

June 12, 2012

OFFICE OF THE HEARING EXAMINER
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REPORT AND RECOMMENDATION TO THE METROPOLITAN KING COUNTY COUNCIL

SUBJECT: Department of Development and Environmental Services File No. **L11TY402**
Proposed Ordinance No. **2012-0111**

ANMARCO
Rezone Application

Location: SW and SE corners of the intersection of Avondale Road NE and NE Woodinville-Duvall Road, east of Woodinville

Applicant: AnMarCo
represented by **David Halinen**
1019 Regents Boulevard Suite 202
Fircrest, WA 98466-6037
Telephone: (206) 443-4684
Email: davidhalinen@halinenlaw.com

King County: Department of Development and Environmental Services (DDES)
represented by **Mark Mitchell**
900 Oakesdale Avenue SW
Renton, WA 98057
Telephone: (206) 296-7119
Email: mark.mitchell@kingcounty.gov

SUMMARY OF RECOMMENDATIONS:

Department's Preliminary Recommendation:	Approve, with revised P-suffix conditions
Department's Final Recommendation:	Approve, with further revised P-suffix conditions
Examiner's Recommendation:	Approve, with further revised P-suffix conditions

EXAMINER PROCEEDINGS:

Hearing Opened:	April 19, 2012
Hearing Closed:	April 19, 2012

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 Hearing Examiner's Office.

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

FINDINGS:

1. General Information

Proponent: AnMarCo
Attn: Brad Merlino
9125 10th Avenue S
Seattle, WA. 98108
(206) 762-9125

Representative: David Halinen, Attorney
206-443-4684

File Number: L11TY402

Threshold Determination: Determination of Nonsignificance (DNS)
Date of Issuance: March 9, 2012

King County Action: Zone Classification Amendment / P-Suffix revisions

County Contact: Mark Mitchell, PPM III Phone No.: 206-296-7119
E-mail: mark.mitchell@kingcounty.gov

Requested Zone: NB-P, Neighborhood Business, with revised P-Suffix conditions

Existing Zone: NB-P, Neighborhood Business, with P-suffix conditions

Community Plan: Bear Creek

Section/Township/Range: NE 7-26-6

Comprehensive Plan Designation: r n (Rural Neighborhood Commercial Center)

2. The subject property consists of two separated portions. The westerly portion, with the vast majority of land area, lies in the southwest quadrant of the intersection of Avondale Road NE and NE Woodinville-Duvall Road. Both roads are principal arterial roadways. A separate small lens-shaped sliver of the property lies to the east, in the intersection's southeast quadrant (an apparent remnant after right-of-way dedication split the property). The total acreage is 1.33 acres, with the small sliver comprising .02 acre of that amount. The larger portion is generally triangularly shaped, conforming to the overall angled nature of the intersection right-of-way configuration.
3. The property is zoned Neighborhood Business (NB) with a number of "P-suffix" development conditions attached. P-suffix conditions impose special conditions of land use and development zoning approval. The current slate of P-suffix conditions was generally enacted in Ordinance 12824 and codified by reference in KCC 21A.38.030. The P-suffix conditions applied to the property, in 1975 and 1997, require that:
- A. A majority of the major site's south boundary be fenced and provided a 30-foot deep vegetated buffer, as a separation from and protection of residentially-zoned parcels abutting to the south;
 - B. Retention of natural open space and dedication of right-of-way to arterial standards along the easterly and northeasterly portions of the major segment;

- C. Dedication of right-of-way for the NE Woodinville-Duvall Road frontage of the major segment; and
- D. Similar right-of-way dedication on the Avondale Road NE frontage of the major segment.

(See exhibit no. 1-1 attached to the DDES department report (exhibit no. 1) for the specific wording of the P-suffix conditions at issue.)

4. Since the time of the imposition of the pertinent P-suffix conditions regarding fencing and buffering, two parcels to the south of the eastern portion of the major segment (along approximately 45 percent of the southerly boundary) have been rezoned to the same NB zoning as the subject property (though likely with different P-suffix conditions, not evident in the instant record). The adjacent NB rezoning was included in legislative zoning amendments implementing the 2004 Comprehensive Plan update.
5. Applicant AnMarCo requests revision of the NB classification and P-suffix conditions to reduce the fencing and buffering requirements so that they are eliminated along the now similarly-zoned NB interface on the easterly portion of the south boundary, asserting they are no longer necessary given the adjacent rezoning from residential zoning to similar NB zoning.
6. The Applicant also requests revision of the P-suffix conditions to delete all requirements of right-of-way dedication, contending that they are unnecessarily rigid at the zoning level of imposition and are more appropriately addressed during specific development project review (e.g., binding site plan and/or building permit review) as may arise in the future. (No specific development proposal is offered at present.)
7. The Applicant additionally argues that the right-of-way dedication/deeding requirements imposed in the P-suffix conditions constitute an unconstitutional regulatory taking.
8. The comprehensive plan land use designation of the property is rn (Rural Neighborhood Commercial Center). The property lies within the Bear Creek Community Plan area. The proposed revisions to the P-suffix conditions do not pose any conflict with pertinent comprehensive plan and community plan policies.
9. 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.
10. Criteria A, B and C of KCC 20.24.190 do not pertain in this case. Individual rezone criterion D of KCC 20.24.190 essentially incorporates the “changed circumstances” test long established by Washington case law (see Conclusion 3 *et seq.* below), but with codified articulations of particular standards and specifications of such circumstances, as well as specific plan policy conformity requirements not applicable here and the standard traditional summary rezone approval test that a rezone be in the public interest.
11. The 2004 rezone of the abutting property to NB removed the general land use “conflict” between the properties that precipitated the motivation for fencing and buffering separation between the two. As the property to the south is now similarly zoned NB, that potential for adverse impact and conflict between generally differing land uses is moot. The 2004 rezone of the adjacent property and resultant mootness of the conflict issue constitute a qualifying “changed

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

circumstance” in support of the requested change to the pertinent P-suffix components of the subject property’s zoning classification.

12. The presence of such qualifying changed circumstances meets conformity criteria KCC 20.24.190.D.1 and .2. The “changed circumstances” test is met.
13. DDES recommends approval of the request, specifically noting the anachronistic nature of the fencing and buffering condition given the 2004 rezoning to similar NB of the property abutting to the south. DDES and the King County Department of Transportation (KCDOT) both agree that the specific development review and permit stage is the more appropriate time to address any right-of-way dedication/deeding requirements.

CONCLUSIONS:

1. 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.

2. As reviewed in the above findings, KCC 20.24.190 establishes special criteria for the review of rezone applications. These special criteria operate independently of the other rezone criteria.
3. 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 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 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)]

4. The *SORE* holding which preempts the *case law* “changed circumstances” test upon a showing of plan conformity does not preempt the enactment of countervailing local rezone 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 rezone under KCC 20.24.190, criterion D must be met even if plan conformity is shown.
5. A persuasive case has been made, by the preponderance of the evidence submitted at hearing, that changed circumstances presented by the property in its land use context justify revising the fencing and buffering P-suffix conditions as requested.
6. The proposal also makes a persuasive case that the appropriate time to determine right-of-way dedication requirements is at the time a specific development proposal is submitted for project review. As noted, the county departments with the most direct administrative jurisdiction over such issues have stated their concurrence with deletion of those pertinent P-suffix conditions.

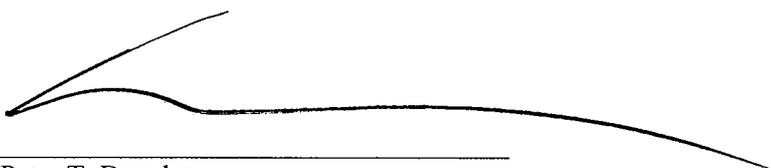
7. The Applicant's contention that the P-suffix conditions mandating right-of-way dedication constitute an unconstitutional regulatory taking is not ripe for adjudication in this proceeding. The appropriate time for raising such a claim was either at the time that such conditions were imposed in the original zoning action applying the pertinent P-suffix conditions or is during future review at the time a specific development proposal is submitted for county review and permitting. It therefore need not be addressed here.
8. 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.
9. The requested P-suffix condition revisions conform to the comprehensive plan and subarea plan.
10. In general, conformity of a rezone, or zoning classification revision as in the instant case, to the applicable comprehensive plan and code requirements would be tantamount to its "bear[ing] a substantial relationship to the public welfare," and being in the public interest, since the comprehensive plan and implementing regulations are the most direct expression of public policy in the topical area of land use. The requested rezone, shown to conform to the comprehensive plan and the code approval criteria, is in support of the public necessity, convenience and general welfare and is in the public interest.
11. The requested zoning classification revision has been shown to meet the applicable approval tests and should be recommended to be approved.

RECOMMENDATION:

Approve Ordinance no. 2012-0111 revising the Neighborhood Business (NB) zoning classification of the subject property by amending the following P-suffix zoning conditions as follows:

1. Post-Conversion Condition BC-P20, Condition 1, is revised so as to state: The portion of the site's south boundary that abuts both (a) residentially zoned parcels APN 1628700005 and APN 1628700125 and (b) the north edge of the dead-ended 191st Avenue NE right-of-way lying between those two parcels is to be fenced so as to preclude all access from 191st Avenue NE.
2. Post-Conversion Condition BC-P20, Condition 2, is revised so as to state: The south 30 feet of the portion of the site that abuts both (a) residentially zoned parcels APN 1628700005 and APN 1628700125 and (b) the north edge of the dead-ended 191st Avenue NE right-of-way lying between those two parcels is to be left as a buffer with existing trees and ground cover to be augmented as required by the Department of Development and Environmental Services.
3. Post-Conversion Condition BC-P20, Conditions 3 and 4; and Post-Conversion Conditions BC-P2 and BC-P3 are deleted.

ORDERED June 12, 2012.



Peter T. Donahue
King County Hearing Examiner

**NOTICE OF RIGHT TO APPEAL
AND ADDITIONAL ACTION REQUIRED**

In order to appeal the recommendation of the hearing examiner, written notice of appeal must be filed with the Clerk of the King County Council with a fee of \$250 (check payable to *King County* Office of Finance) on or before **June 26, 2012**. If a notice of appeal is filed, the original two copies of a written appeal statement specifying the basis for the appeal and argument in support of the appeal must be filed with the Clerk of the *King County* Council on or before **July 3, 2012**. Appeal statements may refer only to facts contained in the hearing record; new facts may not be presented on appeal.

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

If a written notice of appeal and filing fee are not filed within 14 calendar days of the date of this report, or if a written appeal statement and argument are not filed within 21 calendar days of the date of this report, the Clerk of the Council shall place a proposed ordinance that implements the Examiner's recommendation on the agenda of the next available Council meeting. At that meeting the Council may adopt the Examiner's recommendation, defer action, refer the matter to a Council committee, or remand to the Examiner for further hearing or further consideration.

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 (LUPA) is commenced by filing a land use petition in the Superior Court and serving all necessary parties within 21 days of the date on which the Council passes an ordinance acting on this matter. (LUPA defines the date on which a land use decision is issued by the Council as the day the Council passes the decision ordinance.)

MINUTES OF THE APRIL 19, 2012, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. L11TY402.

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Mark Mitchell representing the department and David Halinen representing the Applicant.

The following exhibits were offered and entered into the hearing record:

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| Exhibit no. 1 | DDES Report and Recommendation to the Hearing Examiner, dated April 19, 2012 |
| Exhibit no. 2 | Land Use Permit Application, received by DDES October 27, 2011 |
| Exhibit no. 3 | Certification of Applicant Status, received by DDES October 27, 2011 |
| Exhibit no. 4 | Rezone Application Questionnaire, received by DDES October 27, 2011 |
| Exhibit no. 5 | State Environmental Policy Act (SEPA) Checklist, received by DDES October 27, 2011 |
| Exhibit no. 6 | SEPA Determination of Non-significance, issued March 9, 2012 |
| Exhibit no. 7 | King County Assessor Map SE 07-26-06, dated June 14, 2011 |
| Exhibit no. 8 | DDES file no. L11TY402 |
| Exhibit no. 9 | Applicant's proposed amendments and deletions of APN 0726069019 P-Suffix conditions |