

Countryman, Ryan

From: Tom McCormick <tommccormick@mac.com>
Sent: Wednesday, August 30, 2017 11:47 AM
To: Countryman, Ryan
Cc: MacCready, Paul; Mock, Barb; McCrary, Mike; Dobesh, Michael; Otten, Matthew
Subject: Re: Transit compatibility does not satisfy SCC 30.34A.040(1)'s building height exception

Ryan,

As stated in my email below, "PDS has an obligation to convey the 90-foot height restriction to the Point Wells developer without further delay."

It would be fair to give the developer an opportunity to explain, with legal citations where appropriate, why it believes that SCC 30.34A.040(1) or any other section of the County's 2011 development code governing urban centers would permit buildings taller than 90 feet at Point Wells. Perhaps a message like the following could be sent to the developer:

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To: BSRE, the Point Wells developer

SCC 30.34A.040(1) (2011 version) provides that the "maximum building height in the UC zone shall be 90 feet." But it also provides that 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 and the applicant prepares an environmental impact statement . . .".

The submitted site plan has numerous buildings that exceed 90 feet in height. In light of the GMHB's May 17, 2011 conclusion that Point Wells lacks high capacity transit (see excerpt below), it is questionable that the high capacity transit requirement for the additional 90 feet in height is met, or can be met by vanpooling. High capacity transit would need to be in place before buildings taller than 90 feet may be approved.

Please explain in detail, with legal citations where appropriate, why you believe that SCC 30.34A.040(1) or any other section of the County's 2011 development code governing urban centers would permit buildings taller than 90 feet at Point Wells.

Excerpt from GMHB's May 17, 2011 decision (*City of Shoreline, et al., v. Snohomish County, CPSGMHB Coordinated Case Nos. 09-3-0013c and 10-3-0011c, Corrected Final Decision and Order, pages 11 and 21*):

"Point Wells also lacks transit service. Express transit service, whether offered by King County Metro or Community Transit, is 2.5 miles away, on State Route 99, and Sound Transit's proposed light rail line is beyond – on Interstate 5. While the rail line through Point Wells provides commuter service between Seattle and Everett, Sound Transit, which operates commuter rail, has no present plan to provide a Point Wells station. Even if the King County Metro bus line which now terminates half a mile from Point Wells were extended to Point Wells in the future to serve the anticipated population, this would not be express or high-capacity service. . . . [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." (footnotes omitted)

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Thank you.

Tom McCormick

On Aug 15, 2017, at 4:34 PM, Tom McCormick <tommccormick@mac.com> wrote:

Ryan,

The Department of Public Works (DPW) is in the process of determining whether the proposed Point Wells Urban Center project meets the County's transit compatibility requirements. See Erik Olson's May 23, 2017 memorandum to Paul MacCready.

Whether or not the Point Wells developer is able to satisfy the DPW requirements for transit compatibility (including the "access to public transportation" requirement of SCC 30.34A.085), there is a separate, elephant-in-the-room issue that Planning and Development Services (PDS) needs to address without further delay.

Issue: Whether, for purposes of the maximum building height exception in SCC 30.34A.040(1) (2011 vested version), "the project is located near a high capacity transit route or station."

SCC 30.34A.040(1) provides that "the maximum building height for buildings in the Urban Center zone is 90 feet," but an additional 90 feet may be approved if "the project is located near a high capacity transit route or station."

As explained below, satisfying DPW's transit compatibility requirement does not satisfy SCC 30.34A.040(1)'s proximity requirement. Even if DPW determines that the project is transit compatible (perhaps accepting the use of vanpooling), the fact remains that the Point Wells project is not located near a high capacity transit route or station. **Because the project does not satisfy SCC 30.34A.040(1)'s proximity requirement, buildings taller than 90 feet at Point Wells are prohibited.**

I. The Point Wells project is not located near a high capacity transit route or station. Don't just take my word for it. DPW has reached the same conclusion, saying:

"The project site is located more than 1/2 mile from any 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." (Source: Erik Olson's June 15, 2011 memorandum to Darryl Eastin, referenced in and attached to Mr. Olson's May 23, 2017 memorandum to Paul MacCready.)

The GMHB reached a similar conclusion about a month before DPW's June 15, 2011 memorandum. In the GMHB's May 17, 2011 decision (*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 21*), the GMHB said 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."

II. Vanpooling to/from Point Wells does not satisfy the requirement that the project be located near a high capacity transit route or station.

There is no high capacity transit at Point Wells. Vanpooling is not high capacity transit. With or without vanpooling, the Point Wells project is not located near a high capacity transit route or station.

Vanpooling is one method for a developer to satisfy the "access to public transportation" requirement of SCC 30.34A.085 (a part of transit compatibility), which reads as follows:

"30.34A.085 Access to public transportation.

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."

The mere existence of the subsection (3) vanpooling provision, drafted and proposed by the developer "to avoid a potential trap where appropriate high occupancy travel may not be immediately available," (see Gary Huff's April 28, 2010 email to Peggy Sanders (copy attached)), establishes that vanpooling is not high capacity transit. If vanpooling to a far-away high capacity transit route or station satisfied the subsection (1) requirement that buildings within an urban center be located within one-half mile of existing or planned stops or stations for high capacity transit routes, there would have been no need to add subsection (3) to SCC 30.34A.085.

The developer's vanpooling provision was adopted virtually word-for-word by the Council. Importantly, the developer did not submit a vanpooling amendment to the high capacity transit provision in the 90-foot building height exception of SCC 30.34A.040(1), nor did Council adopt any such amendment on its own. Had the Council intended to allow buildings taller than 90 feet to be constructed far away from a high capacity transit route or station if vanpooling or a similar mechanism were arranged, then the Council would have amended SCC 30.34A.040(1) to say so, BUT IT DID NOT. The Council would have amended SCC 30.34A.040(1) to read something like the following passage, BUT IT DID NOT DO SO (my hypothetical addition is underlined for emphasis; compare SCC 30.91U.085, where Council added text to the definition of "Urban Center" that is almost identical to my hypothetical text):

SCC 30.34A.040 Building height and setbacks.

- (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 documented to be necessary or desirable when the project is located near a high capacity transit route or station or the project provides access to public transportation as set forth in SCC 30.34A.085, and the applicant prepares an environmental impact statement . . .

Unfortunately for the developer, SCC 30.34A.040(1) is very clear: Buildings taller than 90 feet may not be approved unless located near a high capacity transit route or station. Vanpooling to a far-away high capacity transit route or station, or other arrangements set forth in SCC 30.34A.085, might satisfy the access to public transportation requirement of SCC 30.34A.085, but none satisfy 30.34A.040(1)'s proximity requirement that buildings be located near a high capacity transit route or station.

III. A high capacity transit route or station that is in use near Point Wells must exist prior to constructing buildings taller than 90 feet.

A “planned” route or station does not meet the SCC 30.34A.040(1) criterion to get an extra 90 feet of building height. SCC 30.34A.040(1) requires that the high capacity transit route or station be an existing route or station, and it must be in use (see, for example, GMHB’s May 17, 2011 decision: “high capacity transit’ [is not] satisfied by an urban center on a commuter rail line without a stop”).

“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 . . .” SCC 30.34A.040(1). This 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 30.91U.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.” (Underlining added for emphasis; see also SCC 30.21.025(f).)

If the County Council had intended to permit buildings taller than 90 feet near “planned” transit routes or stations in addition to existing routes or stations, the phrase “existing or planned” would be found in SCC 30.34A.040(1). It is significant that Council did not include the phrase “existing or planned” in SCC 30.34A.040(1), while it did include the phrase in other sections such as SCC 30.91U.085 (above), SCC 30.21.025(f), and SCC 30.34A.085(1). Under the presumption of meaningful variation, different statutory wording (for example, the phrase “existing or planned” in one section, but not in another section) 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 the developer 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 and assure its usage, 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 permitting buildings to exceed 90 feet.

IV. PDS to advise the developer that buildings taller than 90 feet are not permitted.

The time to act is now. PDS has an obligation to convey the 90-foot height restriction to the Point Wells developer without further delay, just like PDS has been conveying other restrictions and Code requirements to the developer. See, for example: (1) PDS’s original review completion letter dated April 12, 2013; (2) PDS’s supplemental letter to the developer dated November 15, 2016, identifying six areas of “necessary revisions” and four areas of “recommended revisions” needed in order to continue with further preparation of the DEIS; and (3) PDS’s May 10, 2017 letter to the developer conveying preliminary review comments on the developer’s April 17, 2017 re-submittal of its site plan and other elements.

Once PDS advises the developer of the 90-foot building height limitation, the developer will need to revise its submission accordingly. The 90-foot building height limitation will have significant impacts

on the development, for example, location of parking facilities, number of units, visual and aesthetic issues, facades, etc. All alternatives, including a new alternative responsive to the County's review comments, must incorporate the 90-foot limitation.

V. Resubmit as Urban Village to construct buildings taller than 90 feet.

If the developer wants buildings taller than 90 feet, one option would be for it to withdraw its Urban Center application and then submit an application to develop Point Wells as an Urban Village. SCC 30.31A.115(2) provides as follows, for Urban Villages:

The maximum building height shall be 75 feet. The director may recommend a height increase in appropriate locations within the Urban Village of up to an additional 50 feet beyond that otherwise allowed when the applicant prepares an environmental impact statement pursuant to chapter 30.61 SCC and where such increased height in designated locations does not unreasonably interfere with the views from nearby residential structures.

Note that, unlike the SCC 30.34A.040(1) Urban Center rule, under the above SCC 30.31A.115(2) rule for Urban Villages, buildings as tall as 125 feet can be approved even if the project is not located near a high capacity transit route or station.

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Could you please email me to confirm that the County will be advising the Point Wells developer that the maximum height for buildings at Point Wells is 90 feet.

Thank you.

Tom McCormick

Attachment: Gary Huff's April 28, 2010 email to Peggy Sanders

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