No. 101793-6

(Washington Court of Appeals No. 83820-2-I)

SUPREME COURT OF THE STATE OF WASHINGTON

SNOHOMISH COUNTY,

Appellant/Cross-Respondent,

v.

BSRE POINT WELLS, LP,

Respondent/Cross-Appellant.

RESPONDENT/CROSS-APPELLANT'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

BSRE Point Wells, LP ("BSRE") seeks review of the decision of the Court of Appeals in *BSRE Point Wells, LP v. Snohomish County*, 2022 Wn. App. LEXIS 2454, filed by Division I of the Court of Appeals on December 27, 2022 as an unpublished decision. On February 8, 2023, the Court of Appeals filed an Order Denying Motion for Reconsideration.

II. ISSUES PRESENTED FOR REVIEW

BSRE has spent more than a decade and over ten million dollars in its effort to develop an urban center at Point Wells in Snohomish County (the "County"). The County's Planning and Development Services ("PDS") office engaged in a pattern of delayed and incomplete responses to BSRE's submittals, imposition of arbitrary deadlines, and last-minute newly imposed submittal requirements, to the extent that the Superior Court twice remanded BSRE's applications for further processing and evaluation, the second time with an express finding that the County had failed to act in good faith. The County also

misinterpreted its own development regulations, disregarding the plain language of the regulations under the guise of statutory construction. The Court of Appeals reversed the Superior Court and ruled in the County's favor on the merits of BSRE's application without adequately addressing the County's bad faith denial of BSRE's applications or the County's skewed interpretations of its own regulations. BSRE accordingly seeks review by the Supreme Court. This petition raises the following issues:

1. Whether the Court of Appeals erred in affirming the County's decision to terminate BSRE's land use applications where the Superior Court made an express finding that the County failed to act in good faith in processing and evaluating BSRE's applications?

2. Whether the Court of Appeals erred by disregarding County regulations allowing for remand when there is "reasonable doubt" that a substantial conflict exists between a project application and the County's code requirements?

3. Whether the Court of Appeals erred by disregarding the plain language of County code requirements regarding access to high capacity transit by imposing project requirements based on "legislative intent" rather than the language of the code?

4. Whether the Court of Appeals erred by failing to address and reverse all five of the County's grounds for denying BSRE's applications, instead of ruling on one of the County's objections based on an administrative record that—due to the County's lack of good faith—was never fully developed?

5. Whether the Superior Court and the Court of Appeals erred by failing to determine that Snohomish County's termination of applications without an Environmental Impact Statement (EIS), despite a finding of significance, conflicts with the plain language of state law?

Petitioner seeks review under RAP 13.4(b)(2) and 13.4(b)(4).

III. STATEMENT OF THE CASE

A. Description of the Project

The Snohomish County Council revised its comprehensive plan in 2009 and 2010, adopted Chapter 30.34A SCC (the "Code"), and designated BSRE's land at Point Wells as an Urban Center. CP 21723–38. This land is located in unincorporated Snohomish County, sits on the Puget Sound, and has been used for industrial purposes for more than a century. Following the Council's action, BSRE's predecessor submitted a complete Urban Center Development Application and other related supporting applications for the development of a mixed-use Urban Center including approximately 3,000 residential units, 100,000 square feet of commercial space, and a large public access beach. CP 21723–38.

B. BSRE's Development and Permit Applications

BSRE has worked with the County on submitting and revising its applications to develop Point Wells as an Urban Center since 2011. CP 21723–38. In total, BSRE has spent more

than ten years and over $10 million pursuing approval of BSRE's applications. *See* CP 21723–38, 24176–90.

On October 6, 2017, the County submitted a 389-page letter to BSRE transmitting its review comments. CP 20664–1052. The County requested a response no later than January 8, 2018. CP 20666. Immediately upon receipt of the October 2017 letter, BSRE and its consultants began reviewing, analyzing, and developing scopes of work for BSRE's consultants to address the County's concerns. BSRE budgeted and spent approximately $1,000,000 addressing the comments raised in the October 2017 letter. CP 21723–38.

On November 13, 2017, BSRE, its consultants, and its attorneys met with PDS staff, department management, and a member of the County prosecuting attorney's office to discuss BSRE's anticipated response to the October 2017 letter. *See* CP 21723–38, 24185. BSRE informed the County the additional work it requested could not be completed by January 8.

CP 24185–86. In response, PDS said the January 8 date was merely a "target" and not a statutorily prescribed deadline. *Id.*

PDS advised BSRE to submit a letter stating it could not meet the target and stating the date by which BSRE would respond. CP 24186. PDS gave no reason to suspect an additional extension request might not be approved. CP 24187. This was consistent with PDS's statement made in a May 2, 2017, letter to BSRE. CP 20513–14. BSRE subsequently informed PDS the revised submittal would be completed by April 30, 2018. CP 14395–98.

On January 9, 2018, the County abruptly changed its position in a letter to BSRE. CP 21056. This letter followed *one day* after the supposed "target date" for resubmittal. PDS stated that *as of the date of that letter*, BSRE's applications *as they then existed* could not be approved under the Code. *Id.* At the same time, PDS invited BSRE to continue working on its plan revisions and to submit them to the Hearing Examiner for consideration. CP 21114–15.

In April 2018, BSRE completed additional analysis, revised its plans, and fully responded to the matters raised in the October 2017 letter. *See* CP 742–865, 1060–146, 6339–690, 11837–2477, 14414–5036. Following receipt of BSRE's April 2018 revisions, the County issued a supplemental staff recommendation on May 9, 2018, based on an incomplete review of the April 2018 revisions. The staff identified a new "substantial conflict" not previously included in prior comments. CP 21597–620.

C. The Hearing Examiner

From May 16-24, 2018, BSRE and PDS participated in a hearing before the Hearing Examiner regarding PDS's recommendation to deny BSRE's applications based on several alleged substantial conflicts with the Code. CP 22955–4414. BSRE also requested an extension of its applications from June 30, 2018—the date PDS had set as the expiration of BSRE's applications.

Despite BSRE having addressed all prior comments raised by PDS, the Hearing Examiner held substantial conflicts still existed, denied BSRE's applications, and denied BSRE's request for an extension. CP 22409–67. BSRE submitted a Motion for Reconsideration and Request for Clarification on July 9, 2018. CP 22319–407. In response, the Hearing Examiner entered a reconsideration decision and denial decision. CP 22468–540. BSRE timely appealed to the County Council. CP 22542–71. The Council held a closed record appeal hearing and without debate denied BSRE's Appeal. *Id.* The Council issued its written decision on October 9, 2018. CP 22952.

D. The First LUPA and Council Decision

BSRE filed its first land use petition seeking review pursuant to the Land Use Petition Act (LUPA), Chapter 36.70C RCW. CP 24416–34. In June 2019, after BSRE appealed the denial of its applications, the King County Superior Court issued an order reversing that denial and allowing BSRE to submit revised land use applications within six months. *Id.* The order

instructed the parties to act diligently and in good faith. CP 24434. BSRE timely submitted its revised applications in December 2019. CP 24440–42.

The County failed to respond to BSRE's revised applications until May of 2020, when the County issued another staff recommendation letter asking the Hearing Examiner to deny BSRE's applications without preparation of an EIS. CP 25863-914. A hearing was held in November 2020. On January 29, 2021, the Hearing Examiner denied the revised applications. CP 26711-820. The decision included findings of fact and conclusions of law that were unsupported by the record, contained errors of law, and failed to comply with applicable procedures. The Hearing Examiner also failed to issue a ruling on the expiration date of the revised applications.

BSRE again timely appealed the decision to the Council. CP 26599-709. After a closed-record hearing, the Council affirmed the Hearing Examiner's decision. CP 26974-77.

E. The Second LUPA

BSRE again sought review pursuant to LUPA. CP 1-123. On February 22, 2022, the Superior Court entered its Order Remanding with Directives. CP 28048-54. The Superior Court found "a lack of good faith in the processing and review of the application upon reactivation." CP 28050. The Superior Court held,

> Reactivation is meaningless if a full and fair process and review does not occur. A fair and meaningful process and review on reactivation must occur.

Id. The Superior Court imposed a timeline on remand giving BSRE six months to submit its initial revisions to its applications, four months for the County to provide a comment letter, and two months for BSRE to submit any further revisions. *Id.* at 28050-52.

F. The County's Appeal and BSRE's Cross Appeal

On March 18, 2022, the County filed a notice of appeal seeking review of the second Superior Court decision. CP 28055–56. BSRE timely filed a notice of cross appeal.

CP 28065–66. The Court of Appeals issued an unpublished decision, *BSRE Point Wells, LP v. Snohomish County*, 2022 Wn. App. LEXIS 2454, filed on December 27, 2022.

The Court of Appeals decided the matter based on one out of the five alleged "substantial conflicts" between BSRE's applications and the County code that been identified by PDS. The court disregarded the Superior Court's finding of bad faith. The court also disregarded a County code provision providing for remand by the Hearing Examiner if there is "reasonable doubt" as to whether there is a substantial conflict between applications and the Code. The Court of Appeals apparently assumed its only choice under LUPA was to affirm or reverse the County's permit denials, despite LUPA providing for relief if the body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process. RCW 36.70C.130(1)(a). In effect, the Court of Appeals held that the County's failure to act in good faith in denying the applications was irrelevant.

BSRE timely moved for reconsideration. On February 8, 2023, the Court of Appeals filed an Order Denying Motion for Reconsideration, terminating review.

IV. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. This Court should grant review because the people of the State of Washington have a compelling interest in ensuring that public agencies act in good faith, and LUPA standards expressly provide a remedy for failure to follow required procedure.

A local jurisdiction's obligation to act in good faith when processing and evaluating land use applications cannot be ignored by the courts. This is a matter of substantial public interest requiring review under RAP 13.4(b)(4). A substantial public interest is implicated when an agency's practices have the potential for widespread deleterious effects. *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (prosecuting attorney's *ex parte* communication with court had potential to affect every sentencing proceeding in county); *In re Marriage of Ortiz*, 108 Wn.2d 643, 646 n.2, 740 P.2d 843 (1987) (effect of unlawful child support escalation clause in divorce decree was

matter of substantial public interest). The Legislature has expressly determined there is a public interest in having local governments and the private sector "cooperate and coordinate with one another" in land use planning decisions. RCW 36.70A.010.

The position taken by the County is that public agencies may act in bad faith with impunity when making land use decisions because the decisions are reviewable *de novo* under LUPA. This abrogation of good faith disregards statutory language in LUPA that expressly provides for relief when "[t]he body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless." RCW 36.70C.130(1)(a). A court reviewing land use decisions under LUPA is not confined to affirming or reversing the decision. The court also may remand for further proceedings, as the Superior Court properly did with BSRE's applications:

> The court may affirm or reverse the land use decision under review or remand it for modification or further proceedings. If the decision is remanded for modification or further proceedings, the court may make such an order as it finds necessary to preserve the interests of the parties and the public, pending further proceedings or action by the local jurisdiction.

RCW 36.70C.140.

Here, the County's bad faith was not harmless. It has prevented BSRE from providing a meaningful response to the County's moving goalposts, resulting in review by the Court of Appeals based on an administrative record that was incomplete due to the County's own conduct. The entire point of *de novo* review based on the administrative record is undermined when a public agency's conduct has prevented a land use permit applicant from establishing a full record.

If the Court of Appeals' decision is allowed to stand, it will provide a guidepost for agencies who, out of neglect or through ill will, seek to limit a land use applicant's ability to prepare a full and adequate record for review of agency actions. This problem is illustrated by the County's specific acts in this matter.

BSRE had previously appealed the June 2019 Superior Court order to seek guidance on the same statutory appeal issues presented here. While awaiting the Court of Appeals decision in that appeal, BSRE sought an extension of time from the County for the purpose of responding to the County's many comments. Such an extension would have allowed BSRE to receive a ruling from the Court of Appeals on the statutory appeal issues before submitting the revised applications. The County denied BSRE's request and further argued the Court of Appeals should not accept BSRE's appeal and should not issue a ruling on the statutory appeal issues. Subsequently, BSRE spent significant resources preparing revised applications by their deadline in December 2019, despite the absence of an appellate ruling that potentially could greatly affect the applications.

Denial of an application without an EIS when there has been a determination of significance is an extraordinary measure that exemplifies the County's lack of good faith. Snohomish County Code section 30.61.220 was enacted in 2002, with an

effective date of February 1, 2003. County Planner Ryan Countryman has testified that denial without an EIS has only been done one other time in his 20-year career with the County. CP 27364–35. The County's reliance on an almost never-used ordinance to deny applications in contravention of SEPA's mandated EIS requirement is an indicator of the County's lack of good faith.

Another example of the County's bad faith is its decision to hire a consultant to review BSRE's floor area ratio ("FAR") calculations and specifically prohibit that consultant from communicating with BSRE, forcing the consultant to make incorrect assumptions. CP 27133-34. Moreover, the consultant was specifically advised not to perform any calculations involving the buildings proposed to be built in the Upper Plaza or buildings higher than 90 feet tall, excluding a substantial portion of the Point Wells project. CP 27131-32. This prevented the consultant from accurately determining whether BSRE's applications satisfy mandatory FAR standards.

The County's failure to engage in any discussions with BSRE regarding its landslide hazard area deviation requests is another example of its failure to act in good faith. The normal process involves communicating with the applicant to discuss whether the deviation is necessary, any alternatives, and whether the engineering support can be sufficient. *See* CP 23631. However, the County failed to engage in such discussions with BSRE before issuing a permit denial in May 2020.

Land use applications typically go through seven or eight iterations. CP 23470. With a project this complex, it is understandable why multiple iterations are necessary, from the perspective of both applicant and County. Multiple reviews allow both parties to ensure Code compliance. This project is by far the most complicated project that Snohomish County has seen, making the need for multiple revisions even greater. BSRE has demonstrated its motivation to resolve all issues raised by PDS and has worked diligently to do so.

Conversely, the County has demonstrated it has no desire to work in good faith to process BSRE's applications. The County sought new reasons for denying BSRE's applications in 2020, upon a remand by the Superior Court to address issues raised in 2018. For example, the County, for the first time in its second supplemental staff recommendation issued in May 2020, asserted BSRE's consultants miscalculated the FAR by incorrectly including common areas, stairwells, and elevators in its floor area calculations. CP 25863, 25868-72.[1] The County failed to provide BSRE with any opportunity to meaningfully respond to this new assertion and failed to allow BSRE to work with the County consultants on this issue.

The Superior Court's order with directives entered in February 2022 is authorized by LUPA, RCW 36.70C.140, and

[1] The County's previous staff recommendations had not included the assertions about the FAR that were in the May 2020 supplemental staff recommendation. CP 20664-844 (October 2017 comment letter), CP 21597, 21599 (first supplemental staff recommendation, May 2018).

the courts should not be prevented from requiring public agencies to act with good faith on land use applications.

B. While LUPA places the burden on a petitioner, the County code provides for remand on administrative review when there is "reasonable doubt" as to whether there is "substantial conflict" between code provisions and application materials.

The County and the Court of Appeals both have relied on the burden on LUPA petitioners to establish a right to relief. The County's reliance on the LUPA burden of proof is an attempt to steer the court away from the County's own procedural requirements that favor BSRE. Under SCC 30.61.220, the decision-making body should remand applications to County staff for further processing and evaluation when there is "reasonable doubt" as to whether there are substantial conflicts between the applications and the County code. SCC 30.61.220(3)(b). Here, the Superior Court's finding that the County failed to act in good faith on BSRE's applications plainly establishes reasonable doubt regarding the alleged substantial conflicts.

The party filing a LUPA petition bears the burden of establishing one of the errors set forth in RCW 36.70C.130(1). Here, the Superior Court's factual finding that the County's administrative process was infected by bad faith readily satisfies that burden. In a LUPA petition, the superior court "may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met." RCW 36.70C.130(1). Section (a) states, "The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless." Section (f) states, "The land use decision violates the constitutional rights of the party seeking relief." *Id.*

By finding "there was a lack of good faith in the processing and review of the application upon reactivation," the Superior Court clearly concluded the Hearing Examiner "engaged in unlawful procedure or failed to follow a prescribed process," which violates RCW 36.70C.130(1)(a).

The County also violated BSRE's constitutional rights by proceeding in bad faith, contravening RCW 36.70C.130(1)(f). A municipality's land use action violates a party's right to substantive due process where the governmental action was arbitrary, irrational, or tainted by improper motive. *See Robinson v. City of Seattle*, 119 Wn.2d 34, 62, 830 P.2d 318 (1992). When a land use decision has been judicially determined to have been made in bad faith, the government's conduct at a minimum is arbitrary and irrational, and the County's conduct in this matter—changes of position, impracticable and arbitrary deadlines, and last-minute findings of a new "substantial conflict"—demonstrates that the County's decisions are tainted by improper motives.

Consequently, the Court of Appeals erred in failing to recognize that the Superior Court's finding of bad faith requires remand for full and fair consideration of BSRE's applications. Remand is authorized by LUPA, which allows the court to "affirm or reverse the land use decision under review or remand

it for modification or further proceedings." RCW 36.70C.140. It is immaterial that the Superior Court did not expressly cite RCW 36.70C.130(1)(a) in its order of February 22, 2022. The finding of bad faith establishes a LUPA violation under that subsection and requires remand regardless of whether the Superior Court cited the specific statute in its order.

Moreover, the County's conduct was not harmless, and the County thus does not come within the "harmless error" exception to RCW 36.70C.130(1)(a). The County's conduct resulted in denial of BSRE's applications after millions of dollars and a decade of effort by BSRE to bring the Point Wells project to fruition. And, as the Supreme Court has observed in another context, a party whose bad faith has infected legal proceedings should not be permitted to benefit by placing on the injured party a burden of establishing what might have happened in the absence of bad faith. *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 390-92, 823 P.2d 499 (1992). "The course cannot be rerun, no amount of evidence will prove what might have occurred if a

different route had been taken." *Transamerica Ins. Group v. Chubb & Son, Inc.*, 16 Wn. App.. 247, 252, 554 P.2d 1080 (1976), *rev. denied*, 88 Wn.2d 1015 (1977).

C. The Court of Appeals erred in holding the "legislative intent" behind Snohomish County Code provisions trumps the plain language of the code.

The Court of Appeals erred by delving into the legislative intent behind a county code provision in order to add a new permit requirement that appears nowhere in the plain language of the code. While deference must be given to local jurisdictions' interpretations of their own codes in recognition that code interpretation can require special expertise, this deference is merely an aid to construction of ambiguous or highly technical code provisions; it is not a wholesale abrogation of the courts' responsibility to enforce statutes as written. *See, Dept. of Labor & Indus. v. Landon*, 117 Wn.2d 122, 127, 814 P.2d 626 (1991); *State v. Dodd*, 56 Wn. App.. 257, 261, 783 P.2d 106 (1989).

Chief among the rules of statutory construction is the principle that *statutory construction is neither required nor allowed when the plain language of the statute is clear*:

> We determine the intent of the legislature primarily from the statutory language. In the absence of ambiguity, we will give effect to the plain meaning of the statutory language. In determining whether a statute conveys a plain meaning, "that meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question."

Dep't of Ecology v. City of Spokane Valley, 167 Wn. App.. 952, 962, 275 P.3d 367, *rev. denied,* 175 Wn.2d 1015 (2012) (citations omitted). Courts cannot, under the guise of statutory construction, rewrite a statute to include provisions, requirements, or prohibitions that do not appear in the statutory language:

> This court does not subject an unambiguous statute to statutory construction and has "declined to add language to an unambiguous statute even if it believes the Legislature intended something else but did not adequately express it." "Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute." Thus, when a statute is not ambiguous,

> only a plain language analysis of a statute is appropriate.

Cerrillo v. Esparza, 158 Wn.2d 194, 201, 142 P.3d 155 (2006) (citations omitted). Here, the Court of Appeals erred by accepting the County's invitation to graft new property development requirements onto the Snohomish County Code. The vested language of SCC 30.34A.040(1) sets a maximum building height of 90 feet for urban centers, with an additional 90 feet allowed "when the additional height is documented to be necessary or desirable *when the project is located near a high capacity transit route or station* and the applicant prepares an environmental impact statement. . . ." SCC 30.34A.040(1) [2010] (emphasis added). The plain language of the code provides that a height bonus is available (1) when the project is near a high capacity transit route *or* (2) when the project is near a high capacity transit station.

The code as written makes sense because mass transit providers do not erect stations in thinly populated areas on the

"if you build it they will come" theory. Proximity to a transit route is sufficient to satisfy the height bonus because an urban center development is a likely precursor to a new station on an established transit route. Here, the Point Wells development sits astride the BNSF main rail line that is used by Sound Transit and thus satisfies the "near a high capacity transit route" condition.

Nevertheless, the Court of Appeals' analysis judicially struck the word "route" from the code by holding that the height bonus is not allowed unless the development is near a transit *station.* The court ignored the fact that urban development occurs incrementally. Moreover, BSRE has repeatedly offered to condition approval of the project on the availability of a high capacity transit station within the project. *See, e.g.*, CP 21734-35. The Court of Appeals erred in failing to reverse the County's attempt to rewrite its own unambiguous code language.

D. The Court of Appeals erred by failing to address four of the five alleged "substantial conflicts" between BSRE's applications and the County code.

The County denied BSRE's applications based on five alleged "substantial conflicts" between BSRE's applications and the County code. The Court of Appeals addressed only one of those five alleged conflicts. 2022 Wn. App. LEXIS 2454 at *25. As a tribunal reviewing the County's decisions *de novo*,[2] the Court of Appeals should have addressed all of the grounds for denial that were presented to it and should have reversed the County's decision as to each of them.

E. The Superior Court and the Court of Appeals erred by allowing termination of BSRE's applications without an EIS, in violation of SEPA.

The Point Wells project received a determination of significance, which under state law mandates the preparation of an EIS. RCW 43.21C.031(1); *Lands Council v. Wash. State*

[2] *Girton v. City of Seattle*, 97 Wn. App. 360, 363, 983 P.2d 1135 (1989).

Parks & Recreation Comm'n, 176 Wn. App. 787, 803, 309 P.3d 734 (2013). The statute provides in pertinent part:

> An environmental impact statement (the detailed statement required by RCW 43.21C.030(2)(c)) *shall be prepared* on proposals for legislation and other major actions having a probable significant, adverse environmental impact. . . .

RCW 43.21C.031(1) (emphasis added). Here, the County denied BSRE's applications under the authority of Snohomish County Code section 30.61.220, which purports to allow termination of project applications without an EIS.

The County's response to this conflict between the County code and SEPA amounts to "we were going to deny it anyway, so what is the point of an EIS?" The County's position disregards the fact that an EIS for a complex project is an iterative process, not merely the production of a document. In *Lands Council v. Wash. State Parks & Recreation Comm'n*, 176 Wn. App.. 787, 309 P.3d 734 (2013), the court held that an EIS should have been prepared *before* agency approval of a ski area expansion because the EIS itself would make an important

contribution to fundamental planning concerns. 176 Wn. App. at 803-805. The court reasoned that environmental review may be phased "to focus on issues that are ready for decision and exclude from consideration issues already decided or not yet ready." 176 Wn. App. at 804 (*quoting* WAC 197-11-060(5)(b)). In the present case, the County's decision to dispense entirely with an EIS eliminated any possibility that environmental concerns might dictate changes in project design, potentially removing conflicts between BSRE's applications and the County code.

The Superior Court avoided this issue by holding it lacked authority under LUPA to invalidate SCC 30.61.220. But LUPA expressly gives the Superior Court authority to "make such an order as it finds necessary to preserve the interests of the parties and the public." RCW 36.70C.140. BSRE can request this relief under LUPA because SCC 30.61.220 purports to authorize an unlawful procedure. RCW 36.70C.130(1)(a). The Court of Appeals declined to address this issue. The Court of Appeals

should have held that SCC 30.61.220 is in direct conflict with SEPA.

V. CONCLUSION

The people of the State of Washington rightfully hope and expect that government agencies will act in good faith when ruling on regulatory matters. Here, the Superior Court found that Snohomish County failed to act in good faith in its processing and evaluation of BSRE's applications for the Point Wells project. Under LUPA and the County code, the Superior Court was authorized and fully justified in remanding the applications to the County under a specific schedule for processing BSRE's applications in good faith.

The Court of Appeals issued its decision based on a single issue of building height and transit access, out of the multitude of objections the County originally had raised to the project. This single point of difference almost certainly could have been resolved through the process mandated by the Superior Court. The finding of bad faith has a remedy under LUPA and under the

County code: remand the applications for proper and good faith administrative processing.

The Hearing Examiner and the Court of Appeals both have rendered decisions that were based on an incomplete record due to the County's own acts that prevented a full record from being developed. Under LUPA and the County code, the Court of Appeals' decision should be reversed, and this matter should be remanded to the County for full and fair process as required by the Superior Court.

I certify that this brief is in 14-point Times New Roman font and contains 4,985 words, in compliance with the Rules of Appellate Procedure, RAP 18.17(c)(2).

RESPECTFULLY SUBMITTED this 10th day of March, 2023.

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CERTIFICATE OF SERVICE

The undersigned certifies that on March 10, 2023, a copy of the foregoing document was served by electronic mail to:

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APPENDIX TO RESPONDENT'S PETITION FOR REVIEW BY WASHINGTON SUPREME COURT

Snohomish County, Appellant/Cross-Respondent,
v.
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(Washington Court of Appeals No. 83820-2-I)

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APPENDIX A

FILED
12/27/2022
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Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BSRE POINT WELLS, LP, Respondent/Cross-Appellant, v. SNOHOMISH COUNTY, Appellant/Cross-Respondent.	No. 83820-2-I DIVISION ONE UNPUBLISHED OPINION

DÍAZ, J. — BSRE Point Wells, LP ("BSRE") applied to develop an "urban center" on a former large industrial site in Snohomish County beginning in 2011. The Snohomish County Planning and Development Services Department ("Planning Department"), the Snohomish County Hearing Examiner ("Hearing Examiner"), and the Snohomish County Council ("Council"; together, the "County") all concluded that "substantial conflicts" existed between BSRE's application and the relevant portions of the Snohomish County Code (Chapter 30.34A; the "Code" or "SCC"), and denied each such application, most recently in April 2021 (the "Council's Decision" or the "Decision"). BSRE filed the instant (second) Land Use Petition Act ("LUPA") petition ("Petition"), pursuant to RCW 36.70C, challenging the Decision in King County Superior Court. The superior court made no ruling on the merits on any aspect of the Council's Decision and, in the court's order in February 2022

("Order"), remanded the case to the County for a second time, ordering the Hearing Examiner to consider BSRE's application in "good faith." Snohomish County and BSRE each appealed.

Both parties ask this court to consider the merits of the Council's Decision. Specifically, the County asks this court to reverse the superior court's Order because it made no ruling on the merits at all and, after considering the merits, to affirm the Decision denying the application. BSRE seeks reversal of the superior court's Order because it did not find on the merits that BSRE satisfied the Code, and also seeks reversal because it failed to find that SCC 30.61.220 violates state law.

We conclude that the superior court erred in not ruling on the merits and that BSRE did not carry its burden in establishing that each of the five alleged substantial conflicts were an erroneous interpretation of the County's own Code. We thus reverse and remand the case to dismiss BSRE's LUPA Petition.

I. FACTS

In 2011, BSRE applied to develop an area of land in Snohomish County known as Point Wells into an "urban center" with residential and commercial buildings.[1] In 2013, the County's Planning Department notified BSRE of dozens of conflicts between its application and the Code. In April 2017, BSRE resubmitted its application. In October 2017, the Planning Department again notified BSRE that it failed to resolve the conflicts

[1] For additional detail on the early procedural posture of this matter, see BSRE Point Wells, LP v. Snohomish County, No. 80377-8-I, slip. op. (Wash Ct. App. Feb. 8, 2021) (unpublished) https://www.courts.wa.gov/opinions/pdf/803778.pdf, from which this and the following two paragraphs are drawn.

with the code. BSRE thereafter requested three extensions of a new application deadline, which were granted, and a fourth extension, which the County denied. On April 17, 2018, the County's Planning Department recommended that BSRE's application be denied based on eight "substantial conflicts" with the Code. The Hearing Examiner for the County held its (first) hearing on BSRE's application in May 2018. The Hearing Examiner denied the application based on five remaining substantial conflicts. BSRE appealed to the County Council, which affirmed the Hearing Examiner's decision.

BSRE appealed for the first time to King County Superior Court under LUPA, seeking reversal of the denial of its application for procedural reasons, and a ruling on the merits. In June 2019, the superior court reversed the Hearing Examiner's dismissal of BSRE's first application, not on the merits, but because it found that BSRE was entitled to reactivate its application "one-time," if it submitted its revised materials within six months of the court's decision.

BSRE appealed for the first time to this court ("First LUPA") and contemporaneously submitted its revised application materials by the six-month deadline. This court dismissed the First LUPA because it was not ripe, finding that, while the issues were mainly legal and no further factual development was needed, BSRE had not exhausted its administrative remedies as it had reactivated its application, and the application and review process was not complete. BSRE Point Wells, LP, No. 80377-8-I, slip op. at 5.

BSRE submitted the instant application in December of 2019. In May 2020, the Planning Department recommended that the Hearing Examiner deny BSRE's application

again. In November 2020, the Hearing Examiner conducted a second six-day hearing, including witness and public testimony. On January 29, 2021, the Hearing Examiner denied the application again, citing five substantial conflicts with the Code. BSRE appealed to the Council. The Council affirmed in April 2021. BSRE appealed to the King County Superior Court, filing a second LUPA petition (again, "Petition"). The City of Shoreline ("Shoreline") also intervened.

On February 22, 2022, the superior court entered its Order Remanding with Directives granting the Petition (again, the "Order"), after hearings on November 5, 2021, and December 10, 2021. The superior court found ". . . a lack of good faith in the processing and review of the application upon reactivation and thus, a lack of compliance with Judge McHale's Order on Remand." The superior court, sua sponte, imposed a 12-month timeline on remand, giving BSRE six months to submit its initial revisions to its applications, four months for the County to provide a comment letter, and two months for BSRE to submit any further revisions, without identifying any particular substantive issue BSRE or the County should focus on. The superior court reiterated its "good faith" requirement, ordering that "[t]he parties shall act in good faith and shall engage in meaningful and substantive discussions about the applications and their revisions throughout the review process." The superior court otherwise did not consider the merits of the five conflicts with the Code identified by the Hearing Examiner.

On March 18, 2022, the County filed its present Notice of Appeal. On March 25, 2022, BSRE filed its Notice of Cross Appeal.

II. ANALYSIS

A. Ripeness

First, we consider whether the instant Petition based on the Decision is now ripe. A claim is ripe for appellate review if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. State v. Cates, 183 Wn.2d 531, 534, 354 P.3d 832 (2015) (quoting State v. Sanchez Valencia, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010)). Courts also consider the hardship incurred by the appellant if the court refuses to review the claim. As mentioned above, this court previously concluded that two requirements of the ripeness doctrine were satisfied by the time of the First LUPA petition: the issues were mainly legal and no further factual development was needed. BSRE Point Wells, LP, No. 80377-8-I, slip op. at 6. These two conclusions apply to the present Decision, which returns with no material further legal or factual development, other than the unfortunate passage of time.

The only question then is whether the appeal process is "final." Previously, this court dismissed the appeal because BSRE's revised application was pending before the County. Since then, there is no evidence in the record that BSRE has refiled its application. Therefore, there is no pending administrative review to exhaust. Importantly, BSRE and the County both agree that the appeal is ripe for review and explicitly ask this court to rule on the merits of the Decision. Additionally, the County and BSRE concur that they would suffer hardship if this court does not rule on the merits, as there is no shared understanding of the applicable substantive standards, and further process is a drain on the time and resources of the parties. Br. of Appellant at 20; Br. of Resp't at 16;

Cates, 183 Wn.2d at 534 (courts should consider whether the parties will incur hardship if the court refuses to review the claim) (citations omitted). Further, LUPA contemplates such direct review, even if the parties did not, for reasons unknown, avail themselves of this process. See RCW 36.70C.150[2] and RAP 6.4.[3] Finally, sending the Decision back to the County for a (minimum) one-year delay would not be consistent with legislative intent for timely judicial review under LUPA. See RCW 36.70C.010 ("The purpose of this chapter is to reform the process for judicial review of land use decisions made by local jurisdictions by establishing . . . expedited appeal procedures . . . in order to provide . . . timely judicial review."). Therefore, we conclude that this appeal based on the Decision is ripe for review on the merits.

B. Background on LUPA Petitions

1. BSRE Bears the Burden

As a preliminary matter, we consider who bears the burden in a LUPA appeal. LUPA requires courts to review the decision of the local jurisdiction's body or officer with the highest level of authority to make the determination. Citizens to Preserve Pioneer Park, L.L.C. v. City of Mercer Island, 106 Wn. App. 461, 470, 24 P.3d 1079 (2001). Thus, we review the April 5, 2021 Decision of the County Council, which affirmed the January 29, 2021 Decision of the Hearing Examiner.

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[2] RCW 36.70C.150 provides in part: "The superior court may transfer the judicial review of a land use decision to the court of appeals upon finding that all parties have consented to the transfer to the court of appeals and agreed that the judicial review can occur based upon an existing record."

[3] RAP 6.4 states: "The appellate court accepts direct review of a Land Use Petition Act proceeding according to the procedures set forth in chapter 36.70C RCW. A case that has been certified for review by the superior court is treated as a direct appeal."

"On appeal, the party who filed the LUPA petition bears the burden of establishing one of the errors set forth in RCW 36.70C.130(1), *even if that party prevailed* on its LUPA claim in superior court." Quality Rock Products, Inc. v. Thurston County, 139 Wn. App. 125, 134, 159 P.3d 1 (2007) (emphasis added) (citations omitted). Here, BSRE filed the Petition.

BSRE, nonetheless, argues that the County bears the burden because SCC 30.61.220 states that where there is "reasonable doubt that the grounds for denial are sufficient," a hearing examiner must deny the County's request to deny the application. The County argues it is BSRE's burden to show that it is entitled to the requested relief, not just on one of the substantial conflicts, but on all five.

We find that it is BSRE's burden to find error in each of the five substantial conflicts because "[t]he plain words of the statute make clear that it is [the petitioner's] burden to establish that [it] is entitled to relief under one or more of the specified subsections of the LUPA statute." Nagle v. Snohomish County, 129 Wn. App. 703, 707-08, 119 P.3d 914 (2005). Whatever the standard of review may be for the hearing examiner at that stage of the process, the burden is on the petitioner at this stage of a LUPA action to show that each of the substantial conflicts found by the Council violated LUPA.

2. LUPA's Substantive Principles

Four important principles guide our review of the Petition. First, when reviewing a superior court's decision under LUPA, the court stands in the shoes of the superior court and "review[s] the hearing examiner's action de novo on the basis of the administrative record." Girton v. City of Seattle, 97 Wn. App. 360, 363, 983 P.2d 1135 (1999). In other

words, even where a superior court ruled on the merits, a court of appeals reviews the decision of the local jurisdiction without reference to the superior court decision. Rosema v. City of Seattle, 166 Wn. App. 293, 297, 269 P.3d 393 (2012).

Second, the court next views evidence in the light most favorable to "the party who prevailed in the highest forum that exercised *factfinding* authority, a process that necessarily entails acceptance of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences." City of University Place v. McGuire, 144 Wn.2d 640, 652, 30 P.3d 453 (2001) (emphasis added). Here, the highest fact finder is the Hearing Examiner and the County prevailed before it. Thus, all facts determined by the Hearing Examiner should be viewed in the light most favorable to the County.

Third, the County is granted deference as to how it construes its own laws under its expertise pursuant to RCW 36.70C.130(1)(b). Timberlake Christian Fellowship v. King County, 114 Wn. App. 174, 180, 61 P.3d 332 (2002) (describing the deference as "substantial"). Stated slightly differently, the County's interpretation of its law is accorded "great weight where the statute is within the agency's special expertise." Cornelius v. Wash. Dep't of Ecology, 182 Wn.2d 574, 585, 344 P.3d 199 (2015) (review under the Administrative Procedure Act) (citations omitted). Here, there is no dispute that the relevant portion of the Code is highly technical and the County's Planning Department has expertise in this area. Our review of the County's understanding of its own law is, at a minimum, substantially deferential and perhaps greatly deferential. In turn, a court should not substitute its judgment for that of county decision-makers. Schofield v.

Spokane County, 96 Wn. App. 581, 589, 980 P.2d 277 (1999) (where the petitioner is challenging the application of law to facts). Rather, a court "must be left with the definite and firm conviction that a mistake has been committed." Id. (internal quotations and citation omitted).

Fourth, and most substantively, in a LUPA action, a court may grant relief only if the petitioner has carried the burden of establishing that one of the standards set forth in (a) through (f) of RCW 36.70C.130(1) has been met. Thus, BSRE has the burden of establishing that:

> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
> (d) The land use decision is a clearly erroneous application of the law to the facts;
> (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
> (f) The land use decision violates the constitutional rights of the party seeking relief.

Here, BSRE in general argues that it established that each of the first five types of errors occurred ((a)-(e)) with respect to each of the five substantial conflicts the Hearing Examiner identified. However, BSRE's argument turns primarily on RCW 36.70C.130(1)(b) and (d) as the basis for its appeal, i.e., the County erroneously interpreted its own laws or clearly erroneously applied its own law to the facts here. Furthermore, BSRE's arguments focus on just two of the five substantial conflicts as its "main" arguments, as will be described below.

C. Background on and Key Provisions of the Snohomish County Code

In May 2010, the Snohomish County Council passed Amended Ordinance No. 09-079, which updated the SCC to establish a new zone for "urban centers" and defined the standards for urban center design. In accordance with Washington's Growth Management Act ("GMA") at chapter 36.70A RCW,[4] the County expressed its intent to reduce sprawl and "encourage growth in urban areas served by a multimodel transportation system."

In addition to modifying some of its existing zoning requirements, Former SCC 30.21.020 (2010) created an "urban center" zone (a.k.a., "UC zone"). The County's intent for the UC zone was to:

> [P]rovid[e] a zone that allows a mix of high-density residential, office and retail uses with public and community facilities and pedestrian connections located within *one-half mile of existing or planned stops or stations for high capacity transit routes* such as light rail or commuter rail lines, regional express bus routes, or transit corridors that contain multiple bus routes or which otherwise provide *access* to such transportation[.]

Former SCC 30.21.025(1)(f) (2010) (emphasis added). Indeed, the UC zone was specifically created with the Point Wells site in mind.

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[4] RCW 36.70A.011 explains the State Legislature's purpose in enacting the GMA:

> The legislature finds that uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and the wise use of our lands, pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state. It is in the public interest that citizens, communities, local governments, and the private sector cooperate and coordinate with one another in comprehensive land use planning.

To facilitate its plan for the UC zone, the County added a new chapter to the SCC, Section 30.34A, outlining the standards it would use to "encourage higher density *transit*- and pedestrian-oriented development that provides a mix of uses and encourages high quality design." Former SCC 30.34A.010 (2010) (emphasis added). These standards outlined how urban centers would be developed, including specific requirements such as building height and setbacks, access to public transportation, and the County's review and decision criteria.

Most relevant to the present dispute, Former SCC 30.34A.040(1) (2010) established the requisite building height and setbacks in the UC zone:

> The maximum building height . . . shall be 90 feet. A building height increase up to an additional 90 feet may be approved under SCC 30.34A.180 when the additional height is documented to be necessary or desirable when the project is located near a high capacity transit route or station and the applicant prepares an environmental impact statement pursuant to chapter 30.61 SCC that includes an analysis of the environmental impacts of the additional height on, at a minimum:
>
> (a) aesthetics;
> (b) light and glare;
> (c) noise;
> (d) air quality; and
> (e) transportation.

SCC 30.34A.085 explained the County's requirements on access to transportation within the UC zone:

> Business or residential buildings . . . either:
>
> (1) Shall be constructed within *one-half mile of existing or planned stops or stations for high capacity transit routes* such as light rail or commuter rail lines or regional express bus routes or transit corridors that contain multiple bus routes;
> (2) Shall provide for *new stops or stations* for such high capacity transit routes or transit corridors within one-half mile of any business or residence

> and coordinate with transit providers to assure use of the *new stops or stations*; or
> (3) Shall provide a mechanism such as van pools or other similar means of transporting people on a regular schedule in high occupancy vehicles to *operational stops or stations* for high occupancy transit.

Former SCC 30.34A.085, repealed by Amended Ordinance 12-069 (Oct. 17, 2012) (emphasis added). There is no dispute that there are no such existing or planned stops or stations at the site.

Former SCC 30.34A.180 (2010) outlined the County's review process and decision criteria. Former SCC 30.34A.180(2)(c) provided that the urban center development application would be processed as a Type 2 application and the hearing examiner "may approve or approve with conditions" the proposed development when all the following criteria are met:

> (i) The development complies with the requirements in this chapter, chapters 30.24 and 30.25 SCC, and requirements of other applicable county code provisions;
> (ii) The proposal is *consistent with the comprehensive plan*;
> (iii) The proposal will not be materially detrimental to uses or property in the immediate vicinity; and
> (iv) The development demonstrates high quality design by incorporating elements such as:
> (A) Superior pedestrian- and *transit-oriented architecture*;
> (B) Building massing or orientation that responds to site conditions;
> (C) Use of structural articulation to reduce bulk and scale impacts of the development;
> (D) Use of complementary materials; and
> (E) Use of lighting, landscaping, street furniture, public art, and open space to achieve an integrated design;
> (v) The development features *high density residential* and/or non-residential uses;
> (vi) Buildings and site features are arranged, designed, and oriented to facilitate pedestrian access, to limit conflict between pedestrians and vehicles, and to *provide transit linkages*; and
> (vii) Any urban center development abutting a shoreline of the State as defined in RCW 90.58.030(2)(c) and SCC 30.91S.250 shall provide for

> public access to the water and shoreline consistent with the goals, policies and regulations of the Snohomish County Shoreline Management Master Program.

(emphasis added).

Along with the authority granted to the hearing examiner in Former SCC 30.34A.180(2)(c) to approve or "approve with conditions" a proposed development, the Code provided the County with the authority to deny a proposal when a proposal presented a "substantial conflict" with the County's "adopted plans, ordinances, [or] regulation or laws."

D. The Superior Court Erred by Not Ruling on the Merits and by Remanding Without Concluding That BSRE Satisfied Any LUPA Standard for Relief

The trial court did not address the merits of the land use petition, nor did it explicitly conclude that BSRE satisfied one of the standards for granting relief under RCW 36.70C.130(1)(a)-(f). In a LUPA petition, the superior court "may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met." RCW 36.70C.130(1).

BSRE argues that while the Order did not expressly invoke RCW 36.70C.130(1), the finding of bad faith implicitly invoked standards (a) and (f), relating to procedural and constitutional violations respectively. As to the latter, BSRE argues that, by proceeding in bad faith, the County also violated BSRE's right to substantive due process because its actions were arbitrary, irrational, or tainted by improper motive. Br. of Resp't at 22 (citing Robinson v. City of Seattle, 119 Wn.2d 34, 62, 830 P.2d 318 (1992) abrogated by Yim v. City of Seattle, 194 Wn.2d. 682, 451 P.3d 694 (2019)).

We find BSRE's argument unpersuasive. Without considering the merits of the administrative record, the trial court could not have concluded that the alleged procedural errors, even if any existed, were indeed "harmless" (as required by RCW 36.70C.130(1)(a)) or that the hearing examiner's actions were indeed "arbitrary, irrational, or tainted by improper motive" (as required by RCW 36.70C.130(1)(f)).

In fact, the trial court made no such findings as to either standard. It is clear from the Order that the trial court considered itself effectively to be merely enforcing a prior order of the first superior court judge. As legitimate as that motive may be, it is simply not a basis for relief provided in LUPA. Cingular Wireless, LLC v. Thurston County, 131 Wn. App. 756, 767-68, 129 P.3d 300 (2006) (relief must be based on one of the six standards under LUPA). Even if the court had tied the alleged lack of good faith to a standard in RCW 36.70C.130(1), our review is de novo and we review the decision of the local jurisdiction without reference to the superior court decision. Rosema, 166 Wn. App. at 297.

Finally, the trial court's decision to return the matter to the County for another lengthy delay is contrary to LUPA's desire for efficient judicial review. See RCW 36.70C.010 ("The purpose of this chapter is to reform the process for judicial review of land use decisions made by local jurisdictions by establishing . . . expedited appeal procedures . . . in order to provide . . . timely judicial review."). "A court must not shy from exercising its jurisdiction. As Chief Justice John Marshall wrote, '[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" Indigenous Env't Network v. Trump, 541 F. Supp. 3d 1152, 1159 (D. Mont. 2021)

(alteration in original) (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404, 5 L. Ed. 257 (1821)).

For these reasons, the superior court erred in not addressing the merits and basing its relief on a standard not contemplated by LUPA. We accept the parties' request to consider and decide this matter on the merits. Specifically, BSRE assigns error to the superior court's failure to find that BSRE complied with the Code only with respect to two "main" specific substantive conflicts: those involving the high capacity transit regulations and those involving the height setback regulations. Our review is limited to the first issue.

E. The Application Failed to Comply with High Capacity Transit Regulations for Buildings Over 90 Feet Because There is No High Capacity Transit Access

The high capacity transit regulation at issue states in relevant part: "The maximum building height in the UC zone shall be 90 feet. A building height increase up to an additional 90 feet may be approved . . . when the additional height is documented to be *necessary or desirable* when the project is located *near a high capacity transit route or station*." Former SCC 30.34A.040(1) (emphasis added).

The following facts are the only facts relevant and are uncontroverted: (1) Seventeen of the 46 buildings BSRE proposed exceeded 90 feet in height. (2) While the Point Wells site is bisected by a BNSF rail line used by Sound Transit commuter rail, there is no existing commuter rail stop, no planned stop, and no commitment by Sound Transit to create one.

BSRE argues that the language of the Code clearly indicates that proximity to a transit route without any actual access is sufficient. BSRE argues the final "or" in Former SCC 30.34A.040(1) (". . . near a high capacity transit route or station . . .") should be

interpreted as a "disjunctive conjunction," designating that there are two equally valid alternatives compliant with the rule: the excessively high building must be either near a transit route or near a station, but need not be near both.

The County argues that proximity to a high capacity transit route alone is insufficient for a building height increase as there must be functional access to the route. The County asserts that the legislative intent of Former SCC 30.34A.040(1) is that future residents of extra tall buildings in the Urban Center actually have access to, and the ability to use, the high capacity transit route. The County further asserts that BSRE's interpretation of the Code, requiring only that a high capacity transit route be in the general vicinity, would lead to the absurd result that the urban center development proposal, which is by definition "transit oriented" under the SCC, would provide neither access to nor the ability for residents to actually use the transit route.

Whenever we are tasked with interpreting the meaning and scope of a statute, "our fundamental objective is to determine and give effect to the intent of the legislature." State v. Sweany, 174 Wn.2d 909, 914, 281 P.3d 305 (2012) (citing State v. Budik, 173 Wn.2d 727, 733, 272 P.3d 816 (2012)). We look first to the plain language of the statute as "[t]he surest indication of legislative intent." State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). "'[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.'" State v. Hirschfelder, 170 Wn.2d 536, 543, 242 P.3d 876 (2010) (quoting Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)).

We may determine a statute's plain language by looking to "the text of the statutory provision in question, as well as 'the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.'" Ervin, 169 Wn.2d at 820 (quoting State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)); State v. Larson, 184 Wn.2d 843, 848, 365 P.3d 740 (2015). Again, the primary goal of statutory interpretation is to determine and give effect to the legislature's intent. Jametsky v. Olsen, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). These principles of statutory interpretation apply to local legislation, such as the SCC. Griffin v. Thurston County, 165 Wn.2d 50, 55, 196 P.3d 141 (2008).

We find BSRE's arguments unpersuasive for the following reasons. First, BSRE's focus on one phrase in the Code (". . . located near a high capacity transit route or station. . .") ignores the repeated statements of legislative intent for residents of a high-density urban centers to have ready access, not just proximity, to mass transit stops and stations. The statute is replete with such references. Former See SCC 30.21.020 (desiring high-density residential developments be located within "one-half mile of existing or planned stops or stations for high capacity transit routes"); Former SCC 30.34A.010 (encouraging higher-density transit developments); Former SCC 30.34A.085(1)-(3) (emphasizing the need for stops and stations); Former SCC 30.34A.180(2)(c)(iv)(a), (v), & (vi) (emphasizing transit-oriented architecture and transit linkages for such high-density developments). Proximity is clearly insufficient; functional access is key. Former SCC 30.21.020 (desiring "access" to transportation such as light rail or commuter rail lines, regional express bus routes).

For residents to be able to merely "wave at [a train] as it speeds by," as the County aptly phrases it, would be contrary to that obvious intent. BSRE's reading would lead to this "absurd" result. Strain v. West Travel, Inc., 117 Wn. App. 251, 254, 70 P.3d 158 (2003) ("Statutes must be construed to avoid . . . absurd results.") (citation omitted).

Second, individual words should not be interpreted in isolation and a court should be "reluctant to accept literal readings with . . . 'strained consequences,' especially when they do not align with the statute's purpose and plain meaning of its text." State v. Yusuf, 21 Wn. App. 2d 960, 920-21, 512 P.3d 915 (2022), review denied, 200 Wn.2d 1011, 518 P.3d 206 (2022) (citation omitted). In other words, in interpreting legislative intent, we cannot focus myopically on one sense of one phrase in the Code (". . . located near a high capacity transit route or station . . ."), to the detriment of its context, particularly where other readings exist. Thus, BSRE's reading of the "or" as rigidly disjunctive is not justified.

The "or" can and should be understood, instead, as explanatory or conjunctive, viz., the high rises must be "located near a route and (i.e., as accessible through) its station." Indeed, this court has held that we need not interpret every "or" as disjunctive, where the context so indicates. Black v. Nat'l Merit Ins. Co., 154 Wash. App. 674, 688, 226 P.3d 175 (2010); Bullseye Distrib. LLC v. State Gambling Comm'n, 127 Wn. App. 231, 239, 110 P.3d 1162 (2005) ("the conjunctive 'and' and the disjunctive 'or' may be substituted for each other if it is clear from the plain language of the statute that it is appropriate to do so.").

Third, the parties ignore that the entire provision of the Code is permissive, given the use of the word "may." Former SCC 30.34A.040(1) states that a "building height

increase up to an additional 90 feet *may* be approved . . .” if certain conditions are met. (Emphasis added). There is nothing preventing the County from declining to approve a building height increase (or in this case 17 building height increases) even if it were to interpret the provision in the way BSRE desires.

Fourth, and relatedly, BSRE’s interpretation ignores the prior additional qualifying phrase that the increase must be “necessary or desirable.” Former SCC 30.34A.040(1). On appeal, BSRE argues, without citing any authority, that “desirable” means subjectively desirable to it, the developer. We agree with the County, that the subject to whom the building increase must be desirable is the County. The County’s overarching intent is clearly indicated in the GMA. “The GMA discourages sprawl and encourages growth in urban areas served by a multimodal transportation system.” Amended Ordinance No. 09-079. Thus, an Urban Zone without a high capacity transit system of any kind would be understandably undesirable to the County.

Fifth and finally, on the interpretation of this provision, LUPA requires that we give substantial or great deference to County’s understanding of the Code in this highly technical area. This court should not substitute its judgment for that of county decision-makers. Schofield, 96 Wn. App. at 589.

For these reasons, we interpret Former SCC 30.34A.040(1) in the larger statutory context in which it was adopted and conclude that the County’s intent is, not only proximity to high capacity transit, but the ability of its future residents to use and access the high capacity transit.

For these reasons, we find that BSRE did not carry its burden in establishing that the County erroneously interpreted or clearly erroneously applied its own Code as to this first substantial conflict. We need reach neither the four remaining alleged substantial conflicts nor whether SCC 30.61.220 violates state law. In short, we deny the Petition on the merits.

III. CONCLUSION

We reverse and remand this matter to the superior court to dismiss the LUPA petition for the reasons provided above.

Díaz, J.

WE CONCUR:

Coburn, J.

Smith, A.C.J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BSRE POINT WELLS, LP Respondent/Cross-Appellant, v. SNOHOMISH COUNTY, Appellant/Cross-Respondent.	No. 83820-2-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Respondent/Cross-Appellant BSRE Point Wells, LP, filed a motion for reconsideration of the opinion filed on December 27, 2022 in the above case. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Díaz, J.

APPENDIX C

RCW 36.70A.010 Legislative findings. The legislature finds that uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and the wise use of our lands, pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state. It is in the public interest that citizens, communities, local governments, and the private sector cooperate and coordinate with one another in comprehensive land use planning. Further, the legislature finds that it is in the public interest that economic development programs be shared with communities experiencing insufficient economic growth. [1990 1st ex.s. c 17 § 1.]

RCW 36.70C.130 Standards for granting relief—Renewable resource projects within energy overlay zones. (1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

(2) In order to grant relief under this chapter, it is not necessary for the court to find that the local jurisdiction engaged in arbitrary and capricious conduct. A grant of relief by itself may not be deemed to establish liability for monetary damages or compensation.

(3) Land use decisions made by a local jurisdiction concerning renewable resource projects within a county energy overlay zone are presumed to be reasonable if they are in compliance with the requirements and standards established by local ordinance for that zone. However, for land use decisions concerning wind power generation projects, either:

(a) The local ordinance for that zone is consistent with the department of fish and wildlife's wind power guidelines; or

(b) The local jurisdiction prepared an environmental impact statement under chapter 43.21C RCW on the energy overlay zone; and

(i) The local ordinance for that zone requires project mitigation, as addressed in the environmental impact statement and consistent with local, state, and federal law;

(ii) The local ordinance for that zone requires site specific fish and wildlife and cultural resources analysis; and

(iii) The local jurisdiction has adopted an ordinance that addresses critical areas under chapter 36.70A RCW.

(4) If a local jurisdiction has taken action and adopted local ordinances consistent with subsection (3)(b) of this section, then wind power generation projects permitted consistently with the energy overlay zone are deemed to have adequately addressed their environmental impacts as required under chapter 43.21C RCW. [2009 c 419 § 2; 1995 c 347 § 714.]

RCW 36.70C.140 Decision of the court. The court may affirm or reverse the land use decision under review or remand it for modification or further proceedings. If the decision is remanded for modification or further proceedings, the court may make such an order as it finds necessary to preserve the interests of the parties and the public, pending further proceedings or action by the local jurisdiction. [1995 c 347 § 715.]

RCW 43.21C.031 Significant impacts. (1) An environmental impact statement (the detailed statement required by RCW 43.21C.030(2)(c)) shall be prepared on proposals for legislation and other major actions having a probable significant, adverse environmental impact. The environmental impact statement may be combined with the recommendation or report on the proposal or issued as a separate document. The substantive decisions or recommendations shall be clearly identifiable in the combined document. Actions categorically exempt under RCW 43.21C.110(1)(a) and 43.21C.450 do not require environmental review or the preparation of an environmental impact statement under this chapter.

(2) An environmental impact statement is required to analyze only those probable adverse environmental impacts which are significant. Beneficial environmental impacts may be discussed. The responsible official shall consult with agencies and the public to identify such impacts and limit the scope of an environmental impact statement. The subjects listed in RCW 43.21C.030(2)(c) need not be treated as separate sections of an environmental impact statement. Discussions of significant short-term and long-term environmental impacts, significant irrevocable commitments of natural resources, significant alternatives including mitigation measures, and significant environmental impacts which cannot be mitigated should be consolidated or included, as applicable, in those sections of an environmental impact statement where the responsible official decides they logically belong. [2012 1st sp.s. c 1 § 302; 1995 c 347 § 203; 1983 c 117 § 1.]

Finding—Intent—Limitation—Jurisdiction/authority of Indian tribe under act—2012 1st sp.s. c 1: See notes following RCW 77.55.011.

Authority of department of fish and wildlife under act—2012 1st sp.s. c 1: See note following RCW 76.09.040.

Finding—Severability—Part headings and table of contents not law—1995 c 347: See notes following RCW 36.70A.470.

APPENDIX D

(a) For purposes of this section, affordable housing is leased, rental or owner-occupied housing that has gross housing costs which do not exceed 30 percent of the gross income of individuals or families with household income not to exceed 80 percent of the county median income.

(b) Gross housing costs for owner-occupied housing include mortgages, amortization, taxes, insurance and condominium or association fees, if any. Gross housing costs for leased and rental units include rent and utilities.

(c) To be eligible for the affordable housing FAR bonus, the applicant shall record with the Snohomish County Auditor an agreement in a form approved by the county requiring affordable housing square footage that is provided under this section to remain affordable housing for the life of the project. This agreement shall be a covenant running with the land, binding on the assigns, heirs, and successors of the applicant.

***Former* 30.34A.040 Building height and setbacks.**

(1) The maximum building height in the UC zone shall be 90 feet. A building height increase up to an additional 90 feet may be approved under SCC 30.34A.180 when the additional height is documented to be necessary or desirable when the project is located near a high capacity transit route or station and the applicant prepares an environmental impact statement pursuant to chapter 30.61 SCC that includes an analysis of the environmental impacts of the additional height on, at a minimum:

(a) aesthetics;

(b) light and glare;

(c) noise;

(d) air quality; and

(e) transportation.

(2)

(a) Buildings or portions of buildings that are located within 180 feet of adjacent R-9600, R-8400, R-7200, T or LDMR zoning must be scaled down and limited in building height to a height that represents half the distance the building or that portion of the building is located from the adjacent R-9600, R-8400, R-7200, T or LDMR zoning line (e.g.-a building or portion of a building that is 90 feet from R-9600, R-8400, R-7200, T or LDMR zoning may not exceed 45 feet in height).

(b) Where the UC zoning line abuts a critical area protection area and buffer or utility, railroad, public or private road right-of-way, building heights shall not be subject the limitation in section (2)(a) if the critical area protection area and buffer or utility, railroad, public or private road right-of-way provides an equal or greater distance between the building(s) and the zoning line than would be provided in this subsection (2)(a). All ground floor residential units facing a public street must maintain a minimum structural ceiling height of 13 feet to provide the opportunity for future conversion to nonresidential use.

(3) Excluding weather protection required in SCC 30.34A.150, buildings must be setback pursuant to SCC Table 30.34A.040(4).

Table 30.34A.040(4)
Setbacks

Front	None
Side	None
Rear	None

***Former* 30.34A.050 Parking ratios, parking locations and parking lot and structure design**

(1) Development in the UC zone must comply with the parking ratios established in SCC Table 30.34A.050(1).

Table 30.34A.050(1)
Parking Ratios

Use	Minimum	Maximum	Bicycle Parking
Restaurants	2 stalls/1000 nsf	8 stalls/1000 nsf	2 spaces minimum
Retail	2 stalls/1000 nsf	4 stalls/1000 nsf	2 spaces minimum
Office	2 stalls/1000 nsf	4 stalls/1000 nsf	2 spaces minimum
Residential (units >1000 sq ft each)	1.5 stalls per unit	2.5 stalls per unit	2 spaces minimum
Residential (units <1000 sq ft each)	1 stall per unit	1.5 stalls per unit	2 spaces minimum
Senior Housing	.5 stalls per unit	1 stall per unit	2 spaces minimum
All other uses	See SCC 30.34A.050(5)		2 spaces minimum

(2) Parking must be located under, behind or to the side of buildings.

(3) Parking lots must be landscaped pursuant to SCC 30.25.022.

(4) Parking garage entrances must be minimized, and where feasible, located to the side or rear of buildings. Lighting fixtures within garages must be screened from view from the street. Exterior architectural treatments must complement or integrate with the architecture of the building through the provision of architectural details such as:

(a) window openings;

(b) plantings designed to grow on the façade;

(c) louvers;

(d) expanded metal panels;

(e) decorative metal grills;

(f) spandrel (opaque) glass; and

(g) any other architectural detail approved under SCC 30.34A.180 that reduces and softens the presence of above ground parking structures.

30.61.220 Denial without EIS.

When denial of a non-county proposal can be based on grounds which are ascertainable without preparation of an environmental impact statement, the responsible official may deny the application and/or recommend denial thereof by other departments or agencies with jurisdiction without preparing an EIS in order to avoid incurring needless county and applicant expense, subject to the following:

(1) The proposal is one for which a DS has been issued or for which early notice of the likelihood of a DS has been given;

(2) Any such denial or recommendation of denial shall be supported by express written findings and conclusions of substantial conflict with adopted plans, ordinances, regulations or laws; and

(3) When considering a recommendation of denial made pursuant to this section, the decision-making body may take one of the following actions:

(a) Deny the application; or

(b) Find that there is reasonable doubt that the recommended grounds for denial are sufficient and remand the application to the responsible official for compliance with the procedural requirements of this chapter. (Added by Amended Ord. 02-064, Dec. 9, 2002, Eff date Feb. 1, 2003).

APPENDIX E

KING COUNTY SUPERIOR COURT

BSRE POINT WELLS, LP, a Delaware Limited Partnership Petitioner, v. SNOHOMISH COUNTY, Defendants.	No.: 18-2-27189-4 SEA ORDER ON BSRE POINT WELLS, LP'S LUPA PETITION REMANDING PER SCC 30.34A.180 (2)(f) (2007)

I. INTRODUCTION

This matter is before the Court under the Land Use Petition Act, RCW 36.70C.030. Petitioner, Point Wells, BSRE LP, hereinafter "BSRE" asks the Court to reverse the Snohomish County Hearing Examiner's August 3, 2018 denial "without prejudice" of its "Urban Center Development" land use applications that were subsequently approved by the Snohomish County Council on October 9, 2018. In considering this matter, the Court is, in form, reviewing the Snohomish County Council's approval, but in substance reviewing the specific issues addressed by the Hearing Examiner in the lengthy record provided. The Court under RCW 36.70C.140 may affirm or reverse the land use

decision under review or remand the decision for modification or further proceedings.

The Court considered the Opening Brief of Petitioner, Respondent Snohomish County's Response Brief, Intervenor, City of Shoreline's Response Brief and the Reply Brief of Petitioner along with all associated declarations and the entirety of the official record produced. Additionally, the Court heard oral argument on May 10, 2019.

II. FINDINGS OF FACT

1. This Land Use Petition Act ("LUPA") action arose from the denial of land use applications by the Snohomish County Hearing Examiner on August 3, 2018 that were largely affirmed by the Snohomish County Council in a written decision of October 9, 2018.[1] The applications at issue were initially filed on February 14, 2011 and March 4, 2011. This project was to be developed under the Snohomish County Code, specifically, Chapter 30.34 (the Urban Center Development) code.
2. The proposed development is on 61 acres of waterfront property at Point Wells in Snohomish County, Washington. The site was used previously as a petroleum facility and is reported to be currently in use as an asphalt processing plant.[2] As an "urban center" development, BSRE indicated that it would include approximately 3,000 residential units and provide

[1] Applications at issue were filed under numbers 11-01457 LU/VAR, 11-101461 SM, 11-101464 RC, and 11-101007 SP.

[2] No evidence has been presented as to remediation work having been started on the property.

approximately 100,000 square feet of commercial space. BSRE has also indicated that its development would allow for large public beach access.

3. To the east of the property is a 200-foot bluff. The Town of Woodway and the City of Shoreline abut the property with primarily single-family homes.

4. From the beginning, it was clear to Snohomish County and to BSRE that the project was complex and that it faced many hurdles.[3] In fact, a major hurdle arose in 2010 and 2011 when the Town of Woodway and Save Richmond Beach, Inc. successfully challenged the county's designation of the Point Wells site as an "urban center" before the Growth Management Hearing Board as not compliant with the State Environmental Policy Act ("SEPA").

5. The Growth Management Hearing Board determination led to a second, significant hurdle when The Town of Woodway and Save Richmond Beach, Inc. filed an action in King County Superior Court seeking a declaration that BSRE's project permit applications had not vested because ordinances enacted within the "urban center" code were void under SEPA and the Growth Management Act. This litigation initiated in September, 2011 included an injunction that delayed processing of BSRE's applications as the case proceeded through the Washington State Court system. Division One of the Court of Appeals invalidated the injunction on January 7, 2013. The Washington State Supreme Court

[3] BSRE references a predecessor in interest in the property, but this entity was unnamed. Accordingly, the Court will refer to BSRE as the interested developer throughout this order.

affirmed the Division One decision on April 14, 2014 and confirmed that BSRE had a vested right to permit applications that were filed under the Snohomish County Urban Center Code provisions even though the "urban center" regulations had been determined to be non-compliant with SEPA.

6. After the Court of Appeals decision, Snohomish County recommenced its review of BSRE's applications and issued a 14-page review completion letter on April 12, 2013. This letter referenced not less than 42 issues of code noncompliance and requested that BSRE provide additional information to address the noted issues. BSRE responded in a letter dated March 21, 2014 in which it requested an extension to April 15, 2015, in part due to the above referenced then pending Washington State Supreme Court case. This request was granted.
7. On April 15, 2015, BSRE requested a second application extension to June 30, 2016. This request was also granted.
8. In a letter dated March 30, 2016, BSRE requested a third extension of two years. In this letter, BSRE "reserved" argument that it remained vested under the code provisions that were in effect when its applications were filed such that recently adopted code provisions would not apply to its applications. This extension request was granted in a letter of March 31, 2016 through which the new application deadline was set for June 30, 2018. In the letter granting this extension, Snohomish County responded to BSRE's "reserved" vesting argument and directly informed BSRE of Snohomish County Amended Ordinance 16-004 which it asserted, applied

new application expiration regulations to pending applications, including BSRE's applications. Snohomish County clearly disagreed with BSRE's vesting argument.

9. On April 17, 2017, BSRE provided an application resubmittal, nearly a month ahead of a Snohomish County requested May 15, 2017 deadline. Snohomish County acknowledged receipt of the resubmittal by letter on May 2, 2017 and stated that if an additional extension was to be requested, that a request should be presented before May 30, 2018. A second letter acknowledging receipt of the resubmittal and providing preliminary comments was sent from Snohomish County on May 10, 2017. This letter referenced the May 2, 2017 letter and reiterated that the project would expire on June 30, 2018 unless BSRE requested and the PDS director granted a further extension.

10. On October 6, 2017, Snohomish County provided a 389-page review completion letter to BSRE. In this letter, Snohomish County recognized that BSRE had resolved 13 issues, but noted that many of the deficiencies recognized in its April 2013 review letter had not been addressed. This detailed letter went through all applicable code provisions with direct reference to actions of BSRE. This letter again referenced the approaching, application expiration date of June 30, 2018 and indicated that it was possible that the applications could be transferred to the Hearing Examiner with a recommendation of denial if deficiencies were

not addressed. At relevant part with regard to timing, this letter, at page 3, stated:

> **Timing:** The current permit applications have previously been the subject of three previous requests for extension, all of which have been granted. The most recent was a 24-month extension extending the expiration date of the applications to June 30, 2018. Under County Code, no additional extensions are permitted absent extraordinary circumstances.
>
> Accordingly, Snohomish County asks that the additional information/revisions set forth below be provided within a reasonable period of time to allow completion of SEPA review and submission of the applications for hearing or decision by June 30, 2018. Even if the applicant does not wish to revise the application submittal, we would request that the applicant identify an "alternative" project proposal on the site capable of demonstrating compliance with the County's regulations, including those for critical areas, parking, and fire protection for purposes of SEPA review. If a revised submittal or alternative information addressing the above is not received on or before January 8, 2018, PDS will assume that the applicant wishes the County to proceed with concluding environmental review under SEPA and processing the permit applications for hearing or decision based on the current application submittals. Please be advised that this may result in a recommendation of denial without further preparation of an EIS in accordance with SCC 30.61.220, if PDS concludes that the permit applications as submitted evidence a substantial conflict with applicable County Code and development regulations.

11. A second one-page letter from Snohomish County was sent with the 389-page letter on October 6, 2017. This letter again referenced the June 30, 2018 due date and directed BSRE to provide another application resubmittal by January 8, 2018.

The records indicate that BSRE continued to work to address issues referenced and in that direction, representatives of BSRE and Snohomish County met in person on November 13, 2017. In this meeting, BSRE

asserts that it indicated that it needed additional time beyond January 8, 2018 to complete requested work and that Snohomish County representatives stated that the January 8, 2018 resubmission was a target and not a statutorily prescribed deadline. BSRE also contends that it was encouraged to submit a letter request for more time and that it was told that there was no reason to expect that an additional extension request would not be approved.

12. On December 29, 2017, BSRE wrote Snohomish County explaining that work was ongoing, but could not be finished by January 8, 2018 and that upon receipt of updates from consultants it would provide a new target date when materials would be submitted. In response, Snohomish County sent a letter of January 9, 2019 stating that supplemental materials had not been provided in time, and that the county intended to move onward to the Hearing Examiner for application review. At relevant part, this letter stated:

> At this time, PDS will complete final review and processing of the application materials it has received. Further, PDS will make a recommendation to the Hearing Examiner on the Applications and schedule a public hearing on the Applications with enough time for the Hearing Examiner to render a decision by June 30, 2018. Please note that if PDS concludes that the Applications as submitted substantially conflict with the applicable plans, ordinances, regulations or laws, this process may result in a recommendation of denial without further preparation of an EIS under SCC 30.61.220.

13. In response, BSRE wrote Snohomish County on January 12, 2018 and January 24, 2018 requesting reconsideration of the decision to

proceed ahead and an additional 18-month extension. BSRE also wrote Snohomish County on January 19, 2018 indicating that supplemental materials would be provided by April 30, 2018.

14. Despite these letters from BSRE, Snohomish County proceeded onward on the path to Hearing Examiner consideration. A hearing was scheduled to begin on May 16, 2018.

15. On April 17, 2018, Snohomish County issued a staff recommendation to the Hearing Examiner recommending denial of the applications under SCC 30.61.220. The staff recommendation was based on eight separate issues of "substantial conflict" with Snohomish County Code requirements.

16. BSRE provided additional materials to Snohomish County on April 27, 2018. Snohomish County conducted an expedited review of these materials and on May 9, 2018 submitted a supplemental staff recommendation to the Hearing Examiner in which it concluded that three of the eight areas of "substantial conflict" had been resolved, but that five remaining areas of "substantial conflict" remained upon which it recommended denial.

17. The Snohomish County Hearing Examiner commenced an open record hearing on May 16, 2018. At the beginning of the hearing, Snohomish County informed the Hearing Examiner that BSRE had submitted additional materials the day beforehand and requested a week-long continuance. The request was denied and the hearing

moved onward a seven-day hearing. The parties submitting closing briefs and proposed findings of fact and conclusions of law after testimony concluded.

18. On June 29, 2018, the Hearing Examiner issued a Decision Denying Extension Request and Denying Applications Without an Environmental Impact Statement per SCC 30.61.220.

19. On July 9, 2018, BSRE filed a motion for reconsideration and clarification of the Hearing Examiner's decision.

20. On August 3, 2018, the Hearing Examiner issued two decisions: (1) a Decision Granting in Part and Denying in Part BSRE's Motion for Reconsideration and Clarification ("Reconsideration Decision") and (2) an Amended Decision Denying Extension and Denying Applications Without an Environmental Impact Statement ("Amended Decision").

21. The "Reconsideration Decision" confirmed that the denial of the applications was "without prejudice" per SCC 30.72.060(3) (2013) and further indicated that as a "Type 2 decision" the next appellate step appeared to be consideration by the Snohomish County Council rather than through appeal to the Snohomish County Superior Court. Other than addressing these issues, the Hearing Examiner denied the overall motion for reconsideration because he believed his initial decision was correct and that reconsideration was futile because the expiration period expired.

22. BSRE appealed the Hearing Examiner's Decision of August 3, 2018 to the Snohomish County Council. A closed record hearing was held on October 3, 2018 and the Council adopted Motion No. 18-360 which affirmed the Hearing Examiner's Amended Decision with minor modifications on October 8, 2018.

23. On October 9, 2018, an official Notice of Council Decision was signed by the Clerk of the Council indicating that upon a unanimous vote, the County Council approved a motion affirming the August 3, 2018 Amended Decision of the Hearing Examiner with modifications, as set forth in Council Motion No. 18-360. From this decision, BSRE timely appealed to this Court under the Land Use Petition Act, Chapter 36.70C RCW.

III. ANALYSIS

A. BSRE has a vested right to reactivate its applications under SCC 30.34A.180 (2)(f) (2007).

The Court carefully examined the record and applicable code provisions to assess whether BSRE's application materials as submitted were in "substantial conflict" with code provisions in the five areas at issue. However, upon broad review of the history of this project through the record presented, the paramount issue became whether BSRE has a vested right under the vested rights doctrine to proceed under Title 30.34A of the Snohomish County Code which relates to "Urban Center Development" in the form in which it existed when BSRE's

applications were deemed to have been properly presented on February 14, 2011 and March 4, 2011.

The vested rights doctrine generally provides that certain land development applications must be processed under the land use regulations in effect when the application was submitted, regardless of subsequent changes to those regulations. *Town of Woodway v. Snohomish County,* 180 Wn.2d 165, 172- 173, 222 P.3d 1219 (2016). Development rights "vest" on a date certain—when a complete development application is submitted. *Id.* The purpose of the vested rights doctrine is to provide certainty to developers and to provide some protection against fluctuating land use policy. *Noble Manor Co. v. Pierce County,* 133 Wn.2d.2d 269, 278, 943 P.2d 1378 (1997). The doctrine recognizes that development rights are valuable property interests and ensures that new land use regulations do not interfere with those rights. *Town of Woodway,* 180 Wn. 2d at 173.

The critical vesting issue before the Court is whether BSRE has a vested right to the process set forth in SCC 30.34A.180(2)(f) (2007) which was in place when the applications were submitted. SCC 30.34A.180(2)(f) (2007) at pertinent part provides:

> The hearing examiner may deny an urban center development application without prejudice pursuant to SCC 30.72.060. If denied without prejudice, the application may be reactivated under the original project number without additional filing fees or loss of project vesting if a revised application is submitted within six months of the date of the hearing examiner's decision. In all other cases a new application shall be required.

It is undisputed that SCC 30.34A.180(2)(f) (2007) was repealed in 2013 per Amended Ordinance No 13-007, made effective October 3, 2013 and that developer rights vesting is now addressed in the Snohomish County Code at SCC 30.70.300 which does not allow for a six-month reactivation option. Snohomish County relies on this repeal and argues that BSRE lost the ability to reactivate its applications within six months of the hearing examiner's "without prejudice" decision even though it has a vested right to rely on other provisions of SCC 30.34A. Snohomish County asserts that developer vested rights only apply to ordinances that exercise a restraining of directing influence over land use, such as regulations about sidewalk widths, structure height restrictions or types of uses allowed, i.e. residential, commercial or industrial. *See New Castle Investments v. City of LaCenter,* 98 Wn. App. 224, 232-233, 989 P.2d 569 (1999); *Snohomish County v. Pollution Control Hearings Board,* 187 Wn.2d 346. 361, 386 P.3d 1064 (2016); *Westside Business Park, LLC. v, Pierce County,* 100 Wn. App. 599, 607, 5 P.3d 713 (2000) and *Graham Neighborhood Association v. F.G. Associates,* 162 Wn. App. 98, 252 P.3d 898 (2011).

Snohomish County correctly relies on these cases to support its position. However, the record indicates that Snohomish County specifically informed BSRE that the above referenced six-month reactivation process was available to BSRE in its critically important 389 Review Completion letter dated October 6, 2017. This letter, signed by Paul MacCready, the Principal Planner/Project Manager handling the project at page 79 included the following language:

Urban Center Development (Chapter 30.34A SCC)

> Review of Chapter 30.34A SCC refers to the Land Use permit for an urban center site plan, 11-101457 LU, unless otherwise noted. **The review is per the code in effect when 11-101457 LU was submitted, i.e. the March 4, 2011, version of code, unless explicitly identified otherwise.**[4]

The letter goes on in great detail addressing all provisions of SCC 30.34A as they relate to BSRE's application submissions. Discussion of the Urban Center Development code provisions of Chapter 30.34A continued onward from page 79 to page 98 where it specifically addressed SCC 30.34A.180(2)(f) (2007) and states:

> **Subsection (2)(f)** allows the Hearing Examiner to deny the project without prejudice and, if this happens, allows the applicant to reactivate the project.

It is perplexing that Snohomish County now argues that SCC 30.34A.180(2)(f) (2007) reactivation is unavailable because the letter of October 6, 2017 was written four years after the repeal upon which it relies and nowhere in the letter did Snohomish County "explicitly identify" that this provision of SCC 30.34A was no longer applicable.

Moreover, the record indicates that Snohomish County supported BSRE in establishing its vested rights throughout the litigation process in *Town of Woodway v. Snohomish County and BSRE, Point Wells, LP,* all the way through consideration by the Washington Supreme Court. Although the Washington Supreme Court's consideration in *Town of Woodway* addressed BSRE's vested

[4] Emphasis added for clarity.

rights in the context of whether BSRE and Snohomish County could proceed with application processing despite a determination that Snohomish County's Urban Center plans and regulations were not compliant with SEPA, BSRE and Snohomish County remained allied in asserting the importance of vested developer rights. Like the situation in *Town of Woodway* in which our Washington Supreme Court determined that BSRE's development rights were a valuable property right for which BSRE was entitled to have its applications processed under the law in place at the time when its applications were completed, BSRE's development rights in 2019 remain sufficiently valuable.

The Court understands Snohomish County's reliance on *Graham Neighborhood Association.* However, the facts differentiate its holding from the situation at bar. Unlike the situation at bar, in *Graham Neighborhood Association,* Pierce County did not oppose utilization of the vested rights doctrine after indicating clearly in writing to the developer that the code provisions in effect at the time of application submission would remain in effect throughout the review process. Additionally, in *Graham Neighborhood Association,* the developer appeared neither sincere nor serious in its initial application, and even inappropriately and flippantly answered application questions in submission documentation. Inappropriate, joking responses to serious application questions indicated that the submission was merely a placeholder designed to secure a development right position five days before regulations were to change that were to prohibit certain commercial uses. Additionally, the *Graham Neighborhood*

Association developer appeared disinterested in pursuing the project for thirteen years before submitting an additional environmental review worksheet.

In determining that the *Graham Neighborhood Association* developer did not have a vested right, the Court of Appeals looked to *Erickson and Associates v. McLerran, et al.* 123 Wn.2d 864, 872 P.2d 1090 (1994) and referenced the need to balance the private property and due process rights of a developer against the public interest by selecting a vesting point which prevents permit speculation and which demonstrates substantial commitment by the developer such that good faith of the applicant is generally assured. Despite delays here, evidence indicates that BSRE is substantially committed to the Point Wells project and there is no evidence of bad faith on the part of BSRE.

Graham Neighborhood Association also relies on *Erickson* in recognizing that while development rights are a valuable and protected property right, protection of these rights come at a cost to the public interest. The detrimental effect on the public interest occurs when vested rights are granted too easily, as the public interest can be subverted through sanctioning of non-conforming uses. *See Graham Neighborhood Association* at 112 – 113 citing *Erickson* at 873 – 874.

Here balancing the property and due process rights of BSRE against the public interest, the Court must consider Snohomish County's October 6, 2017 letter providing BSRE with written confirmation that reactivation remained an option if a Hearing Examiner denial was "without prejudice" and BSRE's reliance on this provision as shown through BSRE's pursuit of a denial "without prejudice.

The Court is aware of the significant public interest in the outcome of this application process. The record is beyond replete with demonstrated public interest through submitted comments and testimony in opposition to the development and great public interest was demonstrated in the briefing and eloquent oral argument presented by the City of Shoreline as an intervening party. Presented public interest carries great weight in the balance of vested right consideration, but BSRE also carries great weight in the form of its property interest and in its right to due process in the consideration of its applications.

The heavy weight of due process is felt in BSRE's receipt of the October 6, 2017 letter indicating that review will be "per the code in effect when 11-101457 LU was submitted, i.e. the March 4, 2011, version of code, unless explicitly identified otherwise" and in seeing no evidence that Snohomish County ever "explicitly identified otherwise." In conclusion, the Court sees the public interest as still well protected in the continuation of the application review process, if BSRE opts to reactivate is applications to address the five issues of "substantial conflict" brought to its attention by Snohomish County. The Court has no doubt that public interest and input will continue to be presented.

B. BSRE did not miss its window to reapply under SCC 30.34A.180(2)(f).

Snohomish County argues that even if the six-month reactivation process was available, BSRE missed its window of opportunity by not taking steps to reactivate within six-months of the Hearing Examiner's decision. However, the record indicates that there was no way for BSRE to reactivate its applications after the Hearing Examiner issued his Decision Granting in Part and Denying in

Part BSRE's Motion for Reconsideration and Clarification. In this decision, the Hearing Examiner explained clearly that while he had the authority to deny the application without prejudice under SCC 30.72.060(3), he did not believe he had the authority to deny the application without prejudice under SCC 30.34A.180(2)(f) (2007) because his authority to do so had been revoked by the adoption of Ord. 13-007 Section 28 (adopted September 11, 2013, eff. October 3, 2013). Additionally, reactivation was not possible after the Snohomish County Council's October 9, 2018 approval of the Hearing Examiner's August 3, 2019 decisions because the Council approved the Hearing Examiner's conclusion as to his authority despite argument from BSRE before Council regarding its asserted vested right to reactivate its applications. Moreover, taking expensive reactivation steps when faced with decisions that indicated that there was no authority to allow for reactivation would have been futile. BSRE appropriately addressed this issue with the Court as part of its LUPA appeal.

IV. CONCLUSIONS OF LAW

Based on the above analysis, the Court enters the following Conclusions of Law.

1. BSRE had a vested right to proceed under SCC 30.34A, in its entirety in the form and substance of its language in place at the time of its application submissions on February 14, 2011 and March 4, 2011.
2. BSRE's vested right includes the right to proceed under SCC 30.34A.180(2)(f) (2007) which allows for reactivation of applications

within six months of the Hearing Examiner's denial of its applications without prejudice.

3. The Hearing Examiner erred in determining that he did not have the authority to allow BSRE to reactivate its applications as authorized in SCC 30.34A.180(2)(f) (2007) because BSRE had a vested right to proceed under SCC 30.34A.180(2)(f) (2007).
4. BSRE was unable to reactivate its applications as authorized by SCC 30.34A.180(2)(f) (2007) after the Hearing Examiner rendered his Decision Granting in Part and Denying in part BSRE's Motion for Reconsideration and Clarification and after approval of this decision by the Snohomish County Council on October 8, 2018.
5. BSRE relied on Snohomish County's October 6, 2017 letter in asserting that it had the ability to reactivate its applications as authorized under SCC 20.34A.180(2)(f) (2007).
6. Based on the Court's decision regarding BSRE's ability to reactivate its applications, consideration of the grounds for denial and failure to grant an extension of the application process is unnecessary because through this decision the Court is affording BSRE an opportunity to reactivate its applications. It is possible that the issues of substantial conflict and failure to grant an extension may come before the Court in the future depending on what happens with the reapplication process allowed by this ruling.
7.

V. ORDER

1. This matter is remanded to Snohomish County to proceed with consideration of BSRE's reactivation of its applications previously denied "without prejudice" by the Hearing Examiner on August 3, 2018 and approved by the Snohomish County Council on October 8, 2018.[5]

2. BSRE has six-months from the date of entry of this Order on June 18, 2019 to reactivate its applications, if it chooses to pursue reactivation.

3. The parties are to act diligently, in good faith and in accord with the Snohomish County Code and all other applicable statutory provisions in completing the application review process.

4. The Court sees reactivation as allowed by SCC 30.34A.180(2)(f) (2007) as a one-time reactivation opportunity rather than as an avenue for future reactivation requests.

DATED this 18th day of June, 2019.

Judge John F. McHale

[5] This assumes that BSRE will pursue reactivation as requested.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

BSRE POINT WELLS, LP, a Delaware limited partnership, Petitioner, v. SNOHOMISH COUNTY, Respondent, v. CITY OF SHORELINE, a Washington municipal corporation, Intervenor.	No. 21-2-05508-3 SEA ORDER Remanding with Directives *Clerk's Action Required*

THIS MATTER came before the Honorable Josephine Wiggs-Martin for a hearing on the merits on November 5, 2021, and was further argued in open court on December 10, 2021. Petitioner BSRE Point Wells, LP was represented by Jacque St. Romain, Karr Tuttle Campbell; Respondent Snohomish County was represented by Matthew A. Otten, Deputy Prosecuting Attorney; and Intervenor City of Shoreline was represented by Julie Ainsworth-Taylor, Shoreline City Attorney's Office.

The Court considered Petitioner's Land Use Petition Act Appeal; Petitioner's Opening Brief, Respondent Snohomish County's Response Brief; Intervenor City of

Shoreline's Response Brief; Petitioner's Reply; the Certified Administrative Record in this matter; the records, files, and additional pleadings herein; and the arguments of the parties in open court.

It is hereby **ORDERED, ADJUDGED and DECREED**

When this matter was before the King County Superior Court under Cause Number 18-2-27189-4, Judge McHale entered an order remanding so that BSRE could re-activate its application, if it so chose. In so doing, he indicated that "[t]he parties [were] to act diligently, in good faith *and* in accord with the Snohomish County Code and all other applicable statutory provisions in completing the application review process." (emphasis added)

BSRE alleges a violation of the good faith provision of Judge McHale's order, pointing to several examples in support of that contention, including the following:

1. Failing to take any actions to "complet[e] the application review process;"
2. Failing to provide any comment letters or engaging in any discussions with BSRE prior to issuing another request for the Hearing Examiner to deny the Applications without preparation of an EIS under SCC 30.61.220;
3. Requesting that its third-party consultant determine the Project's FAR calculations without consulting with BSRE and without even considering the actual plans submitted by BSRE;
4. Failing to engage in any discussions with BSRE about the deviation request, despite admitting that the County's process includes such discussions;

5. Relying on the deviation request as a reason for denial of the applications despite previously stating that the deviation request was not a requirement at this stage; and,
6. Raising new issues in the May 2020 Report which were not previously raised and were not part of the Original Conflict Areas and then failing to engage in any discussions with BSRE related to those new issues.

The Court finds that there was a lack of good faith in the processing and review of the application upon reactivation and thus, a lack of compliance with Judge McHale's Order on Remand. Reactivation is meaningless if a full and fair process and review does not occur. A fair and meaningful process and review on reactivation must occur.

A meaningful reactivation also means that the same things are not resubmitted with minor tweaks. The Court agrees with the County that "hope is not a plan." The identified issues need to be addressed; the review process is not going to go on ad infinitum.

In entering this order, the Court recognizes that there has been significant expenditure of time and financial resources by all parties. The Court also recognizes that there has been and continues to be fundamental disagreement between the affected parties about how to develop Point Wells.

The Court has no idea how this will turn out. As the Court sees this issue, at present, it is not about outcome, it's about the fairness of process. This case was previously remanded by Judge McHale on process and review issues. He was explicit in his order that he expected the parties to proceed in good faith. His directive wasn't followed. It must be. This case is REMANDED with directives as below.

1. Timeline on Remand

Given the history of the Project and the relationship between BSRE and the County, this Court finds that a specific timeline is necessary to allow the parties to make progress. The timeline takes into account that significant periods of appellate review have occurred during the course of this project. It also takes into account the complexity of the project and the need for adequate time for discussions and feedback in the review process. Accordingly, the parties shall adhere to the following timeline:

a. BSRE shall have six months or until August 22, 2022 to submit its initial revisions to the Applications based on the comments received from the County in its May 2020 Report. BSRE shall have the opportunity to meet at least once with the County and correspond with the County during this period to discuss any questions or comments BSRE may have.

b. The County shall have four months or until December 26, 2022 to provide a comment letter to BSRE based on the revisions submitted. The County's comment letter shall be solely limited to the issues identified before the Hearing Examiner in November 2020. While the County is preparing this comment letter, if the County hires any third-party consultants those consultants shall be allowed to correspond directly with BSRE and its consultants to resolve any questions and provide feedback during the review process. Further, the County shall have at least one meeting with BSRE to address any questions or comments the County may have during this period.

c. BSRE shall have two months from the date of receipt of the County's comment letter to submit any further revisions to the plans. BSRE shall have the opportunity to meet at least once with the County and to correspond with the County during this period to discuss any questions or comments BSRE may have.

d. This process shall be complete no later than 12 months or February 27, 2023.

e. The parties shall act in good faith and shall engage in meaningful and substantive discussions about the applications and their revisions throughout the review process.

f. This Court does not believe it has authority to maintain ongoing jurisdiction over the LUPA appeal after remand, for purposes of disputes over statutory meanings and any allegations of non-compliance with this order. The Court believes those issues would have to come forth on a future LUPA appeal, should that become necessary.

2. EIS

BSRE has not demonstrated that the Court has the authority under the Land Use Petition Act to invalidate a provision of a county code. Under the Land Use Petition Act, the court may only "affirm or reverse the land use decision under review or remand it for further modification or further proceedings." RCW 36.70C.140. BSRE seeks declaratory relief through invalidation of a local regulation that is not authorized under the Land Use Petition Act, chapter 36.70C. RCW.

Assuming the Court did have authority under the Land Use Petition Act to grant BSRE's requested relief, BSRE does not demonstrate that SCC 30.61.220 violates state

law. RCW 43.21C.031 requires preparation of environmental impact statement for a proposal or action having a probable significant, adverse environmental impact. SCC 30.61.220 provides a process for summary denial of a project proposal or action that substantially conflicts with "adopted plans, ordinances, regulations or laws." SCC 30.61.220 does not allow a proposal or action having a probable significant, adverse environmental impact to proceed without preparation of environmental impact statement. BSRE does not demonstrate that SCC 30.61.220 violates state law and does not demonstrate error as it relates to the EIS under the standards of review for granting relief under the Land Use Petition Act. RCW 36.70C.130(1).

If the complete review after remand leads to the commencement of an EIS pursuant to SCC 30.61.220, the County shall advise its consultants to act in good faith to diligently and promptly proceed with the EIS.

3. If this Order is appealed, all of the deadlines herein shall be automatically stayed while the appeal is pending.

Dated: February 22, 2022

Signed Electronically
Honorable Josephine Wiggs-Martin

King County Superior Court
Judicial Electronic Signature Page

Case Number:	21-2-05508-3
Case Title:	BSRE POINT WELLS vs SNOHOMISH COUNTY
Document Title:	ORDER
Signed By:	Josephine Wiggs-Martin
Date:	February 22, 2022

Judge: Josephine Wiggs-Martin

This document is signed in accordance with the provisions in GR 30.

Certificate Hash:	17191A54C99F1ECEBA4EF6B295DD14D9B1E02ABC
Certificate effective date:	4/15/2019 8:51:22 AM
Certificate expiry date:	4/15/2024 8:51:22 AM
Certificate Issued by:	C=US, E=kcscefiling@kingcounty.gov, OU=KCDJA, O=KCDJA, CN="Josephine Wiggs-Martin: QDbimgvS5hGLn133AFk6yQ=="

APPENDIX F

SNOHOMISH COUNTY COUNCIL
SNOHOMISH COUNTY, WASHINGTON

OFFICIAL NOTICE OF COUNCIL DECISION

In re the Appeal by BSRE Point Wells, LP, of the January 29, 2021, Decision on Remand Denying Applications without Environmental Impact Statement; File Nos. 11-101457 LU, 11-101461 SM, 11-101464 RC, 11-101008 LDA, 11-101007 SP, 11-1001457 FHZ, 11-101457 SHORE, 11-101457-002-00 VAR, 11-101457-003-00 VAR, 11-101457-000-00 WMD, 11-101457-001-00 WMD, and 18-116078 CI for property located at 20500 Richmond Beach Dr. NW, Edmonds WA 98026.

NOTICE IS HEREBY GIVEN, that on March 31, 2021, a closed record appeal hearing, in this matter, was held and the County Council directed staff to draft a written motion upholding the Hearing Examiner's decision.

FURTHER NOTICE IS GIVEN, that on April 5, 2021, the Snohomish County Council approved a written motion consistent with the oral direction provided at the March 31, 2021, closed record appeal hearing, attached hereto as Council Motion No. 21-142.

FURTHER NOTICE IS GIVEN, that unless otherwise provided by law any person having standing who wishes to appeal this decision must do so by filing a land use petition in Superior Court in accordance with the provisions of Chapter 36.70C RCW and SCC 30.72.130.

FURTHER NOTICE IS GIVEN, that affected property owners may request the Snohomish County Assessor to make a change in valuation for property tax purposes notwithstanding any program of revaluation.

DATED this 5th day of April, 2021.

Debbie Eco, CMC
Clerk of the Council

E-Mailed: April 5, 2021
U.S. Mailed: April 5, 2021

SNOHOMISH COUNTY COUNCIL
Snohomish County, Washington

MOTION NO. 21-142

AFFIRMING THE HEARING EXAMINER'S DECISION ON REMAND DENYING APPLICATIONS WITHOUT ENVIRONMENTAL IMPACT STATEMENT, HEARING EXAMINER FILE NOS. 11-101457 LU, 11-101461 SM, 11-101464 RC, 11-101008 LDA, 11-101007 SP, 11-101457 FHZ, 11-101457 SHORE, 11-101457-002-00 VAR, 11-101457-003-00 VAR, 11-101457-000-00 WMD, 11-101457-001-00 WMD, 18-116078 CI

WHEREAS, BSRE Point Wells, LP ("BSRE") applied to Snohomish County for approval of an urban center development at Point Wells; and

WHEREAS, Snohomish County Planning & Development Services Department recommended to the Snohomish County Hearing Examiner ("Hearing Examiner") that BSRE's applications be denied without an environmental impact statement because of substantial conflicts with County Code under SCC 30.61.220; and

WHEREAS, the Hearing Examiner held an open record hearing May 16, 2018, through May 24, 2018, and issued an Amended Decision Denying Extension and Denying Applications Without Environmental Impact Statement on August 3, 2018; and

WHEREAS, BSRE filed an appeal to County Council ("Council") on August 17, 2018, of the Hearing Examiner's August 3, 2018 Amended Decision; and

WHEREAS, the Council held a closed record appeal hearing on October 3, 2018, to hear oral argument, consider the appeal, and deliberate; and

WHEREAS, the Council entered a decision in the appeal, via Motion 18-360, affirming the August 3, 2018, Amended Decision Denying Extension and Denying Applications Without Environmental Impact Statement, with minor modifications to two findings; and

WHEREAS, on October 29, 2018, BSRE filed a Land Use Petition Act appeal in King County Superior Court, challenging the Hearing Examiner's Reconsideration Decision and Denial Decision, along with the Council's Decision on appeal; and

WHEREAS, on June 18, 2019, the King County Superior Court issued an "Order on BSRE Point Wells, LP's LUPA Petition Remanding Per SCC 30.34A.180(2)(f) (2007)" ("Remand Order"), providing that BSRE was entitled to "a one-time reactivation opportunity" under former SCC 30.34A.180(2)(f); and

WHEREAS, subsequent to the Remand Order, BSRE submitted additional and modified application materials to the county; and

WHEREAS, on May 27, 2020, Planning & Development Services and Public Works issued a second supplemental staff recommendation to deny the project applications under SCC 30.61.220 for substantial conflicts with County Code; and

WHEREAS, the Hearing Examiner held a continued open record hearing November 4 through November 6 and November 24, 2020 to consider the project application; and

WHEREAS, on January 29, 2021, the Hearing Examiner issued a decision approving Planning & Development Service's request to deny project approval, with prejudice, without performing an environmental impact statement; and

WHEREAS, BSRE filed an appeal to County Council on February 12, 2021, of the Hearing Examiner's January 29, 2021 Decision; and

WHEREAS, appeal to Council is appropriate under SCC 30.72.070(1) and Council has jurisdiction over this closed record appeal except to the extent BSRE challenges denial of a shoreline substantial development permit, shoreline conditional use permit, or shoreline variance, which must be appealed to the state shoreline hearings board under SCC 30.44.250, not to Council as a closed record appeal; and

WHEREAS, the Council held a closed record appeal hearing on March 31, 2021, to hear oral argument, consider the appeal, and deliberate; and

WHEREAS, Council considered the appeal issues raised by BSRE in its written appeal to Council; and

WHEREAS, Council did not consider any appeal issues not raised in BSRE's written appeal or any evidence not in the record from the Hearing Examiner, consistent with SCC 30.72.110; and

WHEREAS, after considering the appeal based upon the record and the argument of the applicant/appellant and parties of record, the County Council directed council staff to prepare a written motion to affirm the Hearing Examiner's January 29, 2021, decision and adopt the findings and conclusions therein;

NOW, THEREFORE, ON MOTION:

Section 1. The Snohomish County Council makes the following findings of fact and conclusions:

1. The County Council adopts the findings and conclusions of the Hearing Examiner in the January 29, 2021, Decision on Remand Denying Applications without Environmental Impact Statement, File Nos. 11-101457 LU, 11-101461

SM, 11-101464 RC, 11-101008 LDA, 11-101007 SP, 11-101457 FHZ, 11-101457 SHORE, 11-101457-002-00 VAR, 11-101457-003-00 VAR, 11-101457-000-00 WMD, 11-101457-001-00 WMD, 18-116078 CI.

Section 2. The County Council affirms the Hearing Examiner's January 29, 2021, Decision on Remand Denying Applications without Environmental Impact Statement, File Nos. 11-101457 LU, 11-101461 SM, 11-101464 RC, 11-101008 LDA, 11-101007 SP, 11-101457 FHZ, 11-101457 SHORE, 11-101457-002-00 VAR, 11-101457-003-00 VAR, 11-101457-000-00 WMD, 11-101457-001-00 WMD, 18-116078 CI.

Section 3. With regard to the applicant's argument that SCC 30.61.220 violates state law, the council concludes that is not a basis to reject the Hearing Examiner's decision because the council does not have the subject matter jurisdiction to declare that county code provision contrary to state law in this quasi-judicial permit appeal.

Section 4. With regard to the applicant's argument concerning application expiration, the council considered this issue but finds that it does not need to reach it because the Hearing Examiner's decision is affirmed.

DATED this 5th day of April, 2021.

SNOHOMISH COUNTY COUNCIL
Snohomish County, Washington

Megan Dunn
Acting Council Chair

ATTEST:

Debbie Eco, CMC
Clerk of the Council

KARR TUTTLE CAMPBELL

March 10, 2023 - 2:59 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	BSRE Point Wells, Respondent/Cross-App v. Snohomish County, Appellant/Cross-Resp (838202)

The following documents have been uploaded:

- PRV_Petition_for_Review_20230310145759SC348957_4501.pdf
  This File Contains:
  Petition for Review
  The Original File Name was BSRE Petition for Review by Washington Supreme Court.pdf

A copy of the uploaded files will be sent to:

- Diane.Kremenich@co.snohomish.wa.us
- Laura.Kisielius@snoco.org
- ahart@snoco.org
- dluetjen@karrtuttle.com
- dvasquez@karrtuttle.com
- jainsworth-taylor@shorelinewa.gov
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- spa-landuselegalassistants@co.snohomish.wa.us

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