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SNOHOMISH COUNTY HEARING EXAMINER

BSRE POINT WELLS, LP ,)	
)	NO. 11-101457 LU
Appellant)	
)	BSRE POINT WELLS, LP
v.)	PROPOSED FINDINGS OF FACT
)	AND CONCLUSIONS OF LAW
SNOHOMISH COUNTY PLANNING AND)	
DEVELOPMENT SERVICES,)	
)	
Respondent.)	
)	
)	

BSRE respectfully submits the following Findings of Fact and Conclusions of Law.

I. BRIEF SUMMARY

The project involves development of a 60+ acre parcel of land along the Puget Sound shore in southern Snohomish County (the “County”). The Point Wells site (the “Site”) has been in industrial use since the late 1800s. Shell Oil, Standard Oil and eventually Chevron Texaco operated at the Site until its sale in March 2005 to Paramount of Washington, Inc., a wholly owned subsidiary of Paramount Petroleum Corporation. In August 2006, the ownership of the Site was transferred to Paramount of Washington, LLC, a wholly owned subsidiary of Alon USA Energy, Inc. In June 2010, the property and certain of the improvements, such as the roads and railroad crossings, were sold to a then-affiliated company, BSRE Point Wells, LP (“BSRE”), the project applicant.

1 The County Council in 2009 and 2010 revised its comprehensive plan, adopted Chapter
2 30.34 SSC (the “Urban Center Code”) and designated the Site as an Urban Center. Following the
3 Council’s action, BSRE submitted a short plat application on February 14, 2011, and an urban
4 center development application on March 4, 2011, and other related applications (collectively, the
5 “Applications”) for the development of a mixed use Urban Center, including approximately 3,000
6 residential units, approximately 130,000 square feet of commercial space and a large public access
7 beach (the “Project”). The Project also anticipates a high-capacity passenger stop for Sound
8 Transit commuter rail.
9

10 This matter came before the Hearing Examiner on the County’s recommended denial of
11 BSRE’s Applications pursuant to SCC 30.61.220, which states:
12

13 When denial of a non-county proposal can be based on grounds
14 which are ascertainable without preparation of an environmental
15 impact statement, the responsible official may deny the application
16 and/or recommend denial thereof by other departments or agencies
with jurisdiction without preparing an EIS in order to avoid
incurring needless county and applicant expense, subject to the
following:

17 (1) The proposal is one for which a DS has been issued or
18 for which early notice of the likelihood of a DS has been
given;

19 (2) Any such denial or recommendation of denial shall be
20 supported by express written findings and conclusions of
21 substantial conflict with adopted plans, ordinances,
regulations or laws; and

22 (3) When considering a recommendation of denial made
23 pursuant to this section, the decision-making body may take
one of the following actions:

24 (a) Deny the application; or

25 (b) Find that there is reasonable doubt that the
26 recommended grounds for denial are sufficient and
remand the application to the responsible official for
27

1 compliance with the procedural requirements of this
2 chapter.

3 The County ceased the SEPA investigation process in approximately November 2016, alleging the
4 Applications needed to be revised before the SEPA process could continue. BSRE submitted
5 revised submittals in April of 2017 and April of 2018. However, on January 9, 2018, while BSRE
6 was working on creating its April 2018 submittals, the County decided to proceed to the hearing
7 examiner with a recommended denial under SCC 30.61.220, alleging that the Applications, as
8 revised, were in substantial conflict with the Code.

9 As of the date of this order, BSRE has submitted the following documents in support of its
10 Applications:

- 11 a. Project narratives
- 12 b. Supplements to the UC permit application
- 13 c. Expanded traffic impact analyses
- 14 d. Geotechnical engineering studies
- 15 e. Critical area reports
- 16 f. Subsurface condition reports
- 17 g. Transit compatibility studies
- 18 h. Drainage reports
- 19 i. Cultural resources technical report
- 20 j. Secondary access road reports
- 21 k. Coastal engineering assessments
- 22 l. Hydrogeological reports
- 23 m. Remediation memo
- 24
- 25
- 26
- 27

- 1 n. Variance application
- 2 o. Deviation request for the secondary access road
- 3 p. Deviation request for the Upper Plaza buildings
- 4 q. Accompanying plans, drawings, figures and tables.

5
6 The County, the City of Woodway and residents of the City of Shoreline oppose the Project,
7 particularly because of potential traffic impacts. To date, 452 public comments have been
8 received.

9 In recommending denial under SCC 30.61.220, the County alleges the following conflicts:

- 10 a) Failure to Document Feasibility and Code Compliance of Second Access Road
 - 11 - No site plan depicting entirety of second access road.
 - 12 o SCC 30.53A.512
 - 13 o EDDS 3-01 (B)(5) [2010]
 - 14 b) Failure to Provide Appropriate Building Setbacks for Tall Buildings from Lower Density Zones and Failure to Document Evidence for Access to High Capacity Transit for Building Heights Over 90 Feet
 - 15 - Buildings adjacent to property zoned low-density exceed code limitations.
 - 16 o SCC 30.34A.040(1) [2010]
 - 17 - Buildings over 90 feet tall exceed code limitations.
 - 18 o SCC 30.34A.040(2) [2010]
 - 19 c) Failure to Provide Adequate Parking
 - 20 - Does not meet provide required number of parking stalls.
 - 21 o SCC 30.34A.050 [2010]
 - 22 d) Failure to Address Shoreline Management Regulations
 - 23 - Residential development dependent on shoreline protection measures is not allowed without a variance.
 - 24 o SMMP, Residential Development, General Regulation #5 [1993]
 - 25 - Commercial uses on pier not allowed except certain low density recreational developments.
 - 26 o SMMP, Commercial Development, Conservancy Environment Regulation #1 [1993]
 - 27 e) Failure to Comply with Code Provisions Regarding Critical Areas
 - Development activities in a landslide hazard area or its setback not allowed.
 - o SCC 30.62B.340 [2007]
 - o SCC 30.32B.320 [2007]
 - Failure to submit adequate geotechnical report.
 - o SCC 30.62B.140 [2007]
 - o SCC 30.62B.320 [2007]

1 Site (both the upland area and the adjoining tideland area) is included in the calculation of the floor
2 area ratio (“FAR”) for the Site. The Site is currently subject to Snohomish County’s Development
3 Regulations, Title 30, Unified Development Code (the “Code”), which currently classifies the Site
4 as an Urban Village. However, the Project is vested to a prior version of the Code, which classifies
5 the site as an Urban Center. Development is subject to the vested version of the Code as well as
6 applicable state and federal requirements for shoreline management and critical areas. The Code
7 incorporates by reference the International Building Code, International Fire Code, International
8 Mechanical Code, International Electric Code, Uniform Plumbing Code, International Fuel Gas
9 Code, Washington State Energy Code and Washington State Ventilation and Indoor Air Quality
10 Code. The Site is located entirely within Snohomish County, though access to the Property is
11 currently entirely through the City of Shoreline in King County.
12

13
14 The Project is proposed to be developed in phases. Phase I includes public amenities, retail,
15 a mix of residential unit types, parking, utilities, public transportation, and off-site traffic and
16 utility improvements, including a secondary access road to 116th Avenue West in the Town of
17 Woodway. A Sound Transit commuter rail station is also included in Phase I. This station will
18 consist of a two-grade level platform served by the north bridge over the railroad tracks. The
19 bridge connects the Town of Woodway to the Woodland Road. As a result of the large building
20 area encompassed by the phasing, construction and design will likely consist of sub-phases, each
21 made up of three to four buildings containing a mix of uses and residential unit types.
22

23 Phase II encompasses the Urban Plaza, retail, commercial and residential construction,
24 parking, the public transit hub, the ENVAC trash collection terminal and the security/EMT office
25 and onsite parking. The Urban Plaza provides the gateway to the project site. It includes shopping,
26 entertainment and office facilities for the residential community in and around Point Wells.
27

1 Phase III consists of the Central Village and the North Village. The Central Village is the
2 largest development area on the site and comprises over 1,000 residential units, retail and parking.
3 The North Village is comprised of residential towers and low-rise buildings tucked away in the
4 northern end of the Site served by the Woodland Road. This phase includes village access, the
5 esplanade and beach restoration work.
6

7 In its entirety, the Project will consist of 3,085 residential units, approximately 31,000
8 square feet of commercial space and 100,000 square feet of retail space.

9 4. Project Chronology. BSRE filed a Short Plat Application on February 14, 2011,
10 and an Urban Center Application on March 4, 2011. BSRE submitted the initial Expanded Traffic
11 Impact Analysis (the “ETIA”) and the initial Critical Areas Report (“CAR”) to the County on
12 March 4, 2011. On April 25, 2011, the Growth Management Hearing Board (the “GMHB”)
13 invalidated the Urban Center Code and the designation of Point Wells as an Urban Center. On
14 September 12, 2011, the King County Superior Court enjoined the County from processing
15 BSRE’s Applications. In the meantime, on October 19, 2011, BSRE continued to meet with
16 Shoreline to discuss traffic issues and a memorandum of understanding regarding the traffic study.
17 On December 20, 2012, the GMHB issued an Order finding the County in compliance with the
18 GMHB’s prior ruling, including the adoption of the Urban Village Code. On June 7, 2013, the
19 Court of Appeals invalidated the King County Superior Court’s injunction. From February 2, 2014
20 through April 3, 2014, BSRE and the City of Shoreline met on multiple occasions regarding the
21 traffic issues.
22
23

24 From February 12 through April 3, 2014, six public meetings were held in the City of
25 Shoreline to evaluate and receive public comment on the Transportation Corridor Study, which
26 was filed on February 2, 2104, and the potential mitigation of transportation impacts. On April 10,
27

1 2014, the Supreme Court confirmed the Court of Appeals decision from January 7, 2013
2 invalidating the King County Superior Court's injunction. From April 20, 2014 through April 20,
3 2015, BSRE continued to work with the City of Shoreline on the ETIA. As a result of the work
4 being conducted on the ETIA, BSRE requested an extension for their Applications on April 15,
5 2015. The County granted this extension request on April 21, 2015. On May 27, 2015, BSRE
6 received the County's and Woodway's comments on the first methods and assumptions memo
7 related to traffic. On June 2, 2015, BSRE met with Ryan Countryman to discuss the methods and
8 assumptions memo related to traffic.
9

10 In June of 2015, BSRE submitted its revised CAR. On July 6, 2015, BSRE submitted its
11 second revised Methods and Assumptions Memo related to traffic to the County. In July of 2015,
12 the County provided revised comments on the second CAR.
13

14 On August 26, 2015, BSRE submitted its Secondary Access Report. On September 8,
15 2015, BSRE met with the County to discuss the review comments regarding the traffic Methods
16 and Assumptions Memo. On September 17, 2015, the County provided comments regarding the
17 Secondary Access Report. On October 14, 2015, the County provided comments on the second
18 Methods and Assumptions Memo related to traffic. On December 9, 2015, BSRE requesting a
19 meeting with Ryan Countryman to discuss which revisions were necessary at this time and which
20 should be made prior to the construction permit stage.
21

22 On December 14, 2015, BSRE submitted a third revised Methods and Assumptions Memo
23 related to traffic to the County. On January 18, 2016, BSRE received Transpo's peer review
24 comments on the third Methods and Assumptions Memo related to traffic. On March 30, 2016,
25 BSRE submitted a third extension request. PDS granted BSRE's third extension request on
26 March 31, 2016. On April 20, 2016, BSRE met with Woodway to discuss traffic. On May 5,
27

1 2016, BSRE submitted a second updated ETIA to the County. The County provided notice that
2 Transpo was authorized to review the second ETIA on May 11, 2016.

3 On May 26, 2016, BSRE received Transpo's peer review comments on the second ETIA.
4 On May 27, 2016, BSRE received the City of Shoreline's and the County's review comments on
5 the second ETIA. BSRE met with City of Shoreline staff to better understand their review
6 comments on June 7, 2016.

7 On June 23, 2016, BSRE submitted responses to the County's comments received to date.
8 BSRE submitted responses to City of Shoreline comments received to date on June 24, 2016. On
9 July 1, 2016, BSRE received Transpo's responses to the approach of BSRE's consultant, David
10 Evans & Associates ("DEA"), to comments received to date. BSRE was also informed that Ryan
11 Countryman advised EA that the County was working on a detailed review of Point Wells project.

12 On July 29, 2016, PDS provided a 279-page draft EIS for internal review. On September 1,
13 2016, BSRE provided responses to Transpo's responses on DEA's input/approach to comments
14 received to date. After spending months working with Shoreline and Transpo to address comments
15 on the second ETIA, BSRE submitted a third updated ETIA to the County on September 1, 2016.

16 On November 15, 2016, PDS requested BSRE provide a revised submittal by May 15,
17 2017, outlining the four major issues that needed to be resolved. In response to this request, on
18 April 17, 2017, BSRE provided a revised submittal which included the following documents:

- 19 1. Revised Urban Center permit application
- 20 2. Response Narrative
- 21 3. Project Narrative
- 22 4. Urban Center Review Comment Response Drawings
- 23 5. Short Plat Drawings
- 24 6. Targeted Drainage Report
- 25 7. Second revised Critical Areas Report
- 26 8. Transportation Demand Management Plan
- 27 9. Secondary Access "Exhibit A"

- 1 10. Fire Apparatus Turning Radius “Exhibit B”
- 2 11. DNR Aquatic Lands Lease
- 3 12. Architectural drawings
- 4 13. Variance application for cross-parking agreement

5 On May 2, 2017, PDS sent a letter giving notice of the Applications’ expiration date and
6 stated, “As the applicant, if you wish to request a further suspension of the application expiration
7 period pursuant to the above-mentioned Code provisions, you should make a written request to
8 PDS prior to May 30, 2016, in order for the PDS director to have time to evaluate the request.”

9 On May 10, 2017, BSRE received the County’s comments on the second ETIA. BSRE
10 had a call with the County (including Mike McCrary, Ryan Countryman, traffic) on June 1, 2017
11 to discuss the County’s review comments. On June 16, 2017, BSRE met with the County to
12 discuss the County’s preliminary review comments on its April 17, 2017 submissions. BSRE
13 received the County’s comments (dated June 23, 2017) on the third ETIA on July 11, 2017. On
14 July 14, 2017, BSRE received the County’s comments from M. Uddin (dated July 12, 2017) on
15 the third ETIA. On July 31, 2017, BSRE met with the County again to discuss the County’s
16 comments on traffic and the April 17, 2017 submittals.

17
18 BSRE received the County’s comments from Erik Olsen (dated July 12, 2017) on the third
19 ETIA on August 1, 2017. On September 13, 2017, BSRE received the County’s comments (dated
20 May 23, 2017) on the third ETIA and met with the County to discuss the traffic analysis. At the
21 September 13 meeting, Jim Bloodgood, the County traffic engineer, confirmed that the trip limit
22 proposed by BSRE was acceptable.

23
24 On October 6, 2017, PDS provided its formal review comments on BSRE’s April 17, 2017
25 submission. On November 13, 2017, BSRE met with the County to discuss the October 6, 2017
26 letter (the “10/6/17 Letter”), the timeline for responding to that letter, and the expectation of an
27

1 extension. On December 12, 2017, BSRE met with the County to further discuss the 10/6/17
2 Letter. On January 9, 2018, the County informed it was going to proceed with final review based
3 on the April 17, 2017 submittals, rather than waiting for BSRE's next submittal. On January 12,
4 2018, BSRE submitted a fourth extension request. The County denied that extension request on
5 January 24, 2018. On April 17, 2018, the County submitted its Staff Recommendation of denial.
6

7 On April 27, 2018, BSRE provided a revised submittal which included the following
8 documents:

- 9 1. Revised preliminary short plat
- 10 2. Detailed responses to Comment Letter
- 11 3. Revised architectural plans
- 12 4. Updated Master Permit Application and Checklist for 11-101008 LDA
- 13 5. Variance request regarding heights
- 14 6. EDDS deviation request regarding private roads
- 15 7. Updated Master Permit Application for 11-101457 and 11-101461 SM LU
- 16 8. Revised Urban Center Development Project Narrative
- 17 9. Flood Hazard Permit application
- 18 10. Updated Preliminary Short Subdivision Submittal Checklist
- 19 11. Supplement to Urban Center Application
- 20 12. Third revised Critical Areas Report
- 21 13. Secondary Access road exhibit
- 22 14. Subsurface conditions report
- 23 15. Coastal engineering assessment
- 24 16. Hydrogeologic report, version 3
- 25 17. Remediation memo
- 26 18. Revised targeted drainage report for short plat resubmittal
- 27 19. Revised targeted drainage report for urban center resubmittal
20. Geotechnical report

21 On May 9, 2018, the County provided its Supplemental Staff Recommendations (the "May
22 9 Report"). In response, on May 15, 2018, BSRE submitted the following revised documents:

- 23 1. Revised Supplement to Urban Center Application
- 24 2. Revised Shoreline consistency narrative
- 25 3. Landslide area deviation request clarification letter
- 26 4. Revised Phasing Drawing
- 27 5. Revised Urban Center Development Plan Project Narrative
6. Memo from Bill Gerken regarding response to Supplemental Staff Report

7. Memo from Kirk Harris regarding response to Supplemental Staff Report
8. Memo from Mark Davies regarding response to Supplemental Staff Report

5. Surrounding Area. The neighboring properties are primarily zoned for residential uses. The area directly to the east of the Site was annexed by the Town of Woodway in 2016 and is currently zoned as Urban Restricted (“UR”).

6. Stage of the Application. The project is in the feasibility stage as testified by Randy Sleight on 5/22/18. A generalized site plan is required in this feasibility phase as testified by Randy Sleight on 5/22/18.

7. Pending Variance and Deviation Requests. BSRE has submitted a variance request and deviation requests. To date, no decision has been reached on any of these requests. The Hearing Examiner has the final decision-making authority over variance requests and the County has the final decision-making authority over deviation requests.

8. Feasibility and Code Compliance of Secondary Access Road. BSRE provided a Secondary Access Report (Ex. C-21) and Secondary Access Road plans (Ex. A-7, B-8). The plans depict the entirety of the secondary access road, and show that it is located entirely within the Town of Woodway and connects up to 116th Ave West. BSRE agreed to have the project conditioned on the secondary access road.

9. Building Setbacks and Heights. The proposed site plan portrays an Urban Plaza which sits east of the BNSF rail line. The Urban Plaza includes three tall towers, two smaller buildings, and a proposed Sound Transit commuter rail station within the designated landslide areas and buffers. A deviation request (Ex. A-37) from the hazard area setback requirements has been submitted. The County has not issued its decision on this deviation request. The geotechnical report, along with the testimony of John Bingham, demonstrated the level of protection to be

1 provided if the buildings are located within this hazard area. The location of the buildings and
2 Sounder station will be protected by a future retaining wall and/or other slope stabilization
3 methods.

4 The Urban Plaza buildings are located adjacent to a portion of land in the Town of
5 Woodway which is zoned Urban Restricted (“UR”). This land was annexed by Woodway in 2016.
6 A number of the buildings proposed to be built on the Site are greater than 90 feet tall. Buildings
7 are limited to 90 feet in an Urban Center zone unless it can be demonstrated that other criteria are
8 satisfied. If the criteria set forth in SCC 30.34A.040(1) are satisfied, the developer can increase
9 the height by an additional 90 feet, up to 180 feet. BSRE proposes to take advantage of this 90
10 foot bonus by complying with the requirements of SCC 30.34A.040(1).
11

12 10. Parking. BSRE accepted the County’s definition of Senior Housing and revised
13 the Supplement to the UC Application to confirm that fact. Therefore, the parties agree that the
14 required number of parking spaces have been provided.
15

16 11. Development in a Landslide Area. Because the road will be located in a landslide
17 hazard area, the proposed secondary access road requires an engineering deviation. The proposed
18 secondary access road satisfies the first criteria for a deviation as testified by Randy Sleight on
19 5/22/18 because there is no alternative location available for that road. If the secondary access
20 road deviation is not granted, there can be no secondary access road as testified by Randy Sleight
21 on 5/22/18. If a secondary access road cannot be built, the Site will not be able to be used as either
22 an Urban Center or an Urban Village as testified by Randy Sleight on 5/22/18.
23

24 SCC 30.62B.340 provides the requirements for landslide hazard areas and the deviation
25 requirements for buildings within the landslide hazard areas. Hart Crowser prepared a report
26 analyzing the subsurface conditions of the potential landslide hazard areas. Exhibit C-33. The
27

1 slope east of the railroad tracks is a landslide hazard area. Construction in a landslide hazard area
2 requires a deviation from the Code.

3 A code deviation requires the applicant to show:

- 4 a) There is no alternate location for the structure on the subject property; and
- 5 b) The proposal meets the requirements of SCC 30.62B.320

6 SCC 30.62B.340 also requires any proposal for construction in a landslide hazard area to be
7 accompanied by a design which does not decrease the factor of safety for landslide occurrence to
8 below the 1.5 factor of safety limit for static conditions or 1.1 for dynamic conditions. BSRE
9 prepared a geotechnical report pursuant to SCC 30.62B.140 which explains and depicts BSRE's
10 proposed slope stabilization which would allow construction in the landslide hazard area. Exhibit
11 A-37.
12

13 BSRE's proposed slope stabilization includes a retaining wall which provides resisting
14 force at the toe of the landslide hazard area, minimal removal of vegetation, drainage, contouring
15 of the elevation to reduce the risk of landslide, and phased construction which allows additional
16 stabilization and drainage for the site.
17

18 The proposed retaining wall provides 78 kips/foot of resistance and achieves the required
19 County factors of safety. This resistance calculation takes into account the load created by the
20 landslide slip area as well as the load created by the backfill surcharge. The resistance did not
21 include the load created by traffic on the road. The load created by traffic on the road is
22 approximately 250 lb/sq. ft. vertical load. BSRE's proposal provides that storm water, surface
23 water, and collected groundwater along the secondary access road would be collected and
24 conveyed down slope to a suitable discharge point. Specifically, as proposed by drainage expert,
25 Mark Davies, civil engineer from MiG|SVR, the collection point for surface water and storm water
26

1 in the Chevron Creek drainage area would be modified to collect water to the east of the secondary
2 access road location. The water would be diverted to the current underground pipe system running
3 beneath the BNSF railway line and empty into Puget Sound. Phasing of the construction allows
4 the retaining wall to stabilize the slope adequately so the secondary access road can be constructed.
5

6 In the first phase of construction, the soil behind the retaining wall supports the retaining
7 wall and is calculated into the resisting force of the retaining wall. In a subsequent phase of
8 construction, the soil behind the retaining wall will be removed and additional tiebacks for the
9 retaining wall will be added to maintain the resisting force of the wall. A concrete basement will
10 be built adjacent to the retaining wall to replace the resisting force lost by removal of the soil
11 behind the retaining wall. In addition, groundwater to areas of potential liquefaction during a
12 seismic event, specifically on the west side of the proposed Urban Plaza, can be minimized by the
13 proposed secondary retaining wall depicted in BSRE's grading plans. The parties recognize that
14 the entire property is a liquefaction zone. It is common and reasonable to construct structures in a
15 liquefaction zone on deep piles, stone columns and other foundational alternatives for building
16 foundations.
17

18 A 2015 report depicted the secondary access route from the main project site easterly along
19 a strip of land owned by BSRE to 116th in Woodway. Hart Crowser prepared a report dated April
20 20, 2018 to support the preliminary design of the secondary access road. (Ex. A-30.) The report
21 addresses geotechnical aspects and slope stability related to the secondary access road. Hart
22 Crowser prepared and submitted a deviation request from landslide hazard regulations in April,
23 2018 (Ex. A-37).
24

25 Hart Crowser's first deviation request to the County was dated April 24, 2018. (Ex. A-30.)
26 This deviation from landslide hazard regulations relates to the three tallest towers in the Urban
27

1 Plaza. Hart Crowser's revised deviation request was dated May 15, 2018. The revised deviation
2 request was prepared to respond to requested clarifications sought by County Engineer Randy
3 Sleight in the May 9 Report.

4 Figure 23b of Exhibit A-37, which demonstrates the feasibility of retaining wall concepts,
5 was intended to provide additional information regarding slope stability conditions for use by the
6 County Engineer in assessing the deviation request. Figure 23 of Exhibit C-33 represents a prior
7 version of Figure 23b. Figure 23 did not include tiebacks or tieback calculations because the figure
8 illustrates a wall load needed to provide the required factors of safety. Further, the report listed a
9 variety of alternatives for landside repair that could be used to achieve the required load. The
10 tiebacks were added in Figure 23b. The blue line in Figure 23b identifies the groundwater level
11 under this concept. Additional retaining wall alternatives and/or slope stabilization alternatives
12 are addressed in the report. Exhibit A-37, which was drafted to further answer comments
13 contained in the May 9 Report, includes text which elaborated and picked one of the design
14 alternatives. Figure 23b depicts more of the details on the preferred design alternative. Figure
15 23b, Note 2 indicates the building basement floor will support lateral earth pressure below existing
16 grade.
17

18
19 Hart Crowser determined the number of tiebacks necessary to ensure stability and provide
20 the required factor of safety for the selected design alternative. Specific design details normally
21 occur at a later stage. The final stability design will require permanent drainage, therefore
22 eliminating the need for including hydrostatic pressures. Permanent drainage means the water
23 surface in this area will need to be lowered from the light blue line on Figure 23b to the dark blue
24 line below the building. Given the margin of error in the model, factoring in rain or snow surcharge
25 is unnecessary.
26
27

1 Hart Crowser has not yet designed a final wall. Its studies have demonstrated the feasibility
2 of a certain wall type. Hart Crowser's model searches for both shallow and/or deep-seated
3 landslide areas. The model then depicts what the critical or minimum surfaces are. Hart Crowser's
4 borings and surface observations did not disclose signs of soil instability. In attempting to
5 demonstrate the feasibility of the design concept, Hart Crowser utilized conservative assumptions
6 which underscores the strength of the conclusions.
7

8 Hart Crowser's studies concluded that the wall and system must provide 78,000 pounds
9 per foot of resistance to provide the required factor of safety. The slope stability model runs
10 continued, with the loads being increased, until the necessary safety factor is achieved.
11

12 Analysis at Monitoring Well 122 disclosed conditions that would be typical for
13 liquefaction. Other nearby wells do not indicate liquefaction. Boring 12 is sufficiently close to the
14 retaining wall to represent conditions at or around the wall. The lower unit is of a density such that
15 liquefaction is not anticipated. The final design of the soldier pile wall will likely extend between
16 20 to 30 feet into non-liquefiable underlying material (Glacial Outwash). Once the final location
17 of the wall is determined, additional borings may be conducted for aid in determining the final
18 design. Later drainage design will also determine the quantity of water which must be removed
19 from the hillside. This will determine the appropriate pipe size to be used.
20

21 In conjunction with its 2018 explorations, Hart Crowser installed five vibrating wire
22 piezometers to gain further information, which is included in Hart Crowser's recent reports.

23 Drainage of groundwater in slopes with potentially liquefiable soil could be used to
24 mitigate liquefaction because liquefaction will not occur if the soil is not saturated. Several borings
25 do not indicate much potential liquefaction while others indicate more potential. Using the most
26 conservative groundwater parameters and utilizing the highest results from the vibrating wire
27

1 piezometers, the feasibility of these slope stabilization measures was confirmed. While dewatering
2 the hillside may help prevent potential slides, Hart Crowser's analyses indicate that dewatering the
3 hillside is not necessary.

4 Drainages 1, 2, 3 and 4 are all existing drainage basins. Hart Crowser may supplement its
5 reports, if necessary, to more fully describe the proposed methods of drainage if needed to
6 demonstrate feasibility or comply with report requirements.

7 The intent of a landslide hazard setback requirement is to keep structures away from slopes
8 that are unstable. Landslide stabilization changes the stability of the slope. Setbacks do not change
9 slope stability.

10 BSRE's geotechnical report, slope stabilization design, secondary access road design and
11 deviation request provides reasonable information to demonstrate likely compliance with the
12 Snohomish County Codes, specifically the stabilization of a landslide hazard area. BSRE's
13 proposed slope stabilization design provides the same or better protection than the setback
14 requirements for Landslide Hazard Areas. At this time, there is reasonable doubt as to whether a
15 substantial conflict with the Snohomish County Codes exists.

16 12. Adequacy of Geotechnical Report. BSRE's geotechnical engineer, John Bingham
17 of Hart Crowser, is an expert in the field of geotechnical engineering. SCC 30.62B.140 governs
18 the requirements for geotechnical reports. SCC 30.62B.320 provides the general requirements for
19 geotechnical erosion hazard areas.

20 13. Buffer Requirements. The Shoreline Master Management Plan within RCW 90.58
21 governs shoreline conservation. Snohomish County Code 30.62A adopted the SMMP in its
22 entirety. The SMMP requires an analysis of the effect of any development project within 200 feet
23 of a shoreline.

1 Pursuant to the Shoreline Management Master Plan and Snohomish County Code, building
2 cannot occur within 200 feet of the ordinary high water mark (the “OHWM”).

3 RCW 90.58.030(2)(c) defines the OHWM as:

4 that mark that will be found by examining the bed and banks and
5 ascertaining where the presence of waters are so common and usual,
6 and so long continued in all ordinary years, as to mark upon the soil
7 a character distinct from that of the abutting upland, in respect to
8 vegetation as that condition exists on June 1, 1971, as it may
9 naturally change thereafter, or as it may change thereafter in
accordance with permits issued by a local government or the
department: PROVIDED, that in any area where the ordinary high
water mark cannot be found, the ordinary high water mark adjoining
salt water shall be the line of mean higher high tide. . . .

10 The County first objected to BSRE’s use of the mean higher high water mark for its construction
11 design in the May 9 Letter. Ex. N-2.

12 BSRE agreed to obtain agreement from the state and local governmental agencies as to the
13 location of the OHWM on the Point Wells property. In addition, BSRE agreed to amend its CAR
14 and site design to utilize the OHWM and the code restrictions related to the OHWM. BSRE’s
15 CAR included plans for innovative development design (“IDD”) which would offset the project
16 design’s effect on the functions and values of the critical areas of the site.

17 SCC 30.62A.350 requires the CAR to show how the IDD:

18 (a) . . . will achieve protection equivalent to the treatment of the
19 functions and values of the critical area(s) which would be obtained
20 by applying the standard prescriptive measures contained [in the
21 Code].

22 (b) Applicants for innovative designs are encouraged to
23 consider measures prescribed in guidance documents such as
24 watershed conservation plans or other similar conservation plans,
and low impact storm water management strategies that address
wetlands, fish and wildlife habitat conservation area or buffer
protection consistent with this section; and

25 (c) The innovative design will not be materially detrimental to
26 the public health, safety or welfare or injurious to other properties
or improvements located outside of the subject property.

1 BSRE's CAR proposes the following IDD:

- 2 • Cleanup of all contaminated soils on the site and removal of all former industrial materials;
- 3 • Restoration of approximately 7.36 acres of nearshore intertidal habitat by pulling back the
- 4 existing seawall and removing impervious surfaces along approximately 3,600 linear feet
- 5 of shoreline;
- Removing creosote piles and intertidal shading.

6 BSRE's CAR also provided a step-by-step explanation of how the criteria of IDD are met. Ex.

7 C30, p. 106-107, Table 22.

8

9 Table 22: Innovative Development Design Criteria

IDD Criteria	How Criteria is Addressed by Project
10 1. The innovative design will achieve protection 11 equivalent to the treatment of the functions 12 and values of the critical area (s) which 13 would be obtained by applying the standard prescriptive measures contained in this chapter;	Direct impacts to existing wetlands and streams and their functional buffers are only incurred by construction of the second access road, which is unavoidable. Allowing use of the marine shoreline restoration in lieu of standard buffer protections for Stream S2 and the existing marine shoreline will allow a significant improvement in net ecological function for nearshore Puget Sound compared to maintaining existing buffers from the hardened developed shoreline.
14 2. Applicants for innovative designs are 15 encouraged to consider measures 16 prescribed in guidance documents, such as watershed conservation plans or other 17 similar conservation plans, and low impact stormwater management strategies that address wetlands, fish and wildlife habitat conservation area or buffer protection consistent with this section; and	The proposed project incorporates many comprehensive strategies for environmental protection, including extensive LID measures, on-site water conservation, removal of artificial hardened shorelines and remediation of nearshore contamination on a large scale. See the Targeted Drainage Report for more information on LID (MiG/SVR 2018). Removal of shoreline armoring is one of the primary implementation strategies of the Puget Sound Partnership (Shipman 2017).
18 3. The innovative design will not be materially 19 detrimental to the public health, safety or welfare or injurious to other properties or 20 improvements located outside of the subject property.	The proposed project significantly improves public health, safety and welfare by remediation of significant contamination, offering public access to improved shoreline, and removing the land use that has led to numerous fuel and oil spills over the last 100 years.

21 BSRE's Critical Areas Report identified the existing conditions for fish and wildlife habitat

22 on the property. Ex. C30, p. 26-75. BSRE's CAR identified the existing locations of critical

23 species, including location and nature of the use. Ex. C30, p. 104, Table 21 (3); p. 39-43, sect. 6.7,

24 p. 50, p. 54 and p. 58-70. BSRE's Critical Areas Report identified the existing wetlands on the

25 property. Ex. C30, p. 33, Figure 10.

26

27

1 BSRE proposed IDD as mitigation for potential impacts to wetlands which were identified
2 as Wetland T and R in the Critical Areas Report. Ex. C30, p. 76, 77, Figure 16.

3 BSRE does not intend to use the existing dock or pier for any commercial purposes which
4 would be in violation of applicable statutes or regulations.
5

6 BSRE's CAR provides reasonable information to demonstrate likely compliance with the
7 SMMP within RCW 90.58 and Chapter 30.62A SCC. At this time, there is reasonable doubt as to
8 whether a substantial conflict with the Snohomish County Codes or the SMMP exists.

9 14. Habitat Management Plan. BSRE's consultant, Gray Rand of DEA was admitted
10 as an expert wetland scientist. BSRE submitted several editions of the Critical Areas Report for
11 the Point Wells project. Ex. C15, C30, C39 and C40. The CAR is a study of environmentally
12 critical areas as required by the Code to evaluate impacts of a proposed project. Specifically for
13 this Project, the County requested information about the wetlands, streams, fish and wildlife
14 habitat conservation areas.
15

16 15. Shoreline Stabilization and Protection. The Coastal Engineering Report prepared
17 by Moffitt & Nichol (Exhibit C-25) analyzed the stability of the existing shoreline and set forth a
18 conceptual plan for the stabilization of and expansion and enhancement of the shoreline for the
19 Project.
20

21 The Coastal Engineering Report recommended that the elevation of the esplanade be set at
22 16 feet. This recommendation was based on the need to eliminate overtopping for the 50-year
23 design wave condition at a high water level with the inclusion of sea level rise.

24 The intent of the design was not to provide shoreline protection. It was to provide a stable,
25 expanded enhanced shoreline with a sufficient crest elevation and crest setback to prevent
26 overtopping.
27

1 The site currently has bulkheading and a large stone revetment throughout much of the
2 project. These shore protection measures will be removed as part of the shoreline improvement
3 plan. The intent of the design is to remove the existing shore protection measures, to excavate and
4 then replace beach materials to provide an expanded contiguous beach. In the May 9 Report, the
5 County misinterpreted the Coastal Engineering Report in that the County failed to properly
6 distinguish between shoreline stabilization and the creation of an expanded, stable shoreline that
7 will attenuate wave energy naturally as a natural beach would.

9 The issues brought up in the May 9 Report related to Shoreline Management Regulation
10 Number 5 have been properly and fully addressed in the Coastal Engineering Report and follow-
11 up letter of May 15, 2018.

12 Shoreline General Regulation Number 5 for residential development provides that
13 residential development will not be approved when flood control shoreline protection measures or
14 bulkheading will be required for protection unless a variance is obtained. The Coastal Engineering
15 Report and follow-up letter do not propose traditional or conventional shoreline protection.
16 Rather, the plan includes the removal of traditional shoreline protection that currently exists on-
17 site.

18 Exhibit P-17 includes concept-level schematics for the beach restoration plan. This
19 includes the removal of the existing seawall and revetment and excavation of existing beach
20 materials to provide a flat, contiguous expanded upper beach area. The upper beach provides for
21 natural wave attenuation and provides sufficient distance and elevation to allow for wave run-up
22 to dissipate and avoid overtopping at the crest elevation of the beach.

23 Exhibit P-17 depicts the esplanade with edge beam and a separation wall. The edge beam
24 is structural for the edge of the esplanade and the separation wall provides separation between the
25
26
27

1 large grain porous material that constitutes the beach and the sub-grade materials. This separation
2 wall is not a shoreline protection measure. The esplanade and the wall supporting the esplanade
3 form part of the project infrastructure but are unnecessary as shoreline protection measures. Even
4 if the esplanade was removed, the shoreline would remain stable.

5 The esplanade is not a levee.

6 The Project does not include residential development for which flood control, shoreline
7 protection or bulkheading is required.

8 The Project has been sited and designed to prevent the need for shoreline or bank
9 stabilization and structural flood hazard protection measures. The crest elevation of the proposed
10 beach is sited such that it allows for sufficient setback elevation and slope run-up distance. The
11 esplanade does not need to be there for the stable expanded beach shoreline to function to dissipate
12 wave energy. The esplanade is not necessary as an erosion or flood protection measure or to deal
13 with climate change sea level rise.

14 There is no substantial conflict between either the proposed site development plan and
15 Shoreline Regulation Number 5 or the County Code related to shoreline stabilization measures.
16 Alternate designs such as the placement of construction fabric could be utilized to maintain
17 separation of the beach material separation, thus allowing for the elimination of the esplanade
18 concrete wall.

19 The concrete wall is not a shore armoring or hard wall in that it is not necessary in order to
20 provide a stable shoreline. To constitute shore armoring, the wall must serve the function of
21 providing shoreline protection. If the wall is not for the function of providing protection, then it
22 does not constitute shore armoring.

1 Fourth Extension Request. In a letter dated November 15, 2016, the County requested
2 BSRE provide certain supplementation to its Applications by no later than May 15, 2017. BSRE
3 submitted its response materials on April 17, 2017. As the current expiration of the Applications
4 was June 30, 2018, the County, on May 2, 2017, addressed the availability of an additional
5 extension: “As the Applicant, if you wish to request a further suspension of the application
6 expiration period pursuant to [SCC 30.70.140(1)(b)], you should make a written request to PDS
7 prior to May 30, 2018, in order for the PDS director to have time to evaluate the request.”

8
9 In response to the materials BSRE submitted in April 2017, the County confirmed it
10 would provide its responsive comments on or before June 30, 2017. The County actually provided
11 its comments on October 6, 2017 (the “10/6/17 Letter”). In this 10/6/17 Letter, the County
12 instructed BSRE it must submit its response by January 8, 2018. The County and BSRE met on
13 November 13, 2017 to discuss the preparation and expected time it would take for BSRE to
14 complete the submission of BSRE’s response to the 10/6/17 Letter. The County advised BSRE
15 that the January 8, 2018 date was a “target” and not a statutory deadline. This was selected as the
16 “target” to allow the County adequate time to review the submission prior to the application
17 deadline of June 30, 2018. As a result of the discussions at this meeting, the County recommended
18 that BSRE submit a letter to the County confirming BSRE could not complete its response by
19 January 8, 2018, and providing a date certain by which the submittal could be completed.

20
21 As additional time would be required for the publication of the draft environmental
22 impact statement (“EIS”), the public comment period and County review, BSRE’s response, and
23 the preparation of the final EIS, the County and BSRE discussed the need for an additional
24 extension of the application deadline. An 18-month extension was discussed to allow for the
25 various steps to be completed prior to the application deadline. BSRE inquired of County planning
26
27

1 staff and its legal staff in attendance at the November 13 meeting whether there was any reason to
2 suspect an extension of the June 30, 2018 deadline would not be granted. No one from the County
3 at the meeting indicated that they were aware of any issue that would result in a denial of an
4 additional 18-month extension. BSRE left the meeting with the impression the extension would
5 be forthcoming. Therefore, BSRE proceeded with the preparation of its supplemental materials.
6 Without the expectation that an extension would be forthcoming, BSRE would have had no reason
7 to proceed with the revisions to the plans and materials.
8

9 As a result of the discussions with the County in November and December 2017, BSRE
10 notified the County, in a letter dated December 29, 2017, that BSRE would not be able to submit
11 its responsive materials by January 8, 2018. With no other communication between the County
12 and BSRE, the County waited until January 9, 2018 to notify BSRE in writing that as BSRE had
13 failed to submit the supplemental materials by January 8, 2018, the County would proceed with
14 the review of the project materials in their current form and would proceed with the processing of
15 the Urban Center application. The County implied it would likely result in a recommendation of
16 “denial” to the hearing examiner without preparation of the EIS.
17

18 By letter dated January 12, 2018, BSRE confirmed it would submit the revised materials
19 by April 30, 2018. The January 12, 2018 letter also included a formal request for an extension of
20 the application deadline. In a letter dated January 24, 2018, the County denied the request for the
21 extension. In a letter dated February 1, 2018, BSRE requested the County reconsider its denial of
22 the extension request. The County denied the request for reconsideration on February 5, 2018.
23

24 BSRE submitted the revised materials in advance of the self-imposed deadline of April
25 30, 2018.
26
27

1 **III. CONCLUSIONS OF LAW**

2 1. Permit Review Authority. SCC 30.72.020 designates UC zone development
3 applications, and shoreline substantial development, conditional use and variance permits as Type
4 2 permits. SCC 30.72.025 provides that Type 2 permits are subject to hearing examiner approval,
5 subject to appeal to the Snohomish County Council. SCC 30.70.140(2) provides the hearing
6 examiner with the authority to grant an extension. SCC 30.61.220 provides the hearing examiner
7 with the right to either determine that substantial conflict with code exists, and therefore deny the
8 Applications without completion of the SEPA process, or to find that reasonable doubt exists as to
9 whether the grounds for denial are sufficient, and therefore remand the Applications to the County
10 for compliance with Chapter 30.61 SCC.
11

12 2. Substantial Conflict. SCC 30.61.220 provides an application can be denied without
13 preparation of an environmental impact statement (the “EIS”) if a “substantial conflict” with
14 adopted plans, ordinances, regulations or laws exists. “Substantial” is defined by the Oxford
15 Living Dictionaries as “of considerable importance, size, or worth.” Denial of an application
16 without preparation of an EIS must “be supported by express written findings and conclusions of
17 substantial conflict with adopted plans, ordinances, regulations or laws”. SCC 30.61.220(2).
18

19 3. Reasonable Doubt Exists as to Each Alleged Substantial Conflict. The County has
20 failed to show how each of the issues raised is “substantial.” Further, reasonable doubt exists as
21 to whether a conflict actually exists.
22

23 a. *Feasibility and Code Compliance of the Second Access Road.* PDS first informed
24 BSRE that it needed a secondary access road in December of 2015. BSRE has provided a
25 secondary access report which depicts the entire secondary access road. While the road is in
26 Woodway, and outside the purview of the County, BSRE confirmed that it has designed the road
27

1 to be in compliance with SCC 30.53A.512. BSRE agreed to have the Project conditioned on
2 having the full access secondary access road. The Hearing Examiner Rules of Procedure
3 specifically allow the Hearing Examiner to place a “precondition” of approval on a Project. If this
4 Project is eventually approved, it will be approved with the condition that there be a full access
5 secondary access road.
6

7 b. *Appropriate Building Heights.* The County asserted two distinct issues with respect
8 to building heights.

9 i. High Capacity Transit. The clear language of SCC 30.34A.040(1) [2007]
10 provides that the maximum building height in a UC zone shall be 90 feet, unless the building is
11 located near a high capacity transit route or station and the applicant prepares an EIS which
12 includes an analysis of certain potential impacts. “Statutes must be read so that each word is given
13 effect and no portion of the statute is rendered meaningless or superfluous.” *City of Spokane Valley*
14 *v. Spokane County*, 145 Wn. App. 825, 831, 187 P.3d 340 (2008). The only reading of this statute
15 which does not render any word “meaningless or superfluous” is a reading which allows for two
16 alternatives. The clear language of SCC 30.34A.040(1) allows for an additional 90 feet where the
17 building is located either near (1) a high capacity transit route or (2) a high capacity transit station.
18 It is undisputed that the buildings proposed on the Site are located near a high capacity transit route
19 – the BNSF railroad tracks, which are used by the Sound Transit commuter rail, bisect the Site.
20 Assuming the remainder of the requirements of SCC 30.34A.040(1) are satisfied, the buildings at
21 the Site are permitted to be up to 180 feet because they are located near a high capacity transit
22 route. There is no substantial conflict with respect to SCC 30.34A.040(1) [2007].
23
24

25 ii. Residential Setbacks. SCC 30.34A.040(2) provides:
26
27

1 Buildings or portions of buildings that are located within 180 feet of
2 adjacent R-9600, R-8400, T or LDMR zoning must be scaled down
3 and limited in building height to a height that represents half the
4 distance the building or that portion of the building is located from
5 the adjacent R-9600, R-8400, T or LDMR zoning line (e.g. – a
6 building or portion of a building that is 90 feet from R-9600, R-
7 8400, R-7200, T or LDMR zoning may not exceed 45 feet in height.

8 SCC 30.34A.040(2)(a). The buildings proposed to be built in the Upper Plaza are located adjacent
9 to property which was annexed by the Town of Woodway in 2016 and which is currently zoned
10 Urban Restricted (“UR”). Under the plain language of the statute, SCC 30.34A.040(2)(a) only
11 applies where buildings are located within 180 feet of specific zoning designations: R-9600, R-
12 8400, R-7200, T, or LDMR. The code provision does not have any language which would apply
13 these restrictions to equivalent or similar zoning designations, and UR zoning is not included in
14 the specific language of SCC 30.34A.040(2)(a). Therefore, SCC 30.34A.040(2) is not applicable
15 to the Project and no substantial conflict exists with respect to this statute.

16 iii. Parking. BSRE agreed to apply the County’s definition of “Retirement
17 Housing” set forth in SCC 30.62.032 [2013] for the undefined term of “senior housing” set forth
18 in SCC 30.34A.050 [2010]. The parties thus acknowledge that this issue has been resolved and
19 no substantial conflict exists with respect to the parking requirements.

20 iv. Shoreline Management Regulations. The County alleged two sub-issues
21 with respect to Shoreline Management Regulations.

22 1. *Shoreline Protection Measures*. The County alleged the Applications are
23 in conflict with SMMP, Residential Development, General Regulation #5, which prohibits
24 residential structures which are dependent on shoreline protection measures without a variance.
25 BSRE’s expert, Bill Gerken of Moffatt & Nichol, testified on May 24, 2018, that the residential
26 developments proposed by BSRE are not dependent on shoreline protection measures. The
27

1 esplanade is not a levee. The esplanade and buildings have been intentionally set in a location and
2 at an elevation so shoreline protection measures are not necessary. The esplanade has a separation
3 wall on the side closest to the buildings, but this wall is not a shoreline protection measure. Mr.
4 Gerken testified that this wall could be removed and replaced with a fabric separator. If such a
5 simple change would make the Project compliant with General Regulation #5, then any conflict
6 which does exist could not be considered “substantial”. Accordingly, BSRE has provided
7 sufficient information to create reasonable doubt as to whether a substantial conflict exists related
8 to General Regulation #5.

10 2. *Commercial Uses on the Pier.* The County alleged the Project substantially
11 conflicts with the SMMP because it includes proposed commercial uses on the pier. BSRE
12 removed all commercial uses on the pier which would be in violation of applicable codes and
13 regulations and further submitted a conditional use permit for allowance to have a non-commercial
14 water taxi or ferry service on the pier. Mr. Randy Middaugh testified on behalf of the County that
15 there is no express prohibition on a non-commercial ferry service being located on the pier. A
16 non-commercial ferry service may be located on the pier with a conditional use permit, which must
17 be approved by the Department of Ecology. BSRE has submitted a conditional use permit request,
18 which has not been approved or denied. Reasonable doubt exists as to whether there is a substantial
19 conflict with the SMMP.

22 v. Compliance with Code Provisions Regarding Critical Areas. The County alleges
23 substantial conflicts with five sub-issues regarding critical areas.

24 1. *Development Within a Landslide Hazard Area or its Setback.* The County
25 alleges there are substantial conflicts with SCC 30.62B.320 and .340 because the plans call for
26 buildings and a secondary access road to be located within a landslide hazard area or its setback
27

1 (collectively, the “Hazard Area”). SCC 30.62B.340 specifically provides deviations may be
2 granted to allow development within the Hazard Area. BSRE has submitted a deviation request
3 pursuant to SCC 30.62B.340. The County has not issued its determination on the deviation
4 request. A deviation request is often a collaborative process with the County, where the chief
5 engineering officer will typically meet with the applicant or its engineers to review the request and
6 determine if sufficient information has been provided. BSRE and the County have not engaged in
7 such collaboration. If the County denies BSRE’s deviation requests, BSRE should be given the
8 opportunity to revise its plans or provide additional information pursuant to the deviation request.
9 There is reasonable doubt as to whether a substantial conflict exists where a deviation request is
10 pending.
11

12 2. *Adequacy of Geotechnical Report.* The County alleged BSRE’s
13 geotechnical report, prepared by Hart Crowser, is in substantial conflict with SCC 30.62B.140,
14 .320 and .350. The County, in its May 9 Report, stated the applicant must “demonstrate the
15 *feasibility* of the structures.” Ex. N-2 (emphasis in original). BSRE has provided sufficient
16 information to determine that its plans are feasible.
17

18 3. *Compliance with Buffer Requirements.* The County, for the first time in its
19 May 9 Letter, required BSRE to use the ordinary high water mark (“OHWM”) for determining the
20 extent of the shoreline jurisdiction. BSRE agreed to perform the necessary studies and evaluations
21 to confirm the appropriate location of the OHWM and to revise the plans, if necessary, based on
22 the determined location of the OHWM.
23

24 The only specific allegation related to a deficiency in the critical area report made by the
25 County during the hearing pertained to SCC 30.62B.350. With respect to this code provision, the
26 County’s only allegation was that the Critical Area Report did not sufficiently analyze the
27

1 “functions and values of the critical area(s) which would be obtained by applying the standard
2 prescriptive measures.” BSRE’s expert, Gray Rand, testified that sufficient information as
3 included in the CAR for this stage of proceedings. While the CAR does not clearly identify the
4 “functions and values”, the equivalent information is included in the report. Mr. Middaugh
5 testified that he did not have enough information to be able to determine whether the proposed
6 plans conflicted with SCC 30.62B.350. Therefore, there is reasonable doubt as to whether there
7 is a substantial conflict with buffer requirements.
8

9 4. *Adequacy of Habitat Management Plan.* The County alleges that the habitat
10 management plan submitted by BSRE is insufficient. Mr. Rand testified that the habitat
11 management plan addresses all required issues identified in SCC 30.62A.460 [2007]. The County
12 did not challenge this testimony. There is reasonable doubt as to whether the submitted habitat
13 management plan, included in the CAR, substantially conflicts with SCC 30.62A.460 [2007].
14

15 5. *Shoreline Stabilization.* SCC 30.62A.330(2)(a)(i) [2007] provides projects
16 shall be sited and designed to prevent the need for shoreline or bank stabilization and structural
17 flood hazard measures for the life of the development. The Project has been specifically designed
18 to comply with SCC 30.62A.330(2)(a)(i). The elevation of the esplanade has been set above the
19 Base Flood Elevation, and an adequate setback has been proposed from the shoreline to the
20 esplanade to construct a dynamically stable mixed sand-and-gravel beach. The proposed shoreline
21 modifications and rebuilt beach eliminate the need for typical shoreline protection measures.
22 There is reasonable doubt as to whether there is a substantial conflict with shoreline stabilization
23 measures.
24

25 vi. An Extension is Warranted. The Code grants the hearing examiner authority and
26 discretion to modify the application period and grant an extension. SCC 30.70.140(2). The
27

1 hearing examiner’s discretion under SCC 30.70.140(2) is broad and encompasses all applications
2 set forth in SCC Table 30.70.140(1), including the Applications. SCC 30.70.140(2) does not
3 include a temporal restriction on the hearing examiner’s decision. The hearing examiner is in the
4 best position to interpret and apply his authorized discretion pursuant to the Code. *See Durland v.*
5 *San Juan County*, 174 Wn. App. 1, 12, 298 P.3d 757 (2012) (“An appellate court must give
6 substantial deference to both the legal and factual determinations of a hearing examiner as the local
7 authority with expertise in land use regulations.” (internal quotations omitted)). The County has
8 conceded the hearing examiner has jurisdiction over land use decisions, as set forth in Title 30
9 SSC, which necessarily includes the hearing examiner’s discretion authorized by SCC
10 30.70.140(2).
11

12 At least until November 13, 2017, both parties acted as if an additional extension would
13 be forthcoming. In a letter dated November 15, 2016, the County requested BSRE provide certain
14 supplementation to its Applications by no later than May 15, 2017. BSRE submitted its response
15 materials on April 17, 2017. As the current expiration of the Applications was June 30, 2018, the
16 County, on May 2, 2017, addressed the availability of an additional extension: “As the Applicant,
17 if you wish to request a further suspension of the application expiration period pursuant to [SCC
18 30.70.140(1)(b)], you should make a written request to PDS prior to May 30, 2018, in order for
19 the PDS director to have time to evaluate the request.”
20
21

22 In response to the materials BSRE submitted in April 2017, provided its review
23 comments in October of 2017, and requested BSRE submit further revisions no later than January
24 8, 2018. On November 13, 2017, the parties met to discuss the January 8 “deadline” and the
25 potential for an extension. BSRE left the November 13, 2017 meeting with the impression that a
26
27

1 fourth extension would be forthcoming. Based on this impression, BSRE proceeded with the
2 revisions and responses to the 10/6/17 Letter.

3 BSRE has made considerable progress since April 17, 2017. While the 10/6/17 Letter
4 identified 178 issues, the May 9 Report only identified 11. The County terminated all work on the
5 EIS as of November 2016 and has failed to resume work, despite BSRE's progress with its
6 revisions. BSRE has provided sufficient information for the County to resume work on the EIS.
7

8 This Project is large and complex. Given the complexity of this Project and the
9 substantial legal challenges that the County and BSRE have already faced with respect to this
10 development, the length of time during which the Applications have been pending is not
11 unreasonable. The County did not provide its initial review comments on the Applications until
12 April of 2013. Therefore, the length of this project is not seven years, as alleged by the County,
13 but five years.
14

15 The Code contemplates supplementation of otherwise complete applications. In its
16 January 24, 2018 letter, the County invited BSRE to supplement its application so all relevant
17 information would be before the hearing examiner in this proceeding. BSRE has continued to
18 update and supplement its submittals in an ongoing effort to satisfy PDS's increasing demands.
19 That PDS has not objected to this supplementation confirms its view that such supplementation is
20 appropriate.
21

22 This approach is consistent with numerous code provisions which clearly contemplate
23 the supplementation of otherwise complete applications. For example, SCC 30.70.110(2) exempts
24 from review timelines "[a]ny period during which the county asks the applicant to correct plans,
25 perform required studies, or provide additional required information." Similarly, SCC
26
27

1 30.70.110(3)(b) address substantial revisions to an application which restarts the County's review
2 time limit on project review.

3 Because there is reasonable doubt as to the existence of any substantial conflicts with
4 the Code provisions cited by the County, and because BSRE has shown a good faith effort to
5 respond to the County's requests, an extension is warranted.
6

7 The extension shall be structured as follows: BSRE shall be given an additional 18
8 months from the date of this order. This 18 months will only apply to the time by which BSRE is
9 requested to provide any supplemental materials and will not be applied to any time where the
10 Project is being reviewed by the County, the EIS consultants, or any other party not under the
11 control of BSRE.
12

13
14 DATED this 1st day of June, 2018.

15
16 /s/ Jacque E. St. Romain
17 Gary D. Huff, WSBA #6185
18 Douglas A. Luetjen, WSBA #15334
19 J. Dino Vasquez, WSBA #25533
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