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VIA EMAIL: Paul.Maccready@co.snohomish.wa.us

February 12, 2020

Snohomish County
Planning and Development Services
Attn: Paul MacCready

RE: BSRE Point Wells Variances: 11101457002VAR and
11101457003VAR
BSRE Point Wells Shoreline Application: 11101457SHOR
BSRE Point Wells EDDS Deviations

Dear Mr. MacCready:

BSRE Point Wells (“BSRE”), through its agent Perkins & Will, has requested two (2) area variances from the 2011 Snohomish County Code, as it existed at the time BSRE's application vested to those development regulations (11101457002VAR and 11101457003VAR); filed new shoreline permits, a substantial development and a conditional use permit (11101457SHOR), and requests for deviations from the Snohomish County Engineering Development and Design Standards (EDDS).

For the reasons set both below, the City of Shoreline requests that Snohomish County deny the variances as they are simply an attempt to cherry pick the vested 2011 development regulations in order to circumvent certain provisions of the regulations that BSRE would rather not comply with. BSRE's variances should also be denied because BSRE failed to meet its burden to demonstrate, by a preponderance of the evidence, that its request complies with all four of the variance criterion.

The City also requests that Snohomish County consider the shoreline permit applications as new applications subject to current Shoreline Master Program policies and regulations and take into consideration BSRE's non-ownership in lands underlying the pier. Lastly, the deviations sought from the EDDS should also be denied for a variety of reasons that are set out below.

A. SNOHOMISH COUNTY VARIANCE APPROVAL CRITERIA

The requirements for variances are addressed in SCC Chapter 30.34B. A variance may be sought for "*any development standard* contained in subtitle 30.2 SCC,

chapters 30.31A through 30.31F SCC, chapter 30.34A SCC, chapter 30.42B SCC and chapter 30.42E SCC." *Id.*

SCC 30.43B.010 provides that a "variance is the mechanism by which *an adjustment is made to specific regulations* being applied to a particular piece of property." (emphasis added). SCC 30.34B.100 sets forth the basic decision criteria that is fairly common across Washington State. All four elements set out in the SCC must be satisfied in order for the County to approve a requested variance. BSRE has the burden of proving, by a preponderance of the evidence, that each criterion has been met and that the variance should be granted.¹ The variance criteria are:

- (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
- (4) The granting of the variance will not adversely affect the comprehensive plan.²

VARIANCE REQUEST NO. 1 – SCC 30.34A.040(1) TO MODIFY BUILDING HEIGHTS FROM A MAXIMUM OF 90 FEET TO A MAXIMUM OF 180 FEET

Applicable SCC Provisions

SCC 30.34A.040(1) [2010] provides, in relevant part:

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.180³ 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 pursuant to chapter 30.61 SCC that includes an analysis of the environmental impacts of the additional height on, at a minimum:

- (a) Aesthetics;
- (b) Light and glare;

¹ *Hoberg v. City of Bellevue*, 76 Wn. App. 357 (1994).

² In addition, SCC 30.43B.110 states that the variance runs with the land and compliance with the conditions in the original approval are the responsibility of the current property owner whether the original applicant or a successor

³ SCC 30.34A.180 provides the review process and decision criteria for permits and, for the purposes of SCC 30.34A.040(1), tasks the Hearing Examiner as the approval authority.

- (c) Noise;
- (d) Air quality; and
- (e) Transportation

SCC 30.34A.030 [2010] Floor Area Ratio states, in relevant part:

- (1) Floor to area ratios (FAR) in the UC zones are established in accordance with SCC Table 30.34A.030(1). Additional FAR is allowed in accordance with the bonuses set forth in SCC Table 30.34A.030(2) and SCC Table 30.34A.030(3) ...

The Point Wells project is classified as a “Mixed Use” project and, therefore, Table 30.34A.030(1), in relevant part, requires:

Use	Minimum	Maximum	Maximum allowable with bonus Table 30.34A.030(2)	Maximum allowable with super bonus Table 30.34A.030(3)
Mixed Use	1.0	2.0	3.0	5.0

Lastly, SCC 30.91F.445 [2010] defined FAR as:

The total building square footage (building area), measured to the inside fact of exterior walls, excluding areas below finished grade, space dedicated to parking, mechanical spaces, elevators and stair shafts, lobbies and commons spaces including atriums and space used for bonus features, divided by the site size square footage (site area).

$$\text{Floor Area Ratio} = (\text{building area}) / (\text{site area})$$

Stated Basis for Variance

BSRE explains that because of the unresolved high capacity interpretation it is requesting a variance from ninety (90) feet to allow for a maximum building height of 180 feet.⁴ The totality of BSRE’s basis for this variance to SCC 30.34A.040(1) is the Floor Area Ratio (FAR) requirement set out in SCC 30.34A.030.⁵

It must first be noted that BSRE's position for this variance appears to be based on a premise that its original vested application simply cannot meet the requirements of Urban Center regulations,

⁴ More specifically BSRE asserts that it is not waiving its position before the Court of Appeals in *BSRE Point Wells LP v. Snohomish County and City of Shoreline*, Case No. 80377-8-I, that it has satisfied SCC 30.34A.040(1) because its project has “proximity to a high capacity transit route or station” but because the Hearing Examiner and the County do not believe that the additional height is available they are now seeking this variance pending the outcome of the appeal to the Court of Appeals.

⁵ It must be noted Exhibit 3 to BSRE’s Height Variance Request erroneously states that the total square footage is 2,408,637 when it should be 2,679,298 with the result being a FAR of 1.09.

namely SCC 30.34A.040(1) or SCC 30.34A.030. It appears BSRE submitted an application that in hopes that it would be granted a *discretionary* approval to increase height above ninety (90) feet per SCC 30.34A.040(1) in order to be able to meet the minimum FAR requirements set out in SCC 30.34A.030. BSRE entire premise for its variance is premised on its assertion that because its application is vested to the Urban Center zone it is entitled to develop its project as proposed, even if the proposal is not able to meet those regulations. Stated another way, BSRE believes it must receive a variance to a code provision (height) because they can't comply with another required code provision (FAR). And, because the application was deemed vested to the regulations that require a minimum density, they assert that they are entitled to that minimum density, even if it requires the County granting them a variance to other vested development regulations (such as height). The law does not support BSRE's interpretation of vesting.

Of course, BSRE also does not explain why, it cannot meet the minimum FAR without the additional height, or why it is not seeking a variance to the FAR requirement if in fact it is unable to meet the minimum FAR. By BSRE's own numbers, without a height variance, the FAR is .90768, that is just .09232 less than SCC 30.34A.030's stated minimum FAR of 1.0. While Shoreline acknowledges the one of the main purposes of a minimum FAR is to promote a more urban form of development by preventing underbuilding or the creation of strip malls, the SCC does not preclude a variance request to the minimum FAR. BSRE, using all of the same argument it presents with this variance, could have sought a variance to the FAR itself, while still achieving a dense, urban environment. The project, even at a FAR of 0.9, would still meet SCC 30.91U.085's definition of Urban Center – a mix of high-density residential, office and retail uses with public and community facilities (albeit not within the one-half mile of high capacity transit).

Given that BSRE's variance is actually to the vested development regulations of SCC 30.34A.030, which does not "entitle" it to go above 90 feet, its attempt to receive a variance to allow it to bypass that provision and related requirements and restrictions, based on nothing more than desire to meet a separate FAR requirement, should be denied. Its assertion that the additional height is "necessary" or "desirable" seems to be premised on BSRE just wanting that height so as to maximum its economic return on the Point Wells site.

Variance Criteria Analysis

- A. *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;*

BSRE Response:

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.

City of Shoreline Response:

The City incorporates its comments above and additionally notes that all of the “limiting factors” cited by BSRE to support this first criterion existed at the time of its purchase of the property and at the time it requested the Urban Center land use designation and rezone for the property. Thus, in that light, BSRE created the need for the variance it now requests by seeking the Urban Center zoning designation be applied to its property. The fact that it now finds the developable portions of the property to be “too small” to accommodate desired structures that will also satisfy the FAR simply does not create “special circumstances.”⁶ Moreover, economic conditions and FAR, in and of itself, is not a special circumstance as contemplated by the variance criteria because neither is a site condition.

The railroad corridor cited by BSRE is also *not* part of the site’s acreage and, therefore, does not impact the developable nature of the site.⁷ Moreover, as was pointed out in testimony to the Hearing Examiner, even with these limitations the project is technically feasible without this variance. As Mr. Countryman testified, projects meet FAR through various mechanisms of site design, with wider buildings a common solution.

As to critical areas and setbacks, BSRE fails to demonstrate how these aspects actually provide a basis for granting the variance. BSRE also fails to demonstrate that other properties within Snohomish County, and more specifically within Urban Center zones, that also have setbacks and critical areas that reduce the amount of developable area, were granted variances to meet their minimum FAR. That is because they were not. Instead, as noted in the listing of Urban Centers below, those projects have accomplished compliance with the Urban Center regulations without the need for variances.

In support of the variance, BSRE utilizes the entirety of the Point Wells site, including undevelopable tidelands and submerged lands to calculate FAR.⁸ According to application

⁶ The City of Shoreline’s review of the Variance Application also reveals so many inconsistencies, lack of necessary detail, and typographical and mathematical errors that one cannot even verify its assertion related to FAR. For example, the applicant incorrectly identifies the Ordinary High-Water Mark which effects the sites buildable area, and building heights are not consistent across applications.

⁷ In its other variance request BSRE notes it doesn’t own the railroad corridor.

⁸ In a 2010 code interpretation, Snohomish County interpreted the “site area” denominator for FAR as the total gross area of the site. Shoreline asserts that not only was the interpretation based on different facts, such as the presence of submerged aquatic lands, but that vesting does not apply to administrative interpretations – it applies to land use controls (aka development regulations). In addition, SCC 30.91S.355 expressly excludes critical areas and required buffers for Urban Centers. Finally, Shoreline does not believe that BSRE’s calculation of FAR are accurate and finds it interesting that they are attempting to create their own “problem” by calculating the site area as large as they can

reactivation information, the Point Wells site encompasses approximately 61 acres, with the western portion including tidelands and submerged lands, resulting in approximately 45 acres for mixed-use development. According to BSRE's Exhibit 1 Height Variance Request Annotated Site Plan, only 29.04 acres within the western portion is developable because of the presence of tidelands and submerged lands and applicable Shoreline Management Act restrictions. Of course, by their very nature tidelands and submerged lands are undevelopable and, therefore, should not be included in the gross area of the site. In fact, areas of permanently submerged land (open water/aquatic) should not be considered land at all. Assuming that tidelands and submerged lands encompass 10 acres of the entire site, this would reduce the denominator for the FAR to 2,195,860 with the end result being a FAR of 1.09, within the SCC's range. Thus, aligning the denominator to non-aquatic lands is a more realistic approach. The County should not accept either BSRE's calculations or its false "entitlement" premise.

BSRE has failed to demonstrate that it has met Criterion No. 1. The "unique" or "special" circumstances do not preclude satisfying the 1.0 minimum FAR for the property. Buildings can be designed to achieve FAR while still respecting the critical areas, satisfying the height restriction of the Urban Center zone and the urban environment that zone seeks to create. In addition, if the site area excludes the submerged, aquatic lands, FAR is satisfied without any building being over 90 feet or the footprint of any proposed building expanding. Finally, 1.0 FAR is not a unique or special circumstance of the site but instead a regulation that they can seek a variance to.

B. 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;

BSRE Response:

BSRE asserts that because of the challenging conditions of the site noted in Criterion No. 1, in order to satisfy the minimum FAR of 1.0, buildings must be constructed greater than 90 feet in height. Without allowing an increased height, BSRE contends that the Point Wells site cannot be developed as an Urban Center. BSRE argues that if the County were not to allow the increase in height it will have "rendered the property undevelopable by designating it as an Urban Center under the zoning code and comprehensive plan." BSRE also emphasizes the "substantial property right" it claims it has due to its vesting and the no other property in the area has such a right - "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." Thus, according to BSRE the variance is needed to preserve this vested, substantial property right and developed in accordance with that right.

to get the FAR as low as they possible can so that they can then argue that must receive additional height to allow them to increase density arguing otherwise "substantial property rights" (minimum density) will be impacted.

City of Shoreline Response:

While the City has long asserted that the County's actions in designating and zoning Point Wells as an Urban Center was erroneous, it does not follow that BSRE's "vesting" to the code provisions under the Urban Center "entitles" it to develop, regardless of its ability to comply with SEPA or the vested to code provisions and regulations. It does not. Additionally, denying the requested variance would not render the property "undevelopable" as BSRE asserts. Without this height variance BSRE could still build an urban development if its design expanded the footprint of the proposed buildings or the building were designed with architectural features that increase square footage in upper levels while maintaining the footprint, or if that failed they could have sought a variance to drop below the minimum FAR, assuming they could meet all of the other development regulation requirements.

BSRE is vested to the right to have its application processed under the development regulations in place at the time its application vested, nothing more. It is not entitled to cherry pick the regulations by asserting that the minimum 1.0 FAR is a restriction they are "entitled" to but that they should not be required to comply with other vested code requirements restricting height, requiring SEPA review, or mandating proximity to "high capacity transit." BSRE did not vest to a "guarantee" that the County would find that it met all the regulations that it vested to, all the BSRE vested to was that the application would be processed utilizing those regulations in place at that time. Whether BSRE can comply with those regulations is simply a separate question. The fact that BSRE would like to be able to pursue its project under regulations that it cannot meet without a variance does not entitle it to a mandatory variance to maximize its development. A reduction in its profits does not equate to a need for a variance to height.

It also appears that BSRE would likely be the first development under the Urban Center regulations to receive a variance in order to meet the minimum FAR. The County has approved, albeit in different vicinities, several "Urban Centers" under the County's Urban Center regulations. In looking at the Snohomish County Hearing Examiner's website, while not an exhaustive review, no height variances were requested based on FAR due to site restricting conditions which, on many of those projects, included critical areas.

- 2012 – approval of Avalon Alderwood Urban Center, no variances/critical areas present
- 2012 – approval of the Oak Heights Urban Center, no variances/small Type IV wetland filled
- 2014 – approval of the Scriber Creek Apartments Urban Center, no variances/critical areas present
- 2015 and 2018 – approval of the Allegro at Ash Creek Urban Center Phase I and Phase II, no variances/critical areas present
- 2015 – approval of the Creekside Urban Center, no variances/critical areas present
- 2016 – approval of the Puget Park Urban Center, no variances/critical areas present
- 2017 – approval of the Avalon North Creek Apartments Urban Center, no variances/critical areas present

2018 – approval of the Greater Residence Apartments Urban Center, no variances/no critical areas

2019 – approval of the Ash Way at Pleasant Creek Urban Center, no variances/small Type IV wetland

2019 – approval of Ravenswood Urban Center, no variances/no critical areas

While vested rights are a substantial property right, this right does not include a right of maximum economic development which is what BSRE seeks.

In summary, BSRE has failed to demonstrate that it has satisfied Criterion No. 2. No other Urban Center has received a variance to achieve FAR; BSRE would be the only applicant to enjoy such a variance. Nor does the fact that an Urban Center requires a minimum FAR amount to an "entitlement" of the FAR as BSRE seems to suggest in its assertion that the minimum FAR requirement is a "substantial property right." The mere fact that BSRE may have vested to the designation of Urban Center in no way "entitles" them to develop the site at the minimum Urban Center FAR set out in SCC 30.34A.040. In addition, BSRE fails to explain how the additional height that it could "seek" (but is not entitled to) under the Urban Center designation "if it is near high-capacity transit" and subject to the requirements of SEPA, chapter 43.21C RCW, should now be granted to them as a "right" in the form of a variance to meet their FAR without regard to those requirements.

C. 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

BSRE Response:

BSRE states that its design proposed to locate taller buildings closer to the steep hillside of Woodway and low-rise buildings along the waterfront to minimum view interference. BSRE asserts that allowing greater height preserves publicly accessible and contiguous open space, a neighborhood amenity that improves public welfare and properties.

City of Shoreline Response:

BSRE does not demonstrate how it has met the requirements of SCC 30.34A.040(1) that requires SEPA review of impacts to adjacent properties prior to the County considering whether to allow (for those projects near high capacity transit) additional height.⁹ As the City has repeatedly asserted to Snohomish County and the Courts, the development of Point Wells as an Urban

⁹ Of course, the exercise of discretion for additional height is based on a documented finding that it is necessary or desirable but can only come into play for projects "located near a high capacity transit rout or station" and even then, only after the applicant prepares an EIS that addressed aesthetics, light and glare, noise, air quality, and transportation. Because BSRE's variance would simply grant the height without even considering these impacts under SEPA it would effectively, and illegally, remove these requirements from the regulations that they are vested to and required to comply with, thereby allowing BSRE to cherry pick what provisions they want to have applied to their application.

Center has a material impact to the City's transportation network and, potentially, its services. Granting of the variance amounts to another 200,000 square feet of commercial and/or residential spaces that would increase this impact.

As to view interference, based on Exhibit 3 of BSRE's Height Variance Request, while the design may "wedding cake" from east to west, allowing for internal views, the view corridor will still be distorted on a south to north direction, with the majority of buildings in the area west of the railroad corridor rising high above the ground and tall buildings bordering the entrance boulevard in this area. Of course, this design would impact views from Shoreline's Richmond Beach neighborhood.

BSRE's attempt to place the tall buildings in a manner that "minimizes" the additional impact to other properties in the vicinity of Point Wells does not negate that adjacent residential properties are still injured by buildings that are an additional ninety (90) feet tall, for a total of 180 feet. While the buildings may be located further away, any slight reduction of distance does not negate the injury in fact such a tall building. Nor does BSRE explain how the public welfare is served by 180-foot buildings located at the edge of the Puget Sound's shoreline with limited access.

In addition, the increase of building height could be detrimental during a natural disaster given the presence of liquefaction and steep slopes. The City is not asserting a building of 90 feet or less is per se safer during a natural disaster, but there would be less individuals that could potentially suffer harm than in the case of a building of greater than 90 feet.

Lastly, BSRE has provided no evidence that greater public accessibility and contiguous open space would result if some buildings have a wider base footprint so as to provide a community benefit. While a greater footprint would consume more square footage, nothing indicates that this would rise to the level of adversely impacting accessibility.

D. The granting of the variance will not adversely affect the comprehensive plan.

BSRE Response:

BSRE contends that the County's Comprehensive Plan is only served by allowing the variance because it provides for the development of Point Wells as an Urban Center, the designated land use classification for the site, so as to accommodate urban growth.

City of Shoreline Response:

This criterion gives rise to the question of whether an applicant vests to the goals and policies in a Comprehensive Plan or, as the Courts have recently articulated, only to the "land use controls," which a Comprehensive Plan is not considered to be such a control – but instead a blueprint vision. More importantly, the Comprehensive Plan isn't comprised of just the land use designation for Point Wells. The Comprehensive Plan is an integrated, internally consistent document that looks to the County as a whole. The Comprehensive Plan speaks to intergovernmental/interjurisdiction

coordination, which has long been frustrated by this development proposal, and would be further frustrated by granting a variance based on nothing more than the applicant's economic gain. In addition, the Comprehensive Plan speaks to urban development which provides for a mixture of uses in a well-designed development that is focused around transit. Thus, when looking at more than a single designation, the granting of the height increase negatively impacts the Comprehensive Plan as a whole since it would provide for more density in an area that is anything but focused on transit.

In conclusion, BSRE has the burden of demonstrating that all four (4) of the criterion have been satisfied before a variance could be granted. For the reasons set forth above, BSRE has also not met its burden of proof.

VARIANCE REQUEST NO. 2 – SCC 30.34A.040(2)(A) REGARDING BUILDING HEIGHTS AND SETBACK – A HEIGHT THAT REPRESENTS ONE TIMES THE SETBACK FROM ADJACENT ZONING LINE

This request applies only to the portion of the Point Wells site that is in the southeast portion of the property and on the western side of the BNSF railroad corridor. The southeast portion of the property is adjacent to property located in the Town of Woodway which is zoned R-14,500/UR. Snohomish County equates this zoning to the lower density zones listed in SCC 30.34A.040(2)(a).

Applicable SCC Provisions:

SCC 30.34A.040(2)(a) provides:

Buildings or portions of buildings that are located within 180 feet of adjacent R-9600, R-8400, R-7200, T or LDMMR 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 portion of the building is located from the adjacent R-9600, R-8400, R-7200, T or LDMMR zoning line (e.g. – a building or portion of a building that is 90 feet from R-9600, R-8400, R-7200, T or LDMMR zoning may not exceed 45 feet in height.

Variance Criteria Analysis:

- A. *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;*

BSRE Response:

The “panhandle” configuration of this portion of the property, along with its location between the railroad corridor and the critical areas on the hillside, form a narrow site condition that has to be reconciled in the design. Constricted width is 150 feet and this

needs to provide access to the site (residents, utilities, multimodal transportation, along with vertical clearance for a bridge crossing the railroad corridor. Approximately 75 feet of the 150 feet is required for the access road and sidewalks resulting in a development area restricted in both width and height.

City of Shoreline Response:

In this response, BSRE wants to extract the acreage east of the railroad corridor when looking for special circumstances. If that is the case, then these five (5) acres should also be extracted from its other variance request so as to be consistent. Regardless, the fact that this is a narrow entrance corridor, the fact that the width of the public rights-of-way will encompass half of the width is not a special circumstance. Many developers are required to adjust road location and amenities to accommodate building placement and the simple fact that BSRE's project seeks its primary entrance from the south/southwest is not a basis of a variance. The primary entrance could be from the Town of Woodway, the municipality which has an interlocal annexation agreement with Snohomish County in place.

Additionally, BSRE has failed to set forth any actual special circumstances as any development of properties in the vicinity of this site have or will also be limited by the presence of the same constraints on or adjacent to their properties related to the railroad and critical areas and buffers.

- B. 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;*

BSRE Response:

BSRE contends the unique set of site features denoted in its response to Criteria No. 1 create challenging conditions. These unique conditions are – the long proportions and narrow shape of this portion of the site and the site access – which limit development rights on this property. BSRE also emphasizes the “substantial property right” it has due to its vesting and the no other property in the area has such a right. Thus, according to BSRE the variance is needed to preserve this vested, substantial property right and to develop in accordance with that right.

City of Shoreline Response:

As BSRE noted, no other property in the same vicinity and zone has the same vested right. But this vested right applies to the property as a whole not the entrance point, and denial of this variance would not interfere with that right, as explained in Variance No. 1 above. Moreover, granting of the variance would adversely impact the preservation and enjoyment of the rights of adjacent property owners who would be impacted by tall buildings in close proximity to their property lines.

C. 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

BSRE Response:

BSRE states that the entry elevation of the buildings is at the low point of the site and down slope from properties to the east. The proposed building height of 35 feet will minimize view corridor impacts. In addition, BSRE notes that “community services such as EMT and site security” are proposed for one of the buildings in this area and will therefore provide safety and securing, enhancing the community.

City of Shoreline Response:

The City cannot dispute that the public welfare could be served by additional community services, however, how this variance, which seeks a 35 feet high building as opposed to a 17.5 feet high building, is relevant to the provision of those services is difficult to understand. Moreover, what BSRE (or a subsequent owner) may want to include as a use or service in a building is simply not a relevant factor to be considered for a setback or height variance request in relation to the public welfare.in relation to the setback.

Nor does BSRE provide an analysis of how the requested height, 35 ft. impacts views of Puget Sound from the properties in the adjacent lower density zoning classification in comparison to abiding by the required 17.5 ft. height maximum. Therefore, it is unclear to what degree the properties in the vicinity of the proposed 35 ft. Upper Plaza Buildings 1 and 2 will be impacted by loss of valuable Puget Sound views if this variance is approved. It is certain that the doubling of height and the close proximity of these buildings will impact surrounding properties’ view corridors. While these properties may be developed at a low density, BSRE has failed to demonstrate how the views they have enjoyed for years will not be adversely impacted.

D. The granting of the variance will not adversely affect the comprehensive plan.

BSRE Response:

BSRE contends the County’s Comprehensive Plan would not be impacted because the location of this portion of the development is in a key position and enhances safety and transit connections for the surrounding neighborhood. In addition, BSRE contends the 35-foot height is appropriate for this area.

City of Shoreline Response:

The County’s Comprehensive Plan does not address setbacks. Moreover, the City fails to understand BSRE’s statement regarding key position, safety, and transit connections in relationship to the comprehensive plan, without citing a single goal or objective, or how being

appropriate for the area relates as well. Moreover, what is the “surrounding neighborhood” that this enhances transit connections for or to? Surely not the City’s Richmond Beach neighborhood or the Town of Woodway as there is no transit to access.

In conclusion, BSRE has the burden of demonstrating that all four (4) of the criterion have been satisfied before a variance could be granted. For the reasons set forth above, BSRE has not met its burden of proof.

B. SHORELINE DEVELOPMENT AND CONDITIONAL USE APPLICATIONS

In 2011, as part of its application package for the Point Wells Urban Center, BSRE sought a shoreline management substantial development permit (SSDP 11-101461 SM) due to application of the jurisdictional boundaries of the Shoreline Master Program (SCC Chapter 30.67). At the time of the Hearing Examiner’s decision, two shoreline environments are denoted as being impacted - Urban Environment and Conservancy Environment. The original SSDP application sought reconstruction/realignment of an existing seawall, creation of an open water conveyance channel and nearshore habitat and construction of an esplanade and public plazas in the Urban Environment, and renovation of an existing pier for commercial purposes in the Conservancy Environment. In its project proposal, BSRE desired to develop the pier with retail shops, restaurants, and rental facilities for water sports/uses. During the course of the public hearing process, BSRE also proposed to utilize the pier for a water taxi to transport residents to Edmonds for transfer to high capacity.

The original SSDP application was terminated by the Hearing Examiner in the August 2018 decision that was the subject of BSRE’s LUPA to the King County Superior Court, which resulted in the ability for BSRE to re-activate its development applications. In the Hearing Examiner’s decision, not only was the question of the location of Ordinary High-Water Mark at issue but also the need for a Shoreline Conditional Use Permit (SCUP) for the commercial activities; BSRE had not applied for a SCUP. BSRE did not appeal the termination of the SSDP to the Shoreline Hearings Board as required by RCW 90.58.180 and SCC 30.67, thus that application was not within the Superior Court’s jurisdiction.

With its reactivation resubmittal, BSRE continues to seek a SSDP but now, for the first time, seeks a SCUP, and adds the possible use of a water taxi from the reconstructed pier. Given the failure of BSRE to appeal the original SSDP it should not be considered as part of the permit reactivation. Thus, BSRE’s shoreline development and activities sought under a new SSDP and a new SCUP are not vested to the County’s Shoreline Regulations in effect in 2011, but instead to those in effect at the time of complete application submittal. The County’s Shoreline Master Program was last amended by Ordinance 19-020 which became effective October 14, 2019.

Point Wells is largely designated as an Urban Shoreline Environment, including the pier built on State of Washington-owned tidelands and leased to BSRE under an Aquatic Land Lease between the State and Chevron USA Inc. (which permits commercial ship/barge berthing, requires any construction or alteration to be approved by the State, and for which the transfer to BSRE was

purportedly authorized), and abuts the Aquatic Shoreline Environment. In the Shoreline Narrative attached to the resubmittal, it speaks to the Urban Environment but does not rely on the policies and regulations currently in effect; it appears to rely on those that have since been repealed and replaced. Similarly, the Critical Areas Report (December 2019) still speaks to the old designations. Nor can the City find anything in the reactivation resubmittal materials that addresses current policies and regulations for the shoreline environment or responds to the review criteria for a SCUP as set forth in SCC 30.44.140, or how it even complies with the requirements for complete application and processing in SCC Chapter 30.44. In addition, the City finds no information about authorization to utilize the pier as BSRE proposes, including for water taxi service.

Given that lack of information provided in relationship to shoreline development activities and, for that matter, a discussion of the process and procedures for development of water taxi service, the City is unable to respond to what should be considered an incomplete application that provides no substantive analysis. Due to this and for the reasons noted above, the City requests that the County consider the SSDP and SCUP as new shoreline permit applications, subject to current shoreline policies and regulations, requiring the submittal of new permit fees, and supported by an analysis that addresses applicable criteria, including those for a conditional use.

C. EDDS DEVIATION REQUEST

While not specifically denoted in Notice of Application, the reactivation submittal materials available on-line include deviation requests as provided in EDDS 1-05 [2010]. The process for obtaining approval to vary from the EDDS is a deviation. Deviations are granted or denied by the County Engineer after review and recommendation by appropriate staff to the County Engineer. The County Engineer is the final authority on all EDDS deviation requests. Each deviation requires its own review process and demonstrate compliance with the following criteria:

- Deviation will achieve the intent of the design standards;
- Deviation will not adversely affect safety or operations;
- Deviation will provide substantially equivalent environmental protection;
- Deviation will not adversely affect maintenance and its associated costs; and
- Deviation will not adversely affect aesthetic appearance.
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The City wishes to provide the following comments on BSRE's Deviation Requests.

DEVIATION REQUEST NO. 1 – PUBLIC ROADS

BSRE seeks a deviation request in relationship to the requirement for public roads from the following:

SCC 30.41B.200 Design standards – Short Subdivisions
SCC 30.24.060 Public and Private Roads
SCC 30.34A.080 Circulation and Access

EDDS 3-050 Typical Non-Arterial Road – Urban Areas
EDDS 3-065 Road Standards – Non Arterials (Urban)

First, it must be noted that the EDDS Deviation Request application specifically states that a deviation shall not be used to modify or waive a requirement of SCC Chapter 30.24 Roads and Access. Yet, BSRE includes SCC 30.24.060 in its listing of standards proposed for deviation. Nor should BSRE be permitted to utilize the deviation process to seek a variance from SCC 30.41B.200, a development regulation and not an EDDS standard. Variances and deviations request have different process. For these reasons and the reasons set forth below, Snohomish County should deny this deviation request.

Although it is unclear as to which version of the EDDS the request applies to, using either the current version or the former 2010 version, BSRE's application does not specifically set forth the modifications sought for the standard drawings found in EDDS 3-050 and 3-065 and should therefore be rejected. BSRE's proposal is for Snohomish County to simply defer to BSRE, giving it complete discretion to design the project's public access and circulation and to ignore compliance with applicable regulations and EDDS provisions. Allowing BSRE to determine what is best for public safety and welfare as part of its project design would be contrary to the SCC, not in accordance with law, and an abuse of discretion. The requested deviation is simply too broad and if granted, would remove the County's ability to require safe access and circulation on the Point Wells site.

It should also be noted that based on a review of other submittal items, not referenced in BSRE's EDDS Deviation Request, the proposed revisions to the secondary access still fail to "document the feasibility and Code compliance of Second Access Road" cited in the April 17, 2018 Snohomish County Staff Recommendation to deny permits that was accepted by the Snohomish County Hearing Examiner in the August 2018 decision.

DEVIATION REQUEST NO. 2 - SCC 30.62B.340 LANDSLIDE HAZARD AREAS

SCC 30.62B.340(2) provides, in relevant part:

(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 setbacks provide protection which is equal to that provided by the standard minimum setbacks; and
 - (B) the proposal meets the requirements of SCC 30.62B.320.

BSRE fails to demonstrate that there is no alternative location for the four (4) Urban Plaza buildings proposed for construction below the landslide hazard areas. BSRE merely states that minimum project density could not be achieved without the four (4) Upper Plaza buildings as proposed. Of course, as noted in the City's comments to the variance requests, BSRE could seek a variance to the minimum FAR requirements but has chosen not to. The safety of the residents, customers, guests, and even the first responders should preclude this deviation to locate below the landslide hazard area as provided for in SCC 30.62B.340.

Moreover, BSRE's geotechnical report asserts that the alternative setbacks provide protection which is equal to that provided by the standard minimum setback. However, if BSRE were required to adhere to SCC 30.62B.320 then the proposed Urban Plaza would not be permitted. With regards to SCC 30.62B.320(1)(a)(iii), perhaps we missed the section regarding permanent drainage solutions for the secondary access retaining wall and the soldier pile tieback wall west of the Urban Plaza or how permanent drainage for these walls be achieved? If not, such information is lacking.

The City also disagrees with Hart Crowser's statement in the December 12, 2019 letter regarding "Landslide Area Deviation Request Based on Preliminary Analysis" about meeting SCC 30.62B.320(b)(i). The installation of the second access road and retaining walls will not result in property damage, death or injury, but allowing a 16-story residential tower and three public safety buildings within the required setbacks would create a situation where the possibility for property damage, death or injury is greatly increased.

Based on the information in Section 7 Project Impacts from the December 2019 BSRE Point Wells, LP Redevelopment Project Critical Areas Report, the City has questions regarding BSRE's ability to meet SCC 30.62B.320(b)(iv). The Report indicates that many species of fish and marine mammals and associated habitat may be affected during and post construction of the Point Wells project. Deep pile columns have been cited in the geotechnical documents as the main solution to constructing in high liquefaction areas (which are mapped throughout the project site). The noise and vibration associated with pile driving are cited as impacts to address. This is a great concern considering the length of time it will take to construct this project and the reliance of the project on pile driven deep foundation stone columns. The does not agree with BSRE that the project "shall not" adversely impact wetlands, fish and wildlife habitat conservation areas or their buffers. An assertion by the consultant that the project "may affect but is not likely" is not the same as it "shall not."

BSRE's requested deviations from the Landslide Hazard Area regulations for the Secondary Access Road and the Urban Plaza buildings do not meet the required conditions in SCC 30.62B.340 and should therefore be denied.

D. CONCLUSION

For the reasons set forth above, the City of Shoreline requests that Snohomish County:

1. Deny Variance Request No. 1 and Variance Request No. 2
2. Process shoreline applications under current policies and regulations
3. Deny Deviation Request No. 1 and Deviation Request No. 2

Thank you for consideration of the City of Shoreline comments.

Sincerely,



Rachael Markle
Director of Planning and Community Services

Cc: Debbie Tarry, City Manager
Tricia Juhnke, City Engineer
Margaret King, City Attorney