

## Countryman, Ryan

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**From:** Tom McCormick <tommccormick@mac.com>  
**Sent:** Tuesday, June 09, 2015 4:46 PM  
**To:** White, Clay  
**Cc:** Countryman, Ryan; Clifton, Stephen; County Executive; Debbie Tarry; Eric Faison  
**Subject:** Buildings taller than 90 feet not permitted at Point Wells (11-101457 LU)

To: Clay White, Director of PDS and Snohomish County's Responsible SEPA Official

Snohomish County Code does not permit building heights taller than 90 feet at Point Wells. This email explains why.

If the maximum building height is 90 feet, then, to be compliant with SEPA, the Environmental Impact Statement (EIS) for the project must study the impacts of a 90-foot maximum building height alternative.

I respectfully request that a 90-foot maximum building height alternative be included for study in the EIS. (Later this week, I will send you a separate email that explains in detail why it is both necessary and appropriate to include and study in the EIS a 90-foot maximum building height alternative.)

I am not at this time asking the County to make a decision on the merits as to whether the maximum building height at Point Wells is 90 feet. That decision will be made by the hearing examiner.

Here's why building heights taller than 90 feet are not permitted at Point Wells . . .

I.

The default maximum building height in Urban Centers like Point Wells is 90 feet, but an applicant can request an increase up to an additional 90 feet.

"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 . . ." SCC 30.34A.040(1) (2011 version) (Emphasis added). (Unless otherwise indicated, all SCC references in this email are to the March 2011 version of the Snohomish County Code; BSRE submitted its Urban Center application in March 2011).

Because the Point Wells project is not "located near a high capacity transit route or station," the maximum building height at Point Wells is 90 feet.

II.

The Point Wells project is not located near a high capacity transit route or station.

The word "near" is not specifically defined in SCC 30.34A.040(1). With its meaning gleaned from other sections of the Urban Center Development Code (current SCC 30.34A.040(1), and current and 2011 SCC 30.91U.085), and from provisions in the County's comprehensive plan (2011 version of GPP LU Policy 3.A.3), it is reasonable to conclude that the word "near" means that the distance from the project site to high capacity transit access must be somewhere between 1/8 mile to 1/2 mile.

The current version of SCC 30.34A.040(1) provides that, "The maximum building height in the UC zone shall be 90 feet. A building height increase up to an additional 35 feet may be approved under SCC 30.34A.180 when the project

is located within one-eighth mile of a high capacity transit station, major transit corridor or transit center.” The current and 2011 version of SCC 30.91U.085 provides that, "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 ....” And the 2011 version of GPP LU Policy 3.A.3 provides that, "The Urban Centers shall be located adjacent to a freeway/highway and a principal arterial road, and within one-fourth mile walking distance from a transit center, park-and-ride lot, or be located on a regional high capacity transit route."

#### Near a High Capacity Transit “Station”

A site is near a “high capacity transit station” when it is near a full-scale train station where trains stop and where passengers board, a bus station where bus rapid transit (BRT) coaches stop and passengers board, or a multi-modal station.

Point Wells is not near a high capacity transit station. There is no high capacity transit station near Point Wells (the closest high capacity transit station is in Edmonds, three miles away by car).

#### Near a High Capacity Transit “Route”

A site is near a high capacity transit route only if it has transit access. It’s common knowledge that when a person says that her housing development is located near a transit route, the person means that she lives near a transit stop where she can get on the bus or train.

In 2011, in proceedings before the GMHB, the County argued unsuccessfully that, though there is no transit access at the site, Point Wells satisfies the criterion that the site is located on a high capacity transit route "[b]ecause the site is bisected by a railway corridor used by Sound transit.” Snohomish County’s response Brief (Shoreline III), pages 8-9, CPSGMHB Coordinated Case Nos. 09-3-0013c and 10-3-0011c (Feb. 11, 2011). The County further argued (unsuccessfully) that GPP "LU Policy 3.A.3 only requires an Urban Center to be on a high capacity transit route; ... being on a commuter rail line is enough.” Brief at page 10. The GMHB rejected the County’s interpretation, noting that it would produce an “absurd” result.

The GMHB looked at the Urban Center provisions as a whole, and concluded that, "Such an interpretation ignores Policy LU 3.A.2's reference to “good access” and leads to an absurd result: an urban center with limited transportation access.” *City of Shoreline, et al., v. Snohomish County*, CPSGMHB Coordinated Case Nos. 09-3-0013c and 10-3-0011c, Corrected Final Decision and Order, page 16 (May 17, 2011).

The GMHB’s rejection of the County’s argument should come as no surprise, as the County’s own in-house legal counsel had earlier advised the Snohomish County Council that the argument would be a “very difficult sell” to the GMHB.

In a June 9, 2009, Memorandum of Advice from John Moffat, Assistant Chief, Civil Division, Snohomish County Prosecuting Attorney's Office, to members of the Snohomish County Council, Mr. Moffat opined that the Point Wells site likely does not meet the criterion in LU Policy 3.A.3, requiring that an Urban Center “be located on a regional high capacity transit route.” Mr. Moffat cautioned the County Council with strong words, advising them as follows: “Frankly, we believe taking the position that the site is 'on a regional high capacity transit route' just because tracks run through the site when there is no station or plans for a station will be a very difficult sell to the [GMHB]. It is more likely that the [GMHB] would take a more common sense view . . . that if there is no station and no way for the residents in an Urban Center development in Point Wells to actually access the transit route in Point Wells, that the policy is not met.” (Emphasis added.)

Based on the above discussion, it’s clear that Point Wells is not near a high capacity transit route because it has no transit access. Nor is Point Wells near a high capacity transit station

But we do not end there. There are additional, compelling arguments as to why Point Wells is not located near a high capacity transit "route or station," and thus, why the maximum building height at Point Wells is 90 feet.

### III.

It would be contrary to normal canons of statutory construction to conclude that a railroad line passing through Point Wells, without transit access, is a high capacity transit route as used in SCC 30.34A.040(1).

We begin by recognizing the obvious: a high capacity transit "route" is different than a high capacity transit "station."

The terms "route" and "station," separated by the disjunctive "or" in SCC 30.34A.040(1) ("high capacity transit route or station"), have separate meanings. As the U.S. Supreme Court has noted: "Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

#### The County's interpretation renders the word "station" superfluous

Another canon of construction is that each word or phrase in a regulation is meaningful and useful, and thus, an interpretation that would render a word or phrase redundant or meaningless must be rejected. A regulation should be construed to give effect to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. *Hibbs v. Winn*, 542 U. S. 88, 101 (2004).

As noted in Part II of this email, in rejecting the County's interpretation, the GMHB concluded that a site is not on a high capacity transit route just because tracks run through the site when there is no station there — such an interpretation would produce an "absurd" result. The County's interpretation becomes even more absurd once we apply several basic canons of statutory construction to the words "route or station," as used in SCC 30.34A.040(1).

When applied to the disjunctive terms "route" or "station" in SCC 30.34A.040(1), the County's interpretation that a transit route includes a route without access renders the term "station" meaningless and superfluous, contrary to the basic canon of construction expressed in *Hibbs v. Winn*, 542 U. S. 88, 101 (2004). The term "station" is rendered meaningless because all stations are located on a transit route. Under the County's interpretation, one could delete the word "station" from SCC 30.34A.040(1) without consequence. Under the County's interpretation, the word "station" would be meaningless and superfluous. Put differently, the word "station" would add nothing; if a site is near a route, it meets the criterion, period. The word "route" alone would do all the necessary work.

So now we must ask, what other meaning can be assigned to the phrase high capacity transit "route," so that the word "station" does not become superfluous? There are several reasonable and common sense interpretations that give meaning to both words, "route" and "station." Here are three: (1) the site is near a full-scale train station, or near a boarding stop for a high capacity bus rapid transit (BRT) route or a high capacity transit corridor that contains multiple bus routes; (2) the site is near a full-scale bus station with BRT routes or multiple high capacity bus routes, or near a boarding stop for a commuter train route or BRT route or a high capacity transit corridor that contains multiple bus routes; or (3) the site is near a multi-modal station, or near a boarding stop for a commuter train route or BRT route or a high capacity transit corridor that contains multiple bus routes.

#### The route or station must be an existing route or station

SCC 30.34A.040(1) requires that the high capacity transit route or station be an existing route or station. A "planned" route or station does not meet the SCC 30.34A.040(1) criterion to get an extra 90 feet of building height.

A plain reading of SCC 30.34A.040(1) reveals that there must be a high capacity transit route or station at Point Wells before a permit can be approved for building heights in excess of 90 feet: "A building height increase up to an

additional 90 feet may be approved . . . when the project is located near a high capacity transit route or station . . .” The text doesn’t say, when the project is located near an “existing or planned” high capacity transit route or station. It is significant that in other sections of the County’s Urban Center Development Code, the words “existing or planned” are used, but not so in SCC 30.34A.040(1). See, for example, SCC 30.34A.085 (Access to public transportation), which provides:

“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; . . .” (emphasis added);

See also SCC 30.21.025 and SCC 30.91U.085, both employing the words “existing or planned.”

If the Council had intended to permit an extra 90 feet of building height for buildings near “planned” transit routes or stations, the word “planned” would be found in SCC 30.34A.040(1). It’s not. Under the presumption of meaningful variation, different statutory wording suggests different statutory meaning. See, e.g., *Lopez v. Gonzalez*, 549 U.S. 47, 55 (2006) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion”) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). As the Court in *Russello* said, “We would not presume to ascribe this difference to a simple mistake in draftsmanship.” 464 U.S. 16, 23.

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

Finally, it should be noted that is completely reasonable and consistent to require via SCC 30.34A.040(1) that, to gain approval to construct buildings taller than 90 feet, the proposed buildings must be near an existing high capacity transit route or station, while at the same time applying a more lenient requirement in SCC 30.34A.085, that all buildings within an urban center must be constructed within one-half mile of existing or planned stops or stations for high capacity transit routes. The two requirements serve different purposes. In essence, the rules are saying: We’ll grant you an urban center permit to build buildings up to 90 feet in height if all the buildings are near existing or planned high capacity transit stops, but we won’t let you build buildings taller than 90 feet unless nearby there is existing transit access for a high capacity transit route or station.

IV.

For all of the foregoing reasons, Point Wells is not “located near a high capacity transit route or station,” thus the maximum building height at Point Wells is 90 feet.

In light of the above analysis, I am respectfully requesting that you, as the County’s responsible SEPA official, direct that a 90-foot maximum building height alternative be included for study in the EIS. (Later this week, I will send you a separate email that explains in detail why it is both necessary and appropriate to include and study in the EIS a 90-foot maximum building height alternative.)

Thank you.

Tom McCormick