SNOHOMISH COUNTY COUNCIL

BSRE POINT WELLS, LP, 
Appellant

v.
SNOHOMISH COUNTY PLANNING AND DEVELOPMENT SERVICES, 
Respondent.

BSRE POINT WELLS, LP ("BSRE"), by and through its undersigned counsel of record, hereby submits this Appeal of the Amended Decision Denying Extension and Denying Applications Without Environmental Impact Statement, dated August 3, 2018 (the “Decision”).

I. STATEMENT OF FACTS

I. Appellant.

The appellant here is BSRE Point Wells, LP. The address of appellant is:

BSRE Point Wells, LP
c/o Karr Tuttle Campbell
Attn: Douglas Luetjen
701 Fifth Avenue, Suite 3300
Seattle, WA 98104

Exhibit S-1 Appeal Letter Received August 17 2018
PFN: 11-101457 LU
II. Description of the Project.

The Snohomish County Council in 2009 and 2010 revised its comprehensive plan, adopted Chapter 30.34A SCC (the “Urban Center Code”) and designated the land owned by BSRE (“Point Wells”) as an Urban Center. See Pre-Hearing Brief of BSRE Point Wells, LP (“Pre-Hearing Brief”). These combined actions satisfied, at least in part, Snohomish County’s (the “County”) obligation pursuant to the Growth Management Act to plan for the accommodation of future population growth within unincorporated portions of the County. Id. The designation of Point Wells as an Urban Center largely satisfied the County’s density allocation obligation. Id.

Following the Council’s action, BSRE’s predecessor submitted a complete Urban Center Development Application (and other related supporting applications, collectively, the “Land Use Applications”) for the development of a mixed-use Urban Center including approximately 3,000 residential units, approximately 100,000 square feet of commercial space and a large public access beach. Id.

III. BSRE’s Development and Permit Applications.

BSRE has been working with the County on submitting and revising its applications to develop Point Wells as an Urban Center since 2011. Id. Throughout the pendency of the permitting process, BSRE has spent approximately seven years and more than $10 million in pursuing approval of the Land Use Applications. See Pre-Hearing Brief; Douglas Luetjen May 24, 2018 Testimony.

On October 6, 2017, the County submitted a 389-page letter to BSRE, which stated “Snohomish County has completed its review of the Point Wells application materials submitted on April 17, 2017. This letter transmits our review comments.” See Exhibit K-31. Immediately
upon receipt of the letter (the “October 2017 Letter”), BSRE and its consultants began reviewing, analyzing, and developing scopes of work for BSRE’s consultants to address the County’s concerns. BSRE budgeted to spend approximately $1,000,000 in addressing the comments raised in the October 2017 Letter. See Pre-Hearing Brief. In the October 2017 Letter, the County requested a response no later than January 8, 2018.

On November 13, 2017, BSRE, its consultants, and its attorneys met with Planning and Development Services (“PDS”) staff, its department management and a member of the prosecuting attorneys’ office to discuss BSRE’s anticipated response to the October 2017 Letter. See Pre-Hearing Brief, Douglas Luetjen May 24, 2018 Testimony. At the meeting, PDS explicitly stated that the January 8 date set forth in the October 2017 Letter was merely a “target” and not a statutorily prescribed deadline. Id. When BSRE and its consultants informed the County that the required work could not conceivably be completed by January 8, PDS advised BSRE to submit a letter stating that it could not meet the target and stating the date by which BSRE would respond. Id. In addition, PDS clearly and unequivocally stated that there was no reason to suspect that an additional extension request might not be approved. Id. This was consistent with the statement made in a May 2, 2017 letter from PDS to BSRE stating that “As the Applicant, if you wish to request a further suspension of the application expiration period pursuant to the above-mentioned Code provision, you should make a request to PDS prior to May 30, 2018, in order for the PDS director to have time to evaluate the request.” See Exhibit K-19. BSRE subsequently informed PDS that the revised submittal would be made no later than April 30, 2018. See Exhibit G-8.

Despite the statements made by PDS that the January 8 date was simply a “target” and that there was no reason an extension would not be approved, suddenly, on January 9, 2018, the County abruptly changed its position and actively began working to terminate BSRE’s Land Use
Applications. Exhibit K-33. PDS’s decision to deny the very same extension request it represented
would be forthcoming and to instead seek a complete termination of the Land Use Applications
understandably surprised BSRE, its attorneys and its consultants. BSRE has yet to receive an
explanation for PDS’s abrupt change in position.

PDS’s termination decision was first conveyed by correspondence dated January 9, 2018
from Principal Planner/Project Manager Paul MacCready to BSRE’s land use counsel Gary Huff.
Exhibit K-33. This letter follows by one day the supposed “target date” for resubmittal. This
evidences PDS’s intent to terminate the Application as quickly as possible, despite its assurances
to the contrary. As reflected in this letter (the “January 2018 Letter”), PDS determined, despite its
prior representations to the contrary, that as of the date of that letter, BSRE’s application as it then
existed could not be approved under Snohomish County Code (the “Code”). PDS therefore began
the process outlined in SCC 30.61.220 to terminate BSRE’s forthcoming revised submittals
without preparation of an environmental impact statement (“EIS”). Nonetheless, PDS in effect
invited BSRE to continue to work on its plan revisions and submit them to the Hearing Examiner
for consideration. See Exhibit K-40.

As earlier promised, BSRE nonetheless completed its further analyses, revised its plans
and fully responded to the matters raised by the County in its October 2017 Letter. See Exhibits
C-30, C-31, C-32, C-33, G-12, G-13, G-14, and G-15 (collectively, the “April 2018 Revisions”).
Following receipt of the April 2018 Revisions, the County issued a Supplemental Staff
Recommendation on May 9, 2018 (the “May Recommendation”, see Exhibit N-2), which was
based on an incomplete review of the April 2018 Revisions and identified a new comment not
previously included in any prior comments made by PDS.
IV. The Hearing Examiner

BSRE and Snohomish County Planning and Development Services (PDS) participated in an extensive hearing between May 16, 2018 and May 24, 2018 regarding PDS’s recommendation to deny BSRE’s permit application due to several alleged substantial conflicts with applicable Snohomish County codes. Additionally, BSRE requested an extension of its permit application from June 30, 2018, the date which PDS set as the expiration of the permit application.\(^1\)

After the completion of live testimony, the parties submitted closing briefs, and proposed findings of facts and conclusions of law. The Hearing Examiner held substantial conflicts existed between BSRE’s permit application and applicable codes and therefore denied BSRE’s permit application. See the Decision, Exhibit R-2. In addition, the Hearing Examiner denied BSRE’s request for an extension to cure the alleged conflicts between the permit application and applicable codes. Id.

BSRE submitted a Motion for Reconsideration and Request for Clarification (the “Motion for Reconsideration/Clarification”) on July 9, 2018. See Exhibit R-1. In response, the Hearing Examiner granted in part and denied in part BSRE’s Motion for Reconsideration/Clarification and issued an Amended Decision Denying Extension and Denying Applications Without Environmental Impact Statement. See Exhibits R-3, R-4. As directed by the Hearing Examiner, BSRE hereby submits this Appeal to the County Council.

\(^1\) PDS claims that the termination date of the Land Use Applications was June 30, 2018. However, there is a Request for Code Interpretation pending which may show that June 30, 2018 is not the correct termination date. See Exhibit G-21.
II. EVIDENCE RELIED UPON

BSRE relies on the permit application hearing record, including witness testimony and documentary exhibits, and the permit application record.

III. ARGUMENT AND LEGAL AUTHORITY

A. Standard for Appeal

SCC 30.72.080(2) establishes the grounds for an appeal of a Type 2 decision:

(a) The decision exceeded the hearing examiner's jurisdiction;
(b) The hearing examiner failed to follow the applicable procedure in reaching the decision;
(c) The hearing examiner committed an error of law; or
(d) The hearing examiner's findings, conclusions and/or conditions are not supported by the record.

BSRE seeks review of the Decision based on grounds (b), (c), and (d) above.

B. The Hearing Examiner Committed an Error of Law with Respect to All Findings, Conclusions and Rulings Related to the Residential Setback.

BSRE submits that all findings, conclusions and rulings related to the residential setback, including, but not limited to, F.49, C.26, C.78, and Decision 4, reflect an error of law and should be reversed on appeal. SCC 30.34A.040(2)(a) provides:

Buildings 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 effect of SCC 30.34A.040(2)(a) is to limit the height of buildings located adjacent to specific residential zones. PDS, and the Hearing Examiner in its Decision, have determined that the
buildings in the Urban Plaza must be restricted in height because they are located adjacent to residential zones.

However, as noted in F.45, the buildings proposed to be built in the Urban Plaza are adjacent to property which is zoned R-14,500 and Urban Restricted. There is no property which is zoned R-9600, R-7200, T or LDMR adjacent to the buildings proposed to be built by BSRE. Therefore, the plain language of SCC 30.34A.040(2)(a) makes this statute inapplicable to this project. See Bravo v. Dolsen Cos., 125 Wn.2d 745, 752, 888 P.2d 147 (1995) (holding that where statutory language is “plan, free from ambiguity and devoid of uncertainty, there is no room for construction because the legislative intention derives solely from the language of the statute”). The statute does not include any language which would make it applicable to “similar” or “equivalent” zoning designations. Because the buildings proposed to be constructed in the Urban Plaza are not located adjacent to any R-9600, R-7200, T or LDMR zones, SCC 30.34A.040(2)(a) does not apply and no residential setback is required.

Thus, all findings, conclusions and rulings in the Decision which state or imply that SCC 30.34A.040(2)(a) is applicable or that a variance is required because of a residential setback reflect an error of law and should be reversed. There can be no substantial conflict with SCC 30.34A.040(2)(a) where it does not apply.

In addition, Finding F.50 should also be reversed because BSRE included the two service buildings in the variance request, as submitted to the Hearing Examiner with its Motion for Reconsideration/Clarification. See Exhibit R-1, Addendum 2. SCC 30.72.065(f) specifically allows an applicant to propose changes to the application in response to deficiencies identified in the Decision. The Hearing Examiner ignored all changes proposed by the applicant, thereby committing an error of law and failing to follow the applicable procedures.
C. With Respect to all Findings, Conclusions and Rulings Related to the Ordinary High Water Mark, the Hearing Examiner Committed an Error of Law and Failed to follow the Applicable Procedures, and the Hearing Examiner’s Findings and Conclusions were not Supported by the Record.

BSRE submits that all findings, conclusions and rulings related to the Ordinary High Water Mark (the “OHWM”), including, but not limited to, F.38, F.97, C.12, C.13, C.14, C.15, C.17, C.73, C.74, C.75, C.78, and ruling 4 reflect an error of law and are not supported by the record. In addition, the Hearing Examiner failed to follow applicable procedure, in contravention of SCC 30.72.065(f), by ignoring additional information and changes submitted to the Hearing Examiner in response to the Decision.

The Hearing Examiner’s Findings and Conclusions of Law which state or imply that BSRE was derelict in not determining the OHWM are not supported by the record. As Gray Rand of David Evans & Associates, Inc. testified on May 23, 2018, the first time that the County claimed BSRE was deficient because the shoreline buffer was not determined based on the OHWM was in its May Recommendation. Exhibit N-2. There, for the first time, the County stated,

The 200-foot shoreline jurisdiction is not correctly depicted on plans (see, e.g., sheets Ex-2 & C-010). The Mean Higher High Water (MHHW) was used rather than the Ordinary High Water Mark (OHWM) for determining the landward extend [sic] of shoreline jurisdiction. This may affect limitations on development activities occurring within shoreline jurisdiction such as building heights.

Ex. N-2, p. 19. In its April 17, 2018 Staff Recommendation (the “April Recommendation”), sent just two weeks prior to the May Recommendation, the County mentioned no such deficiency. Exhibit N-1. In addition, the October 2017 Letter, only made two comments specific to the OHWM:

Urban Center Comment(s): Sheets A-050 and 051 indicate location of an Ordinary High Water Line along the shoreline. Sheets C-201.
203 indicate location of a Line Mean Higher High Water along the shoreline. Do these terms represent the same line?


PDS notes that the drawings for the Urban Center Submittal from March 4, 2011, make interchangeable use of the terms OHWM and Mean Higher High Water (MHHW) (underline added by PDS). Some pages show OHWM and others show MHHW. This latter term, appears to be intended to refer to Mean High Higher Tide (MHHT), which is synonymous with OHWM at salt water locations per RCW 90.58.030(2)(c). For clarity, when there are revisions to the application for other reasons, please update the pages that refer to MHHW so that they refer to either MHHT or OHWM.”

Ex. K-31, p. 115 (emphasis in original). The first comment, on page 24, simply requested clarification of whether the terms Mean Higher High Water (“MHHW”) and OHWM had the same meaning. BSRE addressed this issue in the April 2018 Revisions. The second comment, on page 115, requested a revision to the use of the terms “when there are revisions to the application for other reasons”. The fact that the County only requested that this change be made “when there are other revisions to the application for other reasons” clearly implies that this change was not urgent and was not a reason to deny the applications in their entirety. Certainly, these comments did not indicate that such an issue would be a “substantial conflict” with the code, as later claimed in the May Recommendation. Contrary to the County’s claims and the Findings of Fact, Conclusions of Law and rulings in the Decision related to the OHWM, BSRE was not derelict in failing to address an issue which was not even raised by the County until May 9, 2018.

As soon as BSRE became aware of the issue with the OHWM, it authorized its consultants to begin work to determine the OHWM. Gray Rand, while working on his Critical Area Report in March 2018, investigated the OHWM and discovered that it could be discerned and that, therefore, the buffer should be determined from the OHWM rather than the MHHW, which had been used
previously. See Gray Rand’s May 23, 2018 Testimony. Once Mr. Rand became aware of the issue, he immediately began working to address it. BSRE was unable to revise the plans prior to the April 2018 Revisions, but BSRE continued working on such revisions after the April 27, 2018 submittal and, after meeting with the Department of Ecology, determined the appropriate location of the OHWM. With its Motion for Reconsideration/Clarification, BSRE submitted an aerial depiction of the OHWM and a memorandum from Perkins + Will which addresses the changes needed to the site plan in order to provide a sufficient setback. See Exhibit R-1, Addenda 7-8. As noted in the memorandum, BSRE can and will comply with the setback and make the necessary changes. It is expected that these revisions may cause a loss of approximately 200 units. A reduction of approximately 200 units in a development which is proposed to have 3080 units represents a loss of less than 6.5% of the units. Contrary to C.74, this is not a “substantial element” of the proposal and correcting this would not require a significant redesign of the proposal. See Exhibit R-1, Addendum 8.

SCC 30.72.065(2)(f) allows for reconsideration before the Hearing Examiner where the applicant proposes changes based on the hearing examiner’s decision. SCC 30.72.065(2)(e) allows for reconsideration where the applicant presents new evidence which could not reasonably have been produced at the open record hearing. Addenda 7 and 8 were submitted to the Hearing Examiner with BSRE’s Motion for Reconsideration/Clarification and conclusively showed that BSRE proposed changes based on May Recommendation and the Decision. This evidence was not reasonably available at the hearing because the work was being done at the time of the hearing and because the issue was not raised by the County until its May Recommendation, which was received just days before the hearing began. In order to determine the OHWM, Mr. Rand had to schedule a meeting with the Department of Ecology at the site, which was held on June 26, 2018.
Immediately after this meeting, Mr. Rand began the work to depict the OHWM on the site plans. This was reflected in Addenda 7 and 8. As noted by Mr. Seng in Addendum 8, the work needed to redesign the buildings located on the site to accommodate the change in the buffer area will take approximately 2-4 weeks. This cannot be considered substantial given the amount of time already spent by both BSRE and the County on this proposal. The Hearing Examiner failed to follow appropriate procedures and committed an error of law by failing to even consider this additional information.

For these reasons, all Findings of Fact, Conclusions of Law and rulings related to the OHWM including, but not limited to, F.38, F.97, C.12, C.13, C.14, C.15, C.17, C.73, C.74, C.75, C.78, and ruling 4, should be reversed on appeal. BSRE did not fail to act diligently by not determining the OHWM earlier when the County failed to even raise this issue until its May Recommendation and, further, this cannot be considered a substantial conflict given the circumstances here.

D. The Findings of Fact, Conclusions of Law and Rulings Related to the Innovative Development Design Should be Reversed Because the Hearing Examiner Failed to Follow Applicable Procedures by Failing to Consider the Changes Made and Additional Evidence Presented by BSRE Based on the Decision.

As noted above, SCC 30.72.065(2)(f) allows for reconsideration where the applicant proposes changes based on the hearing examiner’s decision. Here, BSRE made changes to its applications based on the Decision and therefore all Findings of Fact, Conclusions of Law and rulings related to the Innovative Development Design (“IDD”), including, but not limited to F.104, C.76, C.77, C.78, and ruling 4, should have been revised to state that analysis of the “functions and values” had been provided and that there was no substantial conflict with the Snohomish County Code related to IDD. The Hearing Examiner’s failure to consider these changes and
additional evidence constituted a failure of the Hearing Examiner to follow applicable procedures, in direct violation of SCC 30.72.065(2)(f). Accordingly, all Findings of Fact, Conclusions of Law and rulings related to IDD should be reversed, such that there is no substantial conflict with the Code related to IDD.

On May 23, 2018, Gray Rand of David Evans & Associates, Inc. testified that the critical area report (Exhibit C-30) provided a step-by-step explanation of how each of the criteria of the IDD would be met and provided an overview of the improvement and ecological benefits as a whole. However, because the County expressed concern that the specific “functions and values” were not expressly labeled as such, BSRE had its consultants engage in further work to better address those concerns after the hearing. With additional evidence presented to the Hearing Examiner with its Motion for Reconsideration/Clarification, BSRE specifically satisfied the requirement set forth in F.103: a proposed IDD “must compare the existing functions and values of affected critical areas and buffers with functions and values after the development to ensure the IDD protects the functions and values at least as well as the standard prescriptive measures.” See Exhibit R-1, Addendum 3.

BSRE specifically provided to the Hearing Examiner a Critical Areas Report Addendum prepared by Gray Rand of David Evans & Associates, Inc., dated June 21, 2018, which expressly provided the “functions and values” analysis which the Hearing Examiner deemed to be lacking in the Decision. Id. As noted in this Addendum, “the use of the IDD measures will result in a significant net ecological benefit compared to implementation of standard administrative buffers. Overall, the project as proposed will result in significant improvement to ecological function along the shoreline of Puget Sound equivalent to application of the standard prescriptive measures of SCC 30.62A.” Id. This is demonstrated by the analysis of the “functions and values.” Id. at pp.
5-7. For this reason, all Findings of Fact, Conclusions of Law and rulings related to the IDD should have been revised pursuant to SCC 30.72.065(2)(f), and the Hearing Examiner’s Decision should be reversed on these points because of the Hearing Examiner’s failure to follow applicable procedures.

E. The Findings of Fact, Conclusions of Law and Rulings Related to the Requirement for High Capacity Transit Reflect an Error of Law, are not Supported by the Record, and Failed to Follow Applicable Procedures.

BSRE supplied sufficient evidence to indicate that proximity to a high capacity transit route is sufficient to allow for additional height pursuant to SCC 30.34A.040(1). In the alternative, BSRE demonstrated its dedication to providing high capacity transit, in the form of Sound Transit and/or via water taxi, such that the Hearing Examiner could and should condition the project on having high capacity transit rather than finding that the project is in substantial conflict with the code at this point. Further, the requirement for the additional height to be “necessary or desirable” is a conclusion to be made following the analysis to be included in the project’s environmental impact statement, as set forth in SCC 30.34A.040(1). This matter was not discussed at the hearing, and the Hearing Examiner erred by deciding that issue on his own prior to the completion of the EIS. For these reasons, all Findings of Fact, Conclusions of Law and rulings in the Decision which relate to high capacity transit, including, but not limited to, F.56, F.57, F.58, F.59, F.60, F.62, F.63, C.20, C.34, C.35, C.36, C.37, C.38, C.39, C78, and ruling 4, should be reversed.

i. Proximity to a Transit Station is Sufficient.

The Hearing Examiner committed an error of law by determining, without justification, that while “a high capacity transit route is near the project, proximity alone is not enough.” C.36. SCC 30.34A.040(1) states:
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 pursuant to chapter 30.61 SCC that includes an analysis of the environmental impacts of the additional height on, at a minimum:

(a) Aesthetics;
(b) light and glare;
(c) noise;
(d) air quality; and
(e) transportation.

SCC 30.34A.040(1). The Hearing Examiner’s conclusion that proximity is not enough ignores the plain language of the statute. “Statutes must be read so that each word is given effect and no portion of the statute is rendered meaningless or superfluous.” City of Spokane Valley v. Spokane County, 145 Wn. App. 825, 831, 187 P.3d 340 (2008). While the County has argued that “proximity is not enough,” an agency does not get deference for a statutory interpretation which conflicts with the plain language of the statute. Dept. of Labor & Indus. v. Landon, 117 Wn.2d 122, 127, 814 P.2d 626 (1991).

C.36, and all other Findings of Fact, Conclusions of Law and rulings which state or imply that proximity to a route is not sufficient, directly conflict with the plain language of the statute, which provides two alternatives for high capacity transit—the project must be located either near a high capacity transit route or a high capacity transit station. SCC 30.34A.040(1) (emphasis added). The only reading of this statute which does not render a portion of the statute “meaningless and superfluous” is that which recognizes both options: (1) proximity to a high capacity transit route; or (2) proximity to a high capacity transit station.
The fact that the Growth Management Hearing Board (the "GMHB") ruled in *City of Shoreline, et al. v. Snohomish County, et al.*, Coordinate Case Nos. 09-3-0013c and 10-3-0011c, that proximity is not enough has no bearing on the interpretation of SCC 30.34A.040(1) [2010]. RCW 36.70A.302 provides the GMHB may determine that all or part of a comprehensive plan or development regulations are invalid, however, it states that such authority is "proscriptive in effect" only:

A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or county. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the county or city . . . .

RCW 36.70A.302(2). The Washington Supreme Court recognized this in *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 322 P.3d 1219 (2014). There, the Court held that "whether or not a challenged plan or regulation is found to be noncompliant or invalid, any rights that vested before the [GMHB]'s final order remain vested after the order is issued." *Id.* at 175. Therefore, even if the interpretation of SCC 30.34A.040(1) changed after the GMHB's ruling in *City of Shoreline*, that does not alter the plain language of the statute as it applies to BSRE's applications.

Because the GMHB's ruling does not change the plain language of SCC 30.34A.040(1) and because statutes must be interpreted such that no word or phrase is rendered meaningless or superfluous, the only possible reading of SCC 30.34A.040(1) allows additional height where the urban center is proposed near either a high capacity transit route or station. Point Wells is located near a high capacity transit route and therefore additional height for the buildings is available.
ii. BSRE Acted Diligently in Attempting to Reach Agreement with Sound Transit for a Station at Point Wells.

The record shows that BSRE has had substantial contact with Sound Transit and that Sound Transit has advised BSRE that it will not commit to providing a station at Point Wells until BSRE has received approval and can guarantee a certain number of residents. See Douglas A. Luetjen’s May 24, 2018 Testimony; Exhibit H-24. The Examiner clearly erred in faulting BSRE for failing to obtain Sound Transit’s commitment to provide service for a project which has not yet been approved.

As demonstrated by Exhibit H-26 and Douglas A. Luetjen’s May 24, 2018 testimony, Sound Transit has considered adding a stop in the Richmond Beach/Shoreline area, and it is BSRE’s understanding that the stop considered to be in the Richmond Beach/Shoreline area was specifically considered by Sound Transit to be at Point Wells. See Exhibit H-24, where Sound Transit specifically added a comment on its Final Environmental Impact Statement in response to a letter from BSRE stating “A Sounder station in the general vicinity of Shoreline/Richmond Beach is included in Appendix A of the Final SEIS as a ‘representative project’ under the Current Plan Alternative . . . These are projects that could be implemented along the corridors that comprise the Current Plan Alternative regardless of whether service is already implemented along these corridors. . . .” This indicates that Sound Transit was contemplating a possible stop at Point Wells.

Contrary to the statements made in F.55, F.58 and C.35, BSRE received a letter of support from the appropriate individual (not just a “mid-level manager”) in 2010 indicating that Sound Transit was open to the possibility of a stop at Point Wells. In fact, the letter stated that Sound Transit’s interest in such a station would be increased if BSRE was willing to fund that station. BSRE has unequivocally made that commitment.
In addition, F.60 is not supported by the record because Douglas A. Luetjen testified on May 24, 2018 that BSRE has met with “various transit agencies that included King County Metro and Community Transit as well as Sound Transit to discuss transit-related issues for the development.” See Douglas A. Luetjen May 24, 2018 Testimony.

In addition, BSRE has retained the firm of Shiels Obletz Johnson, a project management consultancy group in the Pacific Northwest that has specific experience working with BNSF and commuter lines to get approvals for additional stops. See id. This shows BSRE’s diligence and dedication to building a Sound Transit station at Point Wells. Furthermore, BSRE has considered Sound Transit’s design guidelines in creating its design and has acted in accordance with the direction received from Sound Transit, which was to wait until approvals were received before pursuing a written agreement with Sound Transit. Id. Any Findings of Fact, Conclusions of Law and rulings which state or imply that BSRE was derelict in its duties by failing to obtain a written commitment from Sound Transit or another transit agency are not supported by the record, do not take into account the particular facts and requirements of the transit agencies, and should be reversed.

iii. BSRE Acted Reasonably to Provide Alternative High Capacity Transit with a Water Taxi.

In order to satisfy the County’s concerns regarding high capacity transit, BSRE proposed providing a water taxi between the site and the Edmonds Sound Transit station at least until an on-site Sound Transit station is constructed. The Hearing Examiner’s Findings of Fact, Conclusions of Law, and rulings regarding the water taxi proposal are not supported by the record and fail to consider evidence provided with BSRE’s closing brief.
In F.63, the Hearing Examiner stated that operating a water taxi would be prohibited by the Shoreline Management Master Program because it is a commercial use and BSRE has not applied for a conditional use permit. However, neither of these statements is supported by the record. Randy Middaugh testified that the water taxi would not be a prohibited use if it was free. See Randy Middaugh May 22, 2018 Testimony. Instead, he said it would simply require a conditional use permit, which would be reviewed by the Department of Ecology. Id. BSRE submitted such a conditional use permit with its closing brief. See Exhibit Q-4, Appendix 1. Therefore, F.64, C.38, C.39, C.78 and ruling 4, should be reversed.

As stated in F.62, the pier at Point Wells is subject to an aquatic lands lease from the Washington Department of Natural Resources (the “DNR”). In its April Recommendation and May Recommendation, the County did not include any allegations with respect to BSRE’s dealings with DNR. For this reason, BSRE did not submit any evidence into the record regarding BSRE’s contacts with DNR. However, this does not mean BSRE has not had discussions with DNR about the use of the pier. Rather, BSRE has had substantial contact with DNR over the years. See Declaration of Douglas A. Luetjen, submitted as Addendum 9 to the Motion for Reconsideration/Clarification. As recently as August of 2017, BSRE was advised by DNR to wait to modify the lease until after the urban center has been approved so as to allow the industrial uses to continue in the meantime. Id. BSRE’s interactions and negotiations with DNR were not part of the hearing and thus this evidence could not reasonably be expected to have been provided at the time of the hearing. All Findings of Fact, Conclusions of Law and rulings related to BSRE’s water taxi proposal, including, but not limited to, F.62, F.63, C.38, C.39, C.78 and ruling 4, should therefore be reversed and revised accordingly.
iv. The Hearing Examiner Erred in Raising a New Issue of “Necessary or Desirable” in Decision.

In C.37, the Hearing Examiner, for the first time, concluded BSRE failed to show that the height increase was “necessary or desirable.” This is a decision which is to be made following the completion of a view analysis in the project EIS. Further, the County has never claimed that BSRE is not entitled to additional height under SCC 30.34A.040 because the height is not “necessary or desirable”; such a claim was not before the Hearing Examiner and therefore the parties did not present evidence on this issue. See April Recommendation and May Recommendation. In addition, neither party addressed this issue in their closing briefs or in their proposed findings of fact and conclusions of law. Neither party has had a chance to brief or argue whether the additional height is “necessary or desirable.” Because of this, the record is silent on this issue.

In making this determination, the Hearing Examiner failed to recognize that BSRE was not arguing that the Land Use Applications were approvable at that exact moment. The project cannot be approvable because the EIS has not been issued. Therefore, there is no allegation by either party that every element of every issue either has been or needs to have been addressed.

Before the Hearing Examiner can rule on whether the additional height is “necessary or desirable”, the parties must be given a chance to brief this subject. Therefore, either this Conclusion should be deleted in its entirety, or the matter should be remanded to the Hearing Examiner to allow BSRE the opportunity to show why the additional height is both necessary and desirable from a “public, aesthetic, planning, or transportation standpoint.”
F. The Hearing Examiner’s Findings of Fact, Conclusions of Law and Rulings Regarding the Landslide Deviation Requests Were Not Supported by the Record and Failed to Follow Applicable Procedures.

BSRE submitted two distinct landslide hazard deviation requests: one for buildings proposed to be located in the Urban Plaza, and one for a secondary access road to be located in that same general area. The County never issued a formal decision on BSRE’s deviation requests. See Ryan Countryman’s May 24, 2018 Testimony. Because the County did not issue a formal decision on the landslide deviation requests, BSRE was not been given an opportunity to respond to any such decision. As Randy Sleight testified on May 22, 2018, the typical process for a deviation request includes a conversation between Mr. Sleight and the developer to discuss what additional information Mr. Sleight needs and what options are available. BSRE should have been given this opportunity prior to the Hearing Examiner issuing its findings of fact, conclusions of law and rulings related to the deviation requests.

The Findings of Fact, Conclusions of Law and rulings regarding the landslide deviation requests, including, but not limited to, F.84, F.85, F.89, F.91, F.93, F.94, C.53, C.54, C.56, C.59, C.60, C.61, C.62, C.63, C.64, C.65, C.67, C.68, C.69, C.70, C.78 and ruling 4, should be reversed because the deviation requests were not denied, the findings are not supported by the evidence and the Hearing Examiner failed to follow applicable procedures by failing to consider the changes made by BSRE in order to address the concerns raised by the County and by the Hearing Examiner in the Decision.

i. BSRE Has Shown there is No Alternate Location Available for the Buildings in the Urban Plaza.

The landslide deviation request for the buildings proposed to be located in the Urban Plaza was updated in response to the Decision, as provided for in SCC 30.72.065(f), to show that there
is no alternate location available for those buildings. This change was made after the hearing in order to address the County’s concerns and was submitted with the Motion for Reconsideration/Clarification. See Exhibit R-1, Addendum 6. Therefore, the Hearing Examiner should have revised all Findings of Fact, Conclusions of Law and rulings related to the issue of whether there is an alternate location for those buildings, including, but not limited to, C.54. Despite code language explicitly providing to the contrary, the Hearing Examiner refused to consider the new information provided and therefore failed to follow the applicable procedures. For this reason, all such Findings of Fact, Conclusions of Law and rulings should be reversed.

ii. The Geotechnical Report Does Not Substantially Conflict with the County Code.

The Hearing Examiner raised the following concerns about the geotechnical report: (1) that the geotechnical report does not adequately demonstrate that the proposed deviation provides protection equal to that provided by the prescribed minimum setbacks (F.84, C.56, C.61); (2) that the subsurface conditions report does not provide the required information regarding the method and locations of drainage (F.89, C.59); (3) that the geotechnical report does not address the safety of the vehicles and pedestrians on the secondary access road (F.91, C.65); (3) that the geotechnical report does not confirm the site is suitable for the proposed development (F.93, F.94); and (4) that the geotechnical report and/or deviation requests do not include what surcharges were included in the safety factor calculations (C.60).

SCC 30.62B.340 specifically provides deviations may be granted to allow development within a landslide hazard area. BSRE has not been given the typical treatment of scheduling a meeting between Mr. Sleight and BSRE’s consultants to discuss any outstanding issues.
BSRE’s consultant, John Bingham of Hart Crowser, did significant additional work in order to address these concerns. Mr. Bingham revised the subsurface conditions report and the landslide area deviation request. See Exhibit R-1, Addenda 4 and 5. This new evidence was not reasonably available during the hearing because BSRE only received the County’s feedback on the deviation requests in the May Recommendation and during the hearing itself. Mr. Bingham promptly revised his reports to provide additional information to address these concerns as soon as he received the feedback and this additional information was provided to the Hearing Examiner, as provided for in SCC 30.72.065(f). The Hearing Examiner failed to consider this new information and therefore failed to follow the applicable procedures.

The record does not support F.91 and C.65 because Mr. Sleight testified that designs had been submitted which would make the road safe for pedestrians and vehicles. Mr. Bingham’s role was not to design the road, but to provide that it could be built safely in the landslide hazard area. He did that. However, the April 20, 2018 geotechnical report and Addendum 4 to the Motion for Reconsideration/Clarification did show that the current slope stability analysis and conceptual retaining wall design were done to achieve at least the minimum static and seismic factors of safety required by the Snohomish County Code. The analysis in these two reports showed that there would not be shallow slides which would affect vehicles or people on the road. No evidence was presented that these issues were not considered in Mr. Bingham’s analysis of the secondary access road. In addition, as Mr. Sleight testified, Mr. Bingham took a conservative approach with the geotechnical report, assuming high liquefaction throughout the area in which the buildings and road would be constructed. See Randy Sleight May 22, 2018 Testimony; John Bingham May 22, 2018 Testimony.
The geotechnical report, landslide hazard deviation requests, and subsurface conditions report, with their respective addenda, provided sufficient information to determine that the project is feasible. The project is not yet at a buildable stage, which means that there will be additional time to provide further details and conduct further tests, if necessary. This project must still go through the environmental impact statement preparation, which allows ample opportunity for any required design changes to be made.

It is an error of law to find a substantial conflict with the code where a deviation request is pending. Unless and until the deviation requests are denied, there is reasonable doubt that the proposal is in substantial conflict with SCC 30.62B.320 and .340. If a project with a pending deviation request is considered to be in substantial conflict with the code, provisions allowing for deviation requests would be directly in conflict with the statute allowing premature denial.

BSRE provided landslide hazard deviation requests, geotechnical reports, and subsurface condition reports which did not substantially conflict with the Snohomish County Code and therefore the Findings of Fact, Conclusions of Law and rulings related to the landslide hazard areas should be revised accordingly. If the County or the Hearing Examiner believes additional work is necessary to show compliance with any applicable provision, then it would be appropriate to condition any future approvals on obtaining the deviation and any necessary approvals for the secondary access road. The Decision failed to recognize that additional revisions will be made as the environmental review continues and that conditions to approval would be appropriate.

G. BSRE's Request for an Extension Should be Granted.

The Findings of Fact, Conclusions of Law, and rulings related to BSRE's actions since April 2013 and related to whether BSRE should be granted an extension, including, but not limited to, F.19, F.10, F.21, F.24, F.27, F.31, F.34, F.32, C.12, C.13, C.14, C.19, C.20, C.21, C.22, C.53,
C.69, C.78, C.79, ruling 3 and ruling 4, are not supported by the evidence. In addition, the Hearing Examiner failed to follow the applicable procedures by failing to consider the changes proposed by BSRE in response to the Decision.

A number of these findings are not supported by the record and should be revised: Nothing in the record indicates that BSRE proposed a transportation corridor study on February 2, 2014, and, in fact, BSRE never proposed a transportation corridor study (F.9). Instead, as testified to by Kirk Harris on May 24, 2018, BSRE entered into a memorandum of understanding with Shoreline regarding how a study would be conducted. See Kirk Harris May 24, 2018 Testimony. BSRE and Shoreline conducted seven public meetings (F.10). Exhibit P-18. BSRE continued working with Shoreline on traffic issues beyond April 20, 2015 (F.14). See id.; Kirk Harris May 24, 2018 Testimony.

Contrary to the Hearing Examiner’s Finding, the County’s March 31, 2016 letter granting BSRE an extension does not state that further extensions will only be granted in “extraordinary circumstances.” Nor does it state that “the applications could be heard by the Hearing Examiner if the alleged deficiencies were not remedied, though PDS would recommend denial” (F.21). See Exhibit K-13. The County’s letter on October 6, 2017, did not discuss further extensions at all. Nor did it state that further extensions would only be granted in “extraordinary circumstances” (F.31). See Exhibit K-32. F.32 mischaracterizes the meeting between the County and BSRE on November 13, 2017: during that meeting, the County, including its legal counsel, assured BSRE that there was no reason that another extension would be forthcoming, acknowledged that BSRE could not meet the January 8, 2018 deadline (which the County admitted was not a “deadline” but instead merely a “target”), and advised BSRE to submit a letter stating the date by which it would be able to provide the necessary information. See Douglas A. Luetjen May 24, 2018 Testimony;
see also Exhibit P-13 (Ryan Countryman’s notes show clearly that BSRE asked when the extension request would need to be submitted).

In addition to the above inaccuracies, the Hearing Examiner failed to note in F.27 that the County’s May 2, 2017, letter specifically stated, “As the applicant, if you wish to request a further suspension of the application expiration period pursuant to the above-mentioned Code provision, you should make a written request to PDS prior to May 30, 2018, in order for the PDS director to have time to evaluate the request.” Exhibit K-19. Not only did the County not indicate that no further extensions would be forthcoming, the County also provided a date by which the next extension must be provided – just one month before the expiration date. BSRE complied with this request, submitting its extension request in January, more than five months prior to the expiration date of June 30, 2018.

C.19 is similarly inaccurate as it fails to show that BSRE and Shoreline were negotiating for years before Shoreline ceased cooperating with BSRE and determined that it would only work with BSRE if Shoreline was permitted to annex Point Wells. At one point, Shoreline advised BSRE that it did not have the votes on the Shoreline Council to permit Shoreline to continue negotiating with BSRE. See Kirk Harris May 24, 2018 Testimony.

As the Hearing Examiner stated in C.11, “[a]n imminent deadline concentrates the mind wonderfully.” This was certainly true for the County. The County provided more substantive feedback from October 2017 through May 2018 than it had in all the time prior to that, which allowed BSRE to provide the responses it did in April and May 2018. If the County had provided such substantive responses earlier, then BSRE could have responded in kind. However, until BSRE received the feedback from the County in its October 2017 Letter and its April and May Recommendations, BSRE was unable to do the work the County deemed necessary. This is
certainly true with respect to the OHWM, which was not even raised as an issue by the County
until its May Recommendation, providing BSRE with no time to respond substantively before the
hearing. See Section C supra.

For these reasons, all Findings of Fact, Conclusions of Law and rulings implying or stating
that BSRE was dilatory in not determining the OHWM sooner, including, but not limited to, C.12,
C.13, C.14, C.15, C.16, C.17, C.21, C.22, C.78, and ruling 3, should be reversed. Furthermore,
BSRE proposed to improve Richmond Beach Drive so as to meet applicable road standards (C.18).

BSRE diligently worked to obtain approval from Sound Transit, but was told repeatedly
that Sound Transit would not consider putting a stop there until after BSRE obtained the necessary
approvals. See Douglas A. Luetjen May 24, 2018 Testimony. The letter that BSRE received in
2010 was the strongest commitment Sound Transit was willing to make until BSRE obtained
approval from Snohomish County for its urban center. Id. BSRE engaged consultants who are
experienced with working with Sound Transit and BNSF to ensure that the necessary approvals
will be received at the appropriate time. Id. BSRE took all steps available to it to show its
commitment to providing high capacity transit at Point Wells. Id. Thus, all Findings of Fact,
Conclusions of Law and rulings implying or stating that BSRE was dilatory in not obtaining
consent from Sound Transit, including, but not limited to, C.20, C.21, C.22, C.39, C.78, and ruling
3, should be reversed.

As Ryan Countryman testified on May 21, 2018, applications typically go through seven
or eight iterations. With a project this complex, it is understandable why multiple iterations are
necessary, both from the applicant’s perspective as well as that of the County. Multiple reviews
allow both parties to ensure code compliance. This ability to fix issues is exactly why the code
authorizes the Examiner to reconsider his decision based on post-decision submittals. This is also
why SCC 30.34A.180 [2007] provides an applicant with the opportunity to revise and re-submit its applications following an initial denial:

The hearing examiner may deny an urban center development application without prejudice pursuant to SCC 30.72.060. If denied without prejudice, the application may be reactivated under the original project number without additional filing fees or loss of project vesting if a revised application is submitted within six months of the date of the hearing examiner's decision. In all other cases a new application shall be required.

SCC 30.34A.180(2)(f) [2007]. See Section I infra. This project is by far the most complicated project that Snohomish County has seen (see Ryan Countryman's May 24, 2018 Testimony), making the need for multiple revisions even greater. BSRE has shown it is motivated to resolve all issues raised by PDS and will work diligently to do so.

For all of the above cited reasons, ruling 3 should be reversed, BSRE should be granted an extension and the parties should be directed to proceed with the draft environmental impact statement.

H. The Hearing Examiner Committed an Error of Law with Respect to Whether BSRE is Entitled to Re-File Pursuant to SCC 30.34A.180 [2007].

The Code expressly contemplates having a Hearing Examiner reconsider its decisions where changes are made to an application to address deficiencies identified in a Hearing Examiner’s decision. See SCC 30.72.065(f). This reflects an on-going process in which an application gradually evolves to come into full code compliance. This is reflected by the fact that the Hearing Examiner’s Decision was without prejudice. While the Hearing Examiner appropriately determined that the Decision was without prejudice, the Hearing Examiner committed an error of law by finding that SCC 30.34A.180(2)(f) [2007] was inapplicable simply because the subject language had been replaced by subsequent code revisions which deleted the
"without prejudice" language. The Hearing Examiner failed to recognize the fact that BSRE’s application was vested to the code in place on the date of its application. In fact, the Point Wells page of PDS’s website explicitly includes the following provision as among those applicable to this application. The vested code provision is set forth in SCC 30.34A.180(2)(f) [2007] which provides in pertinent part:

The hearing examiner may deny an urban center development application without prejudice pursuant to SCC 30.72.060. If denied without prejudice, the application may be reactivated under the original project number without additional filing fees or loss of project vesting if a revised application is submitted within six months of the date of the hearing examiner’s decision. In all other cases a new application shall be required.

BSRE is particularly familiar with this code provision because BSRE suggested this verbiage be included in the Urban Center Code at the time of its initial consideration. The goal was to address this specific situation. PDS and the Snohomish County Council agreed and this provision was included in the code when adopted.

Washington has adopted the “vested rights doctrine” with respect to land use applications. *See Noble Manor v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997). “[V]esting’ refers generally to the notion that a land use application, under the proper conditions, will be considered only under the land use statutes and ordinances in effect at the time of the application’s submission.” *Id.* at 275. The Final Legislative Report of the bill enacting RCW 58.17.033 further clarifies the scope of Washington’s vesting rights: “The doctrine provides that a party filing a timely and sufficiently complete building permit application obtains a vested right to have that application processed according to zoning, land use and building ordinances in effect at the time of the application.” “The purpose of the vested rights doctrine is to provide a measure of certainty
to developers and to protect their expectations against fluctuating land use policy.” Noble Manor, 133 Wn.2d at 278.

Pursuant to RCW 58.17.033(1), a land use application must be “considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances” in effect at the time that the fully completed application is submitted. SCC 30.34A.180 is not a subdivision or short subdivision ordinance, but it is a “land use control ordinance”. “[L]and use control ordinances” are those that exert a restraining or directing influence over land use.” Graham Neighborhood Ass’n v. F.G. Assocs., 162 Wn. App. 98, 115, 252 P.3d 898 (2011). The Code also recognizes the scope of the vesting doctrine: “For the purpose of this section, ‘development regulation’ means those provisions of Title 30 SCC that exercise a restraining or directing influence over land, including provisions that control or affect the type, degree, or physical attributes of land development or use.” SCC 30.70.300. The purpose of the vesting doctrine is to allow property owners to proceed with their planned projects with certitude. Graham Neighborhood Ass’n, 162 Wn. App. at 116.

Here, the Hearing Examiner committed an error of law by failing to recognize that the Land Use Applications were vested to SCC 30.34A.180 [2007]. SCC 30.34A.180 [2007] granted developers a significant property right – the right to re-submit a land use application within six (6) months of a denial without prejudice, in order to have the land use application retain its vesting status. This was a provision that was specifically negotiated by BSRE and the County, and is directly related to and affecting property rights. Therefore, it is appropriately considered a land use ordinance. Because Washington has adopted the vested rights doctrine with respect to land use ordinances, and the County has further codified that doctrine, BSRE’s Land Use Applications should be vested to SCC 30.34A.180 [2007], which provides that BSRE may re-submit revised
Land Use Applications within six (6) months of the Hearing Examiner’s Decision and have those Land Use Applications considered under the law in effect at the time that the Land Use Applications were originally submitted in 2011.

1. BSRE’s Short Plat Application (11-101007 SP) is Unaffected by the Perceived Deficiencies in the Application and Should Not Be Terminated.

The Hearing Examiner failed to address BSRE’s request that the Short Plat Application be deemed to be excluded from the decision terminating the Land Use Applications. BSRE asserts that BSRE’s short plat application stands alone and is unaffected by the issues raised in the hearing and in the Decision. The Hearing Examiner committed an error of law by failing to exclude BSRE’s short plat application from the Decision.

IV. CONCLUSION

Base on the foregoing, BSRE requests that the Snohomish County Council reverse the Hearing Examiner’s Decision and (1) deny the County’s request to deny BSRE’s applications without an environmental impact statement, (2) grant BSRE’s request for an extension, (3) find that the Land Use Applications are vested to SCC 30.34A.180 [2007], and (4) reverse all Findings of Fact, Conclusions of Law or rulings which relate to any of the above issues.

DATED this 17th day of August, 2018.

Gary D. Huff, WSBA #6185
Douglas A. Luetjen, WSBA #15334
J. Dino Vasquez, WSBA #25533
Jacque E. St. Romain, WSBA #44167
KARR TUTTLE CAMPBELL
701 Fifth Avenue, Suite 3300
Seattle, WA 98104
Telephone: 206-223-1313
Facsimile: 206-682-7100
Email: dvasquez@karrturtle.com
Attorneys for Appellant