BSRE POINT WELLS, LP,  
    Appellant,  

    v.  

SNOHOMISH COUNTY PLANNING AND DEVELOPMENT SERVICES,  
    Respondent.

BSRE POINT WELLS, LP ("BSRE"), by and through its undersigned counsel of record, hereby submits this rebuttal argument in further support of its Appeal of the Amended Decision Denying Extension and Denying Applications Without Environmental Impact Statement dated August 3, 2018 (the "Appeal"), filed with the Snohomish County Council (the "Council") on August 17, 2018, and in response to the written arguments received from the City of Shoreline ("Shoreline"), Tom McCormick ("McCormick"), and Mary and Joseph Bundrant (collectively, "Bundrant").
A. There Has Been No Argument Asserted That BSRE is Not Vested to SCC 30.34A.180(2)(f) (2007).

Neither Snohomish County nor any party of record has asserted any argument that BSRE is not vested to SCC 30.34A.180(2)(f) (2007). Because there has been no argument against BSRE’s vesting to this statute and because the County itself specifically identified SCC 30.34A.180(2)(f) (2007) as a statute to which BSRE’s Land Use Applications are vested (see, e.g., Exhibit K-31), the Council should determine that the project is vested to SCC 30.34A.180(2)(f) (2007).

B. The Hearing Examiner Specifically Determined That the Decision Was Without Prejudice, Pursuant to SCC 30.70.060.

McCormick, in his written argument submitted on September 7, 2018, stated, without support, that the Amended Decision Denying Extension and Denying Applications Without Environmental Impact Statement dated August 3, 2018 (the “Decision”) should be made “with prejudice” as opposed to “without prejudice.” Not only is McCormick’s request unsupported by any evidence or argument, but it is not properly before the County because it was not raised in a written appeal: “Appeal issues shall be limited to those expressly raised in the written appeal. No new appeal issues may be raised or argued after the close of the time period for filing the appeal.” SCC 30.72.110(2). There has been no appeal of the Hearing Examiner’s determination that the Decision was without prejudice and therefore any arguments made on that topic should be disregarded.

The Decision specifically stated: “BSRE’s development applications are denied without prejudice pursuant to SCC 30.72.060(3) (2013).” SCC 30.34A.180(2)(f) (2007) 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 months of the Hearing Examiner’s decision. In all other cases a new application shall be required.

The only requirement for an applicant to be able to reapply within six months is a denial “without prejudice pursuant to SCC 30.72.060.” That is exactly the situation we have here—a denial without prejudice pursuant to SCC 30.72.060. Therefore, BSRE should be permitted to reapply within six months “without additional filing fees or loss of project vesting.”

If the Council determines that BSRE’s Urban Center Development Application and other supporting applications (collectively, the “Land Use Applications”) are vested to SCC 30.34A.180(2)(f) (2007), then there is no need to address the other issues raised on appeal.

C. SCC 30.34A.040(1) Allows Additional Height for Proximity to a High Capacity Transit Route.

While admitting that statutes should be read so that no words are rendered meaningless or superfluous, Shoreline nevertheless argues that the Council should read SCC 30.34A.040(1) so that words are indeed rendered meaningless. SCC 30.34A.040(1) states: “The maximum building height in the UC zone shall be 90 feet. A building height increase up to an additional 90 feet may be approved under SCC 30.34A.180 when the additional height is documented to be necessary or desirable when the project is located near a high capacity transit route or station . . . .” (Emphasis added.) The only reading of SCC 30.34A.180(1) which does not render language “meaningless or superfluous” is to understand that there are two options: (1) location near a high capacity transit route, or (2) location near a high capacity transit station.

Shoreline may prefer that the word “route” was not included in SCC 30.34A.180(1). However, the Council does not have authority to change the language of SCC 30.34A.180(1). Instead, the Council must simply apply SCC 30.34A.180(1) as it is written. It is written to allow
proximity to a high capacity transit station or route. In fact, this language is perfectly understandable. If a large development is created “near a high capacity transit route”, it is likely that the high capacity transit provider will add in an additional stop near that large development. This is exactly what would happen at the Point Wells site (the “Site”).

D. BSRE Has Consistently Acknowledged that the Project Could be Approved with Conditions.

BSRE supplied sufficient evidence to indicate that proximity to a high capacity transit route is sufficient to allow for additional height pursuant to SCC 30.34A.040(1). However, if the County Council determines that a route is insufficient, then it can condition the project on BSRE securing a high capacity transit station on or near the Site. BSRE has consistently demonstrated its commitment to providing high capacity transit at the Site and would certainly accept such a condition.

E. The OHWM Does Not Rise to a Substantial Conflict with Code

Before the County’s May 9, 2018 Supplemental Staff Recommendation (the “May 2018 Letter”), the County mentioned the Ordinary High Water Mark (the “OHWM”) in a comment and indicated that it was a minor item to address:

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

Exhibit K-31, p. 115 (emphasis in original). The County specifically requested this change “when there are revisions to the application for other reasons”. Certainly that comment does not imply
that an issue with the OHWM is a "substantial conflict" with the Code. Furthermore, as is set forth in the Appeal, BSRE has confirmed the location of the OHWM with the Department of Ecology and it may result in a loss of 6.5% of the proposed units. It is illogical to find that a loss of 6.5% of the units is a "substantial" issue.

The May 2018 Letter was the first time that the County determined that the shoreline buffer was incorrectly determined. See Exhibit N-2, p.19. This issue has been resolved and the plans will be adjusted accordingly. The Hearing Examiner failed to follow applicable procedures by failing to consider the additional information provided by BSRE on this issue at the conclusion of the hearing.¹

IV. CONCLUSION

Based on the foregoing, BSRE respectfully requests that the Snohomish County Council grant the relief requested in the Appeal.

DATED this 14th day of September, 2018.

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¹ McCormick makes additional allegations about the Mean Higher High Water mark (the "MHHW"), claiming that BSRE somehow incorrectly identified the MHHW on its plans. McCormick has no support for this allegation. Further, even if BSRE had somehow misidentified the MHHW, this is irrelevant because the plans will be redesigned and buildings will be adjusted based on the OHWM, which has been determined in conjunction with the Department of Ecology.
CERTIFICATE OF SERVICE

The undersigned certifies that on Friday, September 14, 2018, I caused to be served the foregoing document to:

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I declare under penalty of perjury under the laws of the state of Washington on Friday, September 14, 2018, at Seattle, Washington.

Heather L. Hattrup
Legal Assistant to J. Dino Vasquez and Jacque E. St. Romain

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