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BEFORE THE HEARING EXAMINER  
FOR SNOHOMISH COUNTY

BSRE POINT WELLS, LP,

Appellant,

vs.

SNOHOMISH COUNTY DEPARTMENT OF  
PLANNING AND DEVELOPMENT,

Respondent.

NO. 11-101457 LU

SNOHOMISH COUNTY’S RESPONSE  
IN OPPOSITION TO BSRE’S MOTION  
TO STAY THE HEARING

**I. INTRODUCTION**

BSRE, Point Wells, LP (BSRE) filed a Motion to Stay a hearing on its Point Wells urban center development applications (the “Application”). The hearing BSRE seeks to stay will reveal that after nine years, multiple application extensions, and a superior court order granting a final opportunity to submit a code compliant application, that BSRE’s Application continues to substantially conflict with the Snohomish County Code (the “county code”). BSRE cannot demonstrate that a stay promotes efficiency when there are substantial conflicts it did not challenge before the court of appeals nor chose to resolve with its revised submittal. In addition, a review of the factual and procedural history regarding BSRE’s diligence in pursuing its Application prevents BSRE from making the requisite showing of good cause for further postponement of a final decision in this matter. The County respectfully requests that the Hearing Examiner deny BSRE’s Motion to Stay.

1 **II. FACTUAL BACKGROUND**

2 **A. The County Reviewed the Application and Recommended Denial for**  
3 **Multiple Substantial Conflicts.**

4 In 2011, BSRE submitted an Application to PDS for development of a mixed-use  
5 urban center development. Ex. N-1. PDS identified that the Application conflicted with the  
6 county code in numerous and significant ways. Ex. K-4. BSRE did not attempt to  
7 meaningfully address the conflicts until 2017. Ex. K-19. After granting BSRE three  
8 extensions of its Application, PDS denied BSRE’s fourth request for an extension and  
9 recommended early denial of the project from the Hearing Examiner to avoid needless county  
10 and applicant expense as authorized under SCC 30.61.220. Exs. N-1; N-2. After holding an  
11 open record hearing spanning seven days in May 2018, the Examiner issued a Denial  
12 Decision<sup>1</sup> on August 3, 2019. Ex. R-4. In the Denial Decision, the Examiner denied BSRE’s  
13 renewed request for a fourth extension and denied the Application, concluding that the  
14 multiple substantial conflicts between BSRE’s Application and the county code justified  
15 denial under SCC 30.61.220. *Id.*

16 BSRE appealed the Examiner’s Denial Decision to the County Council. Following a  
17 closed record appeal hearing, the County Council affirmed the Examiner’s Denial Decision  
18 with minor modifications (the “Council Decision”). *See* Attachment 1 (Council Motion No.  
19 18-360).<sup>2</sup>

20 \_\_\_\_\_  
21 <sup>1</sup> On June 29, 2018, the Examiner issued a Decision Denying Extension and Denying Applications Without an  
22 Environmental Impact Statement. BSRE filed a Motion for Reconsideration which resulted in the Examiner  
23 issuing two decisions: (1) a Decision Granting in Part and Denying in Part BSRE’s Motion for  
24 Reconsideration and Clarification (Ex. R-3) (“Reconsideration Decision”); and 2) an Amended Decision  
25 Denying Extension and Denying Application Without an Environmental Impact Statement (Ex. R-4) (“Denial  
26 Decision”).

27 <sup>2</sup> While the County Council’s Decision was attached to BSRE’s LUPA appeal to superior court, it appears to  
28 have been mistakenly omitted from Exhibits S-17 (Office Notice of Council Decision with Motion 18-360)  
29 and S-18 (Affidavit of Mailing – Notice of Council Decision and Motion No. 18-360) in the administrative  
30 record prepared for the LUPA appeal. To remedy this omission, the County requests that Motion No. 18-360  
31 be added to the record as Exhibit S-19.



1                   **C.      BSRE’s Appealed to the Court of Appeals & its Motion to Stay**  
2                   **Enforcement of the Judgment was Denied.**

3                   However, on July 31, 2019, BSRE appealed the superior court’s Remand Order to the  
4 court of appeals. BSRE alleged that the superior court erred by not reversing or ruling upon  
5 (i) the conclusion that the residential setback of SCC 30.34A.040(2)(a) applies to Point Wells;  
6 and (ii) the conclusion that proximity without access to high capacity transit does not satisfy  
7 SCC 30.34A.040(1). BSRE did not allege error with any other issues of substantial conflict.

8                   On August 27, 2019, BSRE filed a Motion to Stay Enforcement of Judgment with the  
9 court of appeals. While BSRE did not appeal the portion of trial court’s Remand Order  
10 imposing the six-month deadline, it nonetheless requested that the court of appeals stay the  
11 Remand Order to avoid revising its Application to address the substantial conflicts. On  
12 September 19, 2019, a court of appeals commissioner denied BSRE’s motion. The ruling  
13 was based on the grounds that “BSRE offers no authority for this Court to extend the time  
14 period *set by the county code*” (emphasis in the original) and suggested that BSRE may seek  
15 relief from the County. *See Attachment 3 (COA Ruling Denying Motion to Stay Enforcement*  
*of Judgment).*

16                   On October 4, 2019, BSRE sent a letter to PDS requesting a stay of the six-month  
17 application deadline. *See Attachment 4 (October 4, 2019, Karr Tuttle Letter to PDS).* On  
18 October 9, 2019, PDS responded to BSRE’s request and explained that the county code does  
19 not authorize PDS to extend or waive the six-month deadline established in SCC  
20 30.34A.180(2)(f). *See Attachment 5 (October 9, 2019, PDS Letter to Karr Tuttle).* The letter  
21 also explained that BSRE’s request directly contradicted the superior court’s Remand Order,  
22 which imposed a date certain of December 18, 2019, by which BSRE was required to submit  
23 a revised application if it elected to resubmit under SCC 30.34A.180(2)(f).

24                   The parties briefed the appeal from December 2019 through February 2020. Both the  
25 County and Intervenor, City of Shoreline, provided extensive briefing that BSRE’s appeal

1 was not ripe because the superior court’s Remand Order was not a final appealable judgment  
2 under RAP 2.2. As a result, the County and Shoreline argued that the court of appeals lacked  
3 jurisdiction to consider BSRE’s appeal. *See* Attachment 6 (Brief of Respondent Snohomish  
4 County). The court of appeals has not yet scheduled oral argument or issued a decision on  
5 the appeal.

6 **D. On Reactivation, BSRE Submitted a Nearly Identical Development**  
7 **Application that Included the Unresolved Substantial Conflicts.**

8 On December 12, 2019, BSRE provided new and revised application materials to PDS  
9 at a resubmittal meeting. Exs. V1-V18.<sup>3</sup> Some of the new information provided by BSRE  
10 constituted requests for new approvals. The new approval requests included: 1) a variance  
11 application regarding high capacity transit and buildings over 90 feet; 2) a variance  
12 application regarding building height adjacent to low density zones; 3) a shoreline conditional  
13 use permit application for a water taxi; and 4) a landslide hazard deviation request. Ex. X-3.

14 BSRE’s resubmittal represented a development that was mostly unchanged from the  
15 previous development proposal. The modifications that were made to the proposal included:  
16 removing some but not all of the buildings in the Urban Plaza from the residential setback  
17 area; moving buildings outside of the shoreline setback; reducing the unit count from 3,085  
18 to 2,846; and proposing three development phases instead of four. Ex. X-3. The resubmittal  
19 is unchanged with regard to buildings above 90 feet without access to high-capacity transit,  
20 tall buildings in the residential setback area, and substantial development in the landslide  
21 hazard area, including the secondary access road, the entire Urban Plaza portion of the  
22 development, and the proposed Sounder Station. Ex. X-3.

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26 <sup>3</sup> Ex. V-19 was submitted by BSRE to PDS on December 16, 2019.

1                   **E.       PDS Reviewed the Application Resubmittal and Issued a Staff**  
2                   **Recommendation Recommending Denial Based on Unresolved**  
3                   **Substantial Conflicts.**

4                   With regard to the Application, PDS staff diligently proceeded with review of revised  
5                   BSRE's December 2019 submittal. PDS's review of BSRE's resubmittal was comprehensive  
6                   and included staff review of the three new applications, re-assessment of whether the new  
7                   materials resolved the substantial conflicts with the Application, and consideration of the  
8                   numerous public comments received on the revised development. In addition, PDS's Chief  
9                   Engineering Officer reviewed the geotechnical report relating to BSRE's landslide hazard  
10                  deviation request and drafted a detailed landslide deviation decision. Ex. X-2. Based on  
11                  BSRE's failure to satisfy the landslide deviation criteria, BSRE's deviation requests were  
12                  denied for: 1) the secondary access road; 2) the Urban Plaza; and 3) the proposed Sounder  
13                  Station. Ex. X-2. Lastly, PDS hired a third-party architectural consultant to provide  
14                  independent analysis of issues regarding the Point Wells floor area ratio (FAR). In its  
15                  resubmittal, BSRE cited the FAR regulations as a primary justification for both variance  
16                  requests and the landslide hazard deviation. The FAR consultant's report concluded that  
17                  BSRE's FAR calculations conflicted with the urban center regulations and resulted in  
18                  significantly inaccurate FAR calculations for the development. Ex. X-1. As a result, PDS  
19                  determined that BSRE's reliance on the FAR issue did not support the variances or landslide  
20                  deviation request, and that the development did not comply with the density threshold for its  
21                  proposed urban center.

22                  Based on the above review, PDS issued Supplemental Staff Recommendation #2 on  
23                  May 27, 2020. Ex. X-3. In the Staff Recommendation, PDS provided detailed analysis of  
24                  BSRE's variance applications and shoreline conditional use permit application. PDS  
25                  recommended denial of those applications for failure to satisfy the decision criteria. Ex. X-3.  
26                  In addition, PDS continued to recommend denial of the Application under SCC 30.61.220,  
as comprehensive review of the revised submittal revealed that BSRE had not taken steps to

1 resolve the substantial conflicts between its Application and the county code. Ex. X-3. With  
2 issuance of the Staff Recommendation, PDS transferred jurisdiction of the Application to the  
3 Hearing Examiner and requested that a continued public hearing be scheduled on the  
4 Application. Ex. Y-1. A pre-hearing conference was held June 10, 2020, and November  
5 2020 hearings dates were tentatively established by the Examiner. On June 24, 2020, BSRE's  
6 filed the present Motion to Stay the hearing.

### 7 III. ANALYSIS

#### 8 A. The Examiner Has Discretion in the Administration of Hearings and 9 BSRE Has Failed to Demonstrate Good Cause For the Stay.

10 The County Code grants the Examiner the authority to conduct and regulate public  
11 hearings. SCC 2.02.100. The Hearing Examiner's Rules of Procedure provides that the  
12 Examiner may establish the hearing schedule, and also consider and act upon any other matter  
13 that assures an efficient and orderly hearing. HE Rules of Procedure 3.0(c). A principal party  
14 may request a continuation or postponement of a hearing based on a showing of good cause.  
15 HE Rules of Procedure 2.1(d).

16 BSRE's justification for its Motion to Stay fall into two general categories: 1)  
17 outstanding legal issues before the court of appeals; and 2) additional expenses associated  
18 with defending its Application in a public hearing. As explained below, in the circumstances  
19 presented here neither of these issues qualify as good cause justifying a stay.

#### 20 B. The Court of Appeal's Issues are Distinct and Moot in Light of Other 21 Unresolved Substantial Conflicts with BSRE's Application.

22 In its appeal before the court of appeals, BSRE alleges that the superior court erred  
23 by not reversing or ruling upon (i) the conclusion that the residential setback of SCC  
24 30.34A.040(2)(a) applies to Point Wells; and (ii) the conclusion that proximity without access  
25 to high capacity transit does not satisfy SCC 30.34A.040(1). BSRE's claims that these

1 outstanding issues need to be addressed before the hearing can proceed because it impacts  
2 the scope of the hearing.

3         However, in light of the other unresolved substantial conflicts with BSRE's  
4 Application, the residential setback and access to high capacity transit for increased building  
5 height issues are inconsequential to the ultimate question before the Examiner - whether  
6 BSRE has resolved the substantial conflicts with its Application and can proceed with an EIS.  
7 As to the first issue, the residential setback area is located entirely within a landslide hazard  
8 area and coincides with BSRE's proposed Urban Plaza. Since, BSRE's landslide deviation  
9 request for the Urban Plaza was denied for failure to satisfy the decision criteria, any  
10 development in the landslide area is prohibited. Therefore, the issue of whether the  
11 residential setback applies is moot because the area cannot be developed at all – let alone  
12 with tall buildings. The second issue, whether the county regulations require access not just  
13 proximity to high capacity transit, is also moot. That is because the development requires a  
14 secondary access road and BSRE's landslide deviation request for the road was denied based  
15 in part on BSRE's admission it could not satisfy the code requirements for a landslide  
16 deviation.<sup>4</sup> Absent a secondary access, the Application cannot proceed. In the alternative, if  
17 BSRE's variance regarding high capacity transit was granted by the Examiner, then the  
18 appeal issue before the court of appeals would also be rendered moot.

19         In addition, efficiency is not served by a stay because the issues before the Examiner  
20 are distinct and require review regardless of the outcome before the court of appeals. The  
21 issues before the Examiner in the continued open record hearing concern whether there are  
22 substantial conflicts between BSRE's application and the adopted plans, ordinances,  
23

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24 <sup>4</sup> BSRE's geotechnical engineering consultant disclosed that the project could not satisfy the county code  
25 requirement that mandates a 1.1 factor of safety for dynamic slope conditions. The development only  
26 achieves a 1.04 safety factor. In response to this deficiency, BSRE's engineering consultant report provides,  
"Note that certain public agencies have target seismic values of 1.05, or do not require seismic values." V-16  
at 2.

1 regulations, or laws under SCC 30.61.220. Based on BSRE’s revised submittal in December  
2 2019, part of the Hearing Examiner’s evaluation under SCC 30.61.220 will include review  
3 of PDS’s recommendations of denial for two new variance applications and a shoreline  
4 conditional use permit application. Ex. X-3. In addition, the Examiner’s review will take  
5 into consideration PDS’s decision denying BSRE’s landslide area deviation request. Ex. X-  
6 2. As a result of the denial, essential elements of the development proposed by BSRE in a  
7 landslide hazard area cannot be constructed, including the secondary access road, the entire  
8 Urban Plaza, and proposed Sounder Station. These substantial conflicts alone justify denial  
9 of the Application. *See* SCC 30.61.220. None of these applications or substantial conflicts  
10 are under review by the court of appeals.

11 **C. Avoiding Consultant Costs to Address the Substantial Conflicts with the**  
12 **Application Does Not Qualify as Good Cause.**

13 In its Motion to Stay, BSRE discloses that it’s requesting the stay to avoid engaging  
14 consultants to address the substantial conflicts with its Application and takes the position  
15 “that it should be permitted to revise the plans once the Court of Appeals issues its decision,  
16 if necessary.” Motion to Stay at 8-9. BSRE’s proposal is to submit a revised application that  
17 may or may not address the substantial conflicts with its Application at some unspecified date  
18 in the future. However, incurring costs to address substantial conflicts with an application is  
19 a cost incurred by any development applicant, and is not good cause for delaying a review  
20 hearing.

21 It is also worth noting that BSRE was already granted the opportunity to submit a  
22 revised application that resolved the substantial conflicts by the superior court – it chose not  
23 to within the time period provided by the superior court and county code. Instead, BSRE  
24 advocates for an application process under which it can elect to delay or completely avoid  
25 resolving the substantial conflicts with its Application while not being subject to an expiration  
26 date or timeline applicable to any other similarly situated development applicant. Further,

1 BSRE's conduct does not appear to be consistent with the superior court's order "to act  
2 diligently, in good faith and in accord with the Snohomish County Code and all other  
3 applicable statutory provisions in completing the application review process." Ex. U-1 at 19.

4 In citing consultant costs in its Motion, BSRE completely ignores the impact and costs  
5 incurred by PDS in reviewing multiple iterations of a substantially deficient Application.  
6 Similarly, no consideration is given to the time and effort expended other parties, including  
7 the neighboring jurisdictions and residents. Shoreline and Woodway, as well as the residents  
8 adjacent to the proposed development, are the most likely to be severely impacted by the  
9 proposed development and continue to dedicate time and resources in the review and public  
10 comment process. See Exs. W-1 through W-44 (public comments); specifically W-20  
11 (Shoreline); W-31 (Woodway); W-18 (Tulalip Tribes); and W-40 (Muckleshoot Tribe).  
12 Repeated delays and extensions increase the impacts and costs on these parties. In evaluating  
13 good cause for the Motion to Stay, the Examiner should take into account the costs and  
14 burdens already expended by these parties and the general public, not just the hypothetical  
15 costs that BSRE may incur in addressing substantial conflicts that it has not resolved to date.

#### 16 IV. CONCLUSION

17 Based on above, the County respectfully requests that the Examiner deny BSRE's  
18 Motion to Stay.

19  
20 DATED this 2<sup>nd</sup> day of July, 2020.

21 ADAM CORNELL  
22 Snohomish County Prosecuting Attorney

23 By:   
24 MATTHEW A. OTTEN WSBA #40485  
25 Deputy Prosecuting Attorney  
26 Attorney for Respondent Snohomish County  
Department of Planning and Development

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**DECLARATION OF SERVICE**

I, Ashley Lamp, hereby declare under penalty of perjury under the laws of the State of Washington that I served a true and correct copy of the foregoing Snohomish County's Response in Opposition to BSRE's Motion to Stay the Hearing upon the person/persons listed herein and by the following method(s):

Jacque E. St. Romain  
J. Dino Vasquez  
Karr Tuttle Campbell  
701 Fifth Avenue, Suite 330  
Seattle, WA 98104  
[jstromain@karrtuttle.com](mailto:jstromain@karrtuttle.com)

- E-Mail
- Facsimile:
- U.S. Mail
- Hand Delivery
- Messenger Service

SIGNED at Everett, Washington, this 2nd day of July, 2020.

  
\_\_\_\_\_  
Ashley Lamp

# **Attachment 1**

SNOHOMISH COUNTY COUNCIL  
Snohomish County, Washington

MOTION NO. 18-360

AFFIRMING THE AMENDED DECISION OF THE HEARING EXAMINER  
IN RE POINT WELLS URBAN CENTER, HEARING EXAMINER FILE NO. 11-101457 LU/VAR,  
11-101461 SM, 11-101464 RC, 11-101008 LDA, AND 11-101007 SP AND  
MODIFYING FINDINGS F.21 AND F.31

WHEREAS, BSRE Point Wells, LP (BSRE) applied to Snohomish County for approval of an Urban Center development at Point Wells; and

WHEREAS, Snohomish County Planning & Development Services Department recommended to the Snohomish County Hearing Examiner ("Hearing Examiner") that BSRE's applications be denied without an environmental impact statement because of substantial conflicts with County Code under SCC 30.61.220; and

WHEREAS, BSRE requested that the Hearing Examiner extend the expiration of its applications beyond June 30, 2018; and

WHEREAS, the Hearing Examiner held an open record hearing May 16, 2018, through May 24, 2018, and issued a decision on June 29, 2018; and

WHEREAS, BSRE petitioned for reconsideration on July 9, 2018; and

WHEREAS, the Hearing Examiner issued the Amended Decision Denying Extension and Denying Applications Without Environmental Impact Statement on August 3, 2018 ("Amended Decision"); and

WHEREAS, BSRE filed an appeal to Council on August 17, 2018, of the Hearing Examiner's Amended Decision; and

WHEREAS, appeal to Council is appropriate under SCC 30.72.070(1) and Council has jurisdiction over this closed record appeal except to the extent BSRE challenges denial of a shoreline substantial development permit, shoreline conditional use permit, or shoreline variance, which must be appealed to the state shoreline hearings board under SCC 30.44.250, not to Council as a closed record appeal; and

WHEREAS, Council held a closed record appeal hearing on October 3, 2018, to hear oral argument and to consider the appeal; and

WHEREAS, Council considered the following appeal issues raised by BSRE, as summarized, paraphrased, and numbered by Council staff for ease of reference:

1. The Hearing Examiner committed an error of law in applying SCC 30.34A.040(2), which limits building heights adjacent to certain residential zones, to this project.
2. The Hearing Examiner failed to follow applicable procedures by ignoring project changes submitted by BSRE to the Hearing Examiner in response to deficiencies identified in the June 29 decision regarding residential setbacks.

3. The Hearing Examiner committed an error of law and issued findings and conclusions not supported by the record with respect to BSRE's lack of diligence in delineating the Ordinary High Water Mark under SCC 30.62A.320.
4. The Hearing Examiner failed to follow applicable procedure by ignoring additional information and changes submitted by BSRE to the Hearing Examiner in response to deficiencies identified in the June 29 decision regarding the delineation of Ordinary High Water Mark.
5. The Hearing Examiner failed to follow applicable procedure by ignoring additional information and changes submitted by BSRE to the Hearing Examiner in response to deficiencies identified in the June 29 decision regarding the use of innovative development design to protect critical area functions and values (see SCC 30.62A.350).
6. The Hearing Examiner committed an error of law by concluding that additional building height and development capacity permitted through proximity to high capacity transit pursuant to SCC 30.34A.040 [2010] does not apply to this project.
7. The Hearing Examiner issued findings and conclusions that were not supported by the record regarding a lack of commitment by Sound Transit or Community Transit to provide passenger rail or bus rapid transit service to the project site.
8. The Hearing Examiner issued finding and conclusions that were not supported by the record regarding the potential for passenger ferry (aka water taxi) service to the project site.
9. The Hearing Examiner committed an error of law by concluding that the application did not document the necessity or desirability of additional height and development capacity permitted through proximity to high capacity transit pursuant to SCC 30.34A.040 [2010].
10. The Hearing Examiner committed an error of law by finding substantial conflict with county code regarding landslide hazards (SCC 30.62B) while a landslide deviation request was pending.
11. The Hearing Examiner issued findings and conclusions that were not supported by the record regarding landslide hazards.
12. The Hearing Examiner failed to follow applicable procedure by ignoring additional information and changes submitted by BSRE to the Hearing Examiner in response to deficiencies identified in the June 29 decision regarding landslide hazards.
13. The Hearing Examiner issued findings and conclusions that were not supported by the record regarding whether BSRE should be granted an extension of the application expiration deadline.
14. The Hearing Examiner failed to follow applicable procedure by ignoring additional information and changes submitted by BSRE to the Hearing Examiner in response to deficiencies identified in the June 29 decision regarding extension of the application expiration deadline.
15. The Hearing Examiner committed an error of law with respect to whether BSRE is entitled to refile its application pursuant to 30.34A.180(2)(f) [2007].
16. The Hearing Examiner committed an error of law by including BSRE's short plat application (No. 11-101007 SP) in the denial of the applications in the Amended Decision; and

WHEREAS, Council did not consider any appeal issues not raised in BSRE's written appeal or any evidence not in the record from the Hearing Examiner, consistent with SCC 30.72.110; and

WHEREAS, after hearing from Appellant and other parties of record, and following due deliberation, the Council affirms the August 3, 2018, Amended Decision of the Hearing Examiner, with certain findings modified as described below;

NOW, THEREFORE, ON MOTION:

Section 1. The Council incorporates the foregoing recitals as findings.

Section 2. The Council makes the following findings of fact and conclusions:

A. Finding F.21 of the Amended Decision is not supported by substantial evidence as written, and is modified to strike the last two sentences:

F.21 On March 30, 2016, BSRE requested a third extension.<sup>7</sup> PDS granted BSRE's request, extending the expiration to June 30, 2018. PDS notified BSRE of Amended Ordinance 16-004, which applied new expiration regulations to pending applications, including the Point Wells applications. PDS also advised BSRE that the applications could be heard by the Hearing Examiner if the alleged deficiencies were not remedied, though PDS would recommend denial. PDS told BSRE that it would receive no further extensions absent "extraordinary circumstances."<sup>8</sup>

As modified, Finding F.21 is supported by substantial evidence.

B. Finding F.31 of the Amended Decision is not supported by substantial evidence as written, and is modified to cite exhibit K-31 in footnote 11 instead of Exhibit K.32:

<sup>11</sup> Ex ~~K.32~~ K.31

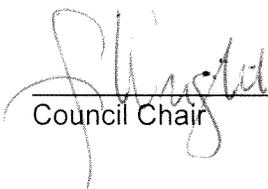
As modified, Finding F.31 is supported by substantial evidence.

Section 3. The County Council enters its decision in the case of In Re Point Wells Urban Center, Hearing Examiner File No. 11-101457 LU/VAR, 11-101461 SM, 11-101464 RC, 11-101008 LDA, and 11-101007 SP as follows:

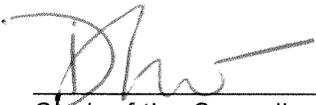
The Council hereby affirms the August 3, 2018, Amended Decision Denying Extension and Denying Applications Without Environmental Impact Statement with modifications, as provided in this Motion. Any language in the Examiner's Amended Decision in this matter that is contrary to this Motion is superseded by this Motion. In all other respects, the Council affirms the Findings, Conclusions, and Decision of the Examiner consistent with the scope of Council's jurisdiction in this closed record appeal under chapter 30.72 SCC.

DATED this 8<sup>th</sup> day of October, 2018.

SNOHOMISH COUNTY COUNCIL  
Snohomish County, Washington

  
\_\_\_\_\_  
Council Chair

ATTEST:

  
\_\_\_\_\_  
Clerk of the Council

D-1

SNOHOMISH COUNTY COUNCIL  
SNOHOMISH COUNTY, WASHINGTON

**OFFICIAL NOTICE OF COUNCIL DECISION**

In re the Appeal of the August 3, 2018, Amended Decision Denying Extension and Denying Applications Without Environmental Impact Statement for BSRE Point Wells, LP, Hearing Examiner File No. 11-101457 LU/VAR, 11-101461 SM, 11-101464 RC, 11-101008 LDA, and 11-101007 SP, for property located at 20500 Richmond Beach Dr. NW, Edmonds, WA 98026.

NOTICE IS HEREBY GIVEN, that on October 8, 2018, a decision in this matter was entered by the Snohomish County Council: Upon a unanimous vote, the County Council approved a motion affirming the August 3, 2018, Amended Decision of the Hearing Examiner with modifications, as set forth in Council Motion No. 18-360, attached hereto.

FURTHER NOTICE IS GIVEN, that unless otherwise provided by law any person having standing who wishes to appeal this decision must do so by filing a land use petition in Superior Court in accordance with the provisions of Chapter 36.70C RCW and SCC 30.72.130.

FURTHER NOTICE IS GIVEN, that affected property owners may request the Snohomish County Assessor to make a change in valuation for property tax purposes notwithstanding any program of revaluation.

DATED this 9<sup>th</sup> day of October, 2018.

/s/ Debbie Eco, CMC  
Clerk of the Council

E-mailed: Tuesday, October 9, 2018  
Mailed: Wednesday, October 10, 2018

# **Attachment 2**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THE COUNTY OF KING

BSRE POINT WELLS, LP, a Delaware limited	)	
partnership,	)	
	)	NO. 18-2-27189-4 SEA
Petitioner,	)	
	)	OPENING BRIEF OF PETITIONER
v.	)	
	)	
SNOHOMISH COUNTY,	)	
	)	
Respondent.	)	
	)	
	)	
	)	

PETITIONER BSRE POINT WELLS, LP (“BSRE”), by and through its undersigned counsel of record, hereby submits this Opening Brief of Petitioner, pursuant to the case schedule provided by this Court’s case scheduling order, dated October 29, 2018.

I. INTRODUCTION

This Land Use Petition Act (“LUPA”) action arose from the denial of land use applications<sup>1</sup> by the Snohomish County Hearing Examiner on August 3, 2018. These applications contemplate the development of an urban center consistent with land use

<sup>1</sup> File numbers 11-01457 LU/VAR, 11-101461 SM, 11-101464 RC, 11-101008 LDA, and 11-101007 SP (collectively, the “Land Use Applications”). See Exhibits A-1, A-2, A-3, and A-6.

1 regulations in effect on the date of the submittal. On August 3, 2018, the Snohomish County  
2 Hearing Examiner issued two decisions which had the effect of terminating the Land Use  
3 Applications without the preparation of an environmental impact statement (an “EIS”): the  
4 Decision Granting in Part and Denying in Part BSRE’s Motion for Reconsideration and  
5 Clarification (the “Reconsideration Decision”) [Exhibit R-3]; and the Amended Decision  
6 Denying Extension and Denying Applications Without Environmental Impact Statement (the  
7 “Denial Decision”) [Exhibit R-4]. The Hearing Examiner’s decisions were timely appealed to  
8 the Snohomish County Council, which held a closed record appeal hearing on October 3, 2018.  
9 The Snohomish County Council issued its written decision on October 9, 2018, largely  
10 affirming the Hearing Examiner’s decision (the “Council Decision”). Exhibit S-17. BSRE  
11 timely filed this appeal, seeking review of this decision pursuant to the Land Use Petition Act,  
12 Chapter 36.70C RCW.

## 16 II. RELIEF REQUESTED

17 BSRE respectfully requests that the Court grant the following relief:

- 18 1. That the Court reverse the decisions of the Snohomish County Council and the  
19 Hearing Examiner.
- 20 2. That the Court issue an order finding that the Land Use Applications should not  
21 have been terminated prior to the completion of the EIS.
- 22 3. That the Court issue an order granting BSRE’s request for an extension.
- 23 4. That the Court issue an order finding that the Land Use Applications are vested  
24 to SCC 30.34A.180 [2007], thereby allowing BSRE six months from the effective date of the  
25 order to refile its Land Use Applications and retain vesting to the Code in place on the original  
26 date of filing.  
27  
28



1       **B. BSRE’s Development and Permit Applications.**

2           BSRE has been working with the County on submitting and revising its applications to  
3 develop Point Wells as an Urban Center since 2011. *Id.* Throughout the pendency of the  
4 permitting process, BSRE has spent approximately seven years and more than \$10 million in  
5 pursuing approval of the Land Use Applications. *See* Exhibits O-3; T-7, p. 994-1008.  
6

7           Finally, after considerable delays by the County, the County submitted a 389-page letter  
8 to BSRE on October 6, 2017, which stated “Snohomish County has completed its review of the  
9 Point Wells application materials submitted on April 17, 2017. This letter transmits our review  
10 comments.” Exhibit K-31. Immediately upon receipt of the letter (the “October 2017 Letter”),  
11 BSRE and its consultants began reviewing, analyzing, and developing scopes of work for  
12 BSRE’s consultants to address the County’s concerns. BSRE budgeted and spent  
13 approximately \$1,000,000 to address the comments raised in the October 2017 Letter. Exhibit  
14 O-3. In the October 2017 Letter, the County requested a response no later than January 8, 2018.  
15  
16 K-31.  
17

18           On November 13, 2017, BSRE, its consultants, and its attorneys met with County  
19 Planning and Development Services (“PDS”) staff, its department management and a member  
20 of the County prosecuting attorney’s office to discuss BSRE’s anticipated response to the  
21 October 2017 Letter. Exhibits O-3; T-7, p. 1003. BSRE informed the County that additional  
22 work requested by the County could not be completed by the January 8 date. Exhibit T-7,  
23 p. 1003-04. At the meeting, PDS explicitly stated to BSRE that the January 8 date set forth in  
24 the October 2017 Letter was merely a “target” and not a statutorily prescribed deadline. *Id.* In  
25 response to BSRE’s statement that the required work could not conceivably be completed by  
26  
27 January 8, PDS advised BSRE to submit a letter stating that it could not meet the target and  
28

1 stating the date by which BSRE would respond. Exhibit T-7, p. 1004. In addition, PDS clearly  
2 and unequivocally stated that there was no reason to suspect that an additional extension request  
3 might not be approved. *Id.* at p. 1005. This was consistent with the statement made in a May  
4 2, 2017 letter from PDS to BSRE stating that “As the Applicant, if you wish to request a further  
5 suspension of the application expiration period pursuant to the above-mentioned Code  
6 provision, you should make a request to PDS prior to May 30, 2018, in order for the PDS  
7 director to have time to evaluate the request.” Exhibit K-19. BSRE subsequently informed  
8 PDS that the revised submittal would be made no later than April 30, 2018. Exhibit G-8.  
9

10  
11 Despite the statements made by PDS that the January 8 date was simply a “target” and  
12 that there was no reason an extension would not be approved, suddenly, on January 9, 2018,  
13 the County abruptly and without notice changed its position and actively began working to  
14 terminate BSRE’s Land Use Applications. Exhibit K-33. PDS’s decision to deny the very  
15 same extension request it represented would be forthcoming and to instead seek a complete  
16 termination of the Land Use Applications understandably surprised BSRE, its attorneys and its  
17 consultants. Despite repeated requests, BSRE has yet to receive an explanation for PDS’s  
18 abrupt change in position.  
19

20  
21 PDS’s termination decision was first conveyed by correspondence dated January 9,  
22 2018 from Principal Planner/Project Manager Paul MacCready to BSRE’s land use counsel  
23 Gary Huff. Exhibit K-33. This letter followed one day the supposed “target date” for  
24 resubmittal. This letter was clearly part of an orchestrated plan to terminate BSRE’s Land Use  
25 Applications, despite its assurances to the contrary. As reflected in this letter (the “January  
26 2018 Letter”), PDS determined, despite its prior representations to the contrary, that *as of the*  
27 *date of that letter*, the Land Use Applications, *as they then existed* could not be approved under  
28

1 Snohomish County Code (the “Code”). Exhibit K-33. PDS thereby began the process outlined  
2 in SCC 30.61.220 to terminate BSRE’s forthcoming revised submittals without preparation of  
3 an EIS. Nonetheless, PDS in effect invited BSRE to continue to work on its plan revisions and  
4 submit them to the Hearing Examiner for consideration. K-40.  
5

6 As earlier promised, BSRE nonetheless completed its further analysis, revised its plans  
7 and fully responded to the matters raised by the County in its October 2017 Letter. *See* Exhibits  
8 A-28, A-29, A-30, A-31, A-32, A-33, A-34, A-35, B-7, B-8, B-9, C-23, C-24, C-25, C-26, C-  
9 27, C-29, C-30, C-31, C-32, C-33, G-12, G-13, G-14, and G-15 (collectively, the “April 2018  
10 Revisions”). Following receipt of the April 2018 Revisions, the County issued a Supplemental  
11 Staff Recommendation on May 9, 2018 (the “May 2018 Recommendation, Exhibit N-2), which  
12 was based on an admittedly incomplete review of the April 2018 Revisions and identified a new  
13 comment not previously included in any prior comments made by PDS.  
14

### 15 **C. The Hearing Examiner**

16 BSRE and PDS participated in an extensive hearing between May 16, 2018 and May 24,  
17 2018 regarding PDS’s recommendation to deny BSRE’s permit application due to several  
18 alleged substantial conflicts with applicable Code provisions. Additionally, BSRE requested  
19 an extension of its permit application from June 30, 2018, the date which PDS set as the  
20 expiration of the permit application.  
21

22 After the completion of live testimony, the parties submitted closing briefs and proposed  
23 findings of fact and conclusions of law. Despite BSRE having addressed nearly the prior  
24 comments raised by PDS, the Hearing Examiner held substantial conflicts existed between  
25 BSRE’s permit application and applicable codes and therefore denied BSRE’s permit  
26  
27  
28

1 application. Exhibit R-2. In addition, the Hearing Examiner denied BSRE’s request for an  
2 extension to cure the alleged conflicts between the permit application and applicable codes. *Id.*

3  
4 BSRE submitted a Motion for Reconsideration and Request for Clarification (the  
5 “Motion for Reconsideration/Clarification”) on July 9, 2018. R-1. In response, the Hearing  
6 Examiner granted in part and denied in part BSRE’s Motion for Reconsideration/Clarification  
7 and issued an Amended Decision Denying Extension and Denying Applications Without  
8 Environmental Impact Statement. R-3, R-4. As directed by the Hearing Examiner, BSRE then  
9 timely submitted an appeal to the Snohomish County Council. Exhibit S-1.  
10

11 The Snohomish County Council held a closed record appeal hearing on October 3, 2018.  
12 Exhibit S-16. In a clearly orchestrated action and without debate of any kind, the Council  
13 denied BSRE’s Appeal. The Council issued its written decision on October 9, 2018. *Id.*  
14 Petitioner timely appealed to this Court, seeking review of the decision pursuant to the Land  
15 Use Petition Act, Chapter 36.70C RCW.  
16

#### 17 IV. STATEMENT OF ISSUES

18 1. Whether the Hearing Examiner and Snohomish County Council committed an  
19 error of law with respect to all Findings of Fact, Conclusions of Law, and Rulings Related to  
20 the Residential Setback where SCC 30.34A.040(2)(a) does not apply to any of the buildings  
21 proposed to be built on the Point Wells Site.  
22

23 2. Whether the Hearing Examiner and Snohomish County Council committed an  
24 error of law, failed to follow applicable procedures, and failed to make Findings of Fact,  
25 Conclusions of Law and Rulings supported by the evidence with respect to the Ordinary High  
26 Water Mark where no substantial conflict with the Code existed.  
27  
28

1           3.       Whether the Findings of Fact, Conclusions of Law and Rulings related to the  
2 Innovative Development Design should be reversed where the Hearing Examiner failed to  
3 follow applicable procedures by failing to consider the changes made and additional evidence  
4 presented by BSRE based on the Denial Decision.  
5

6           4.       Whether the Findings of Fact, Conclusions of Law and Rulings related to the  
7 requirement for high capacity transit reflect an error of law, are not supported by the evidence  
8 and show a failure to follow applicable procedures where Point Wells is located near a high  
9 capacity transit route and BSRE has diligently worked to procure high capacity transit for the  
10 Site.  
11

12           5.       Whether the Hearing Examiner's Findings of Fact, Conclusions of Law and  
13 Rulings regarding the landslide deviation requests were not supported by the record and failed  
14 to follow applicable procedures where the County has not denied the deviation requests, BSRE  
15 has shown no alternative locations for the buildings to be constructed on the Urban Plaza, and  
16 the geotechnical report does not substantially conflict with the Code.  
17

18           6.       Whether BSRE's extension request should be granted where BSRE has acted  
19 diligently and shown that it can resolve any remaining issues presented by the County.  
20

21           7.       Whether the Hearing Examiner committed an error of law with respect to  
22 whether BSRE is entitled to re-file pursuant to SCC 30.34A.180 [2007].  
23

24           8.       Whether the Hearing Examiner erred in failing to address BSRE's argument that  
25 the short plat application (11-101007 SP) is unaffected by the perceived deficiencies in the Land  
26 Use Applications and should not be terminated.  
27  
28

1 V. EVIDENCE RELIED UPON

2 Pursuant to RCW 36.70C.120(1), this LUPA action is based upon the record of the  
3 underlying administrative hearings filed in Superior Court, consisting of the Hearing  
4 Examiner’s and Snohomish County Council’s certified transcripts and the documentary record  
5 filed by Snohomish County.  
6

7 VI. LEGAL ARGUMENT AND AUTHORITY

8 **A. Standard of Review.**

9 In its review of land use decisions under the Land Use Petition Act, the Superior Court  
10 exercises appellate jurisdiction over the disputed administrative decisions. *Benchmark Land*  
11 *Co. v. City of Battle Ground*, 146 Wn.2d 685, 49 P.3d 860 (2002). The Act provides that the  
12 court may grant relief regardless of whether the County “engaged in arbitrary and capricious  
13 conduct.” RCW 36.70C.130(2). In the present case, BSRE relies on four statutory grounds for  
14 reversing the Hearing Examiner’s and the County Council’s decision:  
15  
16

- 17 (a) The body or officer that made the land use decision engaged  
18 in unlawful procedure or failed to follow a prescribed process,  
19 unless the error was harmless;
- 20 (b) The land use decision is an erroneous interpretation of the  
21 law, after allowing for such deference as is due the construction of  
22 a law by a local jurisdiction with expertise;
- 23 (c) The land use decision is not supported by evidence that is  
substantial when viewed in light of the whole record before the  
court; [and]
- 24 (d) The land use decision is a clearly erroneous application of  
the law to the facts[.]

25 RCW 36.70C.130(1).

26 *i. Failure to Follow Prescribed Process.*

27 RCW 36.70C.130(1)(a) provides that a decision should be reversed if the officer that  
28 made the land use decision engaged in “unlawful procedure or failed to follow a prescribed

1 process.” This standard is a question of law to be reviewed by the Court de novo. *Phoenix*  
2 *Dev., Inc. v. City of Woodinville*, 171 Wn.2d 820, 828, 256 P.3d 1150 (2011).

3  
4 *ii. Erroneous Interpretation of Law Standard.*

5 The meaning of county code language is an issue of law that the court reviews de novo.  
6 *Griffin v. Thurston County Bd. Of Health*, 165 Wn.2d 50, 55, 196 P.3d 141 (2008). The Court  
7 interprets local ordinances in the same way it interprets statutes—looking first to the text of the  
8 statute to determine its meaning. *Id.* The Court may also determine plain meaning from related  
9 provisions and the statutory scheme as a whole. *Id.* If the statutory language is unambiguous,  
10 the Court need not employ canons of statutory construction. *Id.* Thus, this Court should take  
11 a fresh look at the applicable Code regulations to determine whether the Land Use Applications  
12 should have been terminated without the completion of an EIS because of a “substantial  
13 conflict” with the Code, and, furthermore, whether BSRE’s Land Use Applications should be  
14 deemed vested to SCC 30.34A.180 [2007].

15  
16  
17 *iii. Not Supported by Substantial Evidence Standard.*

18 RCW 36.70C.130(1)(c) provides that a decision should be reversed if it is not supported  
19 by substantial evidence. “Substantial evidence” for purposes of review of a land use decision  
20 means evidence sufficient to persuade a fair-minded person of the truth or correctness of the  
21 administrative order. *City of University Place v. McGuire*, 102 Wn. App. 658, 9 P.3d 918, *rev’d*  
22 *on other grounds*, 144 Wn.2d 640 (2000).

23  
24 *iv. The “Clearly Erroneous” Standard.*

25 RCW 36.70C.130(1)(d) provides that an agency’s *application* of regulations to the  
26 specific facts of the application can be reversed if it was “clearly erroneous.” An application of  
27 law to the facts is “‘clearly erroneous’ when although there is evidence to support it, the  
28

1 reviewing court on the entire evidence is left with the definite and firm conviction that a mistake  
2 has been committed.” *Norway Hill Pres. & Prot. Ass’n v. King County Council*, 87 Wn.2d 267,  
3 274, 552 P.2d 674 (1976) (internal quotations and citations omitted); *Nisqually Delta Ass’n v.*  
4 *City of DuPont*, 103 Wn.2d 720, 726, 696 P.2d 1222 (1985) (holding that the clearly erroneous  
5 standard is met when the court is “firmly convinced that a mistake has been committed.”).  
6 Applying the language of the County’s Code provisions, the Court should conclude that the  
7 Land Use Applications should not have been summarily terminated without completion of the  
8 EIS, an extension should have been granted, and the Land Use Applications are vested to SCC  
9 30.34A.180 [2007].  
10  
11

12 **B. The Hearing Examiner and the County Council Committed an Error of Law**  
13 **with Respect to all Findings, Conclusions, and Rulings Related to the**  
14 **Residential Setback.**

15 BSRE submits that all findings of fact, conclusions of law, and rulings related to the  
16 residential setback, including, but not limited to, Finding (“F.”) 49, Conclusion (“C.”) 26, C.78  
17 and Ruling 4<sup>2</sup>, reflect an error of law and should be reversed on appeal. SCC 30.34A.040(2)(a)  
18 provides:

19 Buildings or portions of buildings that are located within 180 feet of  
20 adjacent R-9600, R-8400, R-7200, T or LDMR zoning must be  
21 scaled down and limited in building height to a height that represents  
22 half the distance the building or that portion of the building is  
23 located from the adjacent R-9600, R-8400, R-7200, T or LDMR  
24 zoning line (e.g. – a building or portion of a building that is 90 feet  
25 from R-9600, R-8400, R-7200, T or LDMR zoning may not exceed  
26 45 feet in height).

27 \_\_\_\_\_  
28 <sup>2</sup> All references to the Findings of Fact, Conclusions of Law and Rulings refer to those items set forth in  
the Denial Decision. Exhibit R-4.

1 The effect of SCC 30.34A.040(2)(a) is to limit the height of buildings located adjacent to  
2 specific residential zones. PDS, the Hearing Examiner in its Denial Decision, and the  
3 Snohomish County Council in its Council Decision, ruled that the buildings in the Upper Plaza  
4 must be restricted in height because they are located adjacent to residential zones.  
5

6 However, as noted in F. 45, the buildings proposed to be built in the Urban Plaza are  
7 adjacent to property which is zoned R-14,500 and Urban Restricted in the Town of Woodway.  
8 There is no property which is zoned R-9600, R-8400, R-7200, T or LDMR adjacent to the  
9 buildings proposed to be built by BSRE. Therefore, the plain language of SCC  
10 30.34A.040(2)(a) makes this statute inapplicable to this project. *See Bravo v. Dolsen Cos.*, 125  
11 Wn.2d 745, 752, 888 P.2d 147 (1995) (holding that where statutory language is “plain, free  
12 from ambiguity and devoid of uncertainty, there is no room for construction because the  
13 legislative intention derives solely from the language of the statute.”). The statute does not  
14 include any language which would make it applicable to “similar” or “equivalent” zoning  
15 designations, particularly in another jurisdiction. Because the buildings proposed to be  
16 constructed in the Urban Plaza are not located adjacent to any R-9600, R-8400, R-7200, T or  
17 LDMR zones, SCC 30.34A.040(2)(a) does not apply and no residential setback is required.  
18  
19

20 Thus, all findings, conclusions and rulings in the Denial Decision which state or imply  
21 that SCC 30.34A.040(2)(a) is applicable or that a variance is required because of a residential  
22 setback reflect an error of law and should be reversed pursuant to RCW 36.70C.130(1)(b), or,  
23 in the alternative, reflect an erroneous application of law to the facts and should be reversed  
24 pursuant to RCW 36.70C.130(1)(d). There can be no substantial conflict with SCC  
25 30.34A.040(2)(a) where it does not apply.  
26  
27  
28

1 In addition, F. 50 should also be reversed because BSRE included the two service  
2 buildings in the variance request as submitted to the Hearing Examiner with its Motion for  
3 Reconsideration/Clarification. See Exhibit R-1, Addendum 2. SCC 30.72.065(f) specifically  
4 allows an applicant to propose changes to the application in response to deficiencies identified  
5 in the Denial Decision. The original variance request did not include the two service buildings,  
6 but the amended variance request did. The Hearing Examiner ignored all changes proposed by  
7 BSRE at the time that the Motion for Reconsideration/Clarification was submitted, and thereby  
8 committed an error of law and failing to follow the applicable procedures. RCW 36.70C.130(a).  
9  
10

11 **C. With Respect to all Findings, Conclusions, and Rulings Related to the Ordinary**  
12 **High Water Mark, the Hearing Examiner and the County Council Committed**  
13 **an Error of Law and Failed to Follow the Applicable Procedures, and the**  
14 **Hearings Examiner’s Findings and Conclusions Were Not Supported by the**  
15 **Evidence.**

16 BSRE submits that all findings, conclusions and rulings related to the Ordinary High  
17 Water Mark (the “OHWM”), including, but not limited to, F. 38, F. 97, C. 12, C. 13, C. 14, C.  
18 15, C. 17, C. 73, C. 74, C. 75, C.78, and Ruling 4 reflect an error of law and are not supported  
19 by the evidence. In addition, the Hearing Examiner failed to follow applicable procedures, in  
20 contravention of SCC 30.72.065(f), by ignoring additional information and changes submitted  
21 to the Hearing Examiner in response to the Denial Decision.

22 The Hearing Examiner’s Findings and Conclusions of Law which state or imply that  
23 BSRE was derelict in not determining that OHWM are not supported by the evidence and are  
24 reversible pursuant to RCW 36.70C.130(1)(c). Under Washington’s Shoreline Management  
25 Act, the buildable area of a shoreline is determined by the Ordinary High Water Mark. The  
26 OHWM is defined as “on all lakes, streams, and tidal water is that mark that will be found by  
27 examining the bed and banks and ascertaining where the presence and action of waters are so  
28

1 common and usual, and so long continued in all ordinary years, as to mark upon the soil a  
2 character distinct from that of the abutting upland . . .” RCW 90.58.040. However, where the  
3 OHWM cannot be determined, the “ordinary high water mark adjoining salt water shall be the line  
4 of mean higher high tide[.]” *Id.* When BSRE’s predecessor initially submitted the Land Use  
5 Applications, the shoreline was determined based on the Mean Higher High Water (the  
6 “MHHW”) because the OHWM was not able to be determined.

8 As Gray Rand of David Evans & Associates, Inc. testified on May 23, 2018, the first  
9 time that the County claimed BSRE was deficient because the shoreline buffer was not  
10 determined based on the OHWM was in its May 2018 Recommendation. Exhibit N-2. There,  
11 for the first time, the County stated,

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

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

22 Urban Center Comment (s): Sheets A-050 and 051 indicate location  
23 of an Ordinary High Water Line along the shoreline. Sheets C-201  
24 – 203 indicate location of a Line Mean Higher High Water along the  
shoreline. Do these terms represent the same line?

25 Ex. K-31, p.24.

26 PDS notes that the drawings for the Urban Center Submittal from  
27 March 4, 2011, make interchangeable use of the terms OHWM and  
28 Mean Higher High Water (MHHW) (underline added by PDS).

1 Some pages show OHWM and others show MHHW. This latter  
2 term, appears to be intended to refer to Mean High Higher **Tide**  
3 (MHHT), which is synonymous with OHWM at salt water locations  
4 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.

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

17  
18  
19  
20 As soon as BSRE became aware of the issue with the OHWM, it authorized its  
21 consultants to begin work to determine the OHWM. Gray Rand, while working on his Critical  
22 Area Report in March 2018, investigated the OHWM and discovered that it could be discerned  
23 and that, therefore, the buffer should be determined from the OHWM rather than the MHHW,  
24 which had been used previously. *See* Exhibit T-6, p. 766-68. Once Mr. Rand became aware of  
25 the issue, he immediately began working to address is. *Id.* BSRE was unable to revise the  
26 plans prior to the April 2018 Revisions, but BSRE continued working on such revisions after  
27  
28

1 the April 27, 2018 submittal and, after meeting with the Department of Ecology, determined  
2 the appropriate location of the OHWM. Exhibit R-1. With its Motion for  
3 Reconsideration/Clarification, BSRE submitted an aerial depiction of the OHWM and a  
4 memorandum from Perkins + Will (the architects for the development project), which addressed  
5 the changes needed to the site plan in order to provide a sufficient setback. Exhibit R-1,  
6 Addenda 7-8. As noted in the memorandum, BSRE can and will comply with the setback and  
7 make the necessary changes. It is expected that these revisions may cause a loss of  
8 approximately 200 units. *Id.* A reduction of approximately 200 units in a development which  
9 is proposed to have 3080 units represents a loss of less than 6.5% of the units. Contrary to C.  
10 74, this is not a “substantial element” of the proposal and correcting this would not require a  
11 significant redesign of the proposal. Ex. R-1, Addendum 8.

14 SCC 30.72.065(2)(f) explicitly allows for reconsideration before the Hearing Examiner  
15 where the applicant proposes changes based on the hearing examiner’s decision. SCC  
16 30.72.065(2)(e) allows for reconsideration where the applicant presents new evidence which  
17 could not reasonably have been produced at the open record hearing. Addenda 7 and 8 were  
18 submitted to the Hearing Examiner with BSRE’s Motion for Reconsideration/Clarification and  
19 conclusively showed that BSRE proposed changes based on the May 2018 Recommendation  
20 and the Denial Decision. This evidence was not reasonably available at the hearing and because  
21 the issue was not raised by the County until its May 2018 Recommendation, which was received  
22 just days before the hearing began. In order to determine the OHWM, Mr. Rand had to schedule  
23 a meeting with the Department of Ecology at the site, which was held on June 26, 2018. Exhibit  
24 R-1. Immediately after this meeting, Mr. Rand began the work to depict the OHWM on the  
25 site plans. This was reflected in Exhibit R-1, Addenda 7 and 8. As noted by Mr. Seng in

1 Addendum 8, the work needed to redesign the buildings located on the site to accommodate the  
2 changes in the buffer area will take approximately 2-4 weeks. Exhibit R-1, Addenda 7-8. This  
3 cannot be considered substantial given the amount of time already spent by both BSRE and the  
4 County on this proposal. The Hearing Examiner failed to follow appropriate procedures and  
5 committed an error of law by failing to consider this additional information.  
6

7 For these reasons, all Findings of Fact, Conclusions of Law and Rulings related to  
8 OHWM including, but not limited to, F. 38, F. 97, C. 12, C. 13, C. 14, C. 15, C. 17, C. 73, C.  
9 74, C. 75, C. 78, and ruling 4, should be reversed on appeal. BSRE did not fail to act diligently  
10 by not determining the OHWM earlier when the County failed to even raise this issue until its  
11 May 2018 Recommendation and, further, this cannot be considered a substantial conflict given  
12 the circumstances here.  
13

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

19 As noted above, SCC 30.72.065(2)(f) allows for reconsideration where the applicant  
20 proposes changes based on the hearing examiner's decision. Here, BSRE made changes to its  
21 applications based on the Denial Decision and therefore all Findings of Fact, Conclusions of  
22 Law and rulings related to the Innovative Development Design (the "IDD"), including, but not  
23 limited to F. 104, C. 76, C. 77, C. 78 and Ruling 4, should have been revised to state that analysis  
24 of the "functions and values" had been provided and there was no substantial conflict with the  
25 Code related to IDD. The Hearing Examiner's failure to consider these changes and additional  
26 evidence constituted a failure to the Hearing Examiner to follow applicable procedures, in direct  
27 violation of SCC 30.72.065(2)(f). Accordingly, all Findings of Fact, Conclusions of Law, and  
28

1 rulings related to IDD should be reversed, such that there is no substantial conflict with the  
2 Code related to IDD.

3  
4         Snohomish County Code sets forth certain critical area buffers where development may  
5 be limited or prohibited. *See* generally Chapter 30.62A SCC. However, the Code encourages  
6 applicants to request approval of an “innovative design” which “addresses wetland, fish and  
7 wildlife habitat conservation area or buffer treatment in a manner that deviates from the  
8 standards contained in Part 300.” SCC 30.62A.350(1). In order to be able to deviate from the  
9 critical area buffers, an applicant must meet certain criteria, labeled as the “innovative  
10 development design” or IDD criteria. *Id.* One issue raised by the County in its April 2018 and  
11 May 2018 Recommendations was that BSRE failed to satisfy the IDD criteria.

12  
13         On May 23, 2018, Gray Rand of David Evans & Associates, Inc. testified that the critical  
14 area report (Exhibit C-30) provided a step-by-step explanation of how each of the criteria of the  
15 IDD would be met and provided an overview of the improvement and ecological benefits as a  
16 whole. Exhibit T-6, pp. 768-73. However, because the County expressed concern that the  
17 specific “functions and values” were not expressly labeled as such (even though the required  
18 information was contained within the report), BSRE had its consultants engage in further work  
19 to more clearly label and better address those concerns after the hearing. With additional  
20 evidence presented to the Hearing Examiner with its Motion for Reconsideration/Clarification,  
21 BSRE specifically satisfied the requirement set forth in F. 103: a proposed IDD “must compare  
22 the existing functions and values of affected critical areas and buffers with functions and values  
23 after the development to ensure the IDD protects the functions and values at least as well as the  
24 standard prescriptive measures.” Exhibit R-1, Addendum 3.

1 BSRE specifically provided to the Hearing Examiner a Critical Areas Report Addendum  
2 prepared by Gray Rand of David Evans & Associates, Inc., dated June 21, 2018, which  
3 expressly provided the “functions and values” analysis which the Hearing Examiner deemed to  
4 be lacking in the Denial Decision. *Id.* As noted in this Addendum, the “use of the IDD  
5 measures will result in significant net ecological benefit compared to implementation of  
6 standard administrative buffers. Overall, the project as proposed will result in significant  
7 improvement to ecological function along the shoreline of Puget Sound equivalent to  
8 application of the standard prescriptive measures of SCC 30.62A.” *Id.* This is demonstrated  
9 by the analysis of the “functions and values”. *Id.* at pp. 5-7. For this reason, all Findings of  
10 Fact, Conclusions of Law and rulings related to the IDD should have been revised pursuant to  
11 SCC 30.72.065(2)(f), and the Hearing Examiner’s decision should be reversed on these points  
12 because the Hearing Examiner’s failure to follow applicable procedures constitutes a violation  
13 of RCW 36.70C.130(1)(a).  
14  
15  
16

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

20 SCC 30.34A.040 allows an applicant in an urban center to build up to 180 feet where  
21 there is proximity to a “high capacity transit route or station.” The proximity to high capacity  
22 transit gives a developer an additional 90 feet over what would normally be permitted. BSRE  
23 has relied on this additional 90 feet and the County alleges that BSRE is in substantial conflict  
24 with the Code because BSRE has failed to show that Point Well is near a high capacity transit  
25 station. However, BSRE supplied sufficient evidence at this planning and feasibility stage to  
26 indicate that proximity to a high capacity transit route is sufficient to allow for additional height  
27 pursuant to SCC 30.34A.040(1). In the alternative, BSRE demonstrated its dedication to  
28

1 providing high capacity transit, in the form of Sound Transit and/or via water taxi, such that the  
2 Hearing Examiner could and should condition final approval of the project on having high  
3 capacity transit rather than finding that the project is in substantial conflict with the Code at this  
4 point. Further, the requirement for the additional height to be “necessary or desirable” is a  
5 conclusion to be made following the analysis to be included in the project EIS, as set forth in  
6 SCC 30.34A.040(1). This matter was not discussed at the hearing, and the Hearing Examiner  
7 erred by deciding that issue on his own prior to the completion of the EIS. For these reasons,  
8 all Findings of Fact, Conclusions of Law and rulings in the Denial Decision which relate to  
9 high capacity transit, including, but not limited to, F. 56, F. 57, F. 58, F. 59, F. 60, F.62, F. 63,  
10 C. 20, C.34, C. 35, C. 36, C. 37, C. 38, C.39, C. 78, and Ruling 4, should be reversed.

13 *i. Proximity to a Transit Station is Sufficient.*

14 The Hearing Examiner committed an error of law by determining, without justification,  
15 that while “a high capacity transit route is near the project, proximity alone is not enough.” C.  
16

17 36. SCC 30.34A.040(1) states:

18 The maximum building height in the UC zone shall be 90 feet. A  
19 building height increase up to an additional 90 feet may be approved  
20 under SCC 30.34A.180 when the additional height is documented to  
21 be necessary or desirable when the project is located near a high  
22 capacity transit route or station and the applicant prepares an  
23 environmental impact statement pursuant to chapter 30.61 SCC that  
24 includes an analysis of the environmental impacts of the additional  
25 height on, at a minimum:

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

1 SCC 30.34A.040(1). The Hearing Examiner’s conclusion that proximity is not enough ignores  
2 the plain language of the statute. “Statutes must be read so that each word is given effect and  
3 no portion of the statute is rendered meaningless or superfluous.” *City of Spokane Valley v.*  
4 *Spokane County*, 145 Wn. App, 825, 831, 187 P.3d 340 (2008). While the County has argued  
5 that “proximity is not enough,” an agency does not get deference for a statutory interpretation  
6 which conflicts with the plain language of the statute. *Dept. of Labor & Indus. v. Landon*, 117  
7 Wn.2d 122, 127, 814 P.2d 626 (1991).  
8

9 C. 36 and all other Findings of Fact, Conclusions of Law and Rulings which state or  
10 imply that proximity to a route is not sufficient, directly conflict with the plain language of the  
11 statute, which provides two alternatives for high capacity transit—the project must be located  
12 either near a high capacity transit route *or* a high capacity transit station. SCC 30.34A.040(1)  
13 (emphasis added). The only reading of this statute which does not render a portion of the statute  
14 “meaningless and superfluous” is that which recognizes both options: (1) proximity to a high  
15 capacity transit route; or (2) proximity to a high capacity transit station.  
16  
17

18 The fact that the Growth Management Hearing Board (the “GMHB”) ruled in *City of*  
19 *Shoreline, et al. v. Snohomish County, et al.*, Coordinate Case Nos. 09-3-0013c and 10-3-0011c,  
20 that proximity is not enough has no bearing on the interpretation of SCC 30.34A.040(1) [2010].  
21 RCW 36.70A.302 provides the GMHB may determine that all or part of a comprehensive plan  
22 or development regulations are invalid, however, it states that such authority is “proscriptive in  
23 effect” only:  
24

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

1 application for a project that vested under state or local law before  
2 receipt of the board's order by the county or city . . . .

3 RCW 36.70A.302(2). The Washington Supreme Court recognized this in *Town of Woodway*  
4 *v. Snohomish County*, 180 Wn.2d 165, 322 P.3d 1219 (2014). There, the Court held that  
5 “whether or not a challenged plan or regulation is found to be noncompliant or invalid, any  
6 rights that vested before the [GMHB]’s final order remain vested after the order is issued.” *Id.* at  
7 175. Therefore, even if the interpretation of SCC 30.34A.040(1) changed after the GMHB’s  
8 ruling in *City of Shoreline*, that does not alter the plain language of the statute as it applies to  
9 BSRE’s applications.  
10

11 Because the GMHB’s ruling does not change the plain language of SCC 30.34A.040(1)  
12 and because statutes must be interpreted such that no word or phrase is rendered meaningless  
13 or superfluous, the only possible reading of SCC 30.34A.040(1) allows additional height where  
14 the urban center is proposed near *either* a high capacity transit route *or* station. Point Wells is  
15 located near a high capacity transit route and therefore additional height for the buildings is  
16 available.  
17

18  
19 *ii. BSRE Acted Diligently in Attempting to Reach Agreement with Sound Transit*  
20 *for a Station at Point Wells.*

21 The record shows that BSRE has had substantial contact with Sound Transit and that  
22 Sound Transit has advised BSRE that it will not commit to providing a station at Point Wells  
23 until BSRE has received approval and can guarantee a certain number of residents. Exhibits T-  
24 7, pp. 995-1001; H-24. The Hearing Examiner clearly erred in faulting BSRE for failing to  
25 obtain Sound Transit’s commitment to provide service for project which has not yet been  
26 approved.  
27  
28

1 As demonstrated by Exhibit H-26 and Douglas A. Luetjen’s May 24, 2018 Testimony  
2 [Exhibit T-7], Sound Transit has considered adding a stop in the Richmond Beach/Shoreline  
3 area, and it is BSRE’s understanding that the stop considered to be in the Richmond  
4 Beach/Shoreline area was specifically considered by Sound Transit to be at Point Wells. *See*  
5 Exhibit H-24, where Sound Transit specifically added a comment on its Final Environmental  
6 Impact Statement regarding its future service plan in response to a letter from BSRE stating,  
7 “A Sounder station in the general vicinity of Shoreline/Richmond Beach is included in  
8 Appendix A of the Final SEIS as a ‘representative project’ under the Current Plan Alternative  
9 . . . . These are projects that could be implemented along the corridors that comprise the Current  
10 Plan Alternative regardless of whether service is already implemented along these corridors . .  
11 . . .” This indicates that Sound Transit was contemplating a possible stop at Point Wells.  
12 Contrary to the statements made in F. 55, F. 58, and C. 35, BSRE received a letter of support  
13 from the appropriate individual (not just a “mid-level manager”) in 2010 indicating that Sound  
14 Transit was open to the possibility of a stop at Point Wells. In fact, the letter stated that Sound  
15 Transit’s interest in such a station would be increased if BSRE was willing to fund that station.  
16 BSRE has unequivocally made that commitment. Exhibit T-7, p. 996.

17  
18  
19  
20 In addition, F. 60 is not supported by the record because Douglas A. Luetjen testified  
21 on May 24, 2018 that BSRE has met with “various transit agencies that included King County  
22 Metro and Community Transit as well as Sound Transit to discuss transit-related issues for the  
23 development.” *See* Exhibit T-7, p. 995.

24  
25 Further, BSRE has retained the firm of Shiels Obletz Johnson, a project management  
26 consultancy group in the Pacific Northwest that has specific experience working with BNSF  
27 and commuter lines to get approvals for additional stops. *See id.* at pp. 1000-01. This shows  
28

1 BSRE's diligence and dedication to building a Sound Transit station at Point Wells. BSRE has  
2 also considered Sound Transit's design guidelines in creating its design and has acted in  
3 accordance with the direction received from Sound Transit, which was to wait until approvals  
4 were received before pursuing a written agreement with Sound Transit. *Id.* Any Findings of  
5 Fact, Conclusions of Law and Rulings which state or imply that BSRE was derelict in its duties  
6 by failing to obtain a written commitment from Sound Transit or another transit agency are not  
7 supported by the record, do not take into account the particular facts and requirements of the  
8 transit agencies, and should be reversed.  
9

10  
11 *iii. BSRE Acted Reasonably to Provide Alternative High Capacity Transit with a  
Water Taxi.*

12 In order to satisfy the County's concerns regarding high capacity transit, in addition to  
13 being located on the high capacity transit route, which should be sufficient in itself, BSRE also  
14 proposed providing a water taxi between the site and the Edmonds Sound Transit station at least  
15 until an on-site Sound Transit station is constructed. The Hearing Examiner's Findings of Fact,  
16 Conclusions of Law, and Rulings regarding the water taxi proposal are not supported by the  
17 evidence and fail to consider evidence provided with BSRE's closing brief. The County again  
18 has taken the unreasonable position of requiring contracts of service to be in place prior to the  
19 project being conditionally approved.  
20  
21

22 In F. 63, the Hearing Examiner stated that operating a water taxi would be prohibited  
23 by the Shoreline Management Master Program because it is a commercial use and BSRE has  
24 not applied for a conditional use permit. However, neither of these statements is supported by  
25 the evidence. Randy Middaugh testified that the water taxi would not be a prohibited use if it  
26 was free. *See* Exhibit T-5, pp. 500-01. Instead, he said it would simply require a conditional  
27  
28

1 use permit, which would be reviewed by the Department of Ecology. *Id.* BSRE submitted such  
2 a conditional use permit with its closing brief. *See* Exhibit Q-4, Appendix 1. Therefore, F. 64,  
3 C. 38, C. 39, C. 78 and Ruling 4, should be reversed.  
4

5 As stated in F. 62, the pier at Point Wells is subject to an aquatic lands lease from the  
6 Washington Department of Natural Resources (the “DNR”). In its April 2018  
7 Recommendation and May 2018 Recommendation, the County did not include any allegations  
8 with respect to BSRE’s dealings with DNR. Exhibits N-1, N-2. For this reason, BSRE did not  
9 submit any evidence into the record regarding BSRE’s contacts with DNR. However, this does  
10 not mean BSRE has not had discussions with DNR about the use of the pier. Rather, BSRE has  
11 had substantial contact with DNR over the years. *See* Exhibit R-1, Addendum 9. As recently  
12 as August of 2017, BSRE was advised by DNR to wait to modify the lease until after the urban  
13 center has been approved so as to allow the industrial uses to continue in the meantime. *Id.*  
14 BSRE’s interactions and negotiations with DNR were not part of the hearing and thus this  
15 evidence could not reasonably be expected to have been provided at the time of the hearing.  
16 All Findings of Fact, Conclusions of Law and rulings related to BSRE’s water taxi proposal,  
17 including, but not limited to, F. 62, F. 63, C. 38, C. 39, C. 78 and Ruling 4, should therefore be  
18 reversed and revised accordingly.  
19  
20

21 *iv. The Hearing Examiner Erred in Raising a New Issue of “Necessary or*  
22 *Desirable” in the Denial Decision.*

23 In C. 37, the Hearing Examiner, for the first time, concluded BSRE failed to show that  
24 the height increase was “necessary or desirable.” This is a decision which is to be made  
25 following the completion of a view analysis in the project EIS. Further, the County has never  
26 claimed that BSRE is not entitled to additional height under SCC 30.34A.040 because the height  
27  
28

1 is not “necessary or desirable”; such a claim was not before the Hearing Examiner and therefore  
2 the parties did not present evidence on this issue. *See* Exhibits N-1, N-2. In addition, neither  
3 party addressed this issue in their closing briefs or in their proposed findings of fact and  
4 conclusions of law. Neither party has had a chance to brief or argue whether the additional  
5 height is “necessary or desirable.” Because of this, the record is silent on this issue.  
6

7 In making this determination, the Hearing Examiner failed to recognize that BSRE was  
8 not arguing that the Land Use Applications were approvable at that exact moment. The project  
9 cannot be approvable because the EIS has not been issued. Therefore, there is no allegation by  
10 either party that every element of every issue either has been or needs to have been addressed.  
11

12 Before the Hearing Examiner can rule on whether the additional height is “necessary or  
13 desirable”, the parties must be given a chance to brief this subject. Therefore, either this  
14 Conclusion should be deleted in its entirety, or the matter should be remanded to the Hearing  
15 Examiner to allow BSRE the opportunity to show why the additional height is both necessary  
16 and desirable from a “public, aesthetic, planning, or transportation standpoint.”  
17

18 **F. The Hearing Examiner’s Findings of Fact, Conclusions of Law and Rulings**  
19 **Regarding the Landslide Deviation Requests Were Not Supported by the**  
20 **Record and Failed to Follow Applicable Procedures.**

21 BSRE submitted two distinct landslide hazard deviation requests: one for buildings  
22 proposed to be located in the Urban Plaza, and one for a secondary access road to be located in  
23 that same general area. Exhibits C-27; T-5, pp. 546-57. These landslide requests are necessary  
24 in order to build the secondary access road and the buildings in the Upper Plaza because the  
25 area east of the railroad tracks is largely a landslide hazard area. The County never issued a  
26 formal decision on BSRE’s deviation requests. *See* Exhibit T-7, pp. 1025-26. Because the  
27 County did not issue a formal decision on the landslide deviation requests, BSRE was not been  
28

1 given an opportunity to respond to any such decision. As Randy Sleight testified on May 22,  
2 2018, the typical process for a deviation request includes a conversation between Mr. Sleight  
3 and the developer to discuss what additional information Mr. Sleight needs for the deviation  
4 request(s) and what other options may be available. Exhibit T-5, pp. 603-04. BSRE should  
5 have been given this opportunity prior to the Hearing Examiner issuing its findings of fact,  
6 conclusions of law and rulings related to the deviation requests.  
7

8           The Findings of Fact, Conclusions of Law and rulings regarding the landslide deviation  
9 requests, including, but not limited to, F. 84, F. 85, F. 89, F. 91, F. 93, F. 94, C. 53, C. 54, C.  
10 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  
11 4, should be reversed because the deviation requests have not been denied, the findings are not  
12 supported by the evidence and the Hearing Examiner failed to follow applicable procedures by  
13 failing to consider the changes made by BSRE in order to address the concerns raised by the  
14 County and by the Hearing Examiner in the Denial Decision.  
15  
16

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

19           A requirement of a deviation request is that there is no alternative location for the  
20 proposed structure to be built. SCC 30.62B.340. The landslide deviation request for the  
21 buildings proposed to be located in the Urban Plaza was updated in response to the Denial  
22 Decision, as contemplated by SCC 30.72.065(f), to show that there is no alternate location  
23 available for those buildings. This change was made after the hearing in order to address the  
24 County's concerns and was submitted with the Motion for Reconsideration/Clarification. See  
25 Exhibit R-1, Addendum 6. Therefore, the Hearing Examiner should have revised all Findings  
26 of Fact, Conclusions of Law and Rulings related to the issue of whether there is an alternate  
27  
28

1 location for those buildings, including, but not limited to, C. 54. Despite code language  
2 explicitly providing to the contrary, the Hearing Examiner refused to consider the new  
3 information provided and therefore failed to follow the applicable procedures. For this reason,  
4 all such Findings of Fact, Conclusions of Law and rulings should be reversed.  
5

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

8 The Hearing Examiner raised the following concerns about BSRE's geotechnical report:

9 (1) that the geotechnical report does not adequately demonstrate that the proposed deviation  
10 provides protection equal to that provided by the prescribed minimum setbacks (F. 84, C. 56,  
11 C. 61); (2) that the subsurface conditions report does not provide the required information  
12 regarding the method and locations of drainage (F. 89, C. 59); (3) that the geotechnical report  
13 does not address the safety of the vehicles and pedestrians on the secondary access road (F. 91,  
14 C. 65); (3) that the geotechnical report does not confirm the site is suitable for the proposed  
15 development (F. 93, F. 94); and (4) that the geotechnical report and/or deviation requests do not  
16 include what surcharges were included in the safety factor calculations (C. 60).  
17

18 SCC 30.62B.340 specifically provides deviations may be granted to allow development  
19 within a landslide hazard area when certain conditions are met. As part of its orchestrated plan  
20 to deny the Land Use Applications, PDS has refused BSRE and its consultants the opportunity  
21 to meet with Mr. Sleight to work through any outstanding issues.  
22

23 BSRE's consultant, John Bingham of Hart Crowser, did significant additional work in  
24 order to address the concerns raised in the Denial Decision. Mr. Bingham revised the  
25 subsurface conditions report and the landslide area deviation request to meet PDS's concerns.  
26 See Exhibit R-1, Addenda 4 and 5. This new evidence was not reasonably available during the  
27  
28

1 hearing because BSRE only received the County's feedback on the deviation requests in the  
2 May 2018 Recommendation and during the hearing itself. Mr. Bingham promptly revised his  
3 reports to provide additional information to address these concerns as soon as he received the  
4 feedback and this additional information was provided to the Hearing Examiner, as provided  
5 for in SCC 30.72.065(f). The Hearing Examiner failed to consider this new information and  
6 therefore failed to follow the applicable procedures, in violation of RCW 36.70C.130(1)(a).  
7

8         The evidence does not support F. 91 and C. 65 because Mr. Sleight testified that designs  
9 had been submitted which would make the road safe for pedestrians and vehicles. Exhibit T-5,  
10 p. 587. Mr. Bingham's role was not to design the road, but to establish that it could be built  
11 safely in the landslide hazard area. He did that. Mr. Sleight acknowledged that the project is  
12 still in the feasibility stage. Exhibit T-5, p. 597. However, the April 20, 2018 geotechnical  
13 report and Addendum 4 to the Motion for Reconsideration/Clarification did state that the  
14 current slope stability analysis and conceptual retaining wall design were done to achieve at  
15 least the minimum static and seismic factors of safety required by the Code. Exhibits C-33; R-  
16 1, Addendum 4. The analysis in these two reports showed that there would not be shallow  
17 slides which would affect vehicles or people on the road. *Id.* No evidence was presented that  
18 these issues were not considered in Mr. Bingham's analysis of the secondary access road. In  
19 addition, as Mr. Sleight testified, Mr. Bingham took a conservative approach with the  
20 geotechnical report, assuming high liquefaction throughout the area in which the buildings and  
21 road would be constructed. *See* Exhibit T-5, p. 576, 640.  
22

23         The geotechnical report, landslide hazard deviation requests, and subsurface conditions  
24 report, with their respective addenda, provided sufficient information to determine that the  
25 project is feasible. The project is not yet at a buildable stage, which means that there will be  
26  
27  
28

1 additional time to provide further details and conduct further tests, if necessary. This project  
2 must still go through the EIS preparation, which allows ample opportunity for any required  
3 design changes to be made.  
4

5 It is an error of law to find a substantial conflict with the code where a deviation request  
6 is pending. Unless and until the deviation requests are denied, there is reasonable doubt that  
7 the proposal is in substantial conflict with SCC 30.62B.320 and .340. If a project with a pending  
8 deviation request is considered to be in substantial conflict with the code, provisions allowing  
9 for deviation requests would be directly in conflict with the statute allowing premature denial.  
10

11 BSRE provided landslide hazard deviation requests, geotechnical reports, and  
12 subsurface condition reports which did not substantially conflict with the Snohomish County  
13 Code and therefore the Findings of Fact, Conclusions of Law and Rulings related to the  
14 landslide hazard areas should be revised accordingly. If the County or the Hearing Examiner  
15 believes additional work is necessary to show compliance with any applicable provision, then  
16 it would be appropriate to condition any future approvals on obtaining the deviation and any  
17 necessary approvals for the secondary access road. The Denial Decision and the Council's  
18 Decision failed to recognize that additional revisions will be made as the environmental review  
19 continues and that conditions to approval would be appropriate.  
20

21 **G. BSRE's Request for an Extension Should be Granted.**  
22

23 The Findings of Fact, Conclusions of Law, and rulings related to BSRE's actions since  
24 April 2013 and related to whether BSRE should be granted an extension, including, but not  
25 limited to, F. 19, F. 10, F. 24, F. 27, F. 31, F. 34, F. 32, C. 12, C. 13, C. 14, C. 19, C. 20, C. 21,  
26 C. 22, C. 53, C. 69, C. 78, C. 79, Ruling 3 and Ruling 4, are not supported by the evidence. In  
27  
28

1 addition, the Hearing Examiner failed to follow the applicable procedures by failing to consider  
2 the changes proposed by BSRE in response to the Denial Decision.

3         The Land Use Applications were filed in 2011. However, they were tied up in litigation  
4 until 2014, when the Supreme Court issued its decision in *Woodway*. Until that time, it was  
5 unclear whether BSRE was vested to the Urban Center Code. For that reason, the parties did  
6 not substantively proceed with processing the Land Use Applications from 2011 to 2014. In  
7 addition, there was a stay in place preventing the County from even considering the Land Use  
8 Applications until 2013. The County submitted its first Review Completion Letter on April 12,  
9 2013. Exhibit K-4. The life of the Land Use Applications, therefore, has, at most been five  
10 years.  
11

12         The time period from 2014 to 2018 involved significant work by BSRE, including  
13 numerous meetings with Shoreline and Woodway to try to address the complaints about  
14 expected traffic impacts received from the neighboring jurisdictions. For years, the County was  
15 understanding of this approach and in fact encouraged BSRE to work with those neighboring  
16 jurisdictions. This is a very complex development project. Given the complexity of it, five  
17 years of work is not too long and BSRE should be given additional time to resolve any  
18 remaining issues and to proceed with the EIS.  
19  
20

21         It is not unheard of in Snohomish County for a development project to take this length  
22 of time for approval. For example, an application was submitted to develop Froggnal Estates  
23 Planned Residential Development (formerly known as Horseman's Trail Planned Residential  
24 Development) in April 2005. The draft EIS for Froggnal Estates was not issued until July 2014,  
25  
26  
27  
28

1 more than nine years after the application was submitted.<sup>3</sup> While Frogmal Estates is a large  
2 project, consisting of 112 single-family detached homes on 22.34 acres, it is nowhere near the  
3 size of Point Wells, which is to have 3,080 units on more than 60 acres, and which includes  
4 significant challenges with the topography. Therefore, the length of time that the Land Use  
5 Applications have been pending is not unreasonable.  
6

7 A number of these Hearing Examiner’s findings which relate to whether BSRE should  
8 be given an extension are not supported by the evidence and should be revised: Nothing in the  
9 record indicates that BSRE proposed a transportation corridor study on February 2, 2014, and,  
10 in fact, BSRE never proposed a transportation corridor study (F.9). Instead, as testified to by  
11 Kirk Harris on May 24, 2018, BSRE entered into a memorandum of understanding with  
12 Shoreline regarding how a study would be conducted. *See* Exhibit T-7, p. 952. BSRE and  
13 Shoreline conducted at least seven public meetings (F. 10). Exhibit P-18. BSRE continued  
14 working with Shoreline on traffic issues beyond April 20, 2015 (F.14). *See id.*; Exhibit T-7,  
15 pp. 956-58.  
16  
17

18 F. 32 mischaracterizes the meeting between the County and BSRE on November 13,  
19 2017: during that meeting, the County, including its legal counsel, assured BSRE that there was  
20 no reason that another extension would be forthcoming, acknowledged that BSRE could not  
21 meet the January 8, 2018 deadline (which the County admitted was not a “deadline” but instead  
22 merely a “target”), and advised BSRE to submit a letter stating the date by which it would be  
23 able to provide the necessary information. *See* Exhibit T-7, pp. 1003-04; *see also* Exhibit P-13  
24  
25  
26  
27

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28 <sup>3</sup> *See* <https://snohomishcountywa.gov/2541/16713/Frogmal-Estates>.

1 (Ryan Countryman’s notes show clearly that BSRE asked when the extension request would  
2 need to be submitted).

3  
4 In addition to the above inaccuracies, the Hearing Examiner failed to note in F. 27 that  
5 the County’s May 2, 2017, letter specifically stated, “As the applicant, if you wish to request a  
6 further suspension of the application expiration period pursuant to the above-mentioned Code  
7 provision, you should make a written request to PDS prior to May 30, 2018, in order for the  
8 PDS director to have time to evaluate the request.” Exhibit K-19. Not only did the County not  
9 indicate that no further extensions would be forthcoming, the County also provided a date by  
10 which the next extension must be provided – just one month before the expiration date. BSRE  
11 complied with this request, submitting its extension request in January, more than five months  
12 prior to the expiration date of June 30, 2018.

13  
14 C. 19 is similarly inaccurate as it fails to show that BSRE and Shoreline were negotiating  
15 for years before Shoreline ceased cooperating with BSRE and determined that it would only  
16 work with BSRE if Shoreline was permitted to annex Point Wells. T-7, pp. 952-69. At one  
17 point, Shoreline advised BSRE that it did not have the votes on the Shoreline Council to permit  
18 Shoreline to continue negotiating with BSRE. *See* Exhibit T-7, p. 969.

19  
20 As the Hearing Examiner stated in C. 11, “[a]n imminent deadline concentrates the mind  
21 wonderfully.” This was certainly true for the County. The County provided more substantive  
22 feedback from October 2017 through May 2018 than it had in all the time prior to that, which  
23 allowed BSRE to provide the responses it did in April and May 2018. If the County had  
24 provided such substantive responses earlier, then BSRE could have responded in kind.  
25 However, until BSRE received the feedback from the County in its October 2017 Letter and its  
26 April 2018 and May 2018 Recommendations, BSRE was unable to do the work the County  
27  
28

1 deemed necessary. This is certainly true with respect to the OHWM, which was not even raised  
2 as an issue by the County until its May 2018 Recommendation, providing BSRE with no time  
3 to respond substantively before the hearing. *See Section C supra.*

4  
5 For these reasons, all Findings of Fact, Conclusions of Law and rulings implying or  
6 stating that BSRE was dilatory in not determining the OHWM sooner, including, but not limited  
7 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.  
8 Furthermore, BSRE proposed to improve Richmond Beach Drive so as to meet applicable road  
9 standards (C. 18).

10  
11 BSRE diligently worked to obtain approval from Sound Transit, but was told repeatedly  
12 that Sound Transit would not consider putting a stop there until after BSRE obtained the  
13 necessary approvals. *See Exhibits T-7, pp. 998-99; Exhibit R-1, Addendum 9.* The letter that  
14 BSRE received in 2010 was the strongest commitment Sound Transit was willing to make until  
15 BSRE obtained approval from Snohomish County for its urban center. *Id.* BSRE engaged  
16 consultants who are experienced with working with Sound Transit and BNSF to ensure that the  
17 necessary approvals will be received at the appropriate time. Exhibit T-7, p. 995. BSRE took  
18 all steps available to it to show its commitment to providing high capacity transit at Point Wells.  
19 Thus, all Findings of Fact, Conclusions of Law and Rulings implying or stating that BSRE was  
20 dilatory in not obtaining consent from Sound Transit, including, but not limited to, C. 20, C.  
21 21, C. 22, C. 39, C. 78, and Ruling 3, should be reversed.

22  
23  
24 As Ryan Countryman testified on May 21, 2018, applications typically go through seven  
25 or eight iterations. Exhibit T-4, p. 433. With a project this complex, it is understandable why  
26 multiple iterations are necessary, both from the applicant's perspective as well as that of the  
27 County. Multiple reviews allow both parties to ensure code compliance. This ability to fix  
28

1 issues is exactly why the code authorizes the Hearing Examiner to reconsider his decision based  
2 on post-decision submittals. This is also why SCC 30.34A.180 [2007] provides an applicant  
3 with the opportunity to revise and re-submit its applications following an initial denial:  
4

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

12 SCC 30.34A.180(2)(f) [2007] (emphasis added). *See* Section H *infra*.

13           This project is by far the most complicated project that Snohomish County has seen,  
14           making the need for multiple revisions even greater. BSRE has shown it is motivated to resolve  
15           all issues raised by PDS and will work diligently to do so.

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

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

21           BSRE and the County have a long history of working together to protect the vested  
22           status of BSRE's Land Use Applications. Together, the parties prevailed in litigation which  
23           was eventually decided by the Washington State Supreme Court. *See Woodway v. Snohomish*  
24           *County*, 180 Wn.2d 165, 322 P.3d 1219 (2014). In *Woodway*, the Court ruled that the Land  
25           Use Applications vested to the Urban Center Code despite the Urban Center Code later being  
26           replaced by the Urban Village Code.

27           Part of the Urban Center Code in effect at the time the Land Use Applications were filed  
28

1 is SCC 30.34A.180(2)(f) [2007]. This provision, adopted pursuant to Ordinance 09-079, stated:

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

7 This provision was proposed by BSRE at the time of adoption of the Urban Center Code to  
8 specifically address the exact situation present here. At the time of its adoption, both BSRE  
9 and the County understood that the applications for development on Point Wells would be  
10 complex and would involve lengthy negotiations with multiple jurisdictions. The adoption of  
11 SCC 30.34A.180(2)(f) [2007] was based in large part on the realization that Urban Center  
12 development projects are, by definition, extremely complicated. Senior Planner Ryan  
13 Countryman acknowledged this before the Hearing Examiner when he testified that  
14 applications for this type of development would be expected to have seven or eight rounds of  
15 review by the PDS before proceeding to review under the State Environmental Protection Act  
16 (“SEPA”) and the attendant preparation of EIS. Exhibit T-4, p. 433. PDS and the Snohomish  
17 County Council agreed to this provision and approved SCC 30.34A.180(2)(f) [2007]  
18 specifically to allow BSRE to have a second chance with its Land Use Applications, if  
19 necessary, because of the complexity of the project.  
20  
21

22           *i. The Decision was Without Prejudice.*

23           The Hearing Examiner, in the Denial Decision, stated: “BSRE’s development  
24 applications are denied without prejudice pursuant to SCC 30.72.060(3) (2013).” Pursuant to  
25 SCC 30.34A.180(2)(f) [2007], BSRE should have the right to resubmit its Land Use  
26 Applications within six months of the Hearing Examiner’s Denial Decision without losing its  
27  
28

1 vested status.

2 *ii. The Hearing Examiner Failed to Recognize BSRE's Vested Status.*

3 The Denial Decision is silent about whether BSRE is vested to SCC 30.34A.180(2)(f)  
4 [2007]. However, in the Reconsideration Decision, the Hearing Examiner noted that the  
5 provision allowing an applicant to resubmit its application within six months of a denial without  
6 prejudice without losing its vested status was repealed in 2013. Exhibit R-3. The Hearing  
7 Examiner continued, stating:  
8

9 SCC 30.34A.180 does not authorize the Hearing Examiner to  
10 deny BSRE's application without prejudice, consequently  
11 allowing BSRE to reactivate its application within six months.  
12 The Hearing Examiner does not have authority to deny BSRE's  
13 application without prejudice under SCC 30.34A.180 and the  
Hearing Examiner therefore will not do so.

14 *Id.* By stating that SCC 30.34A.180 [2007] had been repealed, the Hearing Examiner failed to  
15 recognize BSRE's vested status under the regulations in effect on the date of the applications.  
16 The Hearing Examiner made this decision without permitting the parties to provide additional  
17 briefing on BSRE's vested status and without asking PDS about whether it considers BSRE to  
18 be vested to SCC 30.34A.180(2)(f) [2007].  
19

20 Regardless of the Hearing Examiner's statement about SCC 30.34A.180(2)(f) [2007]  
21 having been repealed, the Hearing Examiner expressly stated that he was denying the Land Use  
22 Applications without prejudice pursuant to SCC 30.70.060, which is the type of denial afforded  
23 protection under SCC 30.34A.180(2)(f) [2007].  
24

25 *iii. The County Has Consistently Held that the Land Use Applications Are*  
26 *Vested to SCC 30.34A.180(2)(f) [2007].*

27 In its arguments before the Supreme Court in *Woodway* and in its review letters, PDS  
28 has consistently recognized BSRE's vested status. In its October 2017 Letter (which is four

1 years after the repeal of SCC 30.34A.180 [2007]), PDS stated: “Review of Chapter 30.34A  
2 SCC refers to the Land Use permit for an urban center site plan, 11-101457 LU, unless  
3 otherwise noted. The review is per the code in effect when 11-101457 LU was submitted, i.e.  
4 the March 4, 2011, version of code, unless explicitly identified otherwise.” *See* Exhibit K-31,  
5 p. 79. The October 2017 Letter goes on to list this specific provision, stating: “**Former SCC**  
6 **30.34A.180 . . . Subsection (2)(f)** allows the Hearing Examiner to deny the project without  
7 prejudice and, if this happens, allows the applicant to reactivate the project.” *Id.* at p. 98  
8 (emphasis in original). In addition, PDS set forth the entire provision of the former SCC  
9 30.34A.180 [2007] in the October 2017 Letter in PDS’s list of Code provisions to which the  
10 Land Use Applications are vested. *See id.* at pp. 245-48. This is consistent with the Supreme  
11 Court’s ruling in *Woodway*: “BSRE’s development rights vested to the plans and regulations in  
12 place at the time it submitted its permit applications.” *Woodway*, 180 Wn.2d at 180-81.

13  
14  
15  
16 *iv. SCC 30.34A.180 [2007] is a Land Use Ordinance to Which Applications Vest.*

17  
18 The County Code and Washington State law expressly provide that applications are  
19 vested to “land use ordinances.” The Land Use Applications are vested to SCC  
20 30.34A.180(2)(f) [2007] because it is a “land use ordinance.”

21 Washington’s “vested rights doctrine” employs a “date certain” standard for vesting.  
22 *Snohomish County v. Pollution Control Hearings Board*, 187 Wn.2d 346, 387 P.3d 1064  
23 (2016). That standard “entitles developers to have a land development proposal processed  
24 under the regulations in effect at the time a complete building permit application is filed,  
25 regardless of subsequent changes in zoning or other land use regulations.” *Id.* at 358. A land  
26 use application is therefore vested to any “zoning or land use control ordinance” in effect on  
27  
28

1 the date it is filed. *Id.* at 362.

2 In 2016, the County adopted Amended Ordinance 16-004, which provides: “[A]n  
3 application for a permit or approval type set forth in SCC Table 30.70.140(1) shall be  
4 considered under the development regulations in effect on the date a complete application is  
5 filed . . . .” SCC 30.70.300(1). This provision was not in place when the Land Use Applications  
6 were filed, and therefore is inapplicable. However, even if it was applicable, it further provides  
7 support to the idea that the Land Use Applications are vested to SCC 30.34A.180 (2007). A  
8 “development regulation” is defined as “those provisions of Title 30 SCC that exercise a  
9 restraining or directing influence over land, including provisions that control or affect the type,  
10 degree or physical attributes of land development or use.” SCC 30.70.300(3).  
11

12  
13 SCC 30.34A.180(2)(f) [2007] is certainly a provision of Title 30 SCC which exercises  
14 a “restraining or directing influence over land” because it provides property owners with a  
15 significant property right—the right to continue development efforts under the same provisions  
16 in effect at the time an application was filed, even if that application has been denied without  
17 prejudice. Similarly, pursuant to Washington’s vested rights law, SCC 30.34A.180(2)(f) [2007]  
18 is properly deemed a “land use control ordinance”.  
19

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

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

Based on the foregoing, BSRE respectfully requests that the Court reverse the Hearing Examiner's Denial Decision and (1) deny the County's request to deny BSRE's Land Use Applications without completing the 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] such that BSRE can re-submit the applications within six months of the this Court's order without loss of vesting, and (4) reverse all Findings of Fact, Conclusions of Law or Rulings which relate to any of the above issues.

DATED this 25th day of February, 2019.

KARR TUTTLE CAMPBELL

By: /s/ *Jacque E. St. Romain*

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Attorneys for Petitioner

1 **CERTIFICATE OF SERVICE**

2 I, Heather L. Hattrup, affirm and state that I am employed by Karr Tuttle Campbell in  
3 King County, in the State of Washington. I am over the age of 18 and not a party to the within  
4 action. My business address is: 701 Fifth Ave., Suite 3300, Seattle, WA 98104. On this day,  
5 I caused the foregoing document to be served on the parties listed below in the manner  
6 indicated.

7 Matthew Otten, WSBA #40485  
8 Laura Kisielius, WSBA #28255  
9 Deputy Prosecuting Attorneys – Civil  
10 Division  
11 Robert Drewel Bldg., 8<sup>th</sup> Floor, M/S 504  
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13 Everett, WA 98201  
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opted in to receive E-Service**)
- Via Overnight Mail
- Via ECF/E Service (**if opted in**)

22  
23 Executed on this 25<sup>th</sup> day of February, 2019, at Seattle, Washington.

24  
25 /s/ Heather L. Hattrup  
26 Heather L. Hattrup  
27 Litigation Legal Assistant  
28 hhattrup@karrtuttle.com

# **Attachment 3**

*The Court of Appeals*  
of the  
*State of Washington*

RICHARD D. JOHNSON,  
*Court Administrator/Clerk*

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CASE #: 80377-8-1  
BRSE Point Wells, LP, Appellant v. Snohomish County et al, Respondents

Counsel:

The following notation ruling by Commissioner Masako Kanazawa of the Court was entered on September 19, 2019, regarding Appellant's Motion to Stay Enforcement of Judgment:

This is a Land Use Petition Act (LUPA) case. Appellant BSRE Point Wells, LP appeals from a superior court order that, on its appeal, reversed Snohomish County hearing examiner's decision. The hearing examiner denied BSRE's urban center land use applications "without prejudice" and denied BSRE's request for a six-month period under former Snohomish County Code (SCC) 30.34A.180(2)(f) to submit revised applications without a loss of project vesting.

On BSRE's appeal, the superior court agreed with BSRE that BSRE had a vested right to former SCC 30.34A.180(2)(f) and thus granted BSRE a six-month application reactivation period under the code "as a one-time reactivation opportunity." The court declined to address BSRE's challenge to the hearing examiner's decision on the merits of its applications as "unnecessary" because the court was "affording BSRE an opportunity to reactivate its applications." The court stated: "It is possible that the issues of substantial conflict . . . may come before the Court in the future depending on what happens with the reapplication process allowed by this ruling." BSRE appeals to this Court because the superior court declined to address its arguments on the merits of its applications regarding allowable building height and the applicability of a residential setback zone.

At issue in this ruling is BSRE's motion to stay enforcement of judgment under RAP 8.1(b)(3). Under RAP 8.1(b)(3), this Court may stay a superior court decision pending review if the party seeking a stay (here, BSRE) demonstrates (1) that its appeal raises a debatable issue and (2) that the harm without a stay outweighs the harm that would result from it.

But BSRE does not really ask to stay the superior court decision pending review. It asks this Court to stay "the six-month time period in which it can submit its revised land use applications." Motion to Stay at 2. BSRE argues that unless the six-month period is not stayed, it will be "forced to undertake an expensive, impossible, and largely unnecessary land use application revision process to allow BSRE to submit multiple versions of the land use applications prior to the deadline of December 18, 2019." Motion to Stay at 12. It argues its "consultants simply cannot complete multiple different applications before the deadline." Motion to Stay at 12.

But BSRE offers no authority for this Court to extend the time period *set by the county code*. BSRE may seek relief from the county.

The motion to stay is denied.

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

LAW

# **Attachment 4**



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October 4, 2019

*Via Electronic and Regular Mail*

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RE: Deadline for BSRE's Right to Re-Activate its Land Use Applications

To Whom It May Concern:

As you are likely aware, BSRE Point Wells, LP ("BSRE") has filed an appeal of the King County Superior Court's decision (the "Superior Court Order") dated June 18, 2019, on BSRE's Land Use Petition Act Appeal with the Washington State Court of Appeals, Division I. The Superior Court Order granted BSRE the right to re-activate its land use applications (the "Land

October 4, 2019  
Page 2

Use Applications”) for the development of an Urban Center at the “Point Wells” site no later than December 18, 2019 (the “Application Deadline”).

The purpose of the appeal filed by BSRE is to seek guidance on two important questions:

1. Whether proximity to a high capacity transit route is sufficient to allow for a height bonus of 90 feet, as set forth in SCC 30.34A.040, or whether proximity to a high capacity transit station is required instead.
2. Whether the residential setback set forth in SCC 30.34A.040(2)(A) applies to any portion of the Point Wells property.

It is vital for BSRE to know the answer to these two questions in order to appropriately revise and submit the Land Use Applications. For this reason, BSRE requested that the Court of Appeals stay the Application Deadline to allow the court to rule on these questions before BSRE prepared and submitted its Land Use Applications.

However, the Court of Appeals issued a letter decision on September 19, 2019, in which it stated that the Court of Appeals does not have authority to grant an extension of a time period set by the county code. It further stated, “BSRE may seek relief from the county.”

By this letter and pursuant to the direction received from the Court of Appeals, BSRE hereby seeks a stay of the Application Deadline from Snohomish County so that these two very important issues may be resolved prior to the reactivation of the Land Use Applications. We strongly believe that it would be in the best interest of both the County and BSRE to have this guidance before any review commences on the Land Use Applications.

Thank you for your consideration of our request.

Best regards,



Jacque E. St. Romain

CC (via email):      BSRE Point Wells, LP  
                             Steve Ohlenkamp  
                             Douglas A. Luetjen

# **Attachment 5**



**Snohomish County**

**Planning and Development  
Services**

October 9, 2019

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**Dave Somers**  
*County Executive*

Dear Ms. St. Romain,

I am writing in response to your letter dated October 4, 2019, in which you request from the County a stay of the deadline to submit a revised application for the BSRE Point Wells, LP (BSRE) Urban Center Development.

As summarized in your letter, the King County Superior Court issued a decision on BSRE's Land Use Petition Act appeal on June 18, 2019 (the "Superior Court Order"). The Superior Court held that BSRE had a one-time opportunity to submit a revised application within six months of the Superior Court Order. BSRE appealed the Superior Court Order to Division I of the Washington State Court of Appeals and filed a motion to stay the six-month deadline. The Court of Appeals denied the request for the stay.

BSRE now requests a stay from the County, based in part on language by the Court of Appeals suggesting that BSRE may seek relief from the County. As explained below in further detail, the County lacks authority to grant the stay sought by BSRE.

First, the reasoning cited by the Court of Appeals in its decision to deny BSRE's request for a stay applies equally to the County. The six-month deadline to submit a revised application is set forth in SCC 30.34A.180(2)(f) (2007), which in relevant part provides:

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.

The county code provides no authority for the County to extend or waive the six-month deadline as requested by BSRE. Despite the Court of Appeals' suggestion, the Court provided no legal basis for how the County could grant an extension without violating its own code.

In addition, granting the stay as requested by BSRE would directly contradict the Superior Court Order. The Superior Court Order provides that "BSRE has six-months from the date of entry of this Order on June 18, 2019 to reactivate its applications" and that the parties are to act in accord with the county code. The Superior Court Order provided a date certain by which a revised application must be submitted to the County, and the county code does not provide for extensions of that date certain.

Given the lack of authority in the county code to grant an extension of the time period under SCC 30.34A.180(2)(f) (2007), and in consideration of the Superior Court Order, the County does not have authority to waive the six-month deadline and cannot grant BSRE's request for a stay.

Sincerely,

A handwritten signature in black ink that reads "Michael McCrary". The signature is written in a cursive, flowing style.

Michael McCrary  
Deputy Director, PDS

cc: Ken Klein, Executive Director  
Barb Mock, Director, PDS

# **Attachment 6**

Case No. 80377-8-I

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

---

BSRE POINT WELLS, LP, a Delaware limited partnership,

Appellant,

v.

SNOHOMISH COUNTY, and CITY OF SHORELINE,

Respondents.

---

**BRIEF OF RESPONDENT SNOHOMISH COUNTY**

---

ADAM CORNELL  
Snohomish County Prosecuting Attorney

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## I. INTRODUCTION

This appeal concerns a development application (the “Application”) for a massive high-density residential and commercial development project at a site commonly known as Point Wells. BSRE, Point Wells, LP (BSRE) submitted the Application for an urban center in 2011. The Application conflicted with the Snohomish County Code (SCC or “County Code”) in numerous and significant ways. BSRE did not attempt to meaningfully address these conflicts until 2017. Even then, Snohomish County Department of Planning and Development Services (PDS) staff identified over 40 conflicts between the project and County Code. Several of those conflicts were substantial, and PDS recommended early denial of the project from the Snohomish County Hearing Examiner to avoid incurring needless county and applicant expense.<sup>1</sup> The Examiner agreed with PDS, and denied the Application based on findings supporting five substantial conflicts between the project and County Code. The Snohomish County Council agreed and affirmed the Examiner’s decision.

On appeal under the Land Use Petition Act (LUPA), chapter 30.70C RCW, BSRE specifically requested from the trial court relief in the form of a remand to allow BSRE to resolve the five substantial conflicts. In the alternative, BSRE requested the trial court determine the County was

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<sup>1</sup> SCC 30.61.220 allows denial of a proposal without the preparation of an environmental impact statement under the State Environmental Policy Act (chapter 43.21C RCW) when there are substantial conflicts between the proposal and County regulations. The purpose of early denial is “to avoid incurring needless county and applicant expense.” SCC 30.61.220. References to provisions of the County Code are to the version of code in effect on the date of application by BSRE, February and March of 2011. The 2011 versions of the County Code provisions referenced in the County’s Brief are included in Appendix A.

erroneous in determining the existence of any substantial conflicts. The trial court granted BSRE its requested remand; it did not rule on the substantial conflicts.

BSRE now alleges the trial court's remand was granted in error. BSRE is barred from making such a claim under the doctrine of invited error. Further, because the parties are complying with the trial court's remand order, this matter is not ripe for this Court's review until a new land use decision is issued and reviewed by the superior court.

Finally, BSRE asks this Court to substantively address only two of the five substantial conflicts identified in the County's land use decision. Its arguments regarding those two conflicts rest entirely on the application of the plain meaning rule to relevant County Code provisions. However, BSRE's arguments are completely divorced from the legislative intent underlying those County Code provisions, which must be considered when conducting statutory interpretation. Ignoring that legislative intent would lead to absurd results and a failure to protect citizens of the Town of Woodway, the City of Shoreline, and Snohomish County from the impacts of the proposed Point Wells development project. The Court should deny BSRE's appeal.

## **II. RESTATEMENT OF THE ISSUES**

1. Whether BSRE's appeal is barred under the invited error doctrine when the alleged error was specific relief BSRE requested.
2. Whether the Court lacks jurisdiction to consider BSRE's appeal based on ripeness and lack of a final judgment when the Application

was remanded to the County as requested by BSRE for further revision and review.

3. Whether the trial court committed an error of law by not reversing the County's decision that the residential setback of SCC 30.34A.040(2)(a) applies to Point Wells when the County's application of the regulation is consistent with and implements legislative intent.

4. Whether the trial court committed an error of law by not reversing the County's decision that the building height bonus in SCC 30.34A.040(1) requires access to transit when the County's application of the regulation is consistent with and implements legislative intent.

### **III. RESTATEMENT OF THE CASE**

#### **A. BSRE Failed to Address Significant Issues with the Project During the Application Process.**

BSRE submitted its Application for an urban center development in February and March of 2011.<sup>2</sup> PW\_000001-14; 020585.<sup>3</sup> BSRE proposed re-development of the 61-acre Point Wells industrial site that is currently the location of an active asphalt processing plant and oil storage facility.<sup>4</sup>

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<sup>2</sup> The Application consisted of a short plat application, a land disturbing activity permit application, a land use permit application for an urban center site plan, a shoreline substantial development permit application, and a retaining wall permit application. PW\_000001-14; 020585.

<sup>3</sup> All references to documents identified by Bates numbers beginning with PW\_ refer to documents contained within the Administrative Record.

<sup>4</sup> The site previously was used as a petroleum products facility. The site requires remediation under the Model Toxics Control Act (MTCA), chapter 70.105D RCW, before it can be redeveloped and used as a residential site. BSRE has not commenced the remediation process. PW\_020608; Ex. T-6, pp. 813-15, 818-820 (remediation process has not begun because property owner does not want to discontinue asphalt operations).

PW\_000001; 020577-78.<sup>5</sup> BSRE's proposal includes 3,081 residential units, many in high-rise towers up to 180 feet in height, and over 100,000 square feet of commercial and retail uses. PW\_020581-85. The Point Wells site abuts the Puget Sound shoreline to the west and a 200-foot bluff that is a designated landslide hazard area to the east. PW\_020577-78. The site is surrounded almost exclusively by low-density single-family neighborhoods located in the Town of Woodway and the City of Shoreline. The sole access to the site is a two-lane road through the City of Shoreline. PW\_020579-80.

The County's rezoning and designation of the Point Wells site as an urban center in 2010 and 2011 was challenged before the Growth Management Hearings Board. The Growth Board case was resolved by December 2012.<sup>6</sup> PW\_021236. In a separate action, the County's processing of BSRE's Application was challenged in superior court, which resulted in a September 2011 injunction preventing the County from processing the Application. *Id.* This Court invalidated that injunction in January 2013 and that result was affirmed by the Washington State Supreme Court in April 2014. *Town of Woodway v. Snohomish County*, 180 Wn.2d. 165, 322 P.3d 1219 (2014).

Once the injunction was invalidated, the County recommenced its review of the Application and issued a review completion letter on April 12,

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<sup>5</sup> All references to Exhibits T-1 through T-8 refer to the Verbatim Report of Proceedings included within the Administrative Record. These Exhibits were not Bates stamped, so all references to Exhibits T-1 through T-8 refer to the page number on the Exhibit.

<sup>6</sup> *City of Shoreline v. Snohomish County*, CPSGMHB, Corrected Final Decision and Order, Coordinated Case Nos. 09-2-0013c & 10-3-0011c (May 17, 2011).

2013. PW\_019468-81. The County's letter documented 42 issues of noncompliance with the County Code and requested additional information from BSRE related to those issues. *Id.*

BSRE did not respond. Instead, on March 21, 2014, BSRE requested its first extension of the application expiration date, which the County granted. PW\_014049. On April 15, 2015, BSRE requested a second extension, which the County also granted. PW\_014050; PW\_020957-58. On March 30, 2016, BSRE requested a third extension. PW\_014056-57. In a letter dated March 31, 2016, the County granted the extension request for two years and established a June 30, 2018, application expiration date. PW\_019571-72. The County also provided notice to BSRE of Snohomish County Council Amended Ordinance 16-004, which applied new expiration regulations to pending applications, including BSRE's Application. *Id.*

On April 17, 2017, over a year after receiving a two-year extension and four years after receiving the County's April 2013 review completion letter, BSRE provided an Application resubmittal to the County. PW\_021238. The County confirmed receipt of BSRE's resubmittal and again provided notice of the upcoming expiration for the Application. PW\_019655-56.

In a review completion letter dated October 6, 2017, the County recognized that BSRE had partially resolved 13 of the 42 issues but noted BSRE failed to acknowledge more than half of the deficiencies identified in the April 2013, review letter. PW\_019805-06. The County noted the

internal inconsistencies that plagued the Application and identified significant reports and critical project details still missing. The County once again notified BSRE of the June 30, 2018, expiration date for the Application. PW\_019796. The County also identified the potential for the Application to be transmitted to the Examiner with a recommendation of denial if BSRE did not address the deficiencies. *Id.* The County cautioned BSRE that no further extensions would be granted absent “extraordinary circumstances.” *Id.*

In a separate letter also dated October 6, 2017, the County requested BSRE’s response to the October 6, 2017, review completion letter by January 8, 2018, so the County would have time to conduct one final review of the Application and schedule a hearing before the Examiner prior to the June 30, 2018, expiration date. PW\_020183. If BSRE chose not to timely submit materials by the suggested date of January 8, 2018, it was running the risk that the County would not have adequate time to review, schedule, and provide public notice for a hearing before the Examiner. Ex. T-7, pp. 1004-05. Providing the materials by the suggested date would allow BSRE’s Application to be considered on its merits and provide an opportunity for BSRE to make its case before the Examiner instead of the Application expiring under its own terms.

The County met with BSRE on November 13, 2017, to discuss the Application. At that meeting, the County explained the reasoning behind the January 8, 2018, target date. Ex. T-7, pp. 1004-05. The option of BSRE requesting a fourth extension to the Application was discussed. Ex. T-7,

pp. 1004-06. BSRE repeatedly asserts that it was guaranteed a fourth extension by the County during the November 13, 2017, meeting. Amended Appellant’s Opening Brief (“BSRE Brief”), pp. 5-7; CP 321-23; CP 349. While not relevant to the issues presented in this appeal, the County wishes to elucidate the misleading characterization provided by BSRE. Contrary to the claims in its briefing, BSRE’s client representative and attorney testified before the Examiner that BSRE’s expectation about receiving a fourth extension was an “assumption” and the County did not promise BSRE an extension in that November 13, 2017 meeting. Ex. T-7, pp. 1004-05; 1008. On cross-examination, BSRE’s attorney admitted:

- Q. ... Just to clarify, did the county promise to give an app – give the applicant an extension?
- A. No one in the room had the authority to do so, is my understanding.
- Q. So the answer’s no?
- A. Correct.

Ex. T-7, p. 1008.<sup>7</sup> No fourth extension was promised by County staff at the meeting, and any suggestion by BSRE to the contrary is not supported by the record and is patently false.

Ultimately, BSRE requested in a January 12, 2018, letter a fourth extension of the expiration date to at least June 30, 2020, rather than provide the additional information by the date requested. PW\_014061-64. The PDS Director denied BSRE’s request on January 24, 2018. PW\_020235-36.

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<sup>7</sup> PW\_020954-55. A letter from the County to BSRE summarized the November 13, 2017, meeting and provided that no assurances on the extension were given, orally or in writing, which BSRE did not contest.

**B. The County's Land Use Decision Identified Five Substantial Conflicts Between the Application and County Code.**

BSRE did not submit any additional application materials and on April 17, 2018, the County issued a staff recommendation of denial of the Application under SCC 30.61.220. PW\_020572-664. That provision allows for denial of a proposal without preparing an Environmental Impact Statement (EIS) when the proposal is in "substantial conflict with adopted plans, ordinances, regulations or laws." *Id.* The staff recommendation of denial was based on eight issues of "substantial conflict" and, consistent with SCC 30.61.220, was transmitted to the Examiner, as the designated decision-making body, for hearing. *Id.*

Less than one month before the hearing on the County's recommendation of denial under SCC 30.61.220, on April 27, 2018, BSRE submitted new application materials. PW\_000506-621. The County reviewed those materials on an expedited schedule prior to the start of the hearing on May 16, 2018. PW\_021210-11; 021240. The County produced a supplemental staff recommendation dated May 9, 2018, in which it concluded that three of the eight substantial conflicts had been resolved. PW\_020665-88. The day before the hearing, BSRE submitted additional application materials. PW\_021211-12; 021240-41.

The Examiner held an open record hearing from May 16, 2018, to May 24, 2018. The hearing consisted of seven days of testimony and included opening presentations by BSRE and the County, witness testimony, introduction of exhibits, and public testimony.

On June 29, 2018, the Examiner issued a Decision Denying Extension and Denying Applications Without an Environmental Impact Statement. PW\_021438-96. BSRE filed a motion for reconsideration and clarification. PW\_021349-437. In response to BSRE’s motion, the Examiner issued two decisions: (1) a Reconsideration Decision;<sup>8</sup> and (2) a Denial Decision.<sup>9</sup> PW\_021497-508; 021509-67.

BSRE appealed the Examiner’s Denial Decision to the County Council. Following a closed record appeal hearing, the County Council affirmed the Examiner’s Denial Decision with minor modifications (the “Council Decision”). CP 45-48.

**C. The Trial Court Remanded the Application Per BSRE’s Request to Enable BSRE to Resolve the Substantial Conflicts.**

On October 29, 2018, BSRE filed a LUPA appeal of the Examiner’s Reconsideration Decision and Denial Decision, along with the Council’s Decision in King County Superior Court. CP 1-121. The court held oral argument on May 10, 2019, and on June 18, 2019, issued an “Order on BSRE Point Wells, LP’s LUPA Petition Remanding Per SCC 30.34A.180(2)(f)” (“Remand Order”). CP 881-99. The court reversed the Examiner’s Denial Decision in part, allowing BSRE “a one-time reactivation opportunity” to submit a revised application within six months

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<sup>8</sup> While not relevant to this appeal, the Examiner’s “Decision Granting in Part and Denying in part BSRE’s Motion for Reconsideration and Clarification” granted the reconsideration motion in part, clarifying that the denial was without prejudice and that an administrative appeal could be filed with the County Council. The Examiner denied the remainder of the motion.

<sup>9</sup> The full title of the Denial Decision was “Amended Decision Denying Extension and Denying Application Without An Environmental Impact Statement.”

of the Remand Order. CP 889. The court did not reverse the Denial Decision with regard to the five issues of substantial conflict, but ruled that the issues of substantial conflict may be litigated in the future depending on the outcome of BSRE's revised Application. CP 898.

On June 28, 2019, Intervenor, City of Shoreline ("Shoreline"), filed a "Motion for Reconsideration in Interpretation of SCC 30.34A.040(1)" requesting the court rule on the County's determination that BSRE's Application was in substantial conflict with the high capacity transit regulation. CP 900-04. On July 1, 2019, the court denied the motion. CP 905-06.

On July 31, 2019, BSRE filed this appeal. On August 27, 2019, BSRE filed a "Motion to Stay Enforcement of Judgment." On September 19, 2019, a Commissioner of the Court denied BSRE's motion.

#### IV. ARGUMENT

**A. The Invited Error Doctrine Bars BSRE's Appeal Because BSRE Created the Alleged Error By Inviting the Trial Court To Grant it Six Months to File a Revised Application Based on the Representation it Would Resolve All the Conflicts With its Application.**

BSRE's appeal is barred by the invited error doctrine. The invited error doctrine precludes a party from seeking appellate review of an error it helped create. *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); *State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal. *State v. Wakefield*, 130 Wn.2d

464, 475, 925 P.2d 183 (1996); *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds by State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995).

In its LUPA appeal, BSRE presented the superior court with two general remedies. CP 319-20. The first remedy BSRE requested was for the court to hold that the Examiner erred in concluding BSRE's Application included "five substantial conflicts" and erred by denying BSRE a fourth extension to its Application. *Id.* The second remedy BSRE requested was for the court to remand the Application to allow BSRE six months to revise and resubmit it. CP 319-20; 352. In asking for the remand, BSRE represented to the court that "BSRE has shown it is motivated to resolve all issues raised by PDS and will work diligently to do so." CP 352.

BSRE's second requested remedy was based on a regulation, SCC 30.34A.180(2)(f), that allows an applicant to submit a revised application within six months of the Examiner's decision denying an application without prejudice. SCC 30.34A.180(2)(f) provides:

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 and without additional filing fees or loss of project vesting if a revised application is submitted within six month of the Hearing Examiner's decision. In all other cases a new application shall be required.

The provision was repealed by the County Council in 2013.<sup>10</sup> However, the superior court concluded that BSRE was entitled “a one-time reactivation opportunity” under former SCC 30.34A.180(2)(f) because the County had included the regulation in a review letter to BSRE after the regulation had been repealed. CP 892-99. Because it had granted BSRE’s request for reactivation of its Application, the court ruled that consideration of the grounds for denial was unnecessary. CP 898. The court explicitly declined to rule on the issues of substantial conflict recognizing that due to the remand “[those issues] may come before the Court in the future depending on what happens with the reapplication process allowed by this ruling.” *Id.* In other words, the court remanded the Application to provide BSRE a chance to address the conflicts identified by the County as BSRE promised to do.

BSRE now alleges the relief it requested constitutes an error of law. However, it was BSRE who invited the court to grant it another chance with its Application, promising “to resolve all issues raised by PDS.” CP 352. Having received the exact relief is sought from the trial court, the invited error doctrine bars BSRE from obtaining relief from this Court on alleged errors it itself invited. *See Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 826, 965 P.2d 636 (1998) (applying the invited error doctrine to a LUPA appeal and holding the developer “cannot be permitted to argue on appeal that their own motion was erroneous”). Whether BSRE’s

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<sup>10</sup> *See* Snohomish County Council Amended Ordinance No. 13-007, effective October 3, 2013.

requested relief was well-reasoned matters not. The invited error doctrine bars relief regardless of whether BSRE intentionally or inadvertently encouraged the error. *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002).

**B. The Court Lacks Jurisdiction to Consider BSRE’s Appeal as the Remand Order Is Not a Final Judgment, and Therefore Not Ripe for Review.**

BSRE’s appeal of the Remand Order is not ripe nor a final judgment. Therefore, BSRE is precluded from obtaining appellate review based on the Court’s lack of jurisdiction.

**1. The Remand Order is Not Ripe for Judicial Review.**

The ripeness doctrine seeks to prevent courts from resolving “possible, dormant, hypothetical, speculative, or moot disagreement[s],” or entertaining disputes that are merely “potential, theoretical, abstract or academic,” by ensuring that the controversy has sufficiently developed to become suitable for judicial determination; “otherwise the court steps into the prohibited area of advisory opinions.” *State v. Cates*, 183 Wn.2d 531, 539–40, 354 P.3d 832 (2015), (citing *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)). In Washington, ripeness is often called “exhaustion of administrative remedies,” but this doctrine incorporates the “final decision” requirement. *Thun v. City of Bonney Lake*, 164 Wn. App. 755, 762, 265 P.3d 207 (2011) (citing *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 338–39, 787 P.2d 907 (1990)) (applying

the “final decision” requirement in the context of the exhaustion/futility doctrine).

LUPA's requirement of finality comports with the principle that judicial review on a piecemeal basis is generally disfavored. *See Fox v. Sunmaster Prods., Inc.*, 115 Wn.2d 498, 503–04, 798 P.2d 808 (1990); *State ex rel. Stone v. Superior Court, Spokane County*, 97 Wash. 172, 176, 166 P. 69 (1917). In tandem with LUPA's exhaustion of administrative remedies requirement, RCW 36.70C.060(2)(d), the finality requirement prevents a party from needlessly turning to a court for judicial relief when a local authority may still provide the requested relief. *See South Hollywood Hills Citizens Ass'n for Preservation of Neighborhood Safety & Env't v. King County*, 101 Wn.2d 68, 73–74, 677 P.2d 114 (1984) (discussing exhaustion of remedies requirement in context of challenge to plat approval for subdivision construction) (citing *McKart v. United States*, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969)). In short, the finality requirement of LUPA eliminates “premature judicial intrusion into land use decisions.” *Grandmaster Sheng–Yen Lu v. King County*, 110 Wn. App. 92, 101, 38 P.3d 1040 (2002).

Consistent with BSRE's request, the superior court remanded the matter for further administrative review of a revised Application. The outcome of the remand and further administrative review will result in either: 1) BSRE addressing all issues of substantial conflict with its revised Application and permit processing moving forward; or 2) if BSRE does not resolve the substantial conflicts, a denial of the Application under SCC

30.61.220 and a new land use decision that can be appealed to superior court. Therefore, the controversy will either be resolved without need for further judicial intervention, or a final appealable land use decision will issue that supersedes the land use decision remanded by the superior court, which will provide BSRE and interested parties with a means of obtaining judicial review of the new decision under LUPA.<sup>11</sup>

**2. Review of the Remand Order is Barred Under RAP 2.2 as the Order is Not a “Final Judgment” or a “Decision Determining Action.”**

Appellate review of the remand order is also barred by RAP 2.2. RAP 2.2 identifies decisions of the superior court that may be appealed. The only two types of decisions that might apply here are a “final judgment” under RAP 2.2(a)(1) and a “decision determining action” under RAP 2.2(a)(3). However, the court’s Remand Order does not qualify as either, and BSRE’s appeal must be dismissed out of hand.

A “final judgment” is one that settles all the issues in a case. In *Re Detention of Turay*, 139 Wn.2d 379, 392, 986 P.2d 790 (1999) (court defining “final judgment” under RAP 2.2(a)(1)) (citing *Rhodes v. D & D Enters., Inc.*, 16 Wn. App. 175, 178, 554 P.2d 390 (1976)). Here, BSRE argues the court erred by remanding the land use decision rather than

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<sup>11</sup> BSRE’s appeal of the remand order is contrary to several of LUPA’s principles of finality and exhaustion as espoused by Washington Courts, including aiding judicial review by promoting the development of facts during the administrative proceeding and promoting judicial economy by reducing duplication. *Klineburger v. King Cty. Dep’t of Dev. & Env’tl. Servs. Bldg.*, 189 Wn. App. 153, 169, 356 P.3d 223 (2015), (citing *IGI Res., Inc. v. City of Pasco*, 180 Wn. App. 638, 642, 325 P.3d 275 (2014) (internal quotation marks omitted) (quoting *King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 669, 860 P.2d 1024 (1993))).

reaching several substantive issues. Thus, by BSRE’s own admission the Remand Order cannot qualify as a final judgment under RAP 2.2(a)(1) because not all issues were settled.

Similarly, the Remand Order does not qualify under RAP 2.2(a)(3) as a “decision determining action” because it does not determine nor prevent a final judgment. *See Munden v. Hazelrigg*, 105 Wn.2d 39, 41, 711 P.2d 295 (1985) (holding that a dismissal order without prejudice does not qualify under RAP 2.2(a)(3) because it does not bar a subsequent suit and does not determine or discontinue the action). Here, the court’s order recognized that the remand continued the action and would potentially lead to a final judgment on issues of substantial conflict in the future.<sup>12</sup> Thus, the remand order does not qualify as a “decision determining action” under RAP 2.2(a)(3).

Indeed, if this Court does not dismiss BSRE’s appeal on jurisdictional grounds, it is possible that two land use decisions pertaining to the same development application will work their way through the courts on parallel trajectories. In its brief, BSRE describes how its consultants

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<sup>12</sup>In its Remand Order, the court stated, “It is possible that the issues of substantial conflict and failure to grant an extension may come before the Court in the future depending on what happens with the reapplication process allowed by this ruling.” CP 898. Case law suggests the remand divests the superior court of jurisdiction over the appealed land use decision. *See Pierce County Sheriff v. Civil Serv. Comm’n*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983) (citing *Reeploeg v. Jensen*, 81 Wn.2d 541, 546, 503 P.2d 99 (1972)). However, if BSRE is aggrieved by the issuance of a new land use decision by the County on remand, jurisdiction will be obtained by the superior court of the new decision upon the filing of a new LUPA petition. *See (Unpublished Opinion Per GR 14.1) Heller v. Friends of Pine Lake*, 136 Wn. App. 1022 (2019) (holding that upon remand the superior court loses jurisdiction and a new LUPA petition is necessary to confer appellate jurisdiction upon the court).

“have been hard at work preparing the revised Land Use Applications in order to submit them to the County prior to the Reactivation Deadline” set forth in the Remand Order. BSRE Brief, p. 12. If BSRE is aggrieved by any new land use decision issued by the County on remand, it may file a new land use petition in superior court. The issues may or may not be the same as the issues appealed here. As indicated by BSRE, the project Application will have been revised. Thus, if BSRE’s appeal is not barred, the resulting outcome may be two land use decisions, subject to judicial review under LUPA by two different courts, with different administrative records, all on the same project. BSRE’s appeal should be rejected under RAP 2.2.

**C. The County’s Land Use Decision is Not Erroneous on Issues Related to Residential Setbacks and High Capacity Transit.**

BSRE chose to appeal only two of the five substantial conflicts identified in the County’s land use decision. Although BSRE’s appeal should be summarily rejected on jurisdictional grounds, if this Court reaches the merits of its appeal on these two issues, the County’s land use decision should be affirmed for correctly interpreting and applying its land use regulations.

**1. LUPA Standard of Review.**

The burden of proof under LUPA rests with BSRE to show that it is entitled to the requested relief. *Nagle v. Snohomish County*, 129 Wn. App. 703, 707, 119 P.3d 914 (2005). A court may grant relief on a land use decision only if the party seeking relief satisfies one of the standards set

forth in RCW 36.70C.130(1). *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 767-68, 129 P.3d 300 (2006).

BSRE relies on two grounds under RCW 36.70C.130(1):

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise; ...

(d) The land use decision is a clearly erroneous application of the law to the facts; ....

Under RCW 36.70C.130(1)(b), questions of law are reviewed by the courts de novo. *Cingular Wireless*, 131 Wn. App. at 768 (citing *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003)). Under this standard, the court is required to give substantial deference to legal determinations of the local jurisdiction because of its expertise in local land use regulation. *Timberlake Christian Fellowship v. King County*, 114 Wn. App. 174, 180, 61 P.3d 332 (2002).

The clearly erroneous standard, RCW 36.70C.130(1)(d), involves applying the law to the facts. *Cingular Wireless*, 131 Wn. App. at 768; (citing *Citizens to Preserve Pioneer Park, L.L.C. v. City of Mercer Island*, 106 Wn. App. 461, 473, 24 P.3d 1079 (2001)). For BSRE to prevail under this standard, the court must be left with a definite and firm conviction that a mistake has been committed. *Cingular Wireless*, 131 Wn. App. at 768.

LUPA requires courts to review the decision of the local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals and modify

findings and conclusions of an inferior tribunal. RCW 36.70C.020(1); *Citizens to Preserve Pioneer Park*, 106 Wn. App. at 470-74. In this case, the County's decision on review is the October 9, 2018, Decision of the County Council, which affirmed and modified the August 3, 2018, Decisions of the Examiner. A court will not substitute its judgment for that of county decision-makers. *Schofield v. Spokane County*, 96 Wn. App. 581, 589, 980 P.2d 277 (1999).

**2. The County Correctly Applied the Residential Setback Regulation to Buildings in BSRE's Urban Plaza and In a Manner Consistent with the Legislative Intent.**

BSRE alleges the County's decision resulted in an error of law with respect to all findings, conclusions, and rulings related to the residential setback regulation. BSRE's Brief, p. 15.

First, BSRE's scant argument on the legal issues does not include any discussions of particular findings or conclusions. Indeed, BSRE only identifies Finding 49, Conclusions 26 and 28, and Ruling 4, with no ensuing analysis. This Court should not review issues that are inadequately briefed or only passing treatment has been made. *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004). Second, BSRE's appeal relies on an interpretation of the regulation that is contrary to legislative intent, is overly narrow, and omits significant facts regarding the application of the regulation to BSRE's project.<sup>13</sup>

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<sup>13</sup> In its briefing, BSRE alleges that all parties requested that the superior court interpret the residential setback and high capacity transit regulations. BSRE Brief, pp. 2, 23. The County briefed and argued these issues, along with all the other issues at play in the appeal, as part of defending the County's land use decision from BSRE's LUPA appeal. It is a mischaracterization to say that the County sought an independent interpretation of these

The County's urban center regulations require that urban center buildings located adjacent to low-density residential zones be scaled down and limited in height. 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 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).

BSRE's urban plaza portion of its development is comprised of five buildings (two service buildings and three residential towers). PW\_000648; 000649-58. The three residential towers are 180 feet, 170 feet, and 150 feet in height, while the service buildings are each 35 feet in height. PW\_000659. To be compliant with the regulation, the three residential towers cannot exceed 61 feet, 40 feet, and 41 feet in height, respectively, and the service buildings cannot exceed 15 feet. PW\_020601-02. The County determined that all of the buildings in urban plaza violate the height limits established in SCC 30.34A.040(2)(a) because the buildings are not stepped down in height according to each building's distance from adjacent low-density residential zones. PW\_021517.

BSRE represents to the Court that "[t]here is no property which is zoned R-9600, R-8400, R-7200, T or LDMR adjacent to the buildings

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regulations by the superior court. It is the County's position that the County correctly interpreted and applied the regulations, and the court did not reverse on those issues.

proposed to be built by BSRE.” BSRE Brief, p. 16. This statement is, at best, misleading. The property adjacent to BSRE’s proposed buildings was located in unincorporated Snohomish County and zoned R-9600 when the County Council adopted the setback regulation in 2010, and when BSRE submitted its Application in 2011. PW\_021516. These dates are significant because they are relevant to ascertaining the legislative intent behind the regulation, and the County Council’s intent for the regulation to apply specifically to BSRE’s project.

Several years after adoption of the setback regulation, and after BSRE submitted its Application, the Town of Woodway (“Woodway”) annexed the property adjacent to BSRE’s proposed urban plaza. PW\_020600-04; 021516. Woodway has similar but not identical zoning categories to the County. After annexation, the property adjacent to BSRE’s proposed buildings, which had the County zoning designation of R-9600, inherited the Woodway zoning designations of Residential 14,500 (R-14,500) and Urban Restricted (UR). *Id.* These Woodway zones are equivalent to the pre-existing zoning of R-9600, as those three zones are all single-family residential zones and represent the lowest-density urban residential zoning categories in Snohomish County.<sup>14</sup>

BSRE seeks to evade the height restrictions by arguing that the setback from residential properties does not apply to its project because, due

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<sup>14</sup> Woodway’s R-14,500 zone actually allows less density than the County’s R-9,600 zone. For example, a single-family home in unincorporated Snohomish County only requires a 9,600 square-foot lot, whereas the same home in Woodway requires a 14,500 square-foot lot.

to annexation by Woodway, the current adjacent zoning is not specifically listed in SCC 30.34A.040(2)(a).<sup>15</sup> BSRE’s argument relies on an overly narrow interpretation and advocates for this Court to interpret the regulation in a vacuum, disregarding legislative intent and related provisions.

The clear legislative intent behind the setback regulations is to limit the impact of tall buildings on adjacent residential areas. Washington courts interpret local ordinances the same as statutes. *Kitsap County v. Mattress Outlet*, 153 Wn.2d 506, 509, 104 P.3d 1280 (2005). The fundamental objective in interpreting a statute is to give effect to the legislature's intent. *State, Dept. of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). If a statute's meaning is plain on its face, the court gives effect to that plain meaning as an expression of legislative intent. *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 242, 88 P.3d 375 (2004). The court discerns plain meaning not only from the provision in question but also from closely related statutes and the underlying legislative purposes. *Id.*

It is apparent from the language of SCC 30.34A.040(2)(a) that the County Council intended to require urban center buildings to be “scaled down” and “limited in height” when located adjacent to low-density urban

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<sup>15</sup> BSRE’s position on this issue contradicts the position it took on the related issue of vesting. BSRE, and the County, successfully defended the right for BSRE’s urban center application to be considered under the land use regulations in effect at time of application. *See Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 180-81, 322 P.3d 1219 (2014). BSRE is now arguing it is entitled to benefit from a jurisdictional change in a neighboring property that was not in effect at the time it submitted its Application. BSRE cannot have it both ways. *See East County Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 439-40, 105 P.3d 94 (2005) (a developer cannot “cherry-pick” favorable regulations with a vested application).

residential zones. By listing the zoning categories R-9600, R-8400, R-7200, T and LDMR, which includes the entirety of the County's low-density urban residential zones, the Council manifested its intent to protect residents in low-density zones from the impact of the potential towers allowed in the County's most dense zoning category, urban center.

It is also apparent that the County Council intended for SCC 30.34A.040(2)(a) to apply specifically to BSRE's property. The Council re-zoned BSRE's property as an "urban center" and adopted the setback regulation for urban centers on the same day. PW\_021516.<sup>16</sup> At that time, BSRE's property abutted R-9600 zoned residential properties. *Id.*

In addition, BSRE's overly-narrow interpretation of the regulation leads to an absurd result. Under BSRE's interpretation, neighbors to the development that were protected by height limitations while residents of unincorporated Snohomish County would no longer be protected merely because they are now residents of Woodway. It is undisputed that the impacts to the residents are the same - three towering structures of 130, 170, and 180 feet next to single-family homes. A reading that produces absurd results must be avoided because " 'it will not be presumed that the legislature intended absurd results.' " *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting *State v. Delgado*, 148 Wn.2d 723, 733, 63 P.3d 792 (2003) (Madsen, J. dissenting)).

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<sup>16</sup> See Snohomish County Council Amended Ordinance No. 09-079 (adopting urban center regulations) and Snohomish County Council Amended Ordinance No. 09-080 (implementing urban center zone at Point Wells). PW\_021516.

The outcome of plain language analysis may be corroborated by validating the absence of an absurd result. Where an absurd result is produced, further inquiry may be appropriate. *Tingey v. Haisch*, 159 Wn.2d 652, 664, 152 P.3d 1020 (2007). Thus, inquiry into legislative intent and specific facts concerning application of the regulation to Point Wells is also warranted given the absurd result advocated by BSRE. The County's well-reasoned ruling on this issue is grounded in the fundamental objective of statutory interpretation, which is to give effect to the legislative intent, and also avoid absurd results contrary to that intent:

PDS and the Hearing Examiner must implement the intent of the county code, giving meaning to all words in the ordinance, and not interpreting the code to yield absurd results that contradict the otherwise clear intent of the code. Here, the code clearly and unequivocally intends to graduate building heights from the urban center maximum to the lower maximum of adjacent residential areas. BSRE's interpretation of the code yields a result that contradicts the express desire of the code.

CP 111. BSRE does not dispute that its reading of the regulation directly conflicts with the County Council's intent to protect residents of single-family homes from the impacts of neighboring 180-foot urban center buildings. Indeed, BSRE makes no mention of legislative intent. Further, BSRE does not acknowledge or respond to the absurd result of the interpretation it advances.

BSRE fails to demonstrate that application of the residential setback to the Point Wells project, in light of the statutory scheme as a whole, is an erroneous interpretation of law under RCW 36.70C.130(1)(b). Under this

standard, the court is required to give substantial deference to legal determinations of the local jurisdiction because of its expertise in local land use regulation. *Timberlake Christian Fellowship*, 114 Wn. App. at 180. Here, both the Examiner and County Council, the body which adopted the regulation at issue, exercised their expertise in interpreting the County's regulations and ruling that the regulations are intended to protect the adjacent residential properties, including those properties adjacent to Point Wells.

BSRE also fails to satisfy the "clearly erroneous" standard under RCW 36.70C.130(1)(d). While the clearly erroneous standard requires applying the law to the facts, BSRE chose to completely disregard analysis of the legally significant facts. *Cingular Wireless*, 131 Wn. App. at 768 (the clearly erroneous standard, RCW 36.70C.130(1)(d), involves applying the law to the facts). Thus, BSRE fails to demonstrate the decision was clearly erroneous as review of the entire record does not lead to a definitive and firm conviction that a mistake has been committed under RCW 36.70C.130(1)(d). *Norway Hill Pres. & Prot. Ass'n v. King County Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976).

**3. The County Correctly Concluded that BSRE Failed to Satisfy the High Capacity Transit Requirement Based on an Interpretation and Application of the Regulation Consistent with the Principles of Statutory Interpretation.**

BSRE alleges the County's decision resulted in error with respect to all findings, conclusions, and rulings related to the requirement for high capacity transit. BSRE Brief, pp. 17-18.

First, BSRE's scant argument on the legal issues does not include adequate discussion of particular findings or conclusions. BSRE makes passing reference to Findings 45, 57, 58, 59, 60, 62, and 63, Conclusions 20, 34, 36, 37, 38, 39, and 78, and Ruling 4, but only provides minimal discussion of Conclusions 36 and 37. This Court should not review issues that are inadequately briefed or only passing treatment has been made. *Thomas*, 150 Wn.2d at 868-69. Second, BSRE's appeal relies on an interpretation of the high capacity transit regulation, SCC 30.34A.040(1), that is divorced and contrary from the legislative intent, and which produces an absurd result.

The County code provides a maximum building height of 90 feet for buildings in the urban center zone. An additional 90-foot bonus up to a total building height of 180 feet is allowed if the project provides access to high capacity transit and an applicant demonstrates that the additional height is "necessary and desirable." The code provision provides, in relevant part:

The maximum building height in the UC zone shall be 90 feet. A building height increase up to an additional 90 feet may be approved under SCC 30.34A.180 when the additional height is documented to be necessary or desirable when the project is located near a high capacity transit route or station and the applicant prepares an environmental impact statement 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). BSRE seeks to take full advantage of this provision - 21 of the 46 buildings it proposes exceed 90 feet in height. However, the County determined that BSRE did not comply with SCC 30.34A.040(1) because it failed to satisfy the high capacity transit requirement and did not demonstrate that the additional height was “necessary or desirable.” PW\_021529.

**i. The County Correctly Interpreted and Applied the High Capacity Transit Requirement to Require Actual Access to Transit Under SCC 30.34A.040(1).**

BSRE asserts the County erred in concluding SCC 30.34A.040(1) requires access to high capacity transit, not just proximity to it. BSRE Brief, p. 17. BSRE insists proximity alone – as in a Sounder rail line bisecting its development site without a current or planned stop – is sufficient to satisfy SCC 30.34A.040(1) and claim a 90-foot height bonus. BSRE is mistaken.

When tasked with interpreting the meaning and scope of a statute, the objective is to determine and give effect to legislative intent. *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740 (2015). A court may determine a statute’s plain language by looking not only to the text in question, but also the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. *Id.* Statutes should be construed so as to avoid strained, unlikely, or absurd consequences. *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 421, 443, 395 P.3d 1031 (2017).

When interpreting SCC 30.34A.040(1) in the larger statutory context in which it was adopted, it is clear the legislative intent behind the urban center code requires not just proximity to high capacity transit, but the ability of residents to use and access high capacity transit. PW\_020024; 020031. SCC 30.21.025(1)(f), adopted at the same time as SCC 30.34A.040, describes the intent and function of the Urban Center zone. Notably, its purpose is to provide mixed, high-density residential, office, and retail uses with public and community facilities and pedestrian connections “located within one-half mile of existing or planned stops or stations for high capacity transit routes such as light rail or commuter rail lines, regional express bus routes, or transit corridors that contain multiple bus routes or which otherwise provide access to such transportation as set forth in SCC 30.34A.085.” This tracks the definition of “Urban Center” in effect at the time BSRE submitted its applications.<sup>17</sup>

SCC 30.34A.085 provides further insight into the legislative intent for the urban centers regulations to provide actual access to usable transit, not just proximity to an unusable route. PW\_020031. SCC 30.34A.085 requires business or residential buildings within an urban center either (1) shall be constructed within one-half mile of existing or planned stops or stations for high capacity transit routes; or (2) shall provide for new stops or stations for such high capacity transit routes or transit corridors within one-half mile and coordinate with transit providers to assure use of the new

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<sup>17</sup> SCC 30.91U.085 (“high capacity transit routes such as light rail or commuter rail lines, regional express bus routes, or transit corridors that contain multiple bus routes”). *See* Snohomish County Council Amended Ordinance 09-079, effective date May 29, 2010.

stops or stations; or (3) shall provide a mechanism such as van pools or other similar means of transporting people on a regular schedule in high occupancy vehicles to operational stops or stations for high occupancy transit. *Id.* The focus is proximity coupled with the ability to use and access high capacity transit. Similarly, SCC 30.34A.010, which describes the purpose of the urban center code, notes “[t]he standards outlined in this chapter are meant to encourage high density transit- and pedestrian-oriented development that provides a mix of uses and encourages high quality design.” PW\_020024. It is difficult to see how a development could be “transit-oriented” if residents of the development are unable to access and utilize transit. These additional provisions inform interpretation of SCC 30.34A.040(1). In sum, the statutory scheme supports the County’s decision and directly contradicts BSRE’s claim of error.

BSRE’s next argument is that its reading of the regulation is the “only possible reading” that does not render a portion of the regulation “meaningless and superfluous” and which recognizes both alternative methods of qualifying for the height bonus. BSRE Brief, pp. 18-19. The two alternative methods are: (1) proximity to a high capacity route; or (2) proximity to a high capacity transit station. BSRE reasons because it is close to a high capacity route it has satisfied the regulation and claims the County’s decision renders the first alternative, proximity to a route, “meaningless and superfluous.”

However, contrary to BSRE’s argument, there is not “only one possible reading” of the provision. As stated, the regulation outlines two

alternatives: (1) proximity to a high capacity route; or (2) proximity to a high capacity transit station. BSRE's reading of the provision renders the second alternative and the term "station" meaningless and superfluous. After all, it reasons that all high capacity transit stations must be located on a route, so under BSRE's reading of the regulation there would be no purpose or meaning to the second alternative of a high capacity transit "station." Thus, the basic statutory canon to avoid reading a statute in a manner that would render a portion of it "meaningless and superfluous" actually undermines BSRE's reading of the provision and instead supports the County's decision. *See State v. Ervin*, 169 Wn.2d 815, 823, 239 P.3d 354 (2010).

To BSRE, high capacity route or station applies only to the Sounder commuter rail line. However, the legislative context for the provision reveals that high capacity routes are intended to encompass high capacity bus routes, not just rail. PW\_020031 (*See* SCC 30.34A.085); Ex. T-5, pp. 471-72. Thus, reading the provision in a manner that a project may qualify for the height bonus if located near a (1) high capacity bus route; or (2) a high capacity train or light rail station gives meaning to both the words "route" and "station." Therefore, BSRE's interpretation disregards the regulation's context and isolates the provision from the express legislative intent of the urban center zone and regulations. The County's decision is supported by the legislative intent and canons of statutory construction. PW\_021517-19; 021529-31.

Further, the County’s decision on this issue is consistent with a prior interpretation by the Washington State Growth Management Hearings Board concerning a closely-related urban center regulation adopted by the County. The Growth Board observed:<sup>18</sup>

BSRE also provides a letter from Sound Transit expressing “interest” in serving Point Wells if the developer funds construction of the commuter rail station. However, it is undisputed as of today, there is no regional transit solution in the plans of any of the transit agencies to serve an additional population of 6000 at Point Wells.

The Board does not find BSRE’s assurances persuasive. The Board agrees with petitioners that a “highly efficient transportation system linking major centers” is not satisfied by providing van pools to a Metro park-and-ride two and a half miles away. Nor is “high capacity transit” satisfied by an urban center on a commuter rail line without a stop. There is nothing efficient or multi-modal about an urban center designation that could result in an additional 12,860 car trips per day through a two-lane neighborhood street, or that relies for high – capacity transit on an unusable commuter rail line and van pools.

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<sup>18</sup> The Growth Board case involved a challenge to County ordinances amending its comprehensive plan to add Point Wells as an urban center and the County’s ordinances adopting urban center regulations. While the Board dismissed the petitioners’ challenge on the issue of proximity to high-capacity transit, it did so solely because the petitioners cited the incorrect provision of the GMA (RCW 36.70.070, not RCW 36.70.130(1) and RCW 36.70.040). *City of Shoreline v. Snohomish County*, CPSGMHB, Corrected Final Decision and Order, Coordinated Case Nos. 09-2-0013c & 10-3-0011c (May 17, 2011) at 6.

BSRE seeks to dismiss the import of the Growth Board's reasoning. BSRE cites RCW 36.70A.302(2) and case law for the proposition that a determination of invalidity is prospective in effect and does not extinguish rights that vested prior to the finding of invalidity. BSRE Brief, pp. 19-20 (citing *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 322 P.3d 1219 (2014)). The County agrees with regard to the particular remedy of invalidity available under RCW 36.70A.302(2), and successfully argued that issue before the Washington State Supreme Court. The Court in *Woodway* addressed whether developers have a vested right to have their development applications processed under the land use plans and regulations in effect at the time of application. *Id.* at 169.

Where BSRE errors is in attempting to twist the vested rights doctrine to apply to interpretations of statutes or ordinances. The case law does not support BSRE's argument. An applicant does not vest to an erroneous interpretation of law. To the contrary, once a court interprets the meaning of statute, "that is what the statute has meant since its enactment." *State v. Moen*, 129 Wn.2d 535, 538, 919 P.2d 69 (1996); *In re Personal Restraint of Vandervlugt*, 120 Wn.2d 427, 436, 842 P.2d 950 (1992); *In re Personal Restraint of Moore*, 116 Wn.2d 30, 37, 803 P.2d 300 (1991). Thus, once the Growth Board ruled, its interpretation is law and dates back to the regulation's date of enactment. BSRE remains vested to the regulation (SCC 30.34A.040), but not to an erroneous interpretation of that regulation.

The Growth Board is an administrative body tasked with exclusive review of a local jurisdiction's amendments to its comprehensive plan and development regulations adopted under the Growth Management Act (Chapter 36.70A RCW) (GMA), including SCC 30.34A.040(1) at issue here. The County's development regulations must comply with the GMA and interpreting SCC 30.34A.040(1) in the manner advocated by BSRE would be contrary to the Board's precedent on a nearly identical provision of County Code. The County is required to interpret its regulations consistent with the GMA and would be remiss in interpreting a provision in direct conflict with the Growth Board.

Not only is BSRE incorrect in claiming that its interpretation of SCC 30.34A.040 "is the only possible reading," BSRE's reading of the provision violates basic principles of statutory interpretation. The County's decision, in contrast, is supported by the statutory scheme as a whole, avoids absurd consequences, and gives effect to the legislative intent of the provision and urban center zone. Under RCW 36.70C.130(1)(b), the County is entitled to deference in its construction of laws under its expertise and did not err in concluding that the height bonus requires more than simple proximity to unusable high capacity transit rail line. *See Timberlake Christian Fellowship*, 114 Wn. App. at 180. In addition, BSRE fails to demonstrate the decision was clearly erroneous as review of the entire record does not lead to a definitive and firm conviction that a mistake has been committed under RCW 36.70C.130(1)(d). *Cingular Wireless, LLC*, 131 Wn. App. at 767-68.

**ii. The County Correctly Determined BSRE Was Required to Demonstrate Compliance With the Necessary or Desirable Criterion of SCC 30.34A.040(1).**

In addition to the transit proximity requirement, the County's concluded that BSRE failed to demonstrate that additional height was "necessary or desirable," as required under SCC 30.34A.040(1). To build higher than 90 feet, the County Code is clear that an applicant must demonstrate "that the additional height is documented to be necessary or desirable." SCC 30.34A.040(1). BSRE asserts the County erred as a matter of law by applying the "necessary or desirable" criterion in its decision.

BSRE first insists, without explanation or citation to authority, that a determination of the "necessary and desirable" standard in SCC 30.34A.040(1) is to occur only following completion of environmental review. BSRE fails to cite any legal basis for this assertion and this Court should reject it. This Court not review issues that are inadequately briefed or only passing treatment has been made. *Thomas*, 150 Wn.2d at 868-69.

Second, BSRE argues it was unable to brief whether additional height was "necessary or desirable" before the Examiner could rule on it. In its staff recommendation, the County identified non-compliance with SCC 30.34A.040(1) as an issue of substantial conflict and the Examiner's role under SCC 30.61.220 was to evaluate whether substantial conflict existed. PW\_020600-04. The burden was on BSRE to demonstrate compliance with SCC 30.34A.040(1). The duty to ensure compliance with construction, zoning, and land use ordinances remains the responsibility of individual builders and permit applicants, not the local government. *Mull v. City of*

*Bellevue*, 64 Wn. App. 245, 251–52, 823 P.2d 1152 (1992). The Examiner’s determination on BSRE’s compliance with a code provision is not error simply because BSRE chose not to address compliance with the “necessary and desirable” criterion. Finally, BSRE failed to brief or demonstrate how this alleged error falls within the standards of review identified RCW 36.70C.130(1)(b) or (1)(d).

V. **CONCLUSION**

For all of the foregoing reasons, the County respectfully requests that the Court deny BSRE’s appeal.

Respectfully submitted on January 13, 2020.

ADAM CORNELL  
Snohomish County Prosecuting Attorney

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**DECLARATION OF SERVICE**

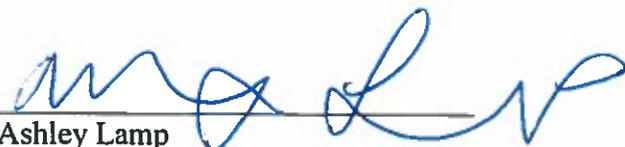
I, Ashley Lamp, hereby certify that on January 13, 2020, I served a true and correct copy of the foregoing Brief of Respondent Snohomish County upon the person/persons listed herein by the following means:

Gary D. Huff Douglas Luetjen J. Dino Vasquez Jacque St. Romain KARR TUTTLE CAMPBELL 701 Fifth Avenue, Suite 3300 Seattle, WA 98104 <i>Attorneys for Petitioner</i>	<input type="checkbox"/>	U.S. Mail, postage prepaid
	<input type="checkbox"/>	Overnight Courier
	<input checked="" type="checkbox"/>	Electronic Court E-file: COA
	<input checked="" type="checkbox"/>	Electronically via email: <a href="mailto:dvasquez@karrtuttle.com">dvasquez@karrtuttle.com</a> <a href="mailto:jstromain@karrtuttle.com">jstromain@karrtuttle.com</a> <a href="mailto:ghuff@karrtuttle.com">ghuff@karrtuttle.com</a> <a href="mailto:dluetjen@karrtuttle.com">dluetjen@karrtuttle.com</a>
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Margaret King Julie Ainsworth-Taylor 17500 Midvale Ave. N. Shoreline, WA 98133 <i>Attorneys for City of Shoreline</i>	<input type="checkbox"/>	U.S. Mail, postage prepaid
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	<input checked="" type="checkbox"/>	Electronic Court E-file: COA
	<input checked="" type="checkbox"/>	Electronically via email: <a href="mailto:mking@shorelinewa.gov">mking@shorelinewa.gov</a> <a href="mailto:Jainsworth-taylor@shorelinewa.gov">Jainsworth-taylor@shorelinewa.gov</a>
	<input type="checkbox"/>	Facsimile

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED in Everett, Washington, this 13<sup>th</sup> day of January, 2020.

  
 \_\_\_\_\_  
 Ashley Lamp  
 Legal Assistant

# **APPENDIX A**

RESPONSE BRIEF OF SNOHOMISH COUNTY

No. 80377-8-I

### **SCC 30.21.025 Intent of zones. (Former)**

This section describes the intent of each use zone. Snohomish County's use zones are categorized and implemented consistent with the comprehensive plan. The comprehensive plan establishes guidelines to determine compatibility and location of use zones. The intent of each zone is established pursuant to SCC Table 30.21.020 and is set forth below in SCC 30.21.025(1) - (4).

(1) Urban Zones. The urban zones category consists of residential, commercial, and industrial zoning classifications in Urban Growth Areas (UGAs) located outside of cities in unincorporated Snohomish County. These areas are either already characterized by, or are planned for, urban growth consistent with the comprehensive plan.

(a) Single Family Residential. The intent and function of single family residential zones is to provide for predominantly single family residential development that achieves a minimum net density of four dwelling units per net acre. These zones may be used as holding zones for properties that are designated urban medium-density residential, urban high-density residential, urban commercial, urban industrial, public/institutional use (P/IU), or other land uses in the comprehensive plan. The official Snohomish County zoning maps prepared pursuant to SCC 30.21.030 shall use the suffix "P/IU" to indicate all areas in which these zones implement the P/IU designation (e.g., R-7,200-P/IU). Single family residential zones consist of the following:

- (i) Residential 7,200 sq. ft. (R-7,200);
- (ii) Residential 8,400 sq. ft. (R-8,400); and
- (iii) Residential 9,600 sq. ft. (R-9,600).

(b) Multiple Family Residential. Multiple family residential zones provide for predominantly apartment and townhouse development in designated medium- and high-density residential locations. Multiple family residential zones consist of the following:

(i) Townhouse (T). The intent and function of the townhouse zone is to:

(A) provide for single family dwellings, both attached and detached, or different styles, sizes, and prices at urban densities greater than those for strictly single family detached development, but less than multifamily development;

(B) provide a flexible tool for development of physically suitable, skipped-over or under-used lands in urban areas without adversely affecting adjacent development; and

(C) provide design standards and review which recognize the special characteristics of townhouses, to ensure the development of well-planned communities, and to ensure the compatibility of such housing developments with adjacent, existing, and planned uses.

Townhouses are intended to serve the housing needs of a variety of housing consumers and producers. Therefore, townhouses may be built for renter occupancy of units on a site under single ownership, owner agreements pursuant to chapters 64.32 or 64.34 RCW, or owner or renter occupancy of separately conveyed units on individual lots created through formal subdivision pursuant to chapter 58.17 RCW;

(ii) Low-Density Multiple Residential (LDMR). The intent and function of the low-density multiple residential zone is to provide a variety of low-density, multifamily housing including townhouses, multifamily structures, and attached or detached homes on small lots;

(iii) Multiple Residential (MR). The intent and function of the multiple residential zone is to provide for high-density development, including townhouses and multifamily structures generally near other high-intensity land uses; and

(iv) Mobile Home Park (MHP). The intent and function of the Mobile Home Park zone is to provide and preserve high density, affordable residential development consisting of mobile homes for existing mobile home parks as a source of affordable detached single-family and senior housing.

(c) Commercial. The Commercial zones provide for neighborhood, community and urban center commercial, and mixed use developments that offer a range of retail, office, personal service and wholesale uses. Commercial zones consist of the following:

(i) Neighborhood Business (NB). The intent and function of the neighborhood business zone is to provide for local facilities that serve the everyday needs of the surrounding neighborhood, rather than the larger surrounding community;

(ii) Planned Community Business (PCB). The intent and function of the planned community business zone is to provide for community business enterprises in areas desirable for business but having highly sensitive elements of vehicular circulation, or natural site and environmental conditions while minimizing impacts upon these elements through the establishment of performance criteria. Performance criteria for this zone are intended to control external as well as internal effects of commercial development. It is the goal of this zone to discourage "piecemeal" and strip development by encouraging development under unified control;

(iii) Community Business (CB). The intent and function of the community business zone is to provide for businesses and services designed to serve the needs of several neighborhoods;

(iv) General Commercial (GC). The intent and function of the general commercial zone is to provide for a wide variety of retail and nonretail commercial and business uses. General commercial sites are auto-oriented as opposed to pedestrian or neighborhood oriented. Certain performance standards, subject to review and approval of an official site plan, are contained in chapter 30.31B SCC;

(v) Freeway Service (FS). The intent and function of the freeway service zone is to provide for needed freeway commercial facilities in the vicinity of on/off ramp frontages and access roads of limited access highways with a minimum of traffic congestion in the vicinity of the ramp. Allowed uses are limited to commercial establishments dependent upon highway users. Certain performance standards, subject to review and approval of an official site plan, are contained in chapter 30.31B SCC to protect freeway design;

(vi) Business Park (BP). The intent and function of the business park zone is to provide for those business/industrial uses of a professional office, wholesale and manufacturing nature which are capable of being constructed, maintained, and operated in a manner uniquely designed to be compatible with adjoining residential, retail commercial, or other less intensive land uses, existing or planned. Strict zoning controls must be applied in conjunction with private covenants and unified control of land; many business/industrial uses otherwise provided for in the zoning code will not be suited to the BP zone due to an inability to comply with its provisions and achieve compatibility with surrounding uses. The BP zone, under limited circumstances, may also provide for residential development where sites are large and where compatibility can be assured for on-site mixed uses and for uses on adjacent properties;

(vii) Light Industrial (LI). The intent and function of the light industrial zone is to promote, protect, and provide for light industrial uses while also maintaining compatibility with adjacent nonindustrial areas;

(viii) Heavy Industrial (HI). The intent and function of the heavy industrial zone is to promote, protect, and provide for heavy industrial uses while also maintaining compatibility with adjacent nonindustrial areas; and

(ix) Industrial Park (IP/PIP). The intent and function of the industrial park and planned industrial park zones is to provide for heavy and light industrial development under controls to protect the higher uses of land and to stabilize property values primarily in those areas in close proximity to residential or other less intensive development. The IP and remaining Planned Industrial Park (PIP) zones are designed to ensure compatibility between industrial uses in industrial centers and thereby maintain the attractiveness of such centers for both existing and potential users and the surrounding community. Vacant/undeveloped land which is currently zoned PIP shall be developed pursuant to industrial park zone regulations (chapter 30.31A SCC).

(d) Industrial Zones. The Industrial zones provide for a range of industrial and manufacturing uses and limited commercial and other nonindustrial uses necessary for the convenience of industrial activities. Industrial zones consist of the following:

- (i) Business Park (BP). See description under SCC 30.21.025(1)(c)(vi);
- (ii) Light Industrial (LI). See description under SCC 30.21.025(1)(c)(vii);
- (iii) Heavy Industrial (HI). See description under SCC 30.21.025(1)(c)(viii); and
- (iv) Industrial Park (IP). See description under SCC 30.21.025(1)(c)(ix).

(e) Mixed use zone. The mixed use (MU) zone shall only be applied to properties approved for an fully contained communities (FCC) in accordance with Chapter 30.33A SCC. Allowed and/or prohibited uses for the MU zone shall be administered through the FCC permit Master Plan pursuant to SCC 30.33A.100(9).

(i) Purposes. The MU zone is established to achieve the following purposes:

(A) To enable FCC development, pursuant to this chapter, with imaginative site and building design in a compatible mixture of land uses that will encourage pedestrian rather than automotive access to employment opportunities and goods and services;

(B) To ensure sensitivity in land use and design to adjacent land uses in the MU district, and avoid the creation of incompatible land uses;

(C) To ensure that all development in the FCC gives adequate consideration to and provides mitigation for the impacts it creates with respect to transportation, public utilities, open space, recreation and public facilities, and that circulation, solid waste disposal and recycling, water, sewer and storm water systems are designed to adequately serve the FCC; and

(D) To ensure that development protects and preserves the natural environment to the maximum extent possible, including but not limited to protection of the water quality of the county's rivers, contribution to the long-term solution of flooding problems, protection of wetlands and critical areas and protection of views of the county's foothills, mountains, open space areas, or other scenic resources within the county.

(ii) Objectives. Each proposal for development within the MU zone shall be in conformity with the FCC permit master plan and advance the achievement of the foregoing purposes of the MU zone and the following objectives:

(A) The preservation or creation of open space for the enjoyment of the residents of the FCC, employees of business located within the FCC and the general public;

(B) The creation of attractive, pedestrian-oriented neighborhoods with a range of housing types, densities, costs and ownership patterns;

(C) The provision of employment opportunities and goods and services in close proximity to, interspersed with, or attached to residential uses;

(D) The provision of a balanced mix and range of land uses within and adjacent to the development that minimize the necessity for the use of automobiles on a daily basis;

(E) The use of highest quality architectural design and a harmonious use of materials;

(F) The provision of a range of street sizes and designs, including narrow streets designed principally for the convenience of pedestrians as well as streets of greater width designed primarily for vehicular traffic;

(G) The provision of commons, greens, parks or civic buildings or spaces as places for social activity and assembly for the community; and

(H) The provision of clustered development to preserve open space within the FCC while still achieving an overall desired density for the FCC.

(f) Urban Center (UC). The intent and function of the Urban Center zone is to implement the Urban Center designation on the future land use map by providing a zone that allows a mix of high-density residential, office and retail uses with public and community facilities and pedestrian connections located within one-half mile of existing or planned stops or stations for high capacity transit routes such as light rail or commuter rail lines, regional express bus routes, or transit corridors that contain multiple bus routes or which otherwise provide access to such transportation as set forth in SCC 30.34A.085.

(2) Rural Zones. The rural zones category consists of zoning classifications applied to lands located outside UGAs that are not designated as agricultural or forest lands of long-term commercial significance. These lands have existing or planned rural services and facilities, and rural fire and police protection services. Rural zones may be used as holding zones for properties that are primarily a transition area within UGAs on steep slopes adjacent to non-UGA lands designated rural or agriculture by the comprehensive plan. Rural zones consist of the following:

(a) Rural Diversification (RD). The intent and function of the rural diversification zone is to provide for the orderly use and development of the most isolated, outlying rural areas of the county and at the same time allow sufficient flexibility so that traditional rural land uses and activities can continue. These areas characteristically have only rudimentary public services and facilities, steep slopes and other natural conditions, which discourage intense development, and a resident population, which forms an extremely rural and undeveloped environment. The resident population of these areas is small and highly dispersed. The zone is intended to protect, maintain, and encourage traditional and appropriate rural land uses, particularly those which allow residents to earn a satisfactory living on their own land. The following guidelines apply:

(i) a minimum of restrictions shall be placed on traditional and appropriate rural land uses;

(ii) the rural character of these outlying areas will be protected by carefully regulating the size, location, design, and timing of large-scale, intensive land use development; and

(iii) large residential lots shall be required with the intent of preserving a desirable rural lifestyle as well as preventing intensive urban- and suburban-density development, while also protecting the quality of ground and surface water supplies and other natural resources;

(b) Rural Resource Transition - 10 Acre (RRT-10). The intent and function of the rural resource transition - 10 acre zone is to implement the rural residential-10 (resource transition) designation and policies in the comprehensive plan, which identify and designate rural lands with forestry resource values as a transition between designated forest lands and rural lands;

(c) Rural-5 Acre (R-5). The intent and function of the rural-5 acre zone is to maintain rural character in areas that lack urban services. Land zoned R-5 and having an RA overlay, depicted as R-5-RA on the official zoning map, is a Transfer of Development Rights (TDR) receiving area

and, consistent with the comprehensive plan, will be retained in the R-5 RA zone until regulatory controls are in place which ensure that TDR certificates issued pursuant to SCC 30.35A.050 will be required for development approvals within the receiving area;

(d) Rural Business (RB). The intent and function of the rural business zone is to permit the location of small-scale commercial retail businesses and personal services which serve a limited service area and rural population outside established UGAs. This zone is to be implemented as a "floating zone" and will be located where consistent with specific locational criteria. The rural business zone permits small-scale retail sales and services located along county roads on small parcels that serve the immediate rural residential population, and for a new rural business, are located two and one-half miles from an existing rural business, rural freeway service zone, or commercial designation in the rural area. Rural businesses, which serve the immediate rural population, may be located at crossroads of county roads, state routes, and major arterials;

(e) Clearview Rural Commercial (CRC). The intent and function of the CRC zone is to permit the location of commercial businesses and services that primarily serve the rural population within the defined boundary established by the CRC land use designation. Uses and development are limited to those compatible with existing rural uses that do not require urban utilities and services.

(f) Rural Freeway Service (RFS). The intent and function of the rural freeway service zone is to permit the location of small-scale, freeway-oriented commercial services in the vicinity of on/off ramp frontages and access roads of interstate highways in areas outside a designated UGA boundary and within rural areas of the county. Permitted uses are limited to commercial establishments dependent upon highway users; and

(g) Rural Industrial (RI). The intent and function of the rural industrial zone is to provide for small-scale light industrial, light manufacturing, recycling, mineral processing, and resource-based goods production uses that are compatible with rural character and do not require an urban level of utilities and services.

(3) Resource Zones. The resource zones category consists of zoning classifications that conserve and protect lands useful for agriculture, forestry, or mineral extraction or lands which have long-term commercial significance for these uses. Resource zones consist of the following:

(a) Forestry (F). The intent and function of the forestry zone is to conserve and protect forest lands for long-term forestry and related uses. Forest lands are normally large tracts under one ownership and located in areas outside UGAs and away from residential and intense recreational use;

(b) Forestry and Recreation (F&R). The intent and function of the forestry and recreation zone is to provide for the development and use of forest land for the production of forest products as well as certain other compatible uses such as recreation, including recreation uses where remote locations may be required, and to protect publicly-owned parks in UGAs;

(c) Agriculture-10 Acre (A-10). The intent and function of the agricultural-10 Acre zone is:

(i) To implement the goals and objectives of the County General Policy Plan, which include the goals of protecting agricultural lands and promoting agriculture as a component of the County economy;

(ii) To protect and promote the continuation of farming in areas where it is already established and in locations where farming has traditionally been a viable component of the local economy; and

(iii) To permit in agricultural lands, with limited exceptions, only agricultural land uses and activities and farm-related uses that provide a support infrastructure for farming, or that

support, promote or sustain agricultural operations and production including compatible accessory commercial or retail uses on designated agricultural lands.

(iv) Allowed uses include, but are not limited to:

(A) Storage and refrigeration of regional agricultural products;

(B) Production, sales and marketing of value-added agricultural products derived from regional sources;

(C) Supplemental sources of on-farm income that support and sustain on-farm agricultural operations and production;

(D) Support services that facilitate the production, marketing and distribution of agricultural products;

(E) Off farm and on-farm sales and marketing of predominately regional agricultural products from one or more producers, agriculturally related experiences, products derived from regional agricultural production, products including locally made arts and crafts, and ancillary sales or service activities.

(F) Accessory commercial or retail uses which shall be accessory to the growing of crops or raising of animals and which shall sell products predominately produced on-site, agricultural experiences, or products, including arts and crafts, produced on-site. Accessory commercial or retail sales shall offer for sale a significant amount of products or services produced on-site.

(v) Allowed uses shall comply with all of the following standards:

(A) The uses shall be compatible with resource land service standards.

(B) The allowed uses shall be located, designed and operated so as not to interfere with normal agricultural practices.

(C) The uses may operate out of existing or new buildings with parking and other supportive uses consistent with the size and scale of agricultural buildings but shall not otherwise convert agricultural land to non-agricultural uses.

(d) Mineral Conservation (MC). The intent and function of the mineral conservation zone is to comprehensively regulate excavations within Snohomish County. The zone is designed to accomplish the following:

(i) preserve certain areas of the county which contain minerals of commercial quality and quantity for mineral conservation purposes and to prevent incompatible land use development prior to the extraction of such minerals and materials and to prevent loss forever of such natural resources;

(ii) preserve the goals and objectives of the comprehensive plan by setting certain guidelines and standards for location of zones and under temporary, small-scale conditions to permit other locations by conditional use permit;

(iii) permit the necessary processing and conversion of such material and minerals to marketable products;

(iv) provide for protection of the surrounding neighborhood, ecological and aesthetic values, by enforcing controls for buffering and for manner and method of operation; and

(v) preserve the ultimate suitability of the land from which natural deposits are extracted for rezones and land usages consistent with the goals and objectives of the comprehensive plan.

(4) Other Zones: The other zones category consists of existing zoning classifications that are no longer primary implementing zones but may be used in special circumstances due to topography, natural features, or the presence of extensive critical areas. Other zones consist of the following:

(a) Suburban Agriculture-1 Acre (SA-1);

- (b) Rural Conservation (RC);
- (c) Rural Use (RU);
- (d) Residential 20,000 sq. ft. (R-20,000);
- (e) Residential 12, 500 sq. ft. (R-12,500); and
- (f) Waterfront beach (WFB).

**SCC 30.34A.010 Purpose and applicability. (Former)**

This chapter regulates development in the Urban Center (UC) zone. This chapter sets forth procedures and standards to be followed in applying for any required permits and for building in this zone. The standards outlined in this chapter are meant to encourage higher density transit- and pedestrian-oriented development that provides a mix of uses and encourages high quality design. The standards outlined in this chapter shall not apply to the following:

- (1) Interior alterations that do not alter the exterior appearance of a structure or modify an existing site condition;
- (2) Site and exterior alterations that do not exceed 75 percent of the assessed valuation (building or land) according to the most recent county assessor records;
- (3) Building additions that are less than 10 percent of the existing floor area of the existing building(s). Any cumulative floor area increase (after the adoption date of this chapter) that totals more than 10 percent shall not be exempt unless approved pursuant to SCC 30.34A.180;
- (4) Normal or routine building and site maintenance or repair that is exempt from permit requirements;
- (5) Any remodeling or expansion of existing single-family residences with no change in use or addition of dwelling units involved;
- (6) Reconstruction of a single-family residence if it is destroyed due to fire or natural disaster.

**SCC 30.34A.040 Building height and setbacks. (Former)**

(1) The maximum building height in the UC zone shall be 90 feet. A building height increase up to an additional 90 feet may be approved under SCC 30.34A.180 when the additional height is document 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.
- (2)
- (a) 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).

(b) Where the UC zoning line abuts a critical area protection area and buffer or utility, railroad, public or private road right-of-way, building heights shall not be subject the limitation in section (2)(a) if the critical area protection area and buffer or utility, railroad, public or private road right-of-way provides an equal or greater distance between the building(s) and the zoning line than would be provided in this subsection (2)(a). All ground floor residential units facing a public street must maintain a minimum structural ceiling height of 13 feet to provide the opportunity for future conversion to nonresidential use.

(3) Excluding weather protection required in SCC 30.34A.150, buildings must be setback pursuant to SCC Table 30.34A.040(4).

**Table 30.34A.040(4)  
Setbacks**

Front	None
Side	None
Rear	None

**SCC 30 34A.085 Access to public transportation. (Former)**

Business or residential buildings within an urban center either:

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

**SCC 30.34A.180 Review process and decision criteria. (Former)**

- (1) Development Agreement Process: Approval under this subsection shall be as follows:
  - (a) Upon submittal of a complete application meeting the requirements of SCC 30.34A.170, the applicant shall immediately initiate negotiations of one agreement with the city or town in whose urban growth area or MUGA the proposed development will be located and any city or town whose municipal boundaries border the proposed urban center development site.
    - (i) The parties shall have forty-five (45) days to reach an agreement on elements of the urban center development such as design, location, density or other aspects of the proposed development. The agreement must be consistent with Snohomish County development regulations.

(ii) If the parties cannot reach agreement within forty-five (45) days, the parties may mutually agree in writing to extend the deadline.

(iii) If the parties cannot reach agreement and do not agree to an extension, the applicant shall notify the department in writing and the application shall be reviewed as a Type 2 process under subsection (2) of this section.

(iv) Any party may withdraw from negotiations at any time and any party may decide that an agreement is not possible, the applicant shall notify the department in writing of the withdrawal and the application shall be reviewed as a Type 2 process under subsection (2) of this section.

(v) If the parties reach agreement, the agreement shall be memorialized in writing and submitted to the department. The department shall review the agreement for consistency with the Snohomish County Code.

(b) Following review of the agreement reached under subsection (1)(a) of this section, the department shall negotiate a development agreement with the applicant and process the application under chapter 30.75 SCC. If the department and the applicant cannot reach agreement on a development agreement, the applicant may choose to have the application reviewed under subsection (2) of this section.

(2) Type 2 Permit Decision Process: If any party withdraws from the negotiation of an agreement under subsection (1)(a) above, the forty-five (45) day period expires without the parties agreeing to an extension, or if the department and applicant cannot reach agreement for a development agreement, the application shall be reviewed as follows:

(a) The design review board established by SCC 30.34A.175 shall hold one open public meeting with urban center project applicants, county staff, neighbors to the project, members of the public, and any city or town whose municipal boundaries are within one mile of the proposed urban center development or whose urban growth area includes the subject site or whose public utilities or services would be used by the proposed urban center development to review and discuss proposed site plans and project design.

(b) Following the public meeting held pursuant to subsection (2)(a) of this section, the design review board shall provide written recommendations to the department and the applicant on potential modifications regarding the project, such as: scale, density, design, building mass and proposed uses of the project. The recommendations shall become part of the project application and they should:

(i) Synthesize community input on design concerns and provide early design guidance to the development team and community; and

(ii) Ensure fair and consistent application of the design standards of this chapter and any neighborhood-specific design guidelines.

(c) The urban center development application shall then be processed as a Type 2 application as described in chapter 30.72 SCC and the hearing examiner may approve or approve with conditions the proposed development when all the following are met:

(i) The development complies with the requirements in this chapter, chapters 30.24 and 30.25 SCC, and requirements of other applicable county code provisions;

(ii) The proposal is consistent with the comprehensive plan;

(iii) The proposal will not be materially detrimental to uses or property in the immediate vicinity; and

(iv) The development demonstrates high quality design by incorporating elements such as:

(A) Superior pedestrian- and transit-oriented architecture;  
(B) Building massing or orientation that responds to site conditions;  
(C) Use of structural articulation to reduce bulk and scale impacts of the development;  
(D) Use of complementary materials; and  
(E) Use of lighting, landscaping, street furniture, public art, and open space to achieve an integrated design;

(v) The development features high density residential and/or non-residential uses;  
(vi) Buildings and site features are arranged, designed, and oriented to facilitate pedestrian access, to limit conflict between pedestrians and vehicles, and to provide transit linkages; and  
(vii) Any urban center development abutting a shoreline of the State as defined in RCW 90.58.030(2)(c) and SCC 30.91S.250 shall provide for public access to the water and shoreline consistent with the goals, policies and regulations of the Snohomish County Shoreline Management Master Program.

(d) Whenever an urban center development application is reviewed as a Type 2 permit decision process under subsection (2) of this section, the county shall involve the cities or towns in the review of urban center development permit applications proposed within their urban growth area or MUGA or whose municipal boundaries border the proposed urban center development site using the following procedures:

(i) The county shall notify any such city or town and provide contact information for the applicant;

(ii) Following notice the relevant city(ies) or town(s) shall contact the county on their need for level of involvement and issues of particular concern;

(iii) The county shall invite a staff representative from any city or town who contacts the county pursuant to subsection (2)(d)(ii) of this section to attend pre-application, submittal and re-submittal meetings;

(iv) The city's or town's recommendation shall:

(A) Contain the name, mailing address, and daytime telephone number of the city's or town's representative;

(B) Identify proposed changes to the application, specific requirements, actions, and/or conditions that are recommended in response to impacts identified by the city or town;

(C) State the specific grounds upon which the recommendation is made; and

(D) Where applicable, identify and provide documentation of the newly-discovered information material to the decision.

(v) The county shall respond to a city's or town's comments and recommendations in its final decision reached pursuant to this section.

(e) An applicant may sign a concomitant agreement in a form approved by the county. The concomitant agreement shall reference the required conditions of approval, including the site plan, design elements and all other conditions of project approval. The concomitant agreement shall be recorded, run with the land, and shall be binding on the owners, heirs, assigns, or successors of the property.

(f) 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 and 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.

(3) All urban center development applications shall be subject to the following requirements:

(a) In addition to the notice required by chapter 30.70 SCC and subsection (2)(d)(i) of this section, the department shall distribute copies of the urban center development application to each of the following agencies and shall allow 21 days from the date of published notice for the agencies to submit comments on the proposal:

- (i) Snohomish Health District;
- (ii) Department of public works;
- (iii) Washington State Department of Transportation; and
- (iv) Any other federal, state, or local agencies as may be relevant.

(b) Any revision which substantially alters the approved site plan is no longer vested and re-submittal of a complete application is required pursuant to SCC 30.34A.170. Revisions not requiring re-submittal are vested to the regulations in place as of the date the original application was submitted. Revisions after approval of the development which cause an increase in traffic generated by the proposed development shall be reviewed pursuant to SCC 30.66B.075.

(c) Urban center project approval expires after six years from the date of approval unless a complete application for construction of a project or for installation of the main roads and utilities has been submitted to the department.

#### **SCC 30.61.220 Denial without EIS. (*Current*)**

When denial of a non-county proposal can be based on grounds which are ascertainable without preparation of an environmental impact statement, the responsible official may deny the application 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:

- (1) The proposal is one for which a DS has been issued or for which early notice of the likelihood of a DS has been given;
- (2) Any such denial or recommendation of denial shall be supported by express written findings and conclusions of substantial conflict with adopted plans, ordinances, regulations or laws; and
- (3) When considering a recommendation of denial made pursuant to this section, the decision-making body may take one of the following actions:
  - (a) Deny the application; or
  - (b) Find that there is reasonable doubt that the recommended grounds for denial are sufficient and remand the application to the responsible official for compliance with the procedural requirements of this chapter.

**SCC 30.91U.085 “Urban center”** means an area with a mix of high-density residential, office and retail uses with public and community facilities and pedestrian connections located within one-half mile of existing or planned stops or stations for high capacity transit routes such as light rail or commuter rail lines, regional express bus routes, or transit corridors that contain multiple bus routes or which otherwise provide access to such transportation as set forth in SCC 30.34A.085. (*Former*)

**From:** [Lamp, Ashley](#)  
**To:** [Davis, Kris](#)  
**Cc:** [Otten, Matthew](#); [Heather Hattrup](#); [Kisielius, Laura](#); [Jacque St. Romain](#); [Douglas A. Luetjen](#); [J. Dino Vasquez](#); [Gary Huff](#)  
**Subject:** BSRE Point Wells, LP v. Snohomish County Planning & Development Services - SnoCo Response re Motion to Stay  
**Date:** Thursday, July 2, 2020 4:01:49 PM  
**Attachments:** [20200702 SnoCo Response re Stay.pdf](#)  
[image001.png](#)

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Kris,

Attached please find Snohomish County's Response re Motion to Stay. A hard copy will follow via U.S. Mail.

Thank you.

[Ashley Lamp](#)

Legal Assistant - Civil Division

 Snohomish County Prosecutor's Office

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