To be considered by the
Metropolitan King County Council on
November 2, 2015

SUMMARY INFORMATION

FOR THE METROPOLITAN KING COUNTY COUNCIL

APPEAL OF A DECISION OF THE HEARING EXAMINER

Proposed ordinance no. 2015-0170

MAPLE VALLEY REZONE

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1200 King County Courthouse
516 Third Avenue
Seattle, WA 98104

KING COUNTY

Signature Report

October 19, 2015

Ordinance

Proposed No. 2015-0170.2 **Sponsors** Dunn

AN ORDINANCE concurring with the recommendation of the hearing examiner to approve reclassification of Parcel no 2022069011 from Industrial (I) to Rural Area with 5 acre minimum (RA-5); and amending K.C.C. Title 21A, as amended, by modifying the zoning map to reflect this reclassification.

BE IT ORDAINED BY THE COUNCIL OF KING COUNTY:

SECTION 1. This ordinance adopts and incorporates the findings and conclusions of the hearing examiner, filed with the clerk of the council and dated November 2, 2015, and hereby reclassifies Parcel No. 2022069011 from Industrial (I) to

Rural Area with a 5 acre minimum (RA-5). The executive shall amend the official zoning maps of King County to reflect this action.

KING COUNTY COUNCIL
KING COUNTY, WASHINGTON

_____

Larry Phillips, Chair

ATTEST:

_____

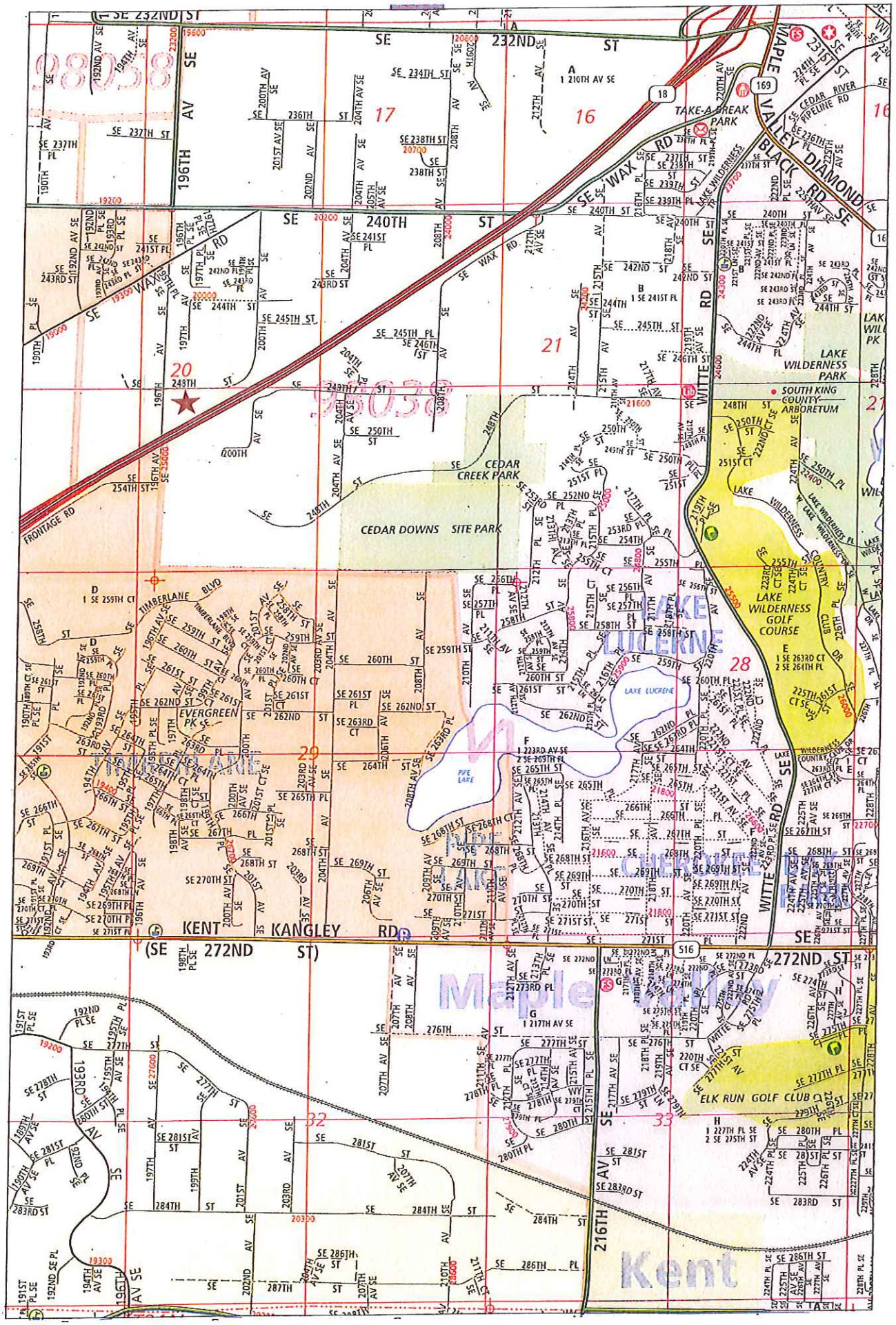
Anne Noris, Clerk of the Council

APPROVED this _____ day of _____, _____.

_____

Dow Constantine, County Executive

Attachments: A. Hearing Examiner Report dated November 2, 2015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WITTE RD SE
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CEDAR RIVER PIPELINE RD
LAKE WILDERNESS PARK
SOUTH KING COUNTY ARBORETUM
SE CEDAR CREEK PARK
CEDAR DOWNS SITE PARK
FRONTAGE RD
LAKE WILDERNESS GOLF COURSE
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PIPE LAKE
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EXAMINER'S SUMMARY

RE: Maple Valley Rezone
Proposed Ordinance No. 2011-0404
Parcel no. 2022069011 (SE 248th Street, just west of 200th Avenue SE)

1. **Overview:** By motion, the Council referred to the Examiner a proposed ordinance, which if adopted would rezone certain property from Industrial to Rural Area. Examiner David Spohr held the public hearing and recommended that the Council rezone the property. The property owner appealed; two neighbors responded. On November 2 the Council will hear oral argument. This memorandum identifies the parties, explains three procedural items, summarizes the appellant's and respondents' arguments, and provides a recommendation.

2. **Parties to the Appeal:**

Appellant:	Maple Valley Industries, LLC *represented by* **Randall Olsen** *and* **Donald Marcy** Cairncross and Hempelmann, P.S. 524 Second Avenue Suite 500 Seattle, WA 98104
Respondents:	Miles Jackson *represented by* **Stephen Tan** *and* **Valerie Rickman** Cascadia Law Group PLLC 1201 Third Avenue, Suite 320 Seattle, WA 98101
	Michael Lorette 24407 200th Avenue SE Maple Valley, WA 98038

3. **Three Procedural Items:**
   a. Our pre-hearing order set the issues for hearing and set a deadline for filing certain submissions. One of the six emails Maple Valley Industries ("MVI") sent at or near that deadline contained an attachment challenging two factual items and adding three issues for hearing. Office staff inadvertently failed to save that email into the case file. At the hearing, MVI presented its evidence in support of its challenges and issues, and argued them in closing. Our July 31, 2015, report (pages 33–54) addressed the merits of MVI's challenges and issues, but indicated (incorrectly) that these had not been timely raised. Pages 55–74 show a red-line revision of our report, excising any reference to MVI having missed a deadline, while pages 75–93 is a clean version, dated November 2, 2015. Council should fully consider MVI's challenges and issues in its deliberations. If Council votes to approve a rezone, we recommend that it adopt this November 2 version as the County's official findings and conclusions.

b. The Clerk received three responses to MVI's appeal.
   i. Miles Jackson's response was timely and procedurally appropriate; it should be considered in full.
   ii. Michael Lorette's response was timely but contained several factual assertions that are not supported by the existing record. The Council's consideration "shall be based upon the record as presented to the examiner at the public hearing and upon written appeal statements based upon the record." KCC 20.24.220. We have grey-shaded those portions of the Lorette response that were not part of the hearing record. Pages 25–27. Any participant is free, at the hearing, to dispute our attempt at identifying the extra-record portion of the Lorette response; absent that, Council should consider only the non-grey portions in its deliberation.
   iii. Michael Hartnett's response was untimely; the Clerk received it five days after the response deadline. Unlike Messrs. Jackson and Lorette, Mr. Hartnett did not participate in the Examiner's hearing, nor was he even a party-of-record. And his response largely mimics what Mr. Lorette had (timely) submitted a week earlier, including adding factual assertions outside the record. For these reasons, and given the quasi-judicial nature of this hearing, Mr. Hartnett's response should not be considered and is not included in the appeal packet. (The Chair previously decided that Mr. Harnett should not be allowed to present oral argument.)

c. Although the proposed ordinance referred only to MVI's property, the motion tasked us with reviewing whether properties immediately abutting the subject property, including public rights-of-way, should also be rezoned. There is no policy reason not to rezone these (if MVI's property is rezoned), but the record does not show exactly what other parcel numbers are involved, or even if these remnants have parcel numbers. The Council may wish to discuss this at hearing. Page 91 at ¶ 73 describes this more fully.

4. **MVI's Issues for Appeal:**
   a. Is the current Industrial zoning designation unreasonably incompatible with or detrimental to affected properties and to the general public?
   b. Will the proposed rezone negatively affect the public health, safety, interest, morals or general welfare?
   c. Have circumstances changed since MVI's property ["the Property"] received its current zoning designation that would warrant rezoning the Property to RA-5?
   d. Would a rezone be consistent with the King County Comprehensive Plan ["Comp Plan"]?
   e. Does the Property meet the Council's definition of isolated industrial zoned parcels and should the Council rezone the Property pursuant to the Council's own criteria?
   f. Do the perceived benefits of the proposed rezone outweigh the hardship that the rezone will cause to MVI?

5. **Summary of Arguments:**

   By Appellant MVI (pages 13–24):

   a. The current Industrial zoning designation is compatible with affected properties and the general public. MVI's project would provide 12 family-wage jobs, result in $350,000–$450,000 in state and local tax revenue, have no significant impact on the

adjacent neighbors, and generate minimal traffic. MVI workers would be reverse commuters. The occasional UPS or van-sized vehicle making deliveries will have no greater impact than existing deliveries to adjacent residential homes. The visual impact is limited; few neighbors could see the buildings, and the buildings will be well-designed, attractive, and muted to reduce visual impact. Such impacts are not incompatible or detrimental.

b. Maintaining the existing Industrial zoning will not negatively affect the public interest or general welfare. Conversely, rezoning would, by replacing a productive use of the Property (12 family-wage jobs and significant tax benefits) with residentially-zoned property adjacent to a four-lane highway. The health impacts of such a residence are likely worse than a state-of-the-art facility organically growing plants per strict state standards. The Property will create jobs, increase tax revenue, and have no discernable health impacts on surrounding properties.

c. Circumstances have not changed; the Property has been zoned Industrial for 20 years. The Property continues to be immediately adjacent to Highway 18 and buffered from nearby properties by SE 248th Street and by its significantly lower elevation. No change in circumstances warrants rezoning away from its longstanding Industrial designation.

d. Rezoning to RA-5 would not be consistent with the Comp Plan.

   i. ED-211 supports preserving and planning for an adequate industrial land supply, including promoting redevelopment and infill of industrial land and preventing non-industrial encroachment of industrially-zoned land and rezoning industrial land to other use. This policy clearly weighs against a rezone.

   ii. U-172 [which starts with "Within the U[rban]G[rowth]A[rea]…properties with existing industrial uses shall be protected"] applies within the UGA, but here the UGA is immediately adjacent to the Property, and so U-172 is persuasive.

   iii. R-514 requires new industrial development in the rural area to mitigate its impacts in many respects. MVI's plan includes many design elements and efforts at such mitigation. The warehouses will be barely visible to neighboring properties, smaller than typical industrial buildings, and oriented so loading activity occurs on the Property area furthest from residences. There will be limited lighting effects, virtually no waste or chemical byproducts, and minimal traffic impacts.

   iv. R-515 states that certain industrial properties should be rezoned to Rural Residential, but R-515 is contradicted by all the other pertinent policies, so R-515 should be given little weight. The Property's location adjacent to the urban growth boundary and Highway 18, plus separating the warehouses from adjacent uses, support maintaining the Industrial zoning. R-515 should not outweigh the other policies.

   v. I-101 requires that King County's regulations protect property rights. MVI's owner has invested $580,000 in this project. Rezoning would negatively affect the Property's value and future use and would undermine his reasonable expectations for how he could use his private property. It would thus violate his property rights; therefore I-101 disfavors rezoning.

e. MVI's property does not meet the definition of "isolated industrial zoned parcels" that Council employed in adopting a moratorium and directing the Executive to identify such parcels. The urban growth boundary starts on the other side of Highway 18 and thus MVI's property is "directly adjacent to the urban growth boundary." Another property,

the Freeman property [near Redmond], is substantially similar to MVI's, and because the Department of Permitting and Environmental Review (DPER) found that the Freeman property did not meet the "directly adjacent" criterion, DPER's findings about MVI's property are erroneous and MVI's property should be exempt from rezone consideration, just as the Freeman property was.

f. MVI has invested $580,000 in this project. Rezoning to RA-5 will have no appreciable benefits compared to the loss to MVI's owner and the negative impacts to the community that will result from zoning this Property in a way that would eliminate future employment opportunities on the site.

By Respondent Miles Jackson (pages 29–32): *(subsection letter corresponds to MVI's)*

b. MVI improperly attempts to recast the health/safety/interest/moral/general welfare inquiry as whether maintaining the existing Industrial zoning will negatively affect the public. The Council should not allow this attempted diversion to confuse the issue.

d. Existing zoning is not compatible with the Comp Plan. U-172 applies only within the UGA; if it had been intended to apply near the UGA, it would say so. MVI ignores [R-514]'s recommendation to scale back industrial uses that require substantial public funds for infrastructure. I-101 explicitly requires more than protection of property rights; it requires protection of public health, safety and general welfare.

e. MVI's interpretation of "directly adjacent" is strained and would require the Council to pretend Highway 18 does not exist. Council should interpret these terms in their usual and ordinary meaning; "Adjacent" is defined as "not too distant; having a common endpoint or border," while "directly" is defined as "immediate physical contact." Even without Highway 18, MVI's property would still not be directly adjacent to an urban growth boundary because the boundary begins southwest of MVI's parcel and shares no common border.

By Respondent Michael Lorette (pages 25–27): *(subsection letter corresponds to MVI's)*

a. The current Industrial zoning is not compatible with the neighborhood and its rural lifestyle. Many neighbors get their exercise walking the street, while children and grandchildren ride the streets. The church on the corner has many weekly activities. Any large industrial facility will have a very detrimental impact. If MVI's operation succeeds, it may creep to more buildings, employees, and traffic; if MVI fails, a new industrial facility would pose its own traffic and safety problems.

c. Circumstances have changed since the Property received its current, Industrial zoning. The Property originally had access to Highway 18; now all traffic must use residential streets. This change is both a changed circumstance and has significantly increased the adverse impact of any industrial facility at that location.

e. MVI's property is not "immediately adjacent" to the urban growth boundary, given the distance between MVI's property and that boundary.

f. As to "hardship," MVI should have assessed neighborhood reaction to its proposed facility prior to purchase and investment. MVI's dollar figures are small compared to the collective loss of neighborhood property values if the subject property is not rezoned. Who would want to buy residential property on a street with a large industrial facility? The emotional hardship on the neighbors should be considered.

6. Examiner's Recommendation (pages 75-93):

a. Industrial zoning has not been reasonably compatible with the surrounding neighborhood and the Comp Plan since the Property lost its arterial access when Highway 18 was sealed off, and routing industrial traffic through the residential neighborhood would be detrimental. Because the traffic associated with MVI's particular use is unlikely to approach the traffic impacts a typical light industrial use would generate, MVI's use appears towards the less intrusive end, neighborhood impact-wise, but its industrial use is still detrimental and incompatible. And there are a myriad of more intensive industrial activities that would be allowed in the Industrial zone, absent a rezone. Page 89, ¶¶ 63–65. (The economic angle is discussed in "f.," below.)

b. Traffic-related safety is the strongest of the "health, safety, morals, and general welfare of the public, and whether the requested reclassification is in the public interest" issues discussed in pages 85–89, ¶¶ 45–62, and it favors a rezone. The three-way intersection presents some risk, and the residential road on which MVI and neighborhood traffic (vehicular and pedestrian) must traverse is narrow (existing pavement-wise), has no sidewalks and little walkable shoulder to allow safe (and frequent) pedestrian traffic, and sits within a constrained right-of way width that makes fixing the issue problematic. (The public interest and economic angles are discussed in "f.," below.)

c. Changed circumstances is the easiest issue. The circumstances have definitely and significantly changed since the Property received its current, Industrial zoning. Most notably, the Property originally had direct access to Highway 18. The Highway 18 expansion project has since eliminated that access, leaving the Property surrounded by rural property, its only remaining access through a half-mile plus of residential street and residential neighborhood. This element decidedly favors rezoning. Page 79, ¶¶ 16–17.

d. The Comp Plan, in total, strongly supports a rezone.

i. ED-211 supports industrial uses, redevelopment, and infilling, but R-515's more specific directive (discussed below) specifies the geographic limits of that desired industrial activity and requires that industrial uses outside those defined areas be zoned residential. Also, MVI's proposed industrial use is less redevelopment or infilling and more developing an industrial use in an otherwise residential area. Page 85, ¶¶ 43–44.

ii. Unlike many other Comp Plan policies that apply to properties adjacent to an urban area, by its express terms U-172 only applies "Within the U[rban] G[rowth] A[area]." The Property is, without question, not within a UGA. U-172 has no bearing on our situation. Page 90, ¶¶ 67–68.

iii. R-514 is the most involved of the policy analyses. Pages 82–84, ¶¶ 30–39. MVI is correct that many R-514 items (such as enhanced setbacks, reduced building heights, and aesthetic concerns) are already reflected in the code's development standards, and thus would apply to MVI and to any future industrial user of the Property. MVI's proposed organic marijuana growing and non-chemical processing may be consistent with R-514(e)'s prohibition against heavy industrial uses, substantial waste byproducts, or wastewater discharge, but—absent a rezoning here—the code would not command that result for (future) industrial uses of the Property. Similarly R-514(f)'s policy of scaling industrial uses to avoid the public's need for funding infrastructure may have a somewhat muted impact, given MVI's traffic expert's estimate that actual MVI traffic generation will be 85–90 percent less than for a more

"typical" light industrial use. Yet, absent a rezone, there is no bar to the much higher traffic associated with a more typical industrial use, with a corresponding need for substantial, publically-funded road improvements. R-514, especially subsection (f), favors rezoning.

iv. R-515 states that, "Existing industrial uses in the Rural Area outside of [three distinct areas] shall be zoned rural residential…" Along with U-173 (discussed below), R-515's import is significant and clear cut. The Council has already decided (in the negative) on the desirability of industrial zoning beyond those three areas. And we cannot agree with MVI's argument that all the other Comp Plan policies analyzed here contradict R-515. R-515 cuts sharply in favor of a rezone. Pages 84–85, ¶¶ 40–42.

v. I-101 states in pertinent part that "King County's regulation of land should: a. protect public health, safety and general welfare, and property rights." As discussed above and in pages 85–89, ¶¶ 45–62, "public health, safety, and general welfare" components favors a rezone, while the "property rights" component favors retaining the Industrial zoning. I-101(a) disfavors a rezone, but only to a point, and perhaps not at all. Pages 80–82, ¶¶ 21–29. We discuss this in "f.," below.)

vi. MVI did not discuss what we deemed the "most definitive" policy, U-173, which states that "Industrial development should have direct access from arterials or freeways…. Access through residential areas should be avoided." Since losing its direct access to Highway 18, traffic to and from the Property must travel a half-mile plus along residential streets to reach a minor arterial. U-173 strongly favors rezoning. Pages 79–80, ¶¶ 19–20.

e. The Property meets the Council's definition of "isolated industrial zoned parcels" in the moratorium, and, that definition is not even a rezone criterion. Pages 90–91, ¶¶ 70–72. The Property is not "directly adjacent to the urban growth boundary," given the separation between the extreme southwest corner of MVI's Property and the extreme northwest tip of an urban growth boundary—most notably, four lanes of divided highway—and because getting to that urban tip involves travelling over a half-mile through a rural residential neighborhood to reach an arterial, then a far greater distance on arterials. More importantly, the moratorium's criteria are not relevant to deciding this rezone, which instead turns on the other issues analyzed here.

f. The last issue MVI raises—whether the rezone's benefits outweigh the hardship to MVI—is not necessarily a rezone criterion, but it provides a vehicle for synthesizing the various factors and analyzing the ordinance as a whole.

i. On the public side, the benefits overwhelm the one negative. Circumstances have definitely and significantly changed since the Property received its current, Industrial zoning, with the Property now cut off from direct access to Highway 18 and all traffic now forced through a half-mile plus of residential street and residential neighborhood. Industrial zoning has not been reasonably compatible with the surrounding neighborhood and the Comp Plan since the Property lost that arterial access. The Comp Plan strongly supports a rezone. The policies with the least room for wiggle or debate are U-173's clear pronouncement that "Industrial development should have direct access from arterials or freeways…. Access through residential areas should be avoided" and R-515's requirement that "[e]xisting industrial uses in the Rural Area

outside of [three distinct areas, all unrelated to our scenario] shall be zoned rural residential…" (underscore added).

ii. The one public negative is that if a rezone winds up causing MVI not to open, the public will lose the family-wage jobs and tax revenue MVI would have created. But it seems unlikely (discussed directly below) that a rezone would sink MVI. And in enacting R-515, which requires that Rural Area industrial uses in areas like ours "shall be zoned rural residential," the Council has already decided that the taxes and employment industrial activity outside those areas could provide are not worth the downsides. A site-specific rezone is not the vehicle for re-thinking R-515. And the health, safety, morals, and general welfare of the public, and the public interest favors rezoning.

iii. That leaves the private harm to MVI from a downzone. MVI purchased the Property at a time when such marijuana production and processing was allowed in an Industrial zone, and it has invested and continues to invest sums pursing its project under the current Industrial zoning. Also, while I-101(a) protects public health, safety and general welfare (which favors a rezone), it also protects "property rights" (which favors MVI). Pages 80–82, ¶¶ 21–29.

iv. MVI's premise that a rezone will "remove" MVI's intended use is not necessarily accurate. MVI applied for a commercial site development application for marijuana production and processing prior to the 2014 zoning code amendment (which changed the relevant use from "allowed" to only "conditional") and prior to this rezone ordinance. While application of the state's "vesting" rules to MVI's project and any permit-related disputes will be decided in another forum, it *appears* that MVI's application is vested to the current Industrial zoning, and that even if the Council now rezones the Property, the rezone would not scuttle MVI's project. Page 80–81, ¶¶ 24–27.

v. Finally, even if MVI suffers economic harm from a rezone, that is inherent in a proposal to "downzone" a property from a more intensive, lucrative use, to one less so. An owner has no right to retain the zoning. And many other RA-5 zoned properties abut Highway 18. Page 80, ¶¶ 22–23. Given the weight of all the public factors favoring a rezone, especially the most definitive Comp Plan policies (R-515 and U-173), our recommendation would still be to rezone. But the Council should consider the potential impact to MVI, weigh this against the public benefits, and reach its own conclusion.

BEFORE THE OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON

In the Matter of: Potential Re-Zone of Parcel No. 2022069011 Pursuant to King County Council Motion 14347	KING COUNTY COUNCIL FILE NO. 2015-0170 MAPLE VALLEY INDUSTRIES APPEAL STATEMENT

I. INTRODUCTION

Maple Valley Industries, LLC, a Washington limited liability company ("MVI") asks the King County Council to reject the recommendation of the King County Hearing Examiner to rezone MVI's property (King County parcel number 2022069011) ("Property") from Industrial (I) to Rural Area 5 (RA-5).

II. FACTS

The following facts are contained in the Hearing Examiner's July 31, 2015 Report and Recommendation ("Decision") and the record from the July 16, 2015 hearing on this matter.

The Property is located between the corporate limits of the cities of Maple Valley and Covington, and is outside the Urban Growth Boundary. In 1994, the Washington State Department of Transportation (WSDOT) purchased a large parcel that included the Property. At the time, the parcel was zoned ML-P (Manufacturing Light). In 1995, the zoning designation

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was converted to "I-P," the "I" being Industrial and the "P" designating restrictions that have since been rescinded. Accordingly, the Property has been zoned Industrial for the past 20 years.

In 1999, WSDOT received a permit to demolish a concrete shop building on the Property. Later, WSDOT used the Property (and other land owned by WSDOT) as a staging area for construction equipment and materials as it expanded Highway 18, which is immediately south of the site. At one time SE 248th Street (immediately north of the Property) had direct access to Highway 18, which was at one time a two-lane highway. That direct access was eliminated after WSDOT completed its expansion of Highway 18 in the early 2000s. Since WSDOT completed the Highway 18 improvements nearly 15 years ago, the Property has continued to be zoned Industrial.

Mark Cramer is the owner and operator of MVI. After I-502 legalized marijuana at the end of 2012, Mr. Cramer began looking for a property on which MVI could operate a marijuana production facility. Mr. Cramer undertook an exhaustive search for a property that would allow for operation of a marijuana production facility, but none met the appropriate criteria. Mr. Cramer then located the Property that is the subject of this appeal and, prior to purchase, he reviewed the subject property with DPER, and DPER advised him that the subject property met the applicable zoning criteria to support his desired use. Mr. Cramer then began a rigorous due diligence process to assure that the Property could be developed and used as a marijuana production facility. After his due diligence confirmed that the Property would support his intended use, Mr. Cramer, on behalf of MVI, purchased the Property from WSDOT in April 2014 for approximately $320,000. Mr. Cramer would not have bought the property had it not been zoned Industrial.

After Mr. Cramer purchased the Property, the Council began considering legislation that would restrict marijuana processing within Industrial zones. Mr. Cramer lobbied against those restrictions, but his efforts were ultimately unsuccessful. On June 23, 2014, the Council enacted Ordinance 17841 ("Code Change"), which resulted in a change to the King County zoning code

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regulations related to marijuana production facilities. On June 25, 2014, prior to the Code Change becoming effective, MVI submitted a complete commercial site development application for marijuana production and processing. The project would create two, 20,000-square foot light industrial buildings. Mr. Cramer purchased the Industrial zoned Property for $320,000 and he has invested an additional $260,000 in furtherance of marijuana operations on the Property.

In September 2014, the Council enacted Ordinance 17893 (the "Moratorium Ordinance"), declaring a one-year moratorium on accepting applications for new development on isolated, industrially zone-parcels, and directing DPER to study the issue. In response, in March 2015 the King County Executive submitted to the King County Council a DPER report ("Report"). After applying the criteria in the Moratorium Ordinance, the Report found that only one of the 29 properties reviewed matched the Council's stated definition of "isolated industrial zone parcels." That property was MVI's Property.[1] The Report concluded with the recommendation that the Property be rezoned from Industrial to Rural Area.

After Council received DPER's Report, it introduced Proposed Ordinance 2015-017 ("Rezone Ordinance"), and (via Motion 14347) referred the Rezone Ordinance to the King County Hearing Examiner in April of 2015 to conduct a quasi-judicial hearing and issue a recommendation as to whether to adopt the Rezone Ordinance and rezone the Property from Industrial to RA-5.

On June 18, 2015, the Examiner held a pre-hearing conference. Counsel for MVI appeared and presented evidence against the proposed rezone. One member of the public appeared but declined to be made a party to the proceedings. The Examiner then issued a Pre-Hearing Order which set, among other things, the issues for hearing and various pre-hearing deadlines. The hearing was held on July 16, 2015. Ten members of the public offered lay testimony in favor of the proposed rezone and MVI presented four witnesses who offered

[1] WSDOT owns some remnant abutting property that also is zoned Industrial, but WSDOT did not participate in the hearing before the Examiner and the Examiner has made no recommendation as to whether to rezone that property. *See* Decision at pg. 19, Recommendation 2.

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testimony against the rezone. MVI's witnesses were Mr. Cramer (on behalf of MVI, owner of the Property), Todd Schutz of Craft Architects (designer of the proposed development on the Property), Mark Jacobs of Jake Traffic Engineering (traffic engineer), and Greg Bondi of Bondi Farms (marijuana production expert). The hearing concluded on July 16, 2015. On July 31, 2015, the Examiner issued a Report and Recommendation ("Decision"), which recommended that the Property be rezoned from Industrial to RA-5, but made no recommendation as to whether to rezone WSDOT's remnant abutting property, which also is currently zoned Industrial.

III. ISSUES

The Examiner's recommendation was based upon four criteria identified in the Examiner's Pre-Hearing Order. Those criteria are:

1. Whether either the current zoning or the potential rezone are unreasonably incompatible with or detrimental to affected properties and to the general public?
2. What is the impact of the proposed rezone on the health, safety, interest, and morals or general welfare of the public? Is the requested reclassification in the public interest?
3. Are there any changed circumstances since the Property received its current zoning designation?
4. Would a rezone be consistent with the King County Comprehensive Plan and other applicable laws, policies, and objectives of King County?

The Examiner's Pre-Hearing Order stated that anyone "wanting other issues (especially Comp Plan policies) to be considered, [should] file those by **noon on July 1, 2015**."[2] MVI submitted[3] the following additional issues for consideration at 11:28 a.m. on July 1, 2015:

5. Does the subject property meet the King County Council's definition of "isolated industrial zoned parcels?"

[2] Pre-Hearing Order at pg. 3.
[3] *See* Declaration of Randall Olsen in Support of Maple Valley Industries Appeal Statement, filed herewith.

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6. If the subject property does not meet the Council's definition of "isolated industrial zoned parcels," should the Examiner recommend that the property not be rezoned pursuant to the Council's own criteria?

7. Do the perceived benefits of the proposed rezone outweigh the hardship that the rezone will cause to the property owner, Maple Valley Industries?

Despite the fact that these three additional issues (and the arguments related to them) were sent via email to hearingexaminer@kingcounty.gov as required by the Pre-Hearing Order, the Examiner's Decision fails to address them and, in fact, erroneously states that the Examiner "received no filings" related to the July 1 deadline.[4] MVI asks the Council to find that the Examiner erred in not considering the additional evidence offered in MVI's July 1, 2015 filing, which is attached hereto along with a copy of the email showing the time it was sent and showing that it was addressed to the email address provided in the Pre-Hearing Order. The Council should consider these issues now or, in the alternative, remand the matter back to the Hearing Examiner for reconsideration so that the Examiner's Decision will include all relevant evidence and argument prior to Council action.

IV. STANDARD OF REVIEW

Pursuant to KCC 20.24.220(D), if, after consideration of the record, written appeal statements and any oral argument the Council determines that:

1. An error in fact or procedure may exist or additional information or clarification is desired, the Council shall remand the matter to the Examiner; or

2. The recommendation of the Examiner is based on an error in judgment or conclusion, the Council may modify or reverse the recommendation of the Examiner, but the Council's land use appeal committee may retain the matter, refer it to other Council committee or remand to the Examiner for the purpose of further hearing, receipt of additional information or

[4] *See* Examiner's Decision at ¶ 72.

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further consideration if determined necessary before the Council's taking final action on the matter.

V. ARGUMENT

A. The Current Industrial Zoning Designation is Not Unreasonably Incompatible with or Detrimental to Affected Properties and the General Public.

The current Industrial zoning designation is compatible with the affected properties and the general public. Industrial zoning will allow for MVI's proposed buildings, which will provide 12 family wage jobs to workers in this community. It also will result in $350,000 - $450,000 in state and local tax revenue. It also will have no significant impact on the adjacent neighbors. For example, the evidence shows that there will be minimal traffic generated as a result of MVI's proposed development. Workers traveling to the Property will be reverse commuters, who will not interfere with the travel of the existing neighbors. The occasional UPS or van-sized vehicles will make deliveries to or remove product from the Property. Those vehicle trips will have no greater impact on the neighborhood than existing UPS deliveries to the adjacent residential homes.

The visual impact of the Property also is limited. Very few neighboring property owners will even be able to see the buildings on the Property. For those who can see the buildings, the buildings will be well designed, with attractive features and muted colors to reduce the visual impact. There will be no external indication that marijuana is being produced on the Property. These very limited impacts are not "unreasonably incompatible with or detrimental to the affected properties and the general public." The Council should reject the Examiner's recommendation and maintain the Property's current Industrial zoning designation.

B. The Proposed Rezone will Not Negatively Affect the Health, Safety, Interest, and Morals or General Welfare of the Public.

Maintaining the existing Industrial zoning will not negatively affect the public. In fact, rezoning the site to RA-5 would create adverse impacts to the public interest and general welfare because it will remove a productive use from the Property—one that produces 12 family-wage

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jobs and significant tax benefits—and replace it with a residentially zoned property immediately adjacent to a four-lane highway. The health impacts of living adjacent to a four-lane highway are likely to be worse than the health impacts of a state-of-the-art facility for organically growing plants pursuant to strict state standards, which will have no health impacts on the surrounding properties. The testimony at the July 16, 2015 hearing supports the conclusion that the proposed use for the Property will create jobs, increase tax revenue, and will have no discernible health impacts to the surrounding properties. The Council should reject the Examiner's recommendation and maintain the Property's current Industrial zoning designation.

C. No Circumstances have Changed since the Property received its Current Zoning Designation that would Warrant Rezoning the Property to RA-5.

The Property has been zoned Industrial for approximately 20 years. Around 15 years ago, WSDOT used the property for construction staging when it expanded Highway 18 to a four-lane highway. The Property continues to be immediately adjacent to Highway 18 and is buffered from nearby rural residential properties by a roadway (SE 248th Street) and by virtue of being at a significantly lower elevation than those properties. The Industrial zoning designation has remained unchanged for at least 15 years. No change in circumstances warrants rezoning the Property from its longstanding Industrial zoning designation to RA-5. The Council should reject the Examiner's recommendation and maintain the Property's current Industrial zoning designation.

D. A Rezone to RA-5 would Not be Consistent with the King County Comprehensive Plan.

The Examiner's Decision is contrary to several Comprehensive Plan policies. For example, Policy ED-211is meant to support programs and strategies to preserve and plan for an adequate supply of industrial land, including promoting redevelopment and infill of industrial areas, and preventing the encroachment of non-industrial uses on industrially zoned land and the rezoning of industrial land to other uses. This policy clearly weighs against the proposed rezone.

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Policy U-172 applies within the Urban Growth Area ("UGA"), but here, the UGA is immediately adjacent to the Property, and so the policy is persuasive. Policy states that "properties with existing industrial uses shall be protected." This policy weighs against the proposed rezone and in favor of maintaining the existing Industrial zoning designation.

Policy R-514 requires new industrial development in the Rural Area to mitigate its impacts by reducing building height, size, protecting natural features, adding buffers to adjacent uses, using muted building colors, minimizing lighting, prohibiting heavy industrial uses that involve waste and chemical byproducts, and scaling back industrial uses that would require substantial investments in infrastructure, such as water, sewers or transportation facilities. Here, the plan for the Property includes many design elements and efforts to mitigate its impact. The record shows that the proposed warehouses should be barely visible to nearby properties. The warehouses also are smaller in size than typical industrial buildings. The buildings also are oriented so that loading activities occur on the south end of the Property, away from residential uses. Lighting also is limited in order to keep light spill from impacting offsite property owners. Additionally, there is virtually no waste or chemical byproducts from the proposed use. Finally, testimony established that traffic impacts are minimal. Thus, the proposed use for the Property complies with Policy R-514.

Policy R-515 states that certain industrial properties should be rezoned to Rural Residential, but all of the other policies identified herein contradict R-515. Given the number of other policies weighing against the proposed rezone, Policy R-515 should be given little weight. The location of the Property adjacent to the urban growth boundary and Highway 18, and the ability to separate the proposed warehouse buildings from adjacent uses all support the conclusion that Policy R-515 should not outweigh the other Comprehensive Policies that apply in this instance and which support maintaining the Property's existing Industrial zoning.

Policy I-101 requires that King County regulations protect property rights. Here, Mark Cramer has invested $580,000 in this project. The rezone would negatively affect the value of

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the Property and the future uses for the site. Rezoning the site will undermine Mr. Cramer's reasonable expectations as to how he could utilize his private property. Rezoning the Property to RA-5 would therefore violate his property rights, and, for that reason, Policy I-101 weighs in favor of not rezoning the Property.

E. The Property does Not meet the Council's Definition of Isolated Industrial Zoned Parcels and the Council should Not Rezone the Property Pursuant to the Council's own Criteria.

The Moratorium Ordinance, which was passed by the County Council on September 22, 2014, adopted a one-year moratorium prohibiting King County from accepting development applications on "isolated industrial zoned parcels."[5] It also directed the King County Executive to develop a work plan for a study that includes, among other things, the "identification of all industrial zoned parcels in King County."[6] Section 3 of the Moratorium Ordinance states the Council's definition of isolated industrial zoned parcels as follows:

> SECTION 3. For the purposes of this ordinance, "isolated industrial zoned parcels" means industrial zoned parcels in the Rural Area that are:
>
> A. Not located in a Rural Town, in a designated area adjacent to the Rural Neighborhood Commercial Center of Preston, or an area located along SR-169 on lands that have been and continue to be used for industrial purposes and have a designation as a King County Historic site;
>
> B. ***Not located*** in or ***directly adjacent to the urban growth boundary***; and
>
> C. Without direct access from arterials or freeways.

(Emphasis added).

On March 11, 2015, the DPER Report was transmitted to the Council. The DPER Report states that "DPER staff found that only [the Property] met the provided definition of isolated industrial zoned parcels."[7] The DPER Report then recommends that the zoning for the Property be changed from Industrial (I) to Rural Area – 5 (RA-5). If DPER had found that the Property did not meet the definition of isolated industrial zoned parcels, then no property would have met

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[5] Ex. 1, King County Ordinance 17893 at Sec. 2.
[6] Ex. 1, King County Ordinance 17893 at Sec. 2(B)(1).
[7] Ex. 3, DPER Report at page 2, Findings.

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the Councils' definition and there would be no property for DPER to recommend for a zoning change.

The Property does not meet the definition of isolated industrial zoned parcels, as provided in the Moratorium Ordinance. According to the definition, an isolated industrial zoned parcel is one that is "Not located in or ***directly adjacent to the urban growth boundary***." (Emphasis added). The Property is directly adjacent to the urban growth boundary, which is immediately south west of the Property across Highway 18. The Highway is not a parcel and it has no zoning designation. The first property immediately southwest of the Property is within the urban growth boundary. The Property thus does not meet the definition of isolated industrial zoned parcels and, pursuant to the terms of the Moratorium Ordinance, should not be considered for rezoning.

The Property is not the only parcel among the 29 evaluated by DPER that is directly adjacent to the Urban Growth Boundary. DPER found that Parcel 0725069024 (address 17525 NE 65th St.) ("Freeman Property") also is not ***within*** the urban growth boundary, but is ***adjacent*** to the boundary. Thus, DPER concluded that the Freeman Property was not an isolated industrial zoned parcel and was not evaluated for rezoning. Despite the fact that the Property is substantially similar to the Freeman Property in its proximity to the urban growth boundary, DPER found that the Property ***did*** meet the definition of an isolated industrial zone parcel. DPER erred. The MVI Property should be exempt from consideration as an isolated industrial zoned parcel subject to rezoning, just as the Freeman Property has been exempted from consideration for rezoning.

F. The Perceived Benefits of the Proposed Rezone do Not Outweigh the Hardship that the Rezone will Cause to MVI.

Mr. Cramer, on behalf of MVI, has invested $580,000 in this project. The rezone to RA-5 will have no appreciable benefits compared to the loss of value to Mr. Cramer and the negative impacts to the community that will result from zoning this property in a way that would eliminate future employment opportunities at this site. The Council should reject the Examiner's recommendation and maintain the Property's current Industrial zoning designation.

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VI. CONCLUSION

For the foregoing reasons, MVI asks that the King County Council to reject the recommendation of the King County Hearing Examiner to rezone MVI's Property from Industrial (I) to Rural Area 5 (RA-5).

DATED this 21st day of August, 2015.

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Attorneys for Maple Valley Industries, LLC

August 31, 2015

Clerk of the Council

Room W1200

King County Courthouse, 516 Third Avenue

Seattle, Washington 98104

Subject: King County Council file no. **2015-0170**

Proposed ordinance no. **2015-0170**

Maple Valley Rezone

Location: Parcel number 202069011

The following is submitted in response to the appeal statement on behalf of Maple Valley Industries, LLC (MVI) concerning proposed ordinance 2015-0170.

My name is Michael L. Lorette, residing at 24407 200th Avenue SE, Maple Valley, Washington, 98038. I have lived here for the last 49 years and know the neighborhood and history of this street well.

I take serious issue with several of the statements in the appeal to the recommended rezone by MVI.

1. The current industrial zoning is clearly incompatible with the neighborhood. Properties adjacent to 200th Avenue SE and SE 248th Street have enjoyed a rural lifestyle since the roads were in existence. We have children, grandchildren, pets, and farm animals on our properties. Many of us get our exercise by walking these streets and our children and grandchildren ride their bikes and skateboards on the street. In addition, the Church of Latter Day Saints has a church on 200th Avenue with many activities several days a week in addition to regular church services. Any large industrial facility such as that proposed by MVI will have a very detrimental impact on the neighborhood.

   Mr. Cramer, owner of MVI, has changed his plans many times, apparently to make it sound like he is only proposing a relatively small operation that will have a minimal impact on the neighborhood. For example, his original proposal was for two 20,000 square foot buildings with over 40 parking stalls. This supposedly has shrunk to only one building with something between six and twelve employees. This is deceptive. If his operation is allowed, there will be nothing stopping him from mission creep to more buildings, more employees, more traffic. And if Mr.

Cramer's operation fails, a new industrial facility will occupy the site with the potential for enormous adverse traffic in terms of size and number of vehicles and associated safety for the neighborhood.

2. Circumstances have clearly changed since the property (parcel number 202069011) received its current industrial zoning. I remember when the sole proprietor of a machine shop built his cinder block building on the property. It was for this sole proprietor, small operation, that the zoning was changed to industrial. What the appeal letter fails to mention is that at that time, the subject property had access to highway 18, and it was for a very small operation. Today, the property does not and has not had access to highway 18 for several years. All traffic to the property must use 200th Avenue SE and SE 248th Street. This is clearly a changed circumstance since the property received its industrial zoning and significantly increases the adverse impact of any industrial facility at that location.

3. The appeal makes mention of the hardship that will be experienced by Mr. Cramer if the property is rezoned, citing the $580,000 invested. It is noted that this is of Mr. Cramer's own doing. Due diligence would have included an assessment of neighborhood reaction regarding such a proposed facility, prior to his purchase and subsequent additional investment for legal fees, permit applications, etc. Further, that dollar figure is small compared to the collective loss of property values for the entire neighborhood that will occur if the property is not rezoned. I estimate that the collective current value of the 50 plus homes affected is about $20,000,000 and will be significantly reduced if the property remains industrial and an industrial facility becomes operational. Who wants to buy residential property on a street utilized by a large industrial facility?

   Emotional hardship for the neighborhood also must be addressed. The neighborhood has been in turmoil over Mr. Cramer's proposal for over a year. Over the 49 years that I have lived here, I recognize most of the owners of vehicles that use this street. There is not a day goes by that if I notice a "strange" vehicle, with an unknown owner heading towards the property in question, I get a knot in my stomach, wondering if it is Mr. Cramer or one of his associates making plans for this miserable project. Families with small children are very anxious, considering the safety implications with potential significant traffic increases. Finally, there are several multi-generational families living on this street, my own included. If this property is utilized for industrial purposes, either by Mr. Cramer or someone else, many family generational breakups in home location will likely occur.

4. I am not a lawyer, but I find the argument in the appeal that the "rezone to RA-5 would not be consistent with the King County Comprehensive Plan" to be ludicrous. The argument being that the parcel is "immediately adjacent" to the Urban Growth Area. Since when is a property immediately adjacent when the distance between the closest point of the property to the closest point of the Urban Growth area is over 400 feet?

Thank you for your consideration of these arguments.

Michael L Lorette

Michael L. Lorette 8/31/15

ORIGINAL

BEFORE THE OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON

In the Matter of: Potential Re-Zone of Parcel No. 2022069011 Pursuant to King County Council Motion 14347	KING COUNTY COUNCIL FILE NO. 2015-0170 **MILES JACKSON'S RESPONSE TO MAPLE VALLEY INDUSTRIES' APPEAL STATEMENT**

Miles Jackson respectfully submits this Response in opposition to Maple Valley Industries, LLC's ("MVI") Appeal Statement. Mr. Jackson resides at 24200 – 200th Ave. SE, Maple Valley, Washington.

I. ARGUMENT

For the following reasons, the King County Council should not reject the Hearing Examiner's recommendation to rezone Parcel No. 2022069011 from Industrial (I) to Rural Area 5 (RA-5).

A. The Hearing Examiner Considered Each of the Issues Raised by Maple Valley Industries in its July 1, 2015 Challenge to DPER Findings/Conclusions.

MVI contends that the Hearing Examiner failed to consider issues raised by MVI in its July 1, 2015 submittal. The Hearing Examiner's Report and Recommendation reflects otherwise. Specifically, the Report reflects clearly that the Hearing Examiner specifically considered (a) U-172 of King County's Comprehensive Plan (*see* Report and Recommendation, ¶¶ 67–69); (b) MVI's argument that rezoning would cause a hardship to MVI (*see* Report and Recommendation, ¶ 70); and (c) MVI's argument that the MVI parcel was inappropriately designated an "isolated industrial zoned parcel" (*see* Report and Recommendation, ¶¶ 75–76).

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B. The Proposed Rezone Will Not Negatively Affect the Health, Safety, Interest, and Morals or General Welfare of the Public.

MVI notes correctly that the Hearing Examiner should have considered whether the proposed rezone would negatively affect the health, safety, interest, and morals or general welfare of the public. MVI Appeal Statement, p. 6 (Section V(B)). Despite expressly recognizing this important factor, however, MVI fails to address it. Instead, it recasts this criterion to mean something else entirely, arguing that "maintaining the existing Industrial zoning will not negatively affect the public." MVI Appeal Statement, p. 6.

MVI offers no case law support for its contention that such hardship is a valid consideration. As the Council is aware, rezoning decisions are made based primarily on the information brought to the table by the proponent of the rezone; there is no presumption in favor of a proposed rezone. *Woods v. Kittitas County*, 162 Wn.2d 597, 617,174 P.3d 25 (2007) (rezone proponent bears the burden of establishing that conditions have changed such that a rezone is appropriate). Because the Hearing Examiner and the Council must evaluate whether the rezone "bear[s] a substantial relationship to the public health, safety, morals, or welfare," due and thorough consideration is given the interests of affected property owners.

The Council should not allow MVI's attempted diversion to confuse the issue. The Hearing Examiner's report reflects a thorough analysis of the proper issue—whether the rezone will negatively affect public welfare—and asserts the clear conclusion that it will not.

C. Rezoning the Parcel to RA-5 is Consistent with the Comprehensive Plan.

MVI asserts that maintaining the existing zoning would be compatible with King County's Comprehensive Plan. Specifically, MVI argues that U-172 from the Comprehensive Plan should be considered because it is persuasive. By its express terms, however, U-172 applies *within the UGA*. King County 2013 Comprehensive Plan, U-172; Maple Valley Rezone, King County Hearing Examiner 2015-0170, ¶¶ 68–69. If U-172 had been intended to apply *near* the UGA rather than *within* the UGA, it would say so.

The Council should note that MVI cites several other Policies that it purports support its challenge but in actuality support the conclusion that the proposed rezone is appropriate. For

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example, Policy R-154 does, as MVI points out, require that new industrial development in the Rural Area mitigate its impacts. However, MVI conveniently ignores the Policy R-154's recommendation to "scal[e] back industrial uses that would require substantial investments in infrastructure, such as water, sewers or transportation facilities." As the Hearing Examiner's Report and Recommendation notes, the unavailability of public funds to improve residential roadways to accommodate new industrial development suggests that this development is in fact inconsistent with Policy R-154. Maple Valley Rezone, King County Hearing Examiner 2015-0170, ¶ 33.

MVI similarly cherry-picks language from Policy I-101 to support its challenge of the Hearing Examiner's recommendation, citing specifically that portion of the Policy requiring the protection of property rights. But a reading of Policy I-101 reveals a broader scope of protection than MVI leads the Council to believe. It requires that King County's land use regulation "[p]rotect *public health, safety and general welfare,* and property rights." [Emphasis added.] The Hearing Examiner clearly recognized this broader responsibility, citing specifically to residents' reliance on a shallow well for water, a use that could be threatened by more intensive industrial use on this property, and to the fact that the only road that accesses the MVI property is a narrow road with a blind curve and no sidewalks and shoulders. *See* Maple Valley Rezone, King County Hearing Examiner 2015-0170, ¶¶ 32, 49.

D. The Property Meets the Definition of an Insolated Industrial Zoned Parcel.

MVI argues that the Property does not meet the definition of an Isolated Industrial Zoned Parcel because it sits "directly adjacent to an urban growth boundary, which is immediately south west of the Property across Highway 18."

MVI's strained interpretation of the phrase "directly adjacent" boils down to a request that the Council pretend that Highway 18 does not exist. Because the phrase "directly adjacent" is undefined, the Council should interpret it according to recognized rules of statutory interpretation. Case law directs that "[t]o discern the plain meaning of undefined statutory language . . . words [are to be given] their usual and ordinary meaning and interpret them in the context of the statute in

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which they appear." *Protect the Peninsula's Future v. Growth Mgmt. Hr'gs Bd.*, 185 Wn. App. 959, 969, 344 P.3d 705, 710 (2015) (citing *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)). The Merriam-Webster Dictionary defines "adjacent" to mean "not distant; having a common endpoint or border; immediately preceding or following; . . . having the vertex and one side in common." It defines "directly" to mean "in immediate physical contact."

In case the word "adjacent" is insufficiently clear, the addition of the word "directly" resolves any ambiguity. "Directly adjacent" means immediately next to. To conclude otherwise would be to ignore the word "directly," which would contradict the fundamental rules of statutory construction that each word in a statute was selected purposefully and that no portion of a statute should be rendered superfluous. *Alpine Lakes Prot. Soc'y v. Dep't of Ecology*, 135 Wn. App. 376, 144 P.3d 385 (2006).[1]

Notably, even if one pretends that Highway 18 does not exist, MVI's property would still not sit directly adjacent to the urban growth boundary. The urban growth boundary begins to the southwest of the MVI parcel. Even without Highway 18, MVI's property would not share a common border with it.

II. CONCLUSION

MVI offers no valid grounds that would justify the Council's rejection of the Hearing Examiner's recommendation to rezone Parcel No. 2022069011. The Council should accept the recommendation and act in accordance with it.

Dated: September 4, 2015.

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[1] MVI's recognition that the "Freeman Property" is adjacent to an urban growth boundary does nothing to help its cause. Because the Freeman Property has nothing in between its boundary and the urban growth boundary, that Property is in fact "directly adjacent" to the urban growth boundary.

July 31, 2015

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REPORT AND RECOMMENDATION

SUBJECT: King County Council file no. **2015-0170**
Proposed ordinance no.: **2015-0170**

MAPLE VALLEY REZONE

Location: Parcel number 2022069011 and directly abutting property SE 248th Street, west of 200th Avenue SE

Referred by: **Metropolitan King County Council**
Staff contact Erin Auzins
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516 Third Avenue
Seattle, WA 98104
Email: erin.auzins@kingcounty.gov

Owner: **Maple Valley Industries LLC**
represented by Randall Olsen and Donald Marcy
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SUMMARY: By motion, the Council referred a proposed ordinance that would rezone property from Industrial to Rural Area. We set and held a pre-conference, issued a pre-hearing order, and held a public hearing, at which we took testimony and exhibits. Based on the hearing evidence, we recommend that the Council approve the proposed ordinance and rezone the subject property.

EXAMINER PROCEEDINGS: The hearing opened and closed on July 16, 2015. Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available from the Hearing Examiner's Office.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION: Having reviewed the record in this matter, the examiner now makes and enters the following:

FINDINGS AND CONCLUSIONS:

1. General Information:

Location:	Parcel number 2022069011 and directly abutting property 248th Street, west of 200th Avenue SE
Threshold Determination:	Determination of Non-Significance (DNS)
Date of Issuance:	May 28, 2015
Existing Zone:	Industrial (I)
Down Zone:	Rural Area (RA), with five acre minimum
Section/Township/Range:	SW 20-22-06

Introduction

2. This matter involves a property in the vicinity of Maple Valley and Covington, but outside those corporate limits and outside the Urban Growth Boundary. The Metropolitan King County Council referred to us the question of whether to rezone the subject property from the current "I" (Industrial) to "RA-5" (Rural Area, with a five-acre minimum). In the foreground is Maple Valley Industries' (MVI's) commercial site development permit application for a marijuana production and processing facility on the subject property. We held a pre-hearing conference and later a public hearing at which ten members of the public testified in favor of a rezone and MVI's four witnesses offered testimony weighing against a rezone.

3. This rezone proceeding is not a proxy hearing on whether MVI is entitled to a permit under the pertinent standards that govern the Department of Permitting and Environmental Review's (DPER's) analysis. Thus, to the extent we make a finding or conclusion that directly overlaps a finding or conclusion DPER must make in reviewing MVI's application, ours is not meant to have final or preclusive effect. Phrased another way, the time to appeal an MVI-application-specific item is not now but instead during the appeal period that will follow DPER's decision on MVI's pending application.

4. For the reasons explained below, we recommend that the Council rezone the subject property.

Background

5. In 1994, the Washington State Department of Transportation (WSDOT) purchased a large parcel that included the subject property. Ex. 3, Report at 3. At the time, the parcel was zoned ML-P (Manufacturing Light). *Id.* At one time 248th Avenue SE had direct access to what was then a two-lane Highway 18 and to areas to the south. Dewitt & Codd testimony; Ex. 8A.

6. In 1995, with the conversion of the county zoning code into Title 21A, the zoning designation was converted to "I-P," the "I" being Industrial and the "P" being since-rescinded restrictions not relevant to our case. Ex. 3, Report at 3.

7. In 1999, WSDOT received a permit to demolish a concrete shop building on the subject property. *Id.* Although the precise dates are not in the record, WSDOT began using the larger property as a staging area for construction equipment and materials as it expanded Highway 18. *Id.* At some point it completed what is now the four-lane (two lanes in each direction, divided by a middle strip), limited access highway. *Id.*; Codd & Dewitt testimony. Once completed, the previous arterial access the subject property enjoyed was eliminated. Ex. 3, Report at 3.

8. This created an industrially-zoned property in a sea of rural-zoned property.[1] Ex. 12A. On the south side of Highway 18, past some RA-zoned properties, is Lakeside Industries, a large quarry mine. Cramer testimony; Ex. 10 (presumably the white area south of Highway 18). These areas to the south were separated from the subject neighborhood once Highway 18 became a barrier to, not a way to reach, those areas. Northwest of the subject property is a state-owned gravel pit, but the testimony was that the state uses this very infrequently. Simpson testimony. And that state-owned parcel is itself zoned RA-5 and has direct access from that operation to the arterial SE Wax Road. Ex. 10 (grey-veined area west of 196th Avenue E and south of SE Wax Road); Ex. 12A. Similarly, a church sits at the intersection of SE Wax Road, SE 240th Street, and 200th Avenue SE. Jensen testimony. This too is also zoned RA-5, and has direct access to the arterial SE Wax Road. The rest of the neighborhood is not only all RA-5, but uniformly residential, per the consistent neighbor testimony at hearing and the lack of any contrary information in the record.

9. Mark Cramer testified as follows. Soon after I-502 legalized marijuana at the end of 2012, he began looking to create a marijuana facility. After determining that other potential sites would not work, he alighted on the subject property. Prior to purchase, he reviewed the subject property with DPER, and DPER advised him that (from a zoning perspective) the subject property was suitable for his desired use. *See also* Ex. 9. He then performed some due diligence in relation to critical areas and soil. Finally, he purchased the property from WSDOT in April 2014 for approximately $320,000. He would not have bought the property had it not been zoned industrial. Based on the current record, we accept this testimony.

10. At about the same time, the Council began considering legislation that would restrict marijuana processing within the Industrial zone. Mr. Cramer lobbied against those restrictions, but his efforts were ultimately unsuccessful; on June 23, 2014, the Council

[1] There is a WSDOT-owned, industrially-zoned, remnant buffering Highway 18 and the subject property, but its parameters are unclear. Ex.12A (grey "I" area between the subject property and Highway 18). After WSDOT completed its work, it converted about half the original parcel into right of way, and segregated the remaining portion into the subject property. Ex. 3, Report at 3.

enacted Ordinance 17841, which the Executive approved on July 4.[2] We will henceforth refer to this as the "July 2014" code change.

11. After the Council's passage, but prior to the ordinance becoming effective, on June 25 MVI submitted a complete commercial site development application for marijuana production and processing. Ex. 3, Report at 3. The project would create two, 20,000-square foot light industrial buildings. Ex. 15 at 2.

12. In September 2014, the Council enacted Ordinance 17893, declaring a one-year moratorium on accepting applications for new development on isolated, industrially-zone-parcels, and directing DPER to study the issue. Ex. 1. In response, in March 2015 the Executive submitted to Council a DPER report ("Report") which recommended rezoning the subject property from Industrial Rural Area. Ex. 3. After applying the criteria in Ordinance 17893, DPER found that only the subject property (plus the abutting, remnant WSDOT holding) matched the Council's stated definition of "isolated industrial zone parcels." Ex. 3, Report at 2.

13. After Council received DPER's Report, it introduced Proposed Ordinance 2015-017, and via Motion 14347 referred that ordinance to us at the end of April, directing us to conduct a quasi-judicial hearing and issue a recommendation on a rezone. Exs. 4 and 5. In May, DPER completed its State Environmental Policy Act (SEPA) analysis of the proposed rezone and issued a Determination of Non-Significance. Ex. 7. No one provided any substantive comments to that SEPA determination.

14. At the beginning of June, we set a June 18 pre-hearing conference. After the conference, we issued a June 23 Pre-Hearing Order which set, among other things, the issues for hearing and various pre-hearing deadlines. We conducted the hearing on July 16. Ten members of the public testified in favor of a rezone and MVI's four witnesses offered testimony weighing against a rezone. After the completing the hearing, we closed the record.

Analysis

15. In considering a potential rezone:

> (1) there is no presumption of validity favoring the action of rezoning; (2) the proponents of the rezone have the burden of proof in demonstrating that conditions have changed since the original zoning; and (3) the rezone must bear a substantial relationship to the public health, safety, morals, or welfare.

Woods v. Kittitas County, 162 Wn.2d 597, 617,174 P.3d 25 (2007). That list is not exclusive; counties may impose additional criteria for analyzing rezones. *Id.* In this case,

[2] Ex. 3, Report at 3; Ord. 17841. Interestingly, it was neighbor Mel Codd who raised the topic of Mr. Cramer's lobbying efforts and entered Mr. Cramer's May 2014 memorandum to Council as Exhibit 11. To the extent they matter, Mr. Cramer's legislative efforts cut in MVI's *favor*, showing that Mr. Cramer was not sleeping on his rights but was striving to bring his development to fruition.

we start with changed circumstances, move to analyzing the consistency of this rezone to the King County Comprehensive Plan, and then discuss public health, safety, morals, welfare and interest, before moving to whether the potential rezone is unreasonably incompatible with or detrimental to affected properties and the general public.

16. Conditions have changed significantly since the original zoning. As described in paragraphs 5–8, when the subject property received its initial (and current) Industrial zoning in 1995, it had direct access to Highway 18 and points south. At the time, WSDOT owned the property and was beginning to use the property for a heavily industrial use—staging construction equipment and materials as it built Highway 18. But that use ceased when WSDOT completed its project. And after WSDOT finished the four-lane, limited access highway, it eliminated the subject property's direct arterial access and access to an urban area to the south. This left the subject property locked on the north side of Highway 18, surrounded by a sea of rural property, its only remaining access through the residential neighborhood to the north. Ex. 12A (showing the gray "I" surrounded by green "RA-5").

17. Washington does not require a "strong" showing of change. *Bassani v. Board of County Com'rs for Yakima County*, 70 Wn. App. 389, 394, 853 P.2d 945 (1993). But even if it did, the circumstances have changed substantially, and this element weighs decidedly in favor of rezoning away from Industrial, given the half-mile plus of residential street industrial traffic to and from the subject property would now have to traverse to reach an arterial.

18. We next turn to consistency with the King County Comprehensive Plan (Comp Plan). Before discussing specific, relevant policy numbers, we observe that both the subject property and the surrounding properties have had a "Rural" designation since at least the 2012 Comp Plan. Ex. 3, Report at 4. So the last time the County approved a Comp Plan, the subject property was slated for RA, not I, zoning.

19. The most definitive Comp Plan policy is:

> U-173 Industrial development should have direct access from arterials or freeways. Access points should be combined and limited in number to allow smooth traffic flow on arterials. Access through residential areas should be avoided.

20. That could hardly be any clearer. Since losing its direct access to Highway 18, traffic to and from the subject property must travel a slight distance along the residential SE 248th Street, and then half-mile up the very residential SE 200th Avenue to reach the intersection with the minor arterials of SE 240th Street and SE Wax Road.[3] Ex. 15 at 3. Industrial development on the subject property thus lacks the necessary, direct access to arterials or freeways, and it would create the industrial access through residential areas that should be avoided. U-173 cuts sharply in favor of a rezone.

[3] Mark Dewitt explained that, with blocks set at 1/16 mile, the eight blocks between SE 240th Street and SE 248th Street would be approximately a half mile. And the entrance to the subject property is west of this, along SE 248th Street.

21. MVI points to Comp Plan policy I-101, which states in pertinent part that "King County's regulation of land should: a. protect public health, safety and general welfare, and property rights." Public health, safety, and general welfare are discussed in paragraphs 45–62, but I-101(a) injects the protection of property rights into the equation. Mr. Cramer purchased the property as Industrial for $320,000 and he testified, without rebuttal, that he has invested an additional $260,000 in furtherance of marijuana operations on the subject property. He opined that, being adjacent to Highway 18, the subject property was not a high value residential site and not one he would have considered investing in.

22. We agree that I-101(a) weighs against a rezone, but only to a point. First, downzoning "generally results in a loss of property value." 3 RATHKOPF'S, THE LAW OF ZONING AND PLANNING § 38.30 (4th ed.). After all, the jurisdiction is typically attempting "to downzone property from a more intensive use, and therefore more lucrative use, to a less intensive use." *Cf. Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 421, 13 P.3d 183 (2000) (Talmadge, J., dissenting on other grounds). So the concept that residential uses would be less lucrative than industrial ones is almost a given, not a surprise twist unique to this case. And "[a] property owner has no legal right to the continued maintenance or retention of the zoning governing his or her own property." RATHKOPF'S at *id*.

23. Second, there are a myriad of other RA-5 zoned properties abutting Highway 18, many without the WSDOT-buffering property the subject property enjoys. Ex. 12A. All of those could potentially argue that they should be zoned something else because they are likely less desirable residence sites than lots further removed from the highway. But we are not aware of other owners arguing that they can make no reasonable residential use of their Highway 18-abutting properties or seeking rezones. There is nothing in the record showing the subject property is any less suitable to residential development than any of the other, RA-zoned properties abutting Highway 18. Even if the subject property (and other Highway 18-abutting properties) are less desirable than more buffered residential lots, that does not make residential use incompatible or infeasible for those parcels. And at 6.5 acres the subject property has more room for internal buffers than the majority of, smaller, RA-5 zoned properties abutting Highway 18. Ex. 12A.

24. Third, and most importantly, "vesting" entitles a developer to have her land development proposal processed under the regulations in effect at the time she filed a complete permit application, despite any subsequent changes in zoning or other land use regulations. *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 172-73, 322 P.3d 1219 (2014). For a commercial site development permit, DPER must base its analysis on the "adopted county and state rules and regulations in effect on the date the complete application was filed." KCC 21A.41.070.

25. According to DPER, MVI submitted a complete permit application on June 25, 2014. Ex. 3, Report at 3. This was two days after the Council passed changes that reduced the allowable marijuana-related uses in an Industrial zone, but several days before the Executive signed the ordinance. Ord. 17841, final page. In *Allenbach v. City of Tukwila*, 101 Wn.2d 193, 194-95, 676 P.2d 473 (1984), our court ruled that a developer was entitled to vesting where he submitted a permit application nearly two months after a

restrictive ordinance passed, but one day before the ordinance actually became effective. Our court recently reaffirmed that vesting still applies in such a scenario. *Town of Woodway*, 180 Wn.2d at 180 (citing *Allenbach* at *id.*).

26. Thus, while the vesting question will conclusively be determined through the permit process (and any appeals to DPER's decision on MVI's application), per the record we consider, MVI is entitled to have its application decided on the basis of the pre-July 2014 code change and under the then (and current) Industrial zoning. If MVI continues through the permit process and receives a permit, this would almost entirely eliminate any loss to MVI. And if MVI is not entitled, per the rules and zoning in place in June 2014, to its project, then it would be harder to argue that the July 2014 code change or this rezone was the proximate cause of MVI's lost, marijuana-related investment. *See, e.g. Orion Corp. v. State*, 109 Wn.2d 621, 660-62, 747 P.2d 1062 (1987).

27. That is not to say that a rezone would have zero economic impact. If MVI receives its permit, constructs its facilities, and begins operations, it would become a legal, non-conforming use. Non-conformance limits flexibility and expansion options. But MVI's use would already—by virtue of the July 2014 code changes—be a legal, non-conforming one, regardless of this rezone. And, for example, the non-conforming use rule that caps any building square footage increases at ten percent tracks the commercial site development rule that caps any building floor area increase at ten percent. *Compare* KCC 21A.32.065(A)(1)(a) *with* KCC 21A.41.110(A)(1). Moreover, the July 2014 changes would restrict any future MVI competitors. As Mr. Cramer noted, that code change adds significant time and cost for a marijuana facility, "effectively prohibiting participation" at this stage of the market. Ex. 11 at 5. Restricted competition would tend to offset the negative impact of being a legal, non-conforming use.

28. Fourth, the neighbors' investment in their residential properties would likely suffer some detriment from an industrial use being established in their neighborhood, especially an industrial use with a greater impact than MVI's. *See, e.g.*, Cornelius testimony; paragraph 65. Our courts accord more weight to the property rights of an individual seeking to develop her property than to the property rights of neighbors who may be adversely impacted by that development. *See, e.g., Durland v. San Juan County*, 182 Wn.2d 55, 75, 340 P.3d 191 (2014) (abutting neighbor lacked sufficient property interest to demand notice of—and a realistic chance to challenge—a development permit). Thus the neighbors' property rights are not entitled to as much weight as MVI's, but they are relevant, and so there some tradeoff between MVI's and the neighbors' property rights.

29. In the final analysis, applying I-101(a) to the rezone proposal depends in part on a factor we cannot know at this time: whether MVI's current permit application will ultimately be approved. If it is, then balancing the slight impediment non-conforming use status would create against the property interests of the surrounding residential owners seems close to a wash. Conversely, if the rezone ultimately winds up being the proximate cause of no industrial development on the subject property, then I-101(a) cuts in MVI's favor. Yet a "property owner has no legal right to the continued maintenance or retention of the zoning governing his or her own property" and downzonings "in accordance with a

comprehensive plan, are likely to be sustained even where the reduction in property value is quite severe." 3 RATHKOPF'S, THE LAW OF ZONING AND PLANNING § 38.30 (4th ed.).

30. Next, we turn to R-514, which states that:

> Development regulations for new industrial development in the Rural Area shall require the following:
>
> a. Greater setbacks, and reduced building height, floor/lot ratios, and maximum impervious surface percentage standards in comparison to standards for urban industrial development;
>
> b. Maximum protection of sensitive natural features, especially salmonid habitat and water quality;
>
> c. Building and landscape design that respects the aesthetic qualities and character of the Rural Area, and provides substantial buffering from the adjoining uses and scenic vistas;
>
> d. Building colors and materials that are muted, signs that are not internally illuminated, and site and building lighting that is held to the minimum necessary for safety;
>
> e. Heavier industrial uses, new industrial uses producing substantial waste byproducts or wastewater discharge, or new paper, chemical and allied products manufacturing uses in the urban industrial zone shall be prohibited; and
>
> f. Industrial uses requiring substantial investments in infrastructure such as water, sewers or transportation facilities shall be scaled to avoid the need for public funding of the infrastructure.

31. MVI is correct that many items in Comp Plan R-514 are already reflected in KCC 21A.14.280, which set the specific development standards for industrially-zoned rural properties. Thus all industrial development (not just MVI's specific proposal) on the subject property would have to meet enhanced setbacks, reduced building heights, and aesthetic concerns. *Compare* R-514(a), (c), and (d) *with* KCC 21A.14.280. While the subject property does not seem to involve the sensitive natural features discussed in R-514(b), that still leaves (e) and (f).

32. For (e), the production and processing proposal MVI described avoids chemical fertilizers in production and the solvents and volatiles used in the extraction process. This seems a pretty big deal. If DPER conditions MVI's permit on the not employing such chemicals, then MVI's project may very well meet R-514(e). However, KCC 21A.14.280 does not command that result for rural industries, and other chemical-employing business such as dry cleaning plants, gasoline service stations, industrial and commercial machinery, heavy equipment and truck repair, and medical labs are allowed. *See* paragraph 65. And even under the July 2014 code changes, if the zoning stays industrial,

a *future* marijuana business could apply for more intensive processor II use, which explicitly allows such chemical processing; conversely, such chemicals would not be allowed if the property is rezoned to Rural. KCC 21A.06.7344(B)(3); KCC 21A.08.080(A) & (B) (items 25 & 26). This concern seems heightened because the properties just west of the subject property on SE 248th Street use a well that taps into shallow (less than fifteen feet below grade) water table that rests at approximately the same elevation as the building pad for the subject property. Simpson testimony.

33. And, the subsection of R-514 that Ordinance 17893 focused on is (f), scaling industrial uses to avoid the public needing to fund infrastructure. Ex. 1 at lines 24–28. In particular, with the County's Road Services Division facing a $250,000,000 annual shortfall, there are not available public funds to improve local residential roadways to accommodate new industrial development. Ex. 1 at lines 29–33.

34. MVI retained Mark Jacobs of Jake Traffic Engineering to analyze the traffic impacts of two, 20,000-square foot Light Industrial buildings. Ex. 15 at 2. In his May 2014 analysis, he calculated MVI would generate 279 trips per weekday, with 37 and 39 of these coming in the AM and PM peak hour. Ex. 15 at 5. We refer to 200th Avenue SE, from the time it leaves the SE 240th Street/SE Wax Road intersection until it bends around and becomes SE 248th Street and then dead-ends past the subject property, as the "Road."

35. The King County Department of Transportation (KCDOT) determined that these trips would be equivalent to adding 30-35 additional homes, and would result in the Road reaching "subcollector" volumes. Ex. 17 at 4, ¶ 19. The pertinent King County Road Design and Construction Standards require, for "subcollector" roads, a minimum 22-foot traveled way, with 6-foot shoulders on each side, set within a 60-foot right of way. Ex. 17 at 5, ¶ 24. Even the lesser "subaccess" street requires a minimum 20-foot travelled way, with 4-foot shoulders on each side, set in a 48-foot right of way. *Id.* And even the lowest road classification KCDOT discussed, "minor access," requires a 20-foot travelled way, with 2-foot shoulders on each side, set in a 40-foot right of way. *Id.* Yet the bulk of the Road sits within only a 30-foot right of way corridor, half the standard "subcollector" width. Ex. 17 at 5, ¶ 23. Ex. 17 at 5, ¶ 23. This makes construction of the Road to rural "subcollector" standards "impossible." Ex. 17 at 5, ¶ 26.

36. The safety perspective is discussed in paragraphs 46–51. From the perspective of public infrastructure requirements, KCDOT recommends that the entire (half-mile plus) Road be improved to "subaccess," with the fallback being, at a minimum, "minor access." Ex. 17 at 5, ¶ 27. And almost half the Road does not meet even this "minor access" street standard (the lowest category KCDOT mentioned). Ex. 17 at 5, ¶ 25. In addition, while the Road pavement is fair to good from the subject property north to just south of SE 242nd Place, it is "poor" from this point north to the SE 240th Street/SE Wax Road intersection. Ex. 17 at 4, ¶ 22. KCDOT recommends that this section be overlaid. Ex. 17 at 5, ¶ 28.

37. This creates a public infrastructure spending problem. While Mr. Jacobs recommended that MVI overlay an approximately 600-foot stretch of Road around SE 245th Street to add a foot or two of pavement width to bring the surface to 20 feet, he noted (we assume

correctly) that KCDOT's recommended overlay of the (poor) pavement from just south of SE 242nd Place north to the SE 240th Street/SE Wax Road intersection is the County's responsibility. Ex. 16 at 4, text under ¶ 28 ("Maintenance of a County Road is the responsibility of the County"). That does not even include trying to create shoulders to accommodate pedestrian travel, discussed in paragraph 49. Creating an industrial use on the subject property would create a pull on scarce Road Services funds.

38. Mr. Jacobs explained that, subsequent to his May 2014 assessment, MVI provided him with more specific information on the precise scope of MVI's operations. He re-ran the analysis to reflect the lower traffic and smaller trucks/vans that MVI would likely use. In January 2015 he estimated that actual MVI traffic would be ten to fifteen percent of his original traffic generation estimate for light industrial. Ex. 16 at 2. He emphasized in testimony that MVI's use would be lighter than "typical" light industrial.

39. We leave the analysis of MVI's specific, lighter intensity development to KCDOT and DPER, to sift through as they process MVI's pending permit application. Our inquiry involves the fuller range of industrial versus rural uses. *See* paragraph 65. We conclude that the May 2014 traffic analysis described the impacts of more typical industrial zoning better than the January 2015 analysis of MVI's more modest endeavor. R-514, especially subsection (f), favors rezoning.

40. And that brings us to R-515:

> Existing industrial uses in the Rural Area outside of Rural Towns, the industrial area on the King County-designated historic site along SR-169 or the designated industrial area adjacent to the Rural Neighborhood Commercial Center of Preston shall be zoned rural residential but may continue if they qualify as legal, nonconforming uses.

41. As with U-173, the import is significant and requires little elaboration. Even *existing* industrial uses outside of the discrete geographic areas mentioned (rural towns, an area on SR-169, and Preston) "shall be zoned" rural residential. We thus do not decide *de novo* whether industrial zoning and establishing a new industrial use is appropriate here, in an area outside the listed geographical areas. The Comp Plan has already made the policy call that it is not. R-515 cuts sharply in favor of a rezone.

42. MVI argued in closing that R-515 conflicted with the other Comp Plan policies and should not apply because the area is adjacent to an urban growth area (UGA), is not appropriate for residential use, and can be functionally separated from the residential area. We answer those concerns in turn. Adjacency is discussed in paragraphs 71 and 75, but adjacency is not relevant to R-515, because the only "adjacency" R-515 makes an exception for is near Preston. As discussed in paragraph 23, that the subject property is a less than an ideal residential site does not make it inappropriate for residential use. And separation is not one of R-515's factors in deciding how to zone industrial uses. To the extent separation matters, and even though MVI's proposal appears to create fewer impacts than more typical industrial use, the biggest impact (of MVI, let alone a more intensive use) is the industrial traffic that would have to cut through the surrounding

residential area. The subject property is thus not functionally separate-able from the residential area. Moreover, R-515 says such industrial uses (outside the discrete, referenced areas) "shall be zoned rural residential" without providing any caveat like "if appropriate" or "if not otherwise separated."

43. ED-211 states that

> King County should support programs and strategies to preserve and plan for an adequate supply of industrial and commercial land, including but not limited to:
>
> …
>
> e. Promoting the redevelopment and infill of industrial and commercial areas and explore the feasibility of using incentives to achieve this goal.

44. ED-211's more general policy supporting industry cannot weigh as heavily as R-515 specifically identifying those rural areas in which the County has decided to concentrate industrial activity and specifying that other industrial uses outside those defined geographic areas "shall be zoned rural residential." And the new, proposed industrial use on the subject property is not redeveloping or infilling an industrial "area" so much as it is developing a single industrial parcel in an otherwise residential area.[4] To the extent ED-211 applies at all to the subject property, its attenuated application could only mildly favor retaining the current Industrial zoning.

45. We turn next to the impact of the proposed rezone on the health, safety, morals, and general welfare of the public, and whether the requested reclassification is in the public interest. Motion 14347, our code, and our Court reference such a test for rezones. Ex. 5, lines 51-52; KCC 20.24.190(D); *Woods v. Kittitas County*, 162 Wn.2d 597, 617,174 P.3d 25 (2007). Yet our Court also has counseled against basing decisions on factors such as "public use and interest" and the "public health, safety, and general welfare," in the face of adopted standards and specifications. *Norco Const., Inc. v. King County*, 97 Wn.2d 680, 688-90, 649 P.2d 103 (1982). We thus analyze this topic, but we do not weight it heavily, particularly compared to the more specific (and less subjective) Comp Plan policies described above. In short, those Comp Plan policies play a significant role in establishing the public interest.

46. We start with safety, specifically related to traffic both at the SE 240th Street/SE Wax Road/200th Avenue SE intersection ("the Intersection"), and from there down 200th Avenue SE until it bends around and becomes SE 248th Street, before dead-ending beyond the subject property (the "Road"). The neighbors described safety issues related to both the Intersection and to the Road.

47. As to the Intersection, KCDOT looked at accidents reported to the State. KCDOT looked at almost eight years of WSDOT's collision reports for the Intersection and found a total

[4] As discussed in footnote 1, there are apparently slivers of remnant WSDOT property abutting the subject property, but exactly what is not clear from the record.

of eight collisions (plus an additional one not yet in the database). Ex. 17 at 3–4, ¶ 17. Since the pertinent KCDOT methodology for judging an intersection "high accident" requires eight collisions in a three year period, the Intersection did not require additional study. *Id.* at 4, ¶ 17(a).

48. The neighbors uniformly believed this understates the Intersection's hazard. They testified to "daily" near misses. Dewitt testimony and Ex. 8N & O. A neighbor who lives and works at the corner of the "Intersection" and said he can hear screeches and accidents, testified that in 2013 alone he observed seven accidents, which exceeds the two reported to WSDOT in 2013. *Compare* Codd testimony to Ex. 17 at 4, ¶ 17. Another neighbor reported seeing so many wrecks at the Intersection that he routinely cuts through the church parking lot to avoid the Intersection. Deaton testimony. WSDOT's totals of reported accidents underestimate the true number of reported plus unreported accidents, but this would likely be true of *any* intersection. Still, we found credible the testimony that the three-way Intersection poses a riskier situation than one would glean from WSDOT's accident data alone.

49. As to the Road itself, there is no dispute that the bulk of the existing pavement is somewhat narrower than even the lowest, 20-foot pavement category. The neighbors discussed a blind curve and sight distances and concerns about road safety. Cornelison & Dewitt testimony; Ex. 8D & E. And the concern is not just for neighborhood drivers, but neighbors on their daily walks along the Road. Testimony of Cornelision & Deaton. The Road has little if any walkable shoulder. Ex. 8C, D, F, G, I, J & K. With no sidewalks or shoulders, the neighbors need to walk on the Road pavement; the Road is how they do their visiting and how they walk to the school bus stop halfway down the Road from the Intersection. Lorette, Cornelision & Dewitt testimony. In addition to residential uses, the first Road property south of the Intersection contains a church in use not just on Sundays, but every morning for religious education of junior high and high school students before their regular school, and for frequent evening youth activities. Jensen testimony.

50. Site distances (both stopping and entering) are measured according to specific, adopted King County Road Design and Construction Standards. KCDOT's preliminary call was that the distance needs to be verified but "appears to be adequate." Ex. 17 at 4, ¶ 21. That does not mean the Road does crest and curve, but those Standards, not subjective assessments, set the rules for required site distances.

51. Of greater concern is the narrow existing Road width, the lack of walkable shoulders, and the constrained right-of way width that makes fixing the issue problematic. As analyzed in paragraphs 34–36, KCDOT explained that the volumes more typical light industrial use would generate, as calculated by Mr. Jacobs, would result in the Road reaching "subcollector" volumes. Even just the pavement and shoulders a "subcollector" requires would exceed the entire 30-foot right of way that exists for most of the Road, let alone be half the 60-foot total right of way a subcollector requires. So Road safety is an issue. That is not to say that it is sufficient to warrant permit denial or a particular conditioning requirement from KCDOT or DPER on MVI's permit application; we leave that to KCDOT and DPER. But it is to say that beyond simply being a route through a residential area—which U-173 says should not be used for industrial developments

anyway—the Road's narrow pavement, lack of shoulders to handle frequent pedestrian travel, and lack of much wiggle room to fix the situation points "safety" in the direction of a downzone.

52. Next we turn to the somewhat nebulous concept of "welfare." Welfare most has a role to play when determining whether a rezone application is an illegal spot zone.[5]

> Spot zoning has been consistently defined to be zoning action by which a smaller area is singled out of a larger area or district and specially zoned for a use classification totally different from and inconsistent with the classification of surrounding land, and not in accordance with the comprehensive plan.

Save Our Rural Environment v. Snohomish County, 99 Wn.2d 363, 818-819, 662 P.2d 816 (1983). Not all spot zones are illegal; the main inquiry being the relationship of the rezone to the "general welfare of the affected community." *Id.* at 819.

53. Here the subject property is bounded by the fenced off Highway 18 and then surrounded by Rural Area. Ex. 12A. If the situation had been reversed, and the subject property were currently zoned Rural and an attempt were made (post Highway 18 seal-off) to rezone it to Industrial, it would be "'granting a discriminatory benefit to one or a group of owners and to the detriment of their neighbors or the community without adequate public advantage or justification.'" *Davidson Serles & Associates v. City of Kirkland*, 159 Wn. App. 616, 638 n.14, 246 P.3d 822 (2011) (*quoting Lutz v. City of Longview*, 83 Wn.2d 566, 573-74, 520 P.2d 1374 (1974)). That is not, by itself, sufficient to warrant this rezone, as the default is the current Industrial zoning, and the thumb is on the scale against a rezone. *Woods v. Kittitas County*, 162 Wn.2d 597, 617,174 P.3d 25 (2007). But it is instructive.

54. The visual impact of industrial development on the surrounding neighborhood probably fits in the "welfare" inquiry. Not surprisingly, the testimony of MVI's witnesses diverged from the neighbors on the topic of what neighbors would see of the proposed project. MVI's proposed construction, as described by Todd Schutz, seems geared to minimizing the visual impact. But again, unlike DPER reviewing MVI's specific proposal, our inquiry involves Industrial versus Rural zoning. *See* paragraph 65. Mr. Schutz noted that MVI's buildings were "dramatically smaller" than the industrial buildings he typically designs, and a different rural industry would be allowed to build thirty percent higher than what MVI is proposing. KCC 21A.14.280(B)(11).

55. Two items the neighbors questioned MVI about that we think are not "welfare" factors here are odor and crime. Mr. Cramer's and Greg Bondi's testimony on odor control methods and security procedures was credible, and there is nothing in the record about any propensity for industrial uses in general to produce odors or crime.

[5] *See, e.g., Pierce v. King County*, 62 Wn.2d 324, 340, 382 P.2d 628 (1963) (absent record showing rezone's furtherance of the public health, safety, morals, or "general welfare of the people in the area or at large," rezone was an improper spot zoning).

56. The economic benefit a more intensive use of a property has on the community is also a legitimate "welfare" consideration in determining whether industrial zoning is appropriate. *Bassani v. Board of County Com'rs for Yakima County*, 70 Wn. App. 389, 398, 853 P.2d 945 (1993). Mr. Cramer testified, without rebuttal, that his business would employ up to a dozen people, have other positive "downstream" economic impacts, and generate $350,000–$450,000 per year in taxes. Unlike traffic, we have no evidence with how that might stack up against a more typical industrial use. Yet, as discussed above, via R-515, the County has already made the policy call that industrial uses should be concentrated in a few discrete locales, decidedly not including the subject neighborhood. We do not second guess the Comp Plan's judgment about the appropriate location for revenue-generating industrial properties. Successfully justifying industrial zoning on the basis of economic welfare assumes the industrial zoning is otherwise consistent with the Comp Plan. See the discussion in *Bassani*, 70 Wn. App. at 397-98. And here it is not.

57. "Welfare" is a relatively subjective term, and we temper the strength of our evaluation accordingly. We conclude that "welfare" favors a rezone, although it is far from the centerpiece of our recommendation.

58. We now briefly discuss the remaining items in the public health, safety, morals, welfare, and interest list.

59. Turning to "health," we have little to add past the discussion in paragraph 32 regarding industrial waste, and in relation to the traffic safety discussion of paragraphs 46–51. MVI argues that putting a residence on the subject property that near to Highway 18's emissions would be deleterious. That is a good argument, but there is simply too little in the record to allow us to balance this against, say, emissions from industrial traffic on a residential street or health risks from more intensive industrial uses. We cannot say that "health" (as a stand-alone factor) weighs in favor of or against a rezone.

60. Courts mention "morals" as a criterion against which to weigh a rezone. *Woods*, 162 Wn.2d at 617. We would not know how to begin to arbitrate that. We leave "morals" untouched.

61. Similarly, to ask whether a rezone is in the "public interest" almost has to fold back into the discussion of whether it furthers the Comp Plan policies (which themselves express the County's considered judgment of what the "public interest" is) and into the safety and welfare discussion above. Otherwise, the inquiry would be untethered. Thus we do not undertake a stand-alone, "public interest" analysis.

62. In summing up the impact of the proposed rezone on health, safety, interest, morals, welfare, and public interest, these factors—especially the safety implications of adding industrial traffic to a residential street—favors a rezone. This complements, but is not a substitute for, the more definitive inquiries of changed circumstances (since the property received its current "I" zoning), and the inconsistency of the current zoning with the Comp Plan.

63. Last on our list of issues for hearing, as stated in our Pre-Hearing Order, is whether either the current zoning or the potential rezone are unreasonably incompatible with or detrimental to affected properties and to the general public? KCC 20.24.180. We conclude, based on the analysis above, that industrial zoning has not been reasonably compatible with the surrounding neighborhood and the Comp Plan since the subject property lost its arterial access when WSDOT sealed off Highway 18, and that routing industrial traffic through the residential neighborhood would be detrimental. But we address one point made at hearing.

64. In her testimony, on neighbor opined that the subject property was entirely inappropriate for industrial use, whether that use was producing baby food or marijuana. Cornelison testimony. We agree. Yet the intended implication of her testimony seemed to be that even baby food production would be detrimental, while MVI's marijuana production would be *really* detrimental. We think that gets it reversed. MVI has shown that the traffic associated with its particular use is unlikely to even approach the more typical light industrial loads Mr. Jacobs originally calculated. It is difficult to see how any 40,000-square foot baby food operation could survive if its production output volumes were limited to what would fit in the SUV-sized delivery van (not a semi-truck) Mr. Cramer testified that he plans to use, and use only every few days—a prediction consistent with what Mr. Bondi described for his own, existing marijuana operation. So we would phrase it the opposite way: even MVI's use would be unreasonably incompatible and detrimental,[6] but a more intensive use such as industrial baby food production would be *really* incompatible and detrimental.

65. Phrased another way, MVI succeeded in showing that, *as industrial uses go*, its proposed facility is towards the less intrusive end, neighborhood impact-wise. But there are a myriad of more intensive industrial activities that are allowed in the Industrial zone that are either not allowed in the Rural Area or are allowed only with a conditional use permit or with some other, significant restrictions: A theater or a shooting range. KCC 21A.08.040. Dry cleaning plants, automotive repair and service, or medical labs. KCC 21A.08.050. Construction and trade, warehousing, self-service storage, heavy equipment and truck repair, or outdoor advertising service. KCC 21A.08.060. Gasoline service stations or car dealerships. KCC 21A.08.070. Materials processing facilities, textile products, fabricated metal products, tire retreading, and transfer stations. KCC 21A.08.080. And school bus base or a motor sports facility. KCC 21A.08.100.

66. In closing argument, MVI interjected three issues.

67. First, it asserted that an additional Comp Plan policy, U-172, was relevant and cut in MVI's factor. Per our June 23, Pre-Hearing Order (Order), this additional Comp Plan policy should have been added by July 1 to the list of issues for hearing. However, if, for example, the neighbors had attempted, at the end of the hearing, to add another Comp

[6] That is not to inject an inquiry onto the standard DPER must apply in reviewing MVI's application. The process for reviewing a "conditional use" permit application allows DPER to "ensure compatibility with nearby land uses." KCC 21A.06.230. And, post-July 2015 code change, MVI's project would apparently require a conditional use permit. But at the time of MVI's June 2014 application, its proposal was apparently for an "allowed" use, not for a "conditional" one.

Plan policy, we likely would have allowed it in, after providing some time for MVI to address it, either at the hearing or by keeping the record open to allow MVI to brief the issue. So we do not exclude U-172. But we require no neighbor response, because U-172 is simply not applicable.

68. U-172 states that:

> Within the UGA, but outside unincorporated activity centers, properties with existing industrial uses shall be protected. The county may use tools such as special district overlays to identify them for property owners and residents of surrounding neighborhoods.

69. We do not make it past the first three words. U-172 only applies "Within the U[rban]G[rowth]A[area]." Thus, unlike other Comp Plan policies that apply to properties *adjacent* to an urban area, U-172 only applies to properties actually "Within the UGA." *Compare* U-172 ("Within the UGA") *to, for example*, U-104 ("Rural properties that are immediately adjacent to a city"), U-105(a) ("adjacent to the original Urban Growth Area boundary"), *or* R-316(b) ("Lands adjacent to the Urban Growth Area boundary"). The subject property is not within a UGA. U-172 has no bearing on our situation.

70. In addition, MVI asserted that another issue in our Order was whether the benefits of a rezone outweighed the hardship. That was actually not on our list of issues, and for good reason. "The word 'hardship' is suggestive of the test for denial of substantive due process." 17 Wash. Prac., Real Estate § 4.7 (2d. ed.). And a council "does not have the power to enforce, interpret, or rule on constitutional challenges," and it cannot delegate to an examiner "powers it does not have." *Exendine v. City of Sammamish*, 127 Wn. App. 574, 587, 113 P.3d 494 (2005). To the extent the issue had been timely raised and we had jurisdiction to consider it, we would have found that this rezone's benefits outweigh the hardships. But this issue is beyond the scope of this hearing.

71. Finally, MVI argued that the subject property is "directly adjacent to an urban growth boundary" and is thus outside the class of "isolated industrial properties" on which Ordinance 17893 placed the moratorium. Ex. 1 at line 97. This does not alter our analysis.

72. First, our Order set the issues for hearing, and set July 1, as the deadline for filing objections, amendments or requests to modify the Order. We received no filings. Whether the property met Ordinance 17893's criteria was not an issue for hearing. And unlike the addition of a Comp Plan policy, something as fundamental as an attack on an entire process had to be raised earlier. If the tables had been turned, and it had been the neighbors who had tried to interject such a fundamentally new issue at hearing, we would have rejected it. Actually, that is not a hypothetical. At the end of the hearing the neighbors raised a new issue, asking us to recommend that Council consider MVI's permit along with this rezone. Dewitt argument. We decline to add that issue either.

73. Second and more specifically, our Order noted that DPER's Report contains two fairly distinct sets of information. We noted that the first group contained numerous

background factual findings regarding the site, its prior history, the neighborhood, and the area zoning. We observed that these did not appear controversial. And the first bulleted entry on that list was "the size, location, and ownership of the site, and that the site is the only one in the County meeting the criteria of Ordinance 17893." We then stated that:

> If someone wants to challenge a Report finding in this first group, any such challenge must be filed with the examiner by noon on **July 1, 2015**, and must specify exactly what DPER finding is objected to. … This will allow participants to prepare their respective cases for hearing and will allow DPER to determine whether/how it needs to respond or participate. Absent a specific challenge, those background findings in the Report will be accepted as the factual foundation from which to begin the hearing.

74. MVI did not object by the July 1 deadline, and indeed, not (functionally) until the final five minutes of the hearing, when the notion appeared in closing argument. That was two weeks after the subject property meeting the criteria of Ordinance 17893 became established fact for purposes of this rezone.[7]

75. Third, to the extent we would consider it, Exhibits 10 and 12A show that south of the southwest corner of subject property, south of the WSDOT property separating the subject property and Highway 18, and south of Highway 18, is the northwest corner of what appears to be urban area (the dotted line in Exhibit 10 and the tannish color in Exhibit 12A). Only traveling (as the crow flies) from the extreme southwest corner of the subject property, across WSDOT property, across the fence that seals off Highway 18 (Exhibit 12D), across the two lanes of southeast-bound traffic, across the intra-highway division, across the two lanes of northwest-bound traffic, and across a some buffer property, would a crow reach the northwest urban tip of that urban area. Thus even if a challenge to DPER's finding had been timely raised, it would not have changed the analysis, not when (for a non-crow) access to that urban tip involves travelling from the subject property north over a half-mile through a rural residential neighborhood to reach the SE Wax Road/SE 240th Street/200th Avenue SE intersection, then a far greater distance either east on SE 240th to the far northeast edge of Exhibit 10, and then south and back west, or west along SE Wax Road to some point actually off that map, and then back east. That is not "directly" adjacent, even under the most liberal definition of "directly adjacent."

76. And fourth and most simply (and perhaps this is the reason this issue was not raised initially), whether this or another property is "directly adjacent to the urban growth boundary" is actually not a criterion for this rezone. It is a criterion for the moratorium Ordinance 17893 placed on accepting applications for new development. Ex. 1 at lines 62-64, 97. But, according to DPER, MVI submitted its application in June 2014, three months before the September moratorium went into effect. Ex. 3, Report at 3. The meaning of "directly adjacent" would be relevant if someone from a different,

[7] Not being challenged on any of the findings in its Report that we listed in our Order, DPER thus had little reason to appear at our public hearing or offer any clarification. DPER thus did not participate.

industrially-zoned parcel attempted to apply for a development permit.[8] But the applicability of the moratorium to MVI and the subject parcel is not at issue. Instead, the criteria for whether the Council should rezone this property turns on the Comp Plan policies and other criteria analyzed above. And those favor rezoning.

Other Issues

77. Motion 14347 tasked us with also reviewing whether properties immediately abutting the subject property, including public rights-of-way, should be rezoned from I to RA-5. Exhibit 5. These abutting areas are apparently owned by WSDOT. Exhibit 3, Report at 3. We sent WSDOT notice of our proceeding, and WSDOT has not objected (nor otherwise responded). We are sending them this Report and Recommendation, which contains information for how to appeal to Council. *Substantively*, rezoning such lands is appropriate, for the reasons detailed above for why rezoning the subject property is appropriate. However, Proposed Ordinance 2015-0170 would only reclassify parcel 2022069011, and the record contains no evidence of exactly what other parcel numbers are involved, or even if these WSDOT remnants have parcel numbers. Thus, *procedurally*, the appropriate course is uncertain, especially where – given that, in this quasi-judicial hearing – Council must base its decision on the factual record made at the examiner stage. KCC 20.24.220(B). We thus make no recommendation on whether or how the Council should rezone such abutting properties.

78. Next, as discussed above, in September 2014 the Council enacted Ordinance 17893, declaring a one-year moratorium on accepting applications for new development on isolated, industrially-zone-parcels. Ex. 1. The timing for an appeal is described below, after the signature line. If an appeal is filed—and given the time for an opposition to that appeal, followed by the Examiner's Office drafting and circulating a memorandum—it seems unlikely that Council could schedule, act on, and make effective a rezone prior to the moratorium running out on September 22. That may or may not matter. As discussed above, the July 2014 code changes would appear to eliminate a similar re-application from MVI, and this was the only parcel DPER identified as meeting the criteria for the moratorium. Given that Motion 14347 references the moratorium and its expiration date, we simply flag the issue.

79. Finally, even if the Council rezones this property, if may be that, per the zoning codes and zoning designation in place at the time of MVI's June 2014 permit application, MVI is entitled to a permit. Our state has rejected the vesting approach the majority of states apply, and has instead adopted a bright-line, more developer-friendly rule. *See, e.g.*, *Allenbach v. City of Tukwila*, 101 Wn.2d 193, 194-95, 676 P.2d 473 (1984). And that is the standard DPER must abide by in processing permits. The extent of rights conveyed by Mr. Cramer's pending application will be decide first by DPER and later on appeal, but we note that to the degree his application creates vested rights, those rights would not

[8] During closing argument, MVI asserted that there was another property that is allegedly similar to the subject property and yet DPER found (in its Report) that this other parcel did not met the criteria of "isolated industrially zoned parcel." We are confined to the record in this case, and there is nothing in the record equivalent to Exhibit 12A that could let us, even for curiosity sake, analyze that other parcel. And whether this, that, or some other parcel was subject to the moratorium of Ordinance 17893 is not at issue in this rezone.

be disturbed by a rezone. A rezone here to Rural Area would preclude any new, future industrial development proposals, but it may not affect MVI's pending application. We do not minimize the neighbor's concerns about an industrial facility in their neighborhood, even one (as MVI's proposal) that seems less impactful than a standard industrial use. Yet the July 2014 code changes and this rezone have the flavor of locking the barn door after the horse is gone.

Conclusion

80. In sum, application of applicable legal requirements to the facts of this case decidedly favor rezoning the subject property to RA-5. Had this rezone been decided prior to MVI's purchase and efforts to develop the industrially-zone subject property, it would truly have been a slam dunk. Industrial zoning has not made sense for the subject property since WSDOT ceased using the property for construction-related uses and sealed off Highway 18. MVI's purchase of the property and investment in marijuana development are not unimportant; combined these are the one significant factor weighing against a rezone. However, the potential hit to MVI seems largely moot, given that DPER is processing MVI's June 2014 development application without reference to the July 2014 code change or to the results of this rezoning. And even if the application is not approved, the evidence supporting a rezone—especially the fact that the property is already designated as Rural in the Comp Plan, along with policies U-173 and R-515—still decidedly favors a rezone.

RECOMMENDATION:

1. Approve proposed ordinance 2015-0170, reclassifying Parcel 2022069011[9] from Industrial (I) to Rural Area with five acre minimum (RA-5) and amending King County Title 21A, as amended, by modifying the zoning map to reflect this classification.

2. No recommendation on whether to amend proposed ordinance 2015-0170 to also rezone any industrially-zoned parcels immediately abutting the subject property from Industrial (I) to Rural Area with five acre minimum (RA-5).

DATED July 31, 2015.

David Spohr
King County Hearing Examiner

[9] Proposed Ordinance 2015-0170 incorrectly lists the parcel as 2022069001. Ex. 4. Motion 14347 correctly lists the parcel as 2022069011. Ex. 5.

NOTICE OF RIGHT TO APPEAL

It is expected that the King County Council will consider this report and recommendation as it would any land use appeal. In order to appeal the decision of Examiner, written notice of appeal must be filed with the Clerk of the King County Council with a fee of $250 (check payable to King County Office of Finance) on or before **August 14, 2015**. If a notice of appeal is filed, the original two copies of a written appeal statement specifying the basis for the appeal and argument in support of the appeal must be filed with the Clerk of the King County Council on or before **August 21, 2015s**. Appeal statements may refer only to facts contained in the hearing record; new facts may not be presented on appeal.

Filing requires actual delivery to the Clerk of the Council's Office, Room 1200, King County Courthouse, 516 Third Avenue, Seattle, Washington 98104, prior to the close of business (4:30) p.m. on the date due. Prior mailing is not sufficient if actual receipt by the Clerk does not occur within the applicable time period. If the Office of the Clerk is not officially open on the specified closing date, delivery prior to the close of business on the next business day is sufficient to meet the filing requirement.

If a timely notice of appeal, filing fee, and then a statement of appeal are all timely filed, notice will be sent to parties of record, inviting a response within 14 calendar days. If a written notice of appeal, filing fee, or statement of appeal is not timely filed, the Clerk of the Council shall place a proposed ordinance that implements the Examiner's recommended action on the agenda of the next available Council meeting. At that meeting the Council may adopt the Examiner's recommendation, defer action, refer the matter to a Council committee, or remand to the Examiner for further hearing or further consideration.

The action of the Council approving or adopting a recommendation of the Examiner shall be final and conclusive unless a proceeding for review pursuant to the Land Use Petition Act (LUPA) is commenced by filing a land use petition in the Superior Court and serving all necessary parties within 21 days of the date on which the Council passes an ordinance acting on this matter. (LUPA defines the date on which a land use decision is issued by the Council as the day the Council passes the decision ordinance.)

MINUTES OF THE JULY 16, 2015, HEARING ON THE APPEAL OF MAPLE VALLEY REZONE, KING COUNTY COUNCIL FILE NO. 2015-0170.

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Randall Olsen, Donald Marcy, Mark Dewitt, Jessica Cornelison, Mel Codd, Dave Simpson, Jim Deaton, Mike Lorette, Jane Jensen, Rick McCurdy, Shane McDougall, Margaret Langworthy, Todd Schutz, Mark Jacobs, Deborah Bills, Miles Jackson, and Greg Bondi.

The following exhibits were offered and entered into the record:

Exhibit no. 1	Ordinance 17893, September 23, 2014
Exhibit no. 2	DPER's SEPA file
Exhibit no. 3	Executive's letter to Council, March 11, 2015, which includes as an attachment DPER's March 6, 2015, report "Isolated Industrial Parcels in Unincorporated King County"
Exhibit no. 4	Proposed Ordinance 2015-0170.1, introduced April 27, 2015
Exhibit no. 5	Motion 14347, passed April 27, 2015
Exhibit no. 6	SEPA Environmental Checklist, submitted April 28, 2015
Exhibit no. 7	SEPA Determination of Non-Significance, May 18, 2015
Exhibit no. 8	A. Map of subject area, submitted by Mark Dewitt B. Photographs of subject area, submitted by Mark Dewitt
Exhibit no. 9	Letter from DPER to Washington State Liquor Control Board, dated January 13, 2014
Exhibit no. 10	Aerial photograph of subject area
Exhibit no. 11	Memorandum from Mark Cramer to King County Councilmembers, dated May 19, 2014
Exhibit no. 12	A. Map of subject area, submitted by MVI B-E. Photographs of subject property, submitted by MVI
Exhibit no. 13	Proposed architectural plans for the subject development
Exhibit no. 14	Resume of Mark Jacobs
Exhibit no. 15	Level I Traffic Impact Analysis, dated May 15, 2014
Exhibit no. 16	Response to Traffic Engineering Items, dated January 12, 2015
Exhibit no. 17	Letter from DPER to Mark Cramer, dated October 3, 2014

DS/vsm

November 2, 2015
~~July 31, 2015~~

OFFICE OF THE HEARING EXAMINER
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REPORT AND RECOMMENDATION

SUBJECT: King County Council file no. **2015-0170**
Proposed ordinance no.: **2015-0170**

MAPLE VALLEY REZONE

Location: Parcel number 2022069011 and directly abutting property SE 248th Street, west of 200th Avenue SE

Formatted: Not Superscript/ Subscript

Referred by: **Metropolitan King County Council**
Staff contact Erin Auzins
King County Courthouse Rm1200
516 Third Avenue
Seattle, WA 98104
Email: erin.auzins@kingcounty.gov

Owner: **Maple Valley Industries LLC**
represented by Randall Olsen and Donald Marcy
Cairncross and Hempelmann
524 Second Avenue Suite 500
Seattle, WA 98104
Email: rolsen@cairncross.com

SUMMARY: By motion, the Council referred a proposed ordinance that would rezone property from Industrial to Rural Area. We set and held a pre-hearing conference, issued a pre-hearing order, and held a public hearing, at which we took testimony and exhibits. Based on the hearing evidence, we recommend that the Council approve the proposed ordinance and rezone the subject property.

EXAMINER PROCEEDINGS: The hearing opened and closed on July 16, 2015. Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available from the Hearing Examiner's Office.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION: Having reviewed the record in this matter, the examiner now makes and enters the following:
FINDINGS AND CONCLUSIONS:

1. General Information:

Location:	Parcel number 2022069011 and directly abutting property 248th Street, west of 200th Avenue SE
Threshold Determination:	Determination of Non-Significance (DNS)
Date of Issuance:	May 28, 2015
Existing Zone:	Industrial (I)
Down Zone:	Rural Area (RA), with five acre minimum
Section/Township/Range:	SW 20-22-06

Introduction

2. This matter involves a property in the vicinity of Maple Valley and Covington, but outside those corporate limits and outside the Urban Growth Boundary. The Metropolitan King County Council referred to us the question of whether to rezone the subject property from the current "I" (Industrial) to "RA-5" (Rural Area, with a five-acre minimum). In the foreground is Maple Valley Industries' (MVI's) commercial site development permit application for a marijuana production and processing facility on the subject property. We held a pre-hearing conference and later a public hearing at which ten members of the public testified in favor of a rezone and MVI's four witnesses offered testimony weighing against a rezone.

3. This rezone proceeding is not a proxy hearing on whether MVI is entitled to a permit under the pertinent standards that govern the Department of Permitting and Environmental Review's (DPER's) analysis. Thus, to the extent we make a finding or conclusion that directly overlaps a finding or conclusion DPER must make in reviewing MVI's application, ours is not meant to have final or preclusive effect. Phrased another way, the time to appeal an MVI-application-specific item is not now but instead during the appeal period that will follow DPER's decision on MVI's pending application.

4. For the reasons explained below, we recommend that the Council rezone the subject property.

Background

5. In 1994, the Washington State Department of Transportation (WSDOT) purchased a large parcel that included the subject property. Ex. 3, Report at 3. At the time, the parcel was zoned ML-P (Manufacturing Light). *Id.* At one time 248th Avenue SE had direct

access to what was then a two-lane Highway 18 and to areas to the south. Dewitt & Codd testimony; Ex. 8A.

6. In 1995, with the conversion of the county zoning code into Title 21A, the zoning designation was converted to "I-P," the "I" being Industrial and the "P" being since-rescinded restrictions not relevant to our case. Ex. 3, Report at 3.

7. In 1999, WSDOT received a permit to demolish a concrete shop building on the subject property. *Id.* Although the precise dates are not in the record, WSDOT began using the larger property as a staging area for construction equipment and materials as it expanded Highway 18. *Id.* At some point it completed what is now the four-lane (two lanes in each direction, divided by a middle strip), limited access highway. *Id.*; Codd & Dewitt testimony. Once completed, the previous arterial access the subject property enjoyed was eliminated. Ex. 3, Report at 3.

8. This created an industrially-zoned property in a sea of rural-zoned property.[1] Ex. 12A. On the south side of Highway 18, past some RA-zoned properties, is Lakeside Industries, a large quarry mine. Cramer testimony; Ex. 10 (presumably the white area south of Highway 18). These areas to the south were separated from the subject neighborhood once Highway 18 became a barrier to, not a way to reach, those areas. Northwest of the subject property is a state-owned gravel pit, but the testimony was that the state uses this very infrequently. Simpson testimony. And that state-owned parcel is itself zoned RA-5 and has direct access from that operation to the arterial SE Wax Road. Ex. 10 (grey-veined area west of 196th Avenue E and south of SE Wax Road); Ex. 12A. Similarly, a church sits at the intersection of SE Wax Road, SE 240th Street, and 200th Avenue SE. Jensen testimony. This too is also zoned RA-5, and has direct access to the arterial SE Wax Road. The rest of the neighborhood is not only all RA-5, but uniformly residential, per the consistent neighbor testimony at hearing and the lack of any contrary information in the record.

9. Mark Cramer testified as follows. Soon after I-502 legalized marijuana at the end of 2012, he began looking to create a marijuana facility. After determining that other potential sites would not work, he alighted on the subject property. Prior to purchase, he reviewed the subject property with DPER, and DPER advised him that (from a zoning perspective) the subject property was suitable for his desired use. *See also* Ex. 9. He then performed some due diligence in relation to critical areas and soil. Finally, he purchased the property from WSDOT in April 2014 for approximately $320,000. He would not have bought the property had it not been zoned industrial. Based on the current record, we accept this testimony.

10. At about the same time, the Council began considering legislation that would restrict marijuana processing within the Industrial zone. Mr. Cramer lobbied against those restrictions, but his efforts were ultimately unsuccessful; on June 23, 2014, the Council

[1] There is a WSDOT-owned, industrially-zoned, remnant buffering Highway 18 and the subject property, but its parameters are unclear. Ex.12A (grey "I" area between the subject property and Highway 18). After WSDOT completed its work, it converted about half the original parcel into right of way, and segregated the remaining portion into the subject property. Ex. 3, Report at 3.

enacted Ordinance 17841, which the Executive approved on July 4.[2] We will henceforth refer to this as the "July 2014" code change.

11. After the Council's passage, but prior to the ordinance becoming effective, on June 25 MVI submitted a complete commercial site development application for marijuana production and processing. Ex. 3, Report at 3. The project would create two, 20,000-square foot light industrial buildings. Ex. 15 at 2.

12. In September 2014, the Council enacted Ordinance 17893, declaring a one-year moratorium on accepting applications for new development on isolated, industrially-zone-parcels, and directing DPER to study the issue. Ex. 1. In response, in March 2015 the Executive submitted to Council a DPER report ("Report") which recommended rezoning the subject property from Industrial Rural Area. Ex. 3. After applying the criteria in Ordinance 17893, DPER found that only the subject property (plus the abutting, remnant WSDOT holding) matched the Council's stated definition of "isolated industrial zone parcels." Ex. 3, Report at 2.

13. After Council received DPER's Report, it introduced Proposed Ordinance 2015-017, and via Motion 14347 referred that ordinance to us at the end of April, directing us to conduct a quasi-judicial hearing and issue a recommendation on a rezone. Exs. 4 and 5. In May, DPER completed its State Environmental Policy Act (SEPA) analysis of the proposed rezone and issued a Determination of Non-Significance. Ex. 7. No one provided any substantive comments to that SEPA determination.

14. At the beginning of June, we set a June 18 pre-hearing conference. After the conference, we issued a June 23 Pre-Hearing Order which set, among other things, the issues for hearing and various pre-hearing deadlines. We conducted the hearing on July 16. Ten members of the public testified in favor of a rezone and MVI's four witnesses offered testimony weighing against a rezone. After the completing the hearing, we closed the record.

Analysis

15. In considering a potential rezone:

> (1) there is no presumption of validity favoring the action of rezoning; (2) the proponents of the rezone have the burden of proof in demonstrating that conditions have changed since the original zoning; and (3) the rezone must bear a substantial relationship to the public health, safety, morals, or welfare.

Woods v. Kittitas County, 162 Wn.2d 597, 617,174 P.3d 25 (2007). That list is not exclusive; counties may impose additional criteria for analyzing rezones. *Id.* In this case,

[2] Ex. 3, Report at 3; Ord. 17841. Interestingly, it was neighbor Mel Codd who raised the topic of Mr. Cramer's lobbying efforts and entered Mr. Cramer's May 2014 memorandum to Council as Exhibit 11. To the extent they matter, Mr. Cramer's legislative efforts cut in MVI's *favor*, showing that Mr. Cramer was not sleeping on his rights but was striving to bring his development to fruition.

we start with changed circumstances, move to analyzing the consistency of this rezone to the King County Comprehensive Plan (Comp Plan), and then discuss public health, safety, morals, welfare and interest, before addressing~~moving to~~ whether the potential rezone is unreasonably incompatible with or detrimental to affected properties and the general public. We then tackle issues raised by MVI: an additional Comp Plan policy, whether the benefits of the reason outweigh the hardship to MVI, and whether the subject property meets the Ordinance 17893's definition of "isolated industrially-zone-parcels" (and if it does not, whether the property should be rezoned).

16. Conditions have changed significantly since the original zoning. As described in paragraphs 5–8, when the subject property received its initial (and current) Industrial zoning in 1995, it had direct access to Highway 18 and points south. At the time, WSDOT owned the property and was beginning to use the property for a heavily industrial use—staging construction equipment and materials as it built Highway 18. But that use ceased when WSDOT completed its project. And after WSDOT finished the four-lane, limited access highway, it eliminated the subject property's direct arterial access and access to an urban area to the south. This left the subject property locked on the north side of Highway 18, surrounded by a sea of rural property, its only remaining access through the residential neighborhood to the north. Ex. 12A (showing the gray "I" surrounded by green "RA-5").

17. Washington does not require a "strong" showing of change. *Bassani v. Board of County Com'rs for Yakima County*, 70 Wn. App. 389, 394, 853 P.2d 945 (1993). But even if it did, the circumstances have changed substantially, and this element weighs decidedly in favor of rezoning away from Industrial, given the half-mile plus of residential street industrial traffic to and from the subject property would now have to traverse to reach an arterial.

18. We next turn to consistency with the ~~King County Comprehensive Plan (~~Comp Plan~~)~~. Before discussing specific, relevant policy numbers, we observe that both the subject property and the surrounding properties have had a "Rural" designation since at least the 2012 Comp Plan. Ex. 3, Report at 4. So the last time the County approved a Comp Plan, the subject property was slated for RA, not I, zoning.

19. The most definitive Comp Plan policy is:

> U-173 Industrial development should have direct access from arterials or freeways. Access points should be combined and limited in number to allow smooth traffic flow on arterials. Access through residential areas should be avoided.

20. That could hardly be any clearer. Since losing its direct access to Highway 18, traffic to and from the subject property must travel a slight distance along the residential SE 248th Street, and then half-mile up the very residential SE 200th Avenue to reach the

intersection with the minor arterials of SE 240th Street and SE Wax Road.[3] Ex. 15 at 3. Industrial development on the subject property thus lacks the necessary, direct access to arterials or freeways, and it would create the industrial access through residential areas that should be avoided. U-173 cuts sharply in favor of a rezone.

21. MVI points to Comp Plan policy I-101, which states in pertinent part that "King County's regulation of land should: a. protect public health, safety and general welfare, and property rights." Public health, safety, and general welfare are discussed in paragraphs 45–62, but I-101(a) injects the protection of property rights into the equation. Mr. Cramer purchased the property as Industrial for $320,000 and he testified, without rebuttal, that he has invested an additional $260,000 in furtherance of marijuana operations on the subject property. He opined that, being adjacent to Highway 18, the subject property was not a high value residential site and not one he would have considered investing in.

22. We agree that I-101(a) weighs against a rezone, but only to a point. First, downzoning "generally results in a loss of property value." 3 RATHKOPF'S, THE LAW OF ZONING AND PLANNING § 38.30 (4th ed.). After all, the jurisdiction is typically attempting "to downzone property from a more intensive use, and therefore more lucrative use, to a less intensive use." *Cf. Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 421, 13 P.3d 183 (2000) (Talmadge, J., dissenting on other grounds). So the concept that residential uses would be less lucrative than industrial ones is almost a given, not a surprise twist unique to this case. And "[a] property owner has no legal right to the continued maintenance or retention of the zoning governing his or her own property." RATHKOPF'S at *id*.

23. Second, there are a myriad of other RA-5 zoned properties abutting Highway 18, many without the WSDOT-buffering property the subject property enjoys. Ex. 12A. All of those could potentially argue that they should be zoned something else because they are likely less desirable residence sites than lots further removed from the highway. But we are not aware of other owners arguing that they can make no reasonable residential use of their Highway 18-abutting properties or seeking rezones. There is nothing in the record showing the subject property is any less suitable to residential development than any of the other, RA-zoned properties abutting Highway 18. Even if the subject property (and other Highway 18-abutting properties) are less desirable than more buffered residential lots, that does not make residential use incompatible or infeasible for those parcels. And at 6.5 acres the subject property has more room for internal buffers than the majority of, smaller, RA-5 zoned properties abutting Highway 18. Ex. 12A.

24. Third, and most importantly, "vesting" entitles a developer to have her land development proposal processed under the regulations in effect at the time she filed a complete permit application, despite any subsequent changes in zoning or other land use regulations. *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 172-73, 322 P.3d 1219 (2014). For a commercial site development permit, DPER must base its analysis on the "adopted

[3] Mark Dewitt explained that, with blocks set at 1/16 mile, the eight blocks between SE 240th Street and SE 248th Street would be approximately a half mile. And the entrance to the subject property is west of this, along SE 248th Street.

county and state rules and regulations in effect on the date the complete application was filed." KCC 21A.41.070.

25. According to DPER, MVI submitted a complete permit application on June 25, 2014. Ex. 3, Report at 3. This was two days after the Council passed changes that reduced the allowable marijuana-related uses in an Industrial zone, but several days before the Executive signed the ordinance. Ord. 17841, final page. In *Allenbach v. City of Tukwila*, 101 Wn.2d 193, 194-95, 676 P.2d 473 (1984), our court ruled that a developer was entitled to vesting where he submitted a permit application nearly two months after a restrictive ordinance passed, but one day before the ordinance actually became effective. Our court recently reaffirmed that vesting still applies in such a scenario. *Town of Woodway*, 180 Wn.2d at 180 (citing *Allenbach* at *id.*).

26. Thus, while the vesting question will conclusively be determined through the permit process (and any appeals to DPER's decision on MVI's application), per the record we consider, MVI is entitled to have its application decided on the basis of the pre-July 2014 code change and under the then (and current) Industrial zoning. If MVI continues through the permit process and receives a permit, this would almost entirely eliminate any loss to MVI. And if MVI is not entitled, per the rules and zoning in place in June 2014, to its project, then it would be harder to argue that the July 2014 code change or this rezone was the proximate cause of MVI's lost, marijuana-related investment. *See, e.g. Orion Corp. v. State*, 109 Wn.2d 621, 660-62, 747 P.2d 1062 (1987).

27. That is not to say that a rezone would have zero economic impact. If MVI receives its permit, constructs its facilities, and begins operations, it would become a legal, non-conforming use. Non-conformance limits flexibility and expansion options. But MVI's use would already—by virtue of the July 2014 code changes—be a legal, non-conforming one, regardless of this rezone. And, for example, the non-conforming use rule that caps any building square footage increases at ten percent tracks the commercial site development rule that caps any building floor area increase at ten percent. *Compare* KCC 21A.32.065(A)(1)(a) *with* KCC 21A.41.110(A)(1). Moreover, the July 2014 changes would restrict any future MVI competitors. As Mr. Cramer noted, that code change adds significant time and cost for a marijuana facility, "effectively prohibiting participation" at this stage of the market. Ex. 11 at 5. Restricted competition would tend to offset the negative impact of being a legal, non-conforming use.

28. Fourth, the neighbors' investment in their residential properties would likely suffer some detriment from an industrial use being established in their neighborhood, especially an industrial use with a greater impact than MVI's. *See, e.g.*, Cornelius testimony; paragraph 65. Our courts accord more weight to the property rights of an individual seeking to develop her property than to the property rights of neighbors who may be adversely impacted by that development. *See, e.g.*, *Durland v. San Juan County*, 182 Wn.2d 55, 75, 340 P.3d 191 (2014) (abutting neighbor lacked sufficient property interest to demand notice of—and a realistic chance to challenge—a development permit). Thus the neighbors' property rights are not entitled to as much weight as MVI's, but they are relevant, and so there is some tradeoff between MVI's and the neighbors' property rights.

29. In the final analysis, applying I-101(a) to the rezone proposal depends in part on a factor we cannot know at this time: whether MVI's current permit application will ultimately be approved. If it is, then balancing the slight impediment non-conforming use status would create against the property interests of the surrounding residential owners seems close to a wash. Conversely, if the rezone ultimately winds up being the proximate cause of no industrial development on the subject property, then I-101(a) cuts in MVI's favor. Yet a "property owner has no legal right to the continued maintenance or retention of the zoning governing his or her own property" and downzonings "in accordance with a comprehensive plan, are likely to be sustained even where the reduction in property value is quite severe." 3 RATHKOPF'S, THE LAW OF ZONING AND PLANNING § 38.30 (4th ed.).

30. Next, we turn to R-514, which states that:

> Development regulations for new industrial development in the Rural Area shall require the following:
>
> a. Greater setbacks, and reduced building height, floor/lot ratios, and maximum impervious surface percentage standards in comparison to standards for urban industrial development;
>
> b. Maximum protection of sensitive natural features, especially salmonid habitat and water quality;
>
> c. Building and landscape design that respects the aesthetic qualities and character of the Rural Area, and provides substantial buffering from the adjoining uses and scenic vistas;
>
> d. Building colors and materials that are muted, signs that are not internally illuminated, and site and building lighting that is held to the minimum necessary for safety;
>
> e. Heavier industrial uses, new industrial uses producing substantial waste byproducts or wastewater discharge, or new paper, chemical and allied products manufacturing uses in the urban industrial zone shall be prohibited; and
>
> f. Industrial uses requiring substantial investments in infrastructure such as water, sewers or transportation facilities shall be scaled to avoid the need for public funding of the infrastructure.

31. MVI is correct that many items in Comp Plan R-514 are already reflected in KCC 21A.14.280, which set the specific development standards for industrially-zoned rural properties. Thus all industrial development (not just MVI's specific proposal) on the subject property would have to meet enhanced setbacks, reduced building heights, and aesthetic concerns. *Compare* R-514(a), (c), and (d) *with* KCC 21A.14.280. While the subject property does not seem to involve the sensitive natural features discussed in R-514(b), that still leaves (e) and (f).

32. For (e), the production and processing proposal MVI described avoids chemical fertilizers in production and the solvents and volatiles used in the extraction process. This seems a pretty big deal. If DPER conditions MVI's permit on ~~the~~ not employing such chemicals, then MVI's project may very well meet R-514(e). However, KCC 21A.14.280 does not command that result for rural industries, and other chemical-employing business such as dry cleaning plants, gasoline service stations, industrial and commercial machinery, heavy equipment and truck repair, and medical labs are allowed. *See* paragraph 65. And even under the July 2014 code changes, if the zoning stays industrial, a *future* marijuana business could apply for more intensive processor II use, which explicitly allows such chemical processing; conversely, such chemicals would not be allowed if the property is rezoned to Rural. KCC 21A.06.7344(B)(3); KCC 21A.08.080(A) & (B) (items 25 & 26). This concern seems heightened because the properties just west of the subject property on SE 248th Street use a well that taps into shallow (less than fifteen feet below grade) water table that rests at approximately the same elevation as the building pad for the subject property. Simpson testimony.

33. And~~,~~ the subsection of R-514 that Ordinance 17893 focused on is (f), scaling industrial uses to avoid the public needing to fund infrastructure. Ex. 1 at lines 24–28. In particular, with the County's Road Services Division facing a $250,000,000 annual shortfall, there are not available public funds to improve local residential roadways to accommodate new industrial development. Ex. 1 at lines 29–33.

34. MVI retained Mark Jacobs of Jake Traffic Engineering to analyze the traffic impacts of two, 20,000-square foot Light Industrial buildings. Ex. 15 at 2. In his May 2014 analysis, he calculated MVI would generate 279 trips per weekday, with 37 and 39 of these coming in the AM and PM peak hour. Ex. 15 at 5. We refer to 200th Avenue SE, from the time it leaves the SE 240th Street/SE Wax Road intersection until it bends around and becomes SE 248th Street and then dead-ends past the subject property, as the "Road."

35. The King County Department of Transportation (KCDOT) determined that these trips would be equivalent to adding 30–35 additional homes, and would result in the Road reaching "subcollector" volumes. Ex. 17 at 4, ¶ 19. The pertinent King County Road Design and Construction Standards require, for "subcollector" roads, a minimum 22-foot traveled way, with 6-foot shoulders on each side, set within a 60-foot right of way. Ex. 17 at 5, ¶ 24. Even the lesser "subaccess" street requires a minimum 20-foot travelled way, with 4-foot shoulders on each side, set in a 48-foot right of way. *Id.* And even the lowest road classification KCDOT discussed, "minor access," requires a 20-foot travelled way, with 2-foot shoulders on each side, set in a 40-foot right of way. *Id.* Yet the bulk of the Road sits within only a 30-foot right of way corridor, half the standard "subcollector" width. Ex. 17 at 5, ¶ 23. Ex. 17 at 5, ¶ 23. This makes construction of the Road to rural "subcollector" standards "impossible." Ex. 17 at 5, ¶ 26.

36. The safety perspective is discussed in paragraphs 46–51. From the perspective of public infrastructure requirements, KCDOT recommends that the entire (half-mile plus) Road be improved to "subaccess," with the fallback being, at a minimum, "minor access." Ex. 17 at 5, ¶ 27. And almost half the Road does not meet even this "minor access" street standard (the lowest category KCDOT mentioned). Ex. 17 at 5, ¶ 25. In addition, while

the Road pavement is fair to good from the subject property north to just south of SE 242nd Place, it is "poor" from this point north to the SE 240th Street/SE Wax Road intersection. Ex. 17 at 4, ¶ 22. KCDOT recommends that this section be overlaid. Ex. 17 at 5, ¶ 28.

37. This creates a public infrastructure spending problem. While Mr. Jacobs recommended that MVI overlay an approximately 600-foot stretch of Road around SE 245th Street to add a foot or two of pavement width to bring the surface to 20 feet, he noted (we assume correctly) that KCDOT's recommended overlay of the (poor) pavement from just south of SE 242nd Place north to the SE 240th Street/SE Wax Road intersection is the County's responsibility. Ex. 16 at 4, text under ¶ 28 ("Maintenance of a County Road is the responsibility of the County"). That does not even include trying to create shoulders to accommodate pedestrian travel, discussed in paragraph 49. Creating an industrial use on the subject property would create a pull on scarce Road Services funds.

38. Mr. Jacobs explained that, subsequent to his May 2014 assessment, MVI provided him with more specific information on the precise scope of MVI's operations. He re-ran the analysis to reflect the lower traffic and smaller trucks/vans that MVI would likely use. In January 2015 he estimated that actual MVI traffic would be ten to fifteen percent of his original traffic generation estimate for light industrial. Ex. 16 at 2. He emphasized in testimony that MVI's use would be lighter than "typical" light industrial.

39. We leave the analysis of MVI's specific, lighter intensity development to KCDOT and DPER, to sift through as they process MVI's pending permit application. Our inquiry involves the fuller range of industrial versus rural uses. *See* paragraph 65. We conclude that the May 2014 traffic analysis described the impacts of more typical industrial zoning better than the January 2015 analysis of MVI's more modest endeavor. R-514, especially subsection (f), favors rezoning.

40. And that brings us to R-515:

> Existing industrial uses in the Rural Area outside of Rural Towns, the industrial area on the King County-designated historic site along SR-169 or the designated industrial area adjacent to the Rural Neighborhood Commercial Center of Preston shall be zoned rural residential but may continue if they qualify as legal, nonconforming uses.

41. As with U-173, the import is significant and requires little elaboration. Even *existing* industrial uses outside of the discrete geographic areas mentioned (rural towns, an area on SR-169, and Preston) "shall be zoned" rural residential. We thus do not decide *de novo* whether industrial zoning and establishing a new industrial use is appropriate here, in an area outside the listed geographical areas. The Comp Plan has already made the policy call that it is not. R-515 cuts sharply in favor of a rezone.

42. MVI argued in closing that R-515 conflicted with the other Comp Plan policies and should not apply because the area is adjacent to an urban growth area (UGA), is not appropriate for residential use, and can be functionally separated from the residential

area. We answer those concerns in turn. Adjacency is discussed in paragraphs 70 ~~1 and~~ 752, but adjacency is not relevant to R-515, because the only "adjacency" R-515 makes an exception for is near Preston. As discussed in paragraph 23, that the subject property is a less than an ideal residential site does not make it inappropriate for residential use. And separation is not one of R-515's factors in deciding how to zone industrial uses. To the extent separation matters, and even though MVI's proposal appears to create fewer impacts than more typical industrial use, the biggest impact (of MVI, let alone a more intensive use) is the industrial traffic that would have to cut through the surrounding residential area. The subject property is thus not functionally separate-able from the residential area. Moreover, R-515 says such industrial uses (outside the discrete, referenced areas) "shall be zoned rural residential" without providing any caveat like "if appropriate" or "if not otherwise separated."

43. ED-211 states that

> King County should support programs and strategies to preserve and plan for an adequate supply of industrial and commercial land, including but not limited to:
>
> …
>
> e. Promoting the redevelopment and infill of industrial and commercial areas and explore the feasibility of using incentives to achieve this goal.

44. ED-211's more general policy supporting industry cannot weigh as heavily as R-515 specifically identifying those rural areas in which the County has decided to concentrate industrial activity and specifying that other industrial uses outside those defined geographic areas "shall be zoned rural residential." And the new, proposed industrial use on the subject property is not redeveloping or infilling an industrial "area" so much as it is developing a single industrial parcel in an otherwise residential area.[4] To the extent ED-211 applies at all to the subject property, its attenuated application could only mildly favor retaining the current Industrial zoning.

45. We turn next to the impact of the proposed rezone on the health, safety, morals, and general welfare of the public, and whether the requested reclassification is in the public interest. Motion 14347, our code, and our Court reference such a test for rezones. Ex. 5, lines 51-52; KCC 20.24.190(D); *Woods v. Kittitas County*, 162 Wn.2d 597, 617, 174 P.3d 25 (2007). Yet our Court also has counseled against basing decisions on factors such as "public use and interest" and the "public health, safety, and general welfare," in the face of adopted standards and specifications. *Norco Const., Inc. v. King County*, 97 Wn.2d 680, 688-90, 649 P.2d 103 (1982). We thus analyze this topic, but we do not weight it heavily, particularly compared to the more specific (and less subjective) Comp Plan policies described above. In short, those Comp Plan policies play a significant role in establishing the public interest.

[4] As discussed in footnote 1, there are apparently slivers of remnant WSDOT property abutting the subject property, but exactly what is not clear from the record.

46. We start with safety, specifically related to traffic both at the SE 240th Street/SE Wax Road/200th Avenue SE intersection ("the Intersection"), and from there down 200th Avenue SE until it bends around and becomes SE 248th Street, before dead-ending beyond the subject property (the "Road"). The neighbors described safety issues related to both the Intersection and to the Road.

47. As to the Intersection, KCDOT looked at accidents reported to the State. KCDOT looked at almost eight years of WSDOT's collision reports for the Intersection and found a total of eight collisions (plus an additional one not yet in the database). Ex. 17 at 3–4, ¶ 17. Since the pertinent KCDOT methodology for judging an intersection "high accident" requires eight collisions in a three year period, the Intersection did not require additional study. *Id.* at 4, ¶ 17(a).

48. The neighbors uniformly believed this understates the Intersection's hazard. They testified to "daily" near misses. Dewitt testimony and Ex. 8N & O. A neighbor who lives and works at the corner of the "Intersection" and said he can hear screeches and accidents, testified that in 2013 alone he observed seven accidents, which exceeds the two reported to WSDOT in 2013. *Compare* Codd testimony to Ex. 17 at 4, ¶ 17. Another neighbor reported seeing so many wrecks at the Intersection that he routinely cuts through the church parking lot to avoid the Intersection. Deaton testimony. WSDOT's totals of reported accidents underestimate the true number of reported plus unreported accidents, but this would likely be true of *any* intersection. Still, we found credible the testimony that the three-way Intersection poses a riskier situation than one would glean from WSDOT's accident data alone.

49. As to the Road itself, there is no dispute that the bulk of the existing pavement is somewhat narrower than even the lowest, 20-foot pavement category. The neighbors discussed a blind curve and sight distances and concerns about road safety. Cornelison & Dewitt testimony; Ex. 8D & E. And the concern is not just for neighborhood drivers, but neighbors on their daily walks along the Road. Testimony of Cornelision & Deaton. The Road has little if any walkable shoulder. Ex. 8C, D, F, G, I, J & K. With no sidewalks or shoulders, the neighbors need to walk on the Road pavement; the Road is how they do their visiting and how they walk to the school bus stop halfway down the Road from the Intersection. Lorette, Cornelision & Dewitt testimony. In addition to residential uses, the first Road property south of the Intersection contains a church in use not just on Sundays, but every morning for religious education of junior high and high school students before their regular school, and for frequent evening youth activities. Jensen testimony.

50. Site distances (both stopping and entering) are measured according to specific, adopted King County Road Design and Construction Standards. KCDOT's preliminary call was that the distance needs to be verified but "appears to be adequate." Ex. 17 at 4, ¶ 21. That does not mean the Road does not crest and curve, but those Standards, not subjective assessments, set the rules for required site distances.

51. Of greater concern is the narrow existing Road width, the lack of walkable shoulders, and the constrained right-of way width that makes fixing the issue problematic. As analyzed in paragraphs 34–36, KCDOT explained that the volumes more typical light industrial

use would generate, as calculated by Mr. Jacobs, would result in the Road reaching "subcollector" volumes. Even just the pavement and shoulders a "subcollector" requires would exceed the entire 30-foot right of way that exists for most of the Road, let alone be half the 60-foot total right of way a subcollector requires. So Road safety is an issue. That is not to say that it is sufficient to warrant permit denial or a particular conditioning requirement from KCDOT or DPER on MVI's permit application; we leave that to KCDOT and DPER. But it is to say that beyond simply being a route through a residential area—which U-173 says should not be used for industrial developments anyway—the Road's narrow pavement, lack of shoulders to handle frequent pedestrian travel, and lack of much wiggle room to fix the situation points "safety" in the direction of a downzone.

52. Next we turn to the somewhat nebulous concept of "welfare." Welfare most has a role to play when determining whether a rezone application is an illegal spot zone.[5]

> Spot zoning has been consistently defined to be zoning action by which a smaller area is singled out of a larger area or district and specially zoned for a use classification totally different from and inconsistent with the classification of surrounding land, and not in accordance with the comprehensive plan.

Save Our Rural Environment v. Snohomish County, 99 Wn.2d 363, 818-819, 662 P.2d 816 (1983). Not all spot zones are illegal; the main inquiry being the relationship of the rezone to the "general welfare of the affected community." *Id.* at 819.

53. Here the subject property is bounded by the fenced off Highway 18 and then surrounded by Rural Area. Ex. 12A. If the situation had been reversed, and the subject property were currently zoned Rural and an attempt were made (post Highway 18 seal-off) to rezone it to Industrial, it would be "'granting a discriminatory benefit to one or a group of owners and to the detriment of their neighbors or the community without adequate public advantage or justification.'" *Davidson Serles & Associates v. City of Kirkland,* 159 Wn. App. 616, 638 n.14, 246 P.3d 822 (2011) (*quoting Lutz v. City of Longview*, 83 Wn.2d 566, 573-74, 520 P.2d 1374 (1974)). That is not, by itself, sufficient to warrant this rezone, as the default is the current Industrial zoning, and the thumb is on the scale against a rezone. *Woods v. Kittitas County*, 162 Wn.2d 597, 617,174 P.3d 25 (2007). But it is instructive.

54. The visual impact of industrial development on the surrounding neighborhood probably fits in the "welfare" inquiry. Not surprisingly, the testimony of MVI's witnesses diverged from the neighbors on the topic of what neighbors would see of the proposed project. MVI's proposed construction, as described by Todd Schutz, seems geared to minimizing the visual impact. But again, unlike DPER reviewing MVI's specific proposal, our inquiry involves Industrial versus Rural zoning. *See* paragraph 65. Mr. Schutz noted that MVI's buildings were "dramatically smaller" than the industrial buildings he typically

[5] *See, e.g., Pierce v. King County*, 62 Wn.2d 324, 340, 382 P.2d 628 (1963) (absent record showing rezone's furtherance of the public health, safety, morals, or "general welfare of the people in the area or at large," rezone was an improper spot zoning).

designs, and a different rural industry would be allowed to build thirty percent higher than what MVI is proposing. KCC 21A.14.280(B)(11).

55. Two items the neighbors questioned MVI about that we think are not "welfare" factors here are odor and crime. Mr. Cramer's and Greg Bondi's testimony on odor control methods and security procedures was credible, and there is nothing in the record about any propensity for industrial uses in general to produce odors or crime.

56. The economic benefit a more intensive use of a property has on the community is also a legitimate "welfare" consideration in determining whether industrial zoning is appropriate. *Bassani v. Board of County Com'rs for Yakima County*, 70 Wn. App. 389, 398, 853 P.2d 945 (1993). Mr. Cramer testified, without rebuttal, that his business would employ up to a dozen people, have other positive "downstream" economic impacts, and generate $350,000–$450,000 per year in taxes. Unlike traffic, we have no evidence of~~with~~ how that might stack up against a more typical industrial use. Yet, as discussed above, via R-515, the County has already made the policy call that industrial uses should be concentrated in a few discrete locales, decidedly not including the subject neighborhood. We do not second guess the Comp Plan's judgment about the appropriate location for revenue-generating industrial properties. Successfully justifying industrial zoning on the basis of economic welfare assumes the industrial zoning is otherwise consistent with the Comp Plan. See the discussion in *Bassani*, 70 Wn. App. at 397-98. And here it is not.

57. "Welfare" is a relatively subjective term, and we temper the strength of our evaluation accordingly. We conclude that "welfare" favors a rezone, although it is far from the centerpiece of our recommendation.

58. We now briefly discuss the remaining items in the public health, safety, morals, welfare, and interest list.

59. Turning to "health," we have little to add past the discussion in paragraph 32 regarding industrial waste, and in relation to the traffic safety discussion of paragraphs 46–51. MVI argues that putting a residence on the subject property that near to Highway 18's emissions would be deleterious. That is a good argument, but there is simply too little in the record to allow us to balance this against, say, emissions from industrial traffic on a residential street or health risks from more intensive industrial uses. We cannot say that "health" (as a stand-alone factor) weighs in favor of or against a rezone.

60. Courts mention "morals" as a criterion against which to weigh a rezone. *Woods*, 162 Wn.2d at 617. We would not know how to begin to arbitrate that. We leave "morals" untouched.

61. Similarly, to ask whether a rezone is in the "public interest" almost has to fold back into the discussion of whether it furthers the Comp Plan policies (which themselves express the County's considered judgment of what the "public interest" is) and into the safety and welfare discussion above. Otherwise, the inquiry would be untethered. Thus we do not undertake a stand-alone, "public interest" analysis.

62. In summing up the impact of the proposed rezone on health, safety, interest, morals, welfare, and public interest, these factors—especially the safety implications of adding industrial traffic to a residential street—favors a rezone. This complements, but is not a substitute for, the more definitive inquiries of changed circumstances (since the property received its current "I" zoning), and the inconsistency of the current zoning with the Comp Plan.

63. Last on our list of issues for hearing, as stated in our Pre-Hearing Order, is whether either the current zoning or the potential rezone are unreasonably incompatible with or detrimental to affected properties and to the general public[2]. KCC 20.24.180. We conclude, based on the analysis above, that industrial zoning has not been reasonably compatible with the surrounding neighborhood and the Comp Plan since the subject property lost its arterial access when WSDOT sealed off Highway 18, and that routing industrial traffic through the residential neighborhood would be detrimental. But we address one point made at hearing.

64. In her testimony, one neighbor opined that the subject property was entirely inappropriate for industrial use, whether that use was producing baby food or marijuana. Cornelison testimony. We agree. Yet the intended implication of her testimony seemed to be that even baby food production would be detrimental, while MVI's marijuana production would be *really* detrimental. We think that gets it reversed. MVI has shown that the traffic associated with its particular use is unlikely to even approach the more typical light industrial loads Mr. Jacobs originally calculated. It is difficult to see how any 40,000-square foot baby food operation could survive if its production output volumes were limited to what would fit in the SUV-sized delivery van (not a semi-truck) Mr. Cramer testified that he plans to use, and use only every few days—a prediction consistent with what Mr. Bondi described for his own, existing marijuana operation. So we would phrase it the opposite way: even MVI's use would be unreasonably incompatible and detrimental,[6] but a more intensive use such as industrial baby food production would be *really* incompatible and detrimental.

65. Phrased another way, MVI succeeded in showing that, *as industrial uses go*, its proposed facility is towards the less intrusive end, neighborhood impact-wise. But there are a myriad of more intensive industrial activities that are allowed in the Industrial zone that are either not allowed in the Rural Area or are allowed only with a conditional use permit or with some other, significant restrictions: A theater or a shooting range. KCC 21A.08.040. Dry cleaning plants, automotive repair and service, or medical labs. KCC 21A.08.050. Construction and trade, warehousing, self-service storage, heavy equipment and truck repair, or outdoor advertising service. KCC 21A.08.060. Gasoline service stations or car dealerships. KCC 21A.08.070. Materials processing facilities, textile products, fabricated metal products, tire retreading, and transfer stations. KCC 21A.08.080. And school bus base or a motor sports facility. KCC 21A.08.100.

[6] That is not to inject an inquiry onto the standard DPER must apply in reviewing MVI's application. The process for reviewing a "conditional use" permit application allows DPER to "ensure compatibility with nearby land uses." KCC 21A.06.230. And, post-July 2015 code change, MVI's project would apparently require a conditional use permit. But at the time of MVI's June 2014 application, its proposal was apparently for an "allowed" use, not for a "conditional" one.

66. In addition~~closing argument~~, MVI raises~~interjected~~ three issues.

~~67. First, i~~It assert~~s~~ed that an additional Comp Plan policy, U-172, is~~was~~ relevant and cut~~s~~ in MVI's factor. ~~Per our June 23, Pre-Hearing Order (Order), this additional Comp Plan policy should have been added by July 1 to the list of issues for hearing. However, if, for example, the neighbors had attempted, at the end of the hearing, to add another Comp Plan policy, we likely would have allowed it in, after providing some time for MVI to address it, either at the hearing or by keeping the record open to allow MVI to brief the issue. So we do not exclude U-172. But we require no neighbor response, because U-172 is simply not applicable.~~

~~68.~~67. U-172 states that:

> Within the UGA, but outside unincorporated activity centers, properties with existing industrial uses shall be protected. The county may use tools such as special district overlays to identify them for property owners and residents of surrounding neighborhoods.

~~69.~~68. We do not make it past the first three words. U-172 only applies "Within the U[rban]G[rowth]A[area]." Thus, unlike other Comp Plan policies that apply to properties *adjacent* to an urban area, U-172 only applies to properties actually "Within the UGA." *Compare* U-172 ("Within the UGA") *to, for example*, U-104 ("Rural properties that are immediately adjacent to a city"), U-105(a) ("adjacent to the original Urban Growth Area boundary"), *or* R-316(b) ("Lands adjacent to the Urban Growth Area boundary"). The subject property is not within a UGA. U-172 has no bearing on our situation.

~~70.~~69. In addition, MVI contends~~asserted~~ that ~~another issue in our Order was whether~~ the benefits of a rezone do not outweigh~~ed~~ the hardship to MVI. ~~That was actually not on our list of issues, and for good reason.~~ "The word 'hardship' is suggestive of the test for denial of substantive due process." 17 Wash. Prac., Real Estate § 4.7 (2d. ed.). And a council "does not have the power to enforce, interpret, or rule on constitutional challenges," and it cannot delegate to an examiner "powers it does not have." *Exendine v. City of Sammamish*, 127 Wn. App. 574, 587, 113 P.3d 494 (2005). Yet MVI's issue is not one that requires a doctrine-bound constitutional analysis, nor is it adding a truly separate issue. In one sense it is a slightly different phrasing of the final analysis we are performing here anyway—weighing the factors that favor a rezone against those that do not (including the potential impact on MVI's property interests). To the extent ~~the issue had been timely raised and~~ we ha~~d~~ve jurisdiction to consider it, and for the reasons explained thus far and summarized in paragraph 76, we ~~would have found~~ find that this rezone's benefits outweigh the hardships to MVI. ~~But this issue is beyond the scope of this hearing.~~

~~71.~~70. Finally, MVI argue~~d~~s that the subject property is "directly adjacent to an urban growth boundary" and is thus outside the class of "isolated industrial properties" on which Ordinance 17893 placed the moratorium. Ex. 1 at line 97. This does not alter our analysis, for two reasons.

~~72. First, our Order set the issues for hearing, and set July 1, as the deadline for filing objections, amendments or requests to modify the Order. We received no filings. Whether the property met Ordinance 17893's criteria was not an issue for hearing. And unlike the addition of a Comp Plan policy, something as fundamental as an attack on an entire process had to be raised earlier. If the tables had been turned, and it had been the neighbors who had tried to interject such a fundamentally new issue at hearing, we would have rejected it. Actually, that is not a hypothetical. At the end of the hearing the neighbors raised a new issue, asking us to recommend that Council consider MVI's permit along with this rezone. Dewitt argument. We decline to add that issue either.~~

~~73. Second and more specifically, our Order noted that DPER's Report contains two fairly distinct sets of information. We noted that the first group contained numerous background factual findings regarding the site, its prior history, the neighborhood, and the area zoning. We observed that these did not appear controversial. And the first bulleted entry on that list was "the size, location, and ownership of the site, and that the site is the only one in the County meeting the criteria of Ordinance 17893." We then stated that:~~

> ~~If someone wants to challenge a Report finding in this first group, any such challenge must be filed with the examiner by noon on **July 1, 2015**, and must specify exactly what DPER finding is objected to. … This will allow participants to prepare their respective cases for hearing and will allow DPER to determine whether/how it needs to respond or participate. Absent a specific challenge, those background findings in the Report will be accepted as the factual foundation from which to begin the hearing.~~

~~74. MVI did not object by the July 1 deadline, and indeed, not (functionally) until the final five minutes of the hearing, when the notion appeared in closing argument. That was two weeks after the subject property meeting the criteria of Ordinance 17893 became established fact for purposes of this rezone.[7]~~

~~75.~~71. First~~Third, to the extent we would consider it~~, Exhibits 10 and 12A show that south of the southwest corner of subject property, south of the WSDOT property separating the subject property and Highway 18, and south of Highway 18, is the northwest corner of ~~what appears to be~~ urban area (the dotted line in Exhibit 10 and the tannish color in Exhibit 12A). Only traveling (as the crow flies) from the extreme southwest corner of the subject property, across WSDOT property, across the fence that seals off Highway 18 (Exhibit 12D), across the two lanes of southeast-bound traffic, across the intra-highway division, across the two lanes of northwest-bound traffic, and across a some buffer property, would a crow reach the northwest urban tip of that urban area. Thus even if a challenge to DPER's finding had been timely raised, it would not have changed the analysis, not when (for a non-crow) access to that urban tip involves travelling from the subject property north over a half-mile through a rural residential neighborhood to reach the SE Wax Road/SE 240th Street/200th Avenue SE intersection, then a far greater

~~[7] Not being challenged on any of the findings in its Report that we listed in our Order, DPER thus had little reason to appear at our public hearing or offer any clarification. DPER thus did not participate.~~

distance either east on SE 240th to the far northeast edge of Exhibit 10, and then south and back west, or west along SE Wax Road to some point actually off that map, and then back east. That is not "directly" adjacent, even under the most liberal definition of "directly adjacent."

~~76.~~72. Second ~~And fourth~~ and mo~~re~~rest simply ~~(and perhaps this is the reason this issue was not raised initially)~~, whether this or another property is "directly adjacent to the urban growth boundary" is actually not a criterion for this rezone. It is a criterion for the moratorium Ordinance 17893 placed on accepting applications for new development. Ex. 1 at lines 62-64, 97. But, according to DPER, MVI submitted its application in June 2014, three months before the September moratorium went into effect. Ex. 3, Report at 3. The meaning of "directly adjacent" would be relevant if someone from a different, industrially-zoned parcel attempted to apply for a development permit.[8] But the applicability of the moratorium to MVI and the subject parcel is not at issue. Instead, the criteria for whether the Council should rezone this property turns on the Comp Plan policies and other criteria analyzed above. And those favor rezoning.

Other Issues

~~77.~~73. Motion 14347 tasked us with also reviewing whether properties immediately abutting the subject property, including public rights-of-way, should be rezoned from I to RA-5. Exhibit 5. These abutting areas are apparently owned by WSDOT. Exhibit 3, Report at 3. We sent WSDOT notice of our proceeding, and WSDOT has not objected (nor otherwise responded). We are sending them this Report and Recommendation, which contains information for how to appeal to Council. *Substantively*, rezoning such lands is appropriate, for the reasons detailed above for why rezoning the subject property is appropriate. However, Proposed Ordinance 2015-0170 would only reclassify parcel 2022069011, and the record contains no evidence of exactly what other parcel numbers are involved, or even if these WSDOT remnants have parcel numbers. Thus, *procedurally*, the appropriate course is uncertain, especially where – given that, in this quasi-judicial hearing – Council must base its decision on the factual record made at the examiner stage. KCC 20.24.220(B). We thus make no recommendation on whether or how the Council should rezone such abutting properties.

~~78.~~74. Next, as discussed above, in September 2014 the Council enacted Ordinance 17893, declaring a one-year moratorium on accepting applications for new development on isolated, industrially-zone-parcels. Ex. 1. The timing for an appeal is described below, after the signature line. If an appeal is filed—and given the time for an opposition to that appeal, followed by the Examiner's Office drafting and circulating a memorandum—it seems unlikely that Council could schedule, act on, and make effective a rezone prior to the moratorium running out on September 22. That may or may not matter. As discussed above, the July 2014 code changes would appear to eliminate a similar re-application

[8] ~~During closing argument,~~ MVI assert~~ed~~s that there ~~wa~~is another property (parcel 1922069041) that is allegedly similar to the subject property, and yet DPER found (in its Report) that this other parcel did not meet the criteria of "isolated industrially zoned parcel." ~~We are confined to the record in this case, and there is nothing in the record equivalent to Exhibit 12A that could let us, even for curiosity sake, analyze that other parcel. And w~~Whether this, that, or some other parcel was subject to the moratorium of Ordinance 17893 is not at issue in this rezone.

from MVI, and this was the only parcel DPER identified as meeting the criteria for the moratorium. Given that Motion 14347 references the moratorium and its expiration date, we simply flag the issue.

~~79.~~75. Finally, even if the Council rezones this property, if may be that, per the zoning codes and zoning designation in place at the time of MVI's June 2014 permit application, MVI is entitled to a permit. Our state has rejected the vesting approach the majority of states apply, and has instead adopted a bright-line, more developer-friendly rule. *See*, *e.g.*, *Allenbach v. City of Tukwila*, 101 Wn.2d 193, 194-95, 676 P.2d 473 (1984). And that is the standard DPER must abide by in processing permits. The extent of rights conveyed by Mr. Cramer's pending application will be decided first by DPER and later on appeal, but we note that to the degree his application creates vested rights, those rights would not be disturbed by a rezone. A rezone here to Rural Area would preclude any new, future industrial development proposals, but it may not affect MVI's pending application. We do not minimize the neighbor's concerns about an industrial facility in their neighborhood, even one (as MVI's proposal) that seems less impactful than a standard industrial use. Yet the July 2014 code changes and this rezone have the flavor of locking the barn door after the horse is gone.

Conclusion

~~80.~~76. In sum, applyi~~cation~~ng ~~of applicable~~the pertinent legal requirements to the facts of this case decidedly favor rezoning the subject property to RA-5. Had this rezone been decided prior to MVI's purchase and efforts to develop the industrially-zone subject property, it would truly have been a slam dunk. Industrial zoning has not made sense for the subject property since WSDOT ceased using the property for construction-related uses and sealed off Highway 18. MVI's purchase of the property and investment in marijuana development are not unimportant; combined these are the one significant factor weighing against a rezone. However, the potential hit to MVI seems largely moot, given that DPER is processing MVI's June 2014 development application without reference to the July 2014 code change or to the results of this rezoning. And even if the application is not approved, the evidence supporting a rezone—especially the fact that the property is already designated as Rural in the Comp Plan, along with policies U-173 and R-515—still decidedly favors a rezone.

RECOMMENDATION:

1. Approve proposed ordinance 2015-0170, reclassifying Parcel 2022069011[9] from Industrial (I) to Rural Area with five acre minimum (RA-5) and amending King County Title 21A, as amended, by modifying the zoning map to reflect this classification.

2. No recommendation on whether to amend proposed ordinance 2015-0170 to also rezone any industrially-zoned parcels immediately abutting the subject property from Industrial (I) to Rural Area with five acre minimum (RA-5).

[9] Proposed Ordinance 2015-0170 incorrectly lists the parcel as 2022069001. Ex. 4. Motion 14347 correctly lists the parcel as 2022069011. Ex. 5.

DATED July 31, 2015~~July 31, 2015~~November 2, 2015.

David Spohr
King County Hearing Examiner

November 2, 2015

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REPORT AND RECOMMENDATION

SUBJECT: King County Council file no. **2015-0170**
Proposed ordinance no.: **2015-0170**

MAPLE VALLEY REZONE

Location: Parcel number 2022069011 and directly abutting property SE 248th Street, west of 200th Avenue SE

Referred by: **Metropolitan King County Council**
Staff contact Erin Auzins
King County Courthouse Rm1200
516 Third Avenue
Seattle, WA 98104
Email: erin.auzins@kingcounty.gov

Owner: **Maple Valley Industries LLC**
represented by Randall Olsen and Donald Marcy
Cairncross and Hempelmann
524 Second Avenue Suite 500
Seattle, WA 98104
Email: rolsen@cairncross.com

SUMMARY: By motion, the Council referred a proposed ordinance that would rezone property from Industrial to Rural Area. We set and held a pre-hearing conference, issued a pre-hearing order, and held a public hearing, at which we took testimony and exhibits. Based on the hearing evidence, we recommend that the Council approve the proposed ordinance and rezone the subject property.

EXAMINER PROCEEDINGS: The hearing opened and closed on July 16, 2015. Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available from the Hearing Examiner's Office.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION: Having reviewed the record in this matter, the examiner now makes and enters the following:
FINDINGS AND CONCLUSIONS:

1. General Information:

Location:	Parcel number 2022069011 and directly abutting property 248th Street, west of 200th Avenue SE
Threshold Determination:	Determination of Non-Significance (DNS)
Date of Issuance:	May 28, 2015
Existing Zone:	Industrial (I)
Down Zone:	Rural Area (RA), with five acre minimum
Section/Township/Range:	SW 20-22-06

Introduction

2. This matter involves a property in the vicinity of Maple Valley and Covington, but outside those corporate limits and outside the Urban Growth Boundary. The Metropolitan King County Council referred to us the question of whether to rezone the subject property from the current "I" (Industrial) to "RA-5" (Rural Area, with a five-acre minimum). In the foreground is Maple Valley Industries' (MVI's) commercial site development permit application for a marijuana production and processing facility on the subject property. We held a pre-hearing conference and later a public hearing at which ten members of the public testified in favor of a rezone and MVI's four witnesses offered testimony weighing against a rezone.

3. This rezone proceeding is not a proxy hearing on whether MVI is entitled to a permit under the pertinent standards that govern the Department of Permitting and Environmental Review's (DPER's) analysis. Thus, to the extent we make a finding or conclusion that directly overlaps a finding or conclusion DPER must make in reviewing MVI's application, ours is not meant to have final or preclusive effect. Phrased another way, the time to appeal an MVI-application-specific item is not now but instead during the appeal period that will follow DPER's decision on MVI's pending application.

4. For the reasons explained below, we recommend that the Council rezone the subject property.

Background

5. In 1994, the Washington State Department of Transportation (WSDOT) purchased a large parcel that included the subject property. Ex. 3, Report at 3. At the time, the parcel was zoned ML-P (Manufacturing Light). *Id.* At one time 248th Avenue SE had direct

access to what was then a two-lane Highway 18 and to areas to the south. Dewitt & Codd testimony; Ex. 8A.

6. In 1995, with the conversion of the county zoning code into Title 21A, the zoning designation was converted to "I-P," the "I" being Industrial and the "P" being since-rescinded restrictions not relevant to our case. Ex. 3, Report at 3.

7. In 1999, WSDOT received a permit to demolish a concrete shop building on the subject property. *Id.* Although the precise dates are not in the record, WSDOT began using the larger property as a staging area for construction equipment and materials as it expanded Highway 18. *Id.* At some point it completed what is now the four-lane (two lanes in each direction, divided by a middle strip), limited access highway. *Id.*; Codd & Dewitt testimony. Once completed, the previous arterial access the subject property enjoyed was eliminated. Ex. 3, Report at 3.

8. This created an industrially-zoned property in a sea of rural-zoned property.[1] Ex. 12A. On the south side of Highway 18, past some RA-zoned properties, is Lakeside Industries, a large quarry mine. Cramer testimony; Ex. 10 (presumably the white area south of Highway 18). These areas to the south were separated from the subject neighborhood once Highway 18 became a barrier to, not a way to reach, those areas. Northwest of the subject property is a state-owned gravel pit, but the testimony was that the state uses this very infrequently. Simpson testimony. And that state-owned parcel is itself zoned RA-5 and has direct access from that operation to the arterial SE Wax Road. Ex. 10 (grey-veined area west of 196th Avenue E and south of SE Wax Road); Ex. 12A. Similarly, a church sits at the intersection of SE Wax Road, SE 240th Street, and 200th Avenue SE. Jensen testimony. This too is also zoned RA-5, and has direct access to the arterial SE Wax Road. The rest of the neighborhood is not only all RA-5, but uniformly residential, per the consistent neighbor testimony at hearing and the lack of any contrary information in the record.

9. Mark Cramer testified as follows. Soon after I-502 legalized marijuana at the end of 2012, he began looking to create a marijuana facility. After determining that other potential sites would not work, he alighted on the subject property. Prior to purchase, he reviewed the subject property with DPER, and DPER advised him that (from a zoning perspective) the subject property was suitable for his desired use. *See also* Ex. 9. He then performed some due diligence in relation to critical areas and soil. Finally, he purchased the property from WSDOT in April 2014 for approximately $320,000. He would not have bought the property had it not been zoned industrial. Based on the current record, we accept this testimony.

10. At about the same time, the Council began considering legislation that would restrict marijuana processing within the Industrial zone. Mr. Cramer lobbied against those restrictions, but his efforts were ultimately unsuccessful; on June 23, 2014, the Council

[1] There is a WSDOT-owned, industrially-zoned, remnant buffering Highway 18 and the subject property, but its parameters are unclear. Ex.12A (grey "I" area between the subject property and Highway 18). After WSDOT completed its work, it converted about half the original parcel into right of way, and segregated the remaining portion into the subject property. Ex. 3, Report at 3.

enacted Ordinance 17841, which the Executive approved on July 4.[2] We will henceforth refer to this as the "July 2014" code change.

11. After the Council's passage, but prior to the ordinance becoming effective, on June 25 MVI submitted a complete commercial site development application for marijuana production and processing. Ex. 3, Report at 3. The project would create two, 20,000-square foot light industrial buildings. Ex. 15 at 2.

12. In September 2014, the Council enacted Ordinance 17893, declaring a one-year moratorium on accepting applications for new development on isolated, industrially-zone-parcels, and directing DPER to study the issue. Ex. 1. In response, in March 2015 the Executive submitted to Council a DPER report ("Report") which recommended rezoning the subject property from Industrial Rural Area. Ex. 3. After applying the criteria in Ordinance 17893, DPER found that only the subject property (plus the abutting, remnant WSDOT holding) matched the Council's stated definition of "isolated industrial zone parcels." Ex. 3, Report at 2.

13. After Council received DPER's Report, it introduced Proposed Ordinance 2015-017, and via Motion 14347 referred that ordinance to us at the end of April, directing us to conduct a quasi-judicial hearing and issue a recommendation on a rezone. Exs. 4 and 5. In May, DPER completed its State Environmental Policy Act (SEPA) analysis of the proposed rezone and issued a Determination of Non-Significance. Ex. 7. No one provided any substantive comments to that SEPA determination.

14. At the beginning of June, we set a June 18 pre-hearing conference. After the conference, we issued a June 23 Pre-Hearing Order which set, among other things, the issues for hearing and various pre-hearing deadlines. We conducted the hearing on July 16. Ten members of the public testified in favor of a rezone and MVI's four witnesses offered testimony weighing against a rezone. After the completing the hearing, we closed the record.

Analysis

15. In considering a potential rezone:

> (1) there is no presumption of validity favoring the action of rezoning; (2) the proponents of the rezone have the burden of proof in demonstrating that conditions have changed since the original zoning; and (3) the rezone must bear a substantial relationship to the public health, safety, morals, or welfare.

Woods v. Kittitas County, 162 Wn.2d 597, 617,174 P.3d 25 (2007). That list is not exclusive; counties may impose additional criteria for analyzing rezones. *Id.* In this case,

[2] Ex. 3, Report at 3; Ord. 17841. Interestingly, it was neighbor Mel Codd who raised the topic of Mr. Cramer's lobbying efforts and entered Mr. Cramer's May 2014 memorandum to Council as Exhibit 11. To the extent they matter, Mr. Cramer's legislative efforts cut in MVI's *favor*, showing that Mr. Cramer was not sleeping on his rights but was striving to bring his development to fruition.

we start with changed circumstances, move to analyzing the consistency of this rezone to the King County Comprehensive Plan (Comp Plan), and then discuss public health, safety, morals, welfare and interest, before addressing whether the potential rezone is unreasonably incompatible with or detrimental to affected properties and the general public. We then tackle issues raised by MVI: an additional Comp Plan policy, whether the benefits of the reason outweigh the hardship to MVI, and whether the subject property meets the Ordinance 17893's definition of "isolated industrially-zone-parcels" (and if it does not, whether the property should be rezoned).

16. Conditions have changed significantly since the original zoning. As described in paragraphs 5–8, when the subject property received its initial (and current) Industrial zoning in 1995, it had direct access to Highway 18 and points south. At the time, WSDOT owned the property and was beginning to use the property for a heavily industrial use—staging construction equipment and materials as it built Highway 18. But that use ceased when WSDOT completed its project. And after WSDOT finished the four-lane, limited access highway, it eliminated the subject property's direct arterial access and access to an urban area to the south. This left the subject property locked on the north side of Highway 18, surrounded by a sea of rural property, its only remaining access through the residential neighborhood to the north. Ex. 12A (showing the gray "I" surrounded by green "RA-5").

17. Washington does not require a "strong" showing of change. *Bassani v. Board of County Com'rs for Yakima County*, 70 Wn. App. 389, 394, 853 P.2d 945 (1993). But even if it did, the circumstances have changed substantially, and this element weighs decidedly in favor of rezoning away from Industrial, given the half-mile plus of residential street industrial traffic to and from the subject property would now have to traverse to reach an arterial.

18. We next turn to consistency with the Comp Plan. Before discussing specific, relevant policy numbers, we observe that both the subject property and the surrounding properties have had a "Rural" designation since at least the 2012 Comp Plan. Ex. 3, Report at 4. So the last time the County approved a Comp Plan, the subject property was slated for RA, not I, zoning.

19. The most definitive Comp Plan policy is:

> U-173 Industrial development should have direct access from arterials or freeways. Access points should be combined and limited in number to allow smooth traffic flow on arterials. Access through residential areas should be avoided.

20. That could hardly be any clearer. Since losing its direct access to Highway 18, traffic to and from the subject property must travel a slight distance along the residential SE 248th Street, and then half-mile up the very residential SE 200th Avenue to reach the

intersection with the minor arterials of SE 240th Street and SE Wax Road.[3] Ex. 15 at 3. Industrial development on the subject property thus lacks the necessary, direct access to arterials or freeways, and it would create the industrial access through residential areas that should be avoided. U-173 cuts sharply in favor of a rezone.

21. MVI points to Comp Plan policy I-101, which states in pertinent part that "King County's regulation of land should: a. protect public health, safety and general welfare, and property rights." Public health, safety, and general welfare are discussed in paragraphs 45–62, but I-101(a) injects the protection of property rights into the equation. Mr. Cramer purchased the property as Industrial for $320,000 and he testified, without rebuttal, that he has invested an additional $260,000 in furtherance of marijuana operations on the subject property. He opined that, being adjacent to Highway 18, the subject property was not a high value residential site and not one he would have considered investing in.

22. We agree that I-101(a) weighs against a rezone, but only to a point. First, downzoning "generally results in a loss of property value." 3 RATHKOPF'S, THE LAW OF ZONING AND PLANNING § 38.30 (4th ed.). After all, the jurisdiction is typically attempting "to downzone property from a more intensive use, and therefore more lucrative use, to a less intensive use." *Cf. Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 421, 13 P.3d 183 (2000) (Talmadge, J., dissenting on other grounds). So the concept that residential uses would be less lucrative than industrial ones is almost a given, not a surprise twist unique to this case. And "[a] property owner has no legal right to the continued maintenance or retention of the zoning governing his or her own property." RATHKOPF'S at *id*.

23. Second, there are a myriad of other RA-5 zoned properties abutting Highway 18, many without the WSDOT-buffering property the subject property enjoys. Ex. 12A. All of those could potentially argue that they should be zoned something else because they are likely less desirable residence sites than lots further removed from the highway. But we are not aware of other owners arguing that they can make no reasonable residential use of their Highway 18-abutting properties or seeking rezones. There is nothing in the record showing the subject property is any less suitable to residential development than any of the other, RA-zoned properties abutting Highway 18. Even if the subject property (and other Highway 18-abutting properties) are less desirable than more buffered residential lots, that does not make residential use incompatible or infeasible for those parcels. And at 6.5 acres the subject property has more room for internal buffers than the majority of, smaller, RA-5 zoned properties abutting Highway 18. Ex. 12A.

24. Third, and most importantly, "vesting" entitles a developer to have her land development proposal processed under the regulations in effect at the time she filed a complete permit application, despite any subsequent changes in zoning or other land use regulations. *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 172-73, 322 P.3d 1219 (2014). For a commercial site development permit, DPER must base its analysis on the "adopted

[3] Mark Dewitt explained that, with blocks set at 1/16 mile, the eight blocks between SE 240th Street and SE 248th Street would be approximately a half mile. And the entrance to the subject property is west of this, along SE 248th Street.

county and state rules and regulations in effect on the date the complete application was filed." KCC 21A.41.070.

25. According to DPER, MVI submitted a complete permit application on June 25, 2014. Ex. 3, Report at 3. This was two days after the Council passed changes that reduced the allowable marijuana-related uses in an Industrial zone, but several days before the Executive signed the ordinance. Ord. 17841, final page. In *Allenbach v. City of Tukwila*, 101 Wn.2d 193, 194-95, 676 P.2d 473 (1984), our court ruled that a developer was entitled to vesting where he submitted a permit application nearly two months after a restrictive ordinance passed, but one day before the ordinance actually became effective. Our court recently reaffirmed that vesting still applies in such a scenario. *Town of Woodway*, 180 Wn.2d at 180 (citing *Allenbach* at *id.*).

26. Thus, while the vesting question will conclusively be determined through the permit process (and any appeals to DPER's decision on MVI's application), per the record we consider, MVI is entitled to have its application decided on the basis of the pre-July 2014 code change and under the then (and current) Industrial zoning. If MVI continues through the permit process and receives a permit, this would almost entirely eliminate any loss to MVI. And if MVI is not entitled, per the rules and zoning in place in June 2014, to its project, then it would be harder to argue that the July 2014 code change or this rezone was the proximate cause of MVI's lost, marijuana-related investment. *See, e.g. Orion Corp. v. State*, 109 Wn.2d 621, 660-62, 747 P.2d 1062 (1987).

27. That is not to say that a rezone would have zero economic impact. If MVI receives its permit, constructs its facilities, and begins operations, it would become a legal, non-conforming use. Non-conformance limits flexibility and expansion options. But MVI's use would already—by virtue of the July 2014 code changes—be a legal, non-conforming one, regardless of this rezone. And, for example, the non-conforming use rule that caps any building square footage increases at ten percent tracks the commercial site development rule that caps any building floor area increase at ten percent. *Compare* KCC 21A.32.065(A)(1)(a) *with* KCC 21A.41.110(A)(1). Moreover, the July 2014 changes would restrict any future MVI competitors. As Mr. Cramer noted, that code change adds significant time and cost for a marijuana facility, "effectively prohibiting participation" at this stage of the market. Ex. 11 at 5. Restricted competition would tend to offset the negative impact of being a legal, non-conforming use.

28. Fourth, the neighbors' investment in their residential properties would likely suffer some detriment from an industrial use being established in their neighborhood, especially an industrial use with a greater impact than MVI's. *See, e.g.*, Cornelius testimony; paragraph 65. Our courts accord more weight to the property rights of an individual seeking to develop her property than to the property rights of neighbors who may be adversely impacted by that development. *See, e.g., Durland v. San Juan County*, 182 Wn.2d 55, 75, 340 P.3d 191 (2014) (abutting neighbor lacked sufficient property interest to demand notice of—and a realistic chance to challenge—a development permit). Thus the neighbors' property rights are not entitled to as much weight as MVI's, but they are relevant, and so there is some tradeoff between MVI's and the neighbors' property rights.

29. In the final analysis, applying I-101(a) to the rezone proposal depends in part on a factor we cannot know at this time: whether MVI's current permit application will ultimately be approved. If it is, then balancing the slight impediment non-conforming use status would create against the property interests of the surrounding residential owners seems close to a wash. Conversely, if the rezone ultimately winds up being the proximate cause of no industrial development on the subject property, then I-101(a) cuts in MVI's favor. Yet a "property owner has no legal right to the continued maintenance or retention of the zoning governing his or her own property" and downzonings "in accordance with a comprehensive plan, are likely to be sustained even where the reduction in property value is quite severe." 3 RATHKOPF'S, THE LAW OF ZONING AND PLANNING § 38.30 (4th ed.).

30. Next, we turn to R-514, which states that:

> Development regulations for new industrial development in the Rural Area shall require the following:
>
> a. Greater setbacks, and reduced building height, floor/lot ratios, and maximum impervious surface percentage standards in comparison to standards for urban industrial development;
>
> b. Maximum protection of sensitive natural features, especially salmonid habitat and water quality;
>
> c. Building and landscape design that respects the aesthetic qualities and character of the Rural Area, and provides substantial buffering from the adjoining uses and scenic vistas;
>
> d. Building colors and materials that are muted, signs that are not internally illuminated, and site and building lighting that is held to the minimum necessary for safety;
>
> e. Heavier industrial uses, new industrial uses producing substantial waste byproducts or wastewater discharge, or new paper, chemical and allied products manufacturing uses in the urban industrial zone shall be prohibited; and
>
> f. Industrial uses requiring substantial investments in infrastructure such as water, sewers or transportation facilities shall be scaled to avoid the need for public funding of the infrastructure.

31. MVI is correct that many items in Comp Plan R-514 are already reflected in KCC 21A.14.280, which set the specific development standards for industrially-zoned rural properties. Thus all industrial development (not just MVI's specific proposal) on the subject property would have to meet enhanced setbacks, reduced building heights, and aesthetic concerns. *Compare* R-514(a), (c), and (d) *with* KCC 21A.14.280. While the subject property does not seem to involve the sensitive natural features discussed in R-514(b), that still leaves (e) and (f).

32. For (e), the production and processing proposal MVI described avoids chemical fertilizers in production and the solvents and volatiles used in the extraction process. This seems a pretty big deal. If DPER conditions MVI's permit on not employing such chemicals, then MVI's project may very well meet R-514(e). However, KCC 21A.14.280 does not command that result for rural industries, and other chemical-employing business such as dry cleaning plants, gasoline service stations, industrial and commercial machinery, heavy equipment and truck repair, and medical labs are allowed. *See* paragraph 65. And even under the July 2014 code changes, if the zoning stays industrial, a *future* marijuana business could apply for more intensive processor II use, which explicitly allows such chemical processing; conversely, such chemicals would not be allowed if the property is rezoned to Rural. KCC 21A.06.7344(B)(3); KCC 21A.08.080(A) & (B) (items 25 & 26). This concern seems heightened because the properties just west of the subject property on SE 248th Street use a well that taps into shallow (less than fifteen feet below grade) water table that rests at approximately the same elevation as the building pad for the subject property. Simpson testimony.

33. And the subsection of R-514 that Ordinance 17893 focused on is (f), scaling industrial uses to avoid the public needing to fund infrastructure. Ex. 1 at lines 24–28. In particular, with the County's Road Services Division facing a $250,000,000 annual shortfall, there are not available public funds to improve local residential roadways to accommodate new industrial development. Ex. 1 at lines 29–33.

34. MVI retained Mark Jacobs of Jake Traffic Engineering to analyze the traffic impacts of two, 20,000-square foot Light Industrial buildings. Ex. 15 at 2. In his May 2014 analysis, he calculated MVI would generate 279 trips per weekday, with 37 and 39 of these coming in the AM and PM peak hour. Ex. 15 at 5. We refer to 200th Avenue SE, from the time it leaves the SE 240th Street/SE Wax Road intersection until it bends around and becomes SE 248th Street and then dead-ends past the subject property, as the "Road."

35. The King County Department of Transportation (KCDOT) determined that these trips would be equivalent to adding 30–35 additional homes, and would result in the Road reaching "subcollector" volumes. Ex. 17 at 4, ¶ 19. The pertinent King County Road Design and Construction Standards require, for "subcollector" roads, a minimum 22-foot traveled way, with 6-foot shoulders on each side, set within a 60-foot right of way. Ex. 17 at 5, ¶ 24. Even the lesser "subaccess" street requires a minimum 20-foot travelled way, with 4-foot shoulders on each side, set in a 48-foot right of way. *Id.* And even the lowest road classification KCDOT discussed, "minor access," requires a 20-foot travelled way, with 2-foot shoulders on each side, set in a 40-foot right of way. *Id.* Yet the bulk of the Road sits within only a 30-foot right of way corridor, half the standard "subcollector" width. Ex. 17 at 5, ¶ 23. Ex. 17 at 5, ¶ 23. This makes construction of the Road to rural "subcollector" standards "impossible." Ex. 17 at 5, ¶ 26.

36. The safety perspective is discussed in paragraphs 46–51. From the perspective of public infrastructure requirements, KCDOT recommends that the entire (half-mile plus) Road be improved to "subaccess," with the fallback being, at a minimum, "minor access." Ex. 17 at 5, ¶ 27. And almost half the Road does not meet even this "minor access" street standard (the lowest category KCDOT mentioned). Ex. 17 at 5, ¶ 25. In addition, while

the Road pavement is fair to good from the subject property north to just south of SE 242nd Place, it is "poor" from this point north to the SE 240th Street/SE Wax Road intersection. Ex. 17 at 4, ¶ 22. KCDOT recommends that this section be overlaid. Ex. 17 at 5, ¶ 28.

37. This creates a public infrastructure spending problem. While Mr. Jacobs recommended that MVI overlay an approximately 600-foot stretch of Road around SE 245th Street to add a foot or two of pavement width to bring the surface to 20 feet, he noted (we assume correctly) that KCDOT's recommended overlay of the (poor) pavement from just south of SE 242nd Place north to the SE 240th Street/SE Wax Road intersection is the County's responsibility. Ex. 16 at 4, text under ¶ 28 ("Maintenance of a County Road is the responsibility of the County"). That does not even include trying to create shoulders to accommodate pedestrian travel, discussed in paragraph 49. Creating an industrial use on the subject property would create a pull on scarce Road Services funds.

38. Mr. Jacobs explained that, subsequent to his May 2014 assessment, MVI provided him with more specific information on the precise scope of MVI's operations. He re-ran the analysis to reflect the lower traffic and smaller trucks/vans that MVI would likely use. In January 2015 he estimated that actual MVI traffic would be ten to fifteen percent of his original traffic generation estimate for light industrial. Ex. 16 at 2. He emphasized in testimony that MVI's use would be lighter than "typical" light industrial.

39. We leave the analysis of MVI's specific, lighter intensity development to KCDOT and DPER, to sift through as they process MVI's pending permit application. Our inquiry involves the fuller range of industrial versus rural uses. *See* paragraph 65. We conclude that the May 2014 traffic analysis described the impacts of more typical industrial zoning better than the January 2015 analysis of MVI's more modest endeavor. R-514, especially subsection (f), favors rezoning.

40. And that brings us to R-515:

> Existing industrial uses in the Rural Area outside of Rural Towns, the industrial area on the King County-designated historic site along SR-169 or the designated industrial area adjacent to the Rural Neighborhood Commercial Center of Preston shall be zoned rural residential but may continue if they qualify as legal, nonconforming uses.

41. As with U-173, the import is significant and requires little elaboration. Even *existing* industrial uses outside of the discrete geographic areas mentioned (rural towns, an area on SR-169, and Preston) "shall be zoned" rural residential. We thus do not decide *de novo* whether industrial zoning and establishing a new industrial use is appropriate here, in an area outside the listed geographical areas. The Comp Plan has already made the policy call that it is not. R-515 cuts sharply in favor of a rezone.

42. MVI argued in closing that R-515 conflicted with the other Comp Plan policies and should not apply because the area is adjacent to an urban growth area (UGA), is not appropriate for residential use, and can be functionally separated from the residential

area. We answer those concerns in turn. Adjacency is discussed in paragraphs 70–72, but adjacency is not relevant to R-515, because the only "adjacency" R-515 makes an exception for is near Preston. As discussed in paragraph 23, that the subject property is a less than an ideal residential site does not make it inappropriate for residential use. And separation is not one of R-515's factors in deciding how to zone industrial uses. To the extent separation matters, and even though MVI's proposal appears to create fewer impacts than more typical industrial use, the biggest impact (of MVI, let alone a more intensive use) is the industrial traffic that would have to cut through the surrounding residential area. The subject property is thus not functionally separate-able from the residential area. Moreover, R-515 says such industrial uses (outside the discrete, referenced areas) "shall be zoned rural residential" without providing any caveat like "if appropriate" or "if not otherwise separated."

43. ED-211 states that

> King County should support programs and strategies to preserve and plan for an adequate supply of industrial and commercial land, including but not limited to:
>
> …
>
> e. Promoting the redevelopment and infill of industrial and commercial areas and explore the feasibility of using incentives to achieve this goal.

44. ED-211's more general policy supporting industry cannot weigh as heavily as R-515 specifically identifying those rural areas in which the County has decided to concentrate industrial activity and specifying that other industrial uses outside those defined geographic areas "shall be zoned rural residential." And the new, proposed industrial use on the subject property is not redeveloping or infilling an industrial "area" so much as it is developing a single industrial parcel in an otherwise residential area.[4] To the extent ED-211 applies at all to the subject property, its attenuated application could only mildly favor retaining the current Industrial zoning.

45. We turn next to the impact of the proposed rezone on the health, safety, morals, and general welfare of the public, and whether the requested reclassification is in the public interest. Motion 14347, our code, and our Court reference such a test for rezones. Ex. 5, lines 51-52; KCC 20.24.190(D); *Woods v. Kittitas County*, 162 Wn.2d 597, 617, 174 P.3d 25 (2007). Yet our Court also has counseled against basing decisions on factors such as "public use and interest" and the "public health, safety, and general welfare," in the face of adopted standards and specifications. *Norco Const., Inc. v. King County*, 97 Wn.2d 680, 688-90, 649 P.2d 103 (1982). We thus analyze this topic, but we do not weight it heavily, particularly compared to the more specific (and less subjective) Comp Plan policies described above. In short, those Comp Plan policies play a significant role in establishing the public interest.

[4] As discussed in footnote 1, there are apparently slivers of remnant WSDOT property abutting the subject property, but exactly what is not clear from the record.

46. We start with safety, specifically related to traffic both at the SE 240th Street/SE Wax Road/200th Avenue SE intersection ("the Intersection"), and from there down 200th Avenue SE until it bends around and becomes SE 248th Street, before dead-ending beyond the subject property (the "Road"). The neighbors described safety issues related to both the Intersection and to the Road.

47. As to the Intersection, KCDOT looked at accidents reported to the State. KCDOT looked at almost eight years of WSDOT's collision reports for the Intersection and found a total of eight collisions (plus an additional one not yet in the database). Ex. 17 at 3–4, ¶ 17. Since the pertinent KCDOT methodology for judging an intersection "high accident" requires eight collisions in a three year period, the Intersection did not require additional study. *Id.* at 4, ¶ 17(a).

48. The neighbors uniformly believed this understates the Intersection's hazard. They testified to "daily" near misses. Dewitt testimony and Ex. 8N & O. A neighbor who lives and works at the corner of the Intersection and said he can hear screeches and accidents, testified that in 2013 alone he observed seven accidents, which exceeds the two reported to WSDOT in 2013. *Compare* Codd testimony to Ex. 17 at 4, ¶ 17. Another neighbor reported seeing so many wrecks at the Intersection that he routinely cuts through the church parking lot to avoid the Intersection. Deaton testimony. WSDOT's totals of reported accidents underestimate the true number of reported plus unreported accidents, but this would likely be true of *any* intersection. Still, we found credible the testimony that the three-way Intersection poses a riskier situation than one would glean from WSDOT's accident data alone.

49. As to the Road itself, there is no dispute that the bulk of the existing pavement is somewhat narrower than even the lowest, 20-foot pavement category. The neighbors discussed a blind curve and sight distances and concerns about road safety. Cornelison & Dewitt testimony; Ex. 8D & E. And the concern is not just for neighborhood drivers, but neighbors on their daily walks along the Road. Testimony of Cornelision & Deaton. The Road has little if any walkable shoulder. Ex. 8C, D, F, G, I, J & K. With no sidewalks or shoulders, the neighbors need to walk on the Road pavement; the Road is how they do their visiting and how they walk to the school bus stop halfway down the Road from the Intersection. Lorette, Cornelision & Dewitt testimony. In addition to residential uses, the first Road property south of the Intersection contains a church in use not just on Sundays, but every morning for religious education of junior high and high school students before their regular school, and for frequent evening youth activities. Jensen testimony.

50. Site distances (both stopping and entering) are measured according to specific, adopted King County Road Design and Construction Standards. KCDOT's preliminary call was that the distance needs to be verified but "appears to be adequate." Ex. 17 at 4, ¶ 21. That does not mean the Road does not crest and curve, but those Standards, not subjective assessments, set the rules for required site distances.

51. Of greater concern is the narrow existing Road width, the lack of walkable shoulders, and the constrained right-of way width that makes fixing the issue problematic. As analyzed in paragraphs 34–36, KCDOT explained that the volumes more typical light industrial

use would generate, as calculated by Mr. Jacobs, would result in the Road reaching "subcollector" volumes. Even just the pavement and shoulders a "subcollector" requires would exceed the entire 30-foot right of way that exists for most of the Road, let alone be half the 60-foot total right of way a subcollector requires. So Road safety is an issue. That is not to say that it is sufficient to warrant permit denial or a particular conditioning requirement from KCDOT or DPER on MVI's permit application; we leave that to KCDOT and DPER. But it is to say that beyond simply being a route through a residential area—which U-173 says should not be used for industrial developments anyway—the Road's narrow pavement, lack of shoulders to handle frequent pedestrian travel, and lack of much wiggle room to fix the situation points "safety" in the direction of a downzone.

52. Next we turn to the somewhat nebulous concept of "welfare." Welfare most has a role to play when determining whether a rezone application is an illegal spot zone.[5]

> Spot zoning has been consistently defined to be zoning action by which a smaller area is singled out of a larger area or district and specially zoned for a use classification totally different from and inconsistent with the classification of surrounding land, and not in accordance with the comprehensive plan.

Save Our Rural Environment v. Snohomish County, 99 Wn.2d 363, 818-819, 662 P.2d 816 (1983). Not all spot zones are illegal; the main inquiry being the relationship of the rezone to the "general welfare of the affected community." *Id.* at 819.

53. Here the subject property is bounded by the fenced off Highway 18 and then surrounded by Rural Area. Ex. 12A. If the situation had been reversed, and the subject property were currently zoned Rural and an attempt were made (post Highway 18 seal-off) to rezone it to Industrial, it would be "'granting a discriminatory benefit to one or a group of owners and to the detriment of their neighbors or the community without adequate public advantage or justification.'" *Davidson Serles & Associates v. City of Kirkland*, 159 Wn. App. 616, 638 n.14, 246 P.3d 822 (2011) (*quoting Lutz v. City of Longview*, 83 Wn.2d 566, 573-74, 520 P.2d 1374 (1974)). That is not, by itself, sufficient to warrant this rezone, as the default is the current Industrial zoning, and the thumb is on the scale against a rezone. *Woods v. Kittitas County*, 162 Wn.2d 597, 617,174 P.3d 25 (2007). But it is instructive.

54. The visual impact of industrial development on the surrounding neighborhood probably fits in the "welfare" inquiry. Not surprisingly, the testimony of MVI's witnesses diverged from the neighbors on the topic of what neighbors would see of the proposed project. MVI's proposed construction, as described by Todd Schutz, seems geared to minimizing the visual impact. But again, unlike DPER reviewing MVI's specific proposal, our inquiry involves Industrial versus Rural zoning. *See* paragraph 65. Mr. Schutz noted that MVI's buildings were "dramatically smaller" than the industrial buildings he typically

[5] *See, e.g.*, *Pierce v. King County*, 62 Wn.2d 324, 340, 382 P.2d 628 (1963) (absent record showing rezone's furtherance of the public health, safety, morals, or "general welfare of the people in the area or at large," rezone was an improper spot zoning).

designs, and a different rural industry would be allowed to build thirty percent higher than what MVI is proposing. KCC 21A.14.280(B)(11).

55. Two items the neighbors questioned MVI about that we think are not "welfare" factors here are odor and crime. Mr. Cramer's and Greg Bondi's testimony on odor control methods and security procedures was credible, and there is nothing in the record about any propensity for industrial uses in general to produce odors or crime.

56. The economic benefit a more intensive use of a property has on the community is also a legitimate "welfare" consideration in determining whether industrial zoning is appropriate. *Bassani v. Board of County Com'rs for Yakima County*, 70 Wn. App. 389, 398, 853 P.2d 945 (1993). Mr. Cramer testified, without rebuttal, that his business would employ up to a dozen people, have other positive "downstream" economic impacts, and generate $350,000–$450,000 per year in taxes. Unlike traffic, we have no evidence of how that might stack up against a more typical industrial use. Yet, as discussed above, via R-515, the County has already made the policy call that industrial uses should be concentrated in a few discrete locales, decidedly not including the subject neighborhood. We do not second guess the Comp Plan's judgment about the appropriate location for revenue-generating industrial properties. Successfully justifying industrial zoning on the basis of economic welfare assumes the industrial zoning is otherwise consistent with the Comp Plan. See the discussion in *Bassani*, 70 Wn. App. at 397-98. And here it is not.

57. "Welfare" is a relatively subjective term, and we temper the strength of our evaluation accordingly. We conclude that "welfare" favors a rezone, although it is far from the centerpiece of our recommendation.

58. We now briefly discuss the remaining items in the public health, safety, morals, welfare, and interest list.

59. Turning to "health," we have little to add past the discussion in paragraph 32 regarding industrial waste, and in relation to the traffic safety discussion of paragraphs 46–51. MVI argues that putting a residence on the subject property that near to Highway 18's emissions would be deleterious. That is a good argument, but there is simply too little in the record to allow us to balance this against, say, emissions from industrial traffic on a residential street or health risks from more intensive industrial uses. We cannot say that "health" (as a stand-alone factor) weighs in favor of or against a rezone.

60. Courts mention "morals" as a criterion against which to weigh a rezone. *Woods*, 162 Wn.2d at 617. We would not know how to begin to arbitrate that. We leave "morals" untouched.

61. Similarly, to ask whether a rezone is in the "public interest" almost has to fold back into the discussion of whether it furthers the Comp Plan policies (which themselves express the County's considered judgment of what the "public interest" is) and into the safety and welfare discussion above. Otherwise, the inquiry would be untethered. Thus we do not undertake a stand-alone, "public interest" analysis.

62. In summing up the impact of the proposed rezone on health, safety, interest, morals, welfare, and public interest, these factors—especially the safety implications of adding industrial traffic to a residential street—favors a rezone. This complements, but is not a substitute for, the more definitive inquiries of changed circumstances (since the property received its current "I" zoning), and the inconsistency of the current zoning with the Comp Plan.

63. Last on our list of issues for hearing, as stated in our Pre-Hearing Order, is whether either the current zoning or the potential rezone are unreasonably incompatible with or detrimental to affected properties and to the general public. KCC 20.24.180. We conclude, based on the analysis above, that industrial zoning has not been reasonably compatible with the surrounding neighborhood and the Comp Plan since the subject property lost its arterial access when WSDOT sealed off Highway 18, and that routing industrial traffic through the residential neighborhood would be detrimental. But we address one point made at hearing.

64. In her testimony, one neighbor opined that the subject property was entirely inappropriate for industrial use, whether that use was producing baby food or marijuana. Cornelison testimony. We agree. Yet the intended implication of her testimony seemed to be that even baby food production would be detrimental, while MVI's marijuana production would be *really* detrimental. We think that gets it reversed. MVI has shown that the traffic associated with its particular use is unlikely to even approach the more typical light industrial loads Mr. Jacobs originally calculated. It is difficult to see how any 40,000-square foot baby food operation could survive if its production output volumes were limited to what would fit in the SUV-sized delivery van (not a semi-truck) Mr. Cramer testified that he plans to use, and use only every few days—a prediction consistent with what Mr. Bondi described for his own, existing marijuana operation. So we would phrase it the opposite way: even MVI's use would be unreasonably incompatible and detrimental,[6] but a more intensive use such as industrial baby food production would be *really* incompatible and detrimental.

65. Phrased another way, MVI succeeded in showing that, *as industrial uses go*, its proposed facility is towards the less intrusive end, neighborhood impact-wise. But there are a myriad of more intensive industrial activities that are allowed in the Industrial zone that are either not allowed in the Rural Area or are allowed only with a conditional use permit or with some other, significant restrictions: A theater or a shooting range. KCC 21A.08.040. Dry cleaning plants, automotive repair and service, or medical labs. KCC 21A.08.050. Construction and trade, warehousing, self-service storage, heavy equipment and truck repair, or outdoor advertising service. KCC 21A.08.060. Gasoline service stations or car dealerships. KCC 21A.08.070. Materials processing facilities, textile products, fabricated metal products, tire retreading, and transfer stations. KCC 21A.08.080. And school bus base or a motor sports facility. KCC 21A.08.100.

[6] That is not to inject an inquiry onto the standard DPER must apply in reviewing MVI's application. The process for reviewing a "conditional use" permit application allows DPER to "ensure compatibility with nearby land uses." KCC 21A.06.230. And, post-July 2015 code change, MVI's project would apparently require a conditional use permit. But at the time of MVI's June 2014 application, its proposal was apparently for an "allowed" use, not for a "conditional" one.

66. In addition, MVI raises three issues.

67. It asserts that an additional Comp Plan policy, U-172, is relevant and cuts in MVI's factor. U-172 states that:

> Within the UGA, but outside unincorporated activity centers, properties with existing industrial uses shall be protected. The county may use tools such as special district overlays to identify them for property owners and residents of surrounding neighborhoods.

68. We do not make it past the first three words. U-172 only applies "Within the U[rban]G[rowth]A[area]." Thus, unlike other Comp Plan policies that apply to properties *adjacent* to an urban area, U-172 only applies to properties actually "Within the UGA." *Compare* U-172 ("Within the UGA") *to, for example,* U-104 ("Rural properties that are immediately adjacent to a city"), U-105(a) ("adjacent to the original Urban Growth Area boundary"), *or* R-316(b) ("Lands adjacent to the Urban Growth Area boundary"). The subject property is not within a UGA. U-172 has no bearing on our situation.

69. In addition, MVI contends that the benefits of a rezone do not outweigh the hardship to MVI. "The word 'hardship' is suggestive of the test for denial of substantive due process." 17 Wash. Prac., Real Estate § 4.7 (2d. ed.). And a council "does not have the power to enforce, interpret, or rule on constitutional challenges," and it cannot delegate to an examiner "powers it does not have." *Exendine v. City of Sammamish*, 127 Wn. App. 574, 587, 113 P.3d 494 (2005). Yet MVI's issue is not one that requires a doctrine-bound constitutional analysis, nor is it adding a truly separate issue. In one sense it is a slightly different phrasing of the final analysis we are performing here anyway—weighing the factors that favor a rezone against those that do not (including the potential impact on MVI's property interests). To the extent we have jurisdiction to consider it, and for the reasons explained thus far and summarized in paragraph 76, we find that this rezone's benefits outweigh the hardships to MVI.

70. Finally, MVI argues that the subject property is "directly adjacent to an urban growth boundary" and is thus outside the class of "isolated industrial properties" on which Ordinance 17893 placed the moratorium. Ex. 1 at line 97. This does not alter our analysis, for two reasons.

71. First, Exhibits 10 and 12A show that south of the southwest corner of subject property, south of the WSDOT property separating the subject property and Highway 18, and south of Highway 18, is the northwest corner of urban area (the dotted line in Exhibit 10 and the tannish color in Exhibit 12A). Only traveling (as the crow flies) from the extreme southwest corner of the subject property, across WSDOT property, across the fence that seals off Highway 18 (Exhibit 12D), across the two lanes of southeast-bound traffic, across the intra-highway division, across the two lanes of northwest-bound traffic, and across a some buffer property, would a crow reach the northwest urban tip of that urban area. Thus even if a challenge to DPER's finding had been timely raised, it would not have changed the analysis, not when (for a non-crow) access to that urban tip involves travelling from the subject property north over a half-mile through a rural residential

neighborhood to reach the SE Wax Road/SE 240th Street/200th Avenue SE intersection, then a far greater distance either east on SE 240th to the far northeast edge of Exhibit 10, and then south and back west, or west along SE Wax Road to some point actually off that map, and then back east. That is not "directly" adjacent, even under the most liberal definition of "directly adjacent."

72. Second and more simply, whether this or another property is "directly adjacent to the urban growth boundary" is actually not a criterion for this rezone. It is a criterion for the moratorium Ordinance 17893 placed on accepting applications for new development. Ex. 1 at lines 62-64, 97. But, according to DPER, MVI submitted its application in June 2014, three months before the September moratorium went into effect. Ex. 3, Report at 3. The meaning of "directly adjacent" would be relevant if someone from a different, industrially-zoned parcel attempted to apply for a development permit.[7] But the applicability of the moratorium to MVI and the subject parcel is not at issue. Instead, the criteria for whether the Council should rezone this property turns on the Comp Plan policies and other criteria analyzed above. And those favor rezoning.

Other Issues

73. Motion 14347 tasked us with also reviewing whether properties immediately abutting the subject property, including public rights-of-way, should be rezoned from I to RA-5. Exhibit 5. These abutting areas are apparently owned by WSDOT. Exhibit 3, Report at 3. We sent WSDOT notice of our proceeding, and WSDOT has not objected (nor otherwise responded). We are sending them this Report and Recommendation, which contains information for how to appeal to Council. *Substantively*, rezoning such lands is appropriate, for the reasons detailed above for why rezoning the subject property is appropriate. However, Proposed Ordinance 2015-0170 would only reclassify parcel 2022069011, and the record contains no evidence of exactly what other parcel numbers are involved, or even if these WSDOT remnants have parcel numbers. Thus, *procedurally*, the appropriate course is uncertain, especially where – given that, in this quasi-judicial hearing – Council must base its decision on the factual record made at the examiner stage. KCC 20.24.220(B). We thus make no recommendation on whether or how the Council should rezone such abutting properties.

74. Next, as discussed above, in September 2014 the Council enacted Ordinance 17893, declaring a one-year moratorium on accepting applications for new development on isolated, industrially-zone-parcels. Ex. 1. The timing for an appeal is described below, after the signature line. If an appeal is filed—and given the time for an opposition to that appeal, followed by the Examiner's Office drafting and circulating a memorandum—it seems unlikely that Council could schedule, act on, and make effective a rezone prior to the moratorium running out on September 22. That may or may not matter. As discussed above, the July 2014 code changes would appear to eliminate a similar re-application from MVI, and this was the only parcel DPER identified as meeting the criteria for the

[7] MVI asserts that there is another property (parcel 1922069041) that is allegedly similar to the subject property, and yet DPER found (in its Report) that this other parcel did not meet the criteria of "isolated industrially zoned parcel." Whether this, that, or some other parcel was subject to the moratorium of Ordinance 17893 is not at issue in this rezone.

moratorium. Given that Motion 14347 references the moratorium and its expiration date, we simply flag the issue.

75. Finally, even if the Council rezones this property, if may be that, per the zoning codes and zoning designation in place at the time of MVI's June 2014 permit application, MVI is entitled to a permit. Our state has rejected the vesting approach the majority of states apply, and has instead adopted a bright-line, more developer-friendly rule. *See, e.g.*, *Allenbach v. City of Tukwila*, 101 Wn.2d 193, 194-95, 676 P.2d 473 (1984). And that is the standard DPER must abide by in processing permits. The extent of rights conveyed by Mr. Cramer's pending application will be decided first by DPER and later on appeal, but we note that to the degree his application creates vested rights, those rights would not be disturbed by a rezone. A rezone here to Rural Area would preclude any new, future industrial development proposals, but it may not affect MVI's pending application. We do not minimize the neighbor's concerns about an industrial facility in their neighborhood, even one (as MVI's proposal) that seems less impactful than a standard industrial use. Yet the July 2014 code changes and this rezone have the flavor of locking the barn door after the horse is gone.

Conclusion

76. In sum, applying the pertinent legal requirements to the facts of this case decidedly favor rezoning the subject property to RA-5. Had this rezone been decided prior to MVI's purchase and efforts to develop the industrially-zone subject property, it would truly have been a slam dunk. Industrial zoning has not made sense for the subject property since WSDOT ceased using the property for construction-related uses and sealed off Highway 18. MVI's purchase of the property and investment in marijuana development are not unimportant; combined these are the one significant factor weighing against a rezone. However, the potential hit to MVI seems largely moot, given that DPER is processing MVI's June 2014 development application without reference to the July 2014 code change or to the results of this rezoning. And even if the application is not approved, the evidence supporting a rezone—especially the fact that the property is already designated as Rural in the Comp Plan, along with policies U-173 and R-515—still decidedly favors a rezone.

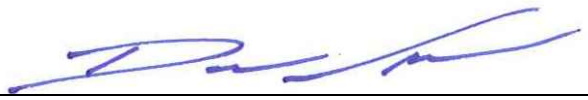
RECOMMENDATION:

1. Approve proposed ordinance 2015-0170, reclassifying Parcel 2022069011[8] from Industrial (I) to Rural Area with five acre minimum (RA-5) and amending King County Title 21A, as amended, by modifying the zoning map to reflect this classification.

2. No recommendation on whether to amend proposed ordinance 2015-0170 to also rezone any industrially-zoned parcels immediately abutting the subject property from Industrial (I) to Rural Area with five acre minimum (RA-5).

[8] Proposed Ordinance 2015-0170 incorrectly lists the parcel as 2022069001. Ex. 4. Motion 14347 correctly lists the parcel as 2022069011. Ex. 5.

DATED November 2, 2015.



David Spohr
King County Hearing Examiner