King County

1200 King County Courthouse
516 Third Avenue
Seattle, WA 98104

KING COUNTY

Signature Report

October 25, 2010

Ordinance 16954

Proposed No. 2009-0458.2 **Sponsors** Constantine and Ferguson

AN ORDINANCE concurring with the recommendation of the hearing examiner to deny reclassification of certain property located at 12811 - 164th Avenue SE, Renton, as described in department of development and environmental services file no. L08TY403 from Office (O), to Regional Business (RB), at the request of Gebran Melki.

BE IT ORDAINED BY THE COUNCIL OF KING COUNTY:

SECTION 1. This ordinance adopts and incorporates the findings and conclusions of the August 4, 2010, revised report and recommendation of the hearing examiner, filed with the clerk of the council on August 4, 2010, upon the application of Gebran Melki to reclassify certain property described in department of development and environmental services file no. L08TY403.

SECTION 2. The recommendation of the hearing examiner to deny

reclassification of the subject property from Office (O) to Regional Business (RB) is hereby adopted.

Ordinance 16954 was introduced on 8/17/2009 and passed by the Metropolitan King County Council on 10/25/2010, by the following vote:

Yes: 9 - Ms. Drago, Mr. Phillips, Mr. von Reichbauer, Mr. Gossett, Ms. Hague, Ms. Patterson, Ms. Lambert, Mr. Ferguson and Mr. Dunn
No: 0
Excused: 0

KING COUNTY COUNCIL
KING COUNTY, WASHINGTON

Robert W. Ferguson, Chair

ATTEST:

Anne Noris, Clerk of the Council

Attachments: A. Hearing Examiner Report dated August 4, 2010

August 4, 2010

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REVISED REPORT AND RECOMMENDATION
TO THE METROPOLITAN KING COUNTY COUNCIL
(Corrected Exhibit List)

SUBJECT: Department of Development and Environmental Services File No. **L08TY403**
Proposed Ordinance No. **2009-0458**

MELKI REZONE
Rezone Application[1]

Location: 12811–164th Avenue Southeast, unincorporated Renton

Applicant: Gebran Melki
represented by **Richard Wilson**, Attorney
Hillis, Clark, Martin & Peterson
1221 Second Avenue, Suite 500
Seattle, Washington 98101
Telephone: (206) 623-1745
Email: rrw@hcmp.com

SEPA Appellant: Citizen's Alliance to Reach Out & Engage (CARE[2])
represented by **Gwendolyn High**, President
PO Box 2936
Renton, Washington 98056
Telephone: (425) 336-4059
Email: highlands_neighbors@hotmail.com

King County: Department of Development and Environmental Services (DDES)
represented by **Mark Mitchell**
900 Oakesdale Avenue SW
Renton, Washington 98055
Telephone: (206) 296-7119
Facsimile: (206) 296-6613
Email: mark.mitchell@kingcounty.gov

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[1] The related appeal of the Determination of Nonsignificance (DNS) issued by DDES under the State Environmental Policy Act (SEPA) for the proposed action is denied in a separate decision issued March 3, 2010.

[2] CARE is an interest group with a stewardship role over the adjacent Cemetery Pond wetland area through a memorandum of understanding (MOU) with the county and the Four Creeks Unincorporated Area Council.

SUMMARY OF RECOMMENDATIONS:

Department's Preliminary Recommendation:	Deny; conditions recommended in the alternative
Department's Final Recommendation:	Deny; revised conditions recommended in the alternative
Examiner Revised Recommendation:	Deny rezone (revised from Approve)

EXAMINER PROCEEDINGS:

Prehearing Conference:	August 27, 2009
Hearing Opened:	November 17, 2009
Hearing Continued to:	December 2, 2009
Hearing Continued Administratively for Additional Submittals to:	January 5, 2010
Hearing Record Closed:	January 5, 2010
SEPA Appeal Decision Issued:	March 3, 2010
Hearing Record Limited Reopening on Rezone:	March 3, 2010
Hearing Record Reclosed:	March 17, 2010
Rezone Recommendation Issued:	March 31, 2010
Rezone Recommendation Withdrawn After Appeal:	June 1, 2010
Hearing Record Limited Reopening After Appeal:	June 1, 2010
Hearing Record Reclosed:	June 18, 2010
Hearing Record Further Limited Reopening:	July 6, 2010
Hearing Record Reclosed:	July 16, 2010

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 in the office of the King County Hearing Examiner.

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

FINDINGS:[3]

1. General Information:

Request:	Zone reclassification from O, Office (Potential RB, Regional Business) to RB (Regional Business).
Location:	12811 164th Avenue Southeast, Renton (unincorporated King County)
Proponent:	Gebran Melki
File Number:	L08TY403
Threshold Determination:	Determination of Nonsignificance (DNS)
Date of Issuance:	July 27, 2009
King County Action:	Zone Reclassification
Requested Zone:	Regional Business (RB)
Existing Zone:	Office (O); Potential RB
Community Plan:	Newcastle
Section/Township/Range:	NE 14-23-5 / Parcel No.: 1457500005

[3] Note: The Examiner acknowledges that to provide a narrative flow in this report, certain findings herein contain conclusions of law in addition to those set forth specifically in the Conclusions section. Whatever findings or portions thereof may be substantively conclusions of law are deemed as such, and vice versa.

2. The subject property is in the East Renton unincorporated area. Essentially rectangular in shape (a slightly off-square parallelogram) except for a wedge-shaped notch in the east side, and 1.10 acres in area, it lies in the southwest quadrant of the intersection of Southeast 128th Street and 164th Avenue Southeast. Possessing very even terrain sloping gently from west to east and southeast (toward Cemetery Pond; see below), its northeast portion is generally cleared of vegetation and is developed with a 910 square foot business office structure (of a manufactured type) with access drives and parking areas which are partly paved (4,800 square feet of area) and partly graveled (7,300 square feet). Such improvements were emplaced on the property prior to Applicant Melki's purchase of the site in February 2008.

3. The fronting roadway to the north is Southeast 128th Street, a four-lane arterial road (aka "NE 4th Street" within the Renton city limits to the west), while the fronting right-of-way to the east is 164th Avenue Southeast, which along the property frontage (the area south of Southeast 128th Street in the vicinity) is not developed for public travel but is only developed for access to the subject property. North of Southeast 128th Street, 164th Avenue Southeast is an improved two-lane public roadway.

4. While the greater vicinity of the site is developed with a mix of suburban densities of residential development, the immediate vicinity has a commercial retail shopping center to the northeast in the northeast quadrant of the intersection and undeveloped wetland areas to the east and southeast and also to the north across Southeast 128th Street. Suburban residential development lies to the west.

5. The zoning of the property is Office (O), with the additional "map designation" of Potential Regional Business (RB). The aggregate abbreviation is O (Potential RB).[4] The vicinity is zoned Urban Residential-4 (R-4) to the west, south and east on the south side of Southeast 128th Street; Community Business (CB) in the northeast quadrant of the aforementioned intersection; and Rural Area-5 (RA-5) to the northwest, north and further to the northeast.

6. The property is provided public water service by King County Water District No. 90. It is not provided sanitary sewer service, which is not available to the area currently, but has a Public Health-approved holding tank system.

7. The stretch of Southeast 128th Street along the property frontage and in the vicinity is Failing Corridor Segment 15 in the officially mapped Corridors Causing Travel Shed Concurrency Failure. Such status in general means that a concurrency certificate may not be issued for new development or redevelopment generating significant new vehicular traffic.

8. The extensive Cemetery Pond wetlands complex lies in close proximity to the developed portions of the site, beginning on the Applicant's property in its southern reaches and extending substantially offsite to the east, southeast and south. The Pond wetland complex includes approximately a dozen acres of open water (all offsite) and is classified under the Critical Areas Ordinance (CAO) as a Class 1 wetland, the highest (most sensitive) classification.[5] The subject property is completely encumbered by the wetland system and its regulatory buffers, although the regulatory buffer area is in turn partly encumbered by the previously established[6] office structure and improved parking areas.

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[4] The potential zone classification is assigned pursuant to KCC 21A.04.170.

[5] There is disputation in the record regarding the proper calculation of the wetland rating and the resulting point total in classification, but there is no disputation of the Class 1 designation. The disputation has no substantial effect here.

[6] Prior to enactment of the county sensitive areas ordinance (SAO), the predecessor ordinance to the CAO.

9. Cemetery Pond also is used systematically as a formal regional drainage detention facility, having been improved as such and administered by the County to perform its detention function. The outlet of Cemetery Pond forms a tributary to May Creek (Tributary WRIA 08 0291A), which runs generally northerly to its confluence with May Creek. The tributary leaves Cemetery Pond at its northern extent southeast of the developed portion of the subject site, and runs due north (toward Southeast 128th Street) a bit inboard of the east side of 164th Avenue Southeast, across the road from the subject property.

10. Flowing generally easterly toward the 164th Avenue Southeast road frontage, the site's surface drainage then is routed through intercepting grassy drainage swales fronting the sides of the abutting north-south 164th Avenue Southeast right-of-way on the east side of the property before being conveyed into a drainage detention vault into the tributary exiting Cemetery Pond. (There is disputation as to the complete conveyance via such system and its routing, with project opponents contending that some of the swale drainage runs southerly rather than going through the vault and thence into the tributary, and instead drains more directly (generally southerly) into the Cemetery Pond wetland area.)

11. Certain site development actions previously undertaken on the property, consisting of clearing and grading without required permits, were the subject of recent code enforcement action by the county. Remediation by a grading permit, removal of gravel fill and vegetative restoration of disturbed areas were required, as well as installation of split rail fencing and wetland signage to delineate the effective regulatory perimeter of the adjacent wetland and its associated buffers. The grading permit is currently in "open" status; the required work has been performed, but a monitoring period still pertains.

12. An SAO "variance" to SAO wetland regulation was granted the property in 1999 by DDES, in association with a prior veterinary office use; that "variance" is equivalent to a CAO "alteration exception" (the current terminology), essentially accepting the developed portions of the site being located within what would normally be regulatory wetland buffer.[7]

13. As noted, the property is developed with an office structure. It housed the established veterinary office until recently. Mr. Melki is in the process of converting the use of the property to a pre-owned vehicle sales business. The business would entail exterior display of an inventory of 30-40 vehicles onsite, drawing an estimated customer traffic of ten customers/day, with three to five during the 4-6 p.m. peak traffic hour.

14. The zoning code use classification encompassing the proposed vehicle sales use is termed "motor vehicle and boat dealers," which is not permitted in the O zone but is allowed in the RB zone with the proviso "excluding retail sale of trucks exceeding one-ton capacity." [KCC 21A.08.070.A and B.8] In order to effect the zoning permissibility of the proposed vehicle sales use on the property, the Applicant requests rezoning (aka "reclassification" of the property to RB, and offers voluntary use and activity limitations and requirements which would limit the use of the property to the vehicle sales use (and therefore not permit the full panoply of RB uses).[8]

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[7] It may be that the exception also constitutes what would now be a "reasonable use exception" under the CAO.

[8] The DDES DNS issued for the rezone action characterizes the "project description" as "Zone reclassification of 1.10 acres from O (Office) Potential RB (Regional Business) to RB to establish a pre owned vehicle sales business." Such description comports with the application narrative, which states the desire "to establish a pre-owned neighborhood automobile dealership." As noted, the zoning code use classification encompassing vehicle sales is termed "motor vehicles and boat dealers," which also as noted is allowed in the RB zone, with the proviso "excluding retail sale of trucks exceeding one-ton capacity." [KCC 21A.08.070.A and B.8] But the boat sales component was not disclosed in the application, the SEPA environmental checklist or the DNS. CARE objects to allowance of boat sales in addition to vehicle sales, arguing that boat sales were not subjected to the SEPA

Additional restrictions/conditions offered consist of disallowance of repair and maintenance onsite; containment of washwater from the natural drainage system; time limits on presence of inoperable vehicles; and, within 30 days of final rezone approval, subjection of the use to the Certificate of Occupancy process, during which review under the Surface Water Design Manual and the Pollution Protection Manual BMP's (see next Finding) would be conducted. (Such limitations and conditions would be formally established as P-Suffix development standards, as set forth in KCC 21A.04.150.)

15. Implementing Chapter 90.45 RCW and the state Department of Ecology (DOE) Stormwater Management Manual for Western Washington, Chapter 9.12 KCC establishes the county's water quality regulations, including adoption of the county Pollution Prevention Manual (PPM), administered by the county Department of Natural Resources and Parks (DNRP) Water and Land Resources Division, Stormwater Services Section. As of January 1, 2009, the PPM has the full force of regulation rather than guidance. The PPM establishes formal requirements of both source control and treatment Best Management Practices (BMPs), the former being the preferred option of implementation, and other standards of land use operation. DNRP has adopted a public rule administering the program. Specific compliance obligations are assigned to business operations (as well as residential), and the County has site inspection and administration authority without property owner initiation. The PPM would apply fully to the proposed used vehicle business and its operational aspects onsite, including management of pollutants generated by the operation, storage/display and washing of vehicles onsite.

16. As previously noted, the property is not only zoned O but has the "potential" zoning map designation of Potential RB as well. The potential zone supplementary classification is established by KCC 21A.04.170, which reads:

A. The purpose of the potential zone (dashed box surrounding zone's map symbol[9]) is to designate properties potentially suitable for future changes in land uses or densities once additional infrastructure, project phasing or site-specific public review has been accomplished. Potential zones are designated by either area zoning or individual zone reclassification. Area zoning may designate more than one potential zone on a single property if the community plan designates alternative uses for the site. Potential zones are actualized pursuant to K.C.C. 20.24.

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

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environmental review. (CARE is concerned that bringing used boats onto the site will have the possibility of also bringing noxious aquatic weeds into close proximity to the Cemetery Pond wetland.) The objection is valid (the boats would not only be brought onto the property, but the only vehicular access to the site is via 164th Avenue SE, in much closer proximity to the pond), and the environmental review conducted to date is procedurally insufficient to allow boat sales onsite at present (without further formal environmental review under SEPA). Boat sales would accordingly have to be disallowed in any recommendation of rezone approval.

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

17. Basic county code rezone criteria are set forth in KCC 21A.44.060:

> A zone reclassification shall be granted only if the applicant demonstrates that the proposal complies with the criteria for approval specified in K.C.C. Title 20.24.180 and 20.24.190 and is consistent with the Comprehensive Plan and applicable community and functional plans.

18. "When the examiner renders a decision or recommendation, he or she shall make and enter findings of fact and conclusions from the record which support the decision and the findings and conclusions shall set forth and demonstrate the manner in which the decision or recommendation is consistent with, carries out and helps implement applicable state laws and regulations and the regulations, policies, objectives and goals of the comprehensive plan, subarea or community plans, the zoning code, the land segregation code and other official laws, policies and objectives of King County, and that the recommendation or decision will not be unreasonably incompatible with or detrimental to affected properties and the general public." [KCC 20.24.180]

19. Rezone proposals are also addressed by Washington case law:

> The following general rules apply to rezone applications: (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.

[*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 courts have also held that a rezone which serves to implement the adopted comprehensive plan need not meet the "changed circumstances" portion of the *Parkridge* test. [*SORE v. Snohomish County*, 99 Wn.2d 363, 370-371, 662 P.2d 816 (1983); *Bjarnson v. Kitsap County*, 78 Wn.App. 840, 846, 899 P.2d 1290 (1995)]

20. With respect to the application of comprehensive plan policies, it should be noted that in the county's criteria for quasi-judicial rezones and other permit matters where comprehensive plan issues pertain, the test of conformity with the plan is "consistency." [See, *e.g.*, KCC 21A.44.060 and 20.24.180, quoted above] Absolute conformity and rigid compliance are not required. This test of "consistency" as opposed to strict compliance comports with pertinent Washington case law. "A proposed land use decision must only *generally conform*, rather than strictly conform, to the comprehensive plan." [*Woods v. Kittitas County*, 135 Wn.2d 597, 613, 174 P.3d 25 (2007) (italics in original), citing *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 873, 947 P.2d 1208 (1997)] The required approach is in part reflective of the different types of comprehensive plan policies, from very general planning-framework policies to very specific "regulatory" policies with clear and objective standards; a reasoned approach must be undertaken to discern direct applicability and determine "consistency." Consistency should be measured against the plan elements which are directly relevant and applicable. (Also see Conclusions 8-9)

21. Special rezone approval criteria are established in KCC 20.24.190.[10] Four special criteria are stated, at least one of which must be met (but only one is necessary to be met for compliance[11]).

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[10] These rezone criteria apply to site-specific quasi-judicial rezone applications, not to legislative enactments.

[11] CARE contends that all four of the KCC 20.24.190 criteria must be met, but its assertion is a misinterpretation of the code section; by the use of the disjunctive "or" at the end of KCC 20.24.190.C, under principles of statutory construction, as well as

Rezoning on an individual, site-specific basis is permitted only in cases where a property is:

A. Expressly specified to be subject to further rezone consideration through formal "potential zoning" nomenclature and conditions of appropriateness have been met;
B. Expressly specified to be subject to further rezone consideration by being called out specifically for subsequent rezone consideration by a formal plan;
C. In an area where there did not occur a legislative zoning enactment to implement a plan and the proposed reclassification is consistent with the adopted subarea plan; or
D. Supported by qualifying changed circumstances, in some cases subject to certain standards.

22. KCC 20.24.190(A) allows a rezone to be approved if "[t]he property is potentially zoned for the reclassification being requested and conditions have been met that indicate the reclassification is appropriate." As noted, "potential zone" is a term of art in the zoning code and denotes a formal map designation of a property as "potentially suitable for future changes in land use or densities..." [KCC 21A.04.170] In this case, as previously noted the record shows that the property is potentially zoned for the requested reclassification to RB.

23. The second provision of KCC 20.24.190.A requires that "conditions have been met that indicate the reclassification is appropriate." There is no specification or reference in the code as to the type or nature, or any codified location, of said "conditions," or any codified definition of the term. DDES has based its recommendation[12] to deny the rezone in part on its interpretation of the phrase "conditions... that indicate the reclassification is appropriate" to include in the umbrella of "conditions" the sufficiency status of urban development infrastructure, and then its conclusion that such conditions have not been met in this case because of the area's lack of sanitary sewer service and transportation concurrency. Given KCC 21A.04.110.B's prescription that "[u]se of this [RB] zone is appropriate in urban activity centers or rural towns that are designated by the Comprehensive Plan and community plans that are *served at the time of development by adequate public sewers, water supply, roads and other needed public facilities and services*" (emphasis added), the Examiner concludes that DDES's interpretation that the infrastructure adequacy requirements of KCC 21A.04.110.B comprise "conditions [to] have been met" for "appropriateness" under KCC 20.24.190.A is reasonable and persuasive given its regulatory context (*i.e.*, read in concert with the prescriptions of KCC 21A.04.110.B). It is accorded deference as an interpretation by an administrative agency with direct regulatory authority (in this case, over the planning and zoning codes). [*Mall, Inc. v. City of Seattle*, 108 Wn.2d 369, 377, 739 P.2d 668 (1987)] (Also see Conclusion 21.)

24. The P-suffix development conditions process set forth in KCC 21A.04.150 could provide a ready source of property-specific performance conditions to be addressed in the context of KCC 20.24.190.A, but none are applied to the subject property. Evidently, certain p-suffix conditions had been applied in the past, but were repealed in 1993. Therefore, there are no p-suffix conditions to address.[13] No other regulatory conditions formally applied specifically to the property are apparent.

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general rules of speech conjunction, it is clear that the requirement is that only one need be met. The applicant is not asserting qualification for approval under any of the other KCC 20.24.190 approval criteria (B, C and D).

[12] See Finding 67 for summary of the DDES recommendation in this case.

[13] CARE expressed concern that in times past the property's zoning had the attachment of one or more restrictive P-suffix conditions. The property currently has no such P-suffix conditions, insofar as the record indicates, and (aside from vesting considerations which do not pertain here) past configurations and zoning treatment cannot be considered as having any legal effect on the current use and development of the property and the requested rezone. One of the legal premises underlying the land use planning and regulatory system in Washington State is that decisions on individual applications must be based upon

25. Rezone opponent CARE asserts lack of conformity of the rezone request with the Countywide Planning Policies (CPP), citing CPP LU-29, LU-33, LU-73 and FW-26. CARE contends, by the inclusion of its CPP inconsistency arguments in its assertions of comprehensive plan inconsistency, that consistency with the CPP should be considered in review of the proposal for plan consistency. This is a misapprehension of the legal role and applicability of the CPP. Utilization of the CPP as criteria in deciding individual land use applications is expressly barred by the Growth Management Act (GMA). The CPP are to be "used *solely* for establishing a county-wide framework from which county and city comprehensive plans are developed and adopted..." [RCW 36.70A.210, emphasis added] This assignment of the CPP role in growth management and land use planning in the county is reiterated by comprehensive plan regional planning policy RP-202: "King County shall implement the Countywide Planning Policies through its comprehensive plan and through Potential Annexation Area, preannexation and other interlocal agreements with the cities." [2008 Comprehensive Plan (Plan), p. 1-9]

Comprehensive Plan Designation and Relationship to Implementing Zoning

26. The comprehensive plan's formal land use designation of the property is CO, Commercial Outside of Center (*aka* Commercial Development Outside of Center). The existing Office (O) zone and the requested Regional Business (RB) zone are listed by the comprehensive plan as implementing zones for the CO designation (as are several other commercial and industrial zones). [Plan, p. 11-3] However, there is a critical caveat stated by the plan to qualify the listing of implementing zones: "This is the range of zoning that may be allowed within each comprehensive plan land use designations [sic] *subject to comprehensive plan and subarea plan policies.*" [Plan, pp. 11-3-4, emphasis added]

Comprehensive Plan Policies

27. Comprehensive plan policies come in a number of guises. Many are general framework-type policies guiding other aspects of comprehensive planning. An additional number are of a very general, sometimes abstract and/or subjective, nature, and guide the implementation of the plan via functional plans and development regulations, etc., by providing generic guidance to the formulation of regulations rather than setting specific threshold or performance standards themselves (*specific* standards are generally to be provided by the implementing *regulations*). Then there are some policies with sufficient specificity and clear applicability to land areas or types of proposals that they could be considered to be sufficiently objective and directed to have a regulatory applicability, akin to threshold or performance standards. It is only the latter which shall be given substantial consideration for the plan consistency test here; the rest are too general, abstract and/or subjective in nature to offer clear and objective standards, either threshold or performance.

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duly enacted ordinances and policies. [*Department of Corrections v. Kennewick*, 86 Wn.App. 521, 937 P.2d 1119 (1997); *Indian Trail Prop. Ass'n. v. Spokane,* 76 Wn.App. 430, 439, 886 P.2d 209 (1994); *Maranatha Mining v. Pierce County,* 59 Wn.App. 795, 805, 801 P.2d. 985 (1990); *Woodcrest Investments v. Skagit County*, 39 Wn.App. 622, 628, 694 P.2d 705 (1985)] The legislative wisdom of state and county lawmakers must be respected "as is" in deciding the application, since policy decisions are the province of the legislative branch. A quasi-judicial decisionmaker cannot substitute the decisionmaker's judgment, or anyone else's, for that of the legislative body "with respect to the wisdom and necessity of a regulation." [*Cazzanigi v. General Electric Credit*, 132 Wn.2d 433, 449, 938 P.2d 819 (1997); *Rental Owners v. Thurston County*, 85 Wn.App. 171, 186-87, 931 P.2d 208 (1997)] Past iterations of the law, since repealed, simply have no legal effect and cannot be considered.

28. A great number of the comprehensive plan policies identified in this matter as of concern or argued as barring the rezone, some by DDES and mostly by CARE, are either not applicable because of their framework policy nature or other general implementation guidance nature, or are irrelevant to the specific rezone action requested. Plan policies I-101,[14] I-203, RP-101, RP-201, E-412, E-105, E-107, U-110 and U-147 fall in the framework/general category and do not have regulatory applicability to the requested rezone. They are either structural framework/general implementation guidance policies and/or are insufficiently specific with discernable standards to be applied directly. The Examiner shall discuss some of the remainder cited by the parties, some of which are also in part or whole also framework/general implementation guidance policies, in greater detail below.

29. Policy ED-105 is a general environmental quality policy that is implemented by SEPA and counterpart county environmental policies and regulations. The related SEPA appeal by CARE of the threshold determination is addressed in the companion decision issued March 3, 2010 under the referenced file number. Appellant CARE cites the policy in asserting that approval of the requested rezone will not "demonstrate the recognition of the economic value of the Cemetery Pond and Wetland and of Tributary O291A." But the policy is a general framework policy for the development of the comprehensive plan itself, any follow-on subplans and the enactment of development regulations. In and of itself, it has no regulatory applicability.

30. Policy U-125 reads: "**King County, when evaluating rezone requests for increases in density, shall notify adjacent cities, special purpose districts and local providers of urban utility services and should work with these service providers on issues raised by the proposal.**" [Plan, p. 2-13] CARE contends that King County failed to "work with" the City of Renton to resolve the disputations in this case. Aside from the policy's limitation to rezones involving "increases in density," which is of dubious applicability to commercial cases (which issue is discussed somewhat more in depth in the later discussion regarding plan policy CP-603 below), the intimation by CARE seems to be that unless the zoning disputation in this case is resolved in the City's favor, the matter has been insufficiently "worked with." The rezone consideration process here is quasi-judicial in nature. The City was formally notified of the rezone request and later of the hearing before the Examiner and participated by submitting written comments to DDES (which were then entered into the hearing record), objecting to the rezone as not in conformity with the City's comprehensive plan and prezoning measures. In the absence of a pertinent ILA, of which there is none, there is no legal authority for requiring adherence to the City comprehensive plan when deciding an application in the unincorporated area, and any implication that the County by such "working with" is to informally subordinate its jurisdiction, policies and regulations to those of the City is without legal foundation. Neither is there any authority in a quasi-judicial proceeding, where due process is required, to mandatorily subject the application to some sort of negotiation process. The parties are free to engage in such process on the staff level, which would constitute a "working with," but a quasi-judicial recommending or decisionmaking body cannot mandate negotiation. Policy U-125 is not violated.

31. Policy U-138 is a general policy guiding the formulation of development regulations. In any case, it is misapplied as the subject property is not strictly within an urban residential neighborhood. Though the area has substantial residential development, it is one of mixed uses, with a retail commercial shopping center diagonally across the intersection (outside of the

[14] For example, citing Policy I-101 CARE objects to the lack of public sewer service to the site and what it considers inadequate transportation infrastructure and transit service to the property. Policy I-101 is a general policy guiding the enactment of development regulations; by its nature and hortatory language, it is not applicable as a specific regulation itself, but provides policy guidance for implementation of the comprehensive plan by the adoption of specific development regulations.

regulatory urban growth area) in addition to the subject property and its commercial office structure, and extensive undeveloped wetlands in the other quadrants. CARE disputes the Examiner's holding that the subject property is not strictly within an urban residential neighborhood. CARE seems to contend that the urban growth boundary defines the boundary of the "neighborhood," and that therefore only areas within the urban growth boundary should be taken into consideration in assessing the neighborhood context. The Examiner finds such artificial distinction inappropriate: the neighborhood is the entirety of the surroundings, regardless of an artificial regulatory boundary. Although there are residences to the west of the subject property, as noted in the recommendation, and in the greater vicinity, the remainder of the close-by surroundings is decidedly non-residential, with undeveloped natural areas to the north, south and east and a commercial shopping center to the northeast. This disagreement is not of dispositive relevance in any case, since as noted Policy U-138 is a general policy guiding the formulation of development regulations and is not of direct applicability here.

32. Policies U-149-153 are applicable only to unincorporated activity centers, which the subject property is not within, as CARE acknowledges. CARE nevertheless disputes the appropriateness of the property as an unincorporated activity center, noting that subarea planning has not made such determination, but such assignment of error with respect to these policies is misplaced as the property is not so designated. The policies have no applicability here. The designation assignment issue is a legislative, planning-process matter; it is not directly germane to consideration of a quasi-judicial rezone.

33. The comprehensive plan contains a section (pp. 2-18-25) addressing commercial land use, consisting of text discussion and formal policies. The plan establishes three levels of commercial land use designations for commercial "centers," unincorporated activity centers, community business centers and neighborhood business centers. [Plan, p. 2-18] The plan then establishes a fourth designation for other commercial sites that are outside of commercial centers, Commercial Development Outside of Center (CO). As noted previously, the CO designation is the one assigned to the subject property.

34. The CO designation applies to two situations, the first in recognition of existing stand-alone commercial uses and establishment of a procedure for future consideration of them as designated commercial centers, and the second establishing a transitional designation in Potential Annexation Areas governed by a pertinent agreement or memorandum of understanding. Two policies are set forth, and apply respectively: Policy U-168 to stand-alone situations and Policy U-169 to the transitional category. [Plan, pp. 2-24-25]

35. The subject property falls in the former situation, that of the CO designation recognizing an existing stand-alone commercial land use. It is therefore subject to Policy U-168.

Plan Policy U-168

36. Policy U-168 reads: "**Stand-alone commercial developments legally established outside designated centers in the Urban Growth Area may be recognized with the CO designation and appropriate commercial zoning. When more detailed subarea plans are prepared, these developments may be designated as centers and allowed to grow if appropriate, or may be encouraged to redevelop consistent with the residential density and design policies of the comprehensive plan.**" [2008 Comprehensive Plan (Plan), pp. 2-24-25]

37. The policy's permissibility of recognizing stand-alone commercial developments by the CO designation has been accomplished for the property. A "stand-alone commercial development[ ] legally established outside designated centers in the urban growth area," it has been "recognized with the CO designation."

38. The next step under the Policy U-168 process is that the property "may be recognized with the... *appropriate commercial zoning*." (Emphasis added) There has been a legislative determination, presumptively under the guidance of Policy U-168, that O zoning, enacted by ordinance, is the current "appropriate commercial zoning" for the property.

39. Policy U-168 then goes on to establish a process for determining the longer-term future land use of the existing stand-alone commercial uses. And it establishes a temporal and qualitative threshold for that process to be undertaken, by stating that "*when* more detailed subarea plans are prepared," two possibilities are to be considered for the treatment of these stand-alone commercial properties. The first is to recognize them as "centers," (*i.e.*, a commercial center of one of the three types noted above and recited in the policy-preceding comprehensive plan text discussion; Plan, p. 2-18) and therefore "allowed to grow," or under the second alternative, such an area would not be designated as a center and would not be "allowed to grow" commercially but would instead would be "encouraged (by some undefined means) to redevelop" residentially.

40. The subarea planning work anticipated by Policy U-168 has not been conducted for this area and therefore the future options anticipated by the policy have not yet been decided.

41. DDES offers a simple conclusion regarding the effect of Policy U-168 on the proposed rezone: "[We] do not believe U-168 bars rezones," citing to the comprehensive plan's zoning implementation table noted above, which indicates RB as one of five zones available for the CO designation. DDES goes on to discuss transitional zoning addressed by a different policy, U-169, opining that zoning under Policy U-168 should not be considered such transitional zoning.

(See Conclusions 14-18 regarding consistency of the proposal with Plan Policy U-168.)

Plan Policy U-169

42. Policy U-169 bars rezoning of some CO-designated properties "to allow other nonresidential uses...unless or until a subarea planning process with the city is completed." But the bar only applies to properties within "Potential Annexation Areas identified in a signed memorandum of understanding between a city and the county... No zone changes to *these properties* to allow other nonresidential uses, or zone changes to allow expansion of existing nonresidential uses onto other properties, should occur unless or until a subarea planning process with the city is completed." [Plan, p. 2-25, emphasis added] The property lies within a Potential Annexation Area (PAA) designated by the City of Renton. However, there is no Interlocal Agreement (ILA) or Memorandum of Understanding (MOU) executed by the City and King County governing the PAA. CARE is correct in its assertions that the parcel is in a PAA and that the joint subarea planning has not been completed, but since the PAA is not "identified in a signed memorandum of understanding," the policy and its rezoning bar are inapplicable to the subject area and the rezone request at hand.

Other Plan Policies

43. CARE argues that the transportation facilities identified in subparts b and h of Plan Policy U-170 are inadequate at present to serve commercial development and that deficits identified in the

county Transportation Needs Report (TNR) are not scheduled or funded for correction. However, Policy U-170 by its nature is not a regulatory policy, but is a planning structure policy guiding the enactment of implementing development regulations. The Plan declares the status of Policy U-170 in unmistakable language, in a preamble directly preceding the policy statement: "The following policy *governs* King County land use *regulations and* functional *plans that contain improvement standards* for the review of proposed rezones and commercial construction permits." (Emphasis added) The policy is therefore not to be imposed directly itself in the "review of proposed rezones"; instead, the "improvement standards" in adopted development regulations and functional plans are what are to be applied. The seeming standards of commercial and industrial development articulated in the policy itself are therefore not of direct applicability to site-specific rezone applications such as the one in question.

44. Newcastle Community Plan Policy CP-603, reiterated in the 2008 general Comprehensive Plan, states that "**May Creek is acknowledged as a regional asset and should be protected. Thus, King County shall not increase zoning density on lands that drain into May Creek (i.e. the May Valley Basin) without first determining and implementing surface water runoff mitigation necessary to control flooding and siltation in May Creek.**" [Plan, p. 10-15] It is arguable whether non-residential zones are distinguishable on a "density" basis and therefore fall under the prescription of "first determining...mitigation." DDES opines that the term "density" should be interchangeable with "intensity" in this regard, but density is an inapt quality to apply to non-residential land uses; it is not readily persuasive that there is a correlation between "density" of commercial and industrial development and increased runoff and siltation, which are the thrusts of concern of the policy.

45. But aside from its dubious applicability to non-residential rezones, the issue is substantially moot, and the policy therefore substantially inapplicable, because (again, addressing the policy's main thrust of concern) there is at most a *de minimis* (relatively insignificant) potential for increase in runoff and siltation in this particular case because the property has already been fully developed with its impervious surfaces (structure and parking lots) and drainage facilities (which presumably mitigated drainage impacts under the standards applicable at the time of structural development). (It also would also be subject to the applicant's voluntary offer of onsite washwater containment, and to the PPM.) It is a far different situation than if it were bare ground proposed for new development; given its constructed status and the restricted critical area nature of its undeveloped remainder, the property's drainage is already at its developed-state level. It is already "in the system." One could reasonably conclude under the policy that the rezone would "increase density," though it is arguable, and that a drainage study must be required before rezoning, but the result is eminently predictable: the site drainage with RB development as proposed would be the same as that which already exists. Requiring a pre-rezone drainage impact study and implementation for a built-out site would seem to be useful only as a drill exercise. Substantial inconsistency of the rezone with policy CP-603 is not found in this case; Policy CP-603 presents no bar to the rezone.

46. The May Creek Basin Action Plan is adopted as an implementing functional plan of the comprehensive plan. [KCC 20.14.080] In its discussion sections on pp. 3-21 and 3-28 and Appendix E cited by CARE, the adjacent Cemetery Pond wetland area and portions of the downstream tributary to May Creek are designated as Locally Significant Resource Areas. Such designation, and the action plan discussion, have no special regulatory effect in this rezone case other than would be implemented via the Critical Areas Ordinance and the Surface Water Design Manual implementing Title 9 KCC. And those development regulations are applied to follow-on development proposals and review, not to rezones themselves; they may come to bear in building permit, certificate of occupancy or other review. Appellant CARE contends that rezone approval

will not be compatible with and will not implement the May Creek Basin Plan. As discussed immediately above regarding Policy CP-603, even if one were to consider that the subject rezone is an increase in zoning "density," the issue is moot given the property's built-out nature.

47. Policy RP-101 reads: "**King County shall strive to provide a high quality of life for all of its residents by working with cities, special purpose districts and residents to develop attractive, safe and accessible urban communities, retain rural character and rural neighborhoods, support economic development, maintain resource lands and preserve the natural environment.**" [Plan, p. 1-5] CARE here reiterates the complaint that the county did not sufficiently "work with" the City of Renton in this matter. The Examiner has addressed such issue previously regarding the legal relationship with City policies and regulations.

48. RP-201 reads: "**King County's planning should include multi-county, countywide, and subarea levels of planning. Working with citizens, special purpose districts and cities as planning partners, the county shall strive to balance the differing needs identified across or within plans at these geographic levels.**" [Plan, p. 1-7] CARE contends again that the county did not sufficiently work with the City of Renton, in this case to "balance the differing needs identified across or within plans." This policy is a general, framework-type policy addressed to the legislative planning process, and is inapplicable as a specific regulation to a quasi-judicial rezone application.

49. Policies RP-102, RP-104 and I-101 are cited by CARE as calling for public participation in the decisionmaking process and violated by the proposed rezone. They are general planning policies which guide the development of the comprehensive plan, specific plans such as subarea and watershed basin plans, etc., and implementing development regulations. They are not of direct relevance to an application case, but the Examiner shall address them as a whole in brief since they concern procedural due process. There is no evidence and no assertion that county code notice procedures, open hearing, etc., have not been followed in this proceeding. CARE has participated from early on, was a SEPA appellant, and gained full hearing party status thereby. CARE seems to intimate that its positions and argument should be considered as representing the public at large, *i.e.*, representing "the public interest." Public participation rights do not equate to certain members of the public, individually or in groups, being conferred status as representing the public interest. CARE is an interest group which has participated in the hearing process. Evidence presented is weighed and facts found regardless of the source of offer; no party is conferred preferred status. The only exceptions to such principle in this proceeding are that the SEPA threshold determination is required by law to be accorded substantial weight in any appeal [RCW 43.21C.075(3)(d) and .090; WAC 197-11-680(3)(viii); and KCC 20.44.120] (separate decision issued on related SEPA appeal under the referenced file no.); and unresolved internal conflicts and ambiguities in development regulations must be decided in favor of the property interest under Washington law. [*Morin v. Johnson*, 49 Wn.2d 275, 300 P.2d 569 (1956)]

50. Plan Policy E-412 reads: "**King County's land use planning, regulatory, and operational functions related to environmental protection, public safety, and equity should be closely coordinated across departments to achieve an ecosystem-based approach.**" [Plan, p. 4-30] CARE contends that the recommended rezone fails to "properly consider the commitment of King County and DNRP to this community that is memorialized in the [Cemetery Pond] Stewardship Memorandum of Understanding as well as" DNRP's written testimony. The policy is a general guideline policy guiding the enactment of development review processes and regulations. The hearing notice and open record hearing processes which culminated in the receipt of written comment from DNRP, among others, reflects the coordination called for by the policy. And there is nothing in the record that suggests that the MOU governing Cemetery

Pond's stewardship has legal applicability to the subject rezone parcel and, more to the point, would present a legal bar to the rezone requested.

51. Policies E-105 and E-107 are environmental quality policies which articulate general policy guidelines for the development of implementing plans and programs and provide legislative guidance, not regulatory application. It is still noted, however, that there was a SEPA appeal in this matter, after which the appeal was heard in concurrent hearing with the rezone application; the DDES threshold determination was sustained. (The threshold determination, a DNS, determined that a probable significant adverse environmental impact would not result from the requested rezone and use of the property as proposed.) In addition, as noted in the Examiner's recommendation the county critical area regulations (Chapter 21A.24 KCC) apply to the property and were recently enforced through a code enforcement action which resulted in a demarcation of critical area buffer boundaries and restoration of critical area functions and values, under DDES direction.[15] Also, the use of the property, currently and in the future in whatever guise it is undertaken, is subject to the county Pollution Prevention Manual (PPM), which evolved from guidance status to full force of regulation as of January 1, 2009.

52. The City of Renton states in correspondence that the property lies within a Renton Potential Annexation Area (PAA) as noted previously and states its opposition to the requested rezone, as the proposal is concluded to be in conflict with the city comprehensive plan and other planning policies. However, the city comprehensive plan and city planning policies have no legal effect in the instant rezone consideration, since as noted previously there is no ILA, MOU or other authority conferring on the City any form of regulatory jurisdiction or influence over the subject property, which lies in unincorporated King County.

53. The county DNRP expresses concern that development of the property not adversely impact the adjacent Cemetery Pond wetland system.

54. CARE opposes the requested rezone and expresses concerns about the proposed rezone, the proposed land use and its potential adverse impacts on the adjacent Cemetery Pond wetland system, the May Creek watershed and the land use pattern in the subject area. Its comprehensive plan inconsistency concerns are addressed above. The remainder of its concerns are addressed below.

55. CARE asserts the absence of significant transit service along the subject stretch of Southeast 124th Street (there is only limited commuter service currently) as not meeting "conditions" ostensibly imposed by KCC 21A.04.110.A, the RB zone purposes statement, which reads:

> 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

[15] The property received a sensitive areas ordinance (CAO-predecessor) variance to wetland regulation in 1999. That allowance is an equivalent to the current "alteration exception," or possibly a "reasonable use exception," under current regulations, and is a given on the subject property; any redevelopment of the property will otherwise be subject to critical areas regulations.

3. Concentrating large scale commercial and office uses to facilitate the efficient provision of public facilities and services. [KCC 21A.04.110.A]

56. But the proper interpretation of the RB purpose language in KCC 21A.04.110.A is that it provides an amenity list of desirable qualities of RB development in general. Particularly by the use of terminology such as "encourage," "supportive," "allowing for" and "concentrating," it is more permissive than anything; it is not a statement of requirements or "conditions." For example, it is not a reasonable interpretation that all RB development must provide "higher nonresidential building heights" and "allow [ ] for outdoor sales and storage…and limited fabrication uses." By the subsection's wording, the "supportive of transit and pedestrian travel" aspect that is cited is a desirable and subordinate outcome of "encourag[ing] compact development," rather than a regulatory requirement of transit service concurrency. The Examiner finds no "conditions" violation presented by examining the proposed RB rezone against the purposes section of KCC 21A.04.110.A. And, in any case, absent specific code requirements mandating their use, purpose statements may offer guidance to interpreting substantive regulations but have no legal applicability themselves as regulations in land use decisionmaking. [*Lakeside Industries v. Thurston County*, 119 Wn.App. 886, 897-898, 83 P.3d 433 (2004); also see *Phoenix Development, Inc. v. City of Woodinville*, 154 Wn.App. 492, 506, 229 P.3d 800 (2009)]

57. CARE also argues that KCC 21A.04.110.B attaches a requirement of infrastructure concurrency before the proposed rezoning to RB would be approved. Subsection B states,

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

(See Conclusions 11 and 23.)

58. DDES and CARE contend that the code section establishing the potential zone provision, KCC 21A.04.170 (quoted above), contains "criteria" that qualify as "conditions" in KCC 20.24.190.A's requirement that "conditions have been met that indicate the reclassification is appropriate." DDES thus argues that KCC 21A.04.170.B establishes "criteria" for the *actuation* of potential zones. But the wording of subsection B, wherein it states, "The *use* of a potential zone *designation* is appropriate to…" (emphasis added), shows that it does not address *actuation* by rezoning to the potential zone, it articulates very generally worded *reasons or rationales for initial assignment* of the potential zone.[16]

59. The language of the purported "criteria" also does not give any support for DDES's contention. The aspect of the subsection particularly referenced by DDES, "The use of a potential zone designation is appropriate to… [p]hase development based on availability of public facilities and services or infrastructure improvements (e.g. roads, utilities, schools)," offers little, not even bare structure, in the way of actual *criteria*. There are no objective indications of what "phasing" means in this context, nor any identification of how the phasing should be structured and what facility/service/infrastructure thresholds, standards and specifications must be met to comply with such "criteria." At best, if accepted as comprising criteria for actuation, the language is unenforceably vague, and only supports the conclusion that, again, the statements are *reasons* for

[16] There is no indication in the record of a particular reason for assigning potential RB zoning to the subject property. (Also see Footnote 22)

assigning potential zones, not *criteria* for their actuation.[17] DDES's interpretation of the section is unpersuasive. As it is not a reasonable interpretation of the code language, it is not accorded deference. [*Mall, Inc.*, above]

60. CARE argues that the requested rezone will create a nonconforming use (presumably, and speculatively, upon the property being annexed into the City of Renton and subjected to City zoning; it would not present a nonconforming use under the requested RB zoning). But the rezone would no more tend to have the possible effect of "creating" a future nonconforming use than would the existing O zoning.

61. CARE next contends that the subject property's small parcel size precludes its appropriateness for RB zoning, asserting that the limited size precludes a truly regional market approach. Aside from the somewhat dubious nature of the substance of the argument, since a vehicle dealer typically is oriented regionally rather than toward a neighborhood or small community context, the argument is misplaced as it is a matter to be considered during the legislative process. (Given the anticipated subarea planning process, it may be a matter addressed legislatively at that time. See Conclusions.)

62. CARE also contends that KCC 20.10.070 requires the execution of interlocal agreements between the county and affected cities governing land use and development in potential annexation areas such as the subject area, and argues that in the absence of such an ILA, both county *and* City of Renton plans and regulations apply. This assertion has no legal basis: first, it is a misstatement of the law; KCC 20.10.070 does not require *execution* of interlocal agreements, it merely requires establishment of a *process* for entering into them. Second, aside from its not actually requiring ILA's, there is no legal support for the notion that the absence of an ILA has a default effect of actuating *city* policy and regulation jurisdiction in the unincorporated area.

63. Next, CARE argues that the application review does not conform to the Local Project Review Act (Chapter 36.70B RCW), citing RCW 36.70B.030 and .040. But "nothing in [RCW 36.70B.030] limits the authority of a permitting agency to approve, condition, or deny a project as provided in its development regulations adopted under chapter 36.70A RCW (the Growth Management Act)" [RCW 36.70B.030(5)]; and "nothing in [RCW 36.70B.040]...dictates an agency's procedures for determining consistency." [RCW 36.70B.040(4)]

64. CARE also notes a current public review process addressing a DDES Form-based Codes pilot program, including review of draft new zoning regulations intended for upcoming legislative consideration. CARE contends that the subject rezone application should be deferred pending completion of the pilot program process. There is no legal authority to require such deferral.

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[17] If the section were to be considered to establish actuation criteria, a strict reading poses its perils: The four elements in subsection B are bound by the conjunctive "and," not the disjunctive "or." That distinction underlies a fundamental principle of normal statutory construction: since the "criteria" are joined by "and," *all* of the criteria would be required to be met for qualification. Only in cases where the disjunctive "or" is used may joined elements be considered independent and thus available as individual alternatives wherein meeting only one, or less than all, qualifies a proposition. (See, *e.g.*, KCC 20.24.190, quoted herein.) A proposition meeting all four of the "criteria" in KCC 21A.04.170.B would be a unique animal indeed: it would be a phased land use for infrastructure adequacy reasons, the potential zone would be necessary to preclude the property from becoming a nonconforming use, it would have to be structured to involve increases in *residential* density based on availability of infrastructure, *and* it would have to require additional public review because some uses in the zone may not be appropriate. This is, frankly, an absurd result of interpretation that further supports the proper interpretation of the section as establishing reasons for assignment, not criteria of actuation: such concern about an absurd result falls by the wayside if the section is concluded, as here, not to present formal *actuation* criteria, but is instead a general list of qualities or situations, a "laundry list" if you will, of possible reasons for *assigning* potential zoning, with the "and"/"or" distinction rendered immaterial.

65. In the event of rezone approval, CARE requests mitigation for asserted wetland impacts in the form of a "significant financial contribution" to ongoing wetland mitigation and restoration efforts. There is no basis of authority for requiring such monetary payments.

66. CARE expresses doubt and concern about the history of code enforcement actions on the site, especially by its assertion of the lack of code enforcement of an alleged land use violation by the operation of a vehicle sales use not properly licensed by the state, and contends that such history demonstrates that the county cannot be trusted to enforce the proposed voluntary rezone conditions and applicable regulations. CARE therefore argues that the rezone should not be approved as it cannot be trusted to be regulated as purported.

67. DDES recommends denial of the proposed rezone. DDES acknowledges that the proposal conforms on its face to the comprehensive plan designation and meets the first half of the special reclassification criterion of KCC 20.24.190.A regarding basic potential zone qualification by the property's being designated Potential RB. DDES, however, concludes that "should the property require sanitary sewers, such service is, and will not be, available to the property until such time as annexation to the City of Renton is accomplished." (As noted above, the proposed use under the requested restricted RB zoning does not depend on utilization of sanitary sewer service.) DDES then goes on to assert that the "site is situated along a failed transportation corridor under the standards of Transportation Concurrency Management. Given the preceding, rezoning of the subject property to RB, *carte blanche*, would be premature at this time." [Italics in original][18] DDES cites these concerns as demonstrating the proposal's failure to comply with KCC 20.24.190.A's requirement that "conditions have been met that indicate the reclassification is appropriate." DDES's recommendation of denial further concludes that "introduction of the requested RB zone, with its permissible uses, could *potentially* threaten [the Cemetery Pond] wetland and its valuable environmental functions. In this regard, approval to the more intensive RB zone would not be in the public interest." (Emphasis added)

68. In the alternative that the rezone is approved, DDES recommended conditions limiting the rezone to the area north of the established wetland demarcation onsite and requiring that the site's parking and stormwater retention facilities be upgraded to current Surface Water Design Manual (SWDM) standards; landscaping provided in conformity with the zoning code; use of the property limited to the sale of used (pre-owned) automobiles, with no repair or maintenance on the property; and containment of vehicle washwater onsite. DDES recommends that such conditions be implemented by completion within 120 days of Council action on the proposed rezone ordinance, with the rezone rendered null and void if such completion is not performed.

69. Also under its alternative approval scenario, DDES recommends that the remaining portion of the O-zoned property, the undeveloped critical area portion, be rezoned from O to Urban Residential-4 (R-4) in this action. As there is no application for such alternative zoning and no applicant consent (and also in part since it would result in a downzoning), there is no legal authority in this proceeding to assign such alternative zoning reclassification to that portion. DDES's proposition is either properly a legislative matter or must await another application.

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[18] The proposed rezone is no longer a "*carte blanche*" rezone, but rather is subject to restrictive limitations voluntarily proposed by the Applicant and to be implemented via P-suffix attachment.

CONCLUSIONS:

1. Code enforcement issues are not legally relevant to the instant consideration. In depending on voluntary restrictions and the operation of county regulation as performance standards in any land use approval, the Examiner must presume their functional, effective operation and enforcement. Enforcement may be sought through other proceedings. It would be wholly inappropriate to presume non-enforcement and, moreover, to base rezone denial on such a presumption; that would be tantamount to a *de facto* zoning moratorium, which is a prerogative of the legislative function, not to apply unilaterally via a quasi-judicial rezone.

2. An effect of the KCC 20.24.190 special rezone criteria is that until reviewed again as part of (usually periodic) legislative area zoning consideration, the established zoning that was enacted in direct comprehensive plan implementation is with limited exception presumed to be intentionally final, regardless whether a reclassification would also conform to the plan and other code regulations governing rezones. Rezoning on an individual, site-specific basis is permitted only in cases where a proposal also meets one of the four KCC 20.24.190 criteria.

3. The Applicant argues that the formal designation of potential zoning, such as the potential RB in this case, is preemptive of any review other than that articulated in KCC 20.24.190.A and therefore, among other things, review for approval should not weigh a potential zone rezone's consistency with the comprehensive plan. This argument is unpersuasive.

4. First, there is no articulation in the planning or zoning codes that the other enacted rezone criteria are preempted by KCC 20.24.190.

5. Second, the contention that only the rezone criteria in KCC 20.24.190 pertain also fails on a plain reading of the section, which expressly states, "When the examiner issues a recommendation regarding an application for a reclassification of property …, the recommendation shall include *additional* findings… that support the conclusion that at least one of the [KCC 20.24.190-required] circumstances applies…" (Emphasis added) The requirement of "additional findings" clearly contemplates that other findings supporting the rezone are required and belies the asserted preemption.

6. Third, KCC 21A.44.060 mandates unequivocally that "a zone reclassification shall be granted only if the applicant demonstrates that the proposal complies with *the criteria for approval specified in K.C.C. Title 20.24.180 and 20.24.190 and is consistent with the Comprehensive Plan* and applicable community and functional plans." (Emphasis added) KCC 21A.44.060 is not merely a general policy articulation exhorting comprehensive plan consistency, it is a development regulation in the zoning code, Title 21A KCC, which is expressly enacted to implement the Growth Management Act (GMA). [KCC 21A.01.020] Similarly, the Planning code, Title 20 KCC, referenced in KCC 21A.44.060, is a GMA development regulation. [KCC 20.04.005]

7. Lastly, KCC 20.24.180, both as a stand-alone planning regulation and by express reference in KCC 21A.44.060 (again, parts of the planning and zoning codes, respectively, both GMA development regulations), requires that "when the examiner renders a decision or recommendation, he or she shall make and enter findings of fact and conclusions from the record which support the decision and the findings and conclusions *shall set forth and demonstrate the manner in which the decision or recommendation is consistent with*, carries out and helps implement applicable state laws and regulations and *the regulations, policies, objectives and goals of the comprehensive plan…*"

8. The Applicant cites *Timberlake Christian Fellowship v. King County*, 114 Wn.App. 174, 61 P.3d 332 (2002) as standing for the general proposition that the zoning code tests for rezone approval preempt consideration of consistency with the comprehensive plan as a decision criterion, and that in any conflict between the two the zoning code must be favored. The first assertion is an overly broad application of the case, which involved a conditional use permit and the justification of permit conditions, not a rezone. The *Timberlake* court addressed the issue of plan consistency with considerably more nuance: though it generally did bar broad challenges to comprehensive plan conformity brought in lieu of, or in addition to, addressing the applicable development regulations, it also expressly held that "although we agree that... comprehensive plans do not serve as development regulations, parties are not prevented from arguing that a specific discretionary approval is inconsistent with...comprehensive plan policies," and further noted, "Although strict adherence to comprehensive plan [is] not required, 'any proposed land use decision must generally conform with the comprehensive plan,' " in both instances citing *Mount Vernon*, above, at 873. The *Timberlake* court went on to hold that "local decisionmakers are not prohibited from citing specific comprehensive plan policies to support their exercise of discretion with regard to a particular... application." [*Timberlake*, above, at 183]

9. More directly on point is a fairly recent holding by the Washington Supreme Court in *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (Dec. 2007). Noting that the county code there in question "explicitly requires that a site-specific rezone application be compatible with the comprehensive plan," the court held that "if a zoning code explicitly requires that all proposed uses comply with a comprehensive plan, then the proposed use must comply with both the zoning code and the comprehensive plan," citing *Cingular Wireless, LLC v. Thurston County*, 131 Wn.App. 756, 770, 129 P.3d 300 (2006) and referencing *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 43, 873 P.2d 498 (1994). [*Woods*, at 614] As noted above, King County's zoning code applies the same explicit requirement of comprehensive plan consistency to site-specific rezones. [See KCC 20.24.180 and 21A.44.060] And the purported general conflict asserted in this case between the zoning code and the comprehensive plan is not apparent.[19] Merely because the two may apply different criteria for approval does not necessarily mean they are in conflict. It means simply that, as under *Woods*, both pertain.

KCC 20.24.190

10. Rather than act as the preemptively exclusive rezone criteria as the Applicant argues, the special rezone criteria established by the "additional findings" test of KCC 20.24.190 act as a sort of "gatekeeper" mechanism (*i.e.*, without the affirmative additional findings, the rezone cannot be approved by quasi-judicial application). Without such qualification under KCC 20.24.190, either by potential designation under .190.A or one of the other .190 allowances,[20] site-specific rezones must await legislative consideration. After passing the "gatekeeper" test of KCC 20.24.190, rezones to potential zones must still then be reviewed against the other applicable rezone approval criteria, set forth in KCC 20.24.180 and KCC 21A.44.060 (which as noted among other things references KCC 20.24.180 and .190 as other rezone review criteria).

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[19] The one conflict that is presented in this case is that between the plan and the zoning code in their declarations of the plan land use designations for which the RB zone is appropriate. See Conclusion 14.H.

[20] As noted previously, site-specific quasi-judicial rezoning of the property could also be considered under the other "prequalifying" criteria of KCC 20.24.190; no representation is made that the property qualifies under any of the other .190 criteria, however, and such alternative qualification is not apparent.

11. The proposal fails the KCC 20.24.190.A "potential zoning" test. The proposed zone is identified as the pertinent potential zone, and therefore meets the first part of the test, but fails the second part of the test, that "conditions have been met that indicate the reclassification is appropriate," in that the general infrastructure adequacy requirements of KCC 21A.04.110.B have not been met. The evidence in the record is that public water service is available, but public sewer service is not available in the area and the fronting arterial road, Southeast 128th Street, is a formal "Failing Corridor Segment" transportation route under county concurrency standards. The proposal therefore fails to conform fully to criterion A and therefore does not comply with KCC 20.24.190. (As noted previously, qualification under one of the other options established by KCC 20.24.190 has not been proposed and is not apparent.)

Comprehensive Plan Consistency

12. RB zoning would on its face seem to implement the comprehensive plan's CO land use designation, but the plan's statement of the range of implementing zones for the CO designation is, as noted, subordinate to the comprehensive plan policies. The question is much larger than just the bland CO designation.

13. The Council's supplementary assignment of Potential RB as a potential zone, and importantly, the timing and ultimate approval of its possible actuation, must be viewed in the context of Policy U-168, as well as any other pertinent plan policies and zoning regulations. Policy U-168 is the only plan policy addressed directly to stand-alone commercial sites such as the subject one.

14. The property is currently zoned Office (O). The central question in this case is whether it may be zoned RB now, and developed with a motor vehicle dealer business, or possibly zoned RB later, after the subarea planning process contemplated by U-168 is completed. The Examiner concludes that the latter answer is the proper one. Until the subarea planning occurs, actuation of the Potential RB zone on the site would be inconsistent with the comprehensive plan and premature.

    A. Under Policy U-168, stand-alone commercial uses, currently outside of designated commercial centers, are intended to be phased out. They will either be encompassed by designated commercial centers or encouraged to be converted residentially.

    B. The Policy defers the commercial center/residential conversion consideration to a later subarea plan process. After subarea plans are enacted, there will no longer be CO-designated areas. The plan thus establishes an interim period of CO designation until the subarea plans are completed.

    C. For the interim period, the Policy established a process of recognizing the stand-alone sites with the CO designation and "appropriate commercial zoning." In its legislative planning and zoning actions, the County has assigned the O zone as the "appropriate commercial zoning" of the subject property. Such assignment is presumptively pursuant to the Policy.

    D. The modifier "appropriate" has significant meaning here and must be interpreted in its context. It is not an innocuous modifier, merely referring to the O zone having been selected from the general array of zones inventoried by the plan for the CO designation, which inventory importantly has the caveat of being "subject to (*i.e.*, subordinate to) comprehensive plan and subarea plan policies." [Plan, p. 11-4] That relationship between the designation's implementing offerings and the selected zone is obvious. But the policy does not merely say "commercial zoning" or "implementing commercial

zoning," it says "*appropriate* commercial zoning." (Emphasis added) Under principles of statutory construction, the term "appropriate" must be given effect. [*Vaughn v. Chung*, 119 Wn.2d 273, 282, 830 P.2d 668 (1992)] The term "appropriate" is not defined in the plan [Plan, p. G-2], so 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: "**appropriate**...*adj*: especially suitable or compatible: FITTING..." [*Webster's* 56 (1977, G. & C. Merriam Co.] The Examiner's conclusion of the import of the modifier "appropriate" in this policy context is that the O zone is, by formal legislative policy declaration, "especially suitable or compatible" to the stand-alone commercial site in question.

E. Since the plan policy language declares that the O zone applied by ordinance is at present the *legislatively selected* "especially suitable or compatible" "appropriate commercial zoning" for this stand-alone commercial property, by exclusion then the RB zone was not considered "appropriate" in that legislative process. RB zoning may have been applied to other CO areas under Policy U-168 for the interim period pending subarea planning, but it was not applied to this one. The assignment choice is presumed a conscious selection based on its being "especially suitable or compatible," and therefore "appropriate." Since RB was not assigned in the process of assigning appropriate zoning, what then is the role of the supplementary Potential RB map designation?

F. The Potential RB map designation also assigned to the property is not "appropriate commercial zoning" assigned by the legislative action under Policy U-168. Since it is potential and not currently effective and active, it cannot reasonably be considered a simultaneous "appropriate commercial zoning" of the property; it is a map designated reserve zone that must be actuated pursuant to the regulatory process, rezoning, to become effective. ("Potential zones are actualized pursuant to K.C.C. 20.24." [KCC 21A.04.170.A])

G. By stating its anticipation of the subarea planning process and calling for the consideration of commercial center designations in that future process, the Policy implicitly establishes a temporal threshold for consideration of commercial zoning other than the interim "appropriate commercial zoning." That temporal threshold set by the policy is the performance of subarea planning, which has not yet occurred. By implication, the legislative assignment of "appropriate commercial zoning" has an interim finality to it, pending the subarea planning. In the meantime, the "appropriate commercial zoning" should be maintained.

H. The RB zone is declared by the zoning code as appropriate for sites designated "urban activity centers or rural towns." [KCC 21A.04.110.B] By exclusion, then, it is held *by the zoning code* not to be appropriate for other designations. The comprehensive plan's inclusion of RB in the inventory listing of implementing zones for the CO designation is in conflict with the zoning code provision. The zoning code controls over the plan in resolving this conflict, so the plan provisions are subordinated to the zoning code's prescription that urban RB is to be in urban activity centers. [*Mount Vernon*, above, at 874])[21] The only preemption of such prescription would be by *legislative* assignment of

[21] The comprehensive plan uses the term "unincorporated activity center" as the most intensive commercial land use designation. The terms "urban activity center" in the zoning code and "unincorporated activity center" in the plan are synonymous in this context. Of note is that the prior two comprehensive plan editions stated that the RB zone was appropriate to the unincorporated

RB as the "appropriate commercial zoning" implementing the CO designation under Policy U-168. The RB in this case was assigned only as a potential zone and its actuation, rather than being preemptive as the Applicant argues, must undergo the full rezone review.

I. In summary, under Policy U-168, the RB zone, a zone "appropriate in *urban activity centers* or rural towns" [KCC 21A.04.110.B, emphasis added], is the potential zone determined by the legislative body to be appropriate *if appropriate commercial center status is assigned* in the future subarea planning. Actuation of potential zoning depends on realizing the potentiality expressed in the totality of county land use policy and regulation. The "potential" status of potential zoning is not merely actuated by complying with the potential zone map designation requirement of the first part of KCC 20.24.190.A; that is too limited a take on the regulatory scheme. Considering compliance with the whole of KCC 20.24.190.A as preemptively sufficient is also too limited a reading. Even if the whole of KCC 20.24.190.A were satisfied, as noted above the standards of KCC 20.24.190 do not form the exclusive rezone criteria. Actuation must also depend on manifesting the potential expressed elsewhere, such as in this case in Policy U-168. Policy U-168 addresses the potential of commercial center designation of the property, through the contemplated subarea planning process. Since the RB zone is stated by the zoning code as appropriate for urban activity centers (in the urban area) [KCC 21A.04.110.B], the potential RB zone must await the subarea planning's commercial center determination process in order to be considered for actuation.

J. It can thus be seen that actuating the potential RB zone prior to the subarea planning would be premature. It would preempt, indeed trump, the intended subarea planning and the commercial center designation and residential planning options that are identified as the two future alternatives by the policy. Reading the whole of the Policy U-168/potential zone interrelationship any other way, and permitting premature RB zoning, a zone intended by the zoning code to be placed in urban activity centers, would run counter to the policy's effect of requiring zoning other than the assigned "appropriate commercial zoning" to await the center designation, and would gut the integrity and effectiveness of the Plan-intended subarea process. (In a sense, the potential RB establishment is a "prepositioning" of possible commercial zoning in the future, not necessarily actuated and certainly not actuated until the appropriate circumstances warrant it. Those circumstances have not yet arisen for the subject property.)

K. The preemption of the subarea planning process in this case not only would result in emplacement of the RB zone, a zone intended only for urban activity centers and rural towns, on a site which is not so designated and which is set for review of commercial center status in future subarea planning, with the outcome uncertain. It also would introduce a motor vehicle dealer use that is restricted by the zoning code to two zones, the RB zone and the Industrial (I) zone, both of which are declared to be "appropriate in urban activity centers or rural towns," to a site which is neither an urban activity center nor a rural town. [KCC 21A.04.110 and .130, and 21A.08.070.A] In shorthand, the rezone would enact urban activity center zoning in an area not yet designated as such.

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activity center designation [2000 and 2004 Comprehensive Plans, Policies U-147 and U-149, respectively], but the current 2008 Plan, which applies to the instant consideration, deleted the RB zone as an implementing zone for unincorporated activity centers. (None of the three plan editions establish RB as an implementing zone for the other two commercial center designations, community business center and neighborhood business center.)

15. The Applicant argues that "nothing in Policy U-168... precludes actuation of this potential RB zoning until a subarea plan is completed. The policy instead describes subarea planning as a subsequent opportunity to rethink whether such properties should be expanded as centers and allowed to grow or should instead be redeveloped consistent with residential policies." The argument mischaracterizes the subarea planning process as "a subsequent opportunity to rethink" the future development options, as if they have already been fully considered. It may seem only a subtle distinction, and is certainly not a central factor in disposition of the case, but rather than a subsequent opportunity, under Policy U-168 the subarea process would seem to be the first genuine opportunity in the current planning era to consider the establishment of commercial center status for stand-alone sites, which only highlights the plan's motive for deferral of commercial center consideration to that time.

16. DDES's conclusion that it does "not believe U-168 bars rezones" is unpersuasive given the above analysis. It is offered with little in the way of relevant argument or support. Its recitation of the comprehensive plan's zoning implementation table is overly simplistic as can be seen from the review of that issue above, and its comparison to the annexation area agreement-dependent transitional zoning addressed by Policy U-169 is an "apples and oranges" comparison that is inapt. DDES's conclusion accordingly is not accorded deference. [*Mall, Inc.*, above]

17. To summarize, under Plan Policy U-168 and KCC 21A.04.110.B, which form part of the potentiality context for actuation of the potential zone, the RB zone is not appropriate for the site under the existing CO designation, since such appropriateness is "subject to comprehensive plan and subarea plan policies," and as seen herein the RB zone does not conform to the policy. It therefore must await the subarea plan consideration of the property as a commercial center. At that time, if the site is designated an appropriate commercial center the potentiality of the RB zone may be realized and actuation sought. Until then, rezoning to RB would be premature. Premature rezoning would have the negative consequences of preempting the subarea planning process's consideration of the appropriateness of commercial center designation of the property, and would allow a motor vehicle sales use on a site which is neither an urban activity center nor a rural town. The rezone is in substantial conflict with plan Policy U-168.[22]

18. As seen from the above findings and conclusions, the proposed rezone poses no substantial inconsistency with any of the other plan policies.

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[22] One might question the reasoning behind the assignment of potential zoning to a CO-designated site when Policy U-168 establishes a process of awaiting future subarea planning (which could be presumed to be accompanied by zoning implementation, as is often the case) and thereby impute some preemptive directive implied by the assignment of Potential RB zoning to the property. That imputation of a preemptive directive is essentially the Applicant's argument, that the Potential RB assignment preempts the code-established rezone approval criteria except for KCC 20.24.190.A. But on further reflection that line of reasoning fails. First, one need not question the legislative prerogative of Potential RB assignment. (Indeed, there is no compelling reason to delve into legislative intent here: assignment of zoning and potential zoning is relatively simple and straightforward; it is not complicated policy articulation that may present ambiguity. No reasons are evident in the record, and divination is improper.) Second, the presumption of accompanying zoning action in the subarea planning process is not valid: it need not occur, and, in fact, just such a situation of an unaccompanied subarea plan is contemplated by KCC 20.24.190.C. If one applies the appropriate longer view of the planning process established by Policy U-168, rather than a shorter term view of a preemptive RB directive as argued by the Applicant, which on reflection is found inappropriate resulting in this revised recommendation, the assignment of RB as a potential zone makes perfect sense: it is assigned as a potential zone in anticipation of the *possible* option, the *potentiality*, of commercial center designation in the future as contemplated by the policy. As concluded elsewhere, actuation of the potential RB zone before that designation occurs would be preemptive of the Policy U-168 process and would vitiate the effectiveness of the policy. It would thus be inconsistent with the comprehensive plan.

19. The plan inconsistency is with the centrally relevant policy of the plan, Policy U-168. Although under *Woods v. Kittitas County*, above, "a proposed land use decision must only *generally conform*, rather than strictly conform, to the comprehensive plan" (italics in original), since the rezone conflicts with the sole policy directly addressing stand-alone commercial sites, approval of it would be a substantial inconsistency with the plan and would therefore not comprise even "general[ ] conform[ity]."

Conflict with Zoning and Planning Codes

20. As the rezone would be substantially inconsistent with the comprehensive plan, it would not comply with the comprehensive plan consistency requirements of KCC 20.24.180 and 21A.44.060. The rezone would thus not be in compliance with Title 20 KCC, the county planning code, and Title 21A KCC, the zoning code.

21. As has been concluded above in Conclusion 11, the proposed rezone does not meet the approval test of KCC 20.24.190. It thus fails to conform to the planning code, Title 20 KCC, in that respect as well.

22. Separately, and independently, the proposed rezone at present also conflicts with the zoning code's assignment of the RB zone to the urban activity center designation, "Use of this [RB] zone is appropriate in urban activity centers or rural towns that are designated by the Comprehensive Plan and community plans..." [KCC 21A.04.110.B] Under *Mt. Vernon*, as noted elsewhere, the zoning code's "appropriateness" assignment of the RB zone to the urban activity center designation prevails over the comprehensive plan's inclusion of that zone in the inventory for the CO designation (as well as over the plan's deletion of it from the commercial center designations, as also noted). For that reason as well, the RB rezone must await the determination of such designation in the subarea planning process. The conflict may evaporate upon subarea plan adoption, as noted above, when the potential for RB actuation may be realized by appropriate commercial center designation.

23. Lastly, the rezone conflicts as well with KCC 21A.04.110.B's statement that, "Use of [the RB] 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," because the basic development infrastructure in place (and therefore available "at the time of development," which is intended to be immediate) is not adequate. (Even though the proposed development does not require public sewer service, and does not appear to generate new additional vehicle trips over those of the previous office use, the test of adequacy is not held to the practical requirements and impacts of the proposed actual *use*, but to the proposed *zone*.) Although the same adequate infrastructure test is applied to all of the commercial and industrial zones, and therefore allows no differentiation of commercial and industrial zoning assignment based on the relative availability of services, the effect of the adequacy requirement is a prohibition on commercial and industrial rezoning pending the provision of adequate infrastructure.

24. The proposal conflicts with the zoning code, Title 21A KCC, for the above two reasons as well.

Remaining Rezone Criteria

25. Substantial inconsistency of a rezone with the applicable comprehensive plan and conflict with code requirements would also be tantamount to the rezone's not "bear[ing] a substantial relationship to the public health, safety, morals and general welfare," since the comprehensive

plan and implementing regulations are the most direct expression of public policy in the topical area of land use. The required recommendation of denial is also not "unreasonably incompatible with or detrimental to affected properties and the general public." [KCC 20.24.180]

Summary Conclusion

26. Substantially inconsistent with the comprehensive plan and in conflict with the zoning and planning codes in several respects, as well as the more general criteria cited in the above conclusion, the requested rezone fails to sufficiently meet the applicable rezone approval tests at present and should therefore be denied.

RECOMMENDATION:

Amend proposed Ordinance no. 2009-0458 to deny the reclassification of the property from O, Office (potential Regional Business (RB)) to Regional Business (RB).

RECOMMENDED August 4, 2010.

Peter T. Donahue
King County Hearing Examiner

NOTICE OF RIGHT TO APPEAL
AND ADDITIONAL ACTION REQUIRED

In order to appeal the recommendation of the Examiner, written notice of appeal must be filed with the Clerk of the King County Council with a fee of $250.00 (check payable to King County Office of Finance) ***on or before*** **August 18, 2010.** If a notice of appeal is filed, the original and six (6) 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 25, 2010**. 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 Office of the Clerk of the Council, Room 1025, King County Courthouse, 516 3rd 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 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 written notice of appeal and filing fee are not filed within fourteen (14) calendar days of the date of this report, or if a written appeal statement and argument are not filed within twenty-one (21) calendar days of the date of this report, the Clerk of the Council shall place a proposed ordinance which 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, may defer action, may refer the matter to a Council committee, or may remand to the Examiner for further hearing or further consideration.

Action of the Council Final. 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 is commenced by filing a land use petition in the Superior Court for King County and serving all

necessary parties within twenty-one (21) days of the date on which the Council passes an ordinance acting on this matter. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE NOVEMBER 17, 2009, PUBLIC HEARING ON THE SEPA APPEAL REZONE APPLICATION OF GEBRAN MELKI, DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. L08TY403

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Mark Mitchell representing the Department, Richard Wilson representing the Applicant, Gebran Melki the Applicant, Gwendolyn High representing the Appellant, Bill Kerschke, Ed Sewall and Peter Eberle.

The following Exhibits were offered and entered into the record:

Exhibit No. 1	Department of Development and Environmental Services (DDES) staff report to the Hearing Examiner for L08TY403
Exhibit No. 2	Land Use Permit Application of Gebran Melki, submitted October 16, 2008
Exhibit No. 3	State Environmental Policy Act (SEPA) Checklist, submitted October 16, 2008
Exhibit No. 4	Rezone Application of Gebran Melki, submitted October 16, 2008
Exhibit No. 5	King County Assessor Map NE 14-23-05, dated April 3, 2008
Exhibit No. 6	Site plan
Exhibit No. 7	SEPA Determination of Non-Significance (DNS) for L08TY403, issued July 27, 2009
Exhibit No. 8	Notice of SEPA DNS and Pre-hearing Conference, issued July 27, 2009
Exhibit No. 9	*not admitted*
Exhibit No. 10	Affidavit of Publication in The Seattle Times on May 27, 2009, notarized May 27, 2009
Exhibit No. 11	Affidavit of Publication in the Renton Reporter on May 29, 2009, notarized May 29, 2009
Exhibit No. 12	Affidavit of Posting on May 23, 2009
Exhibit No. 13	Notice of Application of Gebran Melki, file no. L08TY403, issued May 28, 2009
Exhibit No. 14	Melki site restoration plan, approved February 23, 2009
Exhibit No. 15	*not admitted*
Exhibit No. 16	*not admitted*
Exhibit No. 17	Community Alliance to Reach Out & Engage (CARE) hearing statement for L08TY403
Exhibit No. 18	Excerpts from the May Creek Basin Action Plan
Exhibit No. 19	CARE SEPA comments for L08TY403
Exhibit No. 20	Maps in the May Creek Basin: (a) East Renton Plateau Conditions, figure E-3 and (b) Secondary Recommendation Projects Location map, figure 3-5
Exhibit No. 21	Email strings: (1) between David Christensen and CARE, dated June 19, 2009 and (2) between Erika Conkling, Mark Mitchell and David Christensen, dated July 13, 2009, October 28, 2009 and October 29, 2009
Exhibit No. 22	King County Stormwater Pollution Prevention Manual, II: Stormwater Problems: Your Role, January 2005
Exhibit No. 23	Corridors Causing Travel Shed Concurrency Failure map, King County Comprehensive Plan
Exhibit No. 24	Resume of Edgar K. Sewall III
Exhibit No. 25	Report on the wetland buffer restoration plan, prepared by Sewall Wetland Consulting dated January 13, 2009

Exhibit No. 26	Aerial photograph of subject property (date unknown), annotated by Ed Sewall to illustrate behavior of runoff water
Exhibit No. 27	Excerpt from the 2009 King County Surface Water Design Manual
Exhibit No. 28	Photograph depicting bioswale on subject property
Exhibit No. 29	Photograph depicting bioswale on subject property

MINUTES OF THE DECEMBER 2, 2009, PUBLIC HEARING ON THE SEPA APPEAL REZONE APPLICATION OF GEBRAN MELKI, DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. L08TY403

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Mark Mitchell representing the Department, , Richard Wilson representing the Applicant, Gwendolyn High representing the Appellant, Dale Nelson, Peter Eberle and Ed Sewall.

The following Exhibits were offered and entered into the record:

Exhibit No. 30	Directions for accessing potential zoning designations, includes printscreens (of county website pages) of subject property zoning information
Exhibit No. 31	CARE's SEPA rebuttal
Exhibit No. 32	*not admitted*
Exhibit No. 33	Schedule and route information for King County Metro bus route no. 215, in the form of printscreens from King County Metro's website (date accessed, url unknown)
Exhibit No. 34	Index of King County Public Rules: Stormwater Pollution Prevention Manual, effective January 1, 2009
Exhibit No. 35	Cemetery Regional Wetland 047016, plot date September 12, 1988, King County Department of Public Works-Survey Branch
Exhibit No. 36	magnified version of exhibit 35
Exhibit No. 37	Channelization and Signalization drawing sheet of Southeast 128th Street at 164th Avenue Southeast, pg 7 of 21, 1994, King County Public Works
Exhibit No. 38	magnified version of exhibit 37
Exhibit No. 39	Photographs of subject property taken by Peter Eberle on December 1, 2009
Exhibit No. 40	Cemetery Pond – Beaver Deceiver plans, King County Department of Natural Resources and Parks, Water and Land Resources Division, Stormwater Services Section, 2009
Exhibit No. 41	*duplicate of exhibit 20(a)*
Exhibit No. 42	Excerpt from May Creek Basin Action Plan

The following Exhibits were offered and entered into the record during post-hearing open record periods:

Exhibit No. 43	Email to Peter Donahue from Mark Mitchell dated December 17, 2009
Exhibit No. 44	Email string dated from December 17, 2009 through January 5, 2010 between Richard Wilson, Gwendolyn High, Mark Mitchell, and Peter Donahue
Exhibit No. 45	Letter to Peter Donahue from Richard Wilson dated January 5, 2010
Exhibit No. 46	CARE's response to Hearing Examiner Order of March 3, 2010
Exhibit No. 47	Applicant Melki's reply to CARE's comprehensive plan arguments dated March 17, 2010
Exhibit No. 48	Email to Peter Donahue from Paul Reitenbach dated March 23, 2010
Exhibit No. 49	Email string dated from June 9, 2010 through June 10, 2010 from DDES to the Hearing Examiner, Gwendolyn High and Richard Wilson

Exhibit No. 50	Applicant Melki's argument Re: Comprehensive Plan Policy U-168 dated June 14, 2010
Exhibit No. 51	CARE's response to the Hearing Examiner's Order of June 1, 2010 dated June 14, 2010
Exhibit No. 52	Applicant Melki's response to CARE's arguments Re: Policy U-168
Exhibit No. 53	CARE's response to other parties' comments dated June 18, 2010
Exhibit No. 54	Applicant Melki's argument Re: KCC 21A.04.170 dated July 7, 2010
Exhibit No. 55	CARE's response to the Hearing Examiner's Order of July 6, 2010 dated July 13, 2010
Exhibit No. 56	Email to Peter Donahue from Richard Wilson dated July 13, 2010
Exhibit No. 57	CARE's response to Mr. Wilson's objection of July 13, 2010 dated July 14, 2010
Exhibit No. 58	Order Sustaining Applicant Objection to Party CARE's Extraneous Evidentiary and Argument Submittals and Striking Same dated July 16, 2010

PTD:gao
L08TY403 RPT4 (Corrected ex. list)