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NO. 74464-0-I

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

PUGET SOUND ENERGY, INC.,

Appellant/Cross-Respondent,

v.

EAST BELLEVUE COMMUNITY COUNCIL,

Respondent/Cross-Appellant,

and CITY OF BELLEVUE,

Respondent.

BRIEF OF RESPONDENT/CROSS-APPELLANT EAST BELLEVUE COMMUNITY COUNCIL

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I. INTRODUCTION

The Washington State Legislature deliberately authorized the creation of community municipal corporations to give a voice to local neighborhoods annexed by cities. In this case, the East Bellevue Community Council (EBCC) appropriately made its voice heard. The EBCC had understandable objections to the Puget Sound Energy (PSE) project, and carefully considered all the evidence before disapproving the PSE permits. The EBCC's actions were squarely within its statutory grant of authority. Contrary to PSE's assertions, the EBCC did not "invent" new land use criteria; rather, the EBCC based its disapproval squarely on the broad and discretionary criteria of the Bellevue Land Use Code. Judge Downing appropriately recognized the EBCC's role by deferring to, and sustaining, the EBCC's decision under the Land Use Petition Act (LUPA), Chapter 36.70C RCW.

But the trial court erred by concluding the EBCC lacks jurisdiction over shoreline conditional use permits, forcing a departure from decades of practice in the City of Bellevue. Accordingly, the EBCC asks this Court to affirm the superior court's ruling denying PSE's LUPA petition, but reverse the superior court's ruling that the EBCC lacks jurisdiction over shoreline conditional use permits.

II. ASSIGNMENT OF ERROR

The trial court erred in concluding that the EBCC lacks authority to disapprove the City of Bellevue's decision concerning the Shoreline Conditional Use Permit. CP 680.

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Whether RCW 35.14.040(3) grants community municipal corporations the authority to review shoreline conditional use permits.

IV. STATEMENT OF THE CASE

A. The EBCC and the role of community councils

In 1967, the Washington State Legislature enacted Chapter 35.14 RCW, giving rise to the formation of community municipal corporations. A community municipal corporation is a public entity governed by an elected community council, created when an area is annexed by a city. As is clear from the enabling statute, the central purpose of community municipal corporations is to maintain neighborhood control over land use decisions.

The legislature gave community councils final authority over specified land use decisions, including comprehensive plans, zoning ordinances, conditional use permits, special exceptions or variances, subdivision ordinances, subdivision plats, and planned unit developments. RCW 35.14.040. "The obvious purpose of the statute is to place final

decision making power in the community council where land use regulations affecting property within its jurisdiction are concerned." *City of Bellevue v. E. Bellevue Cmty. Council*, 138 Wn.2d 937, 945, 983 P.2d 602 (1999).

Even where a city might otherwise have final decision-making authority over a listed land use decision, by legislative mandate, that decision does not take effect until the community council either approves it or fails to take action to disapprove it. RCW 35.14.040 ("The adoption . . . of any ordinance or resolution applying to land, buildings or structures within any community council corporation shall become effective . . . either on approval by the community council, or by failure of the community council to disapprove within sixty days of final enactment"). This reflects an intentional legislative scheme to maintain local neighborhood control over land use decisions: the elected officials of a community council "have a significant role in determining land use regulations within the community municipal corporation." *Id.* at 945.

The legislature also granted community municipal corporations the authority to consult with the permitting jurisdiction (*i.e.*, Bellevue in this case) on other land use matters. RCW 35.14.050(3) ("In addition to the powers and duties relating to approval of zoning regulations and restrictions as set forth in RCW 35.14.040, a community municipal corporation acting

through its community council may . . . advise, consult, and cooperate with the legislative authority of the city on any local matters directly or indirectly affecting the service area.").

The EBCC was established by voters in 1969 when the area was annexed by the City of Bellevue.[1] AR 2145. The EBCC is represented by five East Bellevue residents elected to four year terms. CP 632; RCW 35.14.060; RCW 35.14.020. In addition to electing representatives of the EBCC, voters in the EBCC's service area also vote on the continued existence of the EBCC every four years. RCW 35.14.060. Most recently, voters reauthorized the EBCC in the November 2013 election, demonstrating a continued interest in retaining local control of land use decisions in the EBCC service area. CP 669, 671.

Although the EBCC has authority to "independently determine whether to approve or disapprove land use legislation affecting territory within its jurisdiction," *City of Bellevue*, 138 Wn.2d at 945, the EBCC's authority is limited to its geographical territory. It does not have authority to disapprove permits for projects outside its service area. *City of Bellevue v. E. Bellevue Cmty. Mun. Corp.*, 119 Wn. App. 405, 407, 81 P.3d 148 (2003).

[1] Descriptions of the EBCC's geographic territory are located in the record at AR 2087 (map); CP 634 (narrative description).

Historically, the EBCC has carefully exercised its disapproval power, approving the vast majority of City ordinances or resolutions referred to it. *Sammamish Cmty. Mun. Corp. v. City of Bellevue*, 107 Wn. App. 686, 687, 27 P.2d 684 (2001) (noting EBCC and Sammamish Community Council approved 528 of the 606 ordinances and resolutions referred to them since 1969).

B. The PSE project.

1. PSE proposed a project with unproven positives and well-defined negatives.

(a) PSE's claim that the project would improve reliability is questionable

In December 2011, PSE submitted an application to the City of Bellevue seeking several permits and approvals including a conditional use permit. AR 16, AR 1714. The application sought permits for "a new transmission corridor" and to "construct a new 115 kiloVolt (kV) electrical transmission line to connect the existing Lake Hills and Phantom Lake Substations." AR 1714. Each of these substations is served by one transmission line. The goal of the project was to "loop" these substations, connecting each to two transmission lines so that "if one line goes out, the other line can continue to feed the substation and customers." AR 6.

Although PSE's purpose in constructing the transmission line is to improve reliability, East Bellevue citizens have experienced only five power outages over the past 10 years, at least one of which was not caused by a transmission line failure. AR 725, 696; CP 217-219. A reliability report commissioned by the City states that the Lake Hills circuit "experiences a low number of outages." AR 1812.

Moreover, the Project as currently conceived would "double circuit" a portion of the line, calling into question its efficacy in improving reliability. PSE initially planned for the transmission line to run west from the Lake Hills substation at NE 8th Street and 164th Ave. SE, turn south at 148th Ave. SE for 1.43 miles, and then run east on SE 16th Street for an additional half mile to connect to the Phantom Lake substation. AR 79, AR 696, AR 1254. Due to an existing power line on the north side of SE 16th Street, the project as initially proposed would have installed an additional transmission line on the south side of SE 16th Ave. to "loop" the line to the Phantom Lake substation. AR 1254, 420, 436. The end result would have been overhead power lines on both sides of SE 16th Street.

This independent, additional line on the SE 16th Ave. segment was, according to PSE, essential to improve reliability. AR 699. During the first of two "courtesy" informational public EBCC meetings in 2012 on June 5,

2012, in response to community concern about having transmission lines on both side of SE 16th Ave, PSE explained the need for a new line on the south side of SE 16th Street, stating that "co-locating" the line on the poles already existing on the north side of the street would reduce reliability. PSE's representative explained that co-locating the line would be problematic if one of the co-located poles were struck by a car or tree: if a segment of the line were to go down, "You've just taken both transmission lines down, because it was all reliant on one pole, and you've entirely defeated the whole reason we are suggesting that we do this project in the first place." CP 138 (emphasis added); AR 749 (co-locating "would defeat the purpose of providing a redundant transmission line.").

In an August 2012 memorandum to the EBCC, PSE explained:

> To construct the new line on the same side of the street as the existing line, we would "double-circuit" the two lines, meaning we would co-locate both lines on the same set of poles. While we recognize the appeal of this option from a community impact perspective, we avoid double-circuiting lines whenever possible as it significantly increases outage risk, which decreases the reliability benefits for our customers. A double circuit largely defeats the purpose of this project – to create a fully reliable redundant feed to these substations.
>
> Transmission lines are designed for redundancy (back-up); If an outage occurs on one transmission line, customers are re-routed to another transmission line, either decreasing the outage length or avoiding an outage

> completely. With a double-circuited line configuration, one outage event (such as a car hitting a power pole, a tree in the line or a lightning strike) can take both transmission lines out of service – dramatically decreasing the redundancy in the system and more than likely resulting in more customers affected by a significant outage. For this reason, double-circuiting the line on the north side of the street is unacceptable to us. The purpose of this project is to improve electric service reliability for our customers, and double-circuiting any portion of this line would provide no reliability benefit in the case of an incident affecting the double-circuit portion of the project.

AR 699 (emphasis added). *See also* AR 1732 (Alternative Siting Analysis explaining that co-locating on north side of SE 16th "impacts system reliability" increasing potential impact of outage).

But by the third of these three courtesy hearings on June 4, 2013, PSE's tune had changed, with PSE deciding lines could be co-located along SE 16th Street despite the reliability concerns.

Compounding the double-circuiting problem, on October 30, 2014, City staff issued a mitigated determination of nonsignificance (MDNS) under the State Environmental Policy Act (SEPA), Chapter 43.21C RCW. AR 2251. As a condition to the MDNS, the City stated PSE would not be allowed to run a "separate new transmission line down the south side of SE 16th Street." AR 2257. The MDNS delays any final design of the SE 16th Street portion of the line. AR 2257 ("The exact methodology for providing

the second line and the design of this section will be reviewed as a Land Use Exemption to this Conditional Use approval."). The condition states that possible ways to accommodate the second line include "co-location of the new line with the existing transmission on the north side of the street" or "undergrounding the line in a way that does not require removal of trees along the south side of the street." AR 2257. But while the MDNS condition leaves these two options open, PSE believes the cost to underground the line is prohibitive. CP 271.

City staff reviewed the conditional use permits and developed a staff report recommending the Hearing Examiner approve the permits with conditions. AR 76, AR 139. This staff report omits any mention of PSE's earlier warnings that co-locating the project on SE 16th Street would defeat the purpose of the project and that co-locating "significantly increases outage risk, which decreases reliability benefits to our customers." *Compare* AR 2307 (staff report) *with* AR 723-724 (memorandum to EBCC stating double circuiting is "unacceptable" because it "would provide no reliability benefit in the case of an incident affecting the double-circuit portion of the project").

Further calling into question the Project's contribution to increased reliability is the fact that, for the foreseeable future, the SE 16th segment will

be a missing link. At the June 2013 EBCC meeting, PSE's representative, Jeff McMeekin, informed the EBCC that PSE would delay construction of the SE 16th Street segment for an undetermined period of time to await the City's future public improvement project for sidewalks on that segment of roadway "at some point in the next ten years." CP 306; AR 2132 (identifying timeline for completion of this segment as "2020+ . . . [d]epending on the City of Bellevue's Transportation Improvement Plan"). McMeekin stated PSE "thought it would be better for the design to hold off on that portion of it and incorporate that with the City's project" but admitted that "it will impact reliability for some folks at Phantom Lake. It won't be as great as the completed project . . . It's a compromise[.]" CP 306.

Thus, the "compromise" project, by PSE's own admission, would not realize the full reliability benefits of connecting the two substations, delaying the full benefit of the project for ten years, and, depending on the City's funding of the SE 16th Street improvements, possibly even longer.

(b) Overhead utilities would destroy aesthetic character of 148th

In selecting 148th Avenue for the longest leg of the transmission line, PSE chose to locate its 70-80 foot tall poles along a heavily wooded, scenic route cherished by the community.

> 148th Avenue is a corridor emblematic of Bellevue as [a] 'City in a Park.' It is a heavily treed parkway with a rich mix

> of mature evergreens and deciduous trees, wide medians, and frontage plantings that serve to protect the adjacent neighborhoods from the high volumes of traffic on the road, as well as to present a beautiful travel experience and attractive pedestrian environment.

AR 2400. Accordingly, 148th Ave. SE is designated as an "Urban Boulevard." AR 2014, CP 398. A City memorandum to the EBCC describes "Urban Boulevards" as follows:

> Urban Boulevards: The City of Bellevue's Comprehensive plan calls for a greenway and boulevard system throughout the City that will reinforce the image of Bellevue as a "City in a Park." The Urban Boulevards Initiative team is working to implement this policy throughout the City. 148th Avenue is an arterial that significantly adds to the aesthetic, environmental and social fabric of our community.

AR 2014. *See also* City of Bellevue Comprehensive Plan, Urban Design Element, Map UD-1 and Policy UD-69 (describing design for "key city boulevards"). The segments of NE 8th Ave and 148th Avenue at issue have no overhead distribution lines. AR 1731.[2] PSE's proposed transmission line would run through the Lake Hills Greenbelt, "the most significant natural feature within the project area." AR 1724, 1731. The greenbelt is a park

[2] While PSE disputes that the segment of 148th Ave. in question is free of visible utilities, PSE's own application states that "Neither NE 8th Street nor 148th Ave. currently have overheard electrical distribution lines. . . so the transmission line would create a new visual presence." AR 1731. Other segments of 148th Street do have overhead lines. AR 1731. *See also* CP 542 (describing 148th as "the only north/south arterial in East Bellevue that remains largely untouched by above ground utility infrastructure.").

containing Kelsey Creek, Larsen Lake, a blueberry farm, wetlands, and pedestrian trails. AR 1724; AR 558. Larsen Lake's blueberry farm, located along 148th Ave., "is a regional attraction that serves the wider community." AR 865, 889.

PSE's project would remove 295 trees from along the route. AR 2402. PSE proposed to replace trees removed, but its efforts could not account for the changed visual appearance of the street. AR 89. Although the ordinary height restriction for single family land use districts is 30 feet, and the height restriction in commercial business districts is 45 feet, PSE's poles for this project would be 70-80 feet tall. AR 70, 106, AR 86 (staff report stating "Typical pole heights will be 70 to 80 feet above the ground."). The extent to which additional trees can mitigate visual impact to the area is hampered by the need to maintain a "border zone" of 15 feet from the conductor line. AR 88. This requires PSE to remove trees taller than 25 feet within the border zone. AR 89.

(c) PSE had other options

PSE could have avoided the EBCC's objections, while minimizing harm to the community, by choosing a different route. Included in the application for the conditional use permit was an Alternative Siting Analysis, which analyzed three potential routes ranging in length from 2 to

2.9 miles. AR 1714. These potential routes ran primarily down three different north-south avenues: 148th Ave. SE (the selected route), 156th Ave. SE, and 164th Ave. SE. AR 1254; AR 1289. Only the selected route, 148th Ave, runs down the middle of EBCC's service area. CP 632, 641.

Of these three potential routes, 148th was the longest, with a total length of 2.9 miles. AR 1731; AR 1289. Further, while the other two routes also would have crossed the greenbelt, they would have traversed it for a significantly shorter distance. AR 1731–32 (148th route crosses 2000 feet of the greenbelt while 156th route would cross 1,400 feet and 164th Ave. route would cross only 700 feet). 148th Ave. was the most expensive route, required the largest number of utility poles placed in wetland buffers, and due to the "large number of mature trees" along the avenue, selecting 148th "would also result in the greatest amount of tree removal and/or trimming." AR 1732, 1754, 553.

Despite these shortcomings, PSE selected the 148th Ave. route as its preferred alignment. One City staff member characterized the selection of this route as "contradictory to the original design of 148th AV which required that powerlines and utilities be underground." AR 980. Another characterized 148th as an "extraordinarily bad alignment" choice. AR 890.

Glenn Kost, a City Parks and Community Services Department employee, wrote the City Development Services Department a letter sharply criticizing the 148th Ave. alignment. Kost's letter urges the City relocate the transmission line, calling the selected route "ill-conceived, inconsistent with City policies, past practices and current initiatives" and stating it "sacrifices the aesthetics of nearly 3-miles of urban boulevards, and ¾ miles of open space." AR 553-54. Kost states that the selected route "is inconsistent with at least 17 City Comprehensive Plan Policies," and provides a detailed chart itemizing these inconsistencies. AR 553. Kost states the route is inconsistent with the City's "continuing practice of providing tree-lined streets and urban boulevards, the $5 million Enhanced Right-of-Way & Urban Boulevards CIP Program, Environmental Stewardship Initiative, Tree City USA Awards, and stated commitment to neighborhood aesthetics." AR 554.

In addition, an electrical reliability study commissioned by the City provided an alternative option to a new transmission line: redundancy "via a looped 12.5kV distribution circuit that can be fed from another 115kV substation." AR 1828, 1830.

2. The Bellevue Land Use Code requires a conditional use permit and shoreline conditional use permit for the project.

Under LUC 20.20.255.C, new or expanded electrical utility facilities on certain sensitive sites require a conditional use permit. Because the proposed transmission line was on sensitive site designated in the comprehensive plan, PSE was required to obtain a conditional use permit through the hearing examiner and City Council. LUC 20.20.255.C, D; AR 1720; AR 63. A conditional use permit requires a proposed project to comply with certain legislatively-created criteria in order to be permitted. William B. Stoebuck, John W. Weaver, 17 WASH. PRAC. REAL ESTATE §4.22 (West 2016) ("certain uses . . . may be desirable to have but are somewhat discordant with the regularly permitted uses and so should be controlled on an ad hoc basis."). In other words, conditional uses require consideration on a case-by-case basis; they are not allowed outright.

In addition, due to the proposed construction within the Kelsey Creek/Lake Hills Greenbelt and associated critical areas and buffers, the project required a shoreline conditional use permit, a critical areas land use permit, and a shoreline substantial development permit. AR 63, 80. The shoreline permits were required because the area contains wetlands regulated under the City's Shoreline Master Program, including Category I

wetlands, the most vulnerable category of wetlands. AR 23, 101; WAC 173-183-710. The project also required review under the State Environmental Policy Act, Chapter 43.21C RCW.

The conditional use permit and shoreline conditional use permit are "Process III" decisions under the City's code, which means they are quasi judicial decisions made by the City Council based on recommendations by the Development Services Department Director and the Hearing Examiner. AR 80; LUC 20.35.300.

3. The CUP criteria are designed to ensure that a project is compatible with land use policies embodied in the comprehensive plan, and with the surrounding neighborhood.

The City's land use code provides broad criteria for the approval of a conditional use permit, aimed at ensuring the use is compatible with adjacent uses, the comprehensive plan, the City code, and the character of the area. LUC 20.30B.140 provides that the City may approve an application for a conditional use permit, with or without modifications, if:

> 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
> C. The conditional use will be served by adequate public facilities including streets, fire protection, and utilities; and

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

E. The conditional use complies with the applicable requirements of this Code.[3]

While the consistency of a conditional use with some of the code provisions (*e.g.*, the number of residential units permitted per acre) are objectively ascertainable, many of the criteria are broad questions, involving mixed considerations of fact, law and policy, and leave room for the exercise of judgment and discretion. CP 491. Whether a use is "consistent" with the competing policies of a comprehensive plan; "detrimental" to uses in the immediate vicinity; and "compatible" with the "intended character, appearance, quality of development, and physical characteristics" of the property and its surroundings are not reducible to mathematical precision. They involve the exercise of judgment, and as PSE admits, the balancing of considerations. Brief of Appellant at 24-25.

The City of Bellevue unequivocally requires that conditional uses comply with the broad policies of the comprehensive plan including policies pertaining to "community vision." In response to a code interpretation

[3] Permits for electrical utility facilities must comply with several additional criteria. LUC 20.20.255. These additional criteria require the project applicant to complete a siting analysis, demonstrate an operational need for the project, demonstrate that the project improves reliability, and provide "mitigation sufficient to eliminate or minimize long-term impacts to properties located near an electrical utility facility." LUC 20.20.255.D, E.

request by PSE, City SEPA official/land use director Carol Helland responded:

> The first finding that must be shown under the decision criteria is that the 'conditional use is consistent with our comprehensive plan.' That heightens the effect of our comp plan to be more on par with the balance of our development regulations. Bellevue has a somewhat unique comprehensive plan in that regard. It is very specific, and when we issue conditional use permits . . . staff has to make a positive showing that the community vision has been faithfully met through the application of the comprehensive plan provisions. Some cities only apply their comp plan through SEPA, we apply our comp plan to anything that requires some form of discretionary permit approval and do so as part of our regulatory framework.

AR 1336 (emphasis added).

As noted, during staff review of the conditional use permit application, the City and PSE provided EBCC with information about the project at several public meetings. At three lengthy public meetings, held on June 5, 2012, September 4, 2012, and June 4, 2013, the EBCC discussed PSE's project with representatives of the City's planning department, two representatives from PSE, and a representative of Otak, the firm that prepared a conceptual landscape mitigation report for the project. CP 87, 114, 206, 301. At these early "courtesy" meetings, the EBCC and community members raised concerns that the project was not, in fact, consistent with community vision, questioning the need for the project and

expressing concern for the adverse impacts on the greenbelt. CP 115-116, CP 122, CP 130-131, CP 308, CP 318.

Nevertheless, the Hearing Examiner held a public hearing on November 20, 2014, and issued a recommendation that the City Council approve the conditional use permit and the shoreline conditional use permit on December 29, 2014. AR 2158. After reviewing the Hearing Examiner's recommendations at three meetings, the City Council adopted Ordinance 6226, approving the conditional use permit and the shoreline conditional use permit, on May 4, 2015. AR 2629. The City then transmitted the SCUP and CUP decisions to the EBCC for its consideration.

C. EBCC's disapproval of the conditional use permits.

1. Prior to disapproving the CUP and SCUP, the EBCC carefully reviewed the evidence and considered the applicable regulations.

Under RCW 35.14.040(3), the City Council's ordinance was not final until the EBCC approved or failed to disapprove it. The EBCC considered the project during two meetings, held on June 2 and June 24, 2015. The transcripts of those hearings, AR 2972–3015, illustrate the EBCC's careful consideration of the conditional use permit criteria and the EBCC's grave concerns about the project's compatibility with the comprehensive plan, area character and aesthetics, and the extent to which

the project would fail to improve reliability. *E.g.*, AR 2980–81, 2985. Councilmember Betsy Hummer stated,

> I understand mitigation factors were negotiated to minimize the visual and environmental impact of the project. However, simple viewing of existing 80-foot poles shows that no amount of mitigation can obscure the utility poles. The addition of the wires criss-crossing the boulevards exacerbates the issue. Instead of trying to hide them at the edge of the rights-of-way, they will be visible from close up and far away. The addition of visual clutter to the landscape is inexcusable, and, unfortunately, not addressed in enough detail by staff.

AR 3000. Councilmember Hughes referred to evidence in the record stating that most outages were due to failures of overhead conductors and tree related events, and stated he did not believe the "operational need" criteria had been met. AR 3003.

The councilmembers discussed the fact that the project as approved did not include the originally-proposed half-mile stretch along SE 16th Street to the Phantom Lake substation, which had been part of the project as presented to them at the three prior courtesy meetings: "[T]he City is now approving the transmission without that section [SE 16th Street] which was previously stated as essential." AR 2993. The City staff admitted that the SE 16th Street "project is not funded in the Capital Improvement Plan (CIP), which funds projects over a seven-year horizon." AR 2978.

Based upon its findings that the project's benefits had not been proven while its detriments were unacceptable, the EBCC exercised its statutory authority to disapprove the City's ordinance on June 24, 2015. CP 20-21. The EBCC entered detailed findings supporting its disapproval. CP 22–25.

2. The EBCC's findings are all based upon the defined CUP criteria.

The EBCC's findings demonstrate it took care to identify the ways in which PSE's project did not meet the criteria for a conditional use permit.

(a) The project is not consistent with the Comprehensive Plan

The EBCC found the proposed use inconsistent with the comprehensive plan, identifying the specific comprehensive plan policies with which it fails to comply. CP 451–454 (findings 3, 5, 10). EBCC found:

> This conditional use is inconsistent with the Comprehensive Plan provisions noted below which repeatedly refer to Bellevue's Commitment to a City in a Park, and developing the Urban Boulevard and Enhanced Rights of Way:
>
> 1. UT-45 page 209 [Avoid, when reasonably possible, locating overhead line in greenbelts and open spaces];
> 2. UT-53 page 210 [Require all utility facilities to be aesthetically compatible];
> 3. UT-19 page 212 [Preserve trees as a component of the skyline to retain the image of a "City in a Park"];
> 4. UT-42 page 212 [Design 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];

5. S-WI-44 Utilities page 214 [Utilities 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)].[4]

(b) The Project is Not Compatible with the Character, Appearance, Quality of Development and Physical Characteristics in Vicinity

EBCC specifically addressed LUC 20.30B.140.B, requiring that the use be compatible with the character, appearance, quality of development and physical characteristics of the surrounding area:

> The Hearing Examiner's Findings of Fact, Conclusions of Law and Recommendation that Conditional Use Permit LUC 20.30B.140(B) has been met is not supported by material and substantial evidence. Throughout the documents, NE 8th, and especially 148th Ave. are designated as Urban Boulevards, and part of the Enhanced Rights of Way; the routes are continually described as having no existing power lines. (Hearing Examiner Record 139–149C, 192F, 140C). This was not done by accident. 148th Ave. was developed as an Urban Boulevard by a visionary City . . . Obviously a major element of the Urban Boulevard is a lack of visible utilities, such as distribution and transmission wires. The only visible utilities on NE 8th and 148th are light poles. [CP 452 (finding 9).]

[4] CP 452. In its findings, the EBCC abbreviated the text of the policies. For the Court's convenience, the full text of the policies is set out above. *See* AR 3000; CP 410. The EBCC's findings reference specific comprehensive plan policy numbers (e.g., UT-45). The "UT" prefix refers to the Utility Element of the Comprehensive Plan and the page numbers refer to the page of the comprehensive plan these policies appear on. As noted in PSE's brief, Bellevue's comprehensive plan was updated in August 2015.

(c) The Project is Materially Detrimental to Uses or Properties in Vicinity

The EBCC found the proposed use would be materially detrimental to the surrounding area, including the Lake Hills Greenbelt. LUC 20.30B.140.D. The EBCC found, "[M]ore than 50,000 people enjoy this park [the Lake Hills Greenbelt] daily, and the whole project will adversely affect this enjoyment; from construction delays to long-term visual pollution." CP 453 (finding 11). The EBCC also found the project failed to meet this criteria due to the adverse impacts to commerce, pollution and commute time. CP 453 (finding 21).

(d) The project fails to demonstrate operational need, that alternative sites were not feasible, and that it is necessary to improve reliability

The EBCC also found the use did not meet the additional criteria for electrical utility conditional uses in LUC 20.20.255. EBCC found the route selected was not consistent with LUC 20.20.255.D, and that the record contained evidence about the benefits of alternative sites "not considered in selecting 148th Avenue alignment." CP 451–53 (finding 6, finding 14).

EBCC also found PSE did not demonstrate the operational need for the project or that the project enhanced reliability under LUC 20.20.255.E.3–4. As to the operational need, EBCC found:

> The Hearing Examiner's Findings of Fact, Conclusions of Law and Recommendations that Additional Criteria for Electrical Utilities Facilities LUC 20.20.255.E.3 has been met is not supported by material and substantial evidence. The record indicates that there have been few outages due to substation or transmission lines. There were 5 power outages in 10 years; 4 by trees, fixed within a day caused by transmission line failures . . . Outages are "mostly due to failures of overhead conductors and tree related events."

CP 453 (finding 13). As to whether the project enhanced reliability, EBCC found the compromised project failed to meet this criteria:

> The project fails to achieve the desired benefit of redundancy because the 'loop' cannot be completed as originally proposed . . .PSE does not intend to construct the segment of the project along SE 16th until an unspecified date in the future.

CP 453–54 (finding 16). Accordingly, on June 24, the EBCC members adopted a resolution disapproving the conditional use permit and shoreline conditional use permit.

D. In denying PSE's LUPA petition, the Superior Court properly recognized the EBCC's significant role in local land use decisions.

Following the EBC resolution disapproving the permits, PSE filed a petition under the Land Use Petition Act (LUPA), Chapter 36.70C RCW, challenging the EBCC's disapproval of the CUP and SCUP. A flurry of initial motions, reflecting the issues of first impression presented by the case, soon followed. PSE filed a motion requesting the superior court rule

that under Chapter 35.14 RCW, the EBCC lacked disapproval authority over the SCUP. CP 535. EBCC filed a motion requesting the Court determine that the statutory writ procedure, rather than LUPA, governs judicial review of EBCC's action. CP 504. The Court concluded that LUPA does apply, and that EBCC "lacks jurisdiction to review shoreline conditional use permits." CP 680.[5] Without reference to any specific authority allowing such an order, the Court ordered the EBCC to amend its resolution "to eliminate any reference to shoreline conditional use permits." CP 681. The order also directed the City to transmit the shoreline conditional use permit to the Department of Ecology for consideration. CP 681.

On December 14, 2015, following briefing by the parties, Judge William Downing held oral argument on the LUPA petition. 12/14/15 VRP. The Court issued an order and explanatory letter the following week, concluding that PSE failed to meet its burden to establish EBCC erred under any of the LUPA standards of review. CP 499. The superior court's letter

[5] Following the court's ruling on "jurisdiction," EBCC sought an automatic stay of the court's decision. CP 685. PSE filed a motion to quash the stay, arguing the court's decision on the shoreline conditional use permit was not a decision affecting a property interest under RAP 8.1. CP 694. The superior court agreed and entered an order quashing the stay. CP 745. EBCC appealed both these orders under appeal numbers 74117-9 and 74302-3. PSE moved to dismiss both these appeals as interlocutory. EBCC agreed to dismiss the appeals awaiting the court's determination on the conditional use permit under LUPA. Following the court's December 18, 2015 decision on the LUPA petition and PSE's appeal of that order, EBCC cross appealed the Order on Resolution of Jurisdictional Issues as well as the Order on Motion to Quash the Stay.

states that although EBCC's findings may have exaggerated some points, "this does not invalidate the entirety of the Resolution. This Court cannot find that the EBCC committed any fatally erroneous interpretation or application of the law." CP 497. The superior court concluded that although the EBCC defers to the hearing examiner's findings of fact, "it does not abdicate its responsibilities as the law assures it a 'significant role in determining land use regulations within the community municipal corporation.'" CP 496. The court also stated,

> Whether this result is viewed as a major frustration or as democracy-in-action depends on one's perspective (and maybe there is truth to both) but it would seem to be a not-unpredictable byproduct of the unusual governmental structure that exists.

CP 497. PSE appealed the court's order denying its LUPA petition, and EBCC cross-appealed the Order on Resolution of Jurisdictional Issues and the Order on Motion to Quash the Stay.

After review by the Department of Ecology, EBCC appealed the SCUP to the Shorelines Hearings Board (SHB). The parties subsequently settled the case before the SHB, after the City assured the EBCC that it would require PSE to mitigate its impacts on the wetlands to the fullest

extent required by the Shoreline Management Act (SMA), Chapter 90.58 RCW.[6]

V. ARGUMENT

A. EBCC's disapproval of the Project was in accordance with state law and should be upheld.

1. The LUPA standard of review as applied to community council decisions.

Under LUPA, the court of appeals "stands in the shoes of superior court and reviews the administrative decision on the record before the administrative tribunal, not the superior court record, reviewing the record and the questions of law de novo to determine whether the facts and law support the land use decision." *Julian v. City of Vancouver*, 161 Wn. App. 614, 623, 255 P.3d 763, (2011). As the LUPA petitioner, PSE bears the burden of establishing error under at least one of LUPA's six standards of review. *Mower v. King Cnty.*, 130 Wn. App. 707, 712, 125 P.3d 148 (2005).

PSE argues that the EBCC erred under four of the six LUPA standards of review, arguing EBCC's decision is an erroneous interpretation of the law, RCW 36.70C.130(1)(b); unsupported by substantial evidence, RCW 36.70C.130(1)(c); a clearly erroneous application of the law to the

[6] *See* Correspondence with Court of Appeals, dated March 3, 2016; Emergency Motion for Relief under RAP 8.3 (filed Feb. 18 2016).

facts, RCW 36.70C.130(1)(d); and outside the EBCC's authority. RCW 36.70C.130(1)(e).

PSE abandons its argument under RCW 36.70C.130(1)(b) by failing to brief it. RAP 10.3(a)(6); *Kittitas County v. Kittitas County Conservation*, 176 Wn. App. 38, 54, 308 P.3d 745 (2013) ("Unsubstantiated assignments of error are deemed abandoned."). PSE fails to explain how the EBCC erroneously interpreted any specific language in the land use code, nor does PSE identify any ambiguity in the code's language that would permit this Court to defer to the City's interpretation of the code. *Milestone Homes, Inc. v. City of Bonney Lake*, 145 Wn. App. 118, 126, 186 P.3d 357 (2008) ("We apply an unambiguous ordinance according to its plain meaning; we construe only ambiguous ordinances."). In any event, in denying the conditional use permit, the EBCC did not interpret the law; the EBCC simply applied Bellevue's land use code criteria to the permit before it.

(a) The Court must determine whether the EBCC's decision, not the Hearing Examiner's or City Council's, complies with State law.

The application of LUPA's standards of review to a disapproval decision by a community municipal corporation is an issue of first impression in Washington State. There is an argument that LUPA does not even apply to the decisions of this type of municipal entity, which the EBCC raised below. *See* CP 616. But, the EBCC concedes that the legislature did

intend LUPA to supplant the old writ procedure as the exclusive means to review land use decisions, RCW 36.70C.030(1). Moreover, the standard of review under the writ process, Chapter 7.16 RCW, is largely the same. However, the EBCC does emphasize that another statute, in addition to LUPA, controls this case: Chapter 35.14 RCW. Accordingly, this court must interpret and apply the LUPA standards in a manner consistent with the legislature's command that community municipal corporations be the final decision makers within their territory. *State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transportation*, 142 Wn.2d 328, 342, 12 P.3d 134 (2000) ("The construction of two statutes shall be made with the assumption that the Legislature does not intend to create inconsistency. Statutes are to be read together, whenever possible, to achieve a harmonious total statutory scheme . . . maintain[ing] the integrity of the respective statutes.") (internal citation and quotation omitted). The need to harmonize the controlling statutes makes for a unique case in many respects.

First, under state law, the decision reviewed by this court is squarely the EBCC's. LUPA provides for judicial review of local "land use decisions." RCW 36.70C.020 defines "land use decision" as "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to

hear appeals[.]" RCW 36.70C.020(2). By statute, the "final decision" rests with the EBCC for any land use decision enumerated in Chapter 35.14 within its service area. RCW 35.14.040 (giving community councils authority to approve or disapprove certain land use ordinances and resolutions). *See also* LUC 20.35.365.C (decision of community council may be appealed to superior court under LUPA). The decision this court reviews is therefore not the hearing examiner's, and not the City Council's, but the EBCC's. *See, e.g., Quality Rock Products, Inc. v. Thurston County*, 139 Wn. App. 125, 132, 159 P.3d 1 (2007) (court reviews decision of board, not hearing examiner, where that body "had the County's highest level of decision making authority.").

Second, the presence of Chapter 35.14 in this case requires the court to defer to the EBCC's findings, not the findings of the hearing examiner. PSE argues this court must view the facts in the light most favorable to the party who prevailed in the highest forum exercising fact finding authority, *e.g.*, *Peste v. Mason County*, 133 Wn. App. 456, 477, 136 P.3d 140 (2006), and that this highest forum is the hearing examiner. Yet, "the scope and nature of an administrative appeal or review must be determined by the provisions of the statutes and ordinances which authorize them." *Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 106 Wn. App. 461, 471–472, 24

P.3d 1079 (2001). Nothing in RCW 35.14.040(3) requires the EBCC to give deference to the hearing examiner, nor does Bellevue's land use code require the EBCC to defer to the hearing examiner. *See* LUC 20.35.365; AR 2929 (land use code does not specify EBCC's burden of proof or standard of review).

Moreover, nothing in RCW 35.14 or the City's land use code precludes the EBCC from making an independent determination based on the record. And in fact, the Washington Supreme Court has interpreted RCW 35.14.040 to authorize just such an independent review of city decisions. In *City of Bellevue*, 138 Wn.2d 937, the Supreme Court stated RCW 35.14.040 "provides a community council with authority to independently determine whether to approve or disapprove land use legislation . . . in keeping with the Legislature's intent to allow local level decision making." *Id.* at 945.

Thus, requiring the EBCC, or the reviewing court, to defer to the hearing examiner would undermine the legislative intent of Chapter 35.14 RCW. PSE would readily agree that as a community municipal corporation, the EBCC lacked the authority to participate in the hearing examiner proceedings. Given that EBCC did not, and could not, have participated in the forum where facts were found, affording deference to the hearing

examiner would prejudice the EBCC in contravention of its clear statutory grant of authority.

Likewise, the court should not entertain the argument that EBCC's failure to appeal the MDNS somehow gives the conditions in the MDNS preclusive effect. Again, the EBCC has limited statutory authority, which does not include the ability to appeal an MDNS. PSE's assertion that the EBCC's findings regarding traffic are an impermissible collateral attack on the MDNS, Br. of Appellant at 28-29, is legally incorrect. *See Quality Rock Products, Inc. v. Thurston County*, 139 Wn. App. 125, 159 P.3d 1 (2007) ("[N]o Washington court has held that a party must appeal a SEPA decision, such as an MDNS, to validate a challenge to the permit itself.").

2. The EBCC's decision was supported by substantial evidence.

Regardless of who deserves deference under the statutes at issue here, the EBCC's decision is supported by substantial evidence when "viewed in light of the whole record before the court." RCW 36.70C.130(1)(c). "Under the substantial evidence standard, there must be a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true." *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

The EBCC's findings support its ultimate determination that the proposed use was inconsistent with the comprehensive plan, inconsistent with the character of the area, and materially detrimental to the vicinity. As detailed at length in Sections IV.B–C of this brief, the record amply supports the questionable benefits and definite detriments of PSE's project. For example, the evidence in the record shows:

- NE 8th and 148th are repeatedly referred to as tree-lined "urban boulevards." AR 562; AR 242-244; AR 2014; AR 675; AR 687; AR 796. *See also* City of Bellevue Comprehensive Plan, Urban Design Element, Map UD-1 and Policy UD-69 (describing design for "key city boulevards").

- Currently, the only visible utilities on the sections of NE 8th and 148th Ave. at issue here are light poles. AR 1731.

- PSE's transmission line would cross from the west to the east side of 148th Avenue three times, increasing the visual impact of the line. AR 93–95.

- Photo-simulations of the proposed line show the inconsistency between the existing streetscape and the proposed power lines. AR 58–62.

- The staff report, relied on and incorporated by the hearing examiner, itself acknowledges that tree loss impacts "a major visual amenity along public roadways and open spaces." AR 89.

- Thousands of motorists use 148th Ave each day, and the project would take four to six months to complete. AR 553; AR 889; AR 2308.

The evidence in the record also supports EBCC's finding that the PSE engineer overstated the reliability benefits of the project. AR 2995; 3018. It is undisputed that the SE 16th Street portion of the project cannot be completed until some unspecified future date. AR 24–25. The staff report, which the hearing examiner relied on, omits PSE's earlier warnings about the reliability deficits associated with colocation. And the Exponent report and alternative siting analysis relied on by the hearing examiner, AR 2180–2181, do not compel different findings. In fact:

- The alternative siting analysis describes the negative impact of co-locating on SE 16th Street.[7]
- The alternative siting analysis does not discuss the three pole-mounted switches to be used at 148th and SE 16th in the approved project, or analyze the benefits of building the loop in a piecemeal fashion. AR 1732.
- The Exponent report identifies a line between Lake Hills and Phantom Lake substations as "needed to supply these two substations from two directions", but does not propose or analyze any particular routes or the compromised project. AR 1830.
- As described above in Section IV.B(1)(a) of this Brief, PSE's own representatives stated that co-locating a line along SE 16th Street on existing poles would compromise reliability and "defeat the purpose" of the project. CP 138; AR 749.

[7] AR 1732 ("Locating a new transmission line on the north side of SE 16th Street would result in approximately ½ mile of double circuiting, which impacts system reliability. If an accident results in the loss of a pole and a transmission outage in this area, both lines feeding the Phantom Lake Substation would be affected.").

3. The EBCC's decision was not a "clearly erroneous application of the law to the facts."

PSE has also failed to establish that the EBCC's decision was a "clearly erroneous application of the law to the facts" under RCW 36.70C.130(1)(d). The clearly erroneous standard is only met if the court is "left with a definite and firm conviction that a mistake has been committed." *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006). The superior court, after careful consideration, concluded the EBCC committed no such "fatally erroneous interpretation or application of the law," and this Court should agree. CP 497.

Contrary to PSE's assertions, the EBCC did not create new criteria or commit actions beyond the authority of a community municipal corporation. Instead, the EBCC disagreed with the hearing examiner and city council as to the application of the law to the facts. This is not error under LUPA; on the contrary, it was well within the EBCC's authority.

The case law and statutory scheme fully support EBCC's ability to determine mixed questions of fact and law in the manner in which it did. In *Citizens to Preserve Pioneer Park LLC*, 106 Wn. App. 461, the city council disagreed with the planning commission as to whether a pole to be installed was a "material detriment" to the public welfare. Although the planning

commission had acted as the fact finder, the Court upheld the city council's decision reversing the planning commission, concluding the decision involved legal questions or mixed questions of law and fact.

> The major areas in which the city council differed from the planning commission revolved around the meaning and application of the variance criteria. Such disputes, as contrasted to disagreement about "raw facts", present either questions of law, or mixed questions of fact and law. An example of a mixed question of fact and law is whether the visual impact of a monopole is so great as to constitute a material detriment to the public welfare. The city council could properly conclude, based on its own review of the pictures, maps and testimony in the record, as summarized by the planning commission's findings as to underlying facts, that in view of the entire record, there was insufficient evidence that the visibility of the pole constituted a detriment to public welfare.

Id. at 473 (internal citations omitted). Likewise, here, the disagreement is not about the "raw facts" like how many trees would need to be removed or the height of the poles to be installed. Rather, the EBCC properly concluded, based on its review of the record, that the project did not comply with the very broad and discretionary CUP criteria.

Again, a CUP cannot be granted if doing so would violate the comprehensive plan, and the comprehensive plan contains numerous policies with which the PSE project is inconsistent. *See* AR 560. Comprehensive Plan policy UT-45 required PSE to avoid "locating

overhead lines in greenbelt and open spaces[.]" AR 239. The project would clearly locate an overhead transmission line in a greenbelt. Policy UT-53 requires "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.

PSE repeatedly contends that EBCC ignored the "balancing of competing objectives" among comprehensive plan polices in the hearing examiner and City staff recommendations, Brief of Appellant at 24-25, pointing out that staff struck a "balance" between the competing objectives of the comprehensive plan. As City planner Sally Nichols testified at hearing:

> In the case of this particular project it's really a case of balancing objectives. Obviously the first objective is to provide reliable electrical service to underserved geographic areas to meet the need of not only today but also the future. And then that has to be balanced against the city's vision of Bellevue as a city in the park and the protection of our ecological resources.

Certified Appeal Board Record, Transcript of Nov. 20, 2015 hearing at 26 (Sub. No. 39). The EBCC wholeheartedly agrees that the decision whether to grant the CUP was a balancing act. But the EBCC did not "ignore" staff's balancing; it struck a different balance. That was squarely within its authority.

Finally, PSE contends that the Lake Hills Reliability Project is specifically identified in the comprehensive plan, suggesting that this means the project as conceived is automatically compatible. Brief of Appellant at 22. But Utilities Element Figure UT 5a merely identifies areas on a map of the City deemed "sensitive sites." AR 1720. The comprehensive plan does not contain a specific approval of any particular route.

4. Because the EBCC's decision was clearly within its statutory authority, PSE's remedy is with the legislature, not the courts.

PSE couches its appeal in terms of LUPA standards and municipal code provisions. Yet, the fundamental basis of PSE's argument is that the EBCC cannot – and should not – have the power to disapprove its project. AR 2972–3015. Such a premise is flatly inconsistent with the will of the legislature.

PSE essentially argues that the EBCC has virtually no role in land use decisions, and can only rubber stamp the decisions of the City Council where there is room for the exercise of discretion. PSE grossly misconstrues both the text of Chapter 35.14 RCW and applicable case law. The plain language of Chapter 35.14 RCW evinces the legislature's intent that annexed neighborhoods retain control over local land use decisions. *See City of Bellevue*, 138 Wn.2d at 945–46 (rejecting City's argument that EBCC could

do no more than rubber stamp decision of City Council as inconsistent with legislatively-granted approval or disapproval power).

PSE quotes selectively from *City of Bellevue* in support of the contention that EBCC only has authority to reverse the City Council on matters where there is "room for discretion." Brief of Appellant at 12. But the case contains strong language affirming the final decision-making authority of community municipal corporations. The Court held that in light of the purpose of the statute "to allow local level decision making," the EBCC was permitted to disagree with the City as to the consistency of a zoning ordinance and the comprehensive plan. *Id.* at 945.

> [W]here there is room for the 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.

While PSE relies on this case to cabin EBCC's disapproval authority to only matters of discretion, the Court specifically rejected the City's arguments that the EBCC's authority was limited to correcting mistakes made by the City Council:

> [T]he [City's] assumption seems to be that the City's decision must have been wrong in some respect before the Community Council can exercise its authority to disapprove

> land use regulations within the purview of RCW 35.14.040. This is an erroneous assumption. . . [I]t implies that the only authority granted by the statute is to review the City's actions. Nothing in the statutory language indicates that the Community Council has such limited authority or that the Community Council acts as a reviewing body. Also, such a reading would mean that if the City's action were lawfully within its authority and discretion, the Community Council could do no more than 'rubber stamp' the City's land use legislation.

Id. at 946.

Moreover, if PSE believes that the CUP criteria, combined with EBCC's review authority, afford too much discretion to EBCC, PSE can take this argument to the Bellevue City Council. As an elected legislative body, the Council has full authority to revise its land use codes to make them less discretionary, but this Court cannot re-write Bellevue's code.

As noted by the superior court, PSE is in its current position by virtue of the "unusual government structure" that exists. Our state legislature expressly authorized that "unusual" structure, while Bellevue has deliberately adopted broad and discretionary CUP criteria. If PSE feels this combination gives EBCC "virtually unlimited" power, Br. of Appellant at 1, its remedy is through the state and local legislatures, not the courts.

5. EBCC is entitled to attorneys' fees

The EBCC requests attorney fees on appeal under RCW 4.84.370, which provides attorney fees for land use appeals including denial of a

conditional use permit. RCW 4.84.370(1). A public entity whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal. RCW 4.84.370(2); *Durland v. San Juan County*, 182 Wn.2d 55, 78, 340 P.3d 191 (2014) (under RCW 4.84.370(2) ("public entity will receive attorney fees if its decision is 'upheld' in two courts").

PSE may contend that the EBCC's disapproval is not the decision of a "county, city, or town" under RCW 4.84.370. But this statute was intended to provide attorney fees for LUPA appeals. LAWS OF 1995, ch. 347, §§ 701, 718; FINAL BILL REPORT, ESHB 1724, at 6 (1995). Assuming, as PSE contended below, that the EBCC is a "local jurisdiction" to which LUPA applies, RCW 36.70C.020(3), it should likewise be an entity entitled to attorney fees under RCW 4.84.370.

B. The trial court erred in concluding that the EBCC lacks jurisdiction over shoreline conditional use permits.

EBCC cross-appeals the superior court's Order on Resolution of Jurisdictional Issues. In ruling that the EBCC lacked authority to review shoreline conditional use permits, CP 680–681, the superior court erred. Because the legislature explicitly vested authority to review this type of local land use decision in community councils, this court should reverse that ruling of the superior court.

The extent of a municipal entity's statutory authority is an issue of law reviewed de novo. *Okeson v. City of Seattle*, 159 Wn.2d 436, 444, 150 P.3d 556 (2007). Statutory interpretation presents a question of law that the court reviews de novo. *Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770, 785, 357 P.3d 1040 (2015). The court's fundamental purpose in construing statutes is to ascertain and carry out the intent of the legislature. *In re Schneider*, 173 Wn.2d 353, 363, 268 P.3d 215 (2011).

RCW 35.14.040(3) provides community municipal corporations authority to approve "conditional use permits." The superior court ruled that this statutory language did not encompass shoreline conditional use permits. Under the plain language of the statute, this was incorrect.

A shoreline conditional use permit is a type of conditional use permit. Conditional use permits, whether concerning land inside or outside the shoreline, serve the same purpose. The basic function of a conditional use is a "site-specific discretionary review of proposed uses," permitting a certain use where legislatively-prescribed conditions are found. 3 EDWARD H. ZIEGLER, LAW OF ZONING AND PLANNING § 61.2, § 61.9. (2010). A conditional use is a permitted use, but it is not a " 'regularly permitted' use; "it is permitted only upon the grant of a 'conditional-use permit' by a local administrative body." WILLIAM B. STOEBUCK, JOHN W. WEAVER, 17 WASH.

PRAC. REAL ESTATE §4.22 (2d. ed. 2016). "The concept is that certain uses, for example the site of an electric power substation in a residential zone, may be desirable to have but are somewhat discordant with the regularly permitted uses and so should be controlled on an ad hoc basis." *Id.*

Construing RCW 35.14.040(3) to exclude shoreline conditional use permits is inconsistent with "obvious purpose" of the statute: "to place final decision making power in the community council where land use regulations affecting property within its jurisdiction are concerned." *City of Bellevue,* 138 Wn.2d at 945. A distinction between shoreline conditional use permits and conditional use permits divests local communities of authority to disapprove matters affecting the shoreline which, by definition, may have an unusual impact or require special siting considerations.

PSE's arguments below relied on the fact that the word "shoreline" does not appear in RCW 35.14.040. CP 542. But the word "shoreline" is unnecessary in this context. A shoreline conditional use permit is functionally just a more specific type of conditional use permit. Calling this conditional use permit a "shoreline conditional use permit" does not change the function of the permit. Indeed, the Shoreline Management Act (SMA), Chapter 90.58 RCW, does not even use the phrase "shoreline conditional use permit." Rather the SMA directs counties and cities to

adopt shoreline management programs, which must provide for variances and "permits for conditional use." RCW 90.58.100(5).

Moreover, the absence of a specific reference to shoreline conditional use permits in RCW 35.14.040 is not surprising. The land use decisions enumerated in RCW 35.14.040 are phrased in general terms, without reference to the statutes authorizing them. RCW 35.14.040(1)-(6). For example, comprehensive plans are required by the Growth Management Act, Chapter 36.70A, but the statute does not specify "comprehensive plans promulgated under the GMA."

Before the trial court, PSE relied on the fact that the SMA was enacted after Chapter 35.14 RCW to contend the legislature did not intend "conditional use permit" in RCW 34.14.040(3) to include shoreline conditional use permits. CP 540.46. There is no support for this argument. While it is true that the SMA was enacted after Chapter 35.14 RCW, the SMA itself does not use the term "shoreline conditional use permit." *E.g.*, RCW 90.58.100 ("permits for conditional use"). While Bellevue's code does use the term "Shoreline Conditional Use Permit," LUC 20.30C, this is irrelevant to the intent of the state legislature. Given that RCW 35.14.040 already permitted review of "conditional use permits," there was no need to amend the statute after the SMA was enacted.

PSE also argued that the legislature could have amended Chapter 35.14 RCW to include "shoreline conditional use permits" and had the opportunity to do so when it made several other changes to that chapter. *E.g.*, LAWS OF 1993, ch. 75 § 1 (amending RCW 35.14.010 to permit formation of community municipal corporations when two or more cities are consolidated). But the specific provision at issue, RCW 35.14.040, has not been amended since 1967. Further, if the legislature reasonably believed "conditional use permits" already encompassed these shoreline permits, it would have had no reason to amend the statute.

PSE also relied on the statewide interests identified in the SMA to argue the two permits were different because CUPs focused on local concerns, while SCUPs focused on statewide concerns. PSE's argument ignores the local interest in managing shoreline development. Even though shoreline permits reflect state policy, they are implemented at the local level, subject to the same review by the hearing examiner and city council as conditional use permits. *See* RCW 90.58.020 (identifying "a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local governments"). The Growth Management Act, Chapter 36.70A, provides that "use regulations" adopted under a shoreline management program "shall be considered a part of the

county or city's development regulations." RCW 36.70A.480(1). Not surprisingly, there criteria for the two types of permits overlap substantially. LUC 20.30C; LUC 20.30B. The distinction PSE attempts to make between state and local concerns is unpursuasive.

Finally, review by the EBCC does not preclude review by the Department of Ecology. The superior court's letter explaining its reasoning for its ruling states that the Court was "persuaded that it is consistent with RCW 35.14 and state environmental policy for shoreline conditional use permits to be reviewable through the Department of Ecology and not subject to Community Council approval." CP 683.

But the Court did not have to choose between review by the Department of Ecology and review by the EBCC. The parties do not dispute that shoreline conditional review permits are subject to review by Ecology. The only dispute is whether EBCC is permitted to approve or disapprove the permit before it is transmitted to Ecology. The City's past practice has been to send such permits to the EBCC. *See* CP 637 (explaining process for review by City Council, EBCC, and then, if approved, Ecology).

To the extent the Court concluded EBCC review was inconsistent with later review by Ecology, the trial court erred. Chapter 35.14 RCW contemplates an additional layer of review for all land use decisions

enumerated in RCW 35.14.040 that occur within the territory of a community municipal corporation. PSE believes this extra layer of review is unnecessary in the already-robust review process for shoreline conditional use permits. CP 546. But this is not PSE's decision to make. Nor is it the City of Bellevue's. The legislature has already decided this question by enacting Chapter 35.14 RCW and providing local community councils the opportunity to review land use decisions affecting territory within its jurisdiction. This overlay of local control over shoreline conditional use permits is precisely what the legislature intended. Until the legislature amends Chapter 35.14 RCW or the voters within the EBCC service area fail to reauthorize the community municipal corporation, EBCC retains approval authority over all conditional use permits, including shoreline conditional use permits.

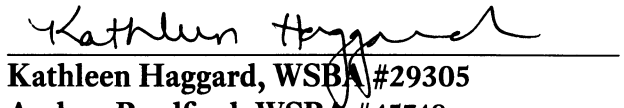
VI. CONCLUSION

In disapproving the City of Bellevue decision to grant PSE a CUP and SCUP, the EBCC properly exercised its legislative authority as the final decision-maker over land use matters affecting its neighborhood. The EBCC carefully studied all the facts before making its decision to ensure that substantial evidence supported its conclusions. Quite simply, PSE failed to convince EBCC, despite full knowledge that EBCC was the final decision-

maker, that the project had adequate benefits to offset the obvious and unavoidable detriments. Accordingly, EBCC applied the very broad CUP criteria of the Bellevue land use code to disapprove the permits. PSE has not met its burden to show EBCC's disapproval was error under LUPA, and the EBCC respectfully requests that this Court reject PSE's appeal. But because the clear statutory language of RCW 35.14.040(3) requires community council review of shoreline conditional use permits, EBCC respectfully requests this Court reverse the superior court's Order on Resolution of Jurisdictional Issues.

RESPECTFULLY SUBMITTED this 23rd day of May, 2016.

PORTER FOSTER RORICK LLP



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