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SUPREME COURT NO. 94242-1

Court of Appeals Nos. 74464-0-II & 74465-8-I (consolidated)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

PUGET SOUND ENERGY, INC., a Washington corporation,

Appellant/Cross-Respondent

v.

EAST BELLEVUE COMMUNITY COUNCIL,

Respondent/Cross-Appellant,

and

CITY OF BELLEVUE,

Respondent.

PSE'S ANSWER TO THE EBCC'S PETITION FOR REVIEW

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I. SUMMARY AND RELIEF REQUESTED

The EBCC is a community council. Division One of the Court of Appeals overturned the EBCC's Resolution 550, which had rejected the Bellevue Hearing Examiner's approval of a conditional use permit authorizing Puget Sound Energy ("PSE") to "loop" two Bellevue substations. The Court of Appeals also held that the EBCC lacked authority to review shoreline conditional use permits approved by the Bellevue Hearing Examiner. The PSE project will improve electrical reliability in the area served by the substations. The service area is only partially in the EBCC territory. The Court of Appeals' decision is unpublished. Appendix Ex. A.

The EBCC's petition does not warrant review of the Court of Appeals' decision by the Supreme Court:

First, the Court of Appeals correctly refused to expand the EBCC's jurisdiction beyond the limits authorized by the statute. RCW 35.14.040(3) lists conditional use permits – but not *shoreline* conditional use permits – among decisions community councils can review. The omission of shoreline conditional use permits was not an oversight. The two permit categories are "sufficiently distinct" to negate the EBCC's superficial argument that "shoreline conditional use permits' are merely a 'subset' of conditional use permits." Appendix Ex. A at 25. The Court of Appeals therefore properly declined the EBCC's invitation to "to add words to the

statute that the legislature did not." *Id.* at 25-26. Nothing in RAP 13.4(b)(1) or (4) supports direct review or a different result.

Second, the EBCC now explicitly concedes that a "lack of substantial evidence" test in RCW 36.70C.130(1)(c) means more than the existence of evidence that might support a conclusion favored by the EBCC. EBCC's Petition for Review ("Petition") at 19. The EBCC also concedes that under RCW 36.70C.130(1)(c) its Resolution 550 fails. Instead, it now argues that two "determinations" in Resolution 550 – that the project was "inconsistent with the comprehensive plan" and was "materially detrimental to uses in the vicinity" – should have been reviewed under RCW 36.70C.130(1)(d) ("clearly erroneous application of the law to the facts"). *Id.* This argument is not properly before the Court. Having defended the same determinations below under RCW 36.70C.130(1)(c), the EBCC cannot fault the Court of Appeals for an alleged error the EBCC itself invited. Appendix Ex. B at 32-33.

Resolution 550 fails even under the standard EBCC now prefers. "Nothing has been cited to us showing that the comprehensive plan bars electric lines from 148th Avenue." Appendix Ex. A at 11 (emphasis added). See also id. at 13-14 (discussing evidence that the project's route met LUC 20.30B.140(D), which allows approval "if the conditional use will not be materially detrimental to uses or property in the immediate vicinity").

The Court of Appeals' analysis does not encroach on the EBCC's "significant role" in local land use decisions. Petition at 16. The court followed settled Washington law that community councils' authority is strictly defined by RCW 35.14.040. It also applied RCW 36.70C.130(1)(c), without any objection from the EBCC. There is no basis for review.

II. COUNTERSTATEMENT OF THE CASE

The City of Bellevue is the fifth fastest-growing city in Washington. The EBCC is a community council, established in 1969 when Bellevue annexed the EBCC territory. PSE has a statutory duty to provide the customers it serves with safe and reliable power. RCW 80.28.010(2). To improve electrical reliability in Bellevue, in 2011 PSE applied to the City of Bellevue for a conditional use permit and a shoreline conditional use permit to construct a 2.89 mile, 115kV transmission line² "looping" an overhead transmission line that serves the Lake Hills substation with the transmission line that serves the Phantom Lake substation. The proposed line is to run along NE 8th Street, 148th Avenue NE and SE, SE 16th Street, and 156th Avenue SE, partially within EBCC's territory. Appendix Ex. A at 2-3. This route runs along the busiest and least residential streets among the

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

² Transmission lines transport electricity from energy sources to substations; substations convert electricity from 115 kV to 12.5 kV; distribution lines then carry electricity to customers.

alternatives considered. When the Lake Hills and Phantom Lake substations are looped, each of their service areas will be served by two transmission lines instead of one. This improves reliability.

Bellevue reviewed PSE's project proposal under the State Environmental Policy Act ("SEPA"), Chapter 43.21C RCW, and issued a Mitigated Determination of Non-Significance ("MDNS"). The final MDNS was not appealed. In October of 2014, Bellevue's Development Services Department issued a Staff Report, recommending the approval of PSE's permit applications with conditions. Appendix Ex. A at 3.

An open-record public hearing before the Bellevue Hearing Examiner followed. The Hearing Examiner found that the preponderance of the evidence supported PSE's applications for both permits under the City land-use code for electrical utilities, LUC 20.30B.140 and LUC 20.20.255, and recommended approval by the Bellevue City Council, with conditions. Appendix Ex. C. The Hearing Examiner specifically found that the "loop" was needed to improve reliability to areas served a single line, and that 148th Avenue route was the busiest and least residential street among the alternatives considered. *Id.* at 11, ¶¶ 5-7. The Bellevue City Council approved the permits by Ordinance 6226. CP 27-38.

In June of 2015, the EBCC conducted its own public hearing and passed Resolution 550 disapproving Ordinance 6226. CP 20-25. Resolution 550 consists of 16 numbered paragraphs stating the bases on

which the EBCC disapproved Ordinance 6226 and the Hearing Examiner's recommendations.

PSE brought a LUPA petition challenging Resolution 550 and its disapproval of Ordinance 6226. CP 1-75. The trial court ruled that under RCW 35.14.040, the EBCC lacked jurisdiction over the City's approval of the shoreline conditional development permit. CP 720-21. Over the EBCC's objection, the trial court also ruled that LUPA applied to PSE's challenge. CP 719. The trial court concluded, however, that substantial evidence in the record supported the EBCC's decision on "mixed questions of fact, law and policy" such as "consistency with the Comprehensive Plan ... [and] compatibility with the immediate vicinity and whether the proposed electrical utility would succeed in providing needed reliability," and dismissed PSE's LUPA challenge. The trial court did not identify specific evidence that supported the EBCC's findings it upheld. CP 486-490.

Both parties appealed to Division One of the Court of Appeals. On appeal, the EBCC conceded that LUPA controlled judicial review of Resolution 550. Appendix Ex. B at 28-29. The EBCC argued, however, that "the presence of Chapter 35.14 in this case requires the court to defer to the *EBCC findings*, not the findings of the hearing examiner." Appendix Ex. B at 30 (emphasis added). The EBCC identified the findings underlying its determination that the project was inconsistent with the comprehensive

plan and detrimental to uses in the vicinity and *defended those findings as* supported by substantial evidence under RCW 30.70C.130(1)(c). Id. at 32-34. In the alternative, the EBCC argued that its disapproval was not a clearly erroneous application of the law to the facts under RCW 30.70C.130(1)(d). Id. at 35-38.

"Based on the parties briefing," the Court of Appeals concluded that "the only review standards at issue in this case are [RCW 36.70C.130(1)](c)-(e)." Appendix Ex. A at 5. It stated that under LUPA, appellate court "sit[s] in the same position as the superior court and appl[ies] the standards provided for in RCW 36.70C.130(1) to the administrative record." *Id.* at 4. The Court of Appeals then analyzed each of eight disputed paragraphs in Resolution 550 under RCW 30.70C.130(1)(c). *Id.* at 6-19.

It concluded that none of the EBCC's "findings" in Paragraphs 3, 5, 9, 10, 11, 12, 13 and 16 were supported by substantial evidence. Each of these paragraphs merely stated, in a conclusory fashion, that "no material and substantial evidence" supported the Hearing Examiner's relevant findings, "without explaining why it is so." *Id.* at 6-19. The EBCC's briefs and citations to the record similarly did not show "why the evidence cited by the hearing examiner is not substantial." *Id.* at 7.

The Court of Appeals concluded that Resolution 550 was not supported by substantial evidence, and reversed the trial court's order

dismissing PSE's LUPA petition. The Court of Appeals affirmed the trial court's order on the EBCC's lack of jurisdiction over shoreline conditional use permits. Its decision is unpublished. The EBCC seeks review.

III. ARGUMENT

The EBCC's petition suffers from the same – and additional – defects identified by the Court of Appeals and does not warrant this Court's review.

A. The Court of Appeals Correctly Followed RCW 35.14.040(3)

RCW 35.14.040(3) was enacted in 1967. It listed "conditional use permit[s], special exception[s] or variance[s]" among the land use decisions over which community councils have approval authority. RCW Chapter 35.14 was amended in 1985 and 1993. Neither amendment added to the list of land use decisions community councils can approve. The EBCC does not argue that the RCW 35.14.040(3) is ambiguous, yet it insists that the legislature left shoreline conditional use permits out of RCW 35.14.040(3) inadvertently and invites the court to add words the legislature left out.

The Court of Appeals was "not persuaded." Appendix Ex. A at 24. It followed the familiar principle that when the statute is unambiguous, the legislature's intent is "solely derived 'from the statute's plain language," *id.* at 23 (citing *Segura v. Cabrera*, 184 Wn.2d 587, 591, 362 P.3d 1278 (2015)). It also followed the maxim that "specific inclusions exclude

implication," id. at 23 (citing Wash. Nat. Gas Co. v. Pub. Utils. Dist. No. 1 of Snohomish County, 77 Wn.2d 94, 98, 459 P.2d 633 (1969)).

The Court observed that shoreline conditional use permits and conditional use permits have "distinct statutory underpinnings." Appendix Ex. A at 25. Among them:

Shoreline conditional use permits are governed by the provisions of Chapter 90.58 RCW [the Shorelines Management Act]. That statutory framework imposes rigorous requirements that reflect, in our view, a primacy of state interests over local interests with respect to Washington's shorelines.

On the other hand, conditional use permits are governed by the provisions of chapter 35.63 RCW ... enacted well before chapter 90.58 RCW ... [T]he chapter [35.63 RCW] focuses on local interests.

Id. The Court of Appeals concluded that the two statutory frameworks are "sufficiently distinct in focus" to "undercut" the EBCC's argument that "shoreline conditional use permits' are merely a subset of 'conditional use permits." Id. Accordingly, it declined "to add words to the statute that the legislature did not." Id. at 25-26.

The legislative intent behind Chapter 35.14 RCW was to vest community councils with a "significant role" in certain – but not all – local land-use decisions. *City of Bellevue v. E. Bellevue Cmty. Council*, 138 Wn.2d 937, 945, 983 P.2d 602 (1999). Nothing in the Court of Appeals' decision undermines this intent. Washington courts have repeatedly held, including in a case involving the EBCC, that community councils'

"significant role" goes no further than the "explicit grant of authority" by the legislature. City of Bellevue v. E. Bellevue Cmty Mun. Corp., 119 Wn. App. 405, 410, 81 P.3d 148 (2003) (emphasis added). See also Sammamish Cmty. Council v. City of Bellevue, 108 Wn. App. 46, 49, 29 P.3d 728 (2001) (community councils "possess only such powers which have been expressly conferred.") (emphasis added). Among the land use decisions the legislature chose not to expressly confer to community councils' approval authority are, without limitation, administrative conditional use permits, shoreline variances, critical area land use permits — and shoreline conditional use permits. This does not diminish the "significant role" community councils have in approving land use decisions specifically listed in RCW 35.14.040(3).

"Specific inclusions exclude implication." Appendix Ex. A at 23 (citation omitted). The Court of Appeals correctly declined to add words to RCW 35.14.040(3) and concluded that "[w]hether the statute should be amended to expressly include shoreline conditional use permits is a question more properly left to the legislature to decide." *Id.* at 26. There is no basis for review.

B. The EBCC's Alternative Basis for Review is Not Properly Before the Court

The second issue the EBCC presents for review – that the Court of Appeals applied the wrong standard to its review of the EBCC's

determination that the Project was inconsistent with the comprehensive plan and the uses in the vicinity – is not properly before this Court. The EBCC waived it by defending its "findings" underlying the same determinations under RCW 36.70C.130(1)(c), as supported by substantial evidence, the standard it now attacks as erroneous. See Appendix Ex. B at 32-34 (listing among its "findings" the references to "urban boulevards," the lack of visible utilities on sections of 148th Ave., and evidence that the project would take four to six months to complete). Having not objected to the Court of Appeals' review of the findings underlying its determination of inconsistency with the comprehensive plan and detriment to the vicinity under RCW 36.70C.130(1)(c), the EBCC cannot ask this Court to review an "error" it invited. See RAP 2.5(a). See also Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983) ("The reason for this rule is to afford the [lower] court an opportunity to correct any error, thereby avoiding unnecessary appeals ..."); Vigil v. Spokane County, 42 Wn. App. 796, 799, 714 P.2d 692 (1986) (appellant's concession below that a three-year statute of limitations applied precluded an argument on review that a two-year statute applied). See also 2A Karl B. Tegland, Washington Practice: Rules Practice, RAP 2.5, Author's Comments, at 212-13 (8th Ed. 2014) ("the opposing parties should have an opportunity ... to respond to possible claims of error ... [raised below] rather than facing newly-asserted errors or new theories for the first time on appeal.").

In any event, Resolution 550 fails even under **RCW** 36.70C.130(1)(d). The EBCC has abandoned the argument it advanced below that "the court [is required] to defer to the EBCC findings, not the findings of the Hearing Examiner." Appendix Ex. B at 30 (emphasis added). The EBCC now correctly states that "under LUPA's substantial evidence review, the court defers to the last tribunal exercising fact-finding authority, in this case the hearing examiner. ... This standard favors upholding the Hearing Examiner's decision, even where evidence exists to support the EBCC's findings." Petition at 19 (emphasis added). The EBCC also agrees that a "lack of substantial evidence" requires more than identifying evidence "that might support a different conclusion." *Id.*

These concessions are fatal to Resolution 550 whether it is reviewed under RCW 36.70C.130(1)(c) or RCW 36.70C.130(1)(d). Whatever the standard, the Hearing Examiner's evidentiary findings are entitled to deference. *Miller v. City of Bainbridge Island*, 111 Wn. App. 152, 161, 43 P.3d 1250 (2002) (on review of a land use decisions that present mixed questions of law and fact, appellate courts review the law independently "and apply it to the facts found by the hearing examiner"). The Court of Appeals identified specific evidence credited by the Hearing Examiner that supports the conclusion that the project is consistent with the comprehensive plan and not detrimental to the nearby uses. The evidence includes, without limitation:

- "[T]he hearing examiner's decision ... cites Bellevue's detailed staff report as well as attachment E to the report, which is a detailed comprehensive plan policy analysis." (Addressing ¶¶ 3 and 10 of Resolution 550 and consistency of the conditional use permit with LUC 20.30B.140(A));
- "Specifically, the hearing examiner cites Bellevue's staff report, hearing testimony, the Conceptual Mitigation Plan, and other evidence to support his decision. ... Further, Bellevue points out that its comprehensive plan 'does not use the term 'urban boulevard' nor does it designate 148th Avenue as an 'urban boulevard. Brief of Respondent City of Bellevue at 2, n. 2." ... "Nothing that has been cited to us shows that the comprehensive plan bars electric lines from 148th Avenue." (Addressing ¶ 9 of Resolution 550 and consistency with LUC 20.30B.140(B), which requires that a project's design be "compatible with ... the existing or intended character ... of the subject property and immediate vicinity");
- "The hearing examiner . . . concluded that the 'conditional use will not be materially detrimental to uses or property in the immediate vicinity of the subject property.' conclusion is based on Bellevue's staff report, the final MDNS – which was not the subject of appeal – and other evidence in the record. ... The record shows that construction for this project will take between four to six months to complete. Bellevue's staff report states that the project's traffic impacts 'will be temporary and occurring only during the construction phase.' Additionally, the construction will not occur in the same location for four to six months because the transmission line covers 2.89 miles. The evidence is substantial in demonstrating that there will be no materially detrimental impacts 'to uses or property in the immediate vicinity of the subject property' from the PSE project." (Discussing LUC 20.30B.140(D)).
- "[T]he hearing examiner cited Bellevue's staff report, testimony and a letter from PSE's engineer, and a reliability study, which recommended an additional transmission line to the existing substations." (Discussing LUC 20.20.255(E)(3), which states that an applicant "shall demonstrate that an

operational need exists that requires the location or expansion at the proposed site.)"

Appendix Ex. A at 7, 9-12, 13-15, 17.

As the EBCC now concedes, the Court of Appeals correctly deferred to these and other factual findings by the Hearing Examiner. The EBCC also concedes that the evidence credited by the Hearing Examiner was substantial. The EBCC's attempt to challenge the conclusions that flow from the Hearing Examiner's findings necessarily fails. Its repeated references to "a City in a Park," "Urban Boulevards" and "Enhanced Rights of Way," cannot change this result, *see* Petition at 18 and Appendix Ex. B. at 33. As the City explained below:

Simply put, nothing in the City's Comprehensive Plan prevents electrical facilities from being sited from being sited along 148th Avenue.

. .

The City's Comprehensive Plan does not use the term 'urban boulevard' not does it designate 148^{th} Avenue as an 'urban boulevard.' Instead, the City has a an urban boulevard initiative. ... 148^{th} Avenue is not part of the urban boulevard initiative.

Appendix Ex. D at 2 and note 2.

Nothing in the Court of Appeals' thorough analysis of the disputed paragraphs in Resolution 550 encroached on the EBCC's authority to approve local decisions within its jurisdiction. The EBCC's "significant role" in the approval of local land use decisions does not allow it to

disregard substantial evidence credited by the Hearing Examiner. There is no basis for review.

IV. CONCLUSION

For the reasons stated, the EBCC's petition for review should be denied.

DATED: March 31, 2017

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APPENDICES

Appendix A	Division One Unpublished Opinion, No. 74464-0-I consolidated with No. 74465-8-I, filed January 30, 2017
Appendix B	Brief of Respondent/Cross-Appellant East Bellevue Community Council, dated May 23, 2016
Appendix C	Before the Hearing Examiner for the City of Bellevue (Gary N. McLean), Findings of Fact, Conclusions and Recommendation (CP0040-75)
Appendix D	Brief of Respondent, City of Bellevue, dated May 23, 2016

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing document with the Supreme Court via email (Supreme@courts.wa.gov), and served a true and correct copy upon the following parties in the manner indicated below via Email/PDF per counsels' agreement:

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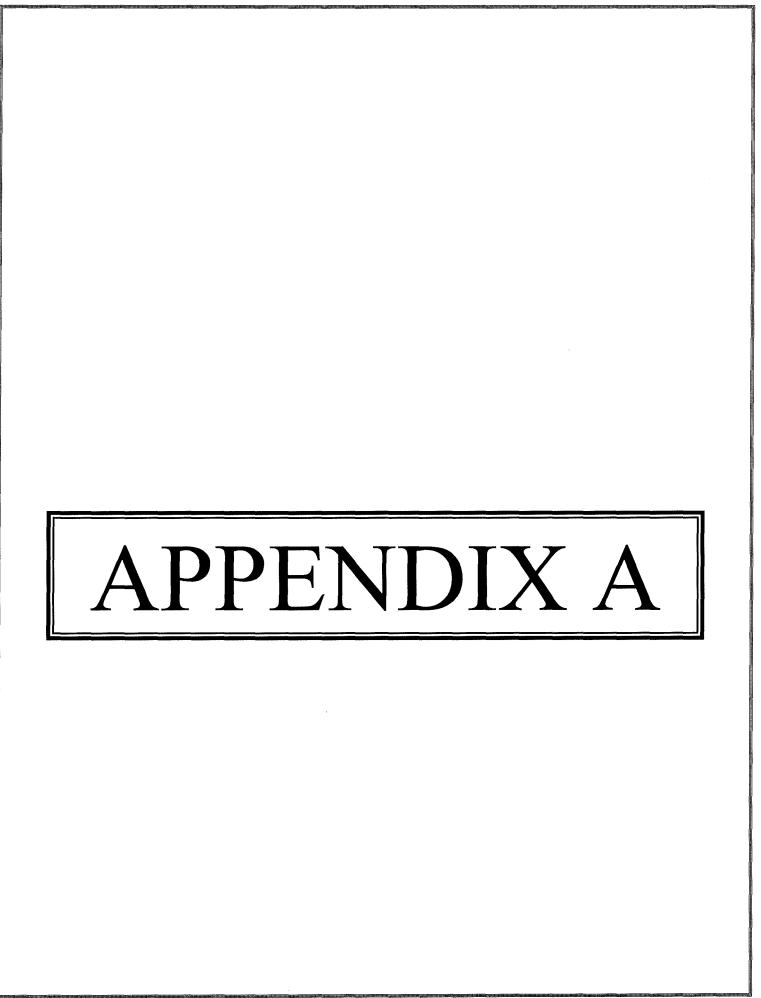
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PUGET SOUND ENERGY, INC., Appellant/ Cross Respondent, v. EAST BELLEVUE COMMUNITY COUNCIL, a community municipal corporation,) No. 74464-0-I (consolidated with No. 74465-8-I) No. 74465-8-I) DIVISION ONE PROPERTY OF THE
Respondent/ Cross Appellant, CITY OF BELLEVUE, a first class city organized pursuant to Washington law, Respondent.))) UNPUBLISHED)) FILED: January 30, 2017)))

Cox, J. — The primary issue in this Land Use Petition Act (LUPA) appeal is whether Puget Sound Energy Inc. (PSE) meets its burden to show that the EBCC's disapproval within its area of the city of Bellevue's approval of a conditional use permit was improper. Another issue is whether the EBCC lacks authority to review the shoreline conditional use permit approved by the city of Bellevue.

We hold that RCW 35.14.040(3) does not give the EBCC authority to review shoreline conditional use permits approved by Bellevue. We affirm the trial court decision in this respect.

We also hold that PSE meets its burden under RCW 36.70C.130 to show that the EBCC's disapproval within its area of Bellevue's approval of PSE's conditional use permit was improper. Accordingly, we reverse the trial court's decision in this respect.

PSE seeks to improve electrical service reliability in Bellevue by looping an overhead transmission line in its Lake Hills substation with its Phantom Lake substation. PSE applied to Bellevue for a conditional use permit and a shoreline conditional use permit to construct a 2.89 mile, 115kV transmission line connecting these two substations. The proposed line is to run along N.E. 8th Street, 148th Avenue N.E. and S.E., S.E. 16th Street, and 156th Avenue S.E. This is partially within the EBCC's area.

The EBCC is a community council, established in 1969 when Bellevue annexed the EBCC area. The northern boundary of this area is N.E. 8th Street. This area also includes 148th Avenue S.E. The service areas for the two respective substations to be linked by the project are only partially within the EBCC's area.

By virtue of Bellevue's annexation of the EBCC area, RCW 35.14.040 provides the EBCC authority to affect whether land use ordinances approved by Bellevue become effective within the EBCC area. We discuss this statute and its application more fully later in this opinion.

In October 2014, Bellevue's Development Services Department recommended approval, subject to conditions, of PSE's application for a conditional use permit and a shoreline conditional use permit. This followed review of the applications under Washington's State Environmental Policy Act (SEPA) and the issuance of a Mitigated Determination of Non-Significance (MDNS). No appeal followed the MDNS, which stated that PSE's project "does not have a probable significant adverse impact upon the environment."

Thereafter, a hearing examiner conducted a public hearing and recommended that the Bellevue City Council approve PSE's application for both permits. The council approved both permits by its Ordinance No. 6226.

In June 2015, the EBCC passed its Resolution No. 550. It did so after conducting its own hearings. The resolution includes 16 numbered paragraphs of "findings and conclusions" in support of the resolution. In its resolution, the EBCC disapproved within its area Bellevue's Ordinance No. 6226.¹

In July 2015, PSE commenced this LUPA action to challenge the EBCC's disapproval within its area of Bellevue's ordinance. The trial court concluded that PSE failed to meet the standards set forth in RCW 36.70C.130 to overturn the EBCC's resolution. The trial court also determined that the EBCC lacks jurisdiction to review Bellevue's approval of the shoreline conditional use permit.

PSE appeals, and the EBCC cross appeals.

¹ Administrative Record 3016-21; Clerk's Papers at 20-25.

LUPA

PSE argues that the trial court improperly upheld the EBCC's disapproval of the ordinance. We agree.

LUPA governs judicial review of land use decisions.² A "land use decision" is "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals"³

Under LUPA, we sit in the same position as the superior court and apply the standards provided in RCW 36.70C.130(1) to the administrative record.⁴

These standards permit us to grant relief from a land use decision only if the party seeking relief establishes that one of the six standards under RCW 36.70C.130(1)(a) through (f) has been met.⁵

² <u>Durland v. San Juan County</u>, 182 Wn.2d 55, 63, 340 P.3d 191 (2014).

³ RCW 36.70C.020(2).

⁴ <u>Dep't of Transp. v. City of Seattle</u>, 192 Wn. App. 824, 836, 368 P.3d 251 (2016).

⁵ <u>ld.</u>

Based on the parties' briefing, the only standards at issue in this case are subsections (c)-(e), which state:

- (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.^[6]

Decision Not Supported By Substantial Evidence

PSE argues that substantial evidence does not support the EBCC's Resolution No. 550. We agree.

Under RCW 36.70C.130(1)(c), we must determine whether substantial evidence supports the land use decision "when viewed in light of the whole record before the court." Thus, we must determine "whether a fair-minded person would be persuaded by the evidence of the truth of the challenged findings."

PSE argues that its project is consistent with Bellevue's comprehensive plan, which reflects Bellevue's effort to balance the city's needs with its appearance and character. PSE's opening brief focuses on paragraphs 3, 5, 9, 10, 11, 12, 13, 15, and 16 of the EBCC's findings and conclusions. The EBCC

⁶ RCW 36.70C.130(1).

⁷ <u>Lauer v. Pierce County</u>, 173 Wn.2d 242, 252-53, 267 P.3d 988 (2011).

responds by discussing paragraphs 3, 5, 6, 9, 10, 11, 12, 13, 14, and 16. Thus, there are only eight paragraphs—3, 5, 9, 10, 11, 12, 13, and 16—that have been briefed by both parties. Accordingly, we focus on these paragraphs to determine whether PSE has met its burden under LUPA to overturn the EBCC's resolution.

Paragraph No. 3

PSE argues that this paragraph is not supported by substantial evidence in the record. We agree.

This paragraph of the EBCC's findings and conclusions states:

The Hearing Examiner's Findings of Fact, Conclusions of Law and Recommendation that the decision criteria for a Conditional Use Permit (CUP) set forth in Land Use Code (LUC) 20.30B.140 have been met is not supported by material and substantial evidence. Specifically, the conditional use is not consistent with the Comprehensive Plan. LUC 20.30B.140.A (Hearing Examiner Record at 149C, 180C).^[8]

This paragraph states that no "material and substantial evidence" supports the hearing examiner's decision. The citation in this paragraph to LUC 20.30B.140(A) shows that the focus of this paragraph is on the hearing examiner's conclusion that the conditional use is consistent with the comprehensive plan as required by the land use code.⁹

Turning to the hearing examiner's decision, we conclude that it is supported by substantial evidence in the record. Specifically, it cites Bellevue's detailed staff report as well as attachment E to the report, which is a detailed

⁸ Administrative Record at 3018.

⁹ Administrative Record at 2179; Clerk's Papers at 61.

comprehensive plan policy analysis. The hearing examiner's conclusion is further supported by other specific evidence in the record.

Paragraph 3 of the EBCC's resolution fails to explain why this evidence, cited by the hearing examiner to support his conclusion that the permit is consistent with Bellevue's comprehensive plan, is not substantial. It is unpersuasive to state in conclusory fashion that no substantial evidence supports the hearing examiner's decision without explaining why this is so.

Likewise, the EBCC's briefing also fails to explain why substantial evidence does not support the hearing examiner's decision. Moreover, the citations to the record in the briefing do not show why the evidence cited by the hearing examiner is not substantial. In the absence of more, we must assume there is no sound basis to conclude that the hearing examiner's decision on this point is not supported by substantial evidence. Accordingly, we conclude there is no substantial evidence to support paragraph 3 of the EBCC's resolution.

Paragraph No. 5

PSE argues that this paragraph is not supported by substantial evidence in the record. We again agree.

This paragraph of the EBCC's findings and conclusions states:

The Hearing Examiner found, based on evidence in the record, that the City of Bellevue and its residents would benefit from a new transmission line, primarily from improved system reliability, and reduction in power outages and their duration, which can be achieved with the "looping" provided with the new line but failed to weigh these benefits against the environmental harm and lack of compliance with the comprehensive plan which would make the

residents of East Bellevue worse off than doing nothing. (Hearing Examiner Record at 56-57F).^[10]

This paragraph faults the hearing examiner for failing to weigh the claimed benefits of PSE's project against the alleged "environmental harm and lack of compliance with the comprehensive plan which would make the residents of East Bellevue worse off than doing nothing."

First, this paragraph fails to specify what part of the Bellevue comprehensive plan is at issue when stating that PSE's project fails to comply with this plan. Unlike paragraph 3 of the resolution, there is not even a citation here to the land use code to guide us. Likewise, the EBCC's briefing also fails to fill this gap.

Second, there is nothing in this paragraph to explain on what basis the alleged failure to balance competing interests—environmental or otherwise—violates any law. Likewise, the EBCC's briefing does not address this point.

Again, we must assume there is no sound basis for this paragraph. Accordingly, we conclude there is no substantial evidence to support paragraph 5 of the resolution.

Paragraph No. 9

PSE argues that this paragraph is not supported by substantial evidence in the record. We agree.

This paragraph of the EBCC's findings and conclusions states:

The Hearing Examiner's Findings of Fact, Conclusions of Law and Recommendation that Conditional Use Permit LUC 20.30B.140(B)

¹⁰ Administrative Record at 3018.

has been met is not supported by material and substantial evidence. Throughout the documents, NW 8th, and especially 148th Ave are designated as Urban Boulevards, and part of the Enhanced Rights of Way; the routes are continually described as having no existing power lines. (Hearing Examiner Record 139-149C, 192F, 140C). This was not done by accident. 148th Ave was developed as an Urban Boulevard by a visionary City, and involved sacrifice for the greater good by private citizens. Homes were condemned and neighborhoods radically transformed to provide a national example of how major thoroughfares can be a pleasant park for commuters and residents alike. Obviously, a major element of the Urban Boulevard is a lack of visible utilities, such as distribution and transmission wires. The only visible utilities on NE 8th and 148th are light poles.^[11]

This paragraph states that there is no "material and substantial evidence" to support the hearing examiner's decision that the project's design complies with LUC 20.30B.140(B). The citation in this paragraph to LUC 20.30B.140(B) shows that this provision is the focus of the paragraph. This provision requires that a project's design be "compatible with and respond[] to the existing or intended character, appearance, quality of development and physical characteristics of the subject property and immediate vicinity."¹²

Turning to the hearing examiner's decision, we conclude that it is supported by substantial evidence in the record. Specifically, the hearing examiner cites Bellevue's staff report, hearing testimony, the Conceptual Mitigation Plan, and other evidence to support his decision. Nothing in

¹¹ Administrative Record at 3019.

¹² LUC 20.30B.140(B), http://www.codepublishing.com/WA/Bellevue/ (last visited January 17, 2017).

paragraph 9 of the resolution addresses any of this evidence or explains why it is not substantial.

Rather than addressing the evidence on which the hearing examiner relied to support his conclusion, paragraph 9 of the EBCC's resolution states, in part, that "NE 8th, and *especially 148th Ave. are designated as urban boulevards*." In its briefing, the EBCC cites to two sections in the record in apparent support of this statement. The first citation is to a September 2012 memorandum from Bellevue to the EBCC in which the terms "Urban Boulevards" and "Urban Boulevards Initiative" appear. But a fair reading of the memorandum does not support the claim that 148th Avenue is an urban boulevard. More importantly, nothing in the memorandum suggests that such a designation would bar this project. Rather, the memorandum speaks of Bellevue's continued review of the project "to lessen [its] environmental and visual impacts." A fair reading of the hearing examiner's December 2014 decision indicates that by the time of the public hearing, environmental and visual impact concerns had been properly addressed.

The second citation to the record is to one page of a December 2011 document addressing aspects of the project. This document states that neither NE 8th nor 148th Avenue then had overhead electrical distribution lines. But

¹³ Administrative Record at 3019 (emphasis added).

¹⁴ <u>Id.</u> at 2014.

nothing in this document suggests that having such lines in those locations would be inconsistent with Bellevue's comprehensive plan.

Further, Bellevue points out that its comprehensive plan "does not use the term 'urban boulevard' nor does it designate 148th Avenue as an 'urban boulevard.'"¹⁷ Neither paragraph 9 of the resolution nor the EBCC's briefing does anything to refute this argument. Thus, an underlying factual premise of paragraph 9 is unsupported by substantial evidence.

Lastly, paragraph 9 goes on to state: "Obviously, a major element of the Urban Boulevard is a lack of visible utilities, such as distribution and transmission wires. The only visible utilities on NE 8th and 148th are light poles." As Bellevue correctly argues, nothing that has been cited to us shows that the comprehensive plan bars electric lines from 148th Avenue.¹⁸

For all of these reasons, we conclude that paragraph 9 is not supported by substantial evidence in the record.

Paragraph No. 10

PSE argues that this paragraph is not supported by substantial evidence. We agree.

This paragraph of the EBCC's findings and conclusions states:

The Hearing Examiner's Findings of Fact, Conclusions of Law and Recommendation that Conditional Use Permit LUC 20.30B.140(A) has been met is not supported by material and substantial evidence. This conditional use is inconsistent with the Comprehensive Plan provisions noted below which repeatedly refer

¹⁷ Brief of Respondent City of Bellevue at 2 n.2.

¹⁸ ld.

to Bellevue's Commitment to a City in a Park, and developing the Urban Boulevard and Enhanced Right of Way:

- a. UT-45 page 209 "avoid . . . locating overhead lines in greenbelt and open spaces . . . [.]"
 - b. UT-53 page 210 "require all utility . . . facilities to be aesthetically compatible . . . [.]"
 - c. UT-19 page 212 refers to city in a park, preserving trees
 - d. UT-42 page 212 Design boulevards to reinforce the image of Bellevue as a "City in a Park"
 - e. S-WI-44 Utilities page 214 serve need enhancing the visual quality of the community.^[19]

This paragraph states that "material and substantial evidence" does not support the hearing examiner's decision that the conditional use permit is consistent with the comprehensive plan. The citation in this paragraph to LUC 20.30B.140(A) shows that this land use code provision is the focus of this paragraph.

We already discussed in this opinion that substantial evidence exists to support the conclusion that the conditional use permit is consistent with the comprehensive plan. Nothing, either in this paragraph or in the EBCC briefing, changes our conclusion on this point.

Paragraph No. 11

PSE argues that this paragraph is not supported by substantial evidence. We agree.

This paragraph of the EBCC's findings and conclusions states:

The evidence in the record does not support the NE 8th St, and 148th Avenue route. (Hearing Examiner Record at 139-149C). "Understanding Bellevue's Commitment to Street Aesthetics" which cites the Formal Enhanced Right of Way & Urban Boulevards

¹⁹ Administrative Record at 3019; Clerk's Paper at 22 (alterations in original).

Program whose mission is to "Enhance the visual and functional quality of city streets and gateways . . . [.] It includes a 4-person Steering Committee of City Directors and Assistant Directors and [an] 8-person Program Team of city staff . . . [.]" (Hearing Examiner Record at 140C). This fundamental criteria was not regarded consistent with other rules and guidelines. As pointed out in the [Bellevue resident's] letter, more than 50,000 people enjoy this park daily, and the whole project will adversely affect this enjoyment; from construction delays to long-term visual pollution. [20]

This paragraph states that the evidence in the record does not support "the NE 8th St and 148th Avenue route" without specifying the relevant criteria in LUC 20.30B.140. From the EBCC briefing, however, it appears that LUC 20.30B.140(D) is the focus of this paragraph of its resolution.²¹ Accordingly, we also focus on this provision of Bellevue's land use code.

Turning again to the hearing examiner's decision, we note that he concluded that the "conditional use will not be materially detrimental to uses or property in the immediate vicinity of the subject property."²² This conclusion is based on Bellevue's staff report, the final MDNS—which was not the subject of appeal—and other evidence in the record. Again, the question is whether the EBCC correctly determined that this evidence was not substantial.

LUC 20.30B.140(D) states that Bellevue may approve a conditional use permit if "[t]he conditional use will not be materially detrimental to uses or

²⁰ Administrative Record at 3020; Clerk's Papers at 24 (some alterations in original).

²¹ <u>See</u> Brief of Respondent/Cross-Appellant East Bellevue Community Council at 23.

²² Administrative Record at 2179.

property in the immediate vicinity of the subject property." Bellevue's land use code does not define "materially detrimental." But "material" can be defined as "[b]eing both relevant and consequential; crucial." And "detrimental" means "[c]ausing damage or harm; injurious." The EBCC appears to imply, without expressly stating, that the project will be materially detrimental to property in the vicinity of the project.

The EBCC relies on a 2012 Bellevue resident letter to support this argument. The letter states: "50,000 . . . motorists . . . will see the impacts of this proposal every day."

The record shows that construction for this project will take between four to six months to complete. Bellevue's staff report states that the project's traffic impacts "will be temporary and occurring only during the construction phase."

Additionally, the construction will not occur in the same location for four to six months because the transmission line covers 2.89 miles.

This evidence is substantial in demonstrating that there will be no materially detrimental impacts "to uses or property in the immediate vicinity of the

²³ <u>See</u> Chapter 20.50 LUC, http://www.codepublishing.com/WA/Bellevue (last visited January 17, 2017).

²⁴ THE AMERICAN HERITAGE DICTIONARY (5th ed. 2016), https://ahdictionary.com/word/search.html?q=material (last visited January 13, 2017).

²⁵ THE AMERICAN HERITAGE DICTIONARY (5th ed. 2016), https://ahdictionary.com/word/search.html?q=detrimental (last visited January 13, 2017).

subject property" from the PSE project.²⁶ That a 2012 letter suggests otherwise does not establish a lack of substantial evidence to support the hearing examiner's conclusion. Rather, it merely is evidence that might support a different conclusion.

We conclude there is no substantial evidence to support paragraph 11 of the EBCC's resolution.

Paragraph No. 12

PSE argues that this paragraph is not supported by substantial evidence. We agree.

This paragraph of the EBCC's findings and conclusions states:

The Hearing Examiner's Findings of Fact, Conclusions of Law and Recommendation that Conditional Use Permit LUC 20.30B.140(D) has been met is not supported by material and substantial evidence. The impact of traffic on 148th Avenue NE including costs of adverse impacts to commerce, pollution, and commute time were not considered. (Hearing Examiner Report at p. 86).^[27]

As previously stated, LUC 20.30B.140(D) states that Bellevue may approve a conditional use permit if "[t]he conditional use will not be materially detrimental to uses or property in the immediate vicinity of the subject property." Substantial evidence does not support this paragraph of the EBCC's resolution.

The EBCC cites the traffic impact section of Bellevue's staff report as support for this conclusion. But the hearing examiner cited this report, along with other evidence in the record, such as the MDNS, to support his conclusion.

²⁶ LUC 20.30B.140(D), http://www.codepublishing.com/WA/Bellevue/ (last visited January 17, 2017).

²⁷ Administrative Record at 3020; Clerk's Papers at 24.

This paragraph of the EBCC's resolution, and their brief, fail to explain why this evidence is not substantial to support the hearing examiner's conclusion. Without this explanation, we must again assume there is no sound basis for the EBCC's conclusion. Thus, we conclude that substantial evidence does not support paragraph 12 of the EBCC's resolution.

Paragraph No. 13

PSE argues that this paragraph is not supported by substantial evidence. We agree.

This paragraph of the EBCC's findings and conclusions states:

The Hearing Examiner's Findings of Fact, Conclusions of Law and Recommendation that Additional Criteria for Electrical Utility Facilities LUC 20.20.255[(E)(3)] has been met is not supported by material and substantial evidence. The record indicates that there have been few outages due to substation or transmission lines. There were 5 power outages in 10 years; 4 by trees, fixed within a day caused by transmission line failure. (Hearing Examiner Record 26F, 19C). Outages are "mostly due to failures of overhead conductors and tree related events." (Hearing Examiner Record 27F). Any claims of improved reliability are statistically insignificant. (Hearing Examiner Record 26F, 19C, 27F, Hearing Examiner Report at p. 11 para 3, stating that the two substations are currently underutilized).^[28]

LUC 20.20.255(E)(3) states that an applicant "shall demonstrate that an operational need exists that requires the location or expansion at the proposed site." Bellevue's land use code does not define "operational need."²⁹

²⁸ Administrative Record at 3020; Clerk's Papers at 24.

²⁹ <u>See</u> Chapter 20.50 LUC, http://www.codepublishing.com/WA/Bellevue/ (last visited January 17, 2017).

As support for his conclusion, the hearing examiner cited Bellevue's staff report, testimony and a letter from PSE's engineer, and a reliability study, which recommended an additional transmission line to the existing substations.

The EBCC cites a list of EBCC council member questions and comments, along with pages from PSE's 2013 System Reliability Review regarding outages, to support its conclusion. The EBCC also cites the hearing examiner's finding that the Lake Hills and Phantom Lake substations are "under-utilized." But this paragraph of the EBCC's resolution, and their brief, fail to explain why the evidence cited by the hearing examiner is not substantial to support his conclusion. Again, without this explanation, we must assume there is no sound basis for the EBCC's conclusion. Accordingly, substantial evidence does not support paragraph 13 of the EBCC's resolution.

Paragraph No. 16

PSE argues that this paragraph is not supported by substantial evidence. We agree.

This paragraph of the EBCC's findings and conclusions states:

The project fails to achieve the desired benefit of redundancy because the "loop" cannot be completed as originally proposed. (Hearing Examiner Report at pp. iv and 36). PSE does not intend to construct the segment of the project along SE 16th until an unspecified date in the future. (Hearing Examiner Report at p. 54).^[30]

Although not explicitly mentioned in this paragraph, it apparently refers to LUC 20.20.255(E)(4). This provision requires that the applicant "demonstrate

³⁰ Administrative Record at 3020-21; Clerk's Papers at 24.

that the proposed electrical utility facility improves reliability to the customers served and reliability of the system as a whole "31

The record shows that Bellevue proposed that PSE "defer[]" construction of the S.E. 16th portion of the line due to a different city project affecting that area. In the meantime, PSE will install three switches on certain poles so the power to the Phantom Lake substation "can be switched from north or from the south."

PSE determined that the reliability impact of these switches "won't be as great as the completed project." But "further reliability improvement for [the] Phantom Lake substation will occur in the future when a second transmission line segment is added along Southeast 16th to provide a loop feed to the Phantom Lake substation."³²

Ultimately, the hearing examiner recommended that PSE "not be allowed to run a separate new transmission line down the south side of SE 16th Street." The hearing examiner also concluded that the project satisfied LUC 20.20.255(E)(4). As support for his conclusion, the hearing examiner cited testimony and a letter from PSE's engineer and a reliability study, which recommended an additional transmission line to the existing substations.

Although the current project does not fully achieve the improved reliability result that PSE originally anticipated, that does not mean that the project fails to

³¹ LUC 20.20.255(E)(4), http://www.codepublishing.com/WA/Bellevue/ (last visited January 17, 2017).

³² Record of Proceeding (November 20, 2014) at 37.

"improve[] reliability to the customers served and reliability of the system as a whole."³³ The record shows that the project still improves reliability, but not as much as it would have as originally proposed. The EBCC acknowledges this fact in its brief. Thus, we conclude there is no substantial evidence to support paragraph 16 of the EBCC's resolution.

Decision Outside the EBCC's Authority

PSE argues that the EBCC exceeded its authority by passing Resolution 500. We disagree.

Under RCW 36.70C.130(1)(e), we may grant PSE relief if it establishes that the EBCC's decision "is outside [EBCC's] authority or jurisdiction." This is a question of law that we review de novo.³⁴

Under RCW 35.14.040(3), the EBCC has the authority to approve or disapprove conditional use permits approved by Bellevue to the extent of property within the EBCC's area.³⁵ But this statute also provides that the community council's disapproval "shall not affect the application of any ordinance or resolution affecting areas outside the community municipal corporation."³⁶

³³ LUC 20.20.255(E)(4), http://www.codepublishing.com/WA/Bellevue/ (last visited January 17, 2017).

³⁴ <u>See Phoenix Dev., Inc. v. City of Woodinville</u>, 171 Wn.2d 820, 828, 256 P.3d 1150 (2011).

³⁵ See RCW 35.14.040.

³⁶ ld.

Here, the EBCC exercised its authority under RCW 35.14.040(3) to disapprove Bellevue's Ordinance 6226. The trial court properly concluded that the EBCC's decision was not outside its authority or jurisdiction to the extent of its area. Thus, the trial court concluded that PSE failed to satisfy its burden under RCW 36.70C.130(1)(e).

PSE makes several arguments in an attempt to show that the EBCC exceeded its authority. We do not address all of them because it is unnecessary to do so in view of our disposition of this appeal.

This is not the first dispute between these litigants over the application of RCW 35.14.040 to land use issues. In <u>City of Bellevue v. East Bellevue</u>

<u>Community Council</u>, this statute was at issue in connection with the EBCC's disapproval of certain Bellevue actions.³⁷ In that case, the supreme court stated:

The obvious purpose of the statute is to place final decision-making power in the community council where land use regulations affecting property *within its jurisdiction* are concerned. RCW 35.14.040 provides a community council with authority to independently determine whether to approve or disapprove land use legislation affecting territory *within its jurisdiction*, in keeping with the Legislature's intent to allow local level decision making. Therefore, where there is room for exercise of discretion as to whether particular land use regulations should be applied to property *within the municipal corporation*, the community council must be allowed to exercise that discretion to carry out the legislative intent underlying RCW 35.14.040.^[38]

³⁷ 138 Wn.2d 937, 939, 983 P.2d 602 (1999).

³⁸ <u>Id.</u> at 945 (emphasis added).

Here, the EBCC exercised its authority to disapprove within its jurisdiction the conditional use permit authorized by Bellevue. Thus, the primary question is whether there was room for the EBCC to exercise its discretion in doing so.

PSE argues, for the first time in its reply brief, that the EBCC "asserts the right to unilaterally affect the reliability of power to Bellevue homeowners outside its territory." Because PSE makes this argument for the first time in its reply brief, it is too late for us to consider.³⁹ We decline to do so.

However, Bellevue makes a similar argument as a respondent. It argues that the EBCC's decision, if left standing, would have an extraterritorial affect because it will affect citizens outside the EBCC's area.

As we discussed earlier in this opinion, the area over which EBCC has jurisdiction is bounded on the north by NE 8th Street. The area includes 148th Avenue S.E., and the service area for the two substations to be linked by the project are only partially within the EBCC's area.

RCW 35.14.040 provides that the EBCC's disapproval "shall not affect the application of any ordinance or resolution affecting areas outside the community municipal corporation." Because we hold that PSE has met its burden to show that the EBCC's resolution is improper, we need not also decide whether the resolution violates the geographical limitations of this statute. Accordingly, that is an issue left for decision another day.

³⁹ <u>See Cowiche Canyon Conservancy v. Bosley</u>, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3(c).

Clearly Erroneous Application of the Law to the Facts

PSE argues that the EBCC erroneously applied the law to the facts by failing to accord substantial weight to the hearing examiner's recommendation. In making this argument, PSE focuses on paragraphs 4, 6, 13, and 14 of the EBCC's findings and conclusions. Because, for the reasons previously stated in this opinion, we focus on other paragraphs of the resolution, we need not address these arguments.

Erroneous Interpretation of the Law

PSE argues in its opening brief that the EBCC erroneously interpreted the law. PSE fails to state which law the EBCC erroneously interpreted.

Accordingly, we need not address this argument.⁴⁰

The parties also argue other issues regarding the conditional use permit in their briefing. Because of our disposition of this case, we need not address those other arguments.

JURISDICTION TO REVIEW SHORELINE CONDITIONAL USE PERMITS

On cross appeal, the EBCC argues that the trial court improperly concluded that the EBCC lacks jurisdiction to approve or disapprove the shoreline conditional use permit granted by Bellevue in this case. We hold that the plain words of RCW 35.14.040(3) do not give the EBCC jurisdiction to approve or disapprove shoreline conditional use permits granted by Bellevue.

⁴⁰ <u>See Darkenwald v. Emp't Sec. Dep't</u>, 183 Wn.2d 237, 246, 350 P.3d 647 (2015); RAP 10.3(a)(6).

We interpret statutes to determine and apply the legislature's intent.⁴¹ The legislature's intent is solely derived "from the statute's plain language, considering the text of the provision at issue"⁴²

"Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim expressio unius est exclusio alterius—specific inclusions exclude implication."

We review de novo questions of statutory interpretation.44

RCW 35.14.040(3) is the sole basis on which the EBCC bases its claim of authority to review shoreline conditional use permits approved by Bellevue. That statute states when a city council's adoption of ordinances applying to land and certain other matters becomes effective within the community municipal corporation's area. It provides:

The **adoption**, approval, enactment, amendment, granting or authorization by the city council . . . of any **ordinance** or resolution applying to land, . . . within any community council corporation shall become effective within such community municipal corporation . . . on approval by the community council, . . . with respect to the following:

(3) Conditional use permit, special exception or variance; . . . [45]

⁴¹ Segura v. Cabrera, 184 Wn.2d 587, 591, 362 P.3d 1278 (2015).

⁴² ld.

⁴³ <u>Wash. Nat. Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish County</u>, 77 Wn.2d 94, 98, 459 P.2d 633 (1969).

⁴⁴ Western Plaza, LLC v. Tison, 184 Wn.2d 702, 707, 364 P.3d 76 (2015).

^{45 (}Emphasis added.)

Here, Bellevue Ordinance No. 6226 adopted the hearing examiner's recommendation to approve, with conditions, PSE's application for a conditional use permit and shoreline conditional use permit. The issue is whether the EBCC has authority under the above statute to bar the effectiveness within its area of Bellevue's Ordinance No. 6226 as it applies to the shoreline conditional use permit. Specifically, the question is whether "shoreline conditional use permits" constitute "conditional use permit[s]" under this statute.

The plain words of this provision of the statute specify three types of land use matters that the EBCC has the authority to either approve or disapprove within its area. These matters are similar to each other in the sense that they are terms generally applicable to land use matters. For example, one respected treatise describes "conditional use" and "special exception" as describing the same thing.⁴⁶ Similarly, a "variance" is defined as "[a] license or official authorization to depart from a zoning law."⁴⁷

Shoreline conditional use permits are not expressly included in the statutory text. Yet the EBCC argues that the legislature impliedly included such permits as a subset of "conditional use permits." We are not persuaded this is so.

⁴⁶ 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 4.22 at 252 (2d ed. 2004).

⁴⁷ BLACK'S LAW DICTIONARY 1787 (10th ed. 2014).

As PSE correctly argues, shoreline conditional use permits are governed by the provisions of chapter 90.58 RCW. That statutory framework imposes rigorous requirements that reflect, in our view, a primacy of state interests over local interests with respect to Washington's shorelines.

On the other hand, conditional use permits are governed by the provisions of chapter 35.63 RCW. This separate chapter, enacted well before chapter 90.58 RCW, does not reflect, in our view, the primacy of state interests over local interests with respect to land use matters related to shorelines. Rather, the chapter focuses on local interests.

In short, this latter statutory framework is sufficiently distinct in focus from the former to undercut the argument that "shoreline conditional use permits" are merely a subset of "conditional use permits." While these statutory provisions operate in tandem, they are sufficiently distinct in purpose for us to infer that the legislature did not intend that RCW 35.14.040(3) include both types of use permits.

We note that the legislature has had opportunities to amend the provisions of RCW 35.14.040(3) to include the express term "shoreline conditional use permit" within the scope of decisions that a community municipal corporation may approve or disapprove within its area. But the legislature has not done so.

Of course, there could be many reasons why the legislature has chosen not to amend this statute to add expressly what the EBCC argues is implied. But in light of the distinct statutory underpinnings of these two types of use permits that we just discussed, we decline to add words to the statute that the legislature

did not. Whether the statute should be amended to expressly include shoreline conditional use permits is a question more properly left to the legislature to decide.

Accordingly, based on the rules of statutory construction, we conclude that shoreline conditional use permits are not within the scope of RCW 35.14.040(3). Thus, the EBCC is without authority to either approve or disapprove within its area shoreline conditional use permits granted by Bellevue.

ATTORNEY FEES

The EBCC requests reasonable attorney fees on appeal. Because there is no authority for an award in its favor, we decline to award such fees.

The EBCC requests attorney fees under RCW 4.84.370, which states in relevant part:

- (1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the *prevailing party* or substantially prevailing party on appeal before the court of appeals . . . of a decision by a county, city, or town to issue, condition, or deny a development permit involving a . . . conditional use The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:
- (a) The prevailing party on appeal was the prevailing or substantially prevailing party before the *county, city, or town*...; and
- (b) The prevailing party on appeal was the *prevailing party* or substantially prevailing party in all prior judicial proceedings.^[48]

^{48 (}Emphasis added.)

First, the EBCC is neither the prevailing nor the substantially prevailing party on appeal. That is because we reverse the trial court's LUPA petition decision on the basis previously discussed in this opinion.

Second, and more importantly, the plain words of this statute on which the EBCC relies limit an award of fees to one who prevails or substantially prevails on appeal of a decision by a "county, city, or town." The EBCC is none of these three entities. Rather, it is a "community municipal corporation," established under chapter 35.14 RCW. Thus, even if it had been a prevailing or substantially prevailing party on appeal, it would still not be entitled to an award of fees on appeal.

The EBCC argues that it is a "local jurisdiction" under RCW 36.70C.020(3), the definitional section of LUPA. But this makes no difference to the proper analysis of whether it is entitled to an award of fees under RCW 4.84.370, the fee statute at issue.

RCW 36.70C.020(3) provides:

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(3) "Local jurisdiction" means a county, city, or incorporated town. [50]

The plain words of this statute make clear that this definition is limited to LUPA. There is nothing in this text to show that it also applies to RCW 4.84.370,

⁴⁹ Durland, 182 Wn.2d at 77 (emphasis added).

⁵⁰ (Emphasis added.)

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a separate statute. In the absence of such a showing, there is simply no authority to award EBCC attorney fees under RCW 4.84.370.

We affirm the orders on jurisdictional issues and on the motion to quash.

We reverse the order dismissing the LUPA petition. We deny the EBCC's request for an award of attorney fees on appeal.

WE CONCUR:

Tricker, AGJ Sclerbelle

APPENDIX B

NO. 74464-0-I

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

PUGET SOUND ENERGY, INC.,

Appellant/Cross-Respondent,

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EAST BELLEVUE COMMUNITY COUNCIL,

Respondent/Cross-Appellant,

and CITY OF BELLEVUE,

Respondent.

BRIEF OF RESPONDENT/CROSS-APPELLANT EAST BELLEVUE COMMUNITY COUNCIL

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I. INTRODUCTION

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

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

II. ASSIGNMENT OF ERROR

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

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

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

IV. STATEMENT OF THE CASE

A. The EBCC and the role of community councils

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

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

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

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

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

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

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

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

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

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

B. The PSE project.

- 1. PSE proposed a project with unproven positives and well-defined negatives.
- (a) PSE's claim that the project would improve reliability is questionable

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

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

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

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

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

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

To construct the new line on the same side of the street as the existing line, we would "double-circuit" the two lines, meaning we would co-locate both lines on the same set of poles. While we recognize the appeal of this option from a community impact perspective, we avoid double-circuiting lines whenever possible as it significantly increases outage risk, which decreases the reliability benefits for our customers. A double circuit largely defeats the purpose of this project – to create a fully reliable redundant feed to these substations.

Transmission lines are designed for redundancy (back-up); If an outage occurs on one transmission line, customers are re-routed to another transmission line, either decreasing the outage length or avoiding an outage

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

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

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

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

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

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

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

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

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

(b) Overhead utilities would destroy aesthetic character of 148th In selecting 148th Avenue for the longest leg of the transmission line, PSE chose to locate its 70-80 foot tall poles along a heavily wooded, scenic route cherished by the community.

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

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

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

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

AR 2014. See also City of Bellevue Comprehensive Plan, Urban Design Element, Map UD-1 and Policy UD-69 (describing design for "key city boulevards"). The segments of NE 8th Ave and 148th Avenue at issue have no overhead distribution lines. AR 1731.² PSE's proposed transmission line would run through the Lake Hills Greenbelt, "the most significant natural feature within the project area." AR 1724, 1731. The greenbelt is a park

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

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

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

(c) PSE had other options

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

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

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

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

Glenn Kost, a City Parks and Community Services Department employee, wrote the City Development Services Department a letter sharply criticizing the 148th Ave. alignment. Kost's letter urges the City relocate the transmission line, calling the selected route "ill-conceived, inconsistent with City policies, past practices and current initiatives" and stating it "sacrifices the aesthetics of néarly 3-miles of urban boulevards, and 3½ miles of open space." AR 553-54. Kost states that the selected route "is inconsistent with at least 17 City Comprehensive Plan Policies," and provides a detailed chart itemizing these inconsistencies. AR 553. Kost states the route is inconsistent with the City's "continuing practice of providing tree-lined streets and urban boulevards, the \$5 million Enhanced Right-of-Way & Urban Boulevards CIP Program, Environmental Stewardship Initiative, Tree City USA Awards, and stated commitment to neighborhood aesthetics." AR 554.

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

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

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

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

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

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

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

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

- A. The conditional use is consistent with the Comprehensive Plan; and
- B. The design is compatible with and responds to the existing or intended character, appearance, quality of development and physical characteristics of the subject property and immediate vicinity; and
- C. The conditional use will be served by adequate public facilities including streets, fire protection, and utilities; and

- D. The conditional use will not be materially detrimental to uses or property in the immediate vicinity of the subject property; and
- E. The conditional use complies with the applicable requirements of this Code.³

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

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

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

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

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

AR 1336 (emphasis added).

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

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

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

- C. EBCC's disapproval of the conditional use permits.
- 1. Prior to disapproving the CUP and SCUP, the EBCC carefully reviewed the evidence and considered the applicable regulations.

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

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

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

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

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

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

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

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

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

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

This conditional use is inconsistent with the Comprehensive Plan provisions noted below which repeatedly refer to Bellevue's Commitment to a City in a Park, and developing the Urban Boulevard and Enhanced Rights of Way:

- 1. UT-45 page 209 [Avoid, when reasonably possible, locating overhead line in greenbelts and open spaces];
- 2. UT-53 page 210 [Require all utility facilities to be aesthetically compatible];
- 3. UT-19 page 212 [Preserve trees as a component of the skyline to retain the image of a "City in a Park"];
- 4. UT-42 page 212 [Design boulevards to be distinctive from other streets and to reinforce the image of Bellevue as a "city in a park," both within the ROW and on adjacent

- private development, utilize features such as gateways, street trees, median plantings, special lighting, separated and wider sidewalks, crosswalks, seating, special signs, street name, landscaping, decorative paving patterns and public art];
- 5. S-WI-44 Utilities page 214 [Utilities should be provided to serve the present and future needs of the Subarea in a way that enhances the visual quality of the community (where practical)].⁴
- (b) The Project is Not Compatible with the Character, Appearance, Quality of Development and Physical Characteristics in Vicinity

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

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

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

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

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

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

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

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

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

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

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

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

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

that under Chapter 35.14 RCW, the EBCC lacked disapproval authority over the SCUP. CP 535. EBCC filed a motion requesting the Court determine that the statutory writ procedure, rather than LUPA, governs judicial review of EBCC's action. CP 504. The Court concluded that LUPA does apply, and that EBCC "lacks jurisdiction to review shoreline conditional use permits." CP 680.5 Without reference to any specific authority allowing such an order, the Court ordered the EBCC to amend its resolution "to eliminate any reference to shoreline conditional use permits." CP 681. The order also directed the City to transmit the shoreline conditional use permit to the Department of Ecology for consideration. CP 681.

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

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

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

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

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

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

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

V. ARGUMENT

- A. EBCC's disapproval of the Project was in accordance with state law and should be upheld.
- 1. The LUPA standard of review as applied to community council decisions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- NE 8th and 148th are repeatedly referred to as tree-lined "urban boulevards." AR 562; AR 242-244; AR 2014; AR 675; AR 687; AR 796. See also City of Bellevue Comprehensive Plan, Urban Design Element, Map UD-1 and Policy UD-69 (describing design for "key city boulevards").
- Currently, the only visible utilities on the sections of NE 8th and 148th Ave. at issue here are light poles. AR 1731.
- PSE's transmission line would cross from the west to the east side of 148th Avenue three times, increasing the visual impact of the line. AR 93-95.
- Photo-simulations of the proposed line show the inconsistency between the existing streetscape and the proposed power lines. AR 58-62.
- The staff report, relied on and incorporated by the hearing examiner, itself acknowledges that tree loss impacts "a major visual amenity along public roadways and open spaces." AR 89.
- Thousands of motorists use 148th Ave each day, and the project would take four to six months to complete. AR 553; AR 889; AR 2308.

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

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

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

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

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

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

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

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

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

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

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

overhead lines in greenbelt and open spaces[.]" AR 239. The project would clearly locate an overhead transmission line in a greenbelt. Policy UT-53 requires "utility equipment support facilities to be aesthetically compatible with the area in which they are placed by using landscape screening and/or architecturally compatible details and integration." AR 240.

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

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

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

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

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

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

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

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

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

[W]here there is room for the exercise of discretion as to whether particular land use regulations should be applied to property within the municipal corporation, the community council must be allowed to exercise that discretion to carry out the legislative intent underlying RCW 35.14.040.

Id. at 945.

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

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

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

Id. at 946.

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

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

5. EBCC is entitled to attorneys' fees

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. CONCLUSION

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

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

RESPECTFULLY SUBMITTED this $\frac{23}{}$ day of May, 2016.

PORTER FOSTER RORICK LLP

By: Kathleen Haggard, WSBA #29305 Andrea Bradford, WSBA #45748

Attorneys for Respondent/Cross-Appellant,

East Bellevue Community Council

APPENDIX C

BEFORE THE HEARING EXAMINER FOR THE CITY OF BELLEVUE

Regarding the Applications for Process
III Conditional Use and Shoreline
Conditional Use Permits to Construct a
New 115 kV Overhead Transmission
Line Connecting the Lake Hills and
Phantom Lake Substations, by

PUGET SOUND ENERGY (PSE),
Applicant,

Applicant,

11-131123-LB - Conditional Use
11-131124-WG - Shoreline Conditional Use
11-000 CONCLUSIONS AND
RECOMMENDATION

I. SUMMARY OF RECOMMENDATION.

The applicant has met its burden of proof to demonstrate that a preponderance of the evidence supports the conclusion that its applications for a Conditional Use Permit and a Shoreline Conditional Use Permit merit approval. Accordingly, the undersigned Examiner recommends APPROVAL by the Bellevue City Council, with conditions.

II. BACKGROUND and RELEVANT CODE PROVISIONS.

In this matter, the Hearing Examiner has jurisdiction to conduct an open record public hearing on the two applications at issue, and is directed to issue a written recommendation for consideration and final action by the Bellevue City Council. Bellevue Land Use Code (LUC) 20.35.015(D)(2); LUC 20.35.300; LUC 20.30B and 20.30C.

The applicant bears the burden of proof to show by a preponderance of the evidence that the pending applications merit approval. LUC 20.35.340(A). The preponderance of the evidence standard is equivalent to "more likely than not."

FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION RE: PSE TRANSMISSION LINE CONNECTING THE LAKE HILLS AND PHANTOM LAKE SUBSTATIONS, DSD FILE NOS. 11-131123-LB AND 11-131124-WG

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in re Pers. Restraint of Woods, 154 Wn.2d 400, 414 (2005).

Conditional Use Permit Decision Criteria: The decision criteria for a Conditional Use Permit is found in LUC 20.30B.140, which explains that the City may approve or approve with modifications an application for a conditional use permit if:

- A. The conditional use is consistent with the Comprehensive Plan; and
- B. The design is compatible with and responds to the existing or intended character, appearance, quality of development and physical characteristics of the subject property and immediate vicinity; and
- C. The conditional use will be served by adequate public facilities including streets, fire protection, and utilities; and
- D. The conditional use will not be materially detrimental to uses or property in the immediate vicinity of the subject property; and
- E. The conditional use complies with the applicable requirements of this Code.

Additional Criteria for Electrical Utility Facilities: Because the proposal is to construct or expand electrical facilities, the provisions of the City's Land Use Code specifically addressing Electrical Utility Facilities, found in LUC 20.20.255, must be satisfied. Prior to submittal of any Conditional Use Permit application, a detailed Alternative Siting Analysis was required. See LUC 20.20.255.D. In addition to the requirements set forth above for a Conditional Use Permit, as detailed in Part 20.30B LUC, all proposals to locate or expand electrical utility facilities shall comply with the following:

- 1. The proposal is consistent with Puget Sound Energy's System Plan;
- 2. The design, use, and operation of the electrical utility facility complies with applicable guidelines, rules, regulations or statutes adopted by state law, or any agency or jurisdiction with authority;
- 3. The applicant shall demonstrate that an operational need exists that requires the location or expansion at the proposed site;
- 4. The applicant shall demonstrate that the proposed electrical utility facility improves reliability to the customers served and reliability of the system as a whole, as certified by the applicant's licensed engineer;

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5.	For	proposals	located	on	sensitive	sites	as	reference	l in	Figure	UT.5a	of	the
Utility Element of the Comprehensive Plan, the applicant shall demonstrate:													

- Compliance with the alternative siting analysis requirements of subsection D of this section;
- b. Where feasible, the preferred site alternative identified in subsection D.2.d of this section is located within the land use district requiring additional service and residential land use districts are avoided when the proposed new or expanded electrical utility facility serves a nonresidential land use district;
- 6. The proposal shall provide mitigation sufficient to eliminate or minimize longterm impacts to properties located near an electrical utility facility. See LUC 20.20.255.E.

Decision Criteria for Shoreline Conditional Use Permit: The decision criteria for a Shoreline Conditional Use Permit is found in LUC 20.30C.155, which explains that the City may approve or approve with modifications an application for a Shoreline Conditional Use Permit if:

- The proposed use will be consistent with the policies of RCW 90.58.020 and the policies of the Bellevue Shoreline Master Program; and
- The proposed use will not interfere with the normal public use of public shorelines; and
- The proposed use of the site and design of the project will be compatible with other permitted uses within the area; and
- The proposed use will cause no unreasonably adverse effects to the shoreline environment designation in which it is to be located; and
- The public interest suffers no substantial detrimental effect; and E.
- The proposed use complies with all requirements of WAC 173-14-140; and
- The proposed use is harmonious and appropriate in design, character and appearance with the existing or intended character and quality of development in the immediate vicinity of the subject property and with the physical characteristics of the subject property; and

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- H. The proposed use will be served by adequate public facilities including streets, fire protection, water, stormwater control and sanitary sewer; and
- I. The proposed use will not be materially detrimental to uses or property in the immediate vicinity of the subject property; and
- J. The proposed use has merit and value for the community as a whole; and
- K. The proposed use is in accord with the Comprehensive Plan; and
- L. The proposed use complies with all other applicable criteria and standards of the Bellevue City Code.

EBCC and Department of Ecology Review: Given the location of the proposed transmission line, the project falls within the jurisdiction of the East Bellevue Community Council (EBCC), which will review the matter if the Bellevue City Council accepts this Recommendation and approves the applications. (Staff Report, page 5; RCW 35.14.040; EBCC boundaries on map dated 2/05/2009, available on City's website). If the project's CUP application is approved by the City Council and the EBCC, such decisions will be appealable to Superior Court. Any Shoreline Conditional Use permit must be transmitted to the Department of Ecology for its review and approval, consistent with the Washington Shoreline Management Act. LUC 20.30C.160; RCW 90.58.140; WAC 173-27-130, and .160.

III. ASSOCIATED PERMITS AND APPROVALS.

Given the scale of the project, a number of other city review and approval processes occurred in association with the two permits addressed in this Recommendation. All of those associated permits and approvals stand as issued. They were not appealed as they could have been, so they were not on review as part of the Hearing Examiner's public hearing process. Specifically, the City thoroughly reviewed application materials for, duly noticed, sought and considered public feedback for, and issued: (i) a Mitigated Determination of Non-Significance (MDNS) under SEPA; (ii) a Critical Areas Land Use Permit for aspects of the transmission line project, under File No. 11-131125-LO; and (iii) a Shoreline Substantial Development Permit, under File No. 12-127693-WA. Under the City's code, all three of these associated permits and approvals were Process II Land Use decisions, subject to appeal before the Hearing Examiner. Again, none were appealed, so

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they stand without modification, as issued, and serve as support for the two permits addressed in this Recommendation.²

IV. RECORD AND EXHIBITS.

Exhibits entered into evidence as part of the record, and an audio recording of the public hearing, are maintained by the City of Bellevue, and may be examined or reviewed by contacting the Clerk in the Hearing Examiner's Office.

Hearing Testimony: The following individuals presented testimony under oath at the duly noticed public hearing for the underlying application, held on Thursday, November 20, 2014:

- 1. Sally Nichols, Senior Land Use Planner for the City of Bellevue, using a PowerPoint presentation, provided a project overview, a summary of the city's review process, and addressed questions or comments raised by the Examiner and other witnesses;
- 2. Catherine Drews, Legal Planner for DSD, addressed the MDNS issued for the project;
- 3. Robert I. Heller, of the Riddell Williams law firm, representing the applicant, PSE, made brief remarks and submitted a detailed letter, as a "roadmap" referencing key documents that establish compliance with applicable decision criterion (See Ex. A-1);
- 4. Robert Charles Parker III, Sr. Project Manager at PSE, project manager for the pending applications, introduced his project team members, briefly summarized the project, and provided supplemental comments regarding the project's compliance with the City's Electrical Utility Facilities Decision Criteria, LUC 20.20.255.E(2). (See Ex. A-2);
- 5. Carol Jaeger, Transmission Planner for PSE, with responsibility for the Bellevue area, provided comments confirming that the proposal is consistent with PSE's system plan, meets an operation need and improves reliability,

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² The MDNS and CALUP had a 14-day appeal deadline, which expired on November 13, 2014. The Shoreline Substantial Development permit had a 21-day appeal deadline, which expired on November 20, 2014. Any appeals would have been included in the Hearing Examiner's public hearing process for the project. There were none. See Staff Report for details on date of issuance, additional code citations, and deadlines.

creates a transmission system "loop", and improves system flexibility for necessary maintenance work (See Ex. A-3);

- 6. Jeff McMeekin, Land Planner for PSE, provided comments summarizing the applicant's Alternative Siting Analysis for the project and impact mitigation (See Ex. A-4). He also summarized a requested modification sought by PSE to proposed condition of approval number 9. That suggestion is reflected in Exhibit A-6, which was entered into the record without objection. Ms. Nichols confirmed that the city accepted PSE's proposed modification reflected in Ex. A-6;
- 7. Andrew Swain, Municipal Liaison Manager for PSE, provided comments summarizing the applicant's public engagement efforts for the project since 2007, including mailings, notices, and public meetings, and public feedback received (See Ex. A-5).
- 8. Ki Kim, local resident, lives along NE 8th Street area affected by the project, expressed concerns with environmental impacts, visual impacts to residence, wanted to change a pole location near his home;
- 9. Young Kim, local resident, lives along NE 8th, reiterated same concerns as Mr. Kim, expressed displeasure with transmission line so close to her residence, asked that PSE reconsider location of pole proposed near her residence;
- 10. Warren Halverson, local resident, explained that he felt a full EIS should be conducted;
- 11. Richard Beard, local resident, lives along 147th Avenue SE, testified that he was not adequately informed about the project, only learned about it sometime in 2012, displeasure with contacts he has had with PSE consultants seeking easements for project;
- 12. Kevin Forsythe, local resident, provided general remarks about the adverse impacts he feared from the project, and asked why PSE would not compensate property owners for what he believes will be negative impacts on value;
- 13. Roni Uyeda, local resident, lives along NE 8th, described that several months ago, she emailed PSE's Mr. Parker, who responded and shared 'before and after pictures' illustrating what her condominium complex would look like if

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Exhibits: A list of Exhibits as they were numbered and entered into the record is attached to this Recommendation. While the list may seem short, many exhibits are voluminous, and full of technical detail addressing various aspects of the project. The DSD Project File and the Director's Recommendation of Approval ("Staff Report") dated October 30, 2014, were provided to the Examiner before the Hearing, and were accepted into the Record in their entirety without objection. These documents are collectively referenced as "Exhibit C-1". For purposes of brevity, only certain documents included in the Project File are highlighted for discussion in this Recommendation, but all others have been reviewed and considered to issue this Recommendation. Any lack of discussion regarding particular documents included as part of the Record should not be viewed to diminish their full meaning and effect, except as modified herein. Among key items in the larger Project File are the following:

- Conditional Use Permit Application and Alternative Siting Analysis materials submitted by PSE, dated December 29. 2011, stamped Received by the City on December 30, 2011, for a Lake Hills to Phantom Lake 115 kV Transmission Line Corridor (49+ pages). See Project File, PDF File named "Section G-Extra Misc.pdf", Pages 182-236.
- Staff Report and Recommendation of Approval for Conditional Use and Shoreline Conditional Use Permits (and Administrative Decisions issuing an MDNS, a Critical Areas Land Use Permit, and a Shoreline Substantial Development Permit) for the PSE Transmission Line to connect the Lake Hills Substation with the Phantom Lake Substation (+/- 208 pages). See Project File, PDF File named "Section B - Staff Report..."
- Noticing and Public Outreach materials, including written public comments; EBCC feedback; PSE responses to comments; sign-in sheets for public meetings; mailings, notices, permit bulletins; comments re: undergrounding costs and feasibility in various items, including pages C-139, C-143; comments re: using existing poles along 16th, C-107 - C-168; and maps and locations of public notice signs. See Project File, PDF file named "Section C-Noticing and POR" (+/- 687 pages).
- Electrical Reliability Study, prepared by Exponent for the City of Bellevue, dated February 2012, explaining need for new transmission line, enhanced

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reliability, reduced outages, and additional technical bases supporting project (+/- 191 pages). Project File, PDF file named "Sec. G", pages 237-428.

- Landscape Mitigation Proposal, with maps, drawings, charts, tree and plant material descriptions (draft), prepared by Otak for the transmission line project, dated February 2013 (+/- 84 pages). Project File, PDF file named "Sec. G", pages 1-84.
- Revised Critical Areas Report, prepared by GeoEngineers, dated August 2, 2012, including wetland identification and assessments of critical areas impacted by the transmission line project (+/- 95 pages), *Project File, PDF file named "Sec. G", pages 86-181.*
- Status of Health Research on Electric and Magnetic Fields (EMF) and Implications for Public Policy (draft), prepared by Exponent for the City of Bellevue, dated October 8, 2007, as part of city's review/update of the Electric Utilities Element of its Comprehensive Plan (33 pages). Project file, PDF file named "Sec. G", pages 430-463
- Collection of Communications, records, by/between the City of Bellevue and the EBCC, agendas, memos, minutes of meetings, questions/answers, updates on project review, 2012-2013 (163 pages). Project File, PDF file named "Sec. G", pages 464-627.

At the Hearing, the Examiner received copies of the following additional materials, which were also entered into the record without objection:

- PowerPoint presentation and overview of the DSD recommendation of approval, presented by Ms. Nichols, marked as Exhibit C-2; and
- Letters from PSE representatives, summarizing their testimony made on the record during the public hearing, marked as Exhibits A-1 through A-7.

The Examiner visited the route of the proposed transmission line in the days following the public hearing, and is fully advised on relevant environmental, city code, and comprehensive plan matters that are at issue in this application.

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V. FINDINGS OF FACT.

Based upon the record, the undersigned Examiner issues the following Findings of Fact.

- 1. In December of 2011, the applicant, Puget Sound Energy (PSE), submitted its application seeking various city permits and approvals needed to construct a new 115kV overhead transmission line connecting its Lake Hills and Phantom Lake Substations, and upgrading such substations, all located in the City of Bellevue. Staff Report, Testimony of Ms. Nichols; Application materials, Project File, PDF File named "Section G-Extra Misc.pdf", Pages 182-236.
- 2. The proposed route and the length of major segments is depicted on the attached slide from Ms. Nichols' hearing presentation:

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Project Request

Conditional Use and Shoreline Conditional Use approval to construct a new 115kV overhead transmission line running between Lake Hills Substation and Phantom Lake Substation. Also includes upgrades to each Substation.

Length of the Line:

Lake Hills Substation to 148th Ave.
 NE Down NE 8th Street:

0.97 miles

 Line along 148th Avenue NE & SE from NE 8th Street to SE 16th Street:

1.43 miles

 SE 16th Street from 148th Ave. SE to Phantom Lake Substation *:

0.49 miles

Total:

2.89 miles

Number of Poles: Approximately 39 poles (excludes SE 16th Street portion of the alignment) and line consisting of 3 Conductors ("wires")

* SE 16th portion of the alignment deferred so can coordinate with City's C.I.P. project for roadway improvements on SE 16th Street.

So can coordinate overnents on SE

Existing Phantom Lake to College/Lakeside Transmission Line

SE 24th ST

Lake Hills-Phantom Lake 115 kV transmission line

sale segment proposed to be promounted with fallar

NE 6th ST

Existing Lake Hills to

Ardmore Transmission

Line)

Lake Hills

NE 6th ST

Lake Hills

Substation (Existing)

transmission lines instead of one. Application; Testimony of PSE witnesses; Staff Report "purpose" summary at page 6.

4. By way of example, during a windstorm event, as this region experiences on a frequent basis in the Fall, if one transmission line is taken off-line by a falling tree, the

explained that the transmission line is needed to improve reliability by creating a "loop" connecting two currently under-utilized substations, and feeding each substation with two

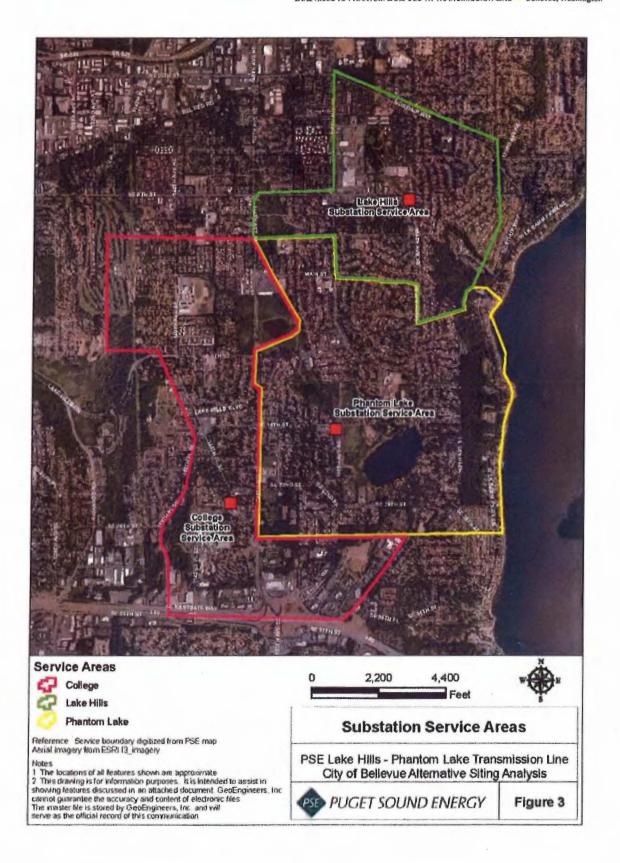
In its application materials, and during the public hearing, PSE and its officials

- 4. By way of example, during a windstorm event, as this region experiences on a frequent basis in the Fall, if one transmission line is taken off-line by a falling tree, the looped system could provide system redundancy, and allow power to be redirected coming from the second line. The goal is to reduce power outages, their frequency, and their duration, because the looped system can even provide better flexibility for necessary maintenance work, meaning if one line needs work, the need to shut down power to customers is reduced, as the second line can serve the need while maintenance work is performed on the other. With just a single line as exists today, an entire service area can experience a temporary power outage if a major maintenance project necessitates turning off the power on that transmission line. Application; Testimony of PSE Witnesses, particularly Carol Jaeger, her hearing Exhibit A-3, and her Compliance Letter, dated October 31, 2013; Staff Report.
- 5. In prior years, the City undertook a thorough study of electrical infrastructure needed to support current and future residents, businesses, and projected growth patterns throughout the city. The Electrical Reliability Study, prepared for the City by Exponent in February of 2012, specifically recommends additional transmission feeds to the Phantom Lake and Lake Hills substations. Project File, PDF file "Sec. G", pages 238-428, on numbered page 66 of the report.
- 6. As required by the City's code, the applicant's licensed engineer, Ms. Jaeger, credibly established that the proposed transmission line improves reliability to customers served and reliability of the system as a whole. Testimony of Ms. Jaeger; Ex. A-3; "Compliance Letter" prepared by Carol Jaeger as PSE's licensed engineer on this project, dated October 31, 2013, and PSE Alternative Siting Analysis, at p. 29.
- 7. The Examiner finds that the City of Bellevue and its residents would benefit from the new transmission line, primarily from improved system reliability, and reductions in power outages and their duration, which can be achieved with the "looping" provided with the new line. Three existing PSE substations and their service areas, including the service areas for the Lake Hills and Phantom Lake facilities within the City of Bellevue are depicted on the following page, found in PSE's application submittal from December of 2011.

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Page 6 December 29, 2011

8. The alternatives analysis performed by PSE before submitting the pending applications initially considered far more than 3 potential routes, exploring many east-west and north-south routes to connect the two substations. *PSE's Alternative Analysis, pages 12-16*. Ultimately, after public feedback and city policies that seek to reduce impacts on the greenbelt running through the center of the impacted area, 3 routes were thoroughly reviewed: 148th, 156th, and 164th. The illustration on the following page depicts the routes studied (*PowerPoint slide from Ms. Nichols' hearing testimony, derived from Attachment I of the Staff Report*):

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BELLEVUE HEARING EXAMINER'S OFFICE 450 – 110th AVENUE NE P.O. BOX 90012 BELLEVUE, WASHINGTON 98008-9012 Siting Analysis Alternatives/Land Uses & Zoning 164th Avenue NE/SE 164th Avenue NE/SE Alignment - Current Alignment Proposal 156th Avenue NE/SE Alignment Refer to Alternative Siting **PSE** Proposed Analysis in Section G of Transmission Line the Project File

- 9. Ultimately, the 148th route was selected, largely because it would run along the busiest street (where drivers should be watching the road, not daydreaming looking at power lines above); had the fewest impacts on residential neighborhoods and the fewest number of residential properties; and had better opportunities for mitigation all factors establishing that the alignment along 148th was most consistent with the City Council's intended outcome derived from the hierarchy of preferred locations found in LUC 20.20.255.D(2)(d).³ Staff Report, pages 7-8; Testimony of Ms. Nichols; Testimony of PSE witnesses, particularly Mr. McMeekin, and his Exhibit A-4; PSE Alternative Siting Analysis submitted with application).
- 10. Under LUC 20.20.255, a new or expanding electric utility facility proposed for a "sensitive site" as depicted in Figure UT-5a, found in the Utilities Element of the City's Comprehensive Plan, must be reviewed for a conditional use permit decision made by the City Council. The attached copy of Figure UT-5a from the City's Comprehensive Plan expressly identifies a new transmission line facility in the Phantom Lake/Lake Hills area as a future new project, which would be subject to the "sensitive siting" requirements mandating a conditional use permit.
- 11. Staff devoted substantial time and attention working with PSE representatives to ensure that the final project will be present a "less industrial design presence", which reads like ugly, but necessary. Pole designs with the "more decorative" wooden davit arms will be used where possible, instead of a standard transmission arm found on many poles. Staff Report, pages 11-13, with pictures and illustrations of pole features.
- 12. The project will require removal of a substantial amount of trees, shrubs and other vegetation. Accordingly, robust replanting and funding for such mitigation is included as a mitigation measure in the MDNS, and restated in the recommended conditions of approval attached to this Recommendation. Staff Report, pages 13-14; Tree Evaluation materials, included as Attachments B and C to the Staff Report; MDNS; Conditions of Approval Nos. B-7, B-14, as addressed in the Staff Report and as attached to this Recommendation.

³ LUC 20.20.255.E(2)(d) reads as follows: "d. Identify a preferred site from the alternative locations considered for the proposed new or expanding electrical utility facility. The following location selection hierarchy shall be considered during identification of the preferred site alternative: (i) nonresidential land use districts not providing transition, (ii) nonresidential Transition Areas (including the Bel-Red Office/ Residential Transition (BR-ORT), and (iii) residential areas. The applicant may identify a preferred site alternative in a Residential Land Use District or Transition Area (including the Bel-Red Office/Residential Transition (BR-ORT) upon demonstration that the location has fewer site compatibility impacts than a nonresidential land use district location. (Emphasis added).

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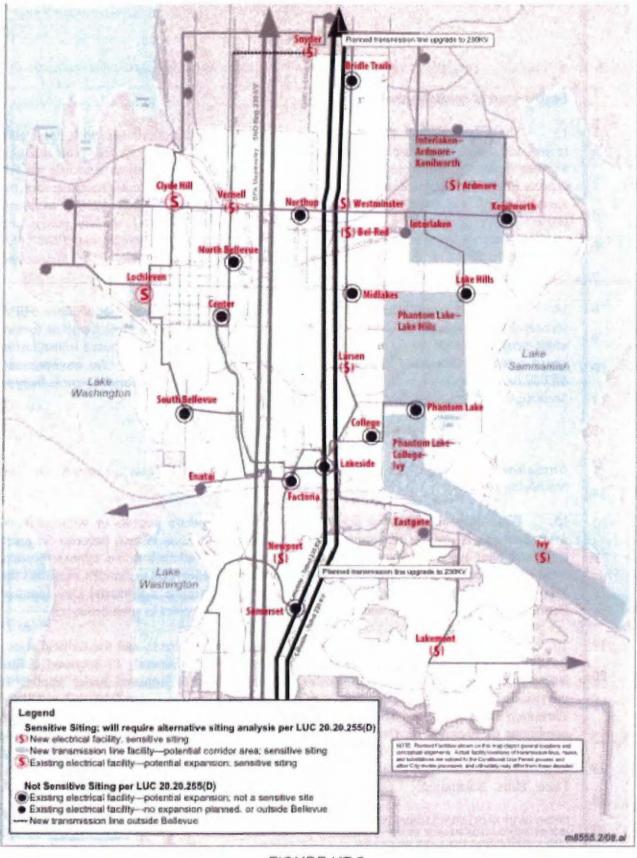




FIGURE UT.5a New or Expanded Electrical Facilities



13. The City satisfied its SEPA review process through compliance with applicable review and notice procedures. As noted above, an MDNS was issued for this project, and it was not appealed. Staff considered thorough analysis and documentation regarding various aspects of the environment, including without limitation wildlife, plants, scenic resources, visual impacts, and noise. MDNS; Staff Report, SEPA discussion and detailed technical project review, pages 37-43; Testimony of Ms. Nichols; Ex. C-1, Public notice and outreach records, see Project File, PDF file named "Section C – Noticing and POR" (+/-687 pages); Ex. C-1, Environmental documentation in Project File, PDF file named "Section E – Environmental" (283 pages).

14. Subject to compliance with mitigation measures grounded in applicable SEPA statutes and regulations, as issued and detailed in the MDNS for the project and as further implemented through the recommended conditions of approval, the proposed transmission line project will not have a probable, significant, adverse impact on the environment. MDNS issued on October 30, 2014, all terms, conditions, findings, stand as unchallenged because no appeals were filed by deadline on November 13, 2014.

Unchallenged findings from other permits and approvals, which support the two remaining permits:

- 15. Conditions and material findings contained in separate permits or administrative determinations issued for the transmission line project stand as issued, because no party exercised their right to appeal such projects through the administrative appeals process available to them. Specifically, failure to exhaust available appeals essentially confirms the MDNS, the Critical Areas Land Use Permit, and the Shoreline Substantial Development Permit, including all findings and conditions issued for the project in such decisions.
- 16. The MDNS, the Shoreline Substantial Development Permit, and the Critical Areas Land Use Permit all included the same 20 conditions (3 General, 17 required before issuance of other permits) of approval/mitigation measures imposed under applicable provisions of the Bellevue City Code or SEPA. Staff Report, Decisions Included and SEPA Threshold Determination. Those conditions are substantially similar to the recommended conditions of approval for the Conditional Use and Shoreline Conditional Use Permits at issue in this hearing process. The only material modification is additional language inserted into Condition No. 9(a), detailing requirements and limits on upgrades proposed for the Lake Hills Substation. Compare MDNS Condition No. 9(a) and Staff Report's

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Recommended Condition of Approval No. 9(a). One more proposed modification came forward from the Applicant at the public hearing, included in the record as Exhibit A-6, with suggested new language for condition 9(b), dealing with tree removal conditions at substation sites. Ms. Nichols confirmed on the record that the city accepted PSE's proposed changes. The Recommended Conditions of Approval included as part of this Recommendation reflect these mutually-agreed modifications.

Summary of Public Hearing:

- 17. The open-record public hearing for the pending applications was duly noticed in accord with law. The hearing occurred on November 20, 2014, wherein the undersigned Examiner presided, with city staff, applicant representatives, and more than a dozen members of the general public, in attendance.
- 18. At the hearing, Ms. Nichols made a PowerPoint presentation, summarizing the City's review process for the proposed transmission line and answered several questions posed by the Examiner. *Testimony of Ms. Nichols*.
- 19. The applicant's attorney, Mr. Heller, accepted the City's Staff Report, and expressed support for the approval recommendation, noting the previously referenced modification requested for condition 9. PSE witnesses summarized their engagement with the public.
- 20. In all, 13 individuals provided testimony under oath at the public hearing, as generally described in the "Hearing Testimony" portion of Sec. IV above. No members of the general public submitted written comments to include as part of the hearing record.
- 21. After observing that no other members of the general public desired to make public comments, the Examiner closed the public comment portion of the public hearing. PSE representatives and City staff were then given an opportunity to respond to public comments or questions.
- 22. Ms. Drews explained that an MDNS is only issued after a formal and detailed environmental review, and that the MDNS for this project already includes a number of specific mitigation measures designed to address potential impacts associated with the project.
- 23. PSE representatives testified that PSE takes the position that the project will have no impact on property values, and applicable law or tariffs probably prohibit compensation for such speculative losses. Mr. Swain submitted Exhibit A-7, a summary sheet PSE prepared

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showing examples of development and redevelopment on properties adjacent to existing 115kV transmission lines in the City of Bellevue. The exhibit reflects four sites where owners made improvements, despite the existence of a PSE transmission line on or very near the lot, resulting in substantial increases in property values. None of the local resident-witnesses presented or submitted any credible evidence to support their speculative concerns about reduced property values.

- 24. Mr. McMeeken followed up noting that PSE already agreed to move a pole location on or near Mr. Forsythe's property, and that PSE would work with interested property owners to address questions about trees near their homes.
- 25. After closing the public hearing, the Examiner notes that a number of PSE staff and members of the general public remained in the room and appeared to engage one another in private conversations off the record.

Public Engagement and Participation:

- 26. Several members of the general public testified to information they learned about the project from various public outreach efforts by PSE, and city staff.
- 27. PSE witnesses provided credible testimony about their public engagement efforts related to the new transmission line project, which began at some point in 2007. Testimony of Mr. Swayne, and his Ex. No. A-5; Alternative Siting Analysis report, submitted with PSE Application.
- 28. Between November of 2007 and April of 2011, PSE held at least 4 public meetings/open house events before submitting its conditional use permit application. Ex. A-5. Then, after the application was filed, in 2012-13, the City of Bellevue (with PSE participation as the project applicant) conducted two public meetings regarding the application, and three courtesy meetings with the East Bellevue Community Council. Ex. A-5; Staff Report, public meetings summary, pages 43-44.
- 29. Copies of the City's Weekly Permit Bulletin, including information about the PSE application, were mailed to addresses within 500 feet of the proposed transmission line, large public information signs were posted along the route and at each substation, and a separate letter was mailed to every property address that "touched" the proposed line route, i.e. within 150 feet. Staff Report, public notice summary, at page 45; See Project File, PDF file named "Section C-Noticing and POR" (+/- 687 pages).

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- 30. As a result of the public outreach efforts, the city received written comments from 105 citizens. A summary of the most frequent comments and/or questions is provided on pages 45-54 of the Staff Report. These comments covered a wide range of topics analyzed by staff before making a recommendation of approval. Topics included without limitation: project need; routing; desire for undergrounding; comments about potential exposure to electric and magnetic fields (EMF); noise; and easements.
- 31. Most comments were thoroughly addressed in the Alternative Siting Analysis Report, submitted by PSE as part of its application. Undergrounding costs were shown to be substantially higher (up to 10 times higher) than the proposed overhead transmission line, and PSE noted that local customers and/or the city would need to participate in paying additional costs, under terms of applicable tariffs and regulations. Staff Report, pages 50-51; Memo from Carol O. Jaeger, PE, dated August 6, 2008, entitled "Considerations for PSE Underground Transmission Lines". To date, no one has stepped forward with a viable plan to fund the substantial costs to underground the new line, and none of the public witnesses expressed a desire to pay their share of costs to modify their existing overhead electric meter connections to an underground system.
- 32. While an underground power line may be "out of sight and out of mind" from a visual standpoint, for this project, so it appears are the costs. The Examiner is without authority to mandate the extraordinary financial participation it would require from the city and affected property owners to underground the new transmission line. Local Improvement District financing or similar tools may be something considered for future projects, but again, the costs may be too great for affected property owners, or the city, to accept.
- 33. With respect to general public comments expressing concerns about health risks presented by high power electrical lines, the record includes a detailed document, entitled "Status of Health Research on Electric and Magnetic Fields (EMF) and Implications for Public Policy" (draft), prepared by Exponent for the City of Bellevue, dated October 8, 2007, as part of city's review/update of the Electric Utilities Element of its Comprehensive Plan (33 pages). Project file, PDF file named "Sec. G", pages 430-463. The report includes the following conclusion at page 458:

"The review of scientific research in this report is a response to [Bellevue Comprehensive Plan] Policy UT-70, which calls for periodic reviews of the state of scientific research on EMF. The frequency of such reviews need not be often as the field of research is now quite mature and, despite continued research, the assessments by national and international agencies have been quite consistent over the past decade. The WHO [World Health Organization] review concluded that the current body of research does not suggest that there are any long-term, adverse

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health effects associated with exposure to electric or magnetic fields at the levels the general public encounters on an everyday basis."

Project Changes Made in City Review Process.

34. Section VIII of the Staff Report, at page 54, includes a list of project modifications that occurred during the City's project review process. The list reads as follows:

VIII, CHANGES TO THE PROPOSAL AS A RESULT OF CITY REVIEW

- Line shifted in at least three locations to avoid tree removal.
- Line shifted to the south side of NE 8th Street to avoid Fire Station 3 and Crossroads Park. Steel poles will also be allowed in this location to further reduce the likelihood that emergency vehicles will be prevented from entering/existing the Station due to downed power lines.
- PSE will need to provide sight-obscuring fencing and sight-obscuring landscaping at the substations. The proposed chain link will not be allowed.
- Construction of the SE 16th portion of the line will be deferred until the City constructs the identified TIP for this street.
- PSE will not be allowed to place overhead lines along the entire southern side of SE 16th Street running from 148th Avenue SE to 156th Avenue SE.
- PSE will be required to pay the City \$856,740 as compensation for the loss of 295 trees along the transmission line route.
- PSE submitted a comprehensive Conceptual Mitigation Plan.
- 35. In sum, city staff review was robust, thorough, and challenging to the applicant as it should be in a project of this scale and impact on local residents. As shown above, real, substantive changes that will benefit affected parties, the city, and even the applicant, have been made to the project from its initial conceptual notion to the present as a result of public feedback, staff review, and exhaustive studies on various aspects of the project.
- 36. The Staff Report, recommending approval with conditions, includes a number of specific findings and explanations that establish how the underlying applications satisfy provisions of applicable law; can be conditioned to comply with city zoning and land use regulations; and how the project, as conditioned, can be developed in a manner consistent with more than 25 separate Comprehensive Plan Policies. Staff Report, pages 16-37, and Attachment E. a 9-page summary of Staff's Comprehensive Plan Policy Analysis for the project.
- 37. Except as modified in this Recommendation, all factual statements and findings contained in the Staff Report, however identified, are incorporated herein by reference as Findings of the undersigned-hearing examiner.

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Any factual matters set forth in the foregoing or following sections of this Recommendation are hereby adopted by the Hearing Examiner as findings of fact, and incorporated into this section as such.

VI. CONCLUSIONS.

- Conditional Use Permit: As noted above, the City's decision criteria for the pending conditional use permit is found in LUC 20.30B.140. As PSE's counsel noted in his hearing testimony, unlike the decision criteria specifically applied to electrical facilities in LUC 20.20.255, the general conditional use permit requirements are the same as would be applied to any conditional use permit decision. Applying facts and evidence in the record to the decision criteria for a Conditional Use Permit (found in LUC 20.30B.140), the Examiner concludes as follows:
 - The conditional use is consistent with the Comprehensive Plan. Staff Report, Attachment E, detailed review of Comprehensive Plan - Policy Analysis, addressing more than 25 Comp. Plan Policies; Staff Report, discussion on page 57; Testimony of PSE Land Planner, Mr. McMeekin; PSE Alternative Siting Analysis, at pages 32-41; Finding No. 36.
 - The design is compatible with and responds to the existing or intended character, appearance, quality of development and physical characteristics of Staff Report, pages 57-58; the subject property and immediate vicinity. Testimony of Mr. McMeekin, Ex A-4; PSE Alternative Siting Analysis, at pages 42-47; Conceptual Mitigation Plan, prepared by Otak for PSE, dated February 13, 2013, in Project File, PDF file named "Sec. G", pages 1-84; Finding Nos. 11, 34-36.
 - The conditional use will be served by adequate public facilities including streets, fire protection, and utilities. Staff Report, finding and discussion on page 58; Finding No. 36.
 - D. The conditional use will not be materially detrimental to uses or property in the immediate vicinity of the subject property. MDNS, particularly condition prohibiting a new overhead transmission line down the southern side of SE 16th Street; Staff Report, pages 58-59, mitigation and restoration required for loss of trees; PSE Alternative Siting Analysis, pages 48-49; Conceptual Mitigation Plan by Otak, in Project File, PDF file named "Sec.G", pages 1-84; Finding Nos. 7, 11, 12, 23. 34 and 35.

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- E. The conditional use complies with the applicable requirements of this Code. Staff Report, pages 29-37, discussion of consistency with Land Use Code and Zoning Regulations, and page 59; Finding No. 36.
- 2. Additional Criteria for Electrical Utility Facilities: Because the proposal is to construct or expand electrical facilities, the provisions of the City's Land Use Code specifically addressing Electrical Utility Facilities, found in LUC 20.20.255, must be satisfied. Prior to submittal of any Conditional Use Permit application, a detailed Alternative Siting Analysis was required. See LUC 20.20.255.D. Applying the facts and evidence in the record to the additional requirements for new or expanding electrical utility facilities, as detailed in LUC 20.20.255.E, the Examiner concludes as follows:
 - A. The proposal is consistent with Puget Sound Energy's System Plan. Testimony of PSE Project Engineer, Carol Jaeger, Ex. A-3; Staff Report, page 55; Comprehensive Plan Figure UT-5a, identifying new transmission line for Lake Hills/Phantom Lake area;
 - B. The design, use, and operation of the electrical utility facility complies with applicable guidelines, rules, regulations or statutes adopted by state law, or any agency or jurisdiction with authority. Testimony of PSE's Project Manager, Robert Parker, Ex. A-2; Staff Report, discussion on pages 55-56.
 - C. The applicant demonstrated that an operational need exists that requires the location or expansion at the proposed site. Finding Nos. 3-7; Electrical Reliability Study, prepared for the City by Exponent in February of 2012, specifically recommends additional transmission feeds to the Phantom Lake and Lake Hills substations, in Project File, PDF file "Sec. G", pages 238-428, on numbered page 66 of the report; Testimony of PSE's Project Engineer, Carol Jaeger, PE, Ex. A-3, and Letter from Ms. Jaeger, dated October 31, 2013, certifying project meets requirement; Staff Report, page 56;
 - D. The applicant demonstrated that the proposed electrical utility facility improves reliability to the customers served and reliability of the system as a whole, as certified by the applicant's licensed engineer. Same as item C, above.
 - E. Because the proposal is located on sensitive sites as referenced in Figure UT.5a of the Utility Element of the Comprehensive Plan, the applicant fully complied with the Alternative Siting Analysis requirements of LUC

FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION RE: PSE TRANSMISSION LINE CONNECTING THE LAKE HILLS AND PHANTOM LAKE SUBSTATIONS, DSD FILE NOS. 11-131[23-LB AND 11-131124-WG

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- **20.20.255.D.** Staff Report, page 56; PSE Application materials, including Alternative Siting Analysis, dated December 29, 2011.
- F. Where feasible, the preferred site alternative is located within the land use district requiring additional service and residential land use districts are avoided when the proposed new or expanded electrical utility facility serves a nonresidential land use district. Findings 7 and 9; Staff Report, discussion on page 56; Testimony of Ms. Jaeger and Mr. McMeekin, Exhibits A-3 and A-4; Alternative Siting Analysis, pages 2-5, 10 and Fig. 3, found in Project File, PDF File named "Sec. G", starting on page 184.
- G. The proposal, as conditioned, will provide mitigation sufficient to eliminate or minimize long-term impacts to properties located near an electrical utility facility. Testimony of Mr. McMeekin; Alternative Siting Analysis, at pages 29-30; Staff Report, page 57, and environmental discussion on pages 37-41; Finding No. 14.
- 3. Shoreline Conditional Use Permit: The decision criteria for a Shoreline Conditional Use Permit is found in LUC 20.30C.155. Applying facts and evidence in the Record to such criteria, including without limitation the Staff Report's detailed findings and discussion on pages 60-63, and all facts, findings, information, studies, and conditions issued or referenced as part of the uncontested Shoreline Substantial Development Permit issued for the project under File No. 12-127693-WA, the Examiner concludes as follows:
 - A. The proposed use will be consistent with the policies of RCW 90.58.020 and the policies of the Bellevue Shoreline Master Program; and
 - B. The proposed use will not interfere with the normal public use of public shorelines; and
 - C. The proposed use of the site and design of the project will be compatible with other permitted uses within the area; and
 - D. The proposed use will cause no unreasonably adverse effects to the shoreline environment designation in which it is to be located; and
 - E. The public interest suffers no substantial detrimental effect; and
 - F. The proposed use complies with all requirements of WAC 173-14-140; and

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- G. The proposed use is harmonious and appropriate in design, character and appearance with the existing or intended character and quality of development in the immediate vicinity of the subject property and with the physical characteristics of the subject property; and
- H. The proposed use will be served by adequate public facilities including streets, fire protection, water, stormwater control and sanitary sewer; and
- I. The proposed use will not be materially detrimental to uses or property in the immediate vicinity of the subject property; and
- J. The proposed use has merit and value for the community as a whole; and
- K. The proposed use is in accord with the Comprehensive Plan; and
- L. The proposed use complies with all other applicable criteria and standards of the Bellevue City Code.
- 4. Based on the record, the applicant established that a preponderance of the evidence supports the conclusion that its permit applications merit approval, meeting its burden of proof imposed by LUC 20.35.340(A).
- 5. Any finding or other statement contained in this Recommendation that is deemed to be a Conclusion is hereby adopted as such and incorporated by reference.

VII. RECOMMENDATION.

Based upon the preceding Findings and Conclusions, the Hearing Examiner recommends that PSE's applications for Process III Conditional Use and Shoreline Conditional Use Permits, needed to construct a new transmission line connecting the Lake Hills and Phantom Lake Substations, should be APPROVED, subject to the attached conditions of approval.

ISSUED this 19th day of December, 2014

Gary N. McLean Hearing Examiner

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Appeal of Hearing Examiner Recommendation.

Bellevue Land Use Code Section 20.35.350 provides for appeals of the Hearing Examiner's Recommendation. Individuals should confer with advisors of their choosing and review the city's code, resolutions, regulations and rules on appeals for details, deadlines, and other requirements, which include without limitation the following:

- 1. Who May Appeal. The recommendation of the Hearing Examiner may be appealed to the City Council by any person who participated in the public hearing as provided for in LUC 20.35.337 or by the applicant or by the City.
- 2. Form of Appeal, Fee Payment Required. A person appealing the recommendation of the Hearing Examiner must file with the City Clerk a written statement of the findings of fact or conclusions which are being appealed and must pay a fee, if any, as established by ordinance or resolution. The written statement must be filed together with an appeal notification form available from the Office of the City Clerk.
- 3. Time and Place to Appeal. The written statement of appeal, the appeal notification form, and the appeal fee, if any, must be received by the City Clerk no later than 14 days following the date the recommendation of the Hearing Examiner was mailed. Because this Recommendation has been issued on December 19, 2014, any appeal and payment of appeal fees must be received by the City Clerk by 5:00 p.m. on January 2, 2015.
- 4. Transcript of Hearing Payment of Cost. An appeal of the Hearing Examiner's decision requires the preparation of a transcript of the hearing before the Hearing Examiner. Therefore, the request for appeal must be accompanied by an initial deposit of \$100 per recording hour. Should the actual cost be less the amount of the deposit, any credit due shall be reimbursed to the appellant. Should the cost for transcript preparation be more than the deposit, the appellant will be additionally charged.
- 5. Waiver of Transcription Fee. Upon request, the City Clerk will waive transcription fees upon submission by an appellant of the following documentation: a) an affidavit stating that the appellant's net financial worth does not exceed \$20,000; b) an affidavit stating that the appellant's annual income does not exceed \$5,200; c) a brief statement of the issues sought to be reviewed; d) a designation of those parts of the record the party thinks are necessary for review; e) a statement that review is sought in good faith.

City Council Consideration. As explained in LUC 20.35.355(A), the City Council shall, at a public meeting, consider and take final action on each Process III application; and if an appeal of the Hearing Examiner recommendation is filed, the City Council will consolidate and integrate the appeal hearing and decision into their consideration of the application. Unless appealed, this matter has tentatively been scheduled to go before the City Council on January 26, 2015 at 6:00 p.m., for discussion, and February 2, 2015 at 8:00 p.m. for legislation. On and after January 5, 2015, interested persons may contact the Hearing Examiner's Office at (425) 452-6934 to find out whether an appeal has been filed.

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Recommended Conditions of Approval

PSE – Lake Hills to Phantom Lake Transmission Line

Conditional Use Permit – File No. 11-131123-LB Shoreline Conditional Use Permit – 11-131124-WG

Ongoing Compliance Requirements:

- A1. The applicant shall comply with the terms and conditions included in any associated permit or approval decision issued by the City of Bellevue for the project, including without limitation the MDNS, the Critical Areas Land Use Permit, and the Shoreline Substantial Development Permit.
- A2. The applicant shall obtain any associated permit, license, or approval required by any state, federal, or other regulatory body with jurisdiction over aspects of the project; any conditions of regulatory agency permits or approvals shall be considered conditions of approval for this project.
- A3. The applicant shall comply with all professional report conclusions and recommendations submitted in connection with this Conditional Use Permit and associated approvals issued by the City of Bellevue for this project, as approved, referenced, relied-upon, and/or modified by the City.
- A4. All construction and other activities undertaken by PSE shall comply with applicable provisions of the Bellevue City Code whether or not such provisions are detailed in the Staff Report or conditions of approval set forth herein. The burden remains on the applicant to show compliance with applicable provisions of the City Code, and for this project, compliance with all applicable codes, standards, regulations and ordinances of the City of Bellevue includes but is not limited to those addressing the following subject matter:
 - Clearing and Grading Code BCC 23.76
 - Construction Code BCC Title 23
 - Fire Code BCC 23.11
 - Land Use Code BCC Title 20
 - Noise Control BCC 9.18
 - Right-of-Way requirements –
 - Transportation regulations and policies –
 - Utility Code BCC Title 24

Conditions of Approval
PSE Lake Hills – Phantom Lake Transmission Line
Conditional Use and Shoreline Conditional Use Permits
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General Conditions:

- 1. Noise & Construction Hours. Authority: BCC 9.18.020.C & BCC 9.18.040.
 - Noise related to construction is allowed from 7:00 a.m. to 6:00 p.m. Monday through Friday and 9:00 a.m. to 6:00 p.m. on Saturday.
 - Construction noise is prohibited on all Sundays and Washington state holidays.
 - Exceptions to the construction noise hours limitation contained in the Noise Control Code may only be granted pursuant to BCC 9.18.020.C when necessary to accommodate construction that cannot be undertaken during exempt hours.
 - Prolonged exposure to noise created by extended hour construction activity is likely to have a significant impact on construction. In order to minimize detriment on residential uses in the immediate vicinity of the project, the Contractor shall not rely on City issuance of a blanket exemption from the Noise Control Code during the construction period. Instead, allowances for short-term work outside of normal construction hours shall be limited and will be reviewed on a case-by-case basis to verify necessity and ensure appropriate noise mitigation is utilized to protect surrounding uses and properties.
 - Written requests for exemption from the Noise Control Code must be submitted two weeks prior to the scheduled onset of extended hour construction activity. Such requests may be required to include a noise analysis prepared by a noise consultant, including recommendations for achieving the noise limitations of the Noise Ordinance for new residential construction.
 - The use of best available noise abatement technology consistent with feasibility is required during construction to mitigate construction noise impacts to surrounding uses.
- 2. Facility Activation/Completion of Work. Authority: LUC 20.40.425.
 - The facility shall not be activated until all work included in the project scope (excluding system test prior to complete activation) and shown on the plans and specifications, as conditioned, is completed.
 - Mitigation and restoration landscaping shall be seasonally installed for optimal plant success (spring or fall). If planting must occur after facility activation date, the applicant shall enter into a surety device for the remaining mitigation and restoration installation work. All restoration and mitigation work must be completed within six months of activation.

Conditions of Approval
PSE Lake Hills – Phantom Lake Transmission Line
Conditional Use and Shoreline Conditional Use Permits
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- 3. Pole Design. Authority: LUC 20.20.255 and 20.30B.140, Bellevue City Code 14.60.240; Transportation Department Design Manual (TE-1, TE-2, TE-3 and sections 21 and 22)
 - a) Poles shall be wooden with wooden davit arms.
 - b) Where the alignment is required to turn a corner, the applicant will be allowed to construct a glu-lam pole that doesn't require guying. If steel poles are desired, they must first be reviewed and approved by the City's Land Use Director. Any steel pole will be required to be painted either dark green or dark brown, depending on the adjacent vegetation and neighborhood context.
 - c) PSE will be allowed to construct no more than two (2) steel poles in the vicinity of Fire Station 3 and the conductors between these two poles may be facing away from the right-way on the southern side of the poles. The poles shall be painted dark green to better recede against the vegetated background to the south.
 - d) All power poles installed under terms of this proposal must meet the City's sight distance criteria.

Conditions to Satisfy Prior to Issuance of Any Engineering / Clearing and Grading Permit for the Project:

1. Right-of-Way Use Permit.

Authority: Bellevue Right of Way Use Code, Chapter 14.30 BCC.

The applicant is required to apply for a Right-of-Way Use Permit before the issuance of any clearing and grading, building, foundation, or demolition permit. In some cases, more than one Right-of-Way Use Permit may be required, such as one for hauling and one for construction work within the right-of-way. A Right-of-Way Use Permit regulates activity within the city right-of-way, including but not limited to the following:

- a) Designated truck hauling routes.
- b) Truck loading and unloading activities.
- c) Hours of construction and hauling.
- d) Continuity of pedestrian facilities.
- e) Temporary traffic control and pedestrian detour routing for construction activities.
- f) Street sweeping and maintenance during excavation and construction.
- g) Location of construction fences.
- h) Parking for construction workers.
- i) Construction vehicles, equipment, and materials in the right-of-way.
- j) All other construction activities as they affect the public street system.

In addition, the applicant shall submit for review and approval a plan for providing pedestrian access during construction of this project. Access shall be provided at all times during the construction process, except when specific construction activities such as public safety, shoring, foundation work, and construction of frontage improvements prevents access. General materials storage and contractor convenience are not reasons for preventing access.

2. Off-Street Parking.

Authority: Bellevue Right of Way Use Code, Chapter 14.30 BCC.

The applicant must secure sufficient off-street parking for construction workers, equipment, and materials storage before the issuance of a Clearing and Grading Permit.

3. Engineering Plans.

Authority: Bellevue Transportation Development Code, Chapter 14.60 BCC; Transportation Department Design Manual.

A site plan produced by a qualified engineer must be approved by the City prior to Clearing and Grading permit approval. The applicant will be required to restore all city infrastructure impacted by this project (sidewalks, curb and gutter, etc.). Restoration of

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ADA ramps must be in conformance with the most updated requirements of the Americans with Disabilities Act, the Transportation Development Code, and the provisions of the Transportation Department Design Manual. The engineering plans must correctly show all transportation-related engineering details, including but not limited to, the design of the guardrails and sight distance. Appropriate standard drawings from the Transportation Department Design Manual must be included in the engineering plans.

4. Payement Restoration.

Authority: BCC 14.60.250 and Transportation Department Design Manual, Design Standard No. 23.

The applicant will be required to restore all damaged pavement within city right-of-way caused by construction activities related to this project. Limits and extent of pavement restoration shall be at the discretion of the Transportation Inspector. Trench restoration must meet the requirements of Section 21 of the Design Manual and standard drawings ROW-1 through ROW-5. Exact copies of the appropriate trench restoration drawing(s) must be included in the final engineering plans.

5. Safety.

Authority: Bellevue Transportation Code, Chapter 14.60 BCC; and Transportation Department Design Manual.

The applicant will be required to provide appropriate clearances from existing overhead signal equipment.

6. Utilities.

Authority: Bellevue Utility Codes, BCC Title 24.

To avoid conflicts with existing utilities, the applicant must do the following:

- a) PSE must call for utilities locates prior to any construction (800-424-555 or 811).
- b) PSE must pothole prior to any work that requires digging in the right-of-way.

7. Disturbance and Restoration.

Authority: LUC 20.25.E.080.U

General: In addition to all landscaping areas delineated on the Conceptual Mitigation Plan, the applicant shall fully restore with appropriate and approved shrubs and groundcover, to the satisfaction of the City of Bellevue, any areas disturbed as a result of

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construction activities, including mandatory restoration of the areas around each new pole.

Restoration in Wetland Buffer: ANY understory damaged within the wetland critical area buffer as a result of construction of the poles or installing the wire will need to be replaced with appropriate trees and/or shrubs that will restore the edge condition while discouraging access and use.

8. Final Landscape and Irrigation Plans — Mitigation AND Restoration Authority: LUC 20.20.255

- a) Final landscape and irrigation plans are required for all required mitigation (including work done in critical areas and critical area buffers) and for restoration of all other construction and tree removal activities along the entire alignment. These plans shall be consistent with the Conceptual Mitigation Plan submitted as part of this application. The final landscape and irrigation plans will be reviewed and approved under the Clearing and Grading Permit.
- b) Final plans for the Substation site upgrades, including fencing and landscaping around each substation, shall also be reviewed and approved under the Clearing and Grading Permit, and shall comply with all standards applicable to Electrical Utility Facilities contained in LUC 20,20,255.
- c) Final landscape and irrigation plans must also be approved by the Parks Department, which will ultimately assume right-of-way maintenance responsibilities after PSE's five-year maintenance period requirement is satisfied.

Final Plans for Substation Upgrades. Authority: LUC 20.20,255

Lake Hills Substation:

a) Final plans for the Substation upgrade, including landscape plans, review of tree removal/retention, and site changes for equipment installation shall take place under the required Clearing and Grading Permit for the installation of the entire transmission line. The design shall be reviewed against all the requirements in LUC 20.20.255.

Removal of healthy trees will be allowed only along the northwest corner of the fenced equipment area, where the new line will enter the substation. The remaining existing trees around the Substation are to remain, to ensure compliance with LUC 20.20.255.F.

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- b) Any work at the Lake Hills Substation that is required to take place in advance of, and is not necessary for the new transmission line may be reviewed under a Land use Exemption to the Substation's original Conditional Use. This work will be limited to the following:
 - Replacement of the existing wood fence with a new wood fence or fencing with an alternate material that is site-obscuring per applicable LUC requirements;
 - Cleaning out of overgrown understory and noxious weeds such as ivy, and replanting with appropriate groundcover and shrubs;
 - Redesign of existing driveways and minor relocation of bus stop. Any driveway configuration will be reviewed to ensure that it is as unobtrusive as possible, which may necessitate additional landscaping and angling the driveway(s) off 164th Avenue NE.
 - Removal of dead or unhealthy trees as verified by a certified arborist via a Hazardous Tree Form(s) or trees that PSE has determined, subject to approval by the Development Services Director, pose a risk to the substation. NOTE: Any tree removal of healthy trees to provide clearance for the new transmission lines on either substation site will be reviewed under the Clearing and Grading Permit associated with this Conditional Use Permit application and mitigation shall be provided to ensure that the requirements of LUC 20.20.255 are met. All other trees shall remain in place.

Phantom Lake Substation:

Preliminary review of the design concept for the Substation upgrade shall occur under a Land Use Exemption to this Conditional Use approval and shall be part of the review of the entire SE 16th portion of the alignment. Once the design has been approved, review of the final landscape plans shall take place under a separate Clearing and Grading Permit. The design shall be reviewed against all the requirements in LUC 20.20.255.

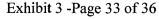
Both Substations:

All substation upgrades must meet the requirements of LUC 20.20.255.F, including the provision that any fence replacement material shall be site obscuring. (See NOTE in last bullet under Condition 9(b))

10. Tree Removal and Mitigation Landscaping within Critical Areas and Critical Area Buffers (Wetlands/Shorelines). Authority: LUC 20.25H.055.C.2

A "Clearing and Grading Permit" will be required for any tree removal, trimming and mitigation landscaping within any Critical Areas.

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The following requirements shall be followed when removing trees and/or installing mitigation landscaping in any wetland, wetland buffer and/or shoreline overlay district:

a) Tree Removal:

- All work shall be done by hand
- All trees over 12 inches in diameter shall be made into wildlife snags. Details for the snags shall be included in the Final Landscape Plans.
- Stumps shall be left in place to reduce soil disturbance.

b) Landscaping:

- Work shall be implemented using the Parks Department "Environmental Best Management Practices.
- Work within a wetland and/or shoreline shall be done by hand.

c) Miscellaneous:

Machinery needed to place the woody debris and for some hauling shall be done
in the dry season and use of mats or fabric-reinforced driving surfaces shall be
used where necessary.

11. Pesticides, Herbicides and Fertilizers.

Authority: LUC 20.25H.080

Prior to any use of pesticides, herbicides, and/or fertilizers associated with the proposal, the applicant must receive approval from Land Use under the required Clearing and Grading Permit.

Applicant shall submit written information identifying the pesticide, herbicide and/or insecticide is to be used AND written confirmation that the product used has been reviewed and approved by a consulting arborist. Work shall be done in accordance with the City of Bellevue's "Environmental Best Management Practices."

12. Maintenance and Monitoring Plan for Restoration and Mitigation Work.

Authority: LUC 20.25H.220

The applicant shall hire a qualified professional to design and implement maintenance and monitoring plan for the mitigation required for work in critical areas and/or critical area buffers. The contractor shall submit documentation each year for five (5) years to the Land Use Division under the Critical Areas Land Use Permit #11-131125-LO to demonstrate compliance with the conditions of this report.

a) There will be 100% survival of all planted species in the enhancement area at the end of the first year.

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- b) There shall be a minimum of 80 percent survival rate throughout the monitoring period years 2-5.
- c) Monitoring stations shall be set up and identified.
- d) Invasive species will not represent more than 15 percent areal cover.
- e) If the applicant can demonstrate an 80 percent survival rate and proper plant establishment, there shall be an option to reduce the monitoring period to three (3) years.

All necessary documentation outlined in the Maintenance and Monitoring Plan shall be sent each year to the following:

City of Bellevue Development Services Department/Land Use Division c/o Sally Nichols, Planner P.O. Box 90012 Bellevue, WA 98009-9012

13. Landscape Maintenance Assurance Device for Areas of Restoration and Mitigation. Authority: LUC 20,20,520.K.1 & 2 and 20,40,490

To ensure plant establishment, the applicant shall provide a separate landscape assurance device that shall cover 20% of the fair market value of labor and materials for the initial landscape installation of all areas of restoration and mitigation required for this Conditional Use approval. This assurance device will cover the landscape maintenance of the project for a period of five (5) years from the date of final inspection.

14. Fee in Lieu.

Authority: SEPA – WAC 197-11-350, BCC 22.02.035.

- a) Trees identified for removal are valued at \$856,740. This amount shall be expended as compensation for the removal of 295 City-owned trees (public assets). This money shall be used by PSE exclusively to pay for materials (plants, soil, irrigation, etc.) needed for the installation of the approved restoration and mitigation landscaping. Verification of all expenditures shall be provided to the City.
- b) Any money remaining from \$856,740 after completion of the project may be used by the City of Bellevue Parks Department for additional landscape enhancements along the transmission line route.
- c) If any public trees are required to be removed with the SE 16th Street portion of the alignment, an evaluation of the trees using the Trunk Formula Method shall be performed and the City shall be compensated for the loss of this resource.

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15. Alignment on SE 16th Street.

Authority: SEPA — WAC 197-11-350, BCC 22.02.035, LUC 20.30.6.175

PSE will not be allowed to run a separate new transmission line down the south side of SE 16th Street. Nor will PSE be allowed to remove trees from this side of the street for this new line. Possible ways to accommodate the second line include but are not limited to co-location of the new line with the existing transmission on the north side of the street or to undergrounding the line in a manner that does not required removal of trees along the south side of the street. The exact methodology for providing the second line and the design of this section of the alignment will be reviewed as a Land Use Exemption to this Conditional Use approval.

16. Development Agreement for SE 16th Street Alignment Vesting Authority: SEPA - WAC 197-11-350, BCC 22.02.035, Comprehensive Plan Policies UT-43, 51, 53, 71, and 74

In order to extend the vested status of the alignment of SE 16th Street until the City undertakes its Transportation Improvement Project, PSE will need to enter into a Development Agreement with the City of Bellevue. Any development agreement will need to demonstrate public benefit — which in this case will be the co-location of transmission lines, added reliability to the adjacent neighborhoods, and the coordination between the City and PSE regarding streetscape improvements and pole location, as well as location of required mitigation landscaping.

17. Changes to Pole Location and/or Alignment.

Any changes to the pole location and/or alignment submitted as part of this Conditional Use shall be reviewed as a Land Use Exemption to this Conditional Use approval prior to construction. See LUC 20.306.175.

APPENDIX D

No. 74464-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION I

PUGET SOUND ENERGY, INC.,

Appellant/Cross-Respondent,

VS.

EAST BELLEVUE COMMUNITY COUNCIL,

Respondent/Cross-Appellant, and

CITY OF BELLEVUE,

Respondents.

BRIEF OF RESPONDENT CITY OF BELLEVUE

CITY OF BELLEVUE
OFFICE OF THE CITY ATTORNEY
Chad R. Barnes, WSBA No. 30480
Assistant City Attorney
Attorney for City of Bellevue
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I. INTRODUCTION

This matter involves Puget Sound Energy's (PSE) proposal to link the Lake Hills and Phantom Lake electrical substations with an additional 115kV transmission line in order to increase reliability and meet future demands. The project underwent over four years of regulatory permit analysis before being approved by the City of Bellevue (City). However, without consideration of the project as a whole, the East Bellevue Community Council (EBCC) disapproved PSE's conditional use permit focusing exclusively on the EBCC's own parochial concerns. The City requests that the trial court's Order dismissing PSE's LUPA petition be reversed and Resolution No. 550 be vacated.

II. ASSIGMENTS OF ERROR

The City joins in the assignments of error and legal arguments put forth in Puget Sound Energy Inc's Opening Brief.

III. (PSE) STATEMENT OF THE CASE

The City incorporates PSE's statement of the case.

IV. SUMMARY OF ARGUMENT

The City provides the following brief argument and recitation of the facts from the record to assist the Court in understanding the

PSE originally applied for the project in December, 2011. Prior to its application PSE engaged the City for several years regarding siting for the project. Linking the Phantom Lake and Lake Hills substations has been part of PSE's Electrical Facilities Plan since 1993. AR 76, 81.

arguments asserted by PSE and to point out factual errors made by the EBCC.

V. ARGUMENT

148TH Avenue is not an "Urban Boulevard".

The City's Comprehensive Plan outlines aspirational goals balancing the needs of residential neighborhoods with utilities and a coordinated design esthetic. In this matter, the EBCC's findings in support of Resolution No. 550 mischaracterize the nature of 148th Avenue under the City's Comprehensive Plan. The EBCC's finding No. 9 asserts that 148th Avenue is an "Urban Boulevard" and thus siting electrical facilities along the route is incompatible with the Comprehensive Plan. AR 3016-3020. Simply put, nothing in the City's Comprehensive Plan prevents electrical facilities from being sited along 148th Avenue. Instead, the City's Comprehensive Plan provides, in part, that the City will:

Work with Puget Sound Energy to implement the electrical service system servicing Bellevue in such a manner that new and expanded transmission and substation facilities are compatible and consistent with the land use pattern established in the Comprehensive Plan.

UT-72; AR 240,

Notably, the City's Comprehensive Plan does not use the term "urban boulevard" nor does it designate 148th Avenue as an "urban boulevard." Instead, the City has an urban boulevard's initiative, which is a program that explores ways to improve neighborhood livability and character as well as the environment through increased tree canopy, natural drainage practices and enhanced streetscapes. 148th Avenue is not part of the urban boulevard initiative.

Additionally, the City's Comprehensive Plan states:

Design, construct, and maintain facilities to minimize their impact on surround neighborhoods.

UT-5; AR 237.

Here, the City undertook a Comprehensive Plan Policy Analysis weighing the competing goals, aspirations and policies within the plan. The City found that the proposed route along 148th Avenue with over \$856,740.003 pledged by PSE toward environmental mitigation and restoration work was compatible with the Comprehensive Plan. By running the proposed transmission lines down a major arterial (148th Avenue) the proposal avoids established single family neighborhoods in favor or more commercial corridors. See Comprehensive Plan - Policy Analysis, AR 236-245. In contrast, the EBCC's findings underlying Resolution 550 and disapproving the project do not address the project as a whole and focus only on the EBCC's narrow concerns regarding the aesthetics of 148th Avenue. The EBCC's disapproval of this project reaches beyond its jurisdiction, affecting over 12,400 citizens served by the substations at issue. Many of these customers reside outside the EBCC's jurisdiction and thus will not benefit by increase electrical reliability due to the EBCC's disapproval. See Staff Report Addressing Project Need and Service Area, AR 120-122.

See AR 133.

In short, to the extent that the EBCC characterized 148th Avenue as an "urban boulevard" thus suggesting that the street is entitled to special protection or consideration under the Comprehensive Plan the EBCC is both factual and legally mistaken. Here, by mischaracterizing the nature of 148th Avenue, the EBCC attempts to support its not-in-my-backyard concerns at the expense of the project and the City as a whole.

VI. CONCLUSION

The City joins in positions put for in PSE's Opening Brief and requests that the trial court's Order dismissing PSE's LUPA petition be reversed and Resolution No. 550 be vacated.

Dated this 23rd day of May, 2016.

Respectfully submitted,

CITY OF BELLEVUE OFFICE OF THE CITY ATTORNEY Lori M. Riordan, City Attorney

Chad R. Barnes, 30480

Assistant City Attorney

Attorney for City of Bellevue