Snohomish County Departments of
Planning & Development Services
and Public Works

Supplemental Staff Recommendation #2

Project Name:	**Point Wells Urban Center**
Date of Original Recommendation:	**April 17, 2018**
Date of Supplemental Recommendation #1:	**May 9, 2018**
New Information Received from Applicant:	**December 12, 2019**
Date of Supplemental Recommendation #2:	**May 27, 2020**
Applicant:	**BSRE Point Wells LP** c/o Karr Tuttle Campbell 701 Fifth Avenue, Suite 3300 Seattle WA 98104
Original Hearing Dates:	**May 16 to 24, 2018**
Continued Hearing Date:	**Not yet scheduled as of the date of this recommendation**
Type of Request:	Urban Center Site Plan and associated permit applications and approval requests to develop in three phases a total of approximately 2,846 residential units plus associated commercial uses and public amenities on 61 acres.

Exhibit X-3 Supplemental Staff Recommendation No 2 May 27 2020
PFN: 11-101457 LU

File Numbers:	11-101457 LU (Land Use Permit for Site Plan) 11-101461 SM (Shoreline Management Permit [Denied, no SHB appeal]) 11-101464 RC (Retaining Wall – Commercial) 11-101008 LDA (Land Disturbing Activity – Grading) 11-101007 SP (Short Plat) 11-101457 FHZ (Flood Hazard Permit) 11-101457 SHORE (Shoreline Conditional Use Permit) 11-101457-000-00 VAR (Parking Variance [withdrawn 4/27/18]) 11-101457-001-00 VAR (Building Height Variance [mooted by changes]) 11-101457-002-00 VAR (Building Height Variance) 11-101457-003-00 VAR (Building Setback Variance) 11-101457-000-00 WMD (EDDS Deviation for Private Roads) 11-101457-001-00 WMD (Title 30 Deviation for Landslide Hazards) 18-116078 CI (Code Interpretation SCC 30.70.140)
Original Submittal Dates:	February 14, 2011 (LDA and SP) March 4, 2011 (LU, SM and RC) April 17, 2017 (VAR [for Parking, withdrawn on 4/27/18]) April 27, 2018 (FHZ, VAR [for Building Heights], 2 WMDs, CI) December 12, 2019 (SHORE, and VAR [for Building Heights]) December 16, 2019 (VAR [for Building Setbacks])
Dates of Re-Submittals:	April 17, 2017 (LU, SP, VAR [for Parking, withdrawn on 4/27/18]) April 27, 2018 (LU, SP, SM, RC, LDA) December 12, 2019 (LU, SP, SM, RC, LDA, FHZ, WMD [for Landslide Hazards])

Recommendations

The following is a summary of the recommendations from Snohomish County and also represents a table of contents for how the staff recommendation is organized.

I. Review of Individual Applications (page 6)

Snohomish County recommends DENIAL of the following applications:

A. Variance Application - SCC 30.34A.040(1) – Building Height & High Capacity Transit for failure to demonstrate compliance with the decision criteria (page 12);

B. Variance Application - SCC 30.34A.040(2)(a) – Height Adjacent to Low Density Zones for failure to demonstrate compliance with the decision criteria (page 20); and

C. Shoreline Conditional Use Permit Application for failure to address or demonstrate compliance with the review criteria of SCC 30.44.140 & SCC 30.44.205 (page 27).

II. Review of the Overall Project Under SCC 30.61.220, Denial Without an EIS (page 30)

Snohomish County continues to recommend DENIAL of the overall project under SCC 30.61.220, Denial Without EIS, for the following reasons:

A. Failure to Document Feasibility and Code Compliance of Second Access Road (page 30);

B. Failure to Document Evidence for Access to High Capacity Transit for Building Heights Over 90 Feet & Failure to Demonstrate Compliance with the Decision Criteria for a Variance from SCC 30.34A.040(1) – Building Height & High Capacity Transit (page 36);

C. Failure to Provide Appropriate Building Setbacks for Tall Buildings from Lower Density Zones & Failure to Demonstrate Compliance with the Decision Criteria for a Variance from SCC 30.34A.040(2)(a) – Height Adjacent to Low Density Zones (page 39); and

D. Failure to Comply with Code Provisions Regarding Critical Areas, Including Geologically Hazardous Areas (page 40).

III. Snohomish County will not continue to rely on the following grounds for its recommendation of DENIAL of the overall project under SCC 30.61.220, Denial Without EIS, based on the following grounds (page 43):

A. Failure to Address the Buffer from the Ordinary High Water Mark (page 43); and

B. Failure to Comply with Critical Areas Regulations – Innovative Development Design (page 43).

Appeals and Remand

On April 17, 2018, PDS and DPW issued a staff recommendation that recommended denial of the Point Wells project applications under SCC 30.61.220 (Exhibit N-1). A supplemental staff report was issued on May 9, 2018 (Exhibit N-2), prior to the mid-May 2018 open record hearing on the recommendation of denial.[1] The Hearing Examiner issued an Amended Decision on August 3, 2018 (Exhibit R-4). In the Amended Decision the Hearing Examiner denied the Point Wells permit applications without prejudice under SCC 30.61.220 based on substantial conflicts between the applications and county code. BSRE Point Wells LP, (the "Applicant" or "BSRE"), appealed the Amended Decision to the Snohomish County Council on August 17, 2018 (Exhibit S-1). On October 9, 2018, the County Council affirmed the Examiner's Amended Decision denying the applications, with minor modifications (Exhibit S-18). The Applicant appealed the Snohomish County Council decision to King County Superior Court under the Land Use Petition Act. On June 18, 2019, the Court remanded the applications to provide the Applicant "a one-time reactivation opportunity" (Exhibit U-1, page 19). The Court's Remand Order provided the Applicant six months, or until December 18, 2019, to reactivate its applications "to address the five issues of 'substantial conflict' brought to its attention by Snohomish County" (Exhibit U-1, page 16).

The Applicant provided new and revised information to Snohomish County at a resubmittal meeting on December 12, 2019, in the form of eighteen (18) documents (Exhibits V1 - V18). There was discussion of an anticipated 19th document at the December 12, 2019 meeting, which PDS received from the Applicant on December 16, 2019 (Exhibit V-19).

Some of the new information provided by the Applicant constitute requests for new approvals. Other new or revised information amends earlier requests that were subject to the Amended Decision denying the applications and Remand Order. The Applicant paid submittal fees for the new requests on December 17, 2019. Fees for existing applications were not required.

The resubmittal represents a development that is mostly unchanged from the previous development proposal. The modifications that were made to the proposal include: removing some but not all of the buildings in the Upper Plaza from the residential setback area; moving buildings outside of the shoreline setback; reducing the unit count from 3,085 to 2,846 units; and proposing three development phases instead of four. The resubmittal is unchanged with regard to buildings above 90-feet without high-capacity transit; tall buildings in the residential setback area; and development in the landslide hazard area, which includes the secondary access road, the Urban Plaza, and proposed Sounder Station.

New and Revised Materials December 2019

There are three new approval requests before the Hearing Examiner involving:

1. Variance Application Regarding High Capacity Transit & Buildings over 90-Feet in Height (11-101457-002-00 VAR);
2. Variance Application Regarding Height Adjacent to Low Density Zones (11-101457-003-00 VAR); and
3. Shoreline Conditional Use Permit Application for Water Taxi (11-101457-000-00 SHOR).

[1] To avoid duplication of information, the April 17, 2018 (Exhibit N-1), and May 9, 2018 (Exhibit N-2), staff recommendations and information provided within those recommendations are incorporated by reference.

Independent of these three approval requests, the Applicant submitted a landslide hazard deviation request on December 12, 2019. Unlike the variance applications and shoreline conditional use permit, the County's Chief Engineering Officer, as the designee of the PDS Director, has the exclusive authority to issue decisions on landslide hazard deviation requests. The landslide hazard deviation decision is in the record as Exhibit X-2.

Table 1 – Summary of Materials Received December 2019

Exhibit	Title	PDF File Name	Notes
V-1	Point Wells Summary of Revisions Letter, dated December 12, 2019	01_2019-1212 Point Wells Summary of Revisions Letter.PDF	Describes changes
V-2	Master Permit Application, revised December 12, 2019	02_DOCS-128871-v1-Master_Permit_Application.PDF	Supersedes Exhibits A-1, A-2, A-3, A-28 and A-31
V-3	Supplement to Urban Center Development Application, dated December 12, 2019	03_DOCS-#995725-v8-Supplement_to_UC_Application.pdf	Supersedes Exhibits A-35, A-38 and G-15
V-4	Point Wells Development Project Narrative, revised December 12, 2019	04_2019-ucdpa-project narrative rev 1127_2019.pdf	Supersedes Exhibits A-5, A-32 and A-40
V-5	Shoreline Narrative for Point Wells Urban Center, revised December 11, 2019	05_Shoreline_Narrative_20191211113234.pdf	Supersedes Exhibits A-24 and A-36
V-6	Architectural Plans, dated December 12, 2019	06_2019-12-12 Point Wells Development_Drawings.pdf	Supersedes Exhibits B-1, B-2, and B-7
V-7	Preliminary Short Plat, dated December 12, 2019	07_191212_PWP SP Set.pdf	Supersedes Exhibits B-5, B-6 and B-9
V-8	Targeted Stormwater Site Plan Report, revised December 12, 2019	08_SP Targeted Drainage Report_2019-12-12.pdf	Supersedes Exhibits C-19, C-22, and C-31
V-9	Targeted Stormwater Site Plan Report, revised December 12, 2019	09_UC Targeted Drainage Report_2019-12-12.pdf	Supersedes Exhibits C-19, C-22, and C-32
V-10	Critical Areas Report dated December 2019	10_PtWellsCAR_2019-12-11.pdf	Supersedes Exhibits C-15, C-30, C-37, C-39, and C-40
V-11	Memo: Calculation of Trip Generation with respect to Senior Housing at Point Wells, dated December 9, 2019	11_m-2019-12-09_Harris to MacCready_senior housing.pdf	Supplemental information
V-12	Memo: Updated Information for the 2016 Expanded Traffic Impact Analysis, dated December 9, 2019	12_m-2019-12-09_Harris to MacCready_Traffic Memo.pdf	Supplemental information
V-13	Second Access Exhibit, dated December 12, 2019	13_191212_Second Access Figure.pdf	Supersedes Exhibits A-7 and B-8
V-14	Fire Truck Turning Movements, dated December 2, 2019	14_191212_PWP Turning Movements.pdf	Supersedes Exhibits A-8 and C-23
V-15	Landslide Deviation Request, dated December 12, 2019	15_Landslide Area Deviation Request Letter 12.12.2019.pdf	Supersedes Exhibits A-37 and C-27
V-16	Subsurface Conditions Report Addendum, dated December 12, 2019	16_Subsurface Conditions Report Addendum 12.12.2019.pdf	Supplemental information
V-17	EDDS Deviation Request for Private Roads, dated December 12, 2019	17_2019-12-12 EDDS Deviation Request Roads.pdf	Supersedes Exhibit A-30. Relates to 11-101457-000-00 WMD
V-18	Variance Application – Height over 90', Received December 12, 2019	18_DOCS-1287460-v1-Variance_Application.pdf	New request, 11-101457-002-00 VAR
V-19	Variance Application – Height near low density zones, dated December 16, 2019	19_2019-12-16 Zoning Code Variance_Pt Wells.pdf	New request, 11-101457-002-00 VAR, supersedes Exhibits A-29 and K-37

I. Review of Individual Applications

Floor Area Ratio (FAR) – SCC 30.34A.030(1)

With its revised application, the Applicant states that the County's floor area ratio (FAR) regulations severely limit development options and potentially render its property undevelopable. The Applicant relies on the FAR issue as a justification for not complying with multiple other development regulations (maximum building heights and transit access, setbacks from residential zones, and development in landslide hazard areas). The Applicant states that if the variances and landslide hazard deviation are not granted by the County, "the County will have necessarily rendered the property undevelopable by designating it as an Urban Center under the zoning code and in the County comprehensive plan." (Exhibit V-18, p. 2). Given that the FAR issue is a component of the Applicant's two variances and landslide hazard deviation request, the County will comprehensively address the FAR issue first.

Based on review of the FAR regulations by the County, there are multiple methods and design options under which an applicant could demonstrate compliance with the County's FAR regulations for the Point Wells site. Despite having other options, the Applicant has not provided application materials utilizing the methods or design options under which it could demonstrate compliance with the prescriptive FAR standards. Further, the FAR calculations provided by the Applicant are inaccurate and misrepresent the FAR for the proposed development by 30%. These inaccuracies are significant because the Applicant relies upon these figures to justify the variance requests and landslide hazard deviation.

Options to Achieve Compliance with Urban Center FAR Regulations

Provided below is an overview of the Urban Center FAR regulations and the multiple methods an Urban Center applicant can utilize to demonstrate compliance with the regulations. The applicable FAR requirements are provided in SCC 30.34A.030(1) [2010], which reads:

> **SCC 30.34A.030 [2010] Floor area ratio.**
> (1) Floor to area ratios (FAR) in the UC zone are established in accordance with SCC Table 30.34A.030(1). Additional FAR is allowed in accordance with the bonuses as set forth in SCC Table 30.34A.030(2) and SCC Table 30.34A.030(3);

Table 30.34A.030(1)
Floor to Area Ratios

	Minimum	Maximum	Maximum allowable with bonus (Table 30.34A.030(2))	Maximum allowable with super bonus (Table 30.34A.030(3))
Non-Residential	0.5	1.0	1.5	2.5
Residential	0.5	1.0	1.5	2.5
Mixed Use	1.0	2.0	3.0	5.0
Ground Floor Retail	0.25	2.0	2.25	5.0

Notes:

1. Allowable FAR for non-residential and residential uses may be added together within a development for a combined total.
2. Hotels are considered residential for the purpose of this chart.
3. "Mixed-use" means residential and non-residential uses located within the same building unless, for purposes of this section, the development proposal includes more than three buildings. To be eligible for the FAR for "mixed use" in development proposals that consist of three buildings or less the entire first floor of a proposed building must be devoted to retail use; or at least one-half of the first floor must be devoted to retail use and double the non-retail area of the first floor must be assigned to retail use on other floors within the building. In order to be eligible for the FAR for "mixed use for development proposals that consist of more than three buildings, the proposed development may include buildings that are devoted to a single use as long as there is a mixture of uses in the development as a whole (e.g. two residential use buildings and two non-residential buildings).
4. It is the intention of the Council that an applicant may utilize the FAR super bonus for a feature listed in Table 30.34A.030(3) only after using one of the features listed in Table 30.34A.030(2).

The first means of demonstrating compliance would involve a revision to the proposed uses. SCC 30.34A.030 [2010] allows Urban Center development with a FAR as low as 0.5 for single-use projects, e.g. those that are entirely residential or entirely non-residential. The regulations only require a 0.25 FAR minimum for retail-only development projects. The Applicant's development proposal calls for 95% of the occupied space to be for residential uses and only 5% for commercial (non-residential) uses.[2] One option available to an urban center applicant that is unable or having difficulty satisfying the minimum 1.0 FAR would be to revise the commercial (non-residential) uses within the development and convert them to residential uses. By converting only 5% of the proposed area to a different use, the Applicant could pursue an Urban Center development with a minimum FAR of 0.50. Thus, that is one development option for the site under the vested zoning category of Urban Center. The Applicant has not provided application materials to take advantage of this development option.

The second option does not require a revision to the proposed uses. SCC Table 30.34A.030(1) provides applicants two methods of calculating FAR. The Applicant has taken the position that there is only one method of calculating FAR, but review of the regulation provides another method of calculating FAR which allows for a lower minimum FAR. The method relied upon by the Applicant is provided in Note 1, which allows, but does not require, applicants to add together the non-residential and residential uses

[2] This 95% and 5% split relies upon the Applicant's own figures in Exhibit V-6 and counts the public building as non-residential. It omits the parking areas, which are not considered occupied.

for a combined total FAR.[3] Note 1 explicitly provides that it is an option but not a requirement by the use of the permissive "may," not the mandatory "shall." Note 3 provides another approach authorized by the FAR regulations for calculating a weighted average of residential and mixed-use buildings throughout the site to achieve compliance with a lower FAR. The weighted average approach is authorized by Note 3 of SCC Table 30.34A.030(1). Under the weighted average approach authorized by Note 3, minimum FAR is calculated as follows:

[(Square footage of Non-Residential buildings x 0.50 minimum FAR) + (Square Footage of Residential buildings x 0.50 minimum FAR) + (Square Footage of Mixed Use buildings x 1.0 minimum FAR) + (Square Footage of Ground floor retail buildings x 0.25 minimum FAR)] / (Square footage of all the buildings) = Combined Total Minimum FAR for the project.[4]

It is possible that the Applicant could have utilized a similar approach with the current version of the plans. However, the Applicant did not provide the County with application materials supporting this calculation and methodology.

FAR Miscalculations in the Application Materials

Lastly, the Applicant relied on the FAR issue, specifically the need to satisfy the minimum FAR requirement, as a primary justification for the variances requests and landslide deviations submitted with the revised application. In order to assist with review of the FAR issue, the County contracted with an independent architectural consultant, WJA Design Collaborative (the "Consultant"). The Consultant reviewed the Applicant's revised application, specifically the FAR calculations and measurement methods, and provided its own calculations of the FAR. The Consultant's findings are provided in the "Point Wells Development Floor Area Ratio (FAR) Review - Initial Findings Report." (Exhibit X-1). The Consultant's analysis reveals that the FAR calculations provided by the Applicant are significantly inaccurate. The Consultant discovered that the Applicant's measurement methods appears to include stairs, exit corridors, and elevator shafts in conflict with the county code requirements for measuring FAR. Exhibit X-1, page 4.[5] SCC 30.91F.445 [2010] established that those areas are not to be included with building square footage for FAR calculations and provides in full:

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[3] The original application submitted by the Applicant proposed a development with a FAR of 1.17. The County's 2013 review letter confirmed that the 1.17 FAR satisfied the "mixed use" FAR under SCC 30.34A.030. Exhibit K-4, p. 3. The alternative method of calculating FAR allowed under Note 3 of SCC 30.34A.030 was not utilized by the Applicant, as the Applicant represented it had satisfied the minimum FAR and calculating FAR under Note 1 allows for higher density.

[4] Exhibit I-439, a public comment provided by Tom McCormick on May 21, 2018, provides a detailed overview of how the weighted average approach may allow for a development of the Point Wells site with a lower minimum FAR.

[5] The Consultant concluded that the "largest contributor to the difference in numbers […] is likely the inclusion of stairs, exit corridors and elevator shafts in the 'Building Area' column [of the Applicant's plans, Exhibit V-6, A-200 series sheets]. This would be in apparent conflict with the *Vested Code* and the parenthetical language of the column header" on the Applicant's plans.

> SCC 30.91F.445 "Floor Area Ratio" means the total building square footage (building area), measured to the inside face of exterior walls, excluding areas below finished grade, space dedicated to parking, mechanical spaces, elevator and stair shafts, lobbies and common spaces including atriums and space used for any bonus features, divided by the site size square footage (site area).
>
> Floor Area Ratio = (Building area)/(Site area)

Amended Ordinance No. 09-079. Thus, the regulation explicitly excludes, stairs, exit corridors, and elevators shafts.

The Applicant's inaccurate FAR calculations are both quantitatively and qualitatively significant to its revised application and the recommendation of denial of the project for substantial conflicts. With regard to FAR, the Applicant's representations and application materials overstate its FAR by over 30%. With buildings under 90 feet, the Applicant represents that it can achieve a FAR of 0.907 (Exhibit V-18, page 6). The Consultant's calculation, using the methodology required by code, results in at most a FAR of 0.627.[6] Since the Applicant relies on the same flawed methodology to supports it proposal for buildings over 90 feet, its claimed 1.0 FAR for that scenario (Exhibit V-18, page 7) likely would not achieve a FAR of 0.70.

This deficiency is extremely significant with regard to both the revised application and the project as a whole. The impact of the Applicant's incorrect FAR calculation is best understood by referring to Exhibit V-18, page 7. This design schematic provided by the Applicant illustrates that even in the scenario that: 1) the Applicant's variance for residential height setback is granted; 2) the Applicant's variance for buildings over 90 feet without providing high capacity transit is granted; and 3) the Applicant's landslide deviation area request is granted, the Applicant just barely achieves the minimum 1.0 FAR.[7] However, the Consultant's Report reveals that the Applicant's methodology and calculations do not comply with county code and overstate FAR by over 30%. As a result, in the event the Applicant's two variances requests and landslide deviation request were granted, the Applicant still would not achieve compliance with the minimum FAR for the project. In addition, the Applicant uses the minimum FAR requirement as

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[6] The Consultant was asked to calculate FAR for the Applicant's proposal for buildings 90 feet and under, and to not include the development square footage in the Urban Plaza portion of the site to determine whether the Applicant could achieve minimum FAR without development in landslide hazard areas. As such, the Consultant's calculation of 0.59 FAR omits the Urban Plaza. For an apples to apples comparison in this section, the Applicant's 88,868 square footage figure for the Urban Plaza was added to the figures in the Consultant's area spreadsheet (Exhibit X-1, page 102). The addition of the Urban Plaza development square footage results in an increase from 0.59 FAR to a FAR of 0.627 [(1,577,304.8 + 88,868) (building area) / 2,653,620 (site area) = 0.627 FAR].

[7] According to the Applicant's own calculations on Exhibit V-18, page 7, the Applicant does not achieve a FAR of 1.0. The total development square footage in its table is 2,408,637 and site area is 2,653,620. 2,408,637 divided by 2,653,620 results in a FAR of .907. It appears the Applicant failed to correctly add up the square footages of each development component, which would result in 2,679,298 square footage sum.

the primary justification for the variance requests and landslide deviation request (Exhibits V-15, V-18). Since this justification is based on inaccurate and non-code compliant FAR calculation, it does not support the variances requests or landslide hazard deviation request.

Variance Requests

Two new requests are a part of this recommendation.[8] The first new variance request asks for relief from SCC 30.34A.040(1) [2010] which requires location "near a high capacity transit route or station" for approval of buildings taller than 90 feet. The second variance requests relief from building height and setback requirements in SCC 30.34A.040(2)(a) [2010] regarding buildings near low-density zones. The file numbers for these requests are 11-101457-002-00 VAR and 11-101457-003-00 VAR respectively. This recommendation discusses these two new requests below.

Authority & Decision Criteria: The Hearing Examiner has the authority under to SCC 30.43B.020(2) to decide the two current variance requests since they are submitted with other applications requiring a predecision hearing by the Hearing Examiner. Therefore, PDS is making separate recommendations for each of the variance requests as part of Type 2 process decided by the Hearing Examiner. The Applicant bears the burden of proof in demonstrating how the variance applications satisfy the decision criteria in SCC 30.43B.100. Even if an applicant satisfies each of the four criteria, the decision whether to grant the variance request is discretionary.[9] The decision criteria is set forth in SCC 30.43B.100, which provides:

> **30.43B.100 Decision criteria - variances.**
>
> The department may approve or approve with conditions a variance request when the following criteria are met:
>
> (1) There are special circumstances applicable to the subject property or to the intended use, such as size, shape, topography, location or surroundings, that do not apply generally to other properties or classes of use in the same vicinity and zone;
>
> (2) A variance is necessary for the preservation and enjoyment of a substantial property right or use possessed by other properties in the same vicinity and zone but which because of special circumstances is denied to the property in question;
>
> (3) The granting of the variance will not be materially detrimental to the public welfare or injurious to the properties or improvements in the vicinity and zone in which the subject property is located; and

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[8] Two prior variance requests are not active. The first, 11 101457 000 00 VAR related to parking. The second, 11 101457 001 00 VAR was an earlier request for relief from SCC 30.34A.040(2)(a) [2010] based on an older version of the site plan. Changes to site plan changes included in the December 2019 resubmittal moot this request and it has now been replaced by 11 101457 003 00 VAR.

[9] SCC 30.43B.100 provides that "[t]he department **may** approve or approve with conditions a variance request when the following criteria are met …" (Emphasis Added).

(4) The granting of the variance will not adversely affect the comprehensive plan.

Agency Comments: Snohomish County received five comments from public agencies after sending the notice of the new variance requests.

- Exhibit W-18: The Tulalip Tribes submitted a comment letter raising concerns with cultural resources, overwater structures and moorage, stormwater and existing contamination, and impacts to creeks on the site.
- Exhibit W-20: The City of Shoreline submitted a comment letter on the variance requests, shoreline CUP, and deviations regarding roads and landslide hazard areas. The City's comment provides detailed analysis of the variance criteria, shoreline CUP requirements, and deviation requests, and concludes that the Applicant has failed to demonstrate compliance with the respective criteria. The City requests denial of the applications.
- Exhibit W-31: The Town of Woodway submitted a comment letter on the variance requests. The Town's letter provides reasons why the Applicant has failed to demonstrate compliance with each of the approval criteria and states that the Town does not support the variance requests.
- Exhibit W-40: The Muckleshoot Tribe provided a comment letter addressing the proposed water taxi. This letter describes concerns with the proposal, including absence of any information in the Critical Areas report (Exhibit V-10), as well as describing approval processing involving other agencies for which the Applicant has provided no documentation of having completed.
- Exhibit W-44: Snohomish County PUD No. 1 submitted a comment that it did not have enough system capacity for anticipated electrical load at full build-out and District system-impact study would be required to address the issue.

Public Comments: Snohomish County received thirty eight (38) public comments after sending notice of the new variance requests. Most comments described general opposition to the project for reasons such as traffic but did not provide comments particular to the variance requests other than citing potential for view blockage.[10] In contrast, Sean Finn (Exhibit W-7) expressed support for the overall project in part because of a wish to have access to a new commuter rail station. Several comments were received that specifically addressed the decision criteria for the variance applications. These include:

[10] See comments from John Brock (Exhibit W-1), Michael Brown (W-2), Jeremy Davis (W-3 and W-4), Alan Doman (W-5), Janice Eckmann (W-6), Tom Haensly (W-9), Ric Heaton (W-10), Colleen Holbrook (W-11), Ray Holm (W-12), Aileen and Kevin Hutt (W-13), Robert Jorgensen (W-14), Bill Krepick (W-15 and W-16), Frederic and Janet Laffitte (W-17), Hank and Joyce Landau (W-19), David Moe (W-30), Eileen Nicholson (W-32), Joan and Gary Proctor (W-33), Mathew Stansberry (W-34), Susanne Tsoming (W-36), James and Janice Tucker (W-37), Leif Udjus (W-38), Henry and Anita Veldman (W-39), Marion Woodfield (W-42) and Nancy York-Erwin (W-43).

- Exhibit W-8: A comment letter was received from Clayton Graham, an attorney representing neighbors to the development (the Bundrants). This comment provides analysis of the variance applications and decision criteria, and concludes that both variances fail to satisfy the variance criteria.
- Exhibit W-35: Another comment letter from a neighbor to the development, Ronald Trompeter. The letter analyzes the variance criteria for the request for additional building height, and includes discussion of specific comprehensive plan policies. The letter concludes that the variance should be denied, or in the alternative, if granted, the minimum height bonus possible.
- Exhibit W-41: John Wolfe provided a comment letter addressing the approval criteria for the variances and providing analysis of a landslide hazard issue. Regarding the variances, this letter gives reasons for denial based on each of the criteria. Under Criterion 3 regarding public safety, Mr. Wolfe identifies a landslide issue that the Applicant's materials do not address.
- Tom McCormick provided nine separate new comments. The six summarized below address the new variance requests. Three other comments are more relevant to the proposed shoreline Conditional Use Permit and are summarized in that section.
    - Exhibit W-25: Summarizes his comments on the variance requests. In this, he also cites to prior comments in the project record relevant to the variance requests (Exhibits I-439, I-433, I-451) and two of his other new comments on the variance requests (W-21 and W-22). These comments address the Applicant's failure to demonstrate compliance with the variance criteria and errors the Applicant has provided to the County with regard to the FAR issue.
    - Exhibit W-23 discusses both the height variance request and the FAR issue.
    - Exhibit W-24 discusses (and includes a copy of) a letter from Miki Zisman, the new CEO of Blue Square Real Estate to Snohomish County Executive Dave Somers.
    - Exhibit W-26 provides commentary regarding the Applicant's economic feasibility argument in their variance requests and a copy of a June 28, 2006 letter from the Applicant's consultants that made a different argument regarding necessary project size when the Applicant was applying for a plan amendment to redesignate the site to Urban Center.

1.A. Variance Application Regarding SCC 30.34A.040(1) [2010] – Building Height and High Capacity Transit (11-1011457-002-00 VAR)

How this Variance Request Relates to the Project

The Applicant submitted a new variance request seeking relief from requirements in SCC 30.34A.040(1) [2010] (Exhibit V-18). The relevant part of this section reads

> (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 […]

If granted, the Applicant intends to construct buildings between 90 feet and 180 feet without satisfying the requirement for high capacity transit and without documenting how the additional height is necessary or desirable.

In the earlier hearings, the Applicant took the position that because Sound Transit operates commuter rail that bisects the site, the requirement in SCC 30.34A.040(1) [2010] that allows taller buildings "near a high capacity transit route or station" has been met due to proximity to the route even without any means to access to the commuter rail.[11] The Hearing Examiner disagreed with Applicant's interpretation of the regulation and concluded that the Applicant's inclusion of buildings over 90-feet in height without access to high capacity transit and without demonstrating that the additional height was necessary or desirable constituted a substantial conflict between the application and county code.[12] (Exhibit R-4)

The Applicant's variance request is intended to remove the substantial conflict between its application and SCC 30.34A.040(1) [2010] by requesting that the County waive the regulation that requires high capacity transit and requires the applicant document why that the additional height is necessary or desirable in order to construct buildings over the 90-foot building height maximum.

Decision Criteria & Analysis

1. The first decision criterion (SCC 30.43B.100(1)) requires that:

> There are special circumstances applicable to the subject property or to the intended use, such as size, shape, topography, location or surroundings, that do not apply generally to other properties or classes of use in the same vicinity and zone;

Addressing the first criterion, the Applicant provides:

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[11] The Applicant notes that the "interpretation of SCC 30.34A.040(1) is currently before the Court of Appeals" and that "BSRE maintains its position that this variance request is not necessary" but is submitting it anyway "to protect BSRE's rights while the Court of Appeals' decision on the interpretation of SCC 30.34A.040(1) is pending." (Exhibit V-18, p. 2).

[12] The Amended Decision included the following conclusions: "While BSRE is correct that a high capacity transit route is near the project, proximity alone is not enough" (C.36); "The record lacks any evidence to support a finding or conclusion that the additional height is necessary or desirable from a public, aesthetic, planning, or transportation standpoint" (C.37); and the proposed "21 buildings in excess [of the base 90 feet] permitted in an urban center [was] a substantial conflict with SCC 30.34A.040." (C.39). (Exhibit R-4, pp. 22-23).

> The applicable Urban Center code requires a minimum floor area density, as measured by the Floor Area Ratio (the "FAR") of 1.0, which limits the development options for the site. Further, the topography of the site itself is a limiting factor because there are significant setbacks and critical areas which must be avoided for the placement of buildings in order to comply with the Snohomish County Code. The physical location of the site—being surrounded by the shoreline, the railroad and the steep wooded hillside to Woodway—forms a unique set of surroundings that has to be reconciled in the design of the Urban Center development to be located at the Point Wells site. See site plan Exhibit 1 for developable area within the project critical area buffers and zoning setbacks. (Exhibit V-18, p. 2.)

The Applicant cites critical areas, shorelines, the railroad, topography, setbacks, and steep wooded hillside as special circumstances applicable to the site. However, the Applicant makes no showing that these circumstances "do not apply generally to other properties … in the same vicinity." The Applicant's variance application does not compare the physical attributes of its property to properties in the same vicinity. Thus, the Applicant does not demonstrate special circumstances applicable to its property that do not apply generally to other properties in the same vicinity, and therefore fails to satisfy the first criterion.

Further, a review of publicly available information on properties in the vicinity of the Applicant's property reveals that the railroad, shorelines, critical areas, including steep slopes and geologically hazardous areas, and regulatory setbacks, are common physical attributes that apply generally to properties in the vicinity. As discussed in the Critical Area Report provided by the Applicant (Exhibit V-10, pages 2-9) and in the Subsurface Conditions Report (Exhibit C-24, pages 12-24), much of the property located along the Puget Sound shoreline in the south Snohomish County vicinity is comprised of steep slopes, shorelines, and BNSF rail corridor, as well as associated regulatory buffers. Therefore, the factors relied upon by the Applicant do not qualify as special circumstances as the term is used in SCC 30.43B.100(1).

The first criterion also includes consideration of similarly zoned property. The Applicant's variance request is completely silent on other properties with the same zoning. Therefore, the Applicant has not demonstrated how special circumstances apply to its property that "do not apply generally to other properties or classes of use in the same […] zone."

Lastly, the Applicant's variance seeks relief from the code requirement requiring proximity to high capacity transit and the requirement to demonstrate why the additional height is necessary or desirable. However, the Applicant does not explain why the physical attributes of its property prevent the Applicant from complying with the requirement for high capacity transit and demonstrating why the additional height is necessary or desirable. Instead, the Applicant cites reasons why it alleges it cannot satisfy the FAR requirement. However, the variance submitted by the Applicant seeks relief from the requirement for high capacity transit, not a variance from the FAR requirement. Thus, the justification cited by the Applicant is not responsive to the variance application that it submitted to the County for review.

The Applicant has not satisfied SCC 30.43B.100(1).

2. The second decision criterion (SCC 30.43B.100(2)) requires that:

> A variance is necessary for the preservation and enjoyment of a substantial property right or use possessed by other properties in the same vicinity and zone but which because of special circumstances is denied to the property in question;

The Applicant's response to this criterion is as follows:

> The unique set of features, described in Point 1 above, create challenging conditions, which the design proposal shows and this application for a variance from the height limit aims to resolve. In order to satisfy the minimum FAR, the buildings must be constructed greater than 90 feet tall, which is the height limit imposed if it is found that BSRE does not satisfy the requirement of proximity to a high capacity transit route or station. In such event, the Point Wells site could not be developed as an Urban Center. See Exhibit 2 for a site plan showing the FAR with building heights of 90 feet and a site plan showing the FAR with building heights up to 180 feet. Therefore, this variance is necessary to allow development on the Point Wells site. The additional height is particularly needed for the Point Wells site because of the constraints caused by the critical areas and setbacks imposed on the property itself. See Exhibit 3 for a site plan showing the critical areas and setbacks. Additional height is necessary to allow the property to be developed as an Urban Center at all. If the County will not allow building heights over 90 feet, the County will have necessarily rendered the property undevelopable by designating it as an Urban Center under the zoning code and in the County comprehensive plan. The Point Wells site is the only property in the area which has vesting as an Urban Center with the substantial property right of being able to be developed as such. The variance is necessary to preserve the substantial property right of being able to develop the property pursuant to its vested property zoning. These are special circumstances which do not apply to other properties in the vicinity. (Exhibit V-18, pp. 2-3.)

The second criterion requires the Applicant to demonstrate a substantial property right or use possessed by other properties in the same vicinity and zone, and to demonstrate that a variance is necessary for the preservation and enjoyment of that right.

The Applicant has identified the substantial property right as "being able to develop the property pursuant to its vested property zoning [Urban Center]." The Applicant claims if the variance is not granted, "the County will have rendered the property undevelopable."

As explained in the section discussing of Floor Area Ratios (starting on page 6) the Applicant has multiple different options for developing its property under its vested Urban Center zoning. The Applicant has elected to pursue an option that requires the highest minimum FAR. SCC 30.34A.030(1) [2009]. The

Applicant has provided no information to demonstrate that its choice to develop a property in a manner that requires the highest minimum density is a "substantial property right," especially considering the multiple other options to develop the site as an Urban Center that do not require a 1.0 FAR. Therefore, the property is not undevelopable as an Urban Center without the variance. In addition, the Applicant has indicated that the property is currently being used for the storage of marine fuels and asphalt that are generating revenue, and as such, an economically viable uses of the property (Exhibit V-10, page 1). Further, the property is currently zoned as Planned Community Business and with a comprehensive plan designation of Urban Village. An urban village development does not require compliance with Urban Center FAR requirements cited by the Applicant as justification for the variance. In sum, the property is currently developed and operating as economically viable use, and the Applicant has multiple alternative options for developing the property. Therefore, the Applicant has not demonstrated that the variance "is necessary for preservation and enjoyment of a substantial property right."

Notwithstanding the above analysis, the information provided by the Applicant for the second variance criterion focuses exclusively on issues regarding site constraints and FAR. However, the variance the Applicant submitted asks for relief from the maximum allowed height and relief from the regulation requiring high capacity transit in order to double the maximum building height, and does not include a variance from the FAR requirement. In light of the variance submitted by the Applicant, the County would need a response and information from the Applicant addressing the following questions:

- Whether doubling the maximum allowable building height is a substantial property right?
- Whether other properties in the same vicinity and zone have been granted or possess the right to double the maximum allowable building height?
- Whether a variance is necessary to preserve and enjoy the right to double the maximum allowable building height?

However, the Applicant did not provide information answering the questions above and its responses were not tailored to the variance application under review. The Applicant failed to provide any information on whether doubling the allowed maximum building height is a substantial property right possessed by other properties in the vicinity or zone. The Applicant also failed to provide any information demonstrating that other Urban Center zoned properties have been granted relief from the maximum 90-foot building height without satisfying the requirement for high capacity transit. To answer that question, the County has not approved any variances that would allow an Urban Center applicant the right to construct buildings above the 90-foot height limit without providing the high capacity transit required by the Code. Therefore, if the variance was granted, the Applicant would be benefitting from a special privilege that has not been granted to any other property owners in same vicinity or any other urban center developments.

In addition, the Applicant has not demonstrated how the special circumstances it cited (physical attributes and environmental constraints on the site) prevent the Applicant from satisfying the high capacity transit requirement, and the necessary and desirable requirement for the additional building height. Information provided by the Applicant earlier in the hearing process indicates that the physical

attributes of the site the Applicant cites in the variance request are not the reasons it failed to satisfy the regulation requiring high capacity transit. (Exhibit R-4, p. 19 (C.20)).

The Applicant has not satisfied SCC 30.43B.100(2).

3. The third decision criterion (SCC 30.43B.100(3)) requires that:

> The granting of the variance will not be materially detrimental to the public welfare or injurious to the properties or improvements in the vicinity and zone in which the subject property is located;

The Applicant provided the following in response to the third criterion:

> The placement of the buildings in the site plan is designed to locate the taller buildings closer to the steep hillside and to locate low rise buildings along the waterfront in order to minimize the view interference of neighboring properties. Adding height also preserves publicly accessible and contiguous open space on the property. This open space is a neighborhood amenity which improves both public welfare and properties in the vicinity.

The criterion requires that the Applicant demonstrate that granting the variance "will not be materially detrimental to the public welfare or injurious to the properties or improvements in the vicinity and zone" where the property is located. The Applicant does not provide evidence or information demonstrating no material detriment. The Applicant has not satisfied the third criterion.

Instead of demonstrating no material detriment as required by the criterion, the Applicant cites that detriment of "view interference of neighboring properties" will be minimized. The Applicant cites that its design and placement of taller buildings at the base of the steep hillside and low-rise buildings along the waterfront would minimize view interference. While the placement of tall buildings at the base of the hillside may minimize some view impacts based on topography of the site, the Applicant has not demonstrated that the increased heights will not be materially detrimental. The Applicant's site plan (Exhibit V-6, Sheet A-050) shows that by placing the taller buildings near the hillside, some of which are proposed to be 180-feet in height, the tall buildings will actually be located closer to the neighboring single-family residential properties, particularly with regard to the buildings in the south village and urban plaza. In addition, the Applicant states that locating low-rise buildings along the waterfront as intended "to minimize view interference of neighboring properties." However, it is the county code that requires building heights in the Shoreline Management Master Program (SMMP) area to be limited to 35 feet, or three stories in height (SCC 30.67.460(1)).

In addition, the Applicant claims that adding height to the buildings provides a benefit to community by preserving publicly accessible open space. However, public benefit is not part of the decision criteria for a variance. Even if the County could take this into consideration, the Applicant has cited no evidence

that available open space would be increased if the variance was granted as compared to a development scheme without a variance.

With this variance application, the Applicant is requesting relief from the requirement for high capacity transit, and doubling the allowed building heights without providing the transit required by the county code. The Applicant does not address the material detriment attributable to the doubling of building density without any means for the residents of those building to access high capacity transit. Thus, the third criterion also has not been satisfied.

The Applicant has not satisfied SCC 30.43B.100(3).

4. The fourth decision criterion (SCC 30.43B.100(4)) requires that:

> (4) The granting of the variance will not adversely affect the comprehensive plan.

On this criterion, the Applicant provided as follows:

> The County's comprehensive plan is only served by this request because it allows for the development of an Urban Center in the area designated as an Urban Center. Denial of the variance would adversely affect the comprehensive plan because it would prevent development of the Point Wells site. The comprehensive plan itself designated the Point Wells site as being an appropriate place for significant development to accommodate urban growth, and a denial of the variance would prevent that from occurring.

The fourth decision criterion requires the Applicant to demonstrate that granting the variance will not adversely affect the comprehensive plan. The Applicant does not directly address the criterion which requires analysis of the impact of the granting the variance on the comprehensive plan. Instead, the Applicant states that <u>denial</u> of the variance would adversely affect the comprehensive plan. The Applicant states denial of the variance would prevent development of the site as an Urban Center as designated in the comprehensive plan and prevent the site from accommodating urban growth. There are several reasons why the Applicant's variance request fails to satisfy the fourth criterion.

First, the Applicant's response for the fourth criterion does not explain how the variance request it submitted satisfies the decision criteria. The Applicant frames its response as the variance allowing development of urban center. However, the variance request submitted by the Applicant relates to waiving the high capacity transit requirement and necessary or desirable criterion in order to double the maximum allowed building height. The Applicant's response is silent on how the variance it submitted, which proposes waving the requirement for high capacity transit, will not adversely affect the comprehensive plan. Therefore, the Applicant fails to satisfy the criterion.

Second, the Applicant's response does not cite any provision of the county's comprehensive plan. Without evidence or citation to the comprehensive plan, the Applicant cannot satisfy the criterion.

Lastly, granting the variance would in fact adversely affect the comprehensive plan. If the variance were granted it would result in allowing the Applicant to construct buildings up to twice the allowed building height (180-feet instead of 90-feet) while waving the requirement that the urban center development have high capacity transit. The granting of this variance would adversely affect the County's comprehensive plan, specifically the following goals, objectives, policies, and definitions:

> Urban Center Designation Definition. This designation identified a higher density area that contains a mix of residential and non-residential uses, and whose location and development are coordinated with the regional high capacity transportation system. The implementing zone is Urban Center.
>
> Objective LU 2.A Increase residential densities within UGAs by concentrating and intensifying development in appropriate locations, particularly within designated centers and along identified transit emphasis corridors.
>
> Objective LU 2.B Plan for future land use and development patterns that are consistent with countywide and regional planning policies and that complement and support the future transportation system outlined in the Transportation Element.
>
> LU Policy 2.B.3 Through corridor-based planning, the county shall identify opportunities for mixed use and medium and high density residential development (including housing for the elderly and disabled). These uses shall be encouraged to locate within walking distance of transit facilities, particularly along transit emphasis corridors, and where possible, in close proximity to medical facilities, urban centers, parks, and recreational amenities.
>
> Goal LU 3 Establish a system of compact, clearly defined mixed-use centers that promote neighborhood identification, reduce vehicle miles traveled, promote physical activity, and support the county's sustainability goals.
>
> LU Policy 3.A.2 Urban Centers shall be located within a UGA and:
>
> …
>
> - Be pedestrian and transit orientated;
>
> …
>
> - Have good access to the local and regional transportation and transit system.
>
> LU Policy 3.A.3 Urban Centers shall be located adjacent to a principal arterial road, and meet one of the following additional criteria (measured along existing road rights-of-way):
>
> - Be within ½ mile of an existing high capacity transit station;
> - Be within ½ mile of an existing transit center; or
> - Be within ¼ mile of an existing bus top on a major transportation corridor.
>
> LU Policy 3.A.6 Desired growth within Urban Centers shall be accomplished through application of appropriate zoning classifications, provision of necessary services and public facilities, including transit, sewer, water, stormwater, roads and pedestrian improvements, parks, trails and open space, and protection of critical areas. The County will identify and apply methods to facilitate development within designated Urban Centers, including supportive transit, parks, road and non-motorized improvements.

The above referenced definitions, goals, policies, and objectives of the County's comprehensive plan provide the intent and purpose of the Urban Center designation as encouraging medium- and high-density transit-orientated development with an essential and defining element of the designation being close proximity and access to transit emphasis corridors and regional high capacity transit. The Applicant's variance, if granted, would negate the requirement for high capacity transit while allowing increased density by doubling the building height maximum. By allowing such substantial increases in density while doing away with the requirement for high capacity transit, the granting of the variance would adversely affect the comprehensive plan by directly conflicting with urban center policies that encourage and require access to high capacity transit and regional transportation system.

The Applicant has not satisfied SCC 30.43B.100(4).

Recommendation

PDS recommends DENIAL of the requested variance from SCC 30.34A.040(1) [2010] based on the Applicant's failure to demonstrate compliance with the decision criteria of SCC 30.43B.100.

1.B. Variance Application Regarding SCC 30.34A.040(2) - Height Adjacent to Low Density Zones (11-101457 003 00 VAR)

How this Variance Request Relates to the Project

The Applicant submitted a new variance on December 16, 2019, seeking relief from SCC 30.34A.040(2)(a),[13] which establishes building height and setbacks for buildings adjacent to low-density residential zones.

SCC 30.34A.040(2)(a) [2010] provides (emphasis added):

> (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).

With this variance request, the Applicant is requesting a variance to allow the scaling down of building height within 180 feet of lower density zones **equal to the distance** rather than height limited to **half the distance** from the lower density zones.

[13] Generally cited as SCC 30.34A.040(2)(a) [2010], Amended Ordinance 09-079 went into effect in 2010.

In earlier hearings, the Applicant took the position that since the neighboring low-density residential properties zoning designation had changed after annexation, the setback regulation no longer applied. In addition to its argument, the Applicant filed a variance request from the setback regulations just weeks before the May 2018 hearing that was not before the Examiner because of the timing of the application.

The Applicant's variance request submitted in December 2019 under review in this recommendation supersedes the previous request as the urban plaza has been redesigned. Due to the internally inconsistent application materials provided by the Applicant, it is unclear which buildings are subject to the Applicant's variance request.[14] However, PDS will presume that the Applicant intended for the variance application to encompass the two service buildings (Service Building 1 and Service Building 2) and the retail/commercial building.

Decision Criteria and Analysis

1. The first decision criteria (SCC 30.43B.100(1)) requires that:

> There are special circumstances applicable to the subject property or to the intended use, such as size, shape, topography, location or surroundings, that do not apply generally to other properties or classes of use in the same vicinity and zone;

The Applicant provides the following response (**bolding** added):

> This is a request for a variance to the amended ordinance No. 09-079 [SCC] 30.34A.040 (2)(a) *Building height and setback*. Specifically, this request is to allow a height that represents one times the distance the building is located from the adjacent zoning line. Height shall be no greater than **45 feet**. This request applies to the southeast portion of the site as illustrated on attached Exhibit 1 [which is the final page of Hearing Exhibit V-19]. It should be noted that Snohomish County has interpreted the Town of Woodway R-14,500 or UR zoning to the south of the Point Wells site are equivalent to the lower density zones listed in the former SCC 30.34A.040(2)(a).

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[14] The Applicant's variance application (Exhibit V-18) and supporting exhibit (Exhibit V-18, Sheet A-050) directly conflict. The annotations on the exhibit state that the request would apply to buildings UP-T1, Service Building 1, and Service Building 2. However, building UP-T1 is not in the area subject to the variance request identified by the Applicant. Additionally, there is a commercial building in the highlighted area of the Applicant's variance request, but the variance narrative and description are silent on whether the request applies to the commercial building. Similarly, the Applicant's Summary of Revision Letter (Exhibit V-1) identifies only Service Buildings 1 and 2 as being subject to the variance request.

> The physical location between the railroad to the west and the critical areas on the hillside to the east forms a narrow site condition that has to be reconciled in the design. Access to and from the site is limited and must serve to provide access to residents, public, utility services, pedestrians and bikes. The property boundary at the southeast portion of the Urban Plaza is a panhandle shape with a constricted width of approximately 150'. The vertical clearance requirements at the BNSF bridge crossing requires that the access road must rise from elevation +35' at Richmond Beach Drive NW up to elevation +55'. This grade change requires the access road to ramp up quickly from the south entry while also providing transit access below the plaza level. More than 75' (almost half of the property width) is required for the access road and sidewalks. The result is a site development area restricted in both width and height.

PDS understands that the request is to allow building heights equal to the distance from low-density zones, with some kind of upper limit. However, the Applicant's statement that "Height shall be no greater than *45* feet" is at odds with the 35' maximum that the Applicant represents in Exhibit 1 to its variance request and the Urban Plaza Data and Building Heights Sheet. (Exhibit V-6, Sheet A-200).

The Applicant cites the critical areas on the hillside to the east and the railroad to the west as special circumstances that form a narrow site condition. However, the Applicant makes no showing that these circumstances "do not apply generally to other properties … in the same vicinity." The Applicant's variance application does not compare the physical attributes of its property to properties in the same vicinity. Thus, the Applicant does not demonstrate special circumstances applicable to its property that do not apply generally to other properties in the same vicinity, and therefore fails to satisfy the first criterion.

Further, as discussed in the Critical Area Report provided by the Applicant (Exhibit V-10, pages 2-9) and in the Subsurface Conditions Report (Exhibit C-24, pages 12-24), properties in the vicinity of the Applicant's property are also subject to the circumstances of railroad adjacency and critical areas, including steep slopes and geologically hazardous areas. These are common physical attributes that apply generally to properties in the vicinity. Much of the property located along or near the Puget Sound shoreline in south Snohomish County is comprised of steep slopes and bordered by BNSF rail corridor, as well as associated regulatory buffers. These circumstances are not special or unique, but common in the area. Therefore, the factors by the Applicant do not qualify as special circumstances as the term is used in SCC 30.43B.100(1).

Lastly, the Applicant's variance seeks relief from the code requirement requiring urban center buildings to be setback and heights limited when adjacent to low-density residential zoned properties. However, the Applicant does not explain why the physical attributes of the property prevent it from complying with the residential setback requirement and why it has chosen to locate buildings in the setback. Instead, the Applicant's response focuses on many details concerning the location and dimensions of the access road but the regulation does not apply to the road and likewise the access road is not part of variance request. Thus, much of the justification cited by the Applicant is inapplicable to the variance it submitted for the siting of the buildings.

The Applicant has not satisfied SCC 30.43B.100(1).

2. The second decision criteria (SCC 30.43B.100(2)) requires that:

> A variance is necessary for the preservation and enjoyment of a substantial property right or use possessed by other properties in the same vicinity and zone but which because of special circumstances is denied to the property in question;

The Applicant responds to this criterion with the following:

> The unique set of site features, described in Point 1, create challenging conditions. This application for a variance from height and setback requirements aims to resolve these conditions. The long proportions and narrow shape of this portion of the site and the site access are unique conditions that limit development rights on this property. The Point Wells site is the only property in the area which has vesting as an Urban Center with the substantial property right of being able to developed as such. The variance is necessary to preserve the substantial property right of begin able to develop the property pursuant to its vested property zoning. These are special circumstances which do not apply to other properties in the vicinity.

The second criterion requires the Applicant to demonstrate a substantial property right or use possessed by other properties in the same vicinity and zone, and to demonstrate that a variance is necessary for the preservation and enjoyment of that right. The Applicant states a variance is necessary to preserve the substantial property right of being able to develop the property as an Urban Center, the vested zoning designation of the property. The Applicant has not satisfied the second criterion.

The Applicant identifies the substantial property right at issue as the right to develop its property according its vested zoning. However, the Applicant provided no information or evidence demonstrating why this specific variance, which is asking for relief from building setbacks from lower density zones, is necessary to develop the property as an Urban Center. The Applicant's statements without supporting evidence is not sufficient to demonstrate how or why the variance is necessary.[15] In addition, there are statements provided by the Applicant's consultant that it was design preferences, not necessity, that was the motivation for siting the buildings in the Urban Plaza portion of the development closest to adjacent low-density residential properties that are subject of this variance request (Hearing Examiner Decision, Exhibit R-4, Finding F.83, page 14).

The Applicant is correct in stating that Point Wells is the only urban center zoned site in the immediate vicinity. However, the Applicant fails to address the properties located in the vicinity that face the same site constraints, such as the railroad, critical areas on the hillside, and narrow site conditions, but have

[15] The Applicant does not cite the FAR issue for this variance. However, to the extent the FAR issue is relied upon by the Applicant, the County incorporates by reference the discussion and analysis in the section addressing FAR that begins on page 6.

developed to their respective vesting zoning designation without requiring a variance. While the properties in the vicinity are not subject specifically to SCC 30.34A.040(2)(a), those properties are subject to setback and building height regulations that apply generally to properties countywide. The Applicant has not demonstrated that neighboring properties have obtained variances from height and setback regulations in order to maximize their development potential respective to their zoning classification.

In addition, the Applicant's variance application does not address other properties vested to the same Urban Center zoning. The variance request is from Amended Ordinance No. 09-079 which adopted regulations to scale down buildings located near low-density zones to a height that represents half the distance. This code requirement is still in effect, although it is now codified in SCC 30.34A.040(2) rather than (2)(a). The Point Wells site is not the only Urban Center zoned property that is located adjacent to low-density residential zoned properties. Since adoption of the requirement to scale down building height for Urban Center projects next to low-density zones, the County has not approved any variance that waives this requirement for any applicant in the Urban Center zone. The Applicant fails to demonstrate that the variance is necessary to preserve substantial property rights possessed by other properties in the same vicinity.

The Applicant has not satisfied SCC 30.43B.100(2).

3. The third decision criteria (SCC 30.43B.100(3)) requires that:

> The granting of the variance will not be materially detrimental to the public welfare or injurious to the properties or improvements in the vicinity and zone in which the subject property is located;

The Applicant's responds to this criterion as follows:

> The entry elevation of the buildings is at the low point of the site and buildings are down slope from the properties to the east. The proposed building height of 35 feet will minimize view corridor impacts from adjacent properties. Community services such as EMT and site security are programmed for community service building 2. This location at the southern site boundary provides safety and security to Point Wells which also serves to enhance community safety, thereby benefitting other property owners in the vicinity.

The criterion requires that the Applicant demonstrate that granting the variance "will not be materially detrimental to the public welfare or injurious to the properties or improvements in the vicinity and zone" in which the property is located. The Applicant has not provided sufficient information demonstrating no material detriment. The Applicant has not satisfied the third criterion.

The Applicant's reference to the entry of the buildings being at the low point of the site and the fact the buildings are located downslope from the adjacent low-density residential properties is relevant

information that could support a finding that this criterion was satisfied if additional information was provided. However, the Applicant did not provide additional information demonstrating no material detriment to the public welfare or injury to properties in the vicinity.

While the placement of buildings downslope of impacted properties may minimize some view corridor impacts, the Applicant has not demonstrated that the increased heights will not be materially detrimental. For example, Service Building and Service Building 2 are located 35 feet from the adjacent low density zones as indicated by the Applicant, and therefore would be limited to 17.5 feet in height under SCC 30.34A.040(2)(a). The Applicant has not provided any information, such as a comparative analysis or view corridor study, demonstrating that the increase in height from 17.5-foot buildings to 35-foot or 45-foot buildings would not result in material detriment to the public welfare or injury to adjacent properties.[16]

In addition, the Applicant states that EMT and site security that will housed in the buildings provides a benefit to community. However, public benefit is not part of the decision criteria for a variance. Even if the County could take this into consideration, the Applicant has not provided information that these public amenities could not be provided without a variance, for example locating the facilities in the first floor or in wider and shorter buildings that are complaint with the height setback regulations.[17]

The Applicant has not satisfied SCC 30.43B.100(3).

4. The fourth decision criterion (SCC 30.43B.100(4)) requires that:

> (4) The granting of the variance will not adversely affect the comprehensive plan.

The Applicant's response to this criterion reads:

> The development comprehensive plan is not adversely impacted by an approval of this request. The location of this particular part of the development is in a key position and enhances safety and transit connections for the surrounding neighborhood. The building massing and proposed height of 35 feet is appropriate for this area.

[16] The documentation received from the Applicant in support of this variance also indicates that the maximum height under this request is 45 feet ("no greater than 45 feet"). Whatever effect 35-foot buildings might have on views from adjacent properties would certainly be greater if the buildings were the proposed 45-foot height indicated by the Applicant.

[17] The area proposed for EMT services is in the setback area for landslide hazards. In the event of a slide on this portion of the hill above, EMT services would be in the area most impacted by a slide. The first responders could not respond. This concern overlaps with the landslide hazard deviation requested by the Applicant. See Exhibit X-2 for further discussion of the landslide issue.

The fourth decision criterion requires the Applicant demonstrate that granting the variance will not adversely affect the comprehensive plan. The Applicant states that the part of the development subject to the variance enhances safety and transit connections, and that building massing and heights are appropriate. The Applicant provides no further information to support this statement. The Applicant also fails to cite or reference any goal, objective, or policy of the County's comprehensive plan. The Applicant's response does not provide any analysis of how the variance might affect the comprehensive plan and is inadequate to demonstrate compliance with the fourth criterion.

Upon review, the granting of this variance would adversely affect the County's comprehensive plan, specifically the following objectives and policies:

> Objective LU 2.E Provide for reasonable flexibility in land use regulation and planned mixing of uses, where appropriate, **while maintaining adequate protection for existing neighborhoods**. (Bolding added).
>
> Objective LU 3.H Encourage transit-supportive land uses **that are compatible with adjacent neighborhoods** to locate and intensify designated centers and along transit emphasis corridors. (Bolding added).
>
> LU Policy 4.A.2(f) Developments should provide adequate setbacks, buffers and visual screen to make them compatible with abutting residential and other land uses.
>
> LU Policy 4.B.2(d) Where increased density housing is proposed, the height, scale, design, and architectural character of the proposed units is compatible with the character of the buildings in the surrounding area and may require taller buildings to be located in the core of the Village or Center, or at an edge adjacent to non-residential uses, with heights stepping down towards existing lower density housing.

The above referenced policies and objectives of the County's comprehensive plan provide that new development, including urban centers, should be compatible with adjacent neighborhoods by including adequate setbacks and stepping down building heights when located next to existing lower density housing. The Applicant's variance, if granted, would directly conflict with these policies and objectives, thereby adversely affecting the comprehensive plan.

The Applicant has not satisfied SCC 30.43B.100(4).

Recommendation

PDS recommends DENIAL of the requested variance from SCC 30.34A.040(2)(a) [2010] based on the Applicant's failure to demonstrate compliance with the decision criteria of SCC 30.43B.100.

1.C Shoreline Conditional Use Permit Application

How this Shoreline CUP Relates to the Rest of the Project

As part of its December 2019 revised application, the Applicant included a new request for a Shoreline Conditional Use Permit (11-101457 SHOR) to allow a passenger ferry service. In explaining this service, which in places is also described by the Applicant as a "water taxi," the Applicant provides:

> [P]roviding a passenger-only ferry service would satisfy the requirement for high capacity transit set forth in SCC 30.34A.040(1). Both the shoreline narrative and the project narrative have been updated to include descriptions for the passenger-only ferry. The Land Use Application is updated to include request for a conditional use permit on the pier to operate passenger-only ferry service. (Exhibit V-1, page 2).

With regard to the passenger ferry, the Hearing Examiner found that the Applicant failed to apply for a shoreline conditional use permit (Exhibit R-4, F.63, page 11).[18] The Applicant responded by applying for a shoreline conditional use permit. However, the Applicant has failed to demonstrate compliance with the applicable criteria discussed below. Under SCC 30.44.210(2)(a), a shoreline conditional use permit application is processed as a Type 2 permit if PDS recommends denial of the application. Therefore, PDS has included in this staff recommendation, a recommendation to the Hearing Examiner that the shoreline conditional use permit application be denied based on the code compliance issues set forth below.

Agency Comments: Three of the comments from public agencies discussed the shoreline CUP in addition to the variances. To re-summarize these comments:

- Exhibit W-18: The Tulalip Tribes submitted a comment letter raising concerns with cultural resources, overwater structures and moorage, stormwater and existing contamination, and impacts to creeks on the site.
- Exhibit W-20: The City of Shoreline submitted a comment letter on the shoreline CUP. The City points out that the Applicant did not appeal denial of the shoreline substantial development permit to the Shoreline Hearings Board. In addition, the City comments that the Applicant does not address current shoreline regulations and policies, and that the application is lacking basic information to the degree it should be considered incomplete.

[18] The Applicant submitted a shoreline substantial development permit (SSDP) in 2011 (11-101461 SM). The SSDP was denied by the Examiner's Amended Decision dated August 3, 2018. Exhibit R-4. Unlike the other applications associated with the Point Wells development, the superior court did not have jurisdiction over the SSDP under LUPA, chapter 36.70C RCW. The Shorelines Hearings Board has exclusive jurisdiction over appeals concerning shoreline permits, including SSDPs. RCW 90.58.180; SCC 30.44.250. Because the superior court lacked jurisdiction over the SSDP, it could not reactivate the SSDP with the Remand Order.

- Exhibit W-40: The Muckleshoot Tribe submitted a comment on the water taxi use proposed in the shoreline CUP. The comment focus on the lack of details regarding the proposed use, lack of government approvals from state and federal agencies, and impacts on habitat and wildlife.

Public Comments: Tom McCormick provided three comments that primarily address the shoreline CUP. No other public comments specifically address the shoreline CUP. To summarize Mr. McCormick's comments:

- Exhibit W-27: This comment provides an argument against the Applicant's assertion that it has delineated the Ordinary High Water Mark (OHWM).
- Exhibit W-28: A comment letter was received from Tom McCormick regarding the shoreline CUP and passenger ferry service. The letter comments on the ownership of the pier, the lease of the pier from DNR (Exhibit D-11), and the passenger-only ferry not qualifying as high capacity transit under 2011 county code.
- Exhibit W-29: This comment references an ongoing legal dispute between BSRE and Paramount of Washington and gives reasons why the dispute, specifically regarding the pier, negatively impacts the water taxi service proposed in the shoreline CUP.

Decision Criteria & Analysis

The decision and review criteria for shoreline conditional use permit applications are provided in chapter 30.44 SCC (shoreline permit regulations), chapter 30.62A SCC (wetlands and fish & habitat conservation areas), and chapter 30.67 SCC (shoreline management program).

The Applicant failed to provide plans and reports in compliance with the review criteria for all shoreline development permits (SCC 30.44.130) or shoreline conditional use permits specifically (SCC 30.44.140). For instance, SCC 30.44.130(4) would require that the urban center site plan provided by the Applicant (Exhibit V-6) specifically delineate where the water taxi service would be located, yet the plans do not show the water taxi. SCC 30.44.130(4) would also require documents submitted by the Applicant to identify mitigation measures for the proposed use, yet the Critical Areas Report provided by the Applicant (Exhibit V-10) makes no mention of the water taxi. Thus, the Applicant's Critical Areas Report lacks any information or analysis of the impacts of the water taxi station and service on the marine habitat and wildlife in conflict with chapter 30.62A SCC. Therefore, the Applicant has failed to identify or propose any mitigation measures for the water taxi service. This same omission in the Critical Areas Report means that the Applicant has not demonstrated that the proposal "will not result in significant adverse impacts on the shoreline environment" (SCC 30.44.140(1)(d)). It also means that the Applicant has provided no means for the County to consider cumulative impacts or to propose conditions to mitigate such impacts from the taxi service (SCC 30.44.140(2)). The Applicant's has not included any information on the above threshold application requirements required any substantive review.

SCC 30.44.130(4) requires that development in the shoreline jurisdiction be limited to that development specifically delineated on the official site plan submitted by the applicant. The Applicant did not comply with this provision as the Applicant failed to include any updates to the site plan or civil plans contained in Exhibit V-6 or in the preliminary short plat (Exhibit V-7) to reflect a water taxi station. Related to this, the application also does not comply with SCC 30.67.330(3)(b), which requires applicants to provide provisions for a public access easement to the shoreline area. The Applicant has failed to provide the necessary easements in Exhibits V-6 and V-7.

SCC 30.44.140(1)(d) requires the applicant to demonstrate that the shoreline development proposal will not result in significant adverse impacts on the shoreline environment and that the cumulative impact will be consistent with the policies of the Shoreline Management Act and the SMP. The Applicant did not comply with this requirement as its Critical Areas Report (Exhibit V-10) lacks any information or analysis of the effect of the station and service on marine habitat and wildlife. Failure to provide this information constitutes a significant omission and conflict with SCC 30.67.060 which requires shoreline conditional use permits to address critical area regulations in Chapter 30.62A SCC. Therefore, in addition the Applicant has failed to comply with Chapter 30.62A SCC, the County's wetlands, and fish and wildlife habitat conservation areas regulations.

Further, under SCC 30.44.140(2) the Applicant's Critical Areas Report does not include information on proposed mitigation, which prevents the County from identifying conditions of approval that are necessary to prevent loss of ecological functions, ensure consistency with the Shoreline Management Act and the SMP, and to address cumulative impacts of the proposed development.

Under SCC 30.67.040, shoreline protective measures required by the shoreline management program shall constitute adequate mitigation of adverse or significant impacts on shoreline ecological functions under chapter 30.61 SCC. Since the Applicant has not provided the required information to evaluate potential impacts or to propose mitigation required under the shoreline management program, the shoreline conditional use permit application's compliance with the County's SEPA regulations cannot be determined.

SCC 30.67.210(1) requires the applicant to determine whether a specific designated shoreline exists and is regulated under the County's shoreline management program. The Applicant incorrectly represents that the water taxi location is in the Urban Environment (Exhibit V-5, page 5). While Map Sheet 40 of the Snohomish County Shoreline Environment Map Set[19] shows the beach area of the Point Wells site as Urban Environment, the water taxi is not proposed in the beach area. The water taxi is proposed on the pier located west of the beach area, an area which Map Sheet 40 designates as Aquatic Environment. The application does not comply with SCC 30.67.210(1). Finally, SCC 30.67.515(3) provides that

[19] The applicable Shoreline Environment Map Set is available at https://www.snohomishcountywa.gov/DocumentCenter/View/68997/ShoreMgmt_TWP_Atlas8x11_APPROVED. The map set is part of the applicable Shoreline Master Program which is available at https://www.snohomishcountywa.gov/DocumentCenter/View/68998/SMP-Policy-Amend-FINAL-20191009.

"[m]oorage on waters of the state without a lease or permission from the state Department of Natural Resources is restricted by the state and mitigation of impacts to navigation and access is required." The Applicant has not provided any evidence of a new lease with DNR that allows for passenger water taxi service as proposed in the shoreline conditional use permit application. The application does not comply with SCC 30.67.515(3).

Recommendation
PDS recommends DENIAL of the shoreline conditional use permit based on failure to demonstrate compliance with the following codes SCC 30.44.130(4), SCC 30.44.140(1)(d), SCC 30.44.140(2), Chapter 30.61 SCC, Chapter 30.62A SCC, SCC 30.67.060, SCC 30.67.210(1), SCC 30.67.330(3)(b), and SCC 30.67.515(3).

II. Basis for Continuing Recommendation of Denial Under SCC 30.61.220, Denial Without An EIS

The following sections represent the County's review of the Applicant's revised application materials and whether the revised materials address the issues of substantial conflict with the application identified in the Amended Decision of the Hearing Examiner, issued on August 3, 2018.

II.A. Failure to Document Feasibility and Code Compliance of Second Access Road;

County Code

The Applicant proposes to construct a secondary access road in a landslide hazard area. Development activities, actions requiring project permit and clearing are not allowed in landslide hazard areas or their required setbacks unless there is no alternative location on the subject property, and the department approves a deviation. SCC 30.62B.340(1), (2) [2007]. The minimum setback from the toe of a landslide hazard area slope "shall be 50 feet or the height divided by two whichever is greater." SCC 30.62B.340(2)(a)(ii) [2007]. For deviations from the prescriptive landslide hazard regulations, SCC 30.62B.340(2)(b) [2007] provides:

> (b) Deviations from setbacks may be allowed when the applicant demonstrates that the following conditions are met:
>
> (i) there is no alternate location for the structure on the subject property; and
>
> (ii) a geotechnical report demonstrates that:
>
> (A) the alternative setback provide protection which is equal to that provided by the minimum setbacks; and
>
> (B) the proposal meets the requirements of SCC 30.62B.320.

Hearing Examiner's Amended Decision
In the August 3, 2018, Amended Decision, the Examiner concluded the Applicant had satisfied only one of the two criteria required for a deviation for the secondary access road. Exhibit R-4, p. 26 (C.61). While

the Applicant adequately demonstrated no alternative location for the secondary access road, the Examiner concluded that the Applicant's geotechnical report did not adequately demonstrate that the proposed alternative setback for the road provided protection equal to that of the prescribed setback. Exhibit R-4, page 25 (C.55, C.56). As a result, the Examiner concluded that the secondary access road substantially conflicts with the Code. Exhibit R-4, page 26 (C.61).

In response to the Examiner's conclusion on the conflicts, the Applicant requested a landside hazard deviation for the secondary access road as part of the December 2019 resubmittal (Exhibit V-15). The County's Chief Engineering Officer, acting on behalf and under the authority of the PDS Director, reviewed the landslide hazard deviation request and issued a decision denying the deviation on May 14, 2020 (Exhibit X-2) (the "Deviation Decision"). In the Deviation Decision, the Chief Engineering Officer concluded that Applicant demonstrated compliance with the first criterion, that there was no location for a second access road except for in the landslide hazard area. However, based on review of the revised application and previous materials the Chief Engineering Officer concluded that the Applicant failed to demonstrate compliance with the second criterion. As result, the Applicant's deviation request for the secondary access road was denied. Exhibit X-2.

The grounds for denial of the landslide hazard deviation for the secondary access road are as follows[20]:

> Conclusion No. 1: For the purposes of SCC 30.62B.340(2)(a) [2007], the Applicant has failed to accurately demonstrate the height of the slope above the Point Wells site.
>
> Conclusion No. 2: For the purposes of SCC 30.62B.340(2)(a) [2007], the Applicant's assumption of a uniform 200-foot slope above the project site and proposed uniform 100-foot setback from the toe of the slope below does not accurately identify the Landslide Hazard Area. For at least the north part of the site, the height of the slope is greater than that assumed by the Applicant; therefore, the required landslide hazard setback is greater in this area than that depicted in the materials provided by the Applicant. The Applicant has failed to depict the Landslide Hazard Area accurately as it extends onto the Point Wells site.
>
> Conclusion No. 6: For the purposes of SCC 30.62B.320 [2007], the Applicant has failed to provide an adequate Geotechnical Report, that reflects the existing and proposed site conditions.
>
> Conclusion No. 7: For the purposes of SCC 30.62B.340(3) [2007], the Applicant has failed to meet the additional requirements, including factors of safety, for development activities and actions requiring permits in Landslide Hazard Area.
>
> Conclusion No. 8: For the purposes of SCC 30.62B.340(2)(b)(ii) [2007], the Applicant has failed to provide protection which is equal to that provided by the minimum setbacks.

[20] Rather than reproduce the analysis in the Landslide Deviation Decision, the Staff Recommendation summarizes the conflicts and incorporates by reference the analysis provided in the Landslide Deviation Decision (Exhibit X-2). Note that Conclusions 3 and 4 do not related to the secondary access road. Also note that while Conclusion 5 does related to the road, it is not part of the grounds for denial.

Using the additional analysis provided in the Deviation Decision, below PDS has evaluated whether the Applicant addressed and resolved each of the conclusions reached by the Examiner in August 3, 2018, Amended Decision.

Equal Protection
First, the Examiner concluded that:

> BSRE must provide a geotechnical report demonstrating its proposed alternative setbacks provide protection equal to that provided by the standard minimum setback [SCC 30.62B.340(2)(b)(ii)]. BSRE's geotechnical report did not adequately demonstrate that the proposed alternative setback for the secondary road provided protection equal to that of the prescribed setback. [HE Decision, p. 25 (C.56)]

With the Revised Application, the Applicant provided new information in a geotechnical report but it failed to demonstrate that the proposed alternative setback for the secondary road provides protection equal to that of the prescribed setback. The Applicant's updated landslide hazard deviation request acknowledges that it does not satisfy the code required factors of safety, proposing a factor of safety of 1.04 instead of the required 1.10 factor of safety (Exhibit V-16, page 2). As a result, the Applicant has not demonstrated that the proposed alternative setback provides equal protection to the prescribed setback. The application remains in substantial conflict with SCC 30.62B.340(2)(b)(ii) [2007].

Factors of Safety
Second, the Examiner concluded that:

> PDS argues that BSRE's geotechnical report does not provide adequate supporting information for the Chief Engineering Officer to confirm the calculations of safety factors. Although this lack results in a conflict with county code, the failure to provide the calculations is not substantial because it is more likely than not that such information can be provided relatively easily. [HE Decision, p. 25 (C.57)]

With the Revised Application, the Applicant provided additional safety calculations of safety. As stated above and documented in the Deviation Decision, the Applicant confirmed that it is unable to demonstrate compliance with the required factors of safety. As a result of the revised application materials, PDS concludes that the application is in substantial conflict with SCC 30.62B.340(3)(b) [2007] and recommends revision to Conclusion 57 in the August 3, 2018, Amended Decision.

Lateral Support for Wall
Third, the Examiner concluded that:

> Similarly, PDS expressed concern that lateral support for the retaining wall would not be installed until phase 2, resulting in a conflict with county code. The conflict is not substantial, however, because BSRE would not remove the soil providing lateral support

> to the retaining wall until phase 2 when it would build the foundation of a building that replaces the lateral support of the soil. Information about the construction sequence likely resolves concerns regarding lateral support for the retaining wall. [HE Decision, p. 25 (C.58)]

With the Revised Application, the Applicant has not resolved this issue. In prior testimony on this issue, the Applicant's representatives described the scenario in the Hearing Examiner's conclusion, namely that the soil providing lateral support for the wall would not be removed until Phase 2. The December 12, 2019, *Subsurface Conditions Report Addendum* provided by the Applicant (Exhibit V-16) now discusses this sequencing in Phase 2. However, it is important to note that this phasing is at odds with the Applicant's project phasing plans (Exhibit V-6, Sheet A-056). The phasing describes in Exhibit V-16 is also directly in conflict with the civil construction plans (Exhibit V-6, Sheets C-000 to C-503). The proposed phasing and construction plans require construction of the parking garage structure for the Urban Plaza (Phase 2) during Phase 1 in order to provide the new access over the railroad tracks to Phase 1 to satisfy requirements for two access points for Phase 1 prior to occupancy (SCC 30.53A.512 [2007] and EDDS 3-02(B)(3). The sequencing conflicts between the materials provided by Applicant are significant because the project cannot be constructed as currently proposed and sequenced by the Applicant. Construction sequence information provided by Applicant has therefore not only failed to address the conflict in Hearing Examiner Conclusion C.58 but confirmed the sequencing conflict raised by PDS. The application remains in substantial conflict with SCC 30.53A.512 [2007] and EDDS 3-02(B)(3) [2010].

Drainage Facilities

Fourth, the Examiner concluded that:

> The lack of information regarding the geotechnical report's failure to describe the proposed method of drainage and the locations of existing and proposed drainage facilities is critical. Insufficient evidence was adduced to allow the Hearing Examiner reasonable doubt that the proposal substantially conflicted with county code. Therefore, the lack of information regarding the method of drainage and locations of drainage facilities is a substantial conflict with county code. [HE Decision, p. 25 (C.59)]

With the Revised Application, the Applicant has not resolved issues related to the method of drainage and locations of existing and proposed drainage facilities. The drainage facilities on the Second Access Exhibit dated December 12, 2019, (Exhibit V-13) do not match the drainage facilities proposed on the civil construction plans (Exhibit V-6, Sheets C-000 to C-503). The Applicant has failed to provide an adequate proposal for how the project would drain the base of the tall retaining wall that would support the second access road, which was one of the grounds for denial of the landslide hazard deviation request by Snohomish County's Chief Engineering Officer. (Exhibit X-2). As documented in that decision, these failings are substantial conflicts with SCC 30.23.110(21)(b) [2010], SCC 30.62B.320(1)(a)(i) and (1)(a)(iii), SCC 30.63B.130 [2010], SCC 30.62B.340(3)(d) and (3)(e) [2007]. The Applicant's new proposal to convey some of the water from Chevron Creek in a pipe mounted on the retaining wall above the Urban Plaza service drive (Sheet C-300) does not comply with Snohomish County Engineering Design and

Development Standards (EDDS), which does not authorize wall mounted pipes (EDDS 5-05 [2010]). The plans show buildings and portions of the site without any drainage facilities, such as South Village Towers 2 and 3 plus the retail space between them (Sheet C-303). The plans contain several curved pipes, including the wall-mounted pipe, without cleanouts (catch basins or manholes), contrary to the requirements of EDDS 5-05(I)(2)(b)(7) [2010]. Many of the cleanouts that are depicted by the Applicant conflicts with EDDS requirements. In many places the plans do not provide for the required pipe slope (e.g. too flat to drain or too steep to be maintainable) (EDDS 5-05(A) [2010]). The application remains in substantial conflict with SCC 30.23.110(21)(b) [2010], SCC 30.62B.320(1)(a)(i) and (1)(a)(iii), SCC 30.63B.130 [2010], SCC 30.62B.340(3)(d) and (3)(e) [2007], as well as EDDS 5-05, 5-05(A), and 5-05(I)(2)(b)(7) [2010].

Surcharges

Fifth, the Examiner Concluded that:

> The lack of information regarding what surcharges were included in the safety factor calculations results in a substantial conflict with county code. If all surcharges were included and the problem [was] only one of providing the information, the conflict with code would likely not be substantial. Not all surcharges were included, however. For example, no consideration was given in the calculations to the weight of vehicular traffic. The Hearing Examiner cannot determine from the evidence the extent to which redesign might be required to obtain the Chief Engineering Officer's approval of the deviation. The Hearing Examiner therefore concludes that this is a substantial conflict with county code. [HE Decision, p. 25-26 (C.60)]

With the Revised Application, the Applicant provided new information regarding surcharges in its *Subsurface Conditions Report Addendum* dated December 12, 2019 (Exhibit V-16) but acknowledged at page 2 in the same report that their own safety calculations did not provide the factor of safety required by Snohomish County Code. The substantial conflict in Examiner's Amended Decision, Conclusion 60, remains.

Landslide Hazard Criteria Summary

Sixth, the Examiner summarized that:

> BSRE satisfied one of two criteria for a deviation from landslide hazard area setbacks for the secondary access road—there is no alternate location. BSRE has not demonstrated a likelihood of successfully satisfying the second criterion of demonstrating equal or better protection. Therefore, substantial conflicts with county code remain regarding the secondary access road. [HE Decision, p. 26 (C.61)]

With the Revised Application, the Applicant provided new information and a new landslide hazard deviation request. The Deviation Decision (Exhibit X-2) confirms that even with revised application the secondary access road substantially conflicts with the county code. The substantial conflict in C.61 remains.

Conflicts Not Addressed in the August 3, 2018, Decision
In addition to failure to demonstrate adequate design for engineering and safety as required to receive a landslide hazard deviation, the second access road as revised by the Applicant in December 2019 is in substantial conflict with multiple other code and design requirements.

New Conflicts. Design changes made by the December 12, 2019, Revised Application introduce several new conflicts with the code.

- Conflict with SCC 30.53A.512 Fire Apparatus Access for failing to address two EDDS 3-01(B)(5) [2010] design requirements. First, the materials provided by the Applicant fail to meet a requirement that private roads include pavement cross-section designs consistent with that required for public roads. Second, the proposed new fire only access from the Urban Plaza to the second access road does not meet turning radius requirements, resulting in a need to redesign the proposed access and retaining wall system supporting it.

- Conflict with SCC 30.62A.150 [2007] requiring mitigation plans for impacts to Chevron Creek and offsite wetlands.

- Conflict with SCC 30.24.080 [2009][21], which requires adequate pedestrian facilities. The revised plans have removed pedestrian facilities from the second access road (see Exhibit V-13).

- Conflict with SCC 30.24.060 [2009][22] Public and Private Roads for revising the second access road in a manner that: (1) fails to propose a private second access road that could meet public road standards if reconstruction were necessary (related to conflict with SCC 30.53A.512) and (2) fails to propose stormwater drainage facilities along this road in accordance with sound engineering practices.

- Conflict with SCC 30.62A.140. Failure to provide the required analysis of grading and drainage impacts, including both temporary during construction and ongoing post-construction, of the second access road's impact on Chevron Creek and offsite wetlands. Related to conflict with SCC 30.62A.150 [2007].

- Conflict with SCC 30.24.050 [2009] *Access Across Railroad Right-of-Way.* Failure to demonstrate or provide documentation that a crossing permit (license) has been granted by the railroad company.

[21] Reintroduced Substantial Conflicts Identified in the April 17, 2018 Staff Recommendation.

[22] Reintroduced Substantial Conflicts Identified in the April 17, 2018 Staff Recommendation.

- Conflict with SCC 30.24.060(1)(b)(iii) [2009] *Public and Private Roads.* Failure to obtain recorded easements from owners of record for the use of a proposed private second access road that would cross at least four neighboring properties (Exhibit V-13) and for failing to depict the required easements on the preliminary short plat map (Exhibit V-7) as required by SCC 30.63B.130 [2010].

Conclusions

Substantial Conflict with SCC 30.62B.340 [2007] *Landslide Hazard Areas* for proposing the Secondary Access Road in the landslide hazard area.

Substantial Conflict with SCC 30.62B.340 [2007] *Landslide Hazard Areas and* SCC 30.62B.320 *General Standards and Requirements for Erosion and Landslide Hazard Areas* for failing to satisfy the requirements for a landslide hazard area deviation for the Secondary Access Road.

II.B. Failure to Document Evidence for Access to High Capacity Transit for Building Heights Over 90 Feet and Variance Fails to Satisfy the Decision Criteria.

County Code

The Applicant proposes buildings that exceed the prescriptive 90-foot height limit. The Applicant seeks approval to construct buildings up to 180 feet under SCC 30.34A.040(1) [2010], which provides:

> (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 and the applicant prepares an environmental impact statement …

SCC 30.34A.040(1) [2010] requires an applicant to document that the additional height is "necessary or desirable" and that "the project is located near a high capacity transit route or station."[23] Even if an applicant satisfies both these criteria, the regulation grants the County the discretion whether to approve the additional height. The regulation provides "[a] building height increase up to an additional 90 feet ***may*** be approved," as opposed to language requiring that the additional height shall be approved. (SCC 30.34A.040(1) [2010] (emphasis added)).

Hearing Examiner's Amended Decision

In the August 3, 2018, Amended Decision of the Hearing Examiner, the Examiner concluded that the application substantially conflicted with SCC 30.34A.040(1) [2010]. The Examiner's decision on this issue cited four independent conclusions regarding the Applicant's May 2018 application. Below, PDS has

[23] SCC 30.34A.040(1) [2010] also requires the applicant to prepare an environmental impact statement.

reviewed whether the December 2019 revised application has addressed and resolved each of the Examiner's four conclusions that were grounds for concluding that the application substantially conflicts with SCC 30.34A.040(1) [2010].

Sound Transit Commuter Rail

First, the Examiner concluded that, "[b]ased on the record, any claim that Sound Transit will operate a commuter rail stop at Point Wells is speculative at best. " HE Decision, p. 22 (C.35).

With the Revised Application, the Applicant has not provided any additional documents demonstrating operation of a commuter rail stop at Point Wells by Sound Transit. The Applicant provided no additional documentation of service or rail commitments from either Sound Transit, who operates the commuter rail, or Burlington Northern Santa Fe (BNSF), who owns the rail corridor. Revisions made by the Applicant to its application now depict the proposed platform in a landslide hazard area. This is a material fact that the Applicant did not disclose in previous application materials. (Exhibit V-15 Landslide Area Deviation Request; Exhibit V-6, Sheet A-051)

In the May 2018 submittal, the Applicant represented that it would build a platform for the commuter rail service in Phase 1. (Exhibit R-4, p. 22 (C.33)). Portions of the Applicant's 2019 revisions would now delay the construction of the platform until Phase 3. (Exhibit V-6, Sheet A-056). Despite this, the updated project narrative includes the statement that the "Sound Transit commuter rail station is included in Phase 1." (Exhibit V-4, p. 7). However, the more specific information in the phasing plan for the project clearly identifies the station as being a part of Phase 3, which the architectural plans show as the final project phase. (Exhibit V-6, Sheet A-056). Meanwhile, the information provided by the Applicant in 2019 to give a partial update to the 2016 traffic impact analysis still refers to the project as being built in four phases and shows transit ridership associated with a commuter rail station not occurring until Phases 3 and 4. (Exhibit V-12, pp. 27-28). The updated Supplement to Urban Center Development Application merely promises a station "once a sufficient on-site population is achieved." (Exhibit V-3, p. 4).

The Applicant's revised 2019 application proposes buildings exceeding the 90-foot height limitation in Phase 1 and Phase 2 but its 2019 revised application demonstrates that construction of a commuter rail station would not take place until at least Phase 3. The Applicant's revised application does not provide any documentation or otherwise demonstrate that Sound Transit is planning for a commuter rail stop at Point Wells or that BNSF would allow such a stop at Point Wells.

Access to High Capacity Transit

Second, the Examiner concluded that proximity to a high capacity transit route without access is not sufficient to satisfy SCC 30.34A.040(1) [2010]. (Exhibit R-4, p. 22 (C.36).

In response, the Applicant submitted a variance application requesting that the County excuse the Applicant from complying with SCC 30.34A.040(1) [2010], which requires location "near a high capacity transit route or station" for approval of buildings taller than 90 feet. PDS has reviewed the Applicant's variance application against the applicable variance criteria, beginning on page 12. Based on that

analysis, PDS is recommending denial of the Applicant's variance from SCC 30.34A.040(1) [2010] because the Applicant failed to satisfy the variance criteria.

Necessary or Desirable Criterion

Third, the Examiner concluded "the record lacks any evidence to support a finding or conclusion that the additional height is necessary or desirable from a public, aesthetic, planning, or transportation standpoint." HE Decision, p. 22 (C.37).

The Applicant did not submit revised application materials or provide any analysis demonstrating that "the additional height is necessary or desirable from a public, aesthetic, planning, or transportation standpoint" as required by SCC 30.34A.040(1) [2010].

Water Taxi

Fourth, the Examiner concluded that the Applicant's plan for a water taxi did not satisfy SCC 30.34A.040(1) [2010] because it "appears to be a commercial activity in the Conservancy Environment, which is prohibited by the Shorelines Master Management Program" and failure to apply for a shoreline conditional use permit. HE Decision, p. 22-23 (C.38); p. 11 (F.63). The Examiner further concluded that the water taxi was a not permitted use of the pier based on the lease terms with DNR. HE Decision, p. 23 (C.39); p. 11 (F.62). The water taxi proposal is discussed in the review of the new shoreline conditional use permit that begins on page 27 and which ends with Snohomish County recommending denial of that permit to the Hearing Examiner for reasons cited in that section.

Vesting

Fifth, the addition of the water taxi to the project does not qualify as "high capacity transit" for purposes of exceeding the 90-foot building height maximum under SCC 30.34A.040(1) [2010]. The Applicant submitted its urban center and related applications in February and March of 2011, and vested to the urban center regulations in effect on the date of application. At the time of application, passenger-only ferries were not included as high capacity transit in the urban center code, Chapter 30.34A SCC. It was not until 2013 that passenger-only ferries were added to a definition of "high capacity transit" in SCC 30.91H.108 by Amended Ordinance 13-007, with an effective date of October 3, 2013. Under Washington's vested rights doctrine, an applicant cannot rely upon regulations adopted after the vesting date of its urban center application (see East County Reclamation Co. v. Bjornsen, 125 Wn. App. 431, 439-40, 105 P.3d 94 (2005) (prohibiting an applicant from picking and choosing between vested regulations and newly adopted regulations)). Therefore, a water taxi does not qualify as high capacity transit under SCC 30.34A.040(1) for purposes of the urban center application. Vesting does not prevent the Applicant from adding a water taxi to the project, it just cannot be used to satisfy the urban center requirement for high capacity transit and the height bonus under SCC 30.34A.040(1) [2010].

Phasing Conflict

Sixth, the 2019 revised application continues a conflict with SCC 30.34A.040(1) [2010]. Even assuming passenger-only ferry service qualified as high capacity transit, the revised plans clearly show new pier access and reconstruction, which would include the water taxi, as not occurring until Phase 3. (Exhibit V-6, Sheet A-056). If the water taxi were deferred to Phase 3, then buildings taller than 90 feet in Phases 1

and 2 would be in conflict with SCC 30.34A.040(1) [2010]. These buildings include South Village Tower 1 (SV-T1) through SV-T6 and Urban Plaza Tower 1 (UP-T1). An additional 11 buildings taller than 90 feet are proposed during Phase 3 that may also conflict depending on the timing and commencement of water taxi service.

Site Plan Revisions

Seventh, with its revised December 2019 application, the Applicant revised the site plan and is now proposing 17 of 45 buildings that exceed 90 feet in height. Previously, the Applicant proposed 21 of 46 buildings exceeding 90 feet in height. Thus, 17 of the high-rise structures proposed by the Applicant are non-compliant with the County Code. The absence of any plans for high capacity transit means the project remains in substantial conflict with SCC 30.34A.040(1) [2010].

Conclusions

Substantial Conflict with SCC 30.34A.040(1) [2010] *Building Heights and Setbacks* for continuing to propose buildings greater than 90 feet tall in the absence of high capacity transit.

Substantial Conflict with SCC 30.34A.040(1) [2010] *Building Heights and Setbacks* for failing to demonstrate compliance with the decision criteria for a Variance under SCC 30.43B.100 (11-1011457-002-00 VAR)

II.C. Failure to Provide Appropriate Building Setbacks for Tall Buildings from Lower Density Zones

County Code

The Applicant proposes buildings that do not meet a requirement to setback tall buildings from lower density zones. The Applicant seeks approval to exceed setback requirements under SCC 30.34A.040(2)(a) [2010], which requires

> (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).

(Emphasis added). SCC 30.34A.040(2)(a) [2010] requires the Applicant to limit the height of buildings within 180 feet of low-density zones, including R-9600, to half the height of that distance. Adjacent property had R-9600 zoning at the time of application by the Applicant in 2011. The Town of Woodway

annexed the adjacent properties and rezoned them to equivalent low-density, residential zoning categories (R-14,500 and UR).

Hearing Examiner's Amended Decision

In the August 3, 2018, Amended Decision, the Examiner concluded that the "buildings of the Urban Plaza require a variance because they are proposed to be located closer to the urban center's boundary with adjacent residential zones than prescribed by county code." (HE Decision, p. 21 (C.26)). The Examiner also concluded that an earlier similar variance request was "not before the Hearing Examiner for decision on the merits because it was filed too close to the open record [hearing] to be included in the public notice for the open record hearing." (HE Decision, p. 21 (C.27)).

The Applicant has revised their plans for the Urban Plaza in their December 2019 resubmittal. The Applicant revised the Urban Plaza so that now three buildings are in conflict with the setback from residential zones instead of six buildings the Applicant originally proposed in conflict with the setback. (Exhibit V-1, p. 1; Exhibit V-6, Sheet A-050). The revised plans, however, still do not meet the building setback requirements in SCC 30.34A.040(2), as three buildings in the setback area in the Urban Plaza are not scaled down and limited in building height to a height that represents half the distance to the adjacent residential area.

With the revised application, the Applicant has submitted a new variance application seeking to have the County waive the setback requirement as applied to its application. (Exhibit V-19). However, the Applicant's variance application does not satisfy any of the four decision criteria in SCC 30.43B.100 (See discussion of that variance beginning on page 20). Therefore, PDS has recommended that the Examiner deny the Applicant's variance request. Absent an approvable variance, the project remains in substantial conflict with SCC 30.34A.040(2) [2010].

Conclusions

Substantial Conflict with SCC 30.34A.040(2) [2010] *Building Heights and Setbacks* for continuing to propose tall buildings close to low-density zones.

Substantial Conflict with SCC 30.34A.040(2) [2010] *Building Heights and Setbacks* for failing to demonstrate compliance with the decision criteria for a Variance under SCC 30.43B.100 (11-101457-003-00 VAR)

II.D. Failure to Comply with Code Provisions Regarding Critical Areas, Including Geologically Hazardous Areas.

This section discusses the proposed **Sounder Station** and buildings in the **Urban Plaza** phase of the project with respect to the Applicant's failure to comply with code provisions regarding critical areas, including geologically hazardous areas. Discussion of similar code compliance issues regarding the

second access road appears under the heading “Failure to Document Feasibility and Code Compliance of Second Access Road” on page 30.

Sounder Station: The Applicant’s site plan submitted in December 2019 (Exhibit V-6) provided a location of the proposed Sounder Station that was internally consistent with other materials it submitted with the revised submittal. Previous application materials provided by the Applicant contained internal conflicts regarding the exact location of the proposed station, which prevented the County from reviewing and evaluating the proposed location against county codes. The location information provided by the Applicant discloses that the proposed Sounder Station would also be located in a landslide hazard area (Chapter 30.62B SCC). In addition, the revised application also allows the County to evaluate the location of the proposed station for impacts to wetland buffers and drainage (Chapters 30.62A & 30.63A SCC).

Urban Plaza: The Applicant’s site plan submitted in December 2019 (Exhibit V-6) provided an “Urban Plaza” phase at the entrance of the project that contains a large parking garage with four buildings on top of it. This includes some changes in building configurations from earlier versions of the project. As with earlier versions, the Urban Plaza is located in the landslide hazard area. Based on the most recent geotechnical analysis from the Applicant, the entire Urban Plaza is inside the landslide hazard area (see Exhibits C-24, V-16 and V-6 Sheet A-051). The revised application allows the County to evaluate landslide hazards (Chapter 30.62B SCC) and impacts to wetland buffers and drainage (Chapters 30.62A & 30.63A SCC) from the proposed Urban Plaza.

Landslide Hazard Analysis: With regard to the landslide hazard area regulations, the Applicant included a landslide hazard deviation request that included the proposed Sounder Station and the Urban Plaza. Exhibit V-15. Development in a landslide hazard area is prohibited unless an applicant satisfies the criteria for a landslide hazard deviation (SCC 30.62B.340 [2007]). A landslide hazard deviation requires an applicant to demonstrate: (1) that there is no alternative location for the proposed structure on the property; and (2) provide a geotechnical report that demonstrates that the proposed location and design would provide equal protection as locating the development outside of the landslide hazard area. The County’s Chief Engineering Officer reviewed and issued a decision on the landslide hazard deviation request. The Deviation Decision is included in the record as Exhibit X-2.

For the Sounder Station, the County determined in the Deviation Decision that the Applicant complied with the first criterion by demonstrating that there is no likely alternative to placement of the proposed station, or at least part of the station, in the landslide hazard area. However, the County concluded that the Applicant failed to satisfy the second criterion based in part on the fact that the Applicant’s engineering analysis did not demonstrate that the proposed location and design would provide equal protection as locating the station outside of the landslide hazard area. As a result, the Applicant’s landslide hazard deviation request was denied. (See Exhibit X-2 for details). Therefore, the Applicant’s proposed Sounder Station is in substantial conflict with geotechnical and landslide hazard requirements of Chapter 30.62B SCC.

With regard to the Urban Plaza, the County determined in the Deviation Decision that the Applicant failed to demonstrate compliance with both of the landslide hazard deviation criteria in SCC 30.62B.340 [2007]. First, the Applicant failed to demonstrate that there was no alternative location for the proposed buildings in the Urban Plaza phase. Second, the Applicant also failed to provide engineering analysis demonstrating equal protection as locating the buildings outside of the landslide hazard area. See Exhibit X-2 for details. Therefore, the Applicant's proposed buildings in the Urban Plaza phase are in substantial conflict with geotechnical and landslide hazard requirements of Chapter 30.62B SCC.

Stream and Wetland Critical Areas Analysis: The majority of the proposed Sounder Station would be located in the protective buffers for a large offsite sloping wetland and associated streams. (Exhibit V-6). These features terminate or are rerouted at the toe of slope that generally coincides with the edge of the rail-right-of-way. (Sheet A-051 (Overall Site Constraints) of Exhibit V-6 provided by the Applicant illustrates these features and configuration relative to the tracks). However, the Applicant has not evaluated whether the station on existing tracks would increase impacts to these wetland and stream buffers from present-day conditions in their updated Critical Areas Report (Exhibit V-10) as required by SCC 30.62A.130 [2007]. For example, there are potential impacts that a large platform would have on the continuity of the hyporheic zone underground. The hyporheic zone is the saturated area in the substrate below the tracks. It is an important function associated with critical area features that also provides valuable freshwater recharge to the marine shoreline environment. In conflict with SCC 30.62A.140 [2007], the Applicant has not provided any information on the impact to the functions and values of the proposed Sounder Station on the hyporheic zone (Exhibit V-10). The Applicant has also failed to provide adequate design and drainage information in Exhibit V-6 to determine the extent that the hyporheic zone could become blocked by the proposed station (SCC 30.62A.330(2)(b)(iii) [2007]). Any blockage would increase the likelihood of a landslide occurring at this location. As detailed in the Deviation Decision and summarized above, the application conflicts with wetland and stream protections in Chapter 30.62A SCC, geotechnical reporting and landslide hazard requirements in Chapter 30.62B SCC, and drainage requirements in Chapter 30.63A SCC.

The proposed Urban Plaza garage and buildings would be constructed by cutting into the hillside, shortening the length of Chevron Creek and impacting sloping wetlands and associated buffer areas (see Exhibit V-6, Sheet A-051). The Applicant has proposed to use Innovative Development Design (IDD) as a means to receive authorization for these impacts. While not code compliant, the Applicant has made progress in its IDD proposal and Snohomish County no longer identifies IDD as an issue of substantial conflict with code. (See details under the heading Innovative Development Design on page 43).

Conclusions

Substantial Conflict with SCC 30.62B.340 [2007]) *Landslide Hazard Areas* for proposing a Sounder Station in the landslide hazard area.

Substantial Conflict with SCC 30.62B.340 [2007] *Landslide Hazard Areas and* SCC 30.62B.320 *General Standards and Requirements for Erosion and Landslide Hazard Areas* for failing to satisfy the requirements for a landslide hazard area deviation for the Sounder Station.

Substantial Conflict with SCC 30.62B.340 [2007]) *Landslide Hazard Areas* for proposing the Urban Plaza buildings and associated development in the landslide hazard area.

Substantial Conflict with SCC 30.62B.340 [2007] *Landslide Hazard Areas and* SCC 30.62B.320 *General Standards and Requirements for Erosion and Landslide Hazard Areas* for failing to satisfy the requirements for a landslide hazard area deviation for the Urban Plaza buildings and associated development.

III. Snohomish County will not continue to rely on the following grounds for its recommendation of DENIAL Without EIS:

III.A. Buffer from Ordinary High Water Mark

Prior Decision of the Hearing Examiner: The Amended Decision of the Hearing Examiner issued August 3, 2018 (Exhibit R-4) includes conclusions C.71 to C.75 that address the location of residential buildings and marine protection buffers. The prescriptive requirement is that buildings must be at least 150 feet shoreward from the Ordinary High Water Mark (OHWM) (SCC 30.62A.320 (Table 2a)). In its prior applications, the Applicant did not provide information to justify a reduction in this setback nor did the Applicant measure from the OHWM. Instead, the Applicant measured from the Mean Higher High Mark (MHHM), which is not compliant with code. This resulted in four residential buildings being located too close to the OWHM.

Submittal of New Information by the Applicant: In its December 2019 Resubmittal, the Applicant provided changes to the site plan (Exhibit V-6) that now setback buildings from the OHWM rather than the MHHM. The Applicant still has not provided documentation that they have determined the OHWM in compliance with the Washington State Department of Ecology's guidance document titled Determining the Ordinary High Water Mark as required by SCC 30.44.300. However, while not approvable, this aspect of the application no longer appears to be a substantial conflict that would justify denial under without an EIS under SCC 30.61.220. This is because the OHWM shown on the plans appears to be in an approximately correct location. Further adjustments to the site plan based on additional refinement of the OHWM location following confirmation would likely be minor.

III.B. Innovative Development Design

Prior Decision of the Hearing Examiner: The Amended Decision of the Hearing Examiner issued August 3, 2018 (Exhibit R-4) includes conclusions C.76 to C.78 that address mitigation of impacts to streams and wetlands. In these conditions, the Hearing Examiner concluded that a substantial conflict existed

because the Applicant had not demonstrate in its Critical Areas Report (Exhibit C-30) that the Innovative Development Design (IDD) proposal would provide protection of critical area functions and values equivalent to that which would be obtained by applying the prescriptive measures in Chapter 30.62A SCC.

Submittal of New Information by the Applicant: In its December 2019 Resubmittal, the Applicant provided an updated Critical Areas Report (Exhibit V-10) that includes an expanded discussion of compliance with IDD requirements. This report now addresses most of the applicable functions and values, showing how equivalent protection is proposed. While still not approvable for three main reasons, this new report is a significant improvement in addressing the prior code conflicts regarding IDD.

The first issue regarding IDD and Exhibit V-10 is new. The December 2019 Resubmittal now proposes a water taxi; however, there is no mention of this in the updated Critical Areas Report. Since Snohomish County is separately recommending denial of the Shoreline Conditional Use permit for a water taxi, the absence of discussion of the water taxi in Exhibit V-10 is not an independent ground for substantial conflict. If the water taxi were somehow approved, then Applicant's failure to address the impacts of the water taxi in the Critical Areas Report would be a substantial conflict.

The second issue regarding IDD and Exhibit V-10 concerns significant conflicts between the Applicant's application materials with regard to critical areas along the second access road. Addressing the substantial conflicts with the road design would result in a need to update the Critical Areas Report to be consistent with said changes. The engineering and design of the second access road is a separate basis for denial but the County has determined that IDD proposal as to the second road at this time does not constitute a substantial conflict.

The third issue regarding IDD and Exhibit V-10 concerns the issue of daylighting Chevron Creek. Partial daylighting of the creek was part of the original 2011 application, revised in the 2017 resubmittal and then dropped from the 2018 version that was before the Hearing Examiner in Exhibit R-4. Now, the 2019 revised applications bring back the proposal of daylighting Chevron Creek. However, there are numerous conflicts between the architectural, civil, and utility plans in Exhibit V-6 and the proposal lacks important details on construction, and includes many specific conflicts with requirements in EDDS. While not approvable as submitted, the premise that daylighting Chevron Creek could provide an improvement to present-day habitat functions and values is not in dispute. It is not considered a substantial conflict.

In summary, the Applicant has improved the Innovative Development Design proposal. The main issue is that the revisions are not consistent with other aspects of the application materials that are the primary sources of remaining substantial conflicts with Snohomish County Code. Therefore, Snohomish County no longer sees IDD as an independent ground of substantial conflict.

IV Conclusion

A. Review of Individual Applications

Snohomish County recommends DENIAL of the following applications:

1. Variance Application - SCC 30.34A.040(1) – Building Height & High Capacity Transit for failure to demonstrate compliance with the decision criteria;
2. Variance Application - SCC 30.34A.040(2)(a) – Height Adjacent to Low Density Zones for failure to demonstrate compliance with the decision criteria; and
3. Shoreline Conditional Use Permit Application for failure to address or demonstrate compliance with the review criteria of SCC 30.44.140 & SCC 30.44.205.

B. Review of the Overall Project Under SCC 30.61.220, Denial Without an EIS

Snohomish County continues to recommend DENIAL of the overall project under SCC 30.61.220, Denial Without EIS, for the following reasons:

1. Failure to Document Feasibility and Code Compliance of Second Access Road;
2. Failure to Document Evidence for Access to High Capacity Transit for Building Heights Over 90 Feet & Failure to Demonstrate Compliance with the Decision Criteria for a Variance from SCC 30.34A.040(1) – Building Height & High Capacity Transit;
3. Failure to Provide Appropriate Building Setbacks for Tall Buildings from Lower Density Zones & Failure to Demonstrate Compliance with the Decision Criteria for a Variance from SCC 30.34A.040(2)(a) – Height Adjacent to Low Density Zones; and
4. Failure to Comply with Code Provisions Regarding Critical Areas, Including Geologically Hazardous Areas.

C. Snohomish County will not continue to rely on the following grounds for its recommendation of DENIAL of the overall project under SCC 30.61.220, Denial Without EIS, based on the following grounds:

1. Failure to Address the Buffer from the Ordinary High Water Mark; and
2. Failure to Comply with Critical Areas Regulations – Innovative Development Design.

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