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**
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Owner: **Maple Valley Industries LLC**
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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-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;
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> b. Maximum protection of sensitive natural features, especially salmonid habitat and water quality;
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> 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