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BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
CENTRAL PUGET SOUND REGION  
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)*

SNOHOMISH COUNTY'S  
RESPONSE TO PETITIONERS'  
MOTION TO SUPPLEMENT THE  
RECORD AND MOTION FOR SITE  
VISIT

**I. INTRODUCTION**

Pursuant to Section 1.A of Petitioners' Motion to Supplement the Record and Motion for Site Visit (the "Motion"), the City of Shoreline ("Shoreline"), the Town of Woodway ("Woodway"), and Save Richmond Beach, Inc. ("SRB") collectively ask the Board to allow supplementation of the record for the *Shoreline III* case. Pursuant to Section 1.B of the Motion, Shoreline and SRB together ask the Board to allow certain additional supplementation of the record for

1 the *Shoreline III* case, and ask the Board to conduct a site visit to the Point Wells  
2 property. Respondent Snohomish County asks the Board to deny the Motion in  
3 part, as described below.

4 The County objects to Shoreline and SRB's request for a site visit, and asks  
5 the Board to deny the Motion with respect to the requested site visit. The County  
6 has no objection to the supplementation of the record for the *Shoreline III* case with  
7 the following four documents proposed by Shoreline and SRB pursuant to  
8 Section 1.B of the Motion:  
9

- 10 (i) Proposed Supplemental GMHB Index #270, a map from Sound  
11 Transit entitled 2005 Long-Range Plan;<sup>1</sup>  
12 (ii) Proposed Supplemental GMHB Index #271<sup>2</sup>, a document from Sound  
13 Transit entitled North Corridor Transit Project;  
14 (iii) Proposed Supplemental GMHB Index #272, a brochure from Sound  
15 Transit entitled Sounder Commuter Rail, Fact Sheet,  
16 September 2007;<sup>3</sup> and  
17 (iv) Proposed Supplemental GMHB Index #273, King County Metro  
18 Transit bus schedules for Routes 348, 347 and 304.<sup>4</sup>

19 The County objects to the supplementation of the record with all other documents  
20 proffered by Petitioners, and asks the Board to deny the Motion with respect to  
21 those documents.

22 <sup>1</sup> As Petitioners assert, Proposed Supplemental GMHB Index #270 was inadvertently omitted from  
23 the record, and should have appeared at Index #14. Accordingly, this document does not constitute  
24 supplemental evidence and should be admitted by the Board.

25 <sup>2</sup> Proposed Supplemental GMHB Index #271 is also offered as supplemental evidence by Intervenor  
26 Point Wells, LP. This document provides background information that could be of substantial  
assistance to the Board.

<sup>3</sup> Proposed Supplemental GMHB Index #272 provides background information regarding rapid  
transit that could be of substantial assistance to the Board.

<sup>4</sup> Proposed Supplemental GMHB Index #273 is also offered as supplemental evidence by Intervenor  
Point Wells, LP. These bus schedules provide background information regarding mass transit that  
could be of substantial assistance to the Board.

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## II. BACKGROUND AND STATEMENT OF FACTS

On August 12, 2009, the County Council adopted the two ordinances being challenged in the *Shoreline III* case, Amended Ordinances Nos. 09-051 and 09-038 (together, the "Shoreline III Ordinances") [Index #246 and 245, respectively (Core Documents)]. The Shoreline III Ordinances generally approved a request by Intervenor BSRE Point Wells, LP (formerly Paramount of Washington, LLC) to amend the comprehensive plan map and zoning map (No. 09-038) and comprehensive plan policies (No. 09-051) to convert its land on Point Wells, southwest of Woodway, from the long-time but now defunct use of tanks for oil storage to a mixed use commercial and residential development. The effective date of the map changes made by Amended Ordinance No. 09-038 was delayed 180 days to give the County an opportunity to adopt implementing development regulations. Those regulations are the subject of the *Shoreline IV* case.

On May 12, 2010, the County Council adopted the two ordinances being challenged in the *Shoreline IV* case, Amended Ordinances Nos. 09-079 and 09-080 (together, the "Shoreline IV Ordinances") [Index #317 and 318, respectively (Core Documents)]. Amended Ordinance No. 09-079 adopted amendments to the County's development regulations and a new chapter 30.34A SCC regarding standards for the Urban Center ("UC") zone. Amended Ordinance No. 09-080 legislatively rezoned 1,455.58 acres of unincorporated land from their pre-existing zones to UC in six different areas in southwest Snohomish County. These area-

1 wide rezones included a 61-acre parcel of land located at Point Wells, which was  
2 rezoned from Planned Community Business ("PCB") to UC.

3 Petitioners Shoreline, Woodway and SRB timely filed petitions with the  
4 Board challenging the Shoreline III Ordinances, Case No. 09-3-0013c, and later the  
5 Shoreline IV Ordinances, Case No. 10-3-0011c.

6 The Board issued a Prehearing Order (the "PHO") in these coordinated  
7 cases on December 15, 2010. The PHO established a deadline of December 21,  
8 2010, for filing dispositive motions and motions to supplement the record.  
9 Petitioners timely filed this Motion on December 21, 2010.  
10

### 11 III. ISSUES

12 1. Should the Board supplement the record by conducting a site visit to  
13 the Point Wells property as requested by Shoreline and SRB pursuant to  
14 Section 1.B of the Motion?

15 2. Should the Board allow the supplementation of the record for the  
16 *Shoreline III* case with the documents proffered collectively by Shoreline, Woodway  
17 and SRB pursuant to Section 1.A of the Motion?  
18

### 19 IV. ARGUMENT

#### 20 A. Supplementation of the Record is Allowed Only in Rare 21 Circumstances.

22 "[T]he GMA requires the Board to base its decision on the Record (sic) that  
23 was before the County."<sup>5</sup> RCW 36.70A.290(4) reads, in its entirety, as follows:  
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25 <sup>5</sup> Larson Beach Neighbors and Jeanie Wagenman v. Stevens County, EWGMHB Case No. 07-1-  
26 0013 (Final Decision and Order, October 6, 2008) at 9.

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The board shall base its decision on the record developed by the city, county, or the state and supplemented with additional evidence if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision.

"This Board interprets...RCW 36.70A.290(4) to mean that the Board shall limit its review to the record below and only in special circumstances allow additional evidence, either by way of documents or witness testimony."<sup>6</sup> "Under the provisions of this section a board renders its decision in a case based upon the evidence contained in the record developed by the local government during the time of adoption of the challenged action except in rare instances where supplemental evidence is allowed."<sup>7</sup> In order to allow supplemental evidence, "the Board itself must find that the 'additional evidence would be necessary or of substantial assistance to the Board (sic) in reaching its decision.' RCW 36.70A.290(4). In actual practice, only in extremely limited situations will this Board allow such evidence."<sup>8</sup>

WAC 242-02-540 reiterates the rule established by RCW 36.70A.290(4), and establishes procedures for parties to request that supplemental evidence be admitted:

<sup>6</sup> Tulalip Tribes of Washington v. Snohomish County, CPSGMHB Case No. 96-3-0029 (Order on Motions, October 2, 1996), 1996 WL 912622 at \*3, citing Twin Falls, Inc. et al., v. Snohomish County, CPSGMHB Case No. 93-3-0003 (Order Partially Granting Petitioners' Motions to Supplement the Record and Order Granting County's Motion for Limited Discovery, June 4, 1993) at 3.  
<sup>7</sup> Reading, et al., v. Thurston County, WWGMHB Case No. 94-2-0019 (Final Order, March 6, 1995), 1995 WL 903152 at \*3.  
<sup>8</sup> Southgate Neighborhood Council, et al., v. City of Spokane, et al., EWGMHB Case No. 08-1-0014 (Order on Petitioner's Motion for Reconsideration, Request for Official Notice, Or In the Alternative, Motion to Supplement the Record, and Second Motion to Supplement the Record, November 4, 2008) at 6.

1 Generally, the board will review only the record developed by the  
2 city, county, or stat in taking the action that is the subject of review  
3 by the board. A party by motion may request that the board allow  
4 such additional evidence as would be necessary or of substantial  
5 assistance to the board in reaching its decision, and shall state its  
6 reasons.

7 (emphasis added). Pursuant to WAC 242-02-540, then, “[t]he motions of the  
8 parties must set forth the reasons why the parties believe that the additional  
9 evidence would be necessary or of substantial assistance to the Board.”<sup>9</sup>

10 **B. A Site Visit Is Unnecessary and Would Inappropriately Supplement the**  
11 **Record.**

12 In this case, Petitioners Shoreline and SRB ask the Board to conduct a site  
13 visit to the Point Wells property. The only reasons Shoreline and SRB provide to  
14 explain why a site visit is necessary or of substantial assistance to the Board in this  
15 case are as follows:<sup>10</sup>

16 [Conducting a site visit] is standard practice for Hearing Examiners  
17 or other officers or bodies considering SEPA appeals or other  
18 quasi-judicial land use decisions as providing an appreciation of the  
19 impacts of development that cannot adequately be provided  
20 through a paper record.

21 This feeble explanation is both inaccurate and unpersuasive. The County  
22 disagrees that it is “standard practice” for Hearing Examiners or other decision  
23 making bodies to conduct site visits. However, even if that assertion were true, the  
24 Board does not sit in a capacity that is analogous to a Hearing Examiner or other  
25 quasi-judicial body charged with making land use decisions.

26 <sup>9</sup> Heikkila v. City of Winlock, WWGMHB Case No. 04-2-0020c (Order on Motions to Supplement  
and/or Add to the Record, December 16, 2004), 2004 WL 3111833 at \*2.

<sup>10</sup> Motion at p. 3, lines 17-20.

1 Hearing examiners and other similar quasi-judicial decision makers, such as  
2 the shorelines hearings board,<sup>11</sup> are triers of fact, conducting *de novo* evidentiary  
3 hearings. They accept and evaluate all testimony and written or other evidence  
4 provided to them. They make factual determinations in the first instance regarding  
5 that evidence, and legal conclusions based on that evidence. The Board, by  
6 contrast, is an appellate body whose legislative mandate is to review the decisions  
7 of jurisdictions planning under the GMA and determine whether or not those  
8 decisions comply with the GMA.<sup>12</sup> As is customary for appellate tribunals, the  
9 Board makes its decision based on the record made before the county or city  
10 legislative body below.<sup>13</sup>

12 As discussed in Section IV.A above, "[t]he Board attempts to confine its  
13 review to the same record that was available to the decision-makers."<sup>14</sup>  
14 Conducting a site visit to the Point Wells property would provide the Board  
15 members with information that was not before the County Council when it made the  
16 legislative decisions at issue in the *Shoreline III* and *Shoreline IV* cases. In the  
17 case of Henderson, et al., v. Spokane County, EWGMHB Case No. 08-1-0002

19  
20 <sup>11</sup> See RCW 90.58.170, .180.

21 <sup>12</sup> RCW 36.70A.280(1); RCW 36.70A.320(3); See Twin Falls, Inc. et al., v. Snohomish County,  
22 CPSGMHB Case No. 93-3-0003 (Final Decision and Order, September 7, 1993) 1993 WL 839715  
23 at \*38 (distinguishing the *de novo* review conducted by the Shorelines Hearings Board from the  
24 appellate review the Growth Board must conduct under the GMA, and contrasting the relaxed  
25 standards for accepting new evidence of the Pollution Control Hearings Board and the Shorelines  
26 Hearings Board from the stricter requirements applicable to the Growth Board under the GMA).

<sup>13</sup> RCW 36.70A.290(4); WAC 242-02-540; See South End Neighbors Defense Fund & Theodore  
Mahr, et al., v. Thurston County, WWGMHB Case No. 94-2-0019 (Order on Dispositive Motions,  
December 22, 1994), 1994 WL 907882 at \*1 (discussing that the Board's role is more like the role of  
a court of appeals than a superior court).

<sup>14</sup> Citizens for Responsible Growth, et al., v. Snohomish County, CPSGMHB Case No. 03-3-0013  
(Order on Motions, August 15, 2003), 2003 WL 23280065 at \*2.

1 (Order Denying Respondent's Motion for View of Subject Site By Growth Board  
2 and Parties, July 31, 2008), 2008 WL 4277159, the Eastern Washington Board  
3 held that conducting a site visit would be an inappropriate and unnecessary  
4 supplementation of the record, stating as follows:<sup>15</sup>

5 The GMA requires the Board to review the Record that was before  
6 Spokane County's Board of County Commissioners (BOCC) at the  
7 time of the decision which is now under challenge. Although the  
8 Board is permitted to supplement the Record with additional  
evidence, the Board must conclude such evidence is "necessary or  
of substantial assistance to the board in reaching its decision."

9 In this case, the Record is substantially detailed and voluminous in  
10 documentation by the County, Petitioners, applicants, and other  
11 sources. Included within the Record are numerous maps of the  
12 area in question and a wide variety of photographs taken of the  
13 subject property and the surrounding community. As in other cases  
14 involving land use, these documents, which were provided to the  
15 decision makers during the amendment process and the basis for  
16 their decision, are what the Board is required by statute to use to  
17 determine compliance with the GMA. Additional evidence in the  
18 form of a site visit places the Board in the awkward position of  
19 having more information to make our decision than the BOCC had  
20 to make theirs.

21 This Board seldom approves motions to supplement the Record  
22 with documents and evidence, and has rarely, if ever, approved a  
23 site visit by the board and parties.

24 The holding in Henderson should apply here, as the record in the *Shoreline III* case  
25 already contains numerous maps and photographs showing the layout of the Point  
26 Wells property and the surrounding area.<sup>16</sup> Because the record already contains

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23 <sup>15</sup> Henderson, et al., v. Spokane County, EWGMHB Case No. 08-1-0002 (Order Denying  
24 Respondent's Motion for View of Subject Site By Growth Board and Parties, July 31, 2008) at 5.

25 <sup>16</sup> See, e.g., Index #17 (14 maps); Index #23 (2 maps); Index #24 (2 maps); Index #96 (1 map);  
26 Index #104 (13 maps, 6 photographs); Index #116 (1 map); Index #131 (1 map); Index #143  
(1 map); Index #169 (8 maps); Index #172 (4 maps); Index #173 (1 map); Index #178 (1 map); and  
Index #232 (1 map).

1 such information, a site visit is unnecessary. Additionally, as the County Council  
2 did not conduct a site visit to the Point Wells property before adopting the  
3 Shoreline III Ordinances, under Henderson, any site visit by the Board members  
4 would be an inappropriate supplementation of the record that was before the  
5 County Council. For all of these reasons, the County asks the Board to deny the  
6 Motion for a site visit.

7 **C. Portions of the Supplemental Evidence Proffered by Petitioners Should**  
8 **Be Rejected By the Board.**

9 As discussed in Section IV.A above, the Board may allow the record to be  
10 supplemented only if the Board finds that the "additional evidence would be  
11 necessary or of substantial assistance to the Board in reaching its decision."<sup>17</sup> A  
12 party moving to include supplemental evidence must explain how the supplemental  
13 evidence meets that standard.<sup>18</sup> "In actual practice, only in extremely limited  
14 situations will this Board even allow such [supplemental] evidence."<sup>19</sup> Additionally,  
15 if "petitioners had ample opportunity to place written and oral expert testimony  
16 before the County....[their] failure to do so does not constitute a special  
17 circumstance that justifies the granting of the Motion to Supplement."<sup>20</sup>

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22 <sup>17</sup> RCW 36.70A.290(4).

<sup>18</sup> WAC 242-02-540.

<sup>19</sup> Twin Falls, Inc., et al., v. Snohomish County, CPSGMHB Case No. 93-3-0003 (Final Decision and Order, September 7, 1993), 1993 WL 839715 at \*38.

<sup>20</sup> Tulalip Tribes of Washington v. Snohomish County, CPSGMHB Case No. 96-3-0029 (Order on Motions, October 2, 1996), 1996 WL 912622 at \*3, citing Twin Falls, Inc. et al., v. Snohomish County, CPSGMHB Case No. 93-3-0003 (Order Partially Granting Petitioners' Motions to Supplement the Record and Order Granting County's Motion for Limited Discovery, June 4, 1993) at 3.

1 Here, Petitioners Shoreline, Woodway and SRB collectively ask the Board to  
2 add the following documents to the record for *Shoreline III*:

- 3 (i) Proposed Supplemental GMHB Index #262, an aerial map  
4 entitled Urban Center at Interstate 5 & 128<sup>th</sup> St. SE;
- 5 (ii) Proposed Supplemental GMHB Index #263, an aerial map  
6 entitled Urban Center at 152<sup>nd</sup> & State Route 99;
- 7 (iii) Proposed Supplemental GMHB Index #264, an aerial map  
8 entitled Urban Center at Point Wells;
- 9 (iv) Proposed Supplemental GMHB Index #265, an aerial map  
10 entitled Urban Center at State Route 527 & 196<sup>th</sup> St. SE;
- 11 (v) Proposed Supplemental GMHB Index #266, an aerial map  
12 entitled Urban Center at Interstate 5 & 164<sup>th</sup> St. SW;
- 13 (vi) Proposed Supplemental GMHB Index #267, an aerial map  
14 entitled Urban Center at State Route 99 & State Route 525;
- 15 (vii) Proposed Supplemental GMHB Index #268, an aerial map  
16 entitled Urban Center at Interstate 5 & 44<sup>th</sup> Ave. West; and
- 17 (viii) Proposed Supplemental GMHB Index #269, nine pages from  
18 WSDOT's 2009 Annual Traffic Report.

19 Petitioners offer little explanation regarding why these documents are necessary or  
20 would be of substantial assistance to the Board. The County submits that none of  
21 these documents meet those statutory criteria ("necessary or of substantial  
22 assistance to the board") for admission as supplemental evidence under  
23 RCW 36.70A.290(4). Additionally, the proper time and place for Petitioners to  
24 submit aerial maps, traffic information or other documents into evidence was during  
25 the legislative process that led to the County Council's adoption of the Shoreline III  
26 Ordinances. Submission of these documents to the Board at this juncture is tardy

1 and should be rejected, as the Board bases its decision on the materials that were  
2 available to the decision makers below.<sup>21</sup>

3 Yet another reason to reject Proposed Supplemental GMHB Index  
4 Nos. 262-269 is that each of these documents was created long after the County  
5 Council had adopted the Shoreline III Ordinances. In the case of Southgate  
6 Neighborhood Council, et al., v. City of Spokane, et al., EWGMHB Case No. 08-1-  
7 0014 (Order on Petitioner's Motion for Reconsideration, Request for Official Notice,  
8 Or In the Alternative, Motion to Supplement the Record, and Second Motion to  
9 Supplement the Record, November 4, 2008), the Eastern Washington Board stated  
10 that "[a]s a general proposition, we reject proffered supplemental evidence  
11 compiled after the decision of the local government has been made."<sup>22</sup> That Board  
12 explained the reasoning behind this rule more fully in the case of Larson Beach  
13 Neighbors/Wagenman v. Stevens County, EWGMHB Case No. 07-1-0013 (Final  
14 Decision and Order, October 6, 2008), 2008 WL 4948100, stating as follows.<sup>23</sup>

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17 Supplemental evidence compiled *after the decision* of the local  
18 government has been made is of little relevance in determining  
19 whether the County acted in compliance with the GMA *at the time it*  
20 *took the action under appeal.*

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23 <sup>21</sup> Larson Beach Neighbors and Jeanie Wagenman v. Stevens County, EWGMHB Case No. 07-1-  
0013 (Final Decision and Order, October 6, 2008) at 9.

24 <sup>22</sup> Southgate Neighborhood Council, et al., v. City of Spokane, et al., EWGMHB Case No. 08-1-  
0014 (Order on Petitioner's Motion for Reconsideration, Request for Official Notice, Or In the  
25 Alternative, Motion to Supplement the Record, and Second Motion to Supplement the Record,  
November 4, 2008) at 7.

26 <sup>23</sup> Larson Beach Neighbors/Wagenman v. Stevens County, EWGMHB Case No. 07-1-0013 (Final  
Decision and Order, October 6, 2008) at 9 (emphasis in original).

1 In this case, Proposed Supplemental GMHB Index No. 269 consists of 9  
2 pages taken from WSDOT's 2009 Annual Traffic Report. In turn, Proposed  
3 Supplemental GMHB Index Nos. 262-268 each contains data (the traffic count  
4 information) taken from Proposed Supplemental GMHB Index No. 269. WSDOT  
5 did not release its 2009 Annual Traffic Report until May 5, 2010.<sup>24</sup> The County  
6 Council adopted the Shoreline III Ordinances on August 12, 2009. Thus, the  
7 WSDOT 2009 Annual Traffic Report was not published until approximately 9  
8 months after the Shoreline III Ordinances were adopted. The Board should follow  
9 the rule articulated by the Eastern Washington Board in Southgate and Larson  
10 Beach and disallow supplemental material that was compiled long after the  
11 Shoreline III Ordinances were adopted.  
12

## 13 V. CONCLUSION

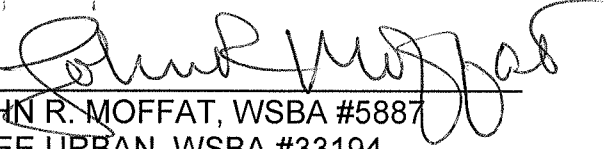
14 For the reasons discussed above, the County respectfully requests that the  
15 Board deny the Motion with respect to the requested site visit and deny the Motion  
16 to supplement the record with respect to the following documents: (i) Proposed  
17 Supplemental GMHB Index #262; (ii) Proposed Supplemental GMHB Index #263;  
18 (iii) Proposed Supplemental GMHB Index #264; (iv) Proposed Supplemental  
19 GMHB Index #265; (v) Proposed Supplemental GMHB Index #266; (vi) Proposed  
20 Supplemental GMHB Index #267; (vii) Proposed Supplemental GMHB Index #268;  
21 and (viii) Proposed Supplemental GMHB Index #269.  
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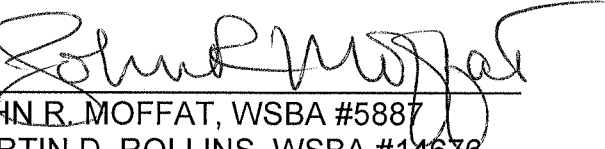
25 <sup>24</sup> See Declaration of Bree Urban in Support of Snohomish County's Response to Petitioners'  
26 Motion to Supplement the Record and Motion for Site Visit, filed herewith, at ¶ 4 and Exh. B.

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DATED this 3<sup>rd</sup> day of January 2011.

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