



KING COUNTY

1200 King County Courthouse
516 Third Avenue
Seattle, WA 98104

Signature Report

August 31, 2009

Ordinance 16636

Proposed No. 2009-0377.3

Sponsors Constantine

1 AN ORDINANCE concurring with the recommendation of
2 the hearing examiner to approve reclassification of certain
3 property located at 11060 – 16th Avenue Southwest as
4 described in department of development and environmental
5 services file no. L09TY401, from CB (Community
6 Business) to Urban Residential-48 (R-48; 48 units/acre), at
7 the request of NB Partners, LLC, and amending King
8 County Title 21A, as amended, by modifying the zoning
9 map to reflect this reclassification.

10

11 BE IT ORDAINED BY THE COUNCIL OF KING COUNTY:

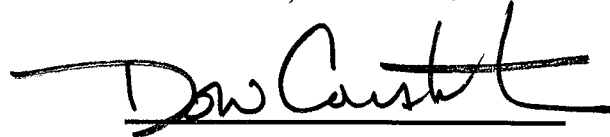
12 SECTION 1. This ordinance adopts and incorporates the findings and
13 conclusions of the July 31, 2009, report and recommendation of the hearing examiner,
14 filed with the clerk of the council on August 26, 2009, upon the application of NB
15 Partners, LLC to reclassify certain property described in department of development and
16 environmental services file no. L09TY401.

17 SECTION 2. The recommendation of the hearing examiner to reclassify the
18 subject property from CB (Community Business) to Urban Residential-48 (R-48; 48
19 units/acre) is hereby adopted. Upon this ordinance becoming effective, the land use
20 services division shall amend the official zoning maps of King County to reflect this
21 action.
22

Ordinance 16636 was introduced on 6/22/2009 and passed by the Metropolitan King
County Council on 8/31/2009, by the following vote:

Yes: 8 - Mr. Constantine, Mr. Ferguson, Ms. Hague, Ms. Lambert, Mr. von
Reichbauer, Mr. Gossett, Mr. Phillips and Ms. Patterson
No: 0
Excused: 1 - Mr. Dunn

KING COUNTY COUNCIL
KING COUNTY, WASHINGTON



Dow Constantine, Chair

ATTEST:



Anne Noris, Clerk of the Council

Attachments A. Hearing Examiner Report dated July 31, 2009

July 31, 2009

**OFFICE OF THE HEARING EXAMINER
 KING COUNTY, WASHINGTON**
 400 Yesler Way, Room 404
 Seattle, Washington 98104
 Telephone (206) 296-4660
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**CORRECTED REPORT AND RECOMMENDATION TO THE METROPOLITAN KING
 COUNTY COUNCIL**

SUBJECT: Department of Development and Environmental Services File No. **L09TY401**
 Proposed Ordinance: **2009-0377**

NB PARTNERS, LLC (Mark Nickels)
 Rezone Application

Location: 11060—16th Avenue Southwest

Appellant: NB Partners, LLC
 Attn: **Mark Nickels**
 PO Box 76037
 Seattle, Washington 98178
 Telephone: (206) 772-3334
 Email: markram@comcast.net

King County: Department of Development and Environmental Services (DDES)
represented by **Mark Mitchell**
 900 Oakesdale Avenue Southwest
 Renton, Washington 98055
 Telephone: (206) 296-7119
 Facsimile: (206) 296-7051

SUMMARY OF RECOMMENDATIONS:

Department's Preliminary Recommendation:	Approve
Department's Final Recommendation:	Approve
Examiner's Recommendation:	Approve

EXAMINER PROCEEDINGS:

Hearing Opened:	July 16, 2009
Hearing Closed:	July 16, 2009

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:

1. General Information:

A request for rezone of .87 acre (37,895 sq. ft.) from CB (Community Business) to Urban Residential-48 (R-48; 48 units/acre).

Location: 11060 16th Ave. SW, White Center

Proponent: NB Partners, LLC
Mark Nickels
P.O. Box 76037
Seattle, WA. 98178
(206) 772-3334

File Number: L09TY401

Threshold Determination: Determination of Non significance (DNS)

Date of Issuance: June 15, 2009

King County Action: Zone Reclassification

Existing Zone: CB

Requested Zone: R-48

Community Plan: White Center

Section/Township/Range: SW 06-23-04 / Parcel No.: 3451000475

2. The subject property lies on the east side of 16th Avenue Southwest in the unincorporated White Center “urban village” area between Seattle and Burien. The property is 37,895 square feet in area (0.87 acre) and rectangular in shape, with a 290- foot long dimension running east-west and the north-south 130-foot width also the amount of road frontage on 16th Avenue Southwest. The property terrain descends generally from east to west to the road frontage.
3. 16th Avenue Southwest is the main thoroughfare of the White Center business district. It is designated a principal arterial roadway. Along the property frontage it is developed with a five-land paved surface with urban curbed gutter and sidewalk improvement on both sides.
4. No known critical areas are identified on the property. The site is vegetated with ornamental landscaping developed in conjunction with its prior use as a restaurant. The restaurant use has discontinued; it was in the recent past a non-franchise restaurant, and the prior use was as a franchise fast-food restaurant. The restaurant structure is currently unoccupied but remains on the property. The remainder of the property is developed with the restaurant parking lot and the aforementioned landscaping.
5. Domestic and fire flow water service is available to the property through Seattle Public Utilities. Sanitary sewer service is available from the Southwest Suburban Sewer District.
6. The property is zoned CB. Most of the 16th Avenue Southwest White Center corridor is zoned Community Business (CB), and much of that has a Special Overlay (SO) designation. But interspersed among the CB and CB-SO areas are stretches of R-48 zoning, a multiple family

dwelling zone allowing a maximum of 48 units/acre. And in the portion of the corridor in the closer vicinity of the site, between Southwest 107th Street and Southwest 112th Street, most properties are zoned R-48, including extensive stretches on the east side of 16th Avenue Southwest running northward from the site, and also along the west side.

7. The Applicant requests a rezone of the property to R-48. Multiple residential development is intended but firm plans are not submitted with the application.
8. The County Comprehensive Plan (2008 edition) designates the property and the subject surrounding area (the White Center business corridor) as an Unincorporated Activity Center (UAC). The R-48 zone is generally allowable within the White Center UAC, as is the existing CB zone. (Plan, p. 11-3)
9. The Applicant contends that the rezone is justified by changed circumstances.
 - A. The Applicant has had a building permit (B07C0029) pending with the county for approximately two years for development of a mixed-use development (allowable under the CB zone), with commercial development on the ground floor and residential apartments above. But the market for such development is extremely weak to non-existent, and not just due to the current global financial crisis and its ramifications on the flow of credit. The mixed-use development proposal has proven infeasible, with an extended period of inability by the Applicant to secure tenants for the retail space on the ground floor. Indeed, commercial business prospects are so poor that there has been an inability to merely engage an agent to represent the availability of the retail space. The Applicant's long-time financial services banker has informed the Applicant that without secured tenants for the commercial space, financing cannot be secured for the development.
 - B. The Applicant has had experience in development in the area, and knows the site conditions well. In the Applicant's experience, a restaurant development on the subject property is infeasible, as demonstrated by the pullout of the fast-food franchise (which evidently is a rare occurrence among franchise restaurants) and the failure of the succeeding private restaurant.
 - C. The Applicant notes the construction of extensive multi-family apartment developments in the subject stretch of the White Center corridor and the continuing economic viability of multiple residential development. The Applicant also notes that it intends to develop low and moderate income units in the anticipated multi-family development, in order to obtain density bonuses authorized by the zoning code.
10. In addition to the basic rezone approval criteria set forth in KCC 21A.44.060 (see Conclusion 1 below), special rezone approval criteria are established in KCC 20.24.190.¹ The four special criteria, at least one of which must be met, are delineated in the following findings, with an assessment of conformity with each.
11. 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." In this case, the record shows that the property is not "potentially zoned" for the reclassification. The property is zoned CB. That nomenclature and the graphic zoning map

¹ These rezone criteria apply to individual site-specific quasi-judicial rezone applications, not to legislative enactments.

depiction indicate no formally declared potential for the requested R-48 zoning. DDES opines that the proposed rezone “meets the spirit and intent of KCC 20.24.190(A).” That sentiment is misplaced; it is irrelevant to the question. The requirement of *actual*, formal “potential zone” status is explicit in the criterion. The term “potential zone” is a term of art in the zoning code, and has regulatory effect. Unless a property is formally designated with “potential” zoning pursuant to KCC 21A.04.170, it cannot be accorded any regulatory effect as a “potential” zone, seemingly “in spirit.” The application does not meet criterion A.

12. KCC 20.24.190.B allows rezone approval if “[a]n adopted subarea plan or area zoning specifies that the property shall be subsequently considered through an individual reclassification application.” The evidence in this case does not show any such specification for the subject property. The application does not meet criterion B.
13. KCC 20.24.190.C allows rezone approval in cases “[w]here a subarea plan has been adopted but subsequent area zoning has not been adopted, [and] the proposed reclassification or shoreline redesignation is consistent with the adopted subarea plan.” Although it can be seen herein that the proposed rezone is consistent with the adopted subarea plan, the proposal does not meet the first part of the criterion C test, that “a subarea plan has been adopted but subsequent area zoning has not been adopted.” The White Center Community Action Plan was adopted through the enactment of Ordinance 11568 effective November 28, 1994. Formal “White Center Area Zoning Maps” were enacted simultaneously in a later section of the same ordinance. Such zoning action, which immediately implemented the White Center Plan, constitutes “subsequent area zoning” in the context that the term is used in KCC 20.24.190(C). Therefore, it cannot be concluded that “subsequent area zoning has not been adopted” in this case. Since that predicate is not present, conformity with criterion C is not possible.
14. KCC 20.24.190.D allows individual rezone consideration if:

The applicant has demonstrated with substantial evidence that:

1. Since the last previous area zoning or shoreline environment designation of the subject property, authorized public improvements, permitted private development or other conditions or circumstances affecting the subject property have undergone substantial and material change not anticipated or contemplated in the subarea plan or area zoning;
2. The impacts from the changed conditions or circumstances affect the subject property in a manner and to a degree different than other properties in the vicinity such that area rezoning or redesignation is not appropriate. For the purposes of this subsection, “changed conditions or circumstances” does not include actions taken by the current or former property owners to facilitate a more intense development of the property including but not limited to changing tax limitations, adjusting property lines, extending services or changing property ownership;
3. For proposals to increase rural residential density (not applicable here), that the proposal meets the criteria in Comprehensive Plan policies R-305 through R-309;

4. For proposals to increase urban residential density, that the proposal meets the criteria in Comprehensive Plan policies U-122 through U-126; and
5. The requested reclassification or redesignation is in the public interest.

Special rezone criterion D essentially incorporates the “changed circumstances” test long established by Washington case law, but with codified articulations of particular standards and specifications of such circumstances, as well as specific plan policy conformity requirements and the standard traditional summary rezone approval test that a rezone be in the public interest.

15. A sufficiently persuasive case has been demonstrated by the preponderance of the evidence that the proposed rezone complies with special criterion D. The evidence shows sufficient qualifying changed circumstances in the economic viability of the White Center corridor that justify rezoning the property from CB to R-48.
 - A. A compelling case has been made that commercial development on the property is not feasible, and not even a mixed-use development as permitted under the CB zoning because the mixed-use development is required to have a commercial use component. Of note regarding commercial viability is the fact that the property is not a corner, and therefore high-visibility, parcel and has relatively diminished commercial visibility therefor. From the evidence presented it does not appear to be a prime commercial property; it certainly has poor commercial prospects. (The perspective taken in reaching such conclusion is an appropriately longer-term perspective, not one just influenced by the current and probably temporary global financial crisis.)
 - B. Multiple residential development is viable on the site, but only without the commercial component required under the CB zone. In order to escape the commercial requirement, rezoning to a non-commercial zone is necessary; hence, the request for R-48 zoning.
 - C. The requirement of KCC 20.24.190.D.2 that the found changed circumstances not apply wholesale to a larger area, which would call for area rezoning rather than a site-specific approach, is met in this case by the property’s relatively unique qualities and context: it is an interior parcel that appears “blighted,” a circumstance which does not appear common to the area; other commercially zoned properties nearby are not shown to be inviable (and most in the immediate area are in higher-visibility corner locations); and the predominantly R-48 zoned parcels in the immediate area are not in need of R-48 zoning as they are already so zoned.
 - D. The “changed circumstances” test is met.
 - E. The R-48 zone allows a higher residential yield than the CB zone (though perhaps accounted for in part due to the mixed-use requirement for some retail space in any residential development, and resultant loss of that space for dwelling units). To the extent that conformity with the specific plan policies cited by KCC 20.24.190.D.4 is therefore necessary to address due to the rezone’s allowing increased density, conformity is found. Of special note in such regard are that the county Department of Transportation has indicated a lack of transportation concurrency problems associated with development of the site, and the City of Seattle has expressly declined to offer substantive comment on the request.

- F. As expressed more fully in Conclusion 8 below, the requested classification is in the public interest.
- G. The application conforms to criterion D.

CONCLUSIONS:

Rezone Analysis

1. Basic county code rezoning 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.

2. As reviewed in detail in the above findings, KCC 20.24.190 establishes special criteria for the review of rezoning applications. These special criteria operate independently of the other rezoning criteria.

3. Rezoning proposals are also addressed by Washington case law:

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

[*Citizens v. 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 rezoning 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)]²

4. An effect of the KCC 20.24.190 special rezoning 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. Only in cases where a property is:
 - A. Expressly specified to be subject to further rezoning consideration through formal “potential zoning” nomenclature (criterion A) or by being called out specifically for subsequent rezoning consideration by a plan (criterion B);

² The *SORE* holding which preempted the *case law* “changed circumstances” test upon a showing of plan conformity does not preempt the enactment of countervailing local rezoning criteria, however. The *codified* “special circumstances” test of KCC 20.24.190.D would not be preempted under the *SORE* holding merely by the happenstance of comprehensive plan conformity; if necessary to approval of a rezoning under KCC 20.24.190, criterion D must be met in full even if plan conformity is shown.

- B. In an area where there did not occur a legislative zoning enactment to implement a plan (criterion C); or
 - C. Supported by qualifying changed circumstances (criterion D), is rezoning on an individual, site-specific basis permitted. In cases other than those expressly qualifying under KCC 20.24.190, rezoning must be undertaken through the legislative area rezoning process.
5. As noted above, the Applicant has made a persuasive case of qualification under the criterion D “changed circumstances” test. The proposal conforms to criterion D and therefore to KCC 20.24.190.

Remaining Rezone Approval Tests

6. Rezoning of the property to R-48 would conform to the comprehensive plan. In particular, it would conform specifically to the Urban Activity Center land use designation applied to the subject White Center area. It would also conform to those Plan urban land use policies which are directly applicable (see Plan, pp. 2-11 – 2-21) and to the applicable policies of the White Center Community Action Plan. (The Action Plan contains a policy, ECD-15 encouraging multiple residential development “as part of a mixed-use development within the designated Urban Village boundary.” Given its context, the thrust of the policy is to encourage inclusion of multiple residential within the overall predominantly commercial corridor, rather than to require it be developed only in within mixed-use construction. That conclusion is reinforced by the previously noted presence of extensive R-48 zoning in the “commercial” corridor.) It is of note that the rezone in this case, of a relatively small parcel from a commercial zone to the highest density residential zone, will not detract from the ability of the White Center UAC to attract and concentrate the relatively dense urban development intended to be accommodated in the UAC under the plan.
7. In general, conformity of a rezone to the applicable comprehensive plan and code requirements would be tantamount to its “bear[ing] a substantial relationship to the public welfare,” since the comprehensive plan and implementing regulations are the most direct expression of public policy in the topical area of land use. There is no evidence or argument in the record which suggests that the requested rezone is not in support of the public necessity, convenience and general welfare.

RECOMMENDATION:

Approve Ordinance no. 2009-0377 granting reclassification of the property from Community Business (CB) to R-48.

RECOMMENDED July 31, 2009.

CORRECTED August 21, 2009.

Peter T. Donahue
King County Hearing Examiner

NOTICE OF RIGHT TO APPEAL

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 14, 2009**. 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 21, 2009**. 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 JULY 16, 2009, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. L09TY401.

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Mark Mitchell representing the Department, Applicant Mark Nickels and Jeremy Rene.

The following Exhibits were offered and entered into the record:

- Exhibit No. 1 Land Use Permit Application Form for L09TY40 received January 22, 2009
- Exhibit No. 2 Rezone Application for L09TY401 received January 22, 2009
- Exhibit No. 3 Certification of Applicant Status for L09TY401 received January 22, 2009
- Exhibit No. 4 State Environmental Policy Act (SEPA) checklist received January 22, 2009
- Exhibit No. 5 SEPA Determination of Non-Significance issued June 15, 2009
- Exhibit No. 6 Plan Sheets – 1) Boundary & Topographic Survey dated March 2006 and 2) Site Plan dated January 22, 2009
- Exhibit No. 7 Affidavit of Posting indicating a posting date of March 19, 2009, received by DDES on March 23, 2009
- Exhibit No. 8 Affidavit of Publication for June 24, 2009
- Exhibit No. 9 Notice of Decision and SEPA Threshold Determination Recommendation and Hearing mailed June 15, 2009
- Exhibit No. 10 DDES Staff Report for July 16, 2009
- Exhibit No. 11 Department of Development and Environmental Services (DDES) file no. L09TY401