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No. 74464-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

PUGET SOUND ENERGY, INC.,

Appellant/Cross-Respondent,

v.

EAST BELLEVUE COMMUNITY COUNCIL,

Respondent/Cross-Appellant, and

CITY OF BELLEVUE,

Respondents.

PUGET SOUND ENERGY, INC.'S OPENING BRIEF

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I. INTRODUCTION

Puget Sound Energy (“PSE”) appeals the King County Superior Court’s decision, which granted the East Bellevue Community Council (“EBCC”) virtually unlimited adjudicative powers to disapprove conditional use permits (“CUPs”) within its territory without any regard to the controlling law or the evidence developed by the fact-finder. While EBCC may opt out of Bellevue’s land use code, it has no power to write its own land use code or deny permits based on criteria not found in the existing Bellevue City Code or Comprehensive Plan. RCW 35.14.040. EBCC Resolution 550 exceeds the authority granted by RCW 35.14.040 and should be vacated.

II. ASSIGNMENTS OF ERROR

- 1) The trial court erred in entering the Findings of Fact and Conclusions of Law upholding the EBCC’s disapproval of PSE’s CUP Application, CP 489-90.
- 2) The trial court erred in dismissing PSE’s Land Use Petition, CP 489-90.

III. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Whether, under RCW 36.70C.130(1)(e), EBCC’s Resolution No. 550 exceeded the authority granted to it by RCW 35.14.040.

Assignments of Error 1 and 2.

2. Whether, under RCW 36.70C.130(1)(b) and (d), EBCC’s Resolution No. 550 is a clearly erroneous application of the law pertaining

to the electrical utility CUPs in the City of Bellevue given the facts found by the Hearing Examiner.

Assignments of Error 1 and 2.

3. Whether, under RCW 36.70C.130(1)(c), EBCC's Resolution No. 550 is supported by substantial evidence in light of the entire record.

Assignments of Error 1 and 2.

IV. STATEMENT OF THE CASE

The City of Bellevue is the fifth fastest-growing city in Washington.¹ PSE has a statutory duty to supply Bellevue residents and businesses with safe and reliable power. RCW 80.28.010(2). PSE does this by connecting high-voltage transmission lines to substations, where voltage is reduced. AR 81.² Distribution lines from the substations carry power to homes and businesses. *Id.* If a transmission line is connected to a single substation, power will stop if the line needs maintenance or is taken down, *e.g.*, by a falling tree. *See, e.g.*, AR 1830. The industry addresses this problem by “looping” substations so that each substation is connected to at least two transmission lines. *Id.*

¹ State of Washington, 2015 Population Trends at 18 (Sept. 2015), <http://ofm.wa.gov/pop/april1/poptrends.pdf>.

² The Administrative Record in this case is referenced using the pagination (“AR”) used by the trial court. Designated Clerks Papers are referenced using (“CP”). The official record of proceedings is designated (“RP”).

Three of Bellevue's electrical substations (College, Lake Hills, and Phantom Lake) are each served by a single transmission line. AR 1768-1959; AR 1829-31. After studying this deficiency and extensive public input, PSE proposed to loop the Lake Hills substation with the Phantom Lake substation. *See* AR 780-82; AR 2168 at ¶ 3; AR 2176 at ¶ 27. In 2011, PSE applied for a land use conditional use permit ("CUP") and shoreline conditional use permit ("SCUP") to construct a new 2.89 mile, 115 kV overhead transmission line connecting the Lake Hills and the Phantom Lake substations ("Lake Hills Reliability Project"). AR 1722-1959. The proposed line runs along NE 8th Avenue and 148th Avenue NE ("148th Corridor"), the busiest streets among the alternatives considered, thereby eliminating or minimizing impacts to residential neighborhoods. *See, e.g.*, AR 2172 at ¶ 9. Because many of the trees proposed for removal along 148th Avenue NE are near the end of their lives, the new line maximizes opportunities for mitigation. AR 679 (criteria for route selection); AR 1729-35 (alternative siting analysis).

The City of Bellevue reviewed PSE's CUP application under the State Environmental Policy Act ("SEPA"), chapter 43.21C RCW, and issued a preliminary Mitigated Determination of Non-Significance ("MDNS"). AR 2161-62. The final MDNS was issued after public comment. *Id.* It was not appealed. *Id.* In October 2014, Bellevue's

Development Services Department (“DSD”) recommended approval of PSE’s CUP Application and an associated shoreline conditional use permit (“SCUP”), if PSE agreed to pay more than \$856,000 in mitigation and accepted 17 categories of conditions. AR 76-285.

Pursuant to the City land use code, PSE’s SCUP and CUP applications underwent an open-record hearing before a Hearing Examiner on November 20, 2014. *See* LUC 20.35.327.B; LUC 20.35.340.A; AR 2158-93 (Hearing Examiner’s Report). The Hearing Examiner found that PSE had met its burden of showing that a preponderance of the evidence supported approval of its applications under the land use code’s decision criteria for electrical utilities, LUC 20.30B.140 and LUC 20.20.255, and recommended approval by the City Council with conditions. AR 2158-93. The Hearing Examiner found, *inter alia*, that:

- A “loop” connecting the two under-utilized substations was needed to improve reliability. With a single line, an entire service area can have a temporary power outage.
- The City’s independent consultants drafted the Exponent Electrical Reliability Study, Phase 2 Report (“Electrical Reliability Report”), which specifically recommends additional transmission line feeds to the Phantom Lake and Lake Hills substations.
- PSE initially considered more than three potential routes and ultimately thoroughly reviewed three routes: 148th, 156th, and 164th.

- The 148th route would run along the busiest street, have the least impact on residential neighborhoods, present the best opportunities for mitigation, and be most consistent with preferred locations in LUC 20.20.255.D.2.d.
- The final project will present a “less industrial design presence.”
- The project will require removal of a substantial amount of trees and shrubs. MDNS includes a robust replanting and mitigation plan.
- Undergrounding would cost about 10 times more than an overhead line, and the Hearing Examiner lacked the authority to mandate the extraordinary financial participation and commitment it would require.

AR 2158-93 at ¶¶ 3-13, 31-32 (internal quotation marks omitted). In 2015, the City Council passed Ordinance No. 6226 approving the Hearing Examiner’s recommendations to approve PSE’s CUP and SCUP applications, with conditions. AR 2629-40.

Portions of the proposed new line are located the EBCC’s territory. The EBCC’s authorizing statute, RCW 35.14.040, provides for the EBCC’s review of CUPs within its jurisdiction. On June 24, 2015, the EBCC adopted Resolution No. 550, rejecting the Hearing Examiner’s findings and disapproving the Bellevue City Council’s approval. AR 3016-21. Resolution No. 550 questioned the operational need for the project, maintained that the project was inconsistent with Bellevue’s image as a “City in a Park” and the designation of 148th Avenue as an

“Urban Boulevard,” and faulted the Hearing Examiner for failing to consider other routes or undergrounding as alternatives to the proposed new overhead line. *Id.*

PSE brought a Land Use Petition Act (“LUPA”) appeal challenging EBCC’s Resolution No. 550. CP 1-75. The King County Superior Court ruled that the EBCC lacked jurisdiction to review the SCUP and remanded Resolution No. 550 to the EBCC with directions to remove references to the SCUP. CP 687. The Court then affirmed the EBCC’s disapproval of PSE’s CUP and dismissed PSE’s LUPA petition. CP 486-90. The court concluded that under RCW 35.14.040, the EBCC had near-absolute authority “to approve or disapprove of a conditional use permit for a project within its jurisdiction.” CP 489-90. The court referred to this extraordinary authority as a “byproduct of the unusual government structure that exists.” *Id.* at 490. The court also ruled that there was substantial evidence in the record to support EBCC’s decision on “mixed questions of fact, law and policy,” including the question of the CUP’s “consistency with the Comprehensive Plan, its compatibility with the immediate vicinity and whether the proposed electrical utility would succeed in providing needed reliability.” *Id.*

This appeal followed. It was consolidated with the EBCC's appeal of the dismissal of EBCC's disapproval of the SCUP on jurisdictional grounds.

V. ARGUMENT

A. Relevant Standards

1. LUPA Standards of Review

Judicial review of land use decisions is governed by the LUPA, chapter 36.70C RCW. The Superior Court exercises appellate jurisdiction when reviewing a land use decision. *Sunderland Family Treatment Servs. v. City of Pasco*, 107 Wn. App. 109, 117, 26 P.3d 955 (2001). On appeal, the Court of Appeals "stands in the same position as the superior court" and applies the LUPA standards of review to the underlying land-use decision. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). The Court of Appeals may grant relief from a land use decision if the petitioner carries its burden of establishing one or more of the six standards in RCW 36.70C.130(1)(a)-(f).

The standards relevant here are:

- (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
- (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

- (d) The land use decision is a clearly erroneous application of the law to the facts; and
- (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision.

RCW 36.70C.130(1)(b)-(e).

Under the first standard, the Court of Appeals reviews *de novo* any legal issues, while according deference to the local agency with expertise, which in this case is the Hearing Examiner and Bellevue City Council. RCW 36.70C.130(1)(b). Under the second standard, the Court of Appeals defers to the fact-findings of the highest forum below that exercised its fact-finding authority, which in this case is the Hearing Examiner. Under the third standard, the Court of Appeals applies the law directly to the facts, and overturns the land use decision if it reaches “a definite and firm conviction that the decision maker committed a mistake.” *Chinn v. City of Spokane*, 173 Wn. App. 89, 95, 293 P.3d 401 (2013) (internal quotation marks and citations omitted).

Evidence and any inferences are viewed “in a light most favorable to the party that prevailed in the highest forum exercising fact-finding authority.” *Lanzee G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 415, 225 P.3d 448 (2010) (citing *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001)). “On review of a land use decision that presents mixed questions of law and fact, [the Court of

Appeals] determine[s] the law independently and appl[ies] it to the facts as found by the hearing examiner.” *Miller v. City of Bainbridge Island*, 111 Wn. App. 152, 161, 43 P.3d 1250 (2002).

2. CUP Criteria

CUPs are required for activities that, although “allowable in all or some of specified zoning categories, ... due to their particular size or impact potential, require special siting considerations.” 5 Wash. State Bar Ass’n, *Real Property Deskbook* § 8.4(2)(a), at 8-11 (2009). CUPs are available only where the regulating authorities previously determined that a given use is permissible. *See id.* Authority to issue CUPs is limited by the standards set forth in the zoning ordinance. *Lund v. City of Tumwater*, 2 Wn. App. 750, 755, 472 P.2d 550 (1970); *Evergreen State Builders, Inc. v. Pierce County*, 9 Wn. App. 973, 977, 516 P.2d 775 (1973) (“[W]hile the Board of County Commissioners has the power to authorize a change in land use administratively via the unclassified use permit, that authority is limited to the specific uses and standards denominated in the pertinent zoning code section.”).

In Bellevue, these criteria must be met for issuance of a CUP:

- A. The conditional use is consistent with the Comprehensive Plan; and
- B. The design is compatible with and responds to the existing or intended character, appearance, quality of development and physical

characteristics of the subject property and immediate vicinity; and

....

- D. The conditional use will not be materially detrimental to uses or property in the immediate vicinity of the subject property....

LUC 20.30B.140.

Additional criteria apply to a CUP for electrical utility facilities:

- 3. The applicant shall demonstrate that an operational need exists that requires the location or expansion at the proposed site;
- 4. The applicant shall demonstrate that the proposed electrical utility facility improves reliability to the customers served and reliability of the system as a whole, as certified by the applicant's licensed engineer;
- 5. For proposals located on sensitive sites as referenced in Figure UT.5a of the Utility Element of the Comprehensive Plan, the applicant shall demonstrate:
 - a. Compliance with the alternative siting analysis requirements of subsection D of this section;
 - b. Where feasible, the preferred site alternative identified in subsection D.2.d of this section is located within the land use district requiring additional service and residential land use districts are avoided when the proposed new or expanded electrical utility facility serves a non-residential land use district;

LUC 20.20.255.E.

3. Statutory Powers of Community Councils

Whenever unincorporated territory is annexed by a city, a community municipal corporation (*i.e.*, “community council”) may be organized for all or part of the territory annexed. RCW 35.14.010, .020. Community councils ““have no inherent powers and possess only such powers as are expressly conferred by statute or implied as necessary in aid of those powers which have been expressly conferred.”” *Sammamish Cmty. Council v. City of Bellevue*, 108 Wn. App. 46, 49, 29 P.3d 728 (2001) (citation omitted). The powers of community councils in Washington are set forth in chapter 35.14 RCW. RCW 35.14.040 authorizes community councils to approve or disapprove the “adoption, approval, enactment, amendment, granting or authorization by the city council or commission of any ordinance or resolution applying to land, buildings or structures within any community council corporation” with respect to: (1) comprehensive plans; (2) zoning ordinances; (3) CUPs, special exceptions, or variances; (4) subdivision ordinances; (5) subdivision plats; or (6) planned unit developments. These powers include both legislative (*e.g.*, comprehensive plan approval) and adjudicatory (*e.g.*, CUP review) functions.

However, the legislature did not delegate independent rulemaking authority to community councils. *See* RCW 35.14.040-.050. Community

councils can only approve or disapprove rules already enacted by the city council. *Id.* In *City of Bellevue v. E. Bellevue Cmty. Council*, 138 Wn.2d 937, 983 P.2d 602 (1999), the Washington Supreme Court upheld EBCC’s disapproval of a rezone in a Crossroads subarea. The hearing examiner had recommended, and the City Council approved, a rezone “to the highest density allowed under density ranges designated in the comprehensive plan for the areas.” *Id.* at 941. The EBCC believed that lower densities within the range were more appropriate and disapproved the rezone. The Supreme Court held:

RCW 35.14.040 provides a community council with authority to independently determine whether to approve or disapprove land use legislation affecting territory within its jurisdiction, in keeping with the Legislature’s intent to allow local level decision-making. Therefore, ***where there is room for exercise of discretion*** as to whether particular land use regulations should be applied to property within the municipal corporation, the community council must be allowed to exercise that discretion to carry out the legislative intent underlying RCW 35.14.040.

Id. at 945 (emphasis added) (with respect to legislation rather than permits).

In subsequent cases Washington courts further clarified the scope of community council authority. *See City of Bellevue v. E. Bellevue Cmty. Mun. Corp.*, 119 Wn. App. 405, 410, 81 P.3d 148 (2003) (community councils cannot appeal the application of ordinances outside their

geographic area; thus “East Bellevue cannot bring actions ... in superior court that do not fall within its explicit grant of authority”); *see also Sammamish Cmty. Mun. Corp. v. City of Bellevue*, 107 Wn. App. 686, 691, 27 P.3d 684 (2001) (RCW 35.14.030 indicates legislative intent “that the City—not the community councils—control funding for the community councils and thus, is empowered to determine the councils’ necessary expenses”); *Sammamish Cmty. Mun. Corp.*, 108 Wn. App. 46 at 57-58 (some ordinances—such as an ordinance concerning the calculation of traffic volume and capacity—are not “zoning ordinances” community councils can disapprove; nor do community councils have authority to approve or disapprove land use applications outside their geographic areas).

B. The Trial Court Erred in Upholding EBCC’s Disapproval of PSE’s CUP³

The trial court failed to recognize that EBCC’s disapproval of PSE’s CUP was based on three fundamental errors: (1) RCW 35.14.040 grants community councils unbounded authority to “approve or disapprove” a CUP based on criteria *not found* in Bellevue’s Comprehensive Plan or land use code; (2) an “Urban Boulevard”

³ PSE does not dispute Resolution No. 550, Exhibit A, paragraph 7. Paragraphs 1 and 2 provide EBCC commentary but lack a legal argument. PSE reserves the right to respond to any argument in EBCC’s response that is based on paragraphs 1, 2, or 7.

designation provided a legal basis for prohibiting the installation of transmission lines along the 148th Corridor; and (3) the EBCC disapproval power allowed it to ignore substantial record evidence and undisputed findings by the Hearing Examiner. This is not the law.

A community council's delegated power to "approve or disapprove" local decisions within its jurisdiction is not absolute. It does not include the power to disregard the applicable law or write new code during a permit adjudication. *See City of Bellevue v. EBCC*, 138 Wn.2d at 945 (the legislative intent was to delegate to community councils decision-making authority on discretionary matters). Following local land use law is not a matter of discretion. *See Lund*, 2 Wn. App. at 755; *Evergreen State Builders, Inc.*, 9 Wn. App. at 977. In passing Resolution No. 550, the EBCC was not free to disregard it, rewrite the Comprehensive Plan and land use code, or ignore the facts (including undisputed facts) established by the Hearing Examiner. Because Resolution No. 550 suffered from all of these defects, the trial court's order approving it was erroneous and should be reversed.

1. Resolution No. 550 Exceeds EBCC's Authority

In Bellevue, "Electrical Facilities are allowed in all zones with a Conditional Use Permit," including those zones along PSE's proposed route. *See AR 64*; LUC 20.10.440 (utility facilities are permitted as a

conditional use in all zones). The Bellevue land use code authorizes PSE to construct overhead utility lines if the conditional use criteria are met. Yet, Resolution No. 550 ***prohibits*** transmission lines along the 148th corridor and requires PSE to meet CUP criteria not found in the land use code. *See* AR 3018-21 at ¶¶ 5, 9, 11, 14, 15. The EBCC was without authority to do so.

Under the Washington Growth Management Act (“GMA”), chapter 36.70A RCW, the EBCC can neither prohibit a permissible use nor add land use criteria during a permit review. The GMA provides that “[f]undamental land use planning decisions made in comprehensive plans and development regulations should not be revisited at the project level. During project review, the local government or any subsequent reviewing body shall not reexamine alternatives to or hear appeals on [select] planning decisions” including the “[t]ype of land use permitted at the site, including uses that may be allowed [as] conditional ... uses.” WAC 365-197-070(2), (3)(a); *see also* RCW 36.70B.030(3). In other words, the GMA prohibits the EBCC from legislating a prohibition on the construction of utilities along the 148th Corridor or new conditional use criteria during the adjudication of a permit.

The EBCC could not avoid this prohibition by labelling 148th Avenue NE an “Urban Boulevard.” *See, e.g.*, AR 3019-20 at ¶¶ 9, 10, 11.

“Urban boulevards” are not defined in Bellevue’s Comprehensive Plan or land use code. The Comprehensive Plan and the land use code nowhere say that transmission lines do not belong in “Urban Boulevards.” The EBCC’s claim that “[o]bviously, a major element of the Urban Boulevard is a lack of visible utilities, such as distribution and transmission wires” has no legal basis. AR 3019 at ¶ 9 (emphasis added); *see also id.* at ¶ 11 (referencing non-existent urban boulevard “criteria”).

By doing so, the EBCC effectively added, without following the procedures set forth in RCW 35.14.040 or LUC 20.35.450, a new provision to the Bellevue land use code, which currently *permits* the construction of transmission lines as a conditional use in all zones. LUC 20.10.440. The EBCC plainly lacks the power to impose this new prohibition within its geographic area, much less the power to do so without any rulemaking or public review. RCW 35.14.040-.050. The EBCC’s prohibition on utility facilities on boulevards exceeded EBCC’s authority.⁴

⁴ The EBCC’s prohibition on utility facilities on boulevards is also factually inaccurate. A transmission line already runs along 148th Avenue NE. AR 3019 at ¶ 9 (asserting no transmission lines); AR 55-7 (photographs of existing lines). In fact, boulevards throughout the City, including 104th Avenue NE, 116th Avenue NE, Bellevue Way SE, and NE Bel-Red Road, all house transmission lines while preserving boulevard aesthetics. *Compare* City of Bellevue Comprehensive Plan, Urban Design Element, “Urban Design Treatment: Boulevards and Intersections” Map *with* Map UT-6 (“Existing Electrical Facilities”) *available at* https://www.bellevuewa.gov/comprehensive_plan.htm.

In further violation of state law, Resolution No. 550 added no fewer than five CUP issuance criteria to LUC 20.30B.140 and 20.20.255.E. See AR 3018-20 at ¶ 5 (requiring an additional cost/benefit analysis), ¶ 9 (adding a prohibition on the construction of transmission lines along 148th Avenue NE), ¶ 11 (renewing scrutiny of the route proposed by PSE in its CUP Application), ¶ 14 (questioning route selection during project-level review), ¶ 15 (requiring analysis of the cost/feasibility of undergrounding during the project-level review). This exceeds the scope of EBCC's authority during a permit adjudication. See generally, *Brown v. City of Seattle*, 117 Wn. App. 781, 791, 72 P.3d 764 (2003), as corrected (Aug. 14, 2003) ("This court does not defer to an interpretation which conflicts with the language of the law."); *Culp v. City of Seattle*, 22 Wn. App. 618, 619, 590 P.2d 1288 (1979) ("A Board of Adjustment is only permitted to grant a conditional use permit in accordance with the guidelines set forth in the zoning ordinance.").

To illustrate, paragraph 15 states that the Hearing Examiner failed to analyze "the cost and/or feasibility of alternative sites/undergrounding" and further states that the Comprehensive Plan "provides that the City needs to approach conversion of distribution lines to underground." AR 3020. The Bellevue Comprehensive Plan promotes the undergrounding of *distribution* lines. With paragraph 15, the EBCC improperly added an

undergrounding requirement to *transmission* lines. See AR 1323; AR 1340-47. Moreover, the cost and/or feasibility of alternative sites and technologies is **not** a CUP issuance criteria. LUC 20.30B.140.A-E; LUC 20.20.255.E.1-5. Finally, the land use code prohibits the Hearing Examiner and EBCC from engaging in an alternatives analysis when adjudicating a CUP. See, e.g., WAC 365-197-070(2),(6) (“[D]uring project review, the local government or any subsequent reviewing body shall not reexamine alternatives”); AR 682 (DSD testimony). Because the EBCC exceeded the scope of its authority, all findings disapproving PSE’s proposed route should be vacated. AR 3018-21 at ¶¶ 5, 9, 11, 14, 15.

PSE was entitled to an EBCC decision “approving or disapproving” the CUP based on the then-existing law and the record. WAC 365-197-070(2), (3)(a); RCW 36.70B.030(3). Instead, the EBCC improperly legislated new substantive criteria during a CUP permit review process. See, e.g., WAC 365-197-070(2),(6). Because it did not have the power to do so, Resolution No. 550 should be vacated.

2. Resolution No. 550 Is a Clearly Erroneous Application of the Law to the Facts

The EBCC erroneously interpreted and applied the law by failing to accord substantial weight to the Hearing Examiner’s recommendation.

See, e.g., AR 3018-21. In a Bellevue CUP review the Hearing Examiner is the finder of fact. *See* CP 489; RCW 36.70B.020(3); AR 2557; AR 2564. The EBCC's counsel repeatedly advised it that it can disapprove a City Council decision only "if it concludes that the Hearing Examiner's recommendation is not supported by material and substantial evidence." AR2557; AR 2564; 2605; AR 2621; *see, e.g., Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 35, 873 P.2d 498 (1994) (an appeal of a hearing examiner's recommendation that was subsequently reviewed by the city council, scrutinizing the hearing examiner's findings of fact).

In other words, the EBCC can only disapprove the Hearing Examiner's decision if there is not "a sufficient quantum of evidence in the record to persuade a reasonable person" that the decision was correct. *See Wenatchee Sportsmen Ass'n*, 141 Wn.2d at 176 (citing *Wilson v. Emp't Sec. Dep't*, 87 Wn. App. 197, 200-01, 940 P.2d 269 (1997)). The EBCC is ***not*** free to disapprove the Hearing Examiner's decision by cherry-picking record evidence that may support a different outcome. *See Isla Verde Int'l Holdings, Inc. v. City of Camas*, 99 Wn. App. 127, 133, 990 P.2d 429 (1999) (citing *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 34, 891 P.2d 29 (1995)).

Furthermore, the EBCC must "defer to the hearing examiner's assessment of ... 'the credibility of witnesses,'" *Friends of Cedar Park*

Neighborhood v. City of Seattle, 156 Wn. App. 633, 641-42, 234 P.3d 214 (2010), and “accept ... the weight accorded to reasonable but competing inferences,” *Isla Verde*, 99 Wn. App. at 133-34. See also *Nations Capital Mortg. Corp. v. State, Dep’t of Fin. Insts.*, 133 Wn. App. 723, 738, 137 P.3d 78 (2006) (“The substantial evidence standard is highly deferential to the agency fact finder.”) (citing *ARCO Prods. Co. v. Wash. Utils. & Transp. Comm’n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995)).

The EBCC conceded that this standard applies. AR 3018-20 at ¶¶ 3, 9, 10, 12, 13. Yet, paragraphs 4, 6, and 14 of Resolution No. 550 explicitly displace the Hearing Examiner’s assessment of the weight and credibility of evidence:

- Paragraph 4 supplants the Hearing Examiner’s credibility determination of PSE’s licensed engineer;
- Paragraph 6 failed to accept the weight accorded by the Hearing Examiner to competing views on PSE’s consistency with LUC 20.20.255.D.2.d;⁵ and
- Paragraph 14 dictated the credibility and weight-of-evidence afforded to record documents commenting on PSE’s route selection.

⁵ Paragraph 6 also erroneously stated that only “self-interest[ed]” witnesses found that PSE’s selected route is most consistent with LUC 20.20.255.D.2.d. See, e.g., AR 83 (DSD, Land Use Division Staff Report finding that “the 148th Avenue alignment was most consistent with the intended outcome of the hierarchy of preferred locations”); AR 2625 (as reported by the EBCC’s own attorney).

AR 3018-20. The EBCC's failure to defer to the Hearing Examiner's fact-finding authority and credibility determinations was clearly erroneous.

Under LUPA, a court may overturn a land use decision that is "an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise." RCW 36.70C.130(1)(b). The Washington Supreme Court explained that LUPA does not require a court to show complete deference, but rather only "such deference as is due." *Ellensburg Cement Prods., Inc. v. Kittitas County*, 179 Wn.2d 737, 753, 317 P.3d 1037 (2014) (citation omitted). The Court went on to say that "deference is not always due." *Id.* In fact,

[e]ven a local entity's interpretation of an ambiguous local ordinance may be rejected. Instead, the interpreting local entity "bears the burden to show its interpretation was a matter of preexisting policy." No deference is due a local entity's interpretation that "was not part of a pattern of past enforcement, but a by-product of current litigation." A local entity's interpretation need not "be memorialized as a formal rule" but the entity must "prove an established practice of enforcement."

Id. (citations omitted) (rejecting a County's CUP criteria interpretation that was "the product of current litigation").

The EBCC's findings with respect to the project's operational need constitute an erroneous application of the law because the EBCC improperly devised its own methodology for assessing electrical

reliability. Whether power outages occurred before is not an industry standard for operational need. *See, e.g.*, AR 1828. The EBCC was required to assess the Hearing Examiner’s operational need finding based on the substantial evidence in the record, including Exponent’s Electrical Reliability Study, rather than its own guesswork. *See* AR 3019 at ¶ 13; LUC 20.20.255.E.3. Because the EBCC has no independent expertise in electrical reliability, its conclusions with respect to operational need merit no deference. Disapproval based on paragraph 13 must be vacated.

3. Resolution No. 550 Is Not Supported by Substantial Evidence

i. The Lake Hills Reliability Project is consistent with the Comprehensive Plan

A comprehensive plan is a general “guide” or “blueprint” rather than a set of rigid rules of land use decisions. *See Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 873, 947 P.2d 1208 (1997). The Lake Hills Reliability Project has been part of the Comprehensive Plan *approved by the EBCC* since 2006. AR 82; AR 2172-73 (“Figure UT-5a, found in the Utilities Element of the City’s Comprehensive Plan, expressly identifies a new transmission line facility in the Phantom Lake/Lake Hills area as a future new project”)⁶; AR 1719

⁶ Note that the Comprehensive Plan in place when PSE submitted its CUP and SCUP applications has since been revised. Figure UT-5a is now UT-7.

(explaining that the proposed transmission line connection was initially submitted in 1996 and that without Project implementation “reliable electric power to the project area cannot be assured”).

In addition, the DSD, the Hearing Examiner, Bellevue City Council, and Department of Ecology⁷ have specifically concluded that the Lake Hills Reliability Project is consistent with the Bellevue Comprehensive Plan. *See* AR 236-45 (containing DSD’s provision-by-provision review of the CUP application’s consistency with applicable Comprehensive Plan provisions); AR 1748-58 (containing PSE’s CUP Application and a provision-by-provision analysis of Comprehensive Plan consistency of each of three alternative transmission line routes); AR 2653-64 (Bellevue City Council’s approval). Their conclusions are consistent with the Comprehensive Plan’s stated objectives to “encourage Puget Sound Energy to plan, site, build and maintain an electrical system that meets the needs of existing and future development, and provides highly reliable service for Bellevue customers,” and promote “system practices intended to minimize the number and duration of interruptions to customer service.” AR 238.

⁷ Under LUC 20.30C.155.K, the Department of Ecology confirmed consistency with Bellevue’s Comprehensive Plan when it approved PSE’s SCUP for the Lake Hills Reliability Project.

The City DSD's review, which was relied upon by the Hearing Examiner and the City Council, went further and balanced competing objectives of the Comprehensive Plan related to utilities with the objectives related to the preservation of vegetation. *See* AR 237-45 at 239; AR 244. The City DSD explained:

[i]n approving the proposed PSE Transmission Line, the City will be required to balance objectives. ***The first objective is the provision of a reliable electrical service in an underserved geographic area*** within the City of Bellevue. This electrical service must serve the needs of today and be able to handle the requirements of the future. This object must be balanced against the City's vision as a "City in a Park" and the protection of valuable ecological resources, which in the case of this proposal are wetlands and mature trees—particularly along the 148th Avenue boulevard. When these objectives are reviewed against the Comprehensive Plan policies, some policies may be found to be in tension. When Policy tensions arise, mitigation will be required to offset the impacts. Through the substantive SEPA authority in LUC 22.02.140, mitigation for impacts to City resources will be required. This mitigation will consist of replanting in the affected critical areas and buffers AND along the entire corridor.

AR 132 (emphasis added); *see also* AR 129 ("Approval of this permit application requires striking a balance between preservation of City amenities (trees and the visual quality of urban boulevards) and the need to provide reliable electrical power now and into the future.").

Resolution No. 550 erroneously states that the Hearing Examiner's approval is inconsistent with the Comprehensive Plan. *See* AR 3018-20 at ¶¶ 3, 5, 9, 10, 11, 15. Each of the EBCC's conclusions fails, as follows:

1) Paragraphs 3 and 5 contain blanket statements of non-compliance with the Comprehensive Plan, and as such deserve no deference.

2) Paragraph 9 lacks substantial basis in the law or the record. No provision of the Comprehensive Plan or land use code precludes construction of utility lines along urban boulevards, including the 148th Corridor. LUC 20.10.440 (utility facilities are permitted conditional uses in all zones); *see also* AR 55-57 (photographs of existing transmission lines on 148th Avenue NE).

3) Paragraph 10 omits key qualifiers in the Comprehensive Plan provisions it recites and wholly ignores the Comprehensive Plan's mandate (approved by the EBCC itself) that PSE provide "highly reliable power." City of Bellevue Comprehensive Plan, UT-75; AR 3019 (omitting "when reasonably possible" and "where practical" from objectives UT-45 and S-WI-44). The conclusions drawn in Paragraph 10 ignore the need for balancing of competing objectives and the substantial evidence that supported the Hearing Examiner's decision. *See, e.g.,* AR 243.

Comprehensive Plan objectives UT-19, UT-42, and UT-53 champion Bellevue's commitment to preserving the City's image as a "City in a Park" while permitting new utilities. *See* AR 240-41. To that end, DSD independently commissioned OTAK, a design consultant, to draft the "148th Avenue Urban Boulevard Concept Plan," which serves as a "landscaping master plan" that "reflect[s] the broad guiding principles of the Enhanced Rights of Way and Urban Boulevards Program." The City further concluded that PSE's compliance with "[t]he [OTAK] Conceptual Plan will respect the new transmission line vegetation requirements while still enhancing the existing right-of-way. In some cases, the mitigation will improve the visual condition of the existing right-of-way." AR 243; *see also*, AR 796-97 (analyzing the entire 148th corridor including the segments of transmission line route on NE 8th Street and SE 16th Street); AR 1536-1615 (148th Avenue Urban Boulevard Concept Plan); AR 2400 ("The mitigation for the PSE project will enhance the 148th urban boulevard character consistent with the Concept Plan.").

4) In Paragraph 11, which is not specific to any CUP criteria, the EBCC asserts that Bellevue failed to engage the "Formal Enhanced Right of Way & Urban Boulevards Program" in reviewing the Lake Hills Reliability Project. *See* AR 3020 at ¶ 11. This assertion conflicts with record evidence, which explains that the "City's Urban Boulevards

Initiative group contracted with the design firm OTAK to do an assessment of the entire 148th Street corridor.” AR 796-97 (emphasis added). PSE’s mitigation plan is consistent with OTAK’s 148th Avenue Urban Boulevard Concept Plan. AR 2400.

5) Paragraph 15 disapproves PSE’s CUP Application because it does not propose to use underground transmission lines. AR 3020 at ¶ 15. This lacks any basis in law or fact. Assuming EBCC seeks to invoke UT-39, which requires the undergrounding of distribution lines when uses intensify, the transmission lines at issue here are not distribution lines, and UT-39 does not apply. AR 126; AR 81.

ii. The Lake Hills Reliability Project is consistent with adjacent uses and property

Resolution No. 550 avers that the Hearing Examiner’s finding that “LUC 20.30B.140(D) has been met [and] is not supported by material and substantial evidence [because] impact of traffic on 148th Avenue NE including costs of adverse impacts to commerce, pollution, and commute time were not considered.” *See* AR 3020 at ¶ 12. This conclusion ignores substantial evidence in the record that supports the Hearing Examiner’s conclusion that approval will not be “materially detrimental to uses on property in the immediate vicinity,” as is required by LUC 20.30B.140(D).

The 148th Corridor is a highly trafficked, mixed-use, transportation corridor. Over half of the proposed route is located within the Crossroads Subarea, which “is seen as a ‘*city in a city*’” because “[t]here is a large diversity among residents and a wide mix of uses,” AR 244 (emphasis added). Adjacent uses include a 65,000 square foot Walmart store; AR 3041 (transcript from the EBCC Regular Meeting of 6-5-2012); AR 1722-23 (“148th connects ... SR 520 and Interstate 90. Adjacent land uses include residential and commercial development, and the Lake Hills Greenbelt.... The most intense development within the study area is situated along portions of the 148th Avenue and NE 8th Street arterials.”). The Comprehensive Plan itself calls 148th “a single major arterial” and “encourag[es] the use of 148th Avenue as the sole principal arterial.” City of Bellevue Comprehensive Plan, S-SE-6.⁸

The record is also clear that impacts to traffic *were* considered in PSE’s unchallenged MDNS. *See, e.g.*, AR 117. The City determined that traffic impacts would be of limited duration and adequately addressed through acquisition of a City’s Right-of-Way (“ROW”) Use Permit.

Traffic impacts for this project will be temporary and occur[] only during the construction phase of this project. These impacts will be the result of needed travel lane and sidewalk closures to allow for safe

⁸ *See supra* note 4.

installation of power lines within [the] city right-of-way. Appropriate mitigation will be specified in the required right-of-way permit for this project (traffic control, detours, etc.). No permanent traffic impacts will be created by this project.

AR 117; AR 140 (describing types of mitigation for traffic impacts); AR 703 (describing ROW permit requirements). The EBCC's disapproval should be rejected as an impermissible collateral attack on the MDNS. *See* AR 2174 at ¶ 15.

iii. The Lake Hills Reliability Project is needed

The DSD, Hearing Examiner and City Council concluded, based on the City's independent Electrical Reliability Study and PSE's certification, that there is an operational need to loop the Lake Hills and Phantom Lake substations to increase electrical reliability in Bellevue. *See, e.g.*, AR 2168 at ¶ 7. The EBCC's contrary conclusion is not supported by substantial evidence. AR 3018 at ¶ 4; AR 3020 at ¶ 13.

LUC 20.20.255.E.3 requires that PSE "demonstrate that an operational need exists that requires the location or expansion at the proposed site." LUC 20.20.255.E.4 requires that PSE demonstrate that the Project "improves reliability to the customers served and reliability of the system as a whole, as certified by the applicant's licensed engineer."

Material and substantial evidence supports the Hearing Examiner and City Council's determinations that the CUP Application complied with LUC 20.20.255.E.3 and 4. As explained in DSD's Staff Report,

[i]n 2011, the City retained Exponent, an engineering and scientific consulting firm, to perform an electric system reliability assessment, which resulted in the Electrical Reliability Study, Phase 2 Report The Lake Hills to Phantom Lake transmission line segment was identified in the Reliability Report as necessary to meet the City's electrical needs, now and in the future.

AR 82; AR 1769-1959 (containing the Exponent Electrical Reliability Study).⁹ In so concluding, Exponent compared PSE's definition of reliability with the industry standard for reliability. As Exponent explains, utilities work to

minimize many so called N-1-1 events. That is, with one outage in the system, planned or unplanned, it tries to be in position to handle a second, unplanned outage. However, this is not possible for some portions of the 115 kV transmission system where a portion of the City is fed via a single 115 kV line.... For example, as is shown in Figure 32, the loss of the single, radial line to Lake Hills would cause a loss of power to those connected to the substation

⁹ DSD further found that "[w]ith the new line in place, approximately 12,400 customers will have much better protection from transmission line outages in the area," AR 121, and that "[t]he proposed facility will add reliability and allow the two substations to expand from a service perspective to operate at their planned capacity," AR 131.

AR 1828. “PSE’s planning assumption to operate under N-1-1 scenarios for its 115 kV system *is consistent with good planning for power distribution systems.*” AR 1830 (emphasis added).

Exponent concluded that “[f]or the substations which at present are fed from a single 115 kV line, it is recommended that these substations are reinforced from a second 115 kV line to be able to ride through an N-1 contingency,” AR 1831, and that “[a] line between Lake Hills and Phantom Lake, which is in the process of being designed, is needed to supply these two substations from two directions,” AR 1830.

The wisdom of this conclusion was confirmed by a windstorm on October 25, 2014, less than a month before the hearing on PSE’s CUP Application. The storm caused an outage that would have been avoided had the Lake Hills substation been looped. CABR, Official Record of Proceedings Held Before Gary McLean (Nov. 20, 2014) at 50 (Testimony of PSE Engineer Carol Jaeger); *see also* CABR, Official Record of Proceeding, East Bellevue Community Council, Special Meeting (June 24, 2015) at 25 (testimony of EBCC Councilmember Kasner citing five transmission-related outages).

No member of the EBCC has a background in electrical engineering or transmission line planning. Yet, the EBCC rejected the engineers’ reliability analysis and, instead, rested its decision solely on its

own inexpert analysis of what constitutes “highly reliable power” and a system deficiency. *See* AR 3018; AR 3020; UT-75 (requiring that PSE “provide[] highly reliable service”); *Lanzce G. Douglass, Inc.*, 154 Wn. App. at 415-16; *see also* AR 789-90 (the solution to preventing long power outages is “redundancy Basically what we need is more transmission lines.’ That will only occur if regulators and the public become more willing to allow those lines to be built even when they would not seemingly affect day-to-day electricity provision”). The EBCC was not free to substitute its own views on technical subjects, such as electrical reliability, for the substantial competent evidence credited by the Hearing Examiner.

iv. The Lake Hills Reliability Project, as conditioned, is sound

Finally, Resolution No. 550 erroneously finds that the Project “fails to achieve the desired benefit of redundancy” because PSE proposes to delay construction of the SE 16th Street segment running to the Phantom Lake substation. AR 3021 at ¶ 16. Ironically, “the conditions associated with Southeast 16th were imposed on the PSE project largely because of the input provided by the East Bellevue Community Council.” CABR, Official Record of Proceeding, East Bellevue Community Council Meeting (June 2, 2015) at 21-22 (Carol Helland, DSD Director speaking).

PSE also agreed to temporarily suspend construction of the SE 16th Street segment until the City undertakes its own transportation improvement projects on SE 16th to minimize impacts to adjacent properties. *Id.*; AR 673.

The delay of transmission line construction on SE 16th Street does not affect reliability improvements achieved on other parts of the Lake Hills Reliability Project. Redundancy benefits for each substation are independent of each other. Construction of a 115 kV line along NE 8th Avenue and 148th Avenue NE would immediately improve reliability to the Lake Hills and College substations. *See* UT-5a; CABR Official Record of Proceedings, East Bellevue Community Council Meeting (June 2, 2015) at 43. The Lake Hills Reliability Project would benefit all East Bellevue residents within the service areas of these two substations. *See* CP 0051.¹⁰ Moreover, following the City's request that PSE put a hold on the SE 16th Street segment, PSE added a switch to the corner of 148th and SE 16th which will provide a significant reliability benefit to residents

¹⁰ Resolution No. 550 incorrectly asserts that "PSE has requested to enter into a development agreement with the City of Bellevue to vest their right to construct a second 115 kV transmission line along...SE 16th Street." AR 3019 at ¶ 8. PSE has never requested entry into a development agreement for construction along SE 16th; obtaining an agreement is a condition to PSE's CUP Application and *would* be required *if* PSE pursued vesting rights. *See* AR 2193.

served by the Phantom Lake Substation. CABR, Official Record of Proceedings Held Before Gary McLean (Nov. 20, 2014) at 20.

VI. CONCLUSION

Resolution No. 550 suffers from a host of legal and factual errors, which fail to provide a single valid basis for concluding that the Lake Hills Reliability Project does not meet the City of Bellevue's CUP criteria. The EBCC is not a super-body exempt from local and state law. PSE respectfully requests that the trial court's Order dismissing PSE's LUPA petition be reversed and Resolution No. 550 be vacated.

DATED: April 21, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sharman D. Loomis, certify and declare:

I am over the age of 18 years, make this Declaration based upon personal knowledge, and am competent to testify regarding the facts contained herein.

On April 21, 2016, I served a true and correct copy of the document to which this certificate is attached on the following persons in the manner listed below:

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I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

DATED: April 21, 2016 at Seattle, Washington.

STOEL RIVES, LLP


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