On October 29, 2020, BSRE provided additional documentation in an attempt to support its variance request to allow 180-foot buildings despite the lack of high capacity transit. See Exhibit Z-8, a memorandum authored by Dan Seng, entitled "Height Variance Request Support Narrative."

Below, I provide rebuttal commentary to the narrative’s unsupported arguments about BSRE’s alleged need for 180-foot buildings.

My italicized comments show that a variance from the 90-foot height limit is not necessary for the preservation and enjoyment of the substantial property right claimed by BSRE. SCC 30.43B.100(2).

Falsehood #1: "The Urban Center Code sets density requirements based on maximum height and minimum FAR." (Exhibit Z-8, pg. 1.)

[Comment: The minimum density for urban center projects is prescribed by the minimum FAR rules of SCC 30.34A.030(1). Density requirements are not based on maximum height.]

Falsehood #2: "If conditions on the site prevent meeting that [minimum density] criteria, then they also prevent property development rights." (Exhibit Z-8, pg. 1.)

[Comment: The premise is false. Conditions on the site do not prevent BSRE from meeting the minimum FAR requirement. To claim successfully that site conditions preclude it from complying with the minimum FAR requirement, BSRE would need to have exhausted all other available options to comply with or get out of the minimum FAR requirement. BSRE has not done so, despite knowing that other options are available. “Preferred design is not a substantial property right.” (Hearing Examiner’s 2018 amended decision, footnote 102.)

As stated in a 9th Circuit takings case from earlier this year, Pakdel v. City and County of San Francisco, 952 F.3d 1157 (9th. Cir. 2020):

"a plaintiff must “meaningful[ly]” request and be denied a variance from the challenged regulation before bringing a regulatory takings claim. S. Pac. Transp. Co., 922 F.2d at 503. But "[t]he term ‘variance’ is not definitive or talismanic; if other types of permits or actions are available and could provide similar relief, they must be sought.” Id.

The principles articulated in Pakdel v. City and County of San Francisco apply here. BSRE should have sought a variance from the minimum FAR requirement—the requirement that BSRE alleges is causing the loss of a substantial property right.

And BSRE could have pursued other available options that would have provided similar relief. As discussed in my prior writings, there are many methods that BSRE could have employed to satisfy the minimum FAR requirement, without resorting to 180-foot buildings. See Exhibits W-70 (Nov. 5, 2020), W-49 (Oct. 21, 2020), W-25 (Feb. 4, 2020), W-22 (Dec. 17, 2019), and Exhibits I-439 (May
Falsehood #3: "To meet a minimum FAR of 1.0, within the 90 feet max building height, BSRE had three options." (Exhibit Z-8, pg. 1.)

[Comment: BSRE assumes that the minimum FAR is 1.0, when in fact the building-by-building weighted average method produces a lower minimum FAR.

Disingenuous: When BSRE submitted its revised plans in December 2019, BSRE knew that its 0.907 project FAR, with buildings no taller than 90 feet (Exhibit V-18, PDF pg. 5), satisfied the weighted average minimum FAR of 0.80 as it was calculated in 2018 (see Exhibit I-451 (May 24, 2018)). Yet, BSRE re-submitted its plans with buildings as tall as 180 feet, along with a disingenuous height variance request claiming that a variance was necessary to satisfy the minimum FAR. Based on documents in the record, BSRE knew in 2019 that it did not need a variance to satisfy the 0.80 minimum FAR calculated on a building-by-building weighted average basis. See Exhibits I-439 (May 21, 2018) and I-451 (May 24, 2018). Note: Using 2020 data, the minimum FAR today is 0.76. (Exhibit W-49.)

Also, BSRE had more than three options to satisfy the minimum FAR requirement, as explained in my prior writings, cited above, in the paragraph labeled Falsehood #2.

Falsehood #4: "[Option 1] Increase the footprint of buildings on the site. Increasing building footprint was not viable based on fire department access requirements, landslide hazard setbacks and shoreline buffers on the site." (Exhibit Z-8, pg. 1.)

[Comment: Preferred design is not a substantial property right. BSRE’s preference is not the standard to judge whether increasing building footprints is possible. The standard is whether it is possible to increase building footprints without violating Code requirements. BSRE failed to produce any evidence that it is impossible to increase building footprints without violating Code requirements. From the beginning (2011), BSRE was wed to its preferred urban center design which aimed to maximize views for future residents. See the snippet below, showing side-by-side comparisons of BSRE’s plans as submitted in 2011, 2017, 2018 and 2019. Aside from two sets of changes, the layout and the count of buildings is basically unchanged since 2011: (1) In 2018, changes were made to the north village road network, with adjustments to north village building footprints and elimination of one building; and (2) In 2019, footprints of 5 or 6 buildings in the south village were reduced to comply with shoreline buffer requirements, and some changes were made to the urban plaza buildings.

BSRE made no effort, ever, to increase building footprints to help satisfy the minimum FAR requirement, with buildings limited to 90 feet. BSRE could easily have increased building footprints, especially the footprints of the 13 towers immediately west of the BNSF tracks.

BSRE has no excuse. Open space requirements certainly do not limit its ability to increase building footprints. BSRE’s open space diagram and accompanying data at Exhibit V-6, PDF pg. 7, reveal that BSRE exceeds the open space requirements by a huge margin.]
Falsehood #5: "[Option 2] Raise the height of the buildings. Raising the height of all buildings to the maximum height limit did not achieve the minimum FAR as demonstrated by exhibit 2 of the variance request." (Exhibit Z-8, pg. 1.)

[Comment: The options available are not mutually exclusive. BSRE could have, and should have, both increased building footprints, and increased to 90 feet the height of the buildings shorter than 90 feet (including the Public Building immediately west of the BNSF tracks), with the exception of buildings within the shoreline buffer whose height is limited to 35 feet. BSRE could also have tried to add an additional building or two. BSRE could also have revised the site plan in more dramatic ways, changing the location of buildings, the size and design of buildings, and the road network. BSRE made no effort, ever, to do any of these things. Preferred design is not a substantial property right.]

Falsehood #6: "[Option 3] Reduce the minimum FAR. Though the Urban Center code provides opportunities to increase allowable FAR through bonuses and “Super Bonuses” up to 5.0, it does not provide options to reduce FAR below the minimum. The County does not have authority to grant changes to FAR by variance request.” (Exhibit Z-8, pg. 1.)

[Comment: It is a flagrant misrepresentation to state that the County "does not have authority to grant changes to [the minimum] FAR by variance request.” No provision in the County’s Code, including the Code section that authorizes variances (SCC 30.43B.100), precludes a variance from being granted. BSRE of course knows this. If there were such a provision, BSRE would have cited it.

In contrast, a variance cannot be granted to allow buildings taller than 90 feet without satisfying the high capacity transit requirement. As I’ve expressed before (Exhibit W-53), the Hearing Examiner lacks authority to approve an extra 90 feet unless the Hearing Examiner concludes that the SCC 30.34A.040(1) high capacity transit and necessity requirements have been satisfied. The Hearing Examiner cannot waive those requirements. The County Council legislatively limited the Hearing Examiner’s authority.
Falsehood #7: “The weighted calculation method for FAR has yet to be considered for this project. Until this cycle of review, the County has not challenged BSRE interpretation of the 1.0 minimum FAR for a mixed-use development.” (Exhibit Z-8, pg. 2.)

[Comment: Until now, the County had no reason to question BSRE’s assumption that the minimum FAR was 1.0. BSRE has consistently represented that its project FAR exceeds 1.0. Even its 2015 submittal, with buildings no taller than 90 feet, yielded a project FAR of 1.12. See Exhibit W-75.

In its December 2019 variance request (Exhibit V-18, PDF pg. 5), BSRE provided a drawing and data with buildings no taller than 90 feet, yielding a project FAR of 0.907. This was the first time, ever, that BSRE reported a project FAR less than its assumed minimum FAR of 1.0. What is striking is that BSRE claimed in December 2019 that it needed a height variance to satisfy the minimum FAR, when, based on documents in the record, BSRE knew in December 2019 that it did not need a variance to satisfy the minimum FAR of 0.80 calculated on a building-by-building weighted average basis. See Exhibits I-439 (May 21, 2018) and I-451 (May 24, 2018). Note: Using 2020 data, the minimum FAR today is 0.76. (Exhibit W-49.)

Now, BSRE says that even if it used the building-by-building weighted average method, it would not be able to satisfy the minimum FAR with buildings limited to 90 feet and no buildings were located east of the BNSF tracks. BSRE points to calculations done by the County’s consultant (see Exhibit X-1), showing a project FAR of 0.59 with buildings limited to 90 feet and no buildings east of the BNSF tracks. Obviously, 0.59 is less than today’s calculated minimum FAR of 0.76.

BSRE is wrong. As explained in Exhibit W-49, there are numerous options available to satisfy the minimum FAR if the project’s FAR with buildings limited to 90 feet and no buildings east of the BNSF tracks is 0.59, and the calculated minimum FAR is 0.76. For example, the project’s FAR can be increased by widening building footprints, increasing the height of the shortest buildings, adding a building or two, or redesigning the entire site plan to maximize building square footage in a Code compliant manner. Recall that BSRE’s preferred design is not a substantial property right.

Or, instead of trying to increase the project’s FAR, perhaps the simplest fix is to take steps to reduce the calculated minimum FAR to 0.59 or lower. By removing non-residential ground floor uses from the ten largest buildings currently considered mixed use, converting the buildings solely to residential use, the calculated minimum FAR drops to 0.56. For details, see the spreadsheet attached to Exhibit W-49. Or, BSRE could use a combination of the available options to achieve compliance with the minimum FAR requirement.

In sum, if the project’s FAR is 0.907 with buildings limited to 90 feet as BSRE claims, then the project satisfies the calculated minimum FAR of 0.76, so BSRE does not need its requested height variance. If instead, the project’s FAR is 0.59 with buildings limited to 90 feet and no buildings east of the BNSF tracks, per the County’s consultant’s calculations, then BSRE has multiple tools available to increase the project’s FAR and/or reduce the project’s minimum FAR, so that the project will satisfy the Code’s minimum FAR requirement. Whatever scenario is presented, BSRE does not need its requested height variance to satisfy the Code’s minimum FAR requirement. And don’t forget the simplest option of all: BSRE could have and should have requested a variance from the minimum FAR requirement.

Falsehood #8: "That left changing height by variance request as the most viable option. The Urban Center code provides an opportunity to increase height near ICT routes.” (Exhibit Z-8, pg. 2.)

[Comment: With numerous other options available to satisfy the minimum FAR, BSRE chose to seek a variance.

However, BSRE sought the wrong variance. BSRE should have sought a variance from the Code requirement that it alleges it is unable to comply with. It should have sought a variance from the Code's minimum FAR requirement. Instead it sought a height variance, which is not an available
option.

In SCC 30.34A.040(1), the County Council legislatively prescribed the only path for the Hearing Examiner to approve building heights taller than 90 feet: "an additional 90 feet may be approved [by the Hearing Examiner] 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 ...."

The corollary to the above-quoted text is that the Hearing Examiner may not approve an extra 90 feet unless the Hearing Examiner concludes that the SCC 30.34A.040(1) high capacity transit and necessity requirements have been satisfied. The Hearing Examiner lacks authority to approve a variance that would effectively waive the high capacity transit and necessity requirement.

Falsehood #9: "The County could conditionally approve the additional height variance request with the stipulation that HCT must be present prior to building permit approval." ( Exhibit Z-8, pg. 2.)

[Comment: BSRE continues to float the idea of conditionally approving 180-foot towers. BSRE mentions in its opening brief that the County "fails to recognize that a project can be approved conditionally." It made this argument in 2018 too, saying in its appeal to the County Council that the County "can condition the project on BSRE securing a high capacity transit station on or near the Site."

If the project FAR with buildings as tall as 180 feet just barely satisfies BSRE’s assumed minimum FAR of 1.0, as represented by BSRE in Exhibit V-18, then how will BSRE’s project comply with the minimum FAR requirement down the road if high capacity transit cannot be secured and the conditionally approved 180-foot buildings must be shortened to 90 feet? BSRE never answered this question. Perhaps the reason is that by explaining how it could satisfy the minimum FAR requirement down the road, BSRE would be effectively admitting that it has multiple options available to satisfy the minimum FAR with buildings no taller than 90 feet.

As I wrote on June 1, 2018 ( Exhibit Q-9):

"BSRE urges the Examiner to let it proceed with its plans for 180-foot towers, to give it more time to work things out with PDS and get an EIS done.

Consider how things might play out: Will the EIS present a hypothetical alternative within the EIS’s Urban Center alternative? Will the EIS describe BSRE’s applications as they currently stand, and then explain that until (if ever) Sound Transit commences a Sounder North commuter train service at Point Wells, none of the planned 20 towers taller than 90 feet will be built? And will the EIS explain, in detail, all of the changes to the proposed development that would occur under the hypothetical alternative if, for example, Sound Transit does not approve a train station at Point Wells, or approves a station but one is never built, or a station gets built but service (1) does not commence until after 1,000 units have been occupied, or (2) until after 1,500 units have been occupied, or (3) until after 2,000 units have been occupied, or (4) never commences service at Point Wells?

Will the site plan and architectural drawings be revised (by when)? Must the application materials be amended now, to address the hypotheticals? If for example, no buildings over 90 feet can get built, or only five such buildings get built (which ones?), will the height of the remaining buildings be shortened to produce a stepped-down design (but how can buildings be shortened if it is not known until after their construction has begun whether Sound Transit will ever serve the site)? How will plans for parking garages change to reflect the lower parking demand from fewer residents? If Sound Transit never approves a train station, what will be built where the train station was supposed to be? If buildings are chopped down to 90 feet, how exactly will the project meet its minimum FAR requirements? Wider buildings, which ones? More buildings, located where? Utilize a different method for calculating FAR? Variance request? (See six possible methods in Exhibit I-431)."

So many uncertainties with so many hypothetical scenarios. PDS looks at the plans as submitted, not hypotheticals. As submitted, with 180-foot towers, BSRE’s applications substantially conflict with SCC 30.34A.040(1), and must be denied.”

Mr. Examiner, please deny BSRE’s variance request and its applications to develop Point Wells as an urban center.

Thank you.

Tom McCormick

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