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BEFORE THE HEARING EXAMINER FOR THE CITY OF AUBURN

Phil Olbrechts, Hearing Examiner

RE: Auburn Townhomes Rezone REZ21-0001	FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION
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INTRODUCTION

The Applicant has requested an amendment to a contract rezone, specifically to authorize live/work units as a permitted use at a parcel located on the north side of 16th St. NW between ‘A’ St. NW and ‘B’ St.. It is recommended that the City Council approve the requested amendment.

The proposed amendment is straightforward and relatively minor. The City Council approved a contract rezone for the project site in 1990. The contract rezone included an extensive list of authorized uses. Live/work units were not included in that list because that use was not recognized in the City’s zoning code at the time. The contract rezone designated the property as C-3, the same zoning that applies to properties on the west, east and south sides of the project site. Live/work units are currently permitted outright in the C-3 zone¹. As discussed in more detail below, existing surrounding uses are generally compatible with live/work units, most notably a hotel on the east side of the project site and short-term housing on the west side.

¹ Although live/work units are authorized in the C-3 zone, it appears that the same contract rezone that applies to the subject property also applies to other properties north of 16th as well. See Ex. 8, p. 5. In this regard, live/work units may not be authorized in some of the surrounding C-3 property. As shown in the zoning map excerpt below, however, the project site is in a large area of C-3 zoned property that extends significantly south of 16th.

TESTIMONY

A computer-generated transcript has been prepared of the appeal hearing to provide an overview of the hearing testimony. The transcript is provided for informational purposes only as Appendix A. Since the transcript is computer generated, it is not 100% accurate, but does provide a useful indication of what testimony was presented during the hearing.

EXHIBITS

Exhibits 1-9 identified in the Exhibit List at page 6 of the April 20, 2022 staff report were admitted into the record during the April 20, 2022 public hearing.

FINDINGS OF FACT

Procedural:

1. Applicant. The Applicant is Rajinder Khera, Swami Investments, 7812 120th Street Surrey, BC V3W3N2.
2. Hearing. A virtual hearing on the application was held on April 20, 2022 at 5:30 p.m., Zoom Meeting ID No. 863 7728 1404.

Substantive:

3. Site/Proposal Description. The Applicant has requested an amendment to a contract rezone, specifically to authorize live/work units as a permitted use at a parcel located on the north side of 16th St. NW between 'A' St. NW and 'B' St.. The City Council approved the contract rezone in 1990 for four parcels totaling 7.7 acres. The parcel subject to the rezone is approximately 7,500 square feet in area². Live/Work is not included as a permitted use in the contract rezone.

A live/work unit is defined by ACC 18.04.527 as follows:

“Live/work unit” means an integrated housing unit and working space, occupied and utilized by a single household in a structure, either single dwelling or multi-unit dwelling, that has been designed or structurally modified to accommodate joint residential occupancy and work activity, and which includes:

A. A complete dwelling unit; and

² The staff report identifies the project site as rectangular with a width of 50 feet and length of 150 feet.

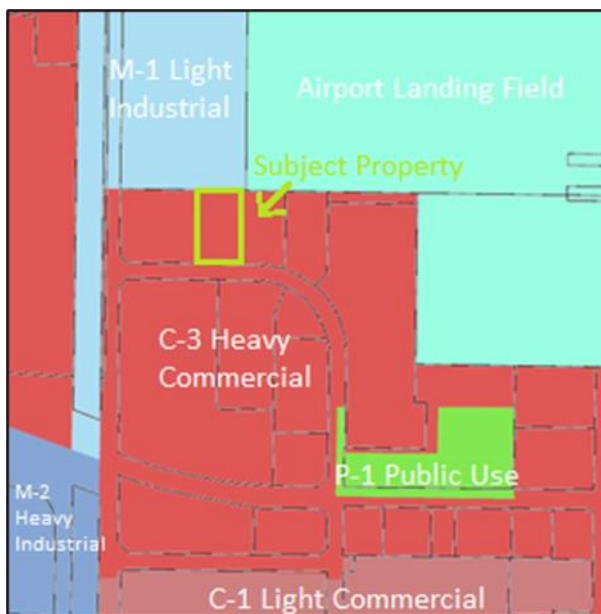
1 *B. Working space reserved for and regularly used by one or more*
2 *occupants of the dwelling unit.*

3 *The difference between a live/work unit and a work/live unit (defined in*
4 *ACC 18.04.913) is that the “work” component of a live/work unit is*
5 *secondary to its residential use, and may include only commercial*
6 *activities and pursuits that are compatible with the character of a quiet*
7 *residential environment, while the work component of a work/live unit is*
8 *the primary use, to which the residential component is secondary.*

9 Live/work units are currently authorized in the C-3 zone (Heavy Commercial
10 District), which is the zoning of the adjoining properties to the south, east and west
11 (however, see Footnote No. 1).

12 According to the SEPA checklist for the project site, Ex. 3, the property is
13 undeveloped and currently used for overflow parking.

14 4. Characteristics of the Area: As previously mentioned, parcels to the
15 south, east and west are zoned C-3. The parcel to the north is zoned M-1 Light
16 Industrial. The subject parcel is located on the north side of 16th St. NW with a
17 Comfort Inn Hotel located on its east side and a former Clarion Hotel located on its
18 west side. The C-3 parcels located across 16th St. are either vacant or occupied by
19 Public Storage and Self Storage. McKeeson Warehousing is located to the north and
20 an airfield to the northeast. According to the testimony of staff, the Clarion Hotel has
21 recently been purchased by King County to be used for short term housing. As of a
22 couple weeks prior to the hearing, staff testified that the Clarion property was “gated
23 off.” Surrounding zoning is depicted in the zoning map excerpt pasted below:



1 5. Adverse Impacts. There are no significant adverse impacts associated
2 with the proposal. The proposed live/work addition to the contract rezone is
3 compatible with the lodging and residential uses currently in place on the adjoining
4 Clarion/King County and Comfort in parcels. Live/work units are also already
5 permitted use in the C-3 zone, which adjoins the property on three sides. It is also not
6 anticipated that live/work units will create any more significant impacts than all the
7 other more intense uses already authorized in the contract rezone. The uses
8 authorized by the contract rezone are identified in a list of almost 70 uses, including
9 retail stores, hotels, schools and personal service shops. See Ex. 8. In terms of
10 surrounding uses creating adverse impacts to live/work units, the existing uses
11 identified in Finding of Fact No. 4 appear to be well suited for proximity to
12 residential use, except for the airport landing field and warehouse use located to the
13 north.

9 There are no critical areas at the project site except for an aquifer recharge area,
10 which is present at a large portion of the City. The live/work units in any event would
11 not be expected to create any greater impact to critical areas than the multitude of
12 uses already authorized by the contract rezone. 16th St. NW, which serves the site, is
13 a two-lane minor arterial. Live/work units are not anticipated to create any greater
14 traffic demand on 16th in comparison to other uses authorized for the project site. As
15 identified in the staff report, any development on the site would be required to
16 provide adequate facilities of public and private utilities such as water, sewer, and
17 electricity.

15 CONCLUSIONS OF LAW

16 Procedural:

17 1. Authority of Hearing Examiner. ACC 18.68.030(B)(1)(a) grants the Hearing
18 Examiner with the authority to review and make a recommendation on rezone requests
19 to the City Council if the Planning Director determines that the rezone requests are
20 consistent with the Comprehensive Plan. The Planning Director has determined that
21 the rezone request is consistent with the Comprehensive Plan.

21 Substantive:

22 2. Comprehensive Plan Land Use Map Designation. The Comprehensive
23 Plan Land Use Map designation for the proposed rezone area is Heavy Commercial.

24 3. Case Law Review Criteria and Application. The proposal meets the legal
25 criteria for approval of a site-specific rezone.

As with many local jurisdictions, the Auburn City Code does not include any criteria
for rezone applications. Washington appellate courts have imposed some rezone
criteria. Those courts require that the proponents of a rezone establish that conditions

1 have substantially changed since the original zoning and that the rezone must bear a
2 substantial relationship to the public health, safety, morals or welfare. *See Ahmann-*
3 *Yamane, LLC v. Tabler*, 105 Wn. App. 103, 111 (2001). If a rezone “implements” the
Comprehensive Plan, a showing that a change of circumstances has occurred is not
required. *Id.* at 112.

4 The public health, safety and welfare criterion is easily met. As determined in
5 Finding of Fact No. 5, the proposal will not create any significant adverse impacts.
6 The proposal will also facilitate the accommodation of urban growth in the City,
which meets numerous policy objectives of the Growth Management Act.

7 The change in circumstances criterion is not so easily addressed due to some
8 ambiguities in that judicial requirement. Staff have taken the position that no change
9 in circumstances is required because the proposal “implements” the comprehensive
10 plan by being consistent with the comprehensive plan. As testified by Mr. Steiner
11 during the hearing, the proposed contract amendment is consistent with the
12 comprehensive plan because it would not necessitate an amendment to the
13 comprehensive plan “Heavy Commercial” map designation.

14 The staff position is reasonable, however also somewhat questionable. RCW
15 36.70A.120 already requires zoning code amendments to be consistent with the
16 comprehensive plan. Consequently, the staff position on what “implements” means
17 renders the judicial standard for change of circumstances entirely meaningless.
18 Under the judicial standard, a change of circumstances is only evaluated if a proposed
19 rezone is inconsistent with the comprehensive plan. But RCW 36.70A.120 prohibits
20 the approval of inconsistent rezones, so there would be no reason to ever consider
21 change of circumstances.

22 It is recognized that RCW 36.70A.120 was adopted in 1993 and the judicial
23 requirement for implementing the comprehensive plan traces back to opinions issued
24 before that date. It is possible that the courts have simply neglected to update their
25 rezone criteria to factor in the impact of RCW 36.70A.120. Taking a moderately
conservative approach, however, it is best to presume that the *Ahmann-Yamane, LLC*
court was aware of current law when it applied the comprehensive plan criterion. *See*
State v. Koontz, No. 30879-1-III (Wash. Ct. App. Nov. 26, 2013) (“*The judge is*
presumed to know the law.”).

22 Miriam Webster defines “implement” as “*to give practical effect to and ensure of*
23 *actual fulfillment by concrete measures.*” At the least, if implementing the
24 comprehensive plan is to mean more than simply being consistent with the plan, the
25 proposed rezone should better serve to fulfill the objectives of the plan than currently
allowed uses. The “live/work” amendment arguably does provide for that better fit
by adding to the variety of housing in Auburn. The housing element of the
comprehensive plan references a need and goal for a variety of housing in multiple
sections. *See* Comprehensive Plan Affordable Housing Element Vision (H-1),

1 Conditions and Trends (H-2, H-4), Healthy Homes and Neighborhoods (H-5), Variety
2 Policy No. H-10.

3 Even if the proposal isn't construed as implementing the comprehensive plan, it still
4 meets the rezone criteria for approval because of a change in circumstances. As
5 testified by staff, the King County housing and Comfort Inn uses that surround the
6 project site were added to the area after the contract rezone was originally adopted in
7 1990. The addition of these uses qualifies as a change in circumstances since they
8 provide better assurance that live work arrangements on the subject property will be
9 compatible with surrounding uses as opposed to the wide range of uses otherwise
10 permitted in the C-3 zone.

11 An even more compelling change in circumstance is that the "live/work" use wasn't a
12 use that was recognized in Auburn's zoning code in 1990. According to staff, the
13 concept was more recently adopted into the C-3 zoning designation. In short, the
14 proposed amendment seeks to take advantage of a residential use that didn't exist
15 when the contract rezone was adopted.

16 For the reasons identified above, the proposed rezone is justified by both a change in
17 circumstances and arguably because it serves to implement the comprehensive plan.
18 All criteria for a rezone are met.

19 **RECOMMENDATION**

20 It is recommended that the City Council approve REZ21-0001.

21 DATED this 4th day of May, 2022.

22 
23 Phil A. Olbrechts

24 City of Auburn Hearing Examiner
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