waters must be provided a 150-foot buffer. SCC 30.62A.320 (Table 2a). Marine buffers must be measured from the OHWM extending horizontally in a landward direction. SCC 30.62A.320(1)(b). The project plans measure the marine buffer from the Mean Higher High Line instead of the OHWM. David Evans and Associates, Inc. did not delineate the OHWM for the site until March of 2018. (Gray Rand Testimony, May 23, 2018, 1:44:20 – 1:44:42 p.m.). At least four residential structures in the proposed South Village are within the marine buffer if measured correctly from the OHWM. (*See* Ex. B-7, Sheet C-203). The project therefore is inconsistent with SCC 30.62A.310 and SCC 30.62A.320. (*See* Dan Seng Testimony, May 23, 2018, 2:29:00 – 2:30:24 p.m., acknowledging the marine buffer was to be measured by the OHWM but that the OHWM was not available until recently).

Project impacts to wetlands, streams, marine waters, and the buffers of those critical areas are quantified in the Critical Areas Report in Table 15 as follows: Wetland buffers (24,656 square feet); streams (677 square feet; 91 linear feet); stream buffers (16,654 square feet); stream buffer over existing developed area (6,202 square feet); marine shoreline over existing developed area (400,345 square feet). (Ex. C-30, p. 76, Table 15). The Applicant proposes to provide mitigation for these impacts through the use of Innovative Development Design (IDD). (Ex. C-30, pp. 106-107).

The requirements for IDD are contained in SCC 30.62A.350. The Applicant must demonstrate in the Critical Areas Report how the innovative design "will achieve protection equivalent to the treatment of the functions and values of the critical area(s) which would be obtained by applying the standard prescriptive measures contained in [chapter 30.62A SCC]." SCC 30.62A.350(1)(a).

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The functions and values of wetlands, streams, and marine shorelines and their buffers are discussed in SCC 30.62A.220.

To comply with the IDD requirements, a critical areas study must contain a description of the functions and values of the critical areas and buffers being impacted, and compare those functions and values with those being provided by the IDD to ensure that the alternative protections are at least equivalent to the standard prescriptive buffers. (Randy Middaugh Testimony, May 22, 10:08:07 – 10:08:36 a.m.). The Critical Areas Report does not contain that comparison. It does not discuss the different functions and values that would be provided by the standard prescriptive buffers of wetlands, streams, and marine waters. (Gray Rand Testimony, May 23, 1:40:26 – 1:40:54 p.m.). It does not discuss the functions and values that would be provided by the IDD. The report does contain a generalized statement that the IDD "will allow a significant improvement in net ecological function for nearshore Puget Sound compared to maintaining existing buffers from the hardened developed shoreline." (Ex. C-30, p. 106). However, the statement is conclusory and is not supported by analysis. It also does not account for the differences in ecological functions and values provided by wetlands and streams and their buffers compared to those provided by marine waters and buffers. The Applicant's consultant confirmed that those functions and values are different. (Gray Rand Testimony, May 23, 2018, 1:41:46 – 1:41:56 p.m.).

Without providing the analysis required by SCC 30.62A.350, the Applicant's use of IDD cannot be approved. Because the use of IDD cannot be approved, the project is inconsistent with the protections of critical areas and their buffers in SCC 30.62A.310 and SCC 30.62A.320.

Failure to Submit Adequate Habitat Management Plans

The requirements for habitat management plans are contained in SCC 30.62A.460. For any development activity requiring a project permit occurring within the primary association area of a critical species, the PDS Director may require, among other things, an assessment of how the proposed activities will affect the critical species and/or its habitat, and how the proposal will avoid, minimize or mitigate impacts to those critical species and their habitats pursuant to SCC 30.62A.450. In addition, in the absence of an adopted administrative rule governing a listed species, the applicant shall provide a habitat management plan that contains an assessment of best available science applicable to the species, demonstrating how the proposal will provide sufficient protection of the critical species and its habitat.

PDS contends the Applicant's Critical Areas Report does not satisfy the requirements of SCC 30.62A.460. The Applicant contends it does.

Section 8 of the Critical Areas Report is titled "Habitat Management Plan." It sets forth the species that are required to have a habitat management plan and the primary association areas for all vertebrate species that are currently considered critical species in Snohomish County. (Ex. C-30, pp. 102-104). Under SCC 30.62A.460, each of these species identified

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in the Critical Areas Report must have a habitat management plan. Table 21 of the Critical Areas Report identifies the content required to be contained in a habitat management plan, and then refers the reader to other sections of the Critical Areas Report to obtain the content described in the table. (Gray Rand Testimony, May 23, 2018, 1:33:36-1:33:53 p.m.).

In his testimony, Mr. Rand acknowledged that the gray whale is identified on page 102 of the Critical Areas Report as a species that requires a habitat management plan. However, Mr. Rand was unable to identify where the Critical Areas Report contained the required information regarding project impacts on the gray whale or proposed mitigation measures to protect the gray whale. (Gray Rand Testimony, May 23, 2018, 1:33:53-1:39:11 p.m.).

The approach utilized in the Critical Areas Report, if properly executed, may satisfy the requirements of SCC 30.62A.460. The content for each required habitat management plan does not need to exist in a single location in the document. However, as demonstrated during hearing testimony, the Critical Areas Report is deficient in satisfying the criteria for a habitat management plan for at least the gray whale. The proposed project is not consistent with SCC 30.62A.460.

G. APPLICATION EXTENSION

[*These findings are applicable only if the Examiner concludes there are no substantial conflicts between the project application and Snohomish County Code. The extension issue is moot if the project application is denied under SCC 30.61.220.*]

The Applicant submitted a short plat application and land disturbing activity permit application on February 4, 2011, and land use permit application for site plan, shoreline management permit application, and retaining wall – commercial permit application on March 4, 2011. In a review completion letter dated April 12, 2013, PDS identified information the Applicant needed to provide in order for PDS to further evaluate the proposal, which included no less than 62 discrete issues with the initial application. (Ex. K-4).

On March 21, 2014, the Applicant requested its first extension of the application expiration date, which PDS granted. (Ex. G-1). On April 15, 2015, the Applicant requested a second extension of the application expiration date, which PDS also granted. (Ex. G-2; Ex. P-11).

On March 30, 2016, the Applicant requested a third extension. (Ex. G-5). In a letter dated March 31, 2016, PDS granted the extension request for two years and established a June 30, 2018, application expiration date. (Ex. K-13). PDS also provided notice of Snohomish County Amended Ordinance 16-004, which applied new expiration regulations to pending applications, including the Point Wells Application. (Ex. K-13). PDS also notified the Applicant of the June 30, 2018, application expiration date and potential to forward the current application materials for hearing with a recommendation of denial if the Applicant

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did not address the deficiencies in the Application. (Ex. K-13). PDS provided that no further extensions would be granted absent "extraordinary circumstances."

On April 17, 2017, the Applicant provided an application resubmittal to PDS. In a May 2, 2017, letter PDS confirmed receipt of the application resubmittal submitted by the Applicant and provided 1-year advance notice of the upcoming application expiration. (Ex. K-19).

In a review completion letter dated October 6, 2017, PDS recognized that some issues had been addressed by the Applicant but identified that for more than half of the issues noted in the April 12, 2013, review letter, the Applicant failed to provide the required information. (Ex. K-31). Significant reports and critical project details were still missing. PDS once again notified the Applicant of the June 30, 2018, application expiration date and potential to forward the current application materials for hearing with a recommendation of denial if the Applicant did not address the deficiencies in the application. PDS reiterated that no further extensions would be granted absent "extraordinary circumstances." (Ex. K-31, p. 3).

In a separate letter dated October 6, 2017, PDS established a January 8, 2018, date for resubmittal by the Applicant, and indicated it would conduct one final review of the application materials at that time in order to have adequate time to process the application materials prior to the June 30, 2018, expiration date. (Ex. K-32).

By letter dated January 12, 2018, the Applicant submitted a request for a fourth extension of the Application for an extension of the expiration date for a minimum of 2 more years from the June 30, 2018, expiration date. (Ex. G-8). PDS Director, Barb Mock, denied the Applicant's request for a fourth extension by letter dated January 24, 2018. (Ex. K-40).

The following reports were submitted by the Applicant to PDS on April 27, 2018:

- Updated Master Permit Application and Checklist for Land Disturbing Activity permit (A-28).
- Variance Request regarding heights (A-29). This request would allow tall buildings near low density zones and was not received in time for the required public notice period before the hearing.
- EDDS Deviation Request to allow private roads (A-30). This was the first such request submitted to PDS.
- Master Permit Application for Urban Center Development Plan and Shoreline Substantial Development Permit (updated), dated April 27, 2018 (Ex. A-31).
- Point Wells Development Project Narrative (updated), dated April 24, 2018 (Ex. A-32).
- Flood Hazard Permit (A-33). This was the first application submitted to PDS.
- Updated preliminary Short Subdivision Submittal Checklist (A-34).

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- Supplement to Urban Center Narrative (A-35). This document is superseded by A-38, submitted on May 15, 2018.
- Architectural Plans for Urban Center Site Plan dated April 24, 2018 (B-7).
- Secondary Access Road Exhibit (B-8).
- Coastal Engineering Assessment, prepared by Moffatt & Nichol, dated April 23, 2018, for County review (Ex. C-25). This was the first such assessment submitted to PDS.
- Critical Areas Report (updated) by David Evans and Associates, Inc., dated April 2018 (Ex. C-30). This report included new information on the innovative development design proposal and revisions in response to prior PDS comments.
- Targeted Stormwater Site Plan Reports (updated) by MIG/SvR, dated April 27, 2018. These reports eliminate infiltration as a method for handling stormwater runoff for the preliminary Short Plat (Ex. C-31) and the Urban Center site plan (Ex. C-32).
- Landslide Area Deviation Request by HartCrowser, dated April 24, 2018 (Ex. C-27). This was the first such deviation request submitted to PDS.
- Subsurface Conditions Report (updated) by HartCrowser, dated April 20, 2018 (Ex. C-33).
- Fire Turning Studies (C-23).
- Hydrogeologic Report (C-26). This report responds to PDS prior requests for a study of critical aquifer recharge areas.
- Expanded Traffic Impact Analysis (C-28). This document consolidates the previous ETIA which was in several separate documents (C-1 to C-12) without making any other changes.
- Point Wells Remediation Memo (C-29). This memo is the first substantive information from the applicant regarding remediation.

The following reports were submitted by the Applicant to PDS on May 15, 2018, late in the afternoon on the day before the hearing commenced:

- Response to Point Wells Urban Center Supplemental Staff Recommendation from Bill Gerken of Moffatt & Nichol, dated May 15, 2018 (Ex. G-24).
- Point Wells Development Project Narrative (updated), dated May 14, 2018 (Ex. A-40).
- Shoreline Management Act Consistency Narrative (updated), dated May 2018 (Ex. A-36).
- Landslide Area Deviation Request (updated) by HartCrowser, dated May 15, 2018 (Ex. A-37).

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- Supplement to the Urban Center Development Application (A-38).
- Revised Phasing Drawing (Sheet A-056, Exhibit A-39). Revised to show transit station in Phase 1.

On May 16, 2018, PDS requested a one-week continuance of the hearing to review the new application materials submitted on May 15, 2018. The request was denied.

David Evans and Associates, Inc. was not authorized to delineate the OHWM for the site until March of 2018 (Gray Rand Testimony, May 23, 2018, 1:44:20 – 1:44:42 p.m.).

John Bingham, an engineer with HartCrowser, was not asked until April 2018 by the Applicant to prepare a deviation request from landslide hazard area requirements. (John Bingham Testimony, May 23, 2018, 9:06 50 – 9:07:13).

The Shoreline Management Master Program and chapter 30.44 SCC were significantly revised in 2012 to comply with new Washington State Department of Ecology Guidelines by Amended Ordinance No. 12-025. The ordinance also adopted new substantive shoreline regulations in new chapter 30.67 SCC.

Regulations pertaining to geologic hazards and other critical areas were significantly revised in 2015, including setback requirements from landslide hazards and geotechnical report requirements. *See* Amended Ordinance No. 15-035.

Drainage regulations contained in chapter 30.63A SCC and the Snohomish County Drainage Manual were significantly revised in 2016 by Amended Ordinance No. 15-102 to comply with the most recent NPDES Phase I Muncipal Stormwater Permit issued by the Washington State Department of Ecology.

Regulations pertaining to Urban Center Development were amended significantly in 2013 under Amended Ordinance No. 13-007. The Application is vested to a Comprehensive Plan Designation of Urban Center. The Comprehensive Plan Designation for the property was changed to Urban Village in 2012 by Amended Ordinance 12-068.

II. CONCLUSIONS OF LAW

The setback requirements of SCC 30.34A.040(2)(a) apply to buildings that are located within 180 feet of the Town of Woodway zoning categories of R-14,500 and UR. The building heights and locations of Service Building 1 and Service Building 2 are in substantial conflict with SCC 30.34A.040(2)(a). The building heights and locations of buildings UP-T1, UP-T2, and UP-T3 are in substantial conflict with SCC 30.34A.040(2)(a).

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The Applicant's proposal for 21 buildings over 90 feet in its Application based on the presence of the Sound Transit Sounder North commuter rail line bisecting the Point Wells site substantially conflicts with SCC 30.34A.040(1).

The Application's inclusion of 21 buildings over 90 feet substantially conflicts with SCC 30.34A.040(1). The Applicant does not provide evidence that Burlington Northern Santa Fe will allow construction of a Sound Transit Sounder North station on its rail line and does not provide evidence that Sound Transit will commit to provide service to a high capacity transit station located at Point Wells. The Applicant provides no meaningful information regarding water taxi or passenger ferry service to the site.

The Application substantially conflicts with SCC 30.34A.040(1) by proposing the construction of 21 buildings over 90 feet, a substantial element of the project, without sufficient evidence that the project will be located near a high capacity transit station.

Based on the Applicant's accession to PDS's definition of Senior Housing, the Application is not in substantial conflict with the Urban Center parking requirements of SCC Table 30.34A.040(1).

The design of the esplanade to include a concrete wall to prevent erosion is considered shoreline stabilization and is inconsistent with the SMMP (Ex. P-12, p. F-60, Residential Development, General Regulation #5) and SCC 30.62A.330(2)(a)(i). This conflict between the project proposal and code requirements is substantial.

The inclusion in the project proposal of commercial activities on the pier is inconsistent with SMMP Commercial Development, Conservancy Regulations #1 and #2. This conflict between the project proposal and code requirements is substantial.

The request for a deviation from landslide hazard area requirements does not meet the first criterion under SCC 30.62B.340(2)(b)(i) for any development activities other than the secondary access road, and the project is inconsistent with SCC 30.62B.320(1)(b) and SCC 30.62B.340. This conflict between the project proposal and code requirements is substantial.

The request for a deviation from landslide hazard area requirements does not meet the second criterion under SCC 30.62B.340(2)(b)(ii) for any development activities within the landslide hazard area or its setback, and the project is inconsistent with SCC 30.62B.320(1)(b) and SCC 30.62B.340. This conflict between the project proposal and code requirements is substantial.

The Subsurface Conditions Report defers characterization of the liquefaction hazard for proposed buildings until building permit applications are submitted, which is inconsistent with SCC 30.62B.350. This conflict between the project proposal and code requirements is substantial.

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The Applicant does not demonstrate compliance with the Innovative Development Design criteria in SCC 30.62A.350, and the project is inconsistent with the protections of critical areas and their buffers in SCC 30.62A.310 and SCC 30.62A.320. This conflict between the project proposal and code requirements is substantial.

The Critical Areas Report does not satisfy the criteria for a habitat management plan under SCC 30.62A.460. This conflict between the project proposal and code requirements is substantial.

PDS proved, without a reasonable doubt, the substantial conflicts exist between the permit application and the Snohomish County Code. Denial of the project prior to the completion of an EIS for the project is justified in order to avoid incurring needless county and Applicant expense.

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