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BEFORE THE CENTRAL PUGET SOUND  
GROWTH MANAGEMENT HEARINGS BOARD  
STATE OF WASHINGTON

CITY of SHORELINE, TOWN of )  
WOODWAY and SAVE RICHMOND )  
BEACH, et al., )  
 )  
Petitioners, )  
 )  
vs. )  
SNOHOMISH COUNTY, )  
 )  
Respondent, )  
 )  
and )  
 )  
BSRE Point Wells, LP, )  
 )  
Intervenor. )

Coordinated Case Nos.  
09-3-0013c and 10-3-0011c  
*(Shoreline III and Shoreline IV)*  
**INTERVENOR BSRE POINT WELLS,  
LP's RESPONSE TO MOTIONS**

**I. RESPONSE TO SAVE RICHMOND BEACH'S DISPOSITIVE MOTION  
REGARDING LACK OF PUBLIC NOTICE (Shoreline IV).**

**A. INTERVENOR'S ADOPTION AND INCORPORATION OF  
RESPONDENT SNOHOMISH COUNTY'S RESPONSE TO SAVE  
RICHMOND BEACH'S DISPOSITIVE MOTION.**

Intervenor BSRE Point Wells, LP ("BSRE" or "Intervenor") fully supports and hereby  
adopts and incorporates herein Respondent Snohomish County's Response to Petitioner

COPY

1 Save Richmond Beach's Dispositive Motion Regarding Lack of Notice (the "Notice  
2 Motion").

3  
4 B. INTERVENOR'S FURTHER RESPONSE TO SAVE RICHMOND  
5 BEACH'S DISPOSITIVE MOTION.

6 Save Richmond Beach ("SRB") bases its Notice Motion on a misleading and  
7 inaccurate factual pattern which can be easily refuted by an examination of the County's  
8 published public notices, Council minutes, code amendments and of SRB's own comments  
9 and correspondence.

10  
11 SRB contends that the Snohomish County Council "made new and substantive  
12 changes to the Urban Center development regulations that were never presented to the  
13 public for review and comment and were beyond the range of alternatives considered  
14 during the public process." (Emphasis added.)<sup>1</sup>

15  
16 SRB describes the two allegedly "new" amendments as: "(1) changing the maximum  
17 allowable distance to a transit stop or station from ¼ to ½ mile, or allowing developers to  
18 meet this requirement by providing 'van pools' to transport people to a transit stop if  
19 further than ½ mile; and (2) creating a new 'Development Agreement Process'. . . ."  
20 (Underlining in original.)<sup>2</sup>

21  
22 The first amendment will generally be referred to herein as the "transportation  
23 access amendment" and the second amendment will be referred to herein as the "process  
24 amendment."  
25  
26

27 <sup>1</sup> SRB Motion, page 2 lines 14-17

28 <sup>2</sup> SRB Motion, page 2 lines 18-23

1 The "Process Amendment" requires a good faith effort between the applicant and  
2 neighboring jurisdictions to negotiate an agreement regarding the development restrictions  
3 imposed on the property. If negotiations are successful and result in an agreement, then the  
4 questioned amendment provides that the resulting agreement shall be reviewed as a  
5 development agreement under pre-existing county regulations.<sup>3</sup> If negotiations do not result  
6 in such an agreement, then the application shall be reviewed first by a design review board  
7 and thereafter by the Hearing Examiner under the land use code's "Type 2" review  
8 procedures.<sup>4</sup>  
9  
10

11 1. The Process Amendments Were Either Properly Noticed or Were Within  
12 the Published Scope of Alternatives.

13 The County's April 10, 2010 "Notice of Continuation of Public Hearing" for the  
14 April 21, 2010 hearing (Index #152) provides that the Council may consider additional  
15 amendments. Among those proposed amendments listed for possible consideration were  
16 Amendments 7, 7A and 7B, each of which address the negotiation of interlocal agreements  
17 ("ILA's") with neighboring jurisdictions.<sup>5</sup> The notice also listed proposed Amendments 9,  
18 9A, 9B and 9C, each of which would change the process for the review of Urban Center  
19 applications to a Type 2 review whereby the permit decision would be made by the Hearing  
20 Examiner. Amendment 9C proposed to create a "hybrid project review process" that  
21 would involve the creation of a design review board which would make recommendations  
22 to the Hearing Examiner.  
23  
24  
25

26 <sup>3</sup> SCC 30.75 et. seq.

27 <sup>4</sup> SCC 30.34A.180

28 <sup>5</sup> at page 14

1 The published notice for the April 21 hearing also specifically lists proposed  
2 Amendment 12A which dealt generally with review procedures and which proposed that a  
3 development agreement should be utilized as the proper mechanism for addressing the  
4 concerns of the surrounding jurisdictions and residents.<sup>6</sup> Amendment 12A was proposed  
5 and sponsored by Shoreline, Woodway and Save Richmond Beach.  
6

7 In their joint letter of April 12, 2010 to Council Chair Dave Somers (Index #235),  
8 Save Richmond Beach and the other Petitioners requested that the Council require that a  
9 development agreement between an applicant and the neighboring jurisdictions should be  
10 made mandatory and utilized as part of the review of each urban center application. The  
11 April 12, 2010 letter supports the development agreement language included in their  
12 proposed Amendment 12A. As acknowledged in its motion, SRB counsel then attended and  
13 provided testimony at the April 21, 2010 Council hearing regarding these matters.<sup>7</sup>  
14

15  
16 The meeting minutes of the Administrative Session on April 26, 2010 (Index #114)  
17 indicate that "Council Chair Gossett suggested that PDS (Planning and Development  
18 Services) and the Prosecutor's Office work together with PDS to continue review of the  
19 ordinance and amendments and provide recommendations to the council . . . for what  
20 pieces of the process should be kept . . . ." Several Council members suggested that if a  
21 binding interlocal or development agreement as contemplated by Amendments 7B and 12A  
22 were successfully negotiated, then design board and hearing examiner review became  
23 redundant. Council staff also stated that she had obtained advice from the Prosecuting  
24 Attorney's office on two issues: (1) whether a private party applicant can be a proper party  
25  
26

27  
28 <sup>6</sup> page 28 of 31

1 to an interlocal agreement (an agreement between governmental entities); and (2) if a city  
2 can legally execute a development agreement covering property outside its jurisdictional  
3 boundaries?  
4

5 At the May 5, 2010 continuation of the April 26 public hearing, Councilmember  
6 Somers suggested language to clarify what had already been noticed and about which the  
7 Council had heard extensive testimony. His suggestion, which became the “process  
8 amendment,” was not new. It merely took separate, inconsistent pre-existing concepts  
9 (interlocal and development agreements on the one hand and design review and Hearing  
10 Examiner Type 2 proceedings on the other, each of which the Petitioners had themselves  
11 either proposed or supported) and changed the labels of the agreements to address legal  
12 concerns regarding the proper parties for each type of agreement. Councilmember Somers  
13 then reconciled the separate processes by requiring that the applicant and jurisdictions  
14 should first try to negotiate an agreement between themselves. If successful, then that  
15 agreement could form the basis of a development agreement between the applicant and the  
16 county which could be reviewed under SCC 30.75, the county’s existing regulations for  
17 such agreements. If the applicant and the jurisdictions could not reach agreement, then the  
18 application would be subject to review by the design review board and Hearing Examiner  
19 under Type 2 review procedures.  
20  
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22

23 This “new and substantive change” that had “never been presented” to the public  
24 and which went “beyond the range of alternatives considered during the public process”  
25 was, in fact, none of the above. The amendment combined long-discussed but inconsistent  
26  
27

28 <sup>7</sup> SRB Motion, page 5, lines 15-18

1 review procedures, about which SRB had testified, into an approach which resolved those  
2 inconsistencies. Removing inherent inconsistencies between properly noticed review  
3 concepts is certainly within the scope of those notices.

4  
5 2. The Transportation Access Amendments Were Either Properly Noticed  
6 or Were Within the Published Scope of Alternatives.

7 The history of the transportation access amendments is quite similar. SRB's own  
8 testimony and correspondence belie any argument that these amendments were "new and  
9 substantive" or that they arose only after the close of public testimony.

10  
11 Prior to the final public hearings, members of the Council occasionally expressed  
12 interest in ensuring that future urban centers would be designed around and would make  
13 actual use of high occupancy transportation. Proposed Amendments 10, 10A, 10B and  
14 10C, which were included in the County's April 10, 2010 notice, each sought to address  
15 definitional and "access to transit" requirements. Amendment 10 proposed adding  
16 language to the definition of an Urban Center which would require that centers be located  
17 within ¼ mile of existing or planned stations. Amendments 10A and 10B similarly  
18 contained the ¼ mile requirement.  
19  
20

21 In its letter to the Council dated April 21, 2010 (Index #254), SRB expressed its  
22 support for the ¼ mile requirement. After expressing such support, the letter ends with the  
23 following statement: "Not the ½ mile that was proposed in a previous round of  
24 amendments." (Emphasis added.) SRB also attached the April 2, 2010 report of the Urban  
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1 Land Institute (Index #114<sup>8</sup>) which had reviewed the draft UC code at the Council's  
2 request. In its letter, SRB argued that the ULI report was so important that it should be  
3 added after the fact to the record for the Shoreline III ordinances.<sup>9</sup> The ULI report makes  
4 the following recommendation regarding transit accessibility: "Walking radius:  $\frac{1}{4}$  mile for  
5 bus transit;  $\frac{1}{2}$  mile for true rapid transit, but only if that  $\frac{1}{2}$  mile is safe and pleasant."  
6 (Emphasis added.)<sup>10</sup>

7  
8 The change from  $\frac{1}{4}$  to  $\frac{1}{2}$  mile was made in part on reliance of the ULI  
9 recommendations. It was also made in recognition of the fact that portions of a larger  
10 urban center site like Point Wells may be slightly more distant than  $\frac{1}{4}$  mile from a centrally  
11 located station.  
12

13 Intervenor suggests that SRB has misread the intent and import of the "van pool"  
14 language added to SCC 30.34A.085. The April 10, 2010 published notice (Index #152)  
15 specifically lists proposed Amendment 10A which read at that time as follows:  
16

17 **30.34A.085. Access to public transportation.** Business or residential  
18 buildings with an urban center either (1) must be constructed with one-  
19 quarter mile of existing or planned stops or stations for high capacity transit  
20 routes, or (2) must provide for new stops or stations within one-quarter mile  
21 of any business or residence and work with transit providers to assure use of  
22 the new stops.

23 As is evident is each of the various versions of Amendment 10<sup>11</sup>, the intent was to  
24 ensure that the appropriate level of transit services be available within a reasonable time

25 <sup>8</sup> The ULI report is attached as an exhibit to the minutes of the April 5, 2010 Council Administrative  
26 Session.

27 <sup>9</sup> at page 2

28 <sup>10</sup> Question 3:TOD at page 10

<sup>11</sup> Index #152, page 23

1 frame. There was also the general recognition that applicants should take reasonable steps  
2 to encourage use of nearby services until such time as stops, stations or routes could be  
3 provided within the stated distance requirement. Thus, the adopted language of this code  
4 section includes language which was intended to require applicants to provide access to  
5 transit until such time as on-site service becomes available.  
6

7 The adopted language is as follows:

8 **30.34A.085. Access to public transportation.**

9 Business or residential buildings within an urban center either:  
10

- 11 (1) Shall be constructed within one-half mile of existing or planned stops or stations  
12 for high capacity transit routes such as light rail or commuter rail lines or  
13 regional express bus routes or transit corridors that contain multiple bus routes;  
14 (2) Shall provide for new stops or stations for such high capacity transit routes or  
15 transit corridors within one-half mile of any business or residence and coordinate  
16 with transit providers to assure use of the new stops or stations; or  
17 (3) Shall provide a mechanism such as van pools or other similar means of  
18 transporting people on a regular schedule in high occupancy vehicles to  
19 operational stops or stations for high occupancy transit.

20 SRB apparently interprets the van pool language in section 3 as providing a  
21 permanent escape from the transit availability requirements contained in sections 1 and 2.

22 We disagree. It has never been the intent of Intervenor to utilize the "van pool"  
23 language as a means of avoiding transit availability compliance. Similarly, we do not  
24 believe that the Council intended to provide such a loop hole. The minutes of the Council's  
25 May 5 General Legislative Session (Index #327) confirm Councilmember Somers' intent as  
26 follows: "He (Councilmember Somers) stated that this amendment would require an urban  
27  
28

1 center to provide van pool or other access to transit until transit service is established by a  
2 transit agency.”<sup>12</sup>

3           Regardless, SRB’s concern is misplaced. Even if section 3 could be read as  
4 allowing an escape from sections 1 and 2, other code provisions should preclude that  
5 possibility.  
6

7           The code defines Urban Centers as follows:

8           "Urban center" means an area with a mix of high-density residential, office and  
9 retail uses with public and community facilities and pedestrian connections located  
10 within one-half mile of existing or planned stops or stations for high capacity transit  
11 routes such as light rail or commuter rail lines, regional express bus routes, or  
12 transit corridors that contain multiple bus routes or which otherwise provide access  
13 to such transportation as set forth in SCC 30.34A.085.”<sup>13</sup>

14           Thus, by definition, an urban center must meet the transit availability requirements,  
15 regardless of the addition of the “interim” means of providing transit service established by  
16 section 3.

17           The van pool language is consistent with and within the scope of the Council’s  
18 notice regarding its intent to ensure transit availability. We see no means by which a  
19 reasonable reading of that language, particularly when viewed in conjunction with the  
20 codified definition of an urban center, can lead to the conclusion that section 3 provides an  
21 escape or loop hole to the transit availability requirements. To the extent that the Board  
22 concludes otherwise, Intervenor would not object to a condition or other agreed mechanism  
23 by which the code language would be clarified to remove any ambiguity.  
24

25  
26  
27           <sup>12</sup> at page 5

28           <sup>13</sup> SCC 30.91U.085

1                   3. SRB's Motion Should be Denied Because the County's Public Notice  
2                                   Complied with the Requirements of the GMA.

3                   Intervenor adopts and incorporates the arguments offered by Respondent Snohomish  
4 County in its Response to SRB's Motion. Intervenor also relies on Burrow v. Kitsap  
5 County<sup>14</sup> which held that "[t]here is no GMA requirement that the County must have  
6 prepared a document for public inspection specifically proposing all elements of the  
7 amendments ultimately adopted by the County; it is enough that the changes to the County-  
8 proposed amendments were within the scope of alternatives available for public  
9 comment."<sup>15</sup> The case then found that even though Kitsap County did not specifically  
10 publish a document outlining the eventual ordinances it passed as amended from the  
11 originally noticed ordinances, the fact that the amendments were discussed at public  
12 meetings was sufficient for the purpose of complying with GMA notice requirements.  
13

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16                   4. The Minor Defects of Notice Alleged by SRB Do Not Warrant a Finding  
17                                   of GMA Noncompliance.

18                   Intervenor adopts and incorporates the arguments offered by Respondent Snohomish  
19 County in its Response to SRB's Motion.  
20

21                   5. Even if the County Failed to Provide Proper Public Notice, the  
22                                   Ordinances are Not Invalid Under RCW 36.70A.302.

23                   Intervenor adopts and incorporates the arguments offered by Respondent Snohomish  
24 County in its Response to SRB's Motion. In addition, Intervenor argues as follows:  
25  
26

27                   <sup>14</sup> CPSGMHB Case No. 99-3-0018, FDO

28                   <sup>15</sup> at page 10

1           Despite the fact that SRB's motion addresses two very minor provisions of the  
2 Urban Centers Code, it requests that the Board enter findings and an order declaring the  
3 entire ordinance invalid and remanding the ordinance to the county with directions for  
4 further public process.<sup>16</sup> The relief sought, in light of the exhaustive public participation  
5 process and the very minor import of the questioned code provisions, constitutes obvious  
6 overkill.  
7

8           Invalidity of any code provision is an extreme remedy and is wholly inappropriate in  
9 the present circumstance. The GMA grants the Board the authority to rule on portions of  
10 challenged development regulations.<sup>17</sup> Should the Board have concerns over the county's  
11 compliance which warrant an invalidity determination, a ruling limited to the offending  
12 code sections is the appropriate remedy.  
13

14                           6. The Board Should Delay Ruling on SRB's Motion.  
15

16           The Board has the discretion to determine the appropriate time for ruling on motions  
17 alleging shortcomings in notice and public participation requirements:

18                           If such a motion is timely brought, the presiding officer or the board shall  
19 determine whether to decide the notice and public participation issue(s) on  
20 motion or whether to continue those issues to the hearing on the merits.<sup>18</sup>  
21

22           Here, an exercise of that discretion to defer ruling on this motion is warranted. The  
23 County undertook an extensive public participation program conducted over a 36 month  
24 period including two Planning Commission public hearings, five Council public hearings  
25 and eight Council committee meetings. SRB was intimately involved throughout the public  
26

27                           <sup>16</sup> SRB Motion, page 3, lines 12-14

28                           <sup>17</sup> RCW 30.70A.302(1).

<sup>18</sup> WAC 242-02-530(6)

1 process. It now challenges only two relatively insignificant code provisions despite the fact  
2 that each was either expressly noticed or was well within the scope of the noticed topics.  
3 Despite SRB's contentions to the contrary, the record clearly establishes that SRB provided  
4 both written and oral testimony regarding the topics now claimed to have been raised after  
5 the close of testimony.  
6

7         Should the Board decide to presently rule on SRB's motion, and should the Board  
8 determine that the specifically challenged code provisions are flawed, Intervenor would not  
9 object to a stipulation or other agreement whereby the parties agreed to clarifying language  
10 for consideration by the Council on remand. The record, however, demonstrates the  
11 following: (1) SRB had advance knowledge of, provided testimony on, and in one area even  
12 proposed the adoption of the ordinance provisions and subject matter which it now  
13 challenges; and (2) the questioned ordinance provisions were either specifically noticed or  
14 within the scope of the matters for which notice was given. Thus, SRB's motion should be  
15 denied.  
16  
17

18 **II. RESPONSE TO SNOHOMISH COUNTY'S DISPOSITIVE MOTION FOR**  
19 **PARTIAL DISMISSAL OF PARTIES AND ISSUES.**  
20

21         Intervenor supports and hereby incorporates Snohomish County's dispositive  
22 motion.  
23

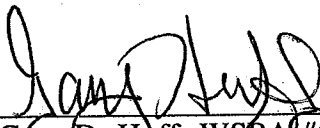
24 **III. RESPONSE TO PETITIONERS' MOTION TO SUPPLEMENT RECORD**  
25 **AND MOTION FOR SITE VISIT.**

26         Intervenor's only objection to Petitioners' Motion to Supplement the Record is to  
27 the aerial maps and traffic materials (GMHB Index Nos. 262-269). These materials are not  
28

1 relevant to the matters before the Board. Similarly, the inclusion of traffic information  
2 including the average daily trip counts on these photos and the WSDOT 2009 Annual  
3 Traffic Report represent an attempt to raise issues not properly before the Board.  
4

5 Petitioners' request for a site visit was previously raised and rejected at the  
6 Prehearing Conference. Should the Board now decide to conduct a site visit, Intervenor has  
7 no objection per se. However, access to the site is restricted due to US Coast Guard and  
8 Department of Homeland Security MARSEC restrictions. Intervenor cannot allow anyone  
9 onto the site without a Paramount Petroleum escort for the entire site visit. Paramount is  
10 an affiliate of Intervenor BSRE, which complicates compliance with ex parte constraints.  
11

12 DATED this 3rd day of January, 2011

13  
14  
15   
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17 Douglas A. Luetjen, WSBA #15334  
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## DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington, that on January 3, 2011, at Seattle, Washington, the foregoing Intervenor's Response to Motions was served on the GMHB and the following persons by the method indicated:

Via Email, with Original and 4 Copies via U. S. Mail to:

Central Puget Sound Growth Management Hearings Board  
Office of the Growth Management Hearings Board  
PO Box 40953  
Olympia, WA 98504-0953  
Email: central@cps.gmhb.wa.gov

Via Email and U. S. Mail to:

Zachary R. Hiatt; Elaine Spencer; and  
Clair L. Molesworth  
Graham & Dunn PC  
2801 Alaskan Way, Suite 300  
Seattle, WA 98121  
Emails: zhiatt@grahamdunn.com  
          espencer@grahamdunn.com  
          cmolesworth@grahamdunn.com

Via Email and U. S. Mail to:

John Moffat; Martin D. Rollins; Matthew A. Otten; Bree Urban  
Snohomish County Prosecuting Attorney's Office  
504 - 3000 Rockefeller Avenue  
Everett, WA 98201-4046  
Emails: jmoffat@co.snohomish.wa.us  
          Martin.rollins@co.snohomish.wa.us  
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          burban@snoco.org

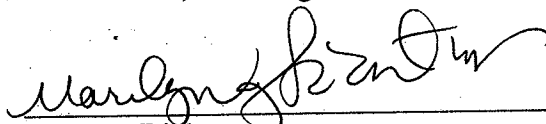
Via Email and U. S. Mail to:

Ian R. Sievers, City Attorney  
City of Shoreline  
17500 Midvale Avenue N.  
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          cao@shorelinewa.gov

Via Email and U. S. Mail to:

Wayne D. Tanaka  
Ogden Murphy Wallace PLLC  
1601 5<sup>th</sup> Avenue, Suite 2100  
Seattle, WA 98101-1686  
Email: wtanaka@omwlaw.com

DATED this 3rd day of January, 2011 at Seattle, Washington.

  
Marilyn Richter