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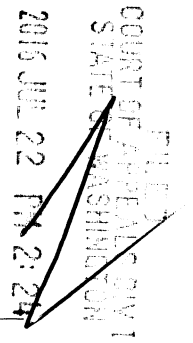

No. 74464-0

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

PUGET SOUND ENERGY, INC.

Appellant/Cross-Respondent,

v.

EAST BELLEVUE COMMUNITY COUNCIL, a Community Municipal Corporation,

Respondent/Cross-Appellant,

and CITY OF BELLEVUE, a First Class City organized pursuant to Washington Law,

Respondent.

PSE'S REPLY AND RESPONSE ON THE EAST BELLEVUE COMMUNITY COUNCIL'S CROSS-APPEAL

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I. INTRODUCTION

In striking down the City of Bellevue's ("City") Ordinance No. 6226, which authorized the construction of a 115 kV transmission line ("Reliability Project"), the EBCC attempts to ban power lines in its "back yard." The EBCC lacks the authority to do so. When, as here, the EBCC reviews the City's land-use decisions within the EBCC's territory, it is bound by the City's development code and Land Use Petition Act ("LUPA") review standards. *See* Bellevue Land Use Code ("LUC") ch. 20; RCW 36.70C.130(1). Because the EBCC has no code of its own, it is due no deference on the City Code's interpretation. On issues of fact, deference is due not to the EBCC, whose self-serving "findings" have little basis in the record, but to the City Hearing Examiner as the final fact-finder under the City's Land Use Code. *See* LUC 3.68.250(A)(2).

The EBCC has waived the majority of the reasons set forth in Resolution No. 550 for its disapproval of Ordinance No. 6226. None of the four bases for disapproval the EBCC chose to defend on appeal—inconsistency with the Comprehensive Plan ("Comp Plan") and the area character, material detriment to the vicinity, and lack of need—involve decisions over which the EBCC is free to strike its own balance. And none of these bases can withstand scrutiny under the applicable LUPA

standards. The EBCC's disapproval of Ordinance No. 6226 should be reversed.

II. EBCC'S COUNTERSTATEMENT OF THE CASE IS INACCURATE

Far from "careful," the EBCC's decision demonstrates its lack of familiarity with the Reliability Project, the administrative record, and City's Comp Plan and development code. The most fundamental among the EBCC's errors is its bald assertion that "obviously a major element of the Urban Boulevard is a lack of visible utilities." AR 3019 at ¶ 9. In fact, the City Code has no such prohibition. *See* AR 64; City of Bellevue's Response Brief at 2 n.2. Instead, the Comp Plan requires harmonizing diverse uses. Transmission lines are explicitly permitted on all roads and boulevards throughout the City, and are common along boulevards, including NE 148th Avenue, 104th Avenue NE, 116th Avenue NE, Bellevue Way SE, and NE Bel-Red Road.[1] AR 64. City's Code has no prohibition on visible utilities on boulevards, and the EBCC is without power to impose one on Puget Sound Energy ("PSE").[2]

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[1] *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).

[2] Contrary to EBCC's assertions in paragraph 11, there is also no land use code or "criteria" that PSE engage a "4-person Steering Committee of City (...continued)

The EBCC is also plainly wrong that the Reliability Project is "compromised" by the delay in construction of the SE 16th Street segment. *See, e.g.*, AR 3020-21 at ¶ 16. The record evidence is undisputed that reliability for customers served by the Phantom Lake substation will be improved by switches, without physically constructing a new transmission line. AR 85. The EBCC's own June 4, 2013 meeting minutes reported that, "[t]he switches will allow PSE to change the flow of power to the Phantom Lake substation from the north or the south. This interim plan allows PSE to improve reliability for all customers in the area." AR 663; AR 85 (same). There is no design or pending permit application for the SE 16th Street segment. It is not before the Court, and the EBCC cannot disapprove PSE's Reliability Project based on speculation about the future design of the SE 16th Street segment.

Finally, the EBCC alleges that "PSE had other options," meaning that the EBCC would prefer the transmission lines in someone else's yard. *Compare* EBCC's Response Brief at 12-14 & AR 3018-21 at ¶¶ 6, 14, 15 (disapproving the Reliability Project, in part, due to route selection) *with* AR 83 (stating that "70 residents" would be impacted by the 156th route)

(...continued)
Directors and Assistant Directors and 8-person Program Team of city staff" in permitting the Reliability Project. AR 3020 at ¶ 11.

and AR 3074 (explaining 164th route puts the poles in "the front yards of many, many more homes"). State law prohibits the Hearing Examiner—and EBCC—from engaging in an alternatives analysis when adjudicating a conditional use permit ("CUP"). *See, e.g.*, WAC 365-197-070(2) ("[D]uring project review, the local government or any subsequent reviewing body shall not reexamine alternatives ...."), (6); AR 682 (DSD testimony). The EBCC's argument about route selection is *ultra vires*.

III. ARGUMENT IN REPLY ON PSE'S APPEAL

A. Relevant Standards of Review and Deference

Community councils have a specific, limited role in administering land-use regulations within the annexed territory. RCW 35.14.040. "Where there is room for discretion under the comprehensive plan, the statute clearly allows the Community Council to exercise authority to approve or disapprove discretionary decisions by the city council." *City of Bellevue v. E. Bellevue Cmty. Council*, 138 Wn.2d 937, 945, 983 P.2d 602 (1999). To illustrate, when the plan allows a range of densities, the community council can select a lower density than the City within the allowable range. *Id.* at 945-46, 948 (explaining that where "[e]ither high or low density could satisfy applicable standards …. there is room for two opinions as to which density should be applied."). In selecting among acceptable choices, the community council acts in a quasi-legislative

capacity implementing the city's designations in the comprehensive plan. *Id.* at 948-49.

In contrast, here, the EBCC's CUP review involved a quasi-judicial permit decision, not a range of the City's legislative choices among which the EBCC was free to make its own selection. Rather, the EBCC was constrained by City Code provisions governing electrical utilities and the CUP review process. An outright prohibition on transmission lines on NE 148th Avenue is not a choice authorized by the Comp Plan or development code. AR 64. The EBCC, therefore, did not have the same discretion to approve or disapprove the City's CUP decision as in *City of Bellevue*. *See* EBCC's Response Brief at 37 (claiming, erroneously, that it was free to "strike any balance" as to the CUP it wanted). Unlike the case above, which was reviewed under a writ procedure, the CUP approval is a permit adjudication as to which LUPA provides the "exclusive means of judicial review," RCW 36.70C.030. LUPA relief can be granted if any of the specific standards listed in RCW 36.70C.130(1)(a)-(f) are met.

The EBCC reluctantly concedes that the LUPA review standards apply to its disapproval of City's Ordinance No. 6226, but asserts, without authority, that LUPA's standards apply to its review of land-use decisions in a special, more deferential way. *See* EBCC's Response Brief at 28-29. This is not the law. In adopting LUPA, the Legislature was aware of

RCW 35.14.040, but chose not to enact special review standards for community council land use decisions. *See* RCW 36.70C.130(1)(a)-(f). Therefore, normal LUPA standards apply. To be valid, the EBCC's disapproval must (1) be within its authority, (2) correctly interpret and apply the City Code for electrical utility CUPs, and (3) be supported by substantial evidence in the record developed before the Hearing Examiner. RCW 36.70C.130(1)(b), (c), (d).[3]

The EBCC was not free to disregard the law applicable to electrical utility CUPs. Nor was it free to ignore substantial evidence in the administrative record that supports the Hearing Examiner's findings of fact.[4] The Hearing Examiner is authorized by the City Code to be the final fact-finder in this case. Bellevue City Code ("BCC") 3.68.250(A)(2) ("The examiner shall have the authority to and shall conduct public hearings and prepare a record thereof, and enter written findings and

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[3] PSE did not waive its argument that Resolution No. 550 violates RCW 36.70C.130(1)(b). PSE's Opening Brief specifically identifies RCW 36.70C.130(1)(b) as a relevant legal standard and argues that the EBCC erroneously interpreted the law with respect to the deference afforded to the City's Hearing Examiner and its interpretation and application of the City Comp Plan. *See* PSE's Opening Brief at 8, 18-20.

[4] AR 2621 (EBCC's attorney explaining that the EBCC cannot disapprove the Hearing Examiner's recommendation unless the recommendation is not supported by material and substantial evidence); AR 3018-20 at ¶¶ 3, 9, 10, 12, 13 (all applying material and substantial deference standard).

conclusions, recommendations or decisions for the following land use matters … [a]pplications for conditional uses[.]").[5]

The EBCC argues, erroneously and without authority, that "the presence of RCW 35.14 in this case" requires this Court to defer to the EBCC's findings. EBCC's Response Brief at 30. Nothing in RCW chapter 35.14 (or the City Code) gives the EBCC any fact-finding authority. The City's decision is "approved" if the community council fails to disapprove it in 60 days; no fact-finding by the community council is permitted. LUC 20.35.300-.365 (describing the "quasi-judicial" CUP review process). In contrast, the Hearing Examiner "***shall*** conduct public hearings and prepare a record thereof" in every case. BCC 3.68.250(A) (emphasis added); LUC 20.35.337; RCW 36.70B.050 (mandating that permits undergo no more than one open record hearing).

In sum, the Hearing Examiner's findings of fact are entitled to deference. The EBCC's "findings" are not. *See Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 415, 225 P.3d 448 (2010) (evidence and any inferences therefrom should be viewed "in a light most

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[5] *See also Lakeside Indus. v. Thurston County*, 119 Wn. App. 886, 894, 83 P.3d 433 (2004) (explaining that "the Board did not alter any of the hearing examiner's findings of fact. Accordingly, the Board acted as an appellate body in its review and it was bound by the hearing examiner's findings of fact." (citing *Maranatha Mining, Inc. v. Pierce County,* 59 Wn. App. 795, 802, 801 P.2d 985 (1990))).

favorable to the party that prevailed in the highest forum exercising fact-finding authority"); *see also Miller v. City of Bainbridge Island*, 111 Wn. App. 152, 161, 43 P.3d 1250 (2002) ("On review of a land use decision that presents mixed questions of law and fact, we determine the law independently and apply it to the facts as found by the hearing examiner. We review administrative actions on the administrative ... record." (citations omitted)).

On issues of law, "[c]onsiderable judicial deference is given to the construction of legislation by those charged with its enforcement." *Keller v. City of Bellingham,* 92 Wn.2d 726, 731, 600 P.2d 1276 (1979); *see also Dev. Servs. of Am., Inc. v. City of Seattle,* 138 Wn.2d 107, 117, 979 P.2d 387 (1999). Here, the City, not the EBCC, is the sole entity charged with enforcing its land use code. LUC ch. 20.40. Therefore, it is the City's construction of the City Comp Plan and development regulations that merit deference from this Court.

B. EBCC's Disapproval Is Erroneous

The EBCC argues 1) that the CUP is inconsistent with the Comp Plan and 2) the character of the area, 3) that the CUP is materially detrimental to the vicinity, and 4) that the Reliability Project is not needed. EBCC's Response Brief at 33. The EBCC has waived the right to defend its disapproval on any other basis and conceded the many additional errors

in its disapproval discussed in PSE's Opening Brief. Each of the bases the EBCC defends fails.

1. The Project Is Consistent with the Comp Plan

Cities, including "Cities in a Park," require basic utilities—roads, water, and power. All feasible routes for the transmission line between the Lake Hills and Phantom Lake substations must cross the greenbelt. AR 239. NE 148th Avenue route was selected because, among other reasons, it is a major transportation arterial and would impact the fewest number of residences. AR 84-5. The NE 148th Avenue route has been part of the Comp Plan since 2009. The EBCC approved the 2009 Comp Plan and all subsequent plans containing the NE 148th Avenue route. *See* RCW 35.14.040. The EBCC now interprets select provisions of the Comp Plan to prohibit any power line along NE 148th Avenue, no matter how designed or mitigated. AR 3019 at ¶¶ 9-10. Under the EBCC's theory, no transmission line along NE 148th Avenue could ever comply with the Comp Plan. The EBCC lacks jurisdiction to impose a ban on utilities on NE 148th Avenue, especially during a permit review process. *See* RCW 35.14.040; LUC 20.35.365. On *de novo* review, the Court should reject the EBCC's reading of the Comp Plan, which would amount to precisely such a ban.

The City's Comp Plan[6] provides a blueprint for accommodating diverse uses. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 873, 947 P.2d 1208 (1997). Under the Comp Plan, greenways and power lines are not mutually exclusive but must coexist. *See* AR 64 (permitting power lines in all areas); *see also* LUC 20.10.440. The Comp Plan specifically "encourages 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 (UT-75; emphasis added); AR 237-45 (containing City's full Comp Plan review). At the same time, the Comp Plan values parks and open spaces. *See* AR 3019 at ¶ 10.

The tension, if any, between Comp Plan provisions must be harmonized. RCW 36.70A.060 ("The plan shall be an internally consistent document"); RCW 36.70A.030(4) (a comp plan is a "generalized ***coordinated*** land use policy statement") (emphasis added). Instead, the EBCC cherry-picked provisions it liked to the exclusion of

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[6] Available at http://www.ci.bellevue.wa.us/comprehensive_plan.htm. The Comp Plan was amended in August 2015; some provisions have changed since the EBCC's Reliability Project review.

others. AR 3019-20 at ¶ 10. The EBCC also failed to harmonize the Comp Plan with the specific development regulations. A specific zoning ordinance will generally prevail over an inconsistent comprehensive plan. *Mount Vernon,* 133 Wn.2d at 873. However, where, as here, the zoning code itself requires compliance with the comprehensive plan, the proposed use must satisfy both the zoning code and the comprehensive plan. *Weyerhaeuser v. Pierce County,* 124 Wn.2d 26, 43, 873 P.2d 498 (1994).

To illustrate, in *Lakeside Industries v. Thurston County*, 119 Wn. App. 886, 891, 83 P.3d 433 (2004), Lakeside applied for a special use permit to construct an asphalt manufacturing facility in an area subject to the Nisqually Sub-Area Plan, which requires that uses be compatible with the "Agricultural/Pastoral Character" of the Nisqually Valley. County staff concluded that the asphalt facility did not comply with the sub-plan, which prohibited large-scale commercial development. The hearing examiner disagreed, concluding that the project was consistent with all applicable plans and codes. *Id.* at 892. The Board of Commissioners overturned the Hearing Examiner, denying the permit.

The Court of Appeals reversed. The Board of Commissioners "lacked legal authority to apply the sub-area plan's general purpose ***to deny a use the County's zoning code specifically allowed***." *Id.* at 891 (emphasis added). The Court explained that this project was required to

"satisfy both the zoning code and comprehensive plan" including the sub-plan. *Id.* at 895. Although the sub-area plan prohibited new commercial development, it "also recognizes existing commercial activities and does not expressly prohibit asphalt production within the planning area." *Id.* at 897. Harmonizing these provisions, the Court held that the Board of Commissioners "may not invoke the plan's general purpose statements to overrule the specific authority granted by the zoning code to manufacture asphalt." *Id.* at 897-98.

The EBCC's disapproval of the Reliability Project mirrors the same errors. Its stated reasons are either conclusory (¶¶ 3, 5), or fail to harmonize Comp Plan provisions internally or with the development regulations (¶ 10). The Comp Plan specifically encourages "highly reliable service" and sites the PSE Project on NE 148th Avenue. AR 64, 238. As a matter of law, no valid attempt at harmonizing these provisions with the Comp Plan's open space provisions could result in a ban on NE 148th Avenue of a permitted use. *See Lakeside*, 119 Wn. App. 886. Rather, harmonizing these provisions is a function of design and mitigation. The EBCC made no attempt to accommodate uses it perceives to be in tension. AR 3018-20.

Moreover, none of the five Comp Plan provisions the EBCC cites to preclude power lines on NE 148th Avenue (*see* ¶ 10) is supported by substantial evidence:

(1) UT-45 requires applicants to "avoid, ***when reasonably possible***, locating overhead lines in greenbelt and open spaces." (Emphasis added). The EBCC omits "when reasonably possible," a key qualifier, from its discussion of UT-45. AR 3019. Because all feasible routes "to connect the Lake Hills and Phantom Lake substations require running overhead lines through the Lake Hills Greenbelt," AR 239, it is not "reasonably possible" to avoid greenbelts altogether. UT-45 does not provide a basis for the EBCC' s disapproval.

(2) UT-53 requires "all utility equipment support facilities to be aesthetically compatible with the area in which they are placed ***by using landscape screening and/or architecturally compatible details and integration***." AR 240 (emphasis added). Once again, the EBCC omits the italicized text, in an attempt to transform UT-53 into a mandate, which it is not. AR 3019. When read in its entirety, UT-53 achieves aesthetic compatibility "by using" landscaping and design modifications. The Reliability Project does both. AR 115 (*e.g.*, use of wooden poles and davit arms and re-vegetation package worth over $856,000). The EBCC's finding with respect to UT-53 is not supported by substantial evidence.

(3) UT-42 requires the City to

> [d]esign boulevards to be distinctive from other streets and to reinforce the image of Bellevue as a "city in a park," both within the ROW and on adjacent private development, utilize features such as gateways, street trees, median plantings, special lighting, separated and wider sidewalks, crosswalks, seating, special signs, street name, landscaping, decorative paving patterns and public art.

Nowhere does UT-42 preclude a transmission line on NE 148th Avenue, as EBCC reads it. Under UT-42, the focus is on design, not on prohibition. Consistent with this focus, PSE worked closely with the City and OTAK, a landscape design contractor, to design a distinctive landscaping plan to replant and fully mitigate the impacts of the tree removal required for transmission line installation. AR 796-97. This constitutes substantial evidence for the Hearing Examiner and City's determination of consistency with this provision.

(4) UD-19[7] requires that development "[p]reserve trees as a component of the skyline to retain the image of a 'City in a Park.'" AR 242. The City Staff Report concluded that the NE 148th Avenue route, as mitigated, is more consistent with preserving trees than the alternative routes:

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[7] Resolution No. 550 and the EBCC's Response Brief erroneously refer to UD-19 as UT-19. *See* AR 242; EBCC's Response Brief at 21.

> Along the alignment and behind the right-of-way, there are large areas of open space … with significant stands of trees. These trees will remain and will form a vegetated backdrop that will minimize the impact of tree removal to the skyline. Other alignment options had greater impacts on the skyline as they ran across open spaces that did not have existing tall, mature trees.

Id. The City's interpretation of UD-19 is entitled to deference as it is the entity charged with its enforcement. LUC ch. 20.40. The Court should reject the EBCC's unreasonable theory that UD-19 prohibits tree removal required for power line installation along NE 148th Avenue.

(5) S-WI-44 provides that "[u]tilities should be provided to serve the present and future needs of the Subarea in a way that enhances the visual quality of the community (where practical)." Substantial evidence does not support the EBCC's conclusion that the Reliability Project is inconsistent with S-WI-44. The EBCC has not identified any "practical" steps PSE failed to take to "enhance the visual quality of the community."

The EBCC erred by rejecting a use specifically identified in the Comp Plan and permitted under the City's development regulations. It did so by cherry-picking (and misinterpreting) select provisions of the Comp Plan that the EBCC perceived to be in tension with the allowed use, without any attempt to harmonize them. AR 3016-21. This approach

would improperly allow the EBCC to veto any otherwise permitted use and should be rejected. *See Lakeside*, 119 Wn. App. at 898 .

2. The Project Is Compatible with the Character of Development in the Vicinity

In arguing that the Reliability Project is incompatible with the nearby vicinity, the EBCC relies on the fact that NE 148th Avenue is a designated boulevard. EBCC's Response Brief at 22-23. The EBCC proclaims, without a shred of authority, that "obviously a major element of the Urban Boulevard is a lack of visible utilities." *Id.* The City disagrees. *See* Brief of Respondent City of Bellevue at 2-3. The City's reading of its own Code is entitled to deference. The EBCC's baseless argument should be rejected as a matter of law.

The EBCC's incompatibility argument also lacks support in the record. PSE proposes construction along NE 8th Street and NE 148th Avenue, in an existing utility right of way. AR 90-93; AR 112. Both NE 8th Street and NE 148th Avenue are major arterials characterized by mixed use. AR 237. Along the north side of NE 8th Street there is "Crossroads Park, Fire Station 3, Crossroads Mall and strip retail"; along the south side, "a mix of multi-family residential apartments, office buildings, a Post Office, and retail uses." AR 91-92. The transmission line will run down the north side of NE 8th Street, along "one commercial

development and three large multi-family developments." *Id.* NE 148th Avenue is a major, four lane, mixed-use corridor . AR 1464 (describing traffic on 148th as "high volume"); AR 131 (describing 148th as a "major transportation corridor"). The existing uses along NE 148th Avenue range from large retail centers (including a Walmart) to single family residences, as well as to open space, wetlands, and greenbelts. AR 93.

PSE's Reliability Project ensures compatibility with these varied uses by "cross[ing] the Lake Hills Greenbelt in the most developed and intensely used section … where cars are going at relatively high speeds and the visual impact … is [reduced]." AR 85. This "minimizes critical area disturbances." *Id.* By selecting a major transportation corridor, the proposed route "places a larger portion of the alignment outside of residential land use districts and … avoids placing the line directly in established residential neighborhoods and in the front yards of homes." AR 131-32. The comprehensive mitigation package "will restore the visual quality of the streets where trees are proposed to be removed and/or trimmed." AR 237.

Additionally,

- The proposed route "is an extension of the ***existing Lakeside to Phantom Lake 115 kV transmission line corridor***, which currently runs south along the east side of 148th Avenue SE," AR 84-85 (emphasis added); AR 131;

- The proposed transmission line poles will be the minimum height required, AR 115;
- The poles will be made of wood to minimize visual impacts, AR 115;
- The wooden davit arms "have a more residential look and feel, and are used elsewhere in Bellevue... in residential settings," AR 115; AR 239; and
- Over $856,000 in mitigation will fully restore the impacts of tree removal and vegetation management, AR 114-15.

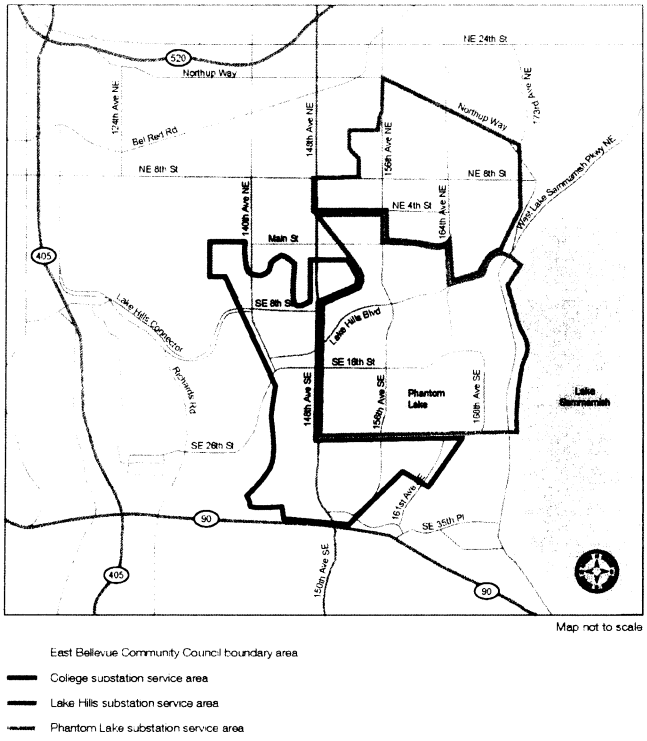
The EBCC did not articulate any different or additional design or mitigation measures required to achieve compatibility. Its incompatibility argument is unsupported by substantial evidence and, if accepted, would preclude ***any*** transmission line along NE 148th Avenue.

The EBCC's position is simply "not in my back yard," even when its "back yard" is a major transportation corridor. The alternative routes, however, lie in the front yards of homeowners outside of EBCC's territory. Because their hook-up costs to connect a transmission line to distribution lines to homes cannot be borne by PSE or the City,[8] *see* AR 85, those homeowners would be required to pay "$2,000 to $5,000" to underground the distribution lines to their homes, AR 126.

[8] UT-39 requires the undergrounding of ***distribution lines*** when uses intensify. Were a transmission line to be built along 156th or 164th, those homeowners would be required to pay for the undergrounding of the distribution lines required to connect their homes to the new transmission line.

RCW 35.14.040 provides that "[d]isapproval by the community council shall not affect the application of any ordinance or resolution affecting areas outside the community municipal corporation." *See Sammamish Cmty. Council v. City of Bellevue*, 108 Wn. App. 46, 57, 29 P.3d 728 (2001) ("Even if the councils had the authority to disapprove Ordinance 5081, that disapproval would not affect… whether land use development projects located outside the councils' geographic boundaries may be approved." (citing RCW 35.14.040)). The EBCC not only imposes new costs on homes outside its boundaries, but asserts the right to unilaterally affect the reliability of power to Bellevue homeowners outside its territory. AR 695. The service map, overlaid on the EBCC's territory, demonstrates that the EBCC's disapproval improperly affects communities beyond its boundaries:

PSE Lake Hills - Phantom Lake transmission line



See http://www.ci.bellevue.wa.us/pdf/Clerk/EastBellCommCounc_A.pdf; AR 695. The Court should reject EBCC's overreach.

3. The Project Is Not Materially Detrimental to Uses or Properties in the Vicinity

The EBCC argues that the proposed line would be "materially detrimental to the vicinity." *See* EBCC's Response Brief at 33. To be "materially detrimental" means that the project will "cause damage or injury" to an "essential component" of adjacent uses. *See Merriam Webster's Dictionary*, available at http://www.merriam-webster.com/dictionary/dictionary.

The City, which is entitled to deference, does not consider power lines to be "materially detrimental" to boulevards. *See, e.g.*, AR 133-34. Boulevards throughout the City, such as 104th Avenue NE, 116th Avenue NE, Bellevue Way SE, and NE Bel-Red Road, house transmission lines while preserving boulevard aesthetics.[9] NE 148th Avenue itself has transmission lines directly south of the Reliability Project's terminus. *Compare* AR 3019 at ¶ 9 (EBCC erroneously asserts that NE 148th Avenue has no transmission lines) *with* AR 55-7 (photographs of existing lines). Existing power lines cause no injury to the essential components of City boulevards. Nor can the EBCC argue that power lines are detrimental to NE 148th Avenue's primary use as a major transportation corridor. Any route linking the Phantom Lake, Lake Hills, and College substations must cross a greenbelt. The four-lane NE 148th Avenue already crosses the greenbelt. The "essential elements" of the greenbelt (use as a park, habitat for animals) are substantially located away from the street crossing and so cannot be "damaged" by the addition of a power line. The EBCC's "materially detrimental" argument fails.

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[9] *Compare* Boulevards and Intersections Map *with* Map UT -6.

4. The Reliability Project Is Needed.

The City's independent utility planning experts confirmed that the Reliability Project is needed and will improve reliability. Exponent, an engineering and scientific consulting firm, performed a reliability assessment and prepared the Electrical Reliability Study, concluding that "[t]he Lake Hills to Phantom Lake transmission line segment was … necessary to meet the City's electrical needs, now and in the future." AR 82. Based on this study, the City Staff Report further explained that the need for this Reliability Project

> was anticipated in the Comprehensive Plan Utilities Element policies for non-city-managed utilities and is shown on Figure UT.5a … PSE has demonstrated that … there will be improved reliability to the customers served directly—particularly those residents served by the Lake Hills, Phantom Lake, and College Substations—and the Eastside's electrical grid as a whole.

AR 131.

The EBCC asks this Court to accept the EBCC's "no need" finding over the contrary, well-supported, conclusions of the City Council and independent experts. The EBCC lacks any expertise in utility planning. The Court should reject the EBCC's inexpert approach to evaluating need, which anecdotally cites "five power outages in the last 10 years" as its basis for utility planning. EBCC's Response Brief at 6. Under EBCC's methodology, there would be "no need" for earthquake or flood planning

in Bellevue. A City planner's job is to use data to plan for foreseeable contingencies, not to hope that known risks will never materialize.

The EBCC cannot point to any credible record evidence that negates Exponent's conclusion that looping is needed at Lake Hills and Phantom Lake. Instead, it impermissibly attacks PSE's ***route***. EBCC's Response Brief at 34 (acknowledging Exponent's conclusion and stating "but [Exponent] does not propose or analyze any particular routes or the compromised project"). The EBCC goes on to attack co-location of transmission lines even though the CUP does not contain a proposal to co-locate. *Id.* It is beyond the EBCC's authority to disapprove PSE's CUP based on route. WAC 365-197-070(2), (6); AR 682. It is also beyond the EBCC's authority to disapprove the Reliability Project based on speculation on how SE 16th Street will ultimately be designed. The EBCC exceeded its authority and drew conclusions unsupported by substantial evidence.

The EBCC's disapproval of the Reliability Project should be vacated. The EBCC's lay decision-makers were not free to deny competent evidence that the Reliability Project was needed or disapprove the Reliability Project based on criteria of their own making. Giving due deference to the City's interpretation of its own Code and to the Hearing

Examiner's fact-findings, the Court should conclude that the Reliability Project should go forward.

C. RCW 4.84.370 Does Not Apply to Community Councils

The EBCC is not entitled to attorney fees on appeal under RCW 4.84.370. The statute provides that:

> (1) ... reasonable attorneys' fees and costs shall be awarded to the prevailing party ... of a decision by a county, city, or town to issue, condition, or deny a development permit .... The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:
>
> (a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town ...; and
>
> (b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.
>
> (2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

See Durland v. San Juan County, 182 Wn.2d 55, 77, 340 P.3d 191 (2014) ("RCW 4.84.370 is divided into two subsections based on the identity of the parties involved.").

The EBCC's claim for fees under subsection (2) above has no merit. *See* EBCC's Response Brief at 41. "Subsection (2) governs specifically when a 'county, city, or town' is the party seeking attorney

fees. RCW 4.84.370(2)." *Durland*, 182 Wn.2d at 78. The only "county, city, or town" involved in this case is the City of Bellevue, whose decision the EBCC ***opposes***.[10] The EBCC is not a "county, city, or town" under RCW chapter 35.14. It has not been—and cannot be—incorporated under RCW chapter 35.02, and has no independent legislative, taxing, or enforcement authority or budget of its own. The EBCC's territory was annexed by the City, which pays the EBCC's reasonable expenses. The EBCC cannot seek fees it has not paid.

If the Legislature intended to include community corporations as am entity entitled to attorney fees under subsection (2) above, it would have done so explicitly. It chose not to do so. Moreover, the EBCC's cross-appeal of the superior court's denial of the its shoreline jurisdiction shows that it is not a prevailing party that can seek fees under RCW 4.84.370(2). Nor can the EBCC seek attorney fees under subsection (1), reserved for private parties, because the EBCC did not prevail before the Hearing Examiner or the City.

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[10] RCW 4.84.370(2) is distinct from the analogous provision of LUPA, RCW chapter 36.70C, which states that LUPA applies to certain decisions made by entities that are "part of" a "local jurisdiction" (defined to include cities, towns, and counties). *See* RCW 36.70C.030(1)(a)(i); RCW 36.70C.020(3). The EBCC ignores that RCW 4.84.370(2) contains no such reference.

IV. PSE'S RESPONSE TO EBCC'S CROSS-APPEAL

A. The EBCC Lacks Jurisdiction to Review Shoreline Permits

1. Legal Framework

The Legislature set forth six categories of land use actions subject to community council review: (1) comprehensive plans; (2) zoning ordinances; (3) CUPs, special exceptions, and variances; (4) subdivision ordinances; (5) subdivision plats; and (6) planned unit developments. *See* RCW 35.14.040(1)-(6); RCW 35.14.050(1)-(3). This list, which describes the full extent of the EBCC's authority, was enacted in 1967 and left unchanged in the two subsequent substantive amendments to RCW chapter 35.14, in 1985 and 1993. RCW 35.14.010 (amended 1985 and 1993); RCW 35.14.020 (amended 1985). Permits omitted from this list include, but are not limited to, shoreline conditional use permits ("SCUPs"), administrative conditional use permits, shoreline substantial development permits, shoreline variance, and critical area land use permits. With the exception of SCUPs, the EBCC has never asserted jurisdiction over any of the above-listed permits including administrative conditional use permits and shoreline variances.

While similar in some ways, land use CUP and SCUPs are fundamentally different. SCUP issuance is more onerous and requires consideration of seven criteria beyond those required for CUP issuance

(including shoreline-specific criteria and consistency with state law) and, to a material degree, places the "*overall best interest of the state and the people generally*" above local interests. RCW 90.58.020 (emphasis added); LUC 20.30C.155(A)-(E), (J); *see also* RCW 90.58.050. City authority to issue land use CUPs arises from the Planning Commission Act, RCW chapter 35.63 (adopted in 1935). In contrast, SCUPs derive from the state's Shorelines Management Act of 1971 ("SMA"), RCW chapter 90.58.

Under the SMA, the final decision maker on SCUPs is the Washington State Department of Ecology, *not* the City Council or EBCC. *See* RCW 90.58.140(10); 6 Wash. State Bar Ass'n, *Real Property Deskbook* § 10.5, at 10-30 (2009). Final appeals SCUPs are brought in the Shorelines Hearings Board ("SHB"), whereas final land use CUP appeals are heard by the superior court. *Compare* RCW 36.70C.030-.040 *with* RCW 90.58.140(10). The SHB reviews SCUP appeals *de novo*; no deference is given to the factual or legal conclusions of local decision-makers. WAC 461-08-500(1); *Coal. to Protect Puget Sound v. Thurston County*, SHB No. 13-006c, at 18 (Aug. 6, 2013). In contrast, appeals of final land use CUPs are reviewed pursuant to LUPA, RCW chapter 36.70C, with substantial deference to the highest finder of fact below. *See, e.g.*, *Durland v. San Juan County*, 174 Wn. App. 1, 11-12, 298 P.3d

757 (2012). The SCUP review standard and appeal structure demonstrate that the Legislature prioritized the state's interest in shorelines over local concerns.

2. The EBCC Lacks Jurisdiction to Review SCUPs

Washington courts have long held that "a municipal corporation's powers are limited to those conferred in express terms or those necessarily implied. If there is any doubt about a claimed grant of power it must be denied." *Chem. Bank v. Wash. Pub. Power Supply Sys.*, 99 Wn.2d 772, 792, 666 P.2d 329 (1983) (citation omitted); *Sammamish Cmty.*, 108 Wn. App. at 49 (applying to community councils). Here, the plain language of RCW 35.14.040, which defines the full extent of the EBCC's authority, defeats the EBCC's assertion of SCUP jurisdiction.

RCW 35.14.040(1)-(6) contains the comprehensive list of actions subject to community council authority and does not include any reference to shoreline permits, including SCUPs. This omission must be given full and meaningful effect as SCUPs did not exist in 1967 when RCW 35.14.040 was enacted. The Legislature declined to add SCUPs in its two subsequent revisions of RCW chapter 35.14—first in 1985 and then in 1993. RCW 35.14.010 (amended 1985 and 1993); RCW 35.14.020 (amended 1993). Given this clear omission from the plain language of the EBCC's enabling statute, the EBCC's assertion of jurisdiction over PSE's

SCUP is *ultra vires*. *See Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wn.2d 359, 367, 89 P.3d 217 (2004).

In the absence of express authority, community council jurisdiction may only be "'implied as necessary in aid of those powers which have been expressly conferred.'" *Sammamish Cmty.*, 108 Wn. App. at 49 (citation omitted). Community council jurisdiction is inherently limited to those land use decisions listed in RCW 35.14.040. The EBCC has never asserted a need for jurisdiction over other permits omitted from RCW 35.14.040 (*e.g.*, shoreline substantial development permits, shoreline variances, and administrative CUPs) to aid the EBCC with its expressly conferred powers. Nor has the EBCC identified any basis or need for expanding its jurisdiction to include shorelines. It cannot do so for the first time in its reply brief.

The EBCC ask this Court to graft "shoreline" onto the front of RCW 35.14.040(3), which provides for EBCC review of "[c]onditional use permit[s], special exception[s] or variance[s]." But RCW 35.14.040 is unambiguous. The Court "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language" and must "assume the legislature 'means exactly what it says.'" *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003) (quoting *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554 (1999)).

"Conditional use permit" means "[c]onditional use permit[s]" and not *shoreline* or administrative "[c]onditional use permit[s]." *See* RCW 35.14.040(3). This Court should decline to add words that the Legislature *twice* declined to add in amending RCW chapter 35.14.

The EBCC argues that the Legislature was not required to amend RCW 35.14.040 because the SMA does not explicitly use the term "shoreline conditional use permits." EBCC's Response Brief at 43-44. This argument places form over substance. Whatever they are called, land use CUPS cannot be construed as encompassing SCUPS because these terms refer to fundamentally different types of permits. *See* Section IV.A.1 *supra*. The SMA requires local jurisdictions to adopt new codes defining SCUPs as a new category of permit, distinct from land use CUPs. *See*, *e.g.*, LUC pt. 20.30C (containing review criteria for "Shoreline Conditional Use Permit"); SMC 23.60A.034 (setting forth the City of Seattle's "Criteria for shoreline conditional use permits"). In other words, post-SMA amendments relating to SCUPs were legally necessary because SCUPs are a specialized category of permits *not* synonymous with land use CUPs. *See, e.g.*, RCW 90.58.140 (setting forth SCUP criteria).

Finally, the EBCC erroneously conflates "land use regulations" and shoreline "permits." EBCC's Response Brief at 43-44. Citing *City of Bellevue*, 138 Wn.2d at 945, the EBCC states that the "obvious purpose"

of RCW 35.14.040(3) is "to place final decision-making power in the community council where *land use regulations* affecting property within its jurisdiction are concerned." (Emphasis added). But shoreline "permits" are not "land use regulations." Permits are applied for by individuals, require project-specific review, and, once issued, only apply to the permit applicant. Land use regulations, in contrast, are of general application and developed through a legislative process. *See, e.g., Spokane County v. E. Wash. Growth Mgmt. Hearings Bd.*, 176 Wn. App. 555, 679-81, 309 P.3d 673 (2013) (distinguishing between land use permits and regulations).

The plain language of RCW 35.14.040 demonstrates that although the Legislature granted the EBCC broad authority with respect to "land use regulations" (listing without exclusions "comprehensive plan" and "land use ordinance"), it excluded from community council review all shoreline permits. This is consistent with the SMA's prioritization of the state's interest in shorelines.

The Washington State Department of Ecology has now reviewed the Reliability Project SCUP and found it to be consistent with the SMA and Bellevue Code. The EBCC's attempt to imply jurisdiction over SCUPs should be rejected.

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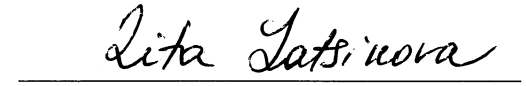
V. CONCLUSION

For the foregoing reasons, PSE respectfully requests that the Court reverse the trial court's judgment upholding the EBCC's disapproval of the Reliability Project, reject the EBCC's request for attorney fees on appeal, and affirm the trial court's vacatur of the EBCC's jurisdiction over shoreline permits.

Respectfully submitted this 22nd day of JULY 2016.



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CERTIFICATE OF SERVICE

I, Michele Brandon, 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 July 22, 2016, I served true and correct copies of the document to which this certificate is attached on the following persons in the manner listed below:

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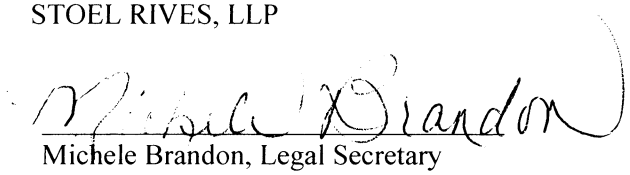
I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

DATED: Friday, July 22, 2016 at Seattle, WA.

STOEL RIVES, LLP



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