



P.O. Box 111
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February 28, 2018

Metropolitan King County Council
King County Courthouse
516 Third Avenue, Room 1200
Seattle, Washington 98104-3272

Re: King County Ordinance 18611
Review of Cedar River Sites Industrial Moratorium Study

Honorable Members of the King County Council:

The Greater Maple Valley Unincorporated Area Council (GMVUAC) has completed its review of the February 9, 2018, Cedar River Sites Industrial Moratorium Study (CRSIM Study) conducted by the King County Department of Permitting and Environmental Review (DPER) in response to Ordinance 18611. The GMVUAC finds that the CRSIM Study is both factually and legally deficient and defective in several significant ways that affect the manner in which the King County Council (KCC) should consider its responsiveness to the clear findings and directives set forth by the KCC in Ordinance 18611, as well as its applicability to the decision the KCC must make regarding and relating to the prudence of maintaining the regulatory status quo and siting a new asphalt facility by Lakeside Industries at its property located at 18825 SE Renton-Maple Valley Road (State Road 169; Parcel ID # 192306-9026) (LI Site).

For the GMVUAC's stated position regarding the myriad of regulatory and environmental issues relating to the construction of a new asphalt facility at this location, please consider our formal and detailed comments submitted to DPER on December 5, 2017; and our January 8, 2018, letter submitted on the record of the public hearing conducted by the KCC on the Moratorium enacted pursuant to Ordinance 18611.

With our prior comments in mind, the GMVUAC respectfully asks the KCC to duly consider our following comments specifically addressing the analysis and conclusions of the CRSIM Study in light of KCC Ordinance 18611 and the long-standing and applicable mandatory policies adopted as law by the KCC in the King County Comprehensive Plan (KCCP).

EXECUTIVE SUMMARY

In addition to the clear directive by the KCC from its interpretation of KCCP Policy R-515 in Ordinance 18611, § 3(B)(2), the construction of a new asphalt facility on the LI Site constitutes an “*other new industrial use in the Rural Area*” and pursuant to KCCP Policy R-513 “*shall be permitted only in Rural Towns and in the designated industrial area adjacent to the Rural Neighborhood Commercial Center of Preston.*” There is absolutely no discretion at issue and no grammatical *wordsmithing* may be applied to the clear and unambiguous language of KCCP Policy R-513 (included in the 2008 KCCP and adopted by the KCC as Ordinance # 16263, Attachment 'A', at p. 3-36); this directive is mandatory and constitutes a duty with which King County officials and its departments must comply. The CRSIM Study patently ignores this KCC mandate and the recommendations therein fail to enforce this express, existing restriction on the use of the LI Site regardless of its Industrial zoning.

DETAILED ANALYSES AND COMMENTS

INTRODUCTION

Based on its analysis of the current regulatory framework as applied to the proposed new industrial use of the LI Site as an asphalt facility, DPER reached the conclusion that “*there are no recommended changes to the County’s adopted land use or zoning regulations, or to associated development regulations.*” CRSIM Study, p. 29 (Part IV). This conclusion is not at all surprising based on the fact that DPER overlooked applicable mandatory constraints and prohibitions adopted by the KCC, as well as the clear interpretation of land use and zoning policies adopted unanimously by the KCC in Ordinance 18611.

KCC ORDINANCE 18611 AND KCCP POLICY R-515

Not merely overlooked by DPER, but most notable by its patent disregard in the CRSIM Study, is the clear and unequivocal interpretation of King County Comprehensive Plan (KCCP) Policy R-515 as set forth in Ordinance 18611:

In accordance with KCCP policy R-515, existing industrial uses along SR-169 shall be zoned rural residential but may continue if they qualify as legal, nonconforming uses.

KCC Ordinance 18611, § 1(J).¹ When the legislative body itself subsequently places its own construction on a prior enactment, no one – not even the court – is at liberty to speculate as to legislative intent. *Anderson v. City of Seattle*, 78 Wn.2d 201, 203, 471 P.2d 87 (1970).² Accordingly, the KCC “must make decisions based on what the policy says to do” – there is no room for discretion. Therefore, as clearly mandated by KCCP Policy R-515 as construed and interpreted by the KCC in Ordinance 18611, the LI Site must be rezoned from I (Industrial) to RA (Rural Area) – no if’s, and’s, or but’s – this is the legal imperative imposed on the KCC to promptly do its duty.

KCCP POLICY R-513

¹ “‘*Shall*’ and ‘*will*’ in a policy mean that it is mandatory for the county to carry out the policy, even if a timeline is not included. ‘*Shall*’ and ‘*will*’ are imperative and nondiscretionary – the county must make decisions based on what the policy says to do.” 2016 KCCP, Attachment A to KCC Ordinance 18427, Glossary at p. G-25 (adopted 12/5/2016).

² The KCCP is adopted as a KCC Ordinance (typically as an Appendix), and thus the general rules of statutory construction apply. *Ford Motor Company v. City of Seattle, Exec. Services Department*, 160 Wn.2d 32, 41, 156 P.3d 185 (2007), *cert. denied*, 552 U.S. 1180 (2008). County ordinances are interpreted under the rules applicable to statutory construction. *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 471, 61 P.3d 1141 (2003).

Even without the mandate of R-515, there is another KCCP policy that has perhaps even more significance as to the siting of a new industrial use in the Rural Area – regardless of the proposed site’s present or future zoning. That policy is set forth as KCCP Policy R-513:

*Rural Public Infrastructure Maintenance Facilities, and agriculture and forestry product processing should be allowed in the Rural Area. **Other new industrial uses in the Rural Area shall be permitted only in Rural Towns and in the designated industrial area adjacent to the Rural Neighborhood Commercial Center of Preston.***

(Bold and underlining added.) R-513 has been around for many years, and only in the 2008 KCCP Update was the word “Other” added to the original language – and 2008 was also the year in which the KCC changed the plan and zoning designations of the LI Site from Rural to Industrial.³

NEW INDUSTRIAL DEVELOPMENT

By the clear and explicit language of R-513, not subject to any creative grammatical *wordsmanship* by anyone, “other new industrial uses in the Rural Area” are prohibited in and at the LI Site – as what is not included in a list is expressly excluded therefrom. *Expressio unius est exclusio alterius*, a common maxim of statutory construction, holds that, “[w]here a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature.” *Washington Natural Gas Company v. Public Utility District No. 1*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969).

In the KCCP policies applicable to industrial uses in the rural area, the term “other new industrial uses” has a very well-defined meaning – one that is clearly expressed and is not subject to interpretation. This well-understood meaning, and express limitation, also takes on added significance with respect to the proposed construction of a new asphalt facility on the LI Site when the background to the change in land use and zoning designation for that particular property in 2008 is duly considered. Following the 2008 KCCP Policy R-514 (formerly R-413 in the 2004 KCCP), is the following explanation:

*The intent of this policy is to preclude expansion of the industrial area beyond the identified boundaries and to ensure that **new development (not previously constructed or vested) in the industrial area meets rural character standards.***

(Bold and underlining added.). In the KCCP, the word “development” means “a use consisting of the construction or exterior alteration of structures.” KCC Ordinance 16263, Attachment A, KCCP 2008, at p. G-6 (10/20/2008).

Thus, the construction of a new asphalt plant (composed of buildings, storage tanks, and other ancillary structures for those purposes outlined in SIC # 2951⁴) where no such facility ever previously existed at the LI Site constitutes “new development (*not previously constructed or vested*) in the industrial area.” The inclusion of the

³ As set forth by the KCC in King County Code § 21A.04.130(A), “the purpose of the industrial zone (I) is to provide for the location and grouping of industrial enterprises and activities involving manufacturing, assembly, fabrication, processing, bulk handling and storage, research facilities, warehousing and heavy trucking.” It is also very clearly set forth by the KCC in § 21A.04.130(B), that the “use of this zone is appropriate in urban activity centers or rural towns designated by the Comprehensive Plan and community plans which are served at the time of development by adequate public sewers, water supply, roads and other needed public facilities and services.” (Ord. 11621 § 16, 1994; Ord. 10870 § 34, 1993). Under this Code adopted by the KCC, the LI Site should **not** be zoned Industrial.

⁴ Standard Industrial Classification (SIC) # 2951 (“Asphalt Paving Mixtures and Blocks”) includes those “establishments primarily engaged in manufacturing asphalt and tar paving mixtures; and paving blocks made of asphalt and various compositions of asphalt or tar with other materials.”

word “other” in describing “new industrial uses” in KCCP Policy R-513 means an industrial use⁵ that is “different from the one mentioned; different in nature or kind”⁶ or “different or distinct from that already mentioned.”⁷ The specific kinds of industrial uses mentioned in 2008 KCCP Policy R-513 are “Rural Public Infrastructure Maintenance Facilities,⁸ and agriculture and forestry product processing.” Not necessarily limited to agriculture and forestry product processing, per se, the use of the LI Site prior to and continuing subsequent to Lakeside Industries purchase of this property was by Sunset Materials, a materials processing facility as defined by the King County Code.

Materials processing facility: A. A site or establishment, not accessory to a mineral extraction or sawmill use, that is primarily engaged in crushing, grinding, pulverizing or otherwise preparing earth materials, vegetation, organic waste, construction and demolition materials or source separated organic materials and that is not the final disposal site; and B. A site or establishment lawfully established before October 10, 2004, as an interim recycling facility for processing source separated, organic materials.

King County Code § 21A.06.742 (KCC Ordinance 17539 § 23, 2013; KCC Ordinance 15032 § 6, 2004).

Accordingly, a use that would not constitute an “other new industrial use” expressly prohibited from being constructed and operated on the LI Site would be one that is but the continuation of the pre-existing maintenance shop and materials processing facilities that have occupied the LI Site for many years. In zoning terminology, if the LI Site were rezoned Rural, a legal nonconforming use would qualify as the type or kind of industrial use that is permitted under KCCP Policy R-513. Under the King County Code, a legal nonconforming use means “a use, improvement or structure established in conformance with King County’s rules and regulations and other applicable local and state rules and regulations in effect at the time the use, improvement or structure was established that no longer conforms to King County’s rules and regulations or other applicable local and state rules and regulations due to changes in the rules and regulations or their application to the subject property.” King County Code § 21A.06.800 (“Nonconformance”; KCC Ordinance 17841 § 16, 2014; KCC Ordinance 10870 § 200, 1993).

A change in use of the property can constitute the loss of legal nonconforming status and be prohibited from establishment on that site. Whereas a mere increase in volume or intensity of use does not constitute a change in use,⁹ a use of a different kind accompanied by a drastic enlargement may create a changed use. *Id.* The general character of a nonconforming use is that in existence at a particular point in time,¹⁰ and a change in the basic nature or character of that use may result in a loss of the protected nonconforming use. *Keller v. City of Bellingham*, 92 Wash.2d 726, 731, 600 P.2d 1276 (1979). An existing nonconforming use may be increased in volume or intensity and remain a legal use of the property; however, the nature and character of the prior use must be unchanged and substantially the same facilities must be used to qualify as a continuation of a legal nonconforming use. *Jahnigen v. Staley*, 225 A.2d 277 (Md. 1967).

⁵ “Use: the purpose for which land or a structure is designed, built, arranged, intended, occupied, maintained, let or leased. Ord. 17841 § 20, 2014; Ord. 10870 § 309, 1993.” King County Code § 21A.06.1345. The word “industrial” is generally defined as meaning “of or pertaining to a type of the nature of, or resulting from industry” which in turn is defined as “the aggregate of manufacturing enterprises in a particular field; any general business activity; trade or manufacture in general.” Webster’s College Dictionary, at pp. 687-88 (Random House 1995).

⁶ Webster’s, at p. 958.

⁷ Black’s Law Dictionary, at p. 992 (5th ed. 1979).

⁸ A prior use of the LI Site was as a shop and maintenance facility for the King County Roads Division.

⁹ 1 R. Anderson, *American Law of Zoning* § 6.38 (3rd ed. 1986).

¹⁰ *E.g.*, prior to a new use being vested by submittal of a complete building permit application. See *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 251-53, 218 P.3d 180 (2009). Here, Lakeside Industries has not yet submitted any building permit application for the construction of the proposed asphalt facility.

A new use that is different in kind from the pre-existing legal nonconforming use does not qualify as a continuation of that prior legal nonconformity. 3 A. Rathkopf, *The Law of Zoning and Planning*, ch. 60-1, § 1 (4th ed. Cum. Supp. 1979); *Town of Salem v. Wickson*, 770 A.2d 1120 (N.H. 2001) (stockpiling earthen materials was not substantially similar to prevailing non-conforming use of the property for farming and constituted a substantial change in use that invalidated the site's nonconforming status, considering whether the new use reflects the nature and purpose of the prior use; whether new use is different in character, nature and kind; and whether the new use will have substantially different effect on neighborhood).

ZONING HISTORY

Also to be factored into consideration is the history of the 2008 rezoning of the LI Site from Rural to Industrial. The genesis of the rezoning of the LI Site was a Docket Request made in 2006 to amend the 2004 KCCP. The specific and express purpose of such Request was *"to allow materials processing as a permitted use"* of that particular property. 2006 Docket Report, Docket Item #16, at p. 7. Noted in the Docket Item #16 Recommendation was the fact that *"an Industrial designation for property not within a Rural Town or the industrial area adjacent to Preston is inconsistent with policy R-412 [now R-513]."* The proposed rezone of the LI Site was required to be included in an Area Zoning Study conducted by the KC Department of Development and Environmental Services (DDES – the predecessor to DPER). The Area Zoning Study for the Goodnight Properties (now the LI Site) as recommended by the King County Executive was for the express purpose of determining whether there should be *"a change in designation from Rural to Industrial to allow natural resource materials processing facilities"* on the LI Site thereby allowing Sunset Materials to continue providing thereat natural resource materials supplies and resource recycling for southeastern King County. KCCP 2008, Area Zoning Studies, at p. 76 (March 1, 2008).

Clearly, the sole purpose of the rezone request was targeted to the continuation of the Sunset Materials use of the LI Site. Although the Area Zoning Study recommended that the LI Site remain zoned Rural and changes to the Zoning Code be made to allow such use in the Rural Area, the KCC ultimately made a decision to change the zoning from Rural to Industrial but subject to the specific changes made in the language of 2004 KCCP Policy R-412¹¹ to that now set forth, and adopted in the 2008 KCCP, as Policy R-513. This historical context sheds further light on the singular importance, and limiting function, of the KCC's addition of the word *"other"* to the phrase *"new industrial uses in the Rural Area."* Based on the fact that the sole purpose of the rezone of the LI Site from Rural to Industrial was to accommodate the continuation of the Sunset Materials use of that particular property for its existing, but, at that time nonconforming, material processing facility, any new industrial use that constitutes a change in the basic nature or character of that pre-existing use¹² is absolutely prohibited from being constructed and operated on the LI Site, and must, if anywhere in the Rural Area, be located only in either a Rural Town or in the industrial area adjacent to Preston.

Duly considering the foregoing, something that DPER most certainly failed to do notwithstanding the clear directives of the KCC in Ordinance 18611, § 3(B)(2), the construction of a new asphalt facility on the LI Site constitutes an *"other new industrial use in the Rural Area"* and pursuant to KCCP Policy R-513 *"shall be permitted only in Rural Towns and in the designated industrial area adjacent to the Rural Neighborhood Commercial Center of Preston."* There is absolutely no discretion at issue; this directive is mandatory and constitutes a duty with which King County officials and its departments must comply.

CONCLUSIONS AND RECOMMENDATIONS

In conclusion, based on the foregoing and as set forth in its prior detailed comments and letters submitted to the KCC and DPER that included the review and assessment of the environmental impact of the proposed construction and operation of a new asphalt facility on the LI Site, it is the recommendation of the GMVUAC as

¹¹ Then KCCP Policy R-412 read *"new industrial uses in the Rural Area shall be permitted only in Rural Towns and in the designated industrial area adjacent to the Rural Neighborhood of Preston."* 2008 Area Zoning Study, at p. 76.

¹² And other than the aforementioned *"Public Rural Public Infrastructure Maintenance Facilities, and agriculture and forestry product processing"* facilities in R-513.

the local representative body of some 16,000 residents and area including the LI Site that the KCC reject the recommendations set forth in the CRSIM Study and enforce the provisions of KCCP Policy R-513.

It is further the recommendation of the GMVUAC that the KCC refer to the Hearing Examiner the matter of rezoning the LI Site back to its original RA-5 land use and zoning designations pursuant to the manner in which the KCC has interpreted KCCP Policy R-515 as set forth in Ordinance 18611, § 1(J). However, as previously acknowledged by both Lakeside Industries and the Washington State Department of Ecology, the cleanup of the LI Site must immediately continue and be conducted pursuant to King County's issuance of a grading permit for the excavation and removal and proper disposal of contaminated soil¹³ and, possibly, groundwater.¹⁴

Thank you for your consideration.

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¹³ See Report dated September 1, 2016, by Farallon Consulting titled "Release Notification and Notice of Independent Remedial Action" for the LI Site that details the fact that "[a]ccording to Ecology, the Site has confirmed the presence of petroleum in soil and groundwater in concentrations exceeding their regulatory cleanup levels. The Site is listed as awaiting cleanup under an independent cleanup action. . . . Total petroleum hydrocarbons (TPH) as diesel-range organics (DRO), TPH as oil-range organics (ORO), and benzene were detected at concentrations exceeding the Washington State Model Toxics Control Act Cleanup Regulation (MTCAR) Method A cleanup levels in soil at the Site during the subsurface investigation [conducted from March through May 2016]." Farallon Report, at p. 2.

¹⁴ See "King County Water District #90 - 2014 Wellhead Protection Plan" by the Pacific Groundwater Group, Appendix M dated August 14, 2014 (PGG WHPP). The LI Site is identified therein as within the 5 - 10 year wellhead protection capture zone in the underlying sole source aquifer, and what happens on this site is reasonably probable to have an adverse effect on the groundwater withdrawn and serving KCWD #90.