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SUPPLEMENT-
HEARING EXAMINER SUMMARY OF PARTIES' ORAL ARGUMENT
AND EXAMINER RESPONSE FOR OCTOBER 25, 2010 COUNCIL MEETING
Melki Rezone – L08TY403

In response to Councilmember Phillip's request forwarded by the Council Clerk, the Examiner offers the following summary and response to the parties' oral argument presented on the Melki rezone appeal at the October 11, 2010 Council meeting.

Applicant Melki's Oral Argument

1. The application is a modest request for an inoffensive rezone to allow a single use, a small used-car dealership that complies with all applicable codes and policies. No other RB uses would be permitted, and certain performance measures would protect against environmental impact. The rezone request is a "no harm, no foul" proposal.

HE response: The assessment of relative modesty and inoffensiveness of a land use and "no harm, no foul" is a subjective exercise; one person's modest and inoffensive proposal may be another's perception of harm. The Examiner subscribes to neither; those value judgments have been evaluated and decided in the legislative enactments of land use policy and development regulations that pertain. In this case as in any other, the Examiner has looked to the pertinent approval criteria, in this case contained in the development regulations (planning and zoning codes), the comprehensive plan and applicable Washington case law, as the sole context for recommendation.

The proposed use may be of relatively small size, but the county's policies and development regulations make no land use distinction based on the size of a vehicle dealer use, and the policy and code implications of the Regional Business rezone necessary for placement of the use on the property are significant regardless.

2. The Examiner has over-interpreted and over-parsed the language of policy and code to arrive at a contorted and distorted interpretation which has resulted in injustice to the Applicant.

HE: The Examiner's approach has been to make reasonable interpretation of the applicable law and policy. Where interpretive judgment is necessary in instances where meaning is not obvious from a plain reading, the Examiner has followed principles of statutory construction. This approach comports with Washington case law. [see, *e.g., Spokane County v. Specialty Auto & Truck Painting, Inc.*, 153 Wn.2d 238, 249, 103 P.3d 792 (2004)]

3. The potential RB zone designation has been applied to the property since 1995.

HE: The issue was not raised in the Applicant's appeal statement, but in any case this argument is irrelevant to the rezone approval criteria. That the potential zoning has been assigned to the property for 15 years is simply not germane. The implication is that actualization of the potential RB zone is somehow overdue. This mischaracterizes the nature of the "potential zone" map designation as established and regulated by the zoning code in KCC 21A.04.170 (quoted in Appendix A attached).

As can be seen from KCC 21A.04.170, the potential zone is a zone used "to designate properties *potentially* suitable for changes in land use...." (Emphasis added) The term "potential" is not defined in the in the zoning code [Chapter 21A.06 KCC], so under principles of statutory construction one resorts to its plain and ordinary meaning. [*Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 813, 828 P.2d 549 (1992)] A proper common

source of definition is a standard dictionary. *Webster's New Collegiate Dictionary* contains the following definition: "**potential**... *adj*... 1: existing in possibility: capable of development into actuality." [*Webster's* 900 (1977, G. & C. Merriam Co.]

From this definition and by the language of KCC 21A.04.170 cited above, the "potential" zone is just that, one of *potential* and therefore of *possibility*. And by regulation, that possibility is to be manifested, "actualized" as the code terms it, under the proper circumstances, which are conformity with the rezone criteria. The potential zoning designation does not carry with it any assurance of probability or guarantee. There is also no temporal default actualization, whereby actualization should occur merely because a period of time has elapsed from enactment. In the context of the enacted development regulations, it is possible the potential may never be realized.

As there is nothing in the code that mandates potential zone actualization by a certain period of time, a claim of overdue actualization amounts to a claim in *equity* (issues of fundamental fairness) that would preempt statutory and common law. Quasi-judicial decisionmakers do not have authority to adjudicate equity issues; they must be taken to a court of general jurisdiction, Superior Court. [*Chaussee v. Snohomish County*, 38 Wn.App. 630, 689 P.2d 1084 (1984)]

4. Mr. Melki exercised due diligence in researching the property and in that process was assured by DDES that the rezone would be "straightforward" and "no problem."

HE: This issue was also not raised in the appeal statement, and evidence of any DDES assurance is not in the record, but regardless, any DDES assurance of an application being "straightforward" and "no problem" was off-base. The rezone process is not a ministerial function of DDES, it is under Council authority requiring public hearings, with site-specific applications to be heard and recommended by the Hearing Examiner. Aside from being an inaccurate prediction in this case, since DDES's recommendation is to deny the rezone, any such "assurance" is contrary to the admonitions of Washington case law: "There is no presumption of validity favoring the action of rezoning;..." [*Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 874-75, 947 P.2d 1208 (1997), citing *Parkridge v. Seattle*, 89 Wn.2d 454, 462, 573 P.2d 359 (1978)] The burden of proof is on a rezone applicant to show conformity with the rezone criteria.

Any claim of an entitlement to the rezone based on a DDES informal assurance also amounts to a claim in *equity*, which as noted above cannot be decided quasi-judicially.

(In Council discussion about the claim of DDES assurance, there was a reference made to the *Nykreim* case decided by the Washington Supreme Court. [*Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002)] An *informal* assurance by DDES such as in this case is distinguishable from the issues in *Nykreim*; the relevant issue in *Nykreim* was Chelan County's attempt to challenge in court its own final approval of a boundary line adjustment long after the LUPA appeal deadline had passed. There is no existing formal permit approval at issue in this rezone application case.)

5. Respondent CARE's objections to the rezone and citations to numerous allegedly violated comprehensive plan policies are due to its activist citizens' opposition to neighborhood change.

HE: CARE's motivations in opposing the rezone are irrelevant to the rezone consideration, as would be the motivations of any other party in a quasi-judicial land use application or appeal case. To consider a party's motivations could tend to be prejudicial to fair consideration of that party's, or an opposing party's, presented facts and argument.

6. The Examiner's recommendation of denial is chiefly due to the conclusion that the proposed rezone is inconsistent with comprehensive plan policy U-168. The other code violations cited by the Examiner are "make weight" arguments that amount to "piling on" to the conclusion of comprehensive plan inconsistency.

HE: As stated in the Examiner's written summary in the Council packets (p. 16), and orally at hearing, the comprehensive plan consistency issue is not the sole or overriding consideration. It is only one of four independent elements of the rezone's planning and zoning code conflicts. The other code conflicts cited are not merely "make weight" arguments or "piling on," as the Applicant argues; if the plan inconsistency did not exist, the three other code conflicts would still each and independently compel a recommendation of denial.

7. No subarea planning is required before the proposed rezone to actualize the potential RB zone. Comprehensive plan policy U-168 is distinguishable from policy U-169's express imposition of a zoning moratorium pending subarea planning. U-169 does not apply to the application because it only applies to Potential Annexation Areas governed by a formal Memorandum of Understanding (MOU), which is not the case for the subject area. U-168 does not contain similar moratorium language as that plainly expressed in U-169 and should not be interpreted as such, nor interpreted as requiring that subarea planning be performed before the potential RB is actualized by the requested rezone.

HE: The applicant's argument that the Examiner's interpretation of the policy is overly-parsed and a hyper-technical approach amounts to a claim that it is a strained interpretation. Under principles of statutory construction, strained interpretations are to be avoided. Such principles also hold, though, that every word in a section or policy must be given effective meaning: one cannot choose to merely disregard or not give import to some words or clauses in a legislative enactment. The Examiner's recommendation therefore is that the word "appropriate" in the term "appropriate commercial zoning" must be given effective meaning. Since the reasonable meaning under the common dictionary definition of the term (the comprehensive plan does not provide one, as noted in the Recommendation, p. 21) is "especially suitable," the legislative assignment of the Office zone to the property was a legislative judgment that the Office zone is especially suitable while the property is designated "commercial outside of center" as it is currently. That legislative judgment, and the clear indication in U-168 that any future designation as a commercial center (necessary under KCC 21A.04.110.B for RB zoning, as noted below in pp. S-4-6) depends on the outcome of the anticipated subarea planning, combine to establish an interim finality of the legislatively assigned Office zone pending the subarea plan and to defer RB consideration until the subarea planning and commercial center designation process is accomplished

The Applicant argues that the different wording of Policy U-168 and Policy U-169 mandates a less restrictive interpretation of Policy U-168. The policies are worded differently. Policy U-169 is unquestionably a more overt statement of a zoning moratorium pending subarea planning in Potential Annexation Areas governed by a formal Memorandum of Understanding (MOU). But a mere comparison of a more overt expression with a less overt expression does not preclude the *effect* of a moratorium or deferral established by the language of Policy U-168. The legislative body is not required to use the same language for policies to have a similar effect, and it should be noted in this regard that the policies address different situations, stand-alone commercial sites in U-168 and areas of mixed use and zoning in U-169. (See Policies quoted in Appendix A attached.)

8. The Examiner's interpretation is not the way potential zoning has been treated in the past.

HE: There is no evidence in the record as to how potential zone actualization has been conducted in the past. No past practice has been cited by the Applicant. Even if there were an example of different treatment, that doesn't bind future quasi-judicial decisions.

9. The Council should interpret its own policy language, as it is the best judge of what it intended in Policy U-168, which should be read to mean just what it says and nothing more.

HE: The Examiner agrees that the Council is the best interpreter of the county code and policies: Not only is the Council the highest appellate body on the County level, it is also the legislative body which enacted the code sections and policy at issue. Deference to the Council's formal interpretation is certainly in order.

10. By assigning Potential RB the Council has already made the policy decision that a small stand-alone commercial use is appropriate on the property. If the Council had not intended for RB to be actualized on the property, it would not have included Potential RB as an additional map designation along with the current Office zoning of the property. There is no need and no policy requirement for further subarea planning to study the issue. Mr. Melki is entitled to actualize the potential RB now without further subarea planning.

HE: The Examiner agrees that "the Council has already made the policy decision that a small stand-alone commercial use is appropriate on the property," but that decision was to recognize the existing use under U-168 by designating it commercial outside of center and assigning the *Office* zone to the property, not the RB zone. The assignment of Potential RB is that of the supplementary *potential* zone map designation, actualization of which potential is contingent on rezone approval in compliance with applicable code and policy provisions. As seen in Issue 7 above, the summary (pp. 13-14) and the Report (pp. 53-54), the Examiner's interpretation is that the RB zone is premature and must await the subarea planning's designation of commercial centers, since the RB zone depends on such designation.

As noted in the Examiner's August 4, 2010 Report in footnote 22 (p. 54), in the packet summary and at the October 11 meeting in response to the Chair's question, the Applicant's argument of essentially a preemptive effect of Potential RB assignment was initially persuasive, but on further reflection and reexamination of the code and policy language at issue the preemption argument is found wanting. It does not comport to the code requirements for potential zone actualization, which must depend on compliance with the *full* rezone criteria.

11. The legislative designation of Potential RB cuts the ground out from under the Examiner's conclusion that KCC 21A.04.110.B is violated.

HE: This is the preemption argument discussed immediately above.

12. KCC 21A.04.110.B is a purpose section, not regulatory, and is only a general descriptive section lending guidance to the Council's future zoning decisions on where to cite RB uses.

HE: This assertion is an erroneous oversimplification of the nature of the section, as can be seen from a plain reading. The section reads:

> **Regional business zone.**
> A. The *purpose* of the regional business zone (RB) is to provide for the broadest mix of comparison retail, wholesale, service and recreation/cultural uses with compatible storage and fabrication uses, serving regional market areas and offering significant employment opportunities. These purposes are accomplished by:
> 1. Encouraging compact development that is supportive of transit and pedestrian travel, through higher nonresidential building heights and floor area ratios than those found in community centers;
> 2. Allowing for outdoor sales and storage, regional shopping areas and limited fabrication uses; and
> 3. Concentrating large scale commercial and office uses to facilitate the efficient provision of public facilities and services.

B. *Use of this zone* is appropriate in *urban activity centers or rural towns* that are designated by the Comprehensive Plan and community plans that are served at the time of development by adequate public sewers, water supply, roads and other needed public facilities and services. [KCC 21A.04.110, emphasis added]

As noted in the Examiner's summary of the issues submitted for the Council October 11, 2010 meeting (p. 15), only subsection A is a purpose section. Subsection B, the one at issue, is not a purpose section, but a regulatory one. Normally, purpose sections of legislation are considered mere preamble or introductory narrative; they can offer guidance to the interpretation of following regulatory or enabling measures, but are not of regulatory effect in and of themselves. [*Hearst v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978), citing *Hartman v. State Game Comm'n*, 85 Wn.2d 176, 179 532 P.2d 614 (1975)] But the purpose section argument is moot as the subsection at issue is not a purpose section.

Importantly, even if KCC 21A.04.110.B *were* a purpose section, KCC 21A.04.020 states, "Zone and map designation purpose. *The purpose statements for each zone* and map designation set forth in the following sections (included among which is KCC 21A.04.110.B at issue) *shall be used to guide the application of the zones* and designations to all lands in unincorporated King County. …." [KCC 21A.04.020, emphasis added] By such section, the purpose statements are given regulatory effect. KCC 21A.04.110.B's statement of the appropriate designations for assignment of the RB zone is regulatory.

13. Even if the section were regulatory, the Examiner's conclusion that the section's listing of appropriate designations for the RB zone is exclusive is incorrect. The RB zone is not limited to such designations by the section.

HE: As noted in the Examiner's summary (p. 15), "That (argument) does not comport with a central principle of statutory construction. Absent an express clause to the contrary, such as 'including but not limited to' as is used in some places in the zoning code (but not in the subject section), 'when the legislature lists various items in a statute but omits others, the courts should assume that the items omitted were left out intentionally.' [*State v. Gamble*, 146 Wn.App. 813, 817-818, 192 P.3d (2008), citing *City of Seattle v. Parker,* 2 Wn.App. 331, 335, 467 P.2d 858 (1970)] The argument also defies common sense: if the listing were non-exclusive, that part of the section would have no effective meaning of zoning appropriateness. (In other words, the section is rendered useless if it is non-exclusive.) That lack of effective meaning would also not comport with principles of statutory construction."

As noted at hearing and in the Examiner's written summary (p. 15, fn 4), the comprehensive plan lists the RB zone as an implementing zone for the current CO designation of the property (subject to the *caveat* of conforming to the plan policies), so the comprehensive plan and the zoning code are in conflict in this regard. In a quasi-judicial rezone consideration, the zoning code's disallowance prevails over the allowance by the plan: As noted in the recommendation (Conclusion 14.H, p. 52), in cases of conflict between zoning code provisions and those of comprehensive plans, Washington case law holds that the zoning code controls. [*Mount Vernon*, above, at 873-874]

14. The Examiner's conclusion that under KCC 21A.04.110.B the RB zone is only permitted in urban activity centers is in any case trumped by the Council's policy decision that RB zoning is appropriate by its designating the property as Potential RB.

HE: This is an element of the preemption argument discussed above.

Summary comment on issues 12-14: Regarding Applicant oral argument issues 12-14, KCC 21A.04.110.B regulates the assignment of RB zoning by exclusively stating which designations it is appropriate to: "urban activity centers or rural towns that are designated by the Comprehensive Plan and community plans." The property is not designated either of the two designations assigned, and the rezone is therefore not in compliance with the zoning code with respect to this issue.

15. The term "conditions have been met" in KCC 20.24.190.A is limited to express conditions applied specifically to the property through regulatory provisions such as p-suffix conditions, and that in the absence of such express conditions as in this case, no other "conditions [need be] met."

HE: As well as finding it reasonable and persuasive given its regulatory context (*i.e.*, read in concert with the infrastructure adequacy prescriptions of KCC 21A.04.110.B, discussed immediately below), the Examiner accorded deference to DDES's interpretation of KCC 20.24.190.A (its requirement that for potential zone actualization "conditions have been met that indicate the reclassification is appropriate") as requiring infrastructure adequacy at the time of development under the rezone, *i.e.*, conditions in place on the ground. As DDES's interpretation is not clearly erroneous and it is the agency charged with direct administration of the zoning code, deference is proper under such circumstances. The full pertinent excerpt from Finding 23 in the Examiner's August 4, 2010 Report and Recommendation is quoted in the Appendix below.

16. As to KCC 21A.04.110.B's infrastructure requirements for rezoning, they apply to the "time of development," and Mr. Melki is not intending to "develop" his property by any structural or grounds improvement changes, only making a change in use. Since sanitary sewer service and a concurrency certificate are not necessary for his intended change in use, the rezone satisfies the KCC 21A.04.110.B's infrastructure requirements for the RB zone even if they are read into KCC 20.24.190.A's requirement that "conditions have been met that show that the rezone is appropriate," which they should not be in any case.

HE: This is the second aspect of conformity with KCC 21A.04.110.B, its requirement that "Use of this zone is appropriate in urban activity centers...that are *served at the time of development by adequate public sewers, water supply, roads and other needed public facilities and services*." (Emphasis added) The zoning code does not contain a definition of "development," per se. It does contain a definition of "development activity" (KCC 21A.06.300) in which the term includes, "any change in use of a building or structure." The Examiner's interpretation is that it is reasonable to apply that definition to interpretation of the term "development" in the section,[1] and since there is a proposed change in use of the existing building and grounds, the change in use constitutes "development" under KCC 21A.04.110.B and the infrastructure adequacy requirement applies to the requested rezone. Since there is no sanitary sewer service available, nor concurrency of the arterial road, by the time of development, *i.e.*, the change in use, the rezone does not comply with the zoning code here as well.

17. The Examiner's withdrawal on his own motion of the March 31, 2010 report is implied as procedurally improper. The several reopenings of the hearing record allowed further argument on abstruse issues, and are implied as an unnecessary waste of time.

HE: The Examiner's actions to reopen the record are expressly provided for by Hearing Examiner Rule of Procedure XI.3.a and b. In the case of a pending Council appeal consideration, withdrawal of an issued report upon reopening is an implicit necessity, as the report would have to be revised to address newly admitted facts and/or argument regardless of any change to the fundamental recommendation. Each record reopening was necessary to provide due process to one or more of the parties. The third reopening was specifically to protect the Applicant's right to due process.

[1] By claiming that the proposed action does not constitute "development," perhaps the Applicant means to reference the very limited definition of "development" for transportation concurrency and impact mitigation purposes under KCC 14.70.210.I, though no citation is made. That definition, in Title 14 KCC, the Roads and Bridges title, is not applicable to interpretation of the zoning code, Title 21A KCC.

Respondent CARE's Oral Argument

1. CARE made general comments about its nature as a community group representing households in the East Renton area, and that it has been frustrated by general land use planning and infrastructure problems, noting specifically that City of Renton sanitary sewer service is unavailable in the foreseeable future and that the fronting arterial road SE 128th Street is a formally designated failing corridor from a concurrency standpoint. CARE also complained that the proposed rezone is one of cumulative "unintended consequences" resulting from delays in intended subarea land use planning and execution of interlocal agreements (ILA) with the City of Renton governing planning issues. CARE considers it unfortunate that pre-annexation planning adopted by the City may not be considered by the County in land use decisions because of the lack of an ILA. CARE gave a general background history of its interactions with the Applicant.

HE: Except for the infrastructure deficiencies noted, these issues are not related to the specific claims on appeal.

2. The Hearing Examiner recommendation is supported by CARE, as is the propriety of the hearing record reopenings.

HE: See above comment on reopenings under Applicant portion.

3. The subject property is not a good location for the use as proposed.

HE: No comment on generic contention. The issue is addressed by the applicable county policies and development regulations, which are discussed elsewhere in the Report and Recommendation, the Examiner's summary of appeal issues and this supplement.

4. DDES's assurance of a "slam dunk" approval of the rezone was improper.

HE: See above comment under Applicant portion.

5. Rezoning of the property to RB would set a precedent leading to other rezones based on "changed circumstances" (another option for site-specific rezone qualification set forth in KCC 20.24.190.C).

HE: This response is ostensibly to the Applicant's contention that the rezone is "no harm, no foul." An understandable concern, it is however speculative; any such effect remains to be seen on a case-by-case application basis. A broad conclusion that the rezone would present compelling "changed circumstances" to justify other rezones in the area would be speculative and prejudicial for the Examiner and Council to offer.

Summary of Issues to be Decided

A summary of the issues to be decided, which is the projected handout from the October 11, 2010 meeting, slightly expanded with additional comments in italics, is attached to this summary as Appendix B.

Appendix A

Comprehensive Plan Policies U-168 and U-169 and preceding text (Plan, pp. 2-24-25)

The Commercial Outside of Center (CO) Land Use designation recognizes commercial uses predating this plan that were located outside a designated center. The CO designation is also appropriate as a transitional designation within certain potential annexation areas. In these areas, the county will utilize the memorandum of understanding and applicable comprehensive plan policies to determine the appropriate zoning to implement this transitional designation.

U-168 Stand-alone commercial developments legally established outside designated centers in the Urban Growth Area may be recognized with the CO designation and appropriate commercial zoning. When more detailed subarea plans are prepared, these developments may be designated as centers and allowed to grow if appropriate, or may be encouraged to redevelop consistent with the residential density and design policies of the comprehensive plan.

U-169 The CO designation may be applied as a transitional designation in Potential Annexation Areas identified in a signed memorandum of understanding between a city and the county for areas with a mix of urban uses and zoning in order to facilitate the joint planning effort directed by the memorandum of understanding. Zoning to implement this transitional designation should recognize the mix of existing and planned uses. No zone changes to these properties to allow other nonresidential uses, or zone changes to allow expansion of existing nonresidential uses onto other properties, should occur unless or until a subarea planning process with the city is completed.

KCC 21A.04.170

A. The purpose of the potential zone (dashed box surrounding zone's map symbol[2]) is to designate properties *potentially suitable* for future changes in land uses or densities once additional infrastructure, project phasing or site-specific public review has been accomplished. Potential zones are designated by either area zoning or individual zone reclassification. Area zoning may designate more than one potential zone on a single property if the community plan designates alternative uses for the site. *Potential zones are actualized pursuant to K.C.C. 20.24* (the Hearing Examiner chapter of the planning code).)

B. The use of a potential zone designation is appropriate to:
   1. Phase development based on availability of public facilities and services or infrastructure improvements (e.g. roads, utilities, schools);
   2. Prevent existing development from becoming a nonconforming use in areas that are in transition from previous uses;
   3. Allow for future residential density increases consistent with a community plan; and
   4. Provide for public review of proposed uses on sites where some permitted uses in a zone designation may not be appropriate. (Emphasis added

[2] Depiction and record-keeping process revised by KCC 20.12.050.

Excerpt from Finding 23 in Recommendation (p. 38)

The second provision of KCC 20.24.190.A requires that "conditions have been met that indicate the reclassification is appropriate." There is no specification or reference in the code as to the type or nature, or any codified location, of said "conditions," or any codified definition of the term. DDES has based its recommendation to deny the rezone in part on its interpretation of the phrase "conditions... that indicate the reclassification is appropriate" to include in the umbrella of "conditions" the sufficiency status of urban development infrastructure, and then its conclusion that such conditions have not been met in this case because of the area's lack of sanitary sewer service and transportation concurrency. Given KCC 21A.04.110.B's prescription that "[u]se of this [RB] zone is appropriate in urban activity centers or rural towns that are designated by the Comprehensive Plan and community plans that are *served at the time of development by adequate public sewers, water supply, roads and other needed public facilities and services*" (emphasis added), the Examiner concludes that DDES's interpretation that the infrastructure adequacy requirements of KCC 21A.04.110.B comprise "conditions [to] have been met" for "appropriateness" under KCC 20.24.190.A is reasonable and persuasive given its regulatory context (*i.e.*, read in concert with the prescriptions of KCC 21A.04.110.B). It is accorded deference as an interpretation by an administrative agency with direct regulatory authority (in this case, over the planning and zoning codes). [*Mall, Inc. v. City of Seattle*, 108 Wn.2d 369, 377, 739 P.2d 668 (1987)]

Appendix B – Issues to Decide

There are four issues of policy/code conflict. The first two address two aspects of zoning code section 21A.04.110.B KCC. The third addresses planning code section 20.24.190.A KCC. The fourth and last addresses consistency with the comprehensive plan, which is required by the planning and zoning codes.

1. The rezone violates the zoning code requirement that the Regional Business zone be placed in areas designated by the comprehensive plan as "urban activity center" (a commercial designation) or "rural town." The property, in the urban area, is designated "commercial outside of center," not "urban activity center." [KCC 21A.04.110.B] *The issue to decide is whether the list of designations is exclusive. The Examiner's interpretation is that under the law it is, and since the property is not designated urban activity center, the Examiner's recommendation concludes that the requested rezone does not comply with this aspect of the zoning code, Title 21A KCC.*

2. The rezone violates the zoning code requirement of adequate urban infrastructure (sanitary sewer service and concurrent road system are lacking in this case) for placement of RB *zoning*, regardless whether the proposed use itself requires sewer service or a concurrency certificate. [KCC 21A.04.110.B] *The issue to decide is whether the term "development" includes "change in use of a building," and that therefore infrastructure adequacy must be assured to be in place at the time of the change of use for the rezone to be approved. The Examiner's interpretation is that the term does include "change in use," and since infrastructure adequacy is not assured to be in place at the time of change of use, the requested rezone does not comply with this aspect of the zoning code as well.*

3. The rezone violates the planning code requirement that for actualization of potential zones, "conditions have been met that indicate the reclassification is appropriate," in that the urban infrastructure is presently inadequate. [KCC 20.24.190.A] *The issue to decide is the meaning of "conditions have been met," whether it is limited to written regulatory or contractual conditions, or also includes infrastructural conditions in the field. The Examiner's interpretation is the latter, and since infrastructure adequacy is not in place for the change in use, the requested rezone does not comply with the planning code, Title 20 KCC.*

4. The rezone is inconsistent with the comprehensive plan, in that it is inconsistent with the centrally applicable plan policy, Policy U-168. The policy guided the legislative designation of the property as commercial outside of center and the legislative assignment of the existing Office (O) zone as the "appropriate commercial zoning" pending a subarea planning process that will determine the location of commercial centers (RB zone required to be in urban activity center). The Office zone being the "appropriate commercial zoning" pending the subarea plan is concluded to have interim finality: zoning to RB before the subarea plan is done would be premature and would preempt the integrity and effectiveness of the subarea planning process, including its designation of commercial centers. Consistency with the comprehensive plan is required for rezones by the planning and zoning codes. [KCC 20.24.180 and 21A.44.060] *The issues to decide here are the whether the term "appropriate" means that the legislatively assigned zoning is meant to remain until the possibility of the property's commercial center designation is decided in the anticipated subarea planning (as noted above, such designation is required for the RB zone), and whether as a result rezoning to RB at this time, before the subarea planning and commercial center designation occurs, would be premature and preempt the subarea planning and commercial center designation process. The Examiner's interpretation is that the term "appropriate" has that meaning, and RB rezoning is premature, and that the rezone is therefore not consistent with the centrally applicable plan policy. It thus is inconsistent with the comprehensive plan as a general proposition. And because the planning and zoning codes require comprehensive plan consistency, it therefore does not comply with those codes in this respect as well.*