

## Countryman, Ryan

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**From:** Tom McCormick <tommccormick@mac.com>  
**Sent:** Friday, April 10, 2020 3:42 PM  
**To:** MacCready, Paul; Countryman, Ryan  
**Cc:** Mock, Barb; McCrary, Mike; Dobesh, Michael; Otten, Matthew; Klein, Ken  
**Subject:** BSRE v. Paramount; the pier at Point Wells; DNR lease prohibits water taxis

**CAUTION :** This email originated from outside of this organization. Please exercise caution with links and attachments.

Paul and Ryan:

### I. Lawsuit — BSRE v. Paramount.

On February 24, 2020, the Point Wells property owner (BSRE) filed a lawsuit against the oil company operating at Point Wells (Paramount), seeking among other things:

"A declaration that defendant Paramount of Washington, LLC ("POW") is required as of June 1, 2020, to remove the improvements [(defined in Section 1.1 of the 2010 Purchase Agreement between Paramount (seller) and BSRE (purchaser) to mean buildings, structures, fixtures, pipelines, tanks, equipment, parking areas, fencing, docks, piers, and other improvements)] situated on the real property in Snohomish County known as Point Wells (the "Property") and remediate the Property to residential standards; ... [and]

Damages for POW's breach of its contractual obligations, including the damages suffered by BSRE as a result of its delay in performing its removal and remediation obligations; ..."

In its answer to BSRE's complaint, Paramount seeks dismissal of BSRE's lawsuit. Further, Paramount filed counterclaims against BSRE, seeking among other things:

"Rescission of the [2010] Development Agreement and [2010] Purchase Agreement [(copies of both are attached to BSRE's lawsuit)], as well as [rescission of] the transfer of the Property to BSRE pursuant to the Purchase Agreement, and transmittal of all portions of the Property still owned by BSRE back to POW."

### II. BSRE wants the pier removed but wants to develop it too. — huh?

Per the 2010 Purchase Agreement, Paramount owns the improvements, including the pier, on BSRE's real property. BSRE acquired all of the real property at Point Wells, "excluding the Improvements, any personal property situated thereon and the Dock Lease." Purchase Agreement Section 2.1, and definitions of "Real Property" and "Improvements" in Section 1.1.

In its lawsuit, BSRE wants the court to declare that Paramount must remove the improvements, including the pier, from BSRE's property. BSRE seeks an "Order requiring POW to specifically perform its removal and remediation obligations."

Despite that Paramount owns the pier, and that BSRE has sued Paramount demanding that Paramount remove the pier (as one of the "Improvements" on the property), BSRE nonetheless wants the County to approve BSRE's plans to develop the pier. This makes no sense.

As I stated in my February 12, 2020 email (forwarded below), any BSRE proposal to redevelop the pier must be rejected because there is no evidence of BSRE's ownership or control of the pier. Now more than ever this is true. BSRE's February 24, 2020 lawsuit, demanding that Paramount remove the pier (as one of the "Improvements" on the property), is a further reason why the County should reject BSRE's plans to develop the pier. If the pier is removed, how can it be developed?

III. County should reject BSRE's 2018 application for a conditional use permit to use the pier for a water taxi service because the DNR lease prohibits a water taxi service.

The pier at Point Wells resides on state-owned tidelands, managed by the Washington State Department of Natural Resources (DNR). In order to have and use a pier on state-owned tidelands, the pier owner must enter into a lease with the DNR, as Paramount has done. BSRE is not a party to the lease. As the DNR has stated, it has "privity of contract with Paramount" only. The lease expired on July 31, 2019. The parties are working on a new lease. Meanwhile, pursuant to a holdover agreement, Paramount continues as the tenant under the terms of the original lease.

The lease prohibits the tenant from operating a water taxi service. The lease permits only certain uses, as follows:

"2.1 Permitted Use. Tenant shall use the Property for Commercial ship/barge berthing and loading, off-loading, and bunkering of cargo (the "Permitted Use"), *and for no other purpose.*" (emphasis added.)

Given the explicit prohibition in Section 2.1 of the lease, the pier cannot be used to provide a water taxi service. And even if the lease permitted such use (it does not), that would not help BSRE because BSRE is neither the tenant under the lease nor the owner of the pier.

The County should deny BSRE's application for a conditional use permit to use the pier for a water taxi service because such use is not permitted under the lease between Paramount and the DNR.

Also relevant is that neither BSRE nor Paramount has ever sought DNR's permission to use the pier at Point Wells for a water taxi service. I confirmed this with a DNR representative today. Please let me know if you want contact information so that you can independently verify.

IV. A water taxi service cannot be used to satisfy the high capacity transit requirement in SCC 30.34A.040(1).

Because a water taxi service using the pier at Point Wells is prohibited by the DNR lease, the County should reject BSRE's attempt to use a pier-dependent water taxi service to satisfy the high capacity transit requirement in SCC 30.34A.040(1).

Thank you.

Tom McCormick

*"A small development at Point Wells  
with a second public access road,  
or no development at all."*

Begin forwarded message:

**From:** Tom McCormick <[tommccormick@mac.com](mailto:tommccormick@mac.com)>  
**Subject:** Problems with BSRE's plans for the pier at Point Wells  
**Date:** February 12, 2020 at 1:38:12 PM PST  
**To:** Paul MacCready <[paul.maccready@snoco.org](mailto:paul.maccready@snoco.org)>, Ryan Countryman <[ryan.countryman@snoco.org](mailto:ryan.countryman@snoco.org)>  
**Cc:** "Barb Mock, Director" <[barbara.mock@snoco.org](mailto:barbara.mock@snoco.org)>, Mike McCrary <[mike.mccrary@snoco.org](mailto:mike.mccrary@snoco.org)>, Michael Dobesh <[michael.dobesh@snoco.org](mailto:michael.dobesh@snoco.org)>, "Otten, Matthew" <[Matthew.Otten@co.snohomish.wa.us](mailto:Matthew.Otten@co.snohomish.wa.us)>, Ken Klein <[ken.klein@snoco.org](mailto:ken.klein@snoco.org)>

Paul and Ryan:

In BSRE's Dec. 12, 2019 summary of revisions, it states that "The Land Use Application is updated to include request for a conditional use permit on the pier to operate passenger-only ferry service." Page 16 of the revised 2019 Project Narrative discusses the pier as follows:

"The pier is built on State of Washington-owned tidelands and leased to BSRE under an aquatics Lands Lease between Washington State Department of Natural Resources and Chevron U.S.A. Inc. The pier is not subject to the Urban Center code. The Urban Center Plan proposed redevelopment of the pier will focus on rehabilitation of existing structures, and uses will be limited to water-oriented public recreation opportunities. This limited pier redevelopment will address potential view impact concerns and additional shadow impacts on the water that could adversely impact endangered salmon fingerlings, and overall aesthetics."

The County should reject BSRE's pier redevelopment efforts. Consider the following:

— Any BSRE proposal to redevelop the pier must be rejected because there is no evidence of BSRE's ownership or control of the pier. If BSRE has an ownership interest, or lease rights or other rights to develop the pier, it must produce documentation proving it.

— BSRE mentions in the Dec. 12, 2019 Project Narrative that the aquatics Lands Lease between Washington State Department of Natural Resources (DNR) and Chevron U.S.A. Inc. That lease expired July 31, 2019. Further, BSRE is not a party to the expired lease.

— A new lease between DNR and the current oil company (Paramount, a unit of Delek) is in the process of being finalized. BSRE sought to insert itself in the negotiations for the new lease; for example, it objected to Paramount's request for an early termination clause in the new lease. In response, an Oct. 30, 2019 email from Paramount's attorney to DNR says this:

"Legal counsel for BSRE recently copied you on a letter that was sent to me objecting to Paramount's request for an early termination clause. The letter wrongly asserts that such a clause violates an agreement between BSRE and Paramount. We disagree with BSRE and have responded to them by separate letter. I chose not to copy you on the response because this is a matter between BSRE and Paramount. Paramount's request for the early termination clause stands, as last submitted, and we appreciate DNR's consideration of this request."

DNR concluded that BSRE had no right to insert itself in the negotiations for the new lease, saying in an internal DNR email dated Oct. 31, 2019, "With due respect for BSRE, we have only privity of contract with Paramount so we actually have no choice but to proceed with Paramount only."

BSRE eventually withdrew its objection to the early termination clause (Nov. 29, 2019 email to DNR), but requested advance notice if early termination were to occur:

"we ask that Paramount and DNR add a provision that provides for contemporaneous notice to BSRE in the event Paramount elects the early termination to ensure that BSRE has the option to protect its interests in the lease by exercising its assignment right prior to the commencement of decommissioning the dock.

If for some reason the parties to the lease renewal are not inclined to add that notice provision to the lease, BSRE still supports and the prompt execution of the lease renewal. Nonetheless, please understand that it is BSRE's view that to ensure its rights under Section 9.7 of the purchase agreement are protected (and in accordance with Paramount's obligations thereunder), reasonably contemporaneous notice should be given to BSRE of an early termination notice from Paramount to the DNR no matter whether such notice is required under the lease renewal."

As stated above, there is no evidence that BSRE has any ownership or other rights regarding the pier. BSRE might claim that it does, but that is not good enough. Recall what Paramount's counsel said to the DNR: "[BSRE's] letter wrongly asserts that [an early termination] clause violates an agreement between BSRE and Paramount." BSRE may assert an interest in the pier, but in the absence of supporting documents, its assertions are without merit. It is also noteworthy that per SEC filings, the lease and development agreement between BSRE and Paramount will expire in June 2020. What happens then? The County must require BSRE to produce documents proving that BSRE owns rights to the pier—rights that continue beyond June 2020.

— What about BSRE's passenger-only ferry idea? A passenger-only ferry service does not constitute high capacity transit as defined in the 2011 version of the County Code to which BSRE vested. Any attempt by BSRE to use its dream of a passenger-only ferry service to satisfy the high capacity transit condition under SCC 30.34A.040(1) to achieve approval of building heights greater than 90 feet must be rejected (the Hearing Examiner already rejected it). Further, a passenger-only ferry service is not allowed under either the expired lease between DNR and Chevron, or the new lease being finalized between DNR and Paramount. A bald dream of a passenger-only ferry service without more is meaningless. BSRE has not produced any documentation showing that it has a right to operate a passenger-only ferry service at Point Wells, nor that it has reached agreements with the DNR and all other relevant jurisdictions.

— BSRE says that "The pier is not subject to the Urban Center code." How can this be? The easterly portion of the pier is located on land owned by BSRE that is zoned Urban Center per BSRE's 2011 vesting. Being located on BSRE-owned land, the pier is subject to the Urban Center code, and BSRE must show that its plans for the pier comply with the code. The foregoing assumes, contrary to the existing record, that BSRE has ownership or control of the pier. If it does not, then any BSRE proposal to redevelop the pier must of course be rejected.

Please enter this email into the record in opposition to BSRE's request for a variance from the 90-foot maximum building height.

Thank you.

Tom McCormick