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

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

Applicant Melki's Oral Argument

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

HE: This is the preemption argument discussed immediately above.

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

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

Regional business zone.
A. The *purpose* of the regional business zone (RB) is to provide for the broadest mix of comparison retail, wholesale, service and recreation/cultural uses with compatible storage and fabrication uses, serving regional market areas and offering significant employment opportunities. These purposes are accomplished by:

1. Encouraging compact development that is supportive of transit and pedestrian travel, through higher nonresidential building heights and floor area ratios than those found in community centers;
2. Allowing for outdoor sales and storage, regional shopping areas and limited fabrication uses; and
3. Concentrating large scale commercial and office uses to facilitate the efficient provision of public facilities and services.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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