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2 **BEFORE THE HEARING EXAMINER FOR THE CITY OF BELLEVUE**

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4
5 In the Matter of the Application for

Case File No.: 17-125912-LQ

6
7 **The Flats Rezone**

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND RECOMMENDATION**

8 For a Rezone from Community Business
9 (CB) to Multi-Family Residential (R-30) at
10 15516 NE 15th PL

11 **SUMMARY OF RECOMMENDATION**

12 The Hearing Examiner respectfully recommends that the Bellevue City Council
13 **APPROVE** the requested rezone, subject to the condition contained at the end of this decision.

14 **REZONE REQUEST**

15 The Applicant, Jeff Peterson representing Toll Brothers, LLP, (“Applicant”) requests a
16 rezone from Community Business (CB) to Multi-Family Residential-30 (R-30) re-classifying a
17 .6-acre parcel at 15516 NE 15th Place, in the Crossroads Subarea (“property”). No development
application accompanies the proposal at this time.

18 The proposed rezone would achieve consistency with a comprehensive plan amendment
19 enacted by the Bellevue City Council in 2007 which changed the planning designation from
20 Community Business to Multi-Family High.

21 **PROCEDURE**

22 A rezone application is a Process III decision governed by Land Use Code (LUC)
23 20.35..300. The Hearing Examiner is responsible for holding a public hearing and making a
24 recommendation to the City Council. The City Council makes the final decision on behalf of
the City.

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1 A Notice of Application was published in the City of Bellevue’s Weekly Permit Bulletin
2 on November 2, 2017. Notice was mailed to property owners within 500 feet of the property.
3 The Department held a public meeting on November 21, 2017. No one from the public attended
4 the meeting.

5 The Development Services Department (“Department”) published a recommendation of
6 approval with conditions on October 25, 2018. The Department also published a Determination
7 of Non-Significance (“DNS”) on the project pursuant to BCC Chapter 22.02.

8 After appropriate public notice, the Hearing Examiner held a hearing on November 8,
9 2018 at six p.m. in the Bellevue City Council Chambers. The Applicant was represented by
10 Brent Carson, Van Ness Feldman LLP. The Department was represented by Matt McFarland,
11 Assistant City Attorney, City of Bellevue, 450 110th Avenue NE, P. O. Box 90012, Bellevue,
12 Washington 98009, and the owner of a neighboring parcel, Kasar Investments, was represented
13 by Alex Sidles, Bricklin & Newman LLP. Leah Chulsky, Land Use Reviewer, made the
14 presentation on behalf of the Department.

15 Several people testified at the public hearing. On behalf of the applicant, Jennifer
16 Bushnell and Jeff Peterson testified. On behalf of Kasar Investments, Sam Ngai and Brian
17 O’Connor testified.

18 As required by the code, the Hearing Examiner must issue his or her decision within 10
19 working days of the hearing.

20 **FINDINGS OF FACT**

21 1. Prior to April 2, 2007, the property was designated Community Business and
22 located in District E of the Crossroads Subarea Plan. The property was subject to a multi-family
23 housing limit identified within the Crossroads Subarea Plan, which places a maximum of 400
24 total housing units within District E. In 2006, the City of Bellevue initiated a Comprehensive
25 Plan Amendment (“CPA”) (File No. 05-114492-AC) to the Crossroads Subarea and the
Crossroads Center Plan.

2. The CPA process included amendments that affected the property. It was
determined that the property was more appropriately located within District F because the
predominant uses within District F are multi-family apartments and homes. Because the
property is set back from 156th Avenue NE, it has limited potential for commercial development.

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1 3. Ultimately, after appropriate public process, the Bellevue City Council adopted
2 the amendments that changed the boundary of District E so that it would no longer include the
3 property, and instead, the property is now included within District F and the comprehensive
4 plan designation changed from Community Business to Multi-Family High. City of Bellevue
5 Ordinance 5729 (Exhibit 1 at 43). The zoning was not changed at that time, however, and the
6 property continues to be zoned Community Business, a zoning classification inconsistent with
7 the new plan designation adopted in the CPA.

8 4. A property immediately east of the property owned by Kasar Investments and
9 doing business as an Ivar’s Restaurant (“Ivar’s Site”) remains within District E and is zoned as
10 Community Business (“CB”). The Kasar property abuts a property zoned R-30 to the north.

11 5. The applicant is proposing a rezone for the property to bring the zoning
12 classification into conformance with the comprehensive plan designation. The new zoning
13 classification would be R-30. Although there are no other development applications filed at
14 present, the applicant plans to construct four, four-story residential buildings comprised of 22
15 units along with necessary frontage improvements and associated utility infrastructure. Exhibit
16 1 at 66.

17 6. The Bellevue City Code contains a Transition Area Design District at LUC
18 Chapter 20.25B. The Transition Area Design District provides a buffer between residential uses
19 in a residential land use district and an adjacent land use district which permits development at
20 a much higher intensity. Where multi-family residential development is planned adjacent to
21 commercial development, the development within the overlay district is required to incorporate
22 elements in the site design and building design to soften its impacts and building design to result
23 in a compatible transition, including setbacks.

24 7. An effect of the proposed rezone of the property to R-30 is that there will be
25 setbacks imposed on the Ivar’s site, which is adjacent to the property and zoned Community
Business. Referring to the Ivar’s site, one of the public comments in the rezone application
process stated:

Approval of the Rezone will be materially detrimental to the property to the
immediate east of the subject property (Ivar’s site) as it will increase setback and
landscaping along their western property line and additional tree retention
requirements which will impact the redevelopment permitted onsite.

1 November 21, 2017. Exhibit 1 at 32.

2 8. The Staff Report states that

3 If the Rezone is approved, the building setback from the western property line
4 would increase from 0 to 30 feet. . . [R]edevlopment of the Ivar’s site may be
5 [subject to] impacts since any new structure will need to comply with the 30-foot
6 setback. However at this time, no building or land use permits have been applied
7 for or are under review for the Ivar’s site. . .

8 The required landscape buffer would increase from eight feet to 20 feet. The
9 required landscape buffer may be modified pursuant to LUC 20.20.520.J. . .

10 Exhibit 1 at 33-34.

11 9. The open record public hearing was convened on this rezone application on
12 November 8, 2018 at 6:00 p.m. in the Bellevue City Council chambers. Represented at the
13 hearing were the Applicant and the owner of the Ivar’s site, Kasar Investments. Kasar included
14 in the record a real estate appraisal indicating that the new buffer requirements that would be
15 imposed as a result of the rezone of the adjacent property would reduce the value of the Ivar’s
16 site. Exhibit 1 at 266-348. The estimate is that the loss in value to the Ivar’s site due to this
17 rezone would be \$492,000, or about 17% of the value of the property, based on potential
18 redevelopment as multi-family housing. *Id.* at 268. Kasar’s attorney pointed out that Kasar
19 currently has a zero-foot setback along its shared property line with the Applicant, and an eight-
20 foot landscape buffer requirement along the shared property line. Exhibit 5 at 2. There is
21 already a 30-foot setback on the north side of the property and the rezone would require another
22 30-foot setback on the west side. According to Kasar’s attorney, the new 30-foot setback
23 constitutes a material detriment to the Ivar’s site, and a reason the rezone should not be granted.

24 10. The Applicant and the Department disputed the assertion that the rezone will
25 result in material detriment to the Ivar’s site. The Applicant asserts several theories to argue
that the claim of material detriment is unsupported and speculative. Exhibit 3 at 3. First, since
the application is for a rezone only, without a development application, any effects from the
rezone are speculative. Second, the approval of the rezone does not trigger any change in use
on the Ivar’s site. The new 30-foot setback would only apply if Kasar decided to redevelop the
Ivar’s site. The Applicant cites LUC 20.25B.020.B.9, which states: “Where a transition area
abuts a single-family or multifamily district and all properties that would receive the transition

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1 are developed with legally permitted nonresidential uses, the requirements of this part shall not
2 apply.” *Id.* at 3-4. Applicant argues and the Department confirms that since the Ivar’s site is
3 developed as a parking lot in that area, the rezone would not trigger the requirements of LUC
4 Chapter 20.25B on the Ivar’s site. *Id.* at 4.

5 11. The Applicant argues that further, even if the requirements of LUC 20.25B are
6 triggered, Kasar cannot establish material detriment based on pure speculation about how the
7 requirements might apply to a hypothetical development proposal for the Kasar property. *Id.*
8 The Applicant finally points out that Kasar had over a decade’s worth of notice about this
9 designation change, and yet never sought to re-develop the property. The Department also
10 points out that Kasar could have appealed the CPA designation change in 2007 but did not.
11 Exhibit 1 at 34.

12 12. Any finding of fact which is a conclusion law herein which may be deemed a
13 finding of fact is hereby adopted as such, and vice versa.

14 **CONCLUSIONS OF LAW**

15 1. The Hearing Examiner has jurisdiction over this application. Under LUC
16 20.35.340.A, the following recommendation criteria apply:

17 The Examiner shall recommend approval or approval with conditions or
18 modification if the applicant has demonstrated that the proposal complies with the
19 applicable decision criteria of the Bellevue City Code. The applicant carries the
20 burden of proof and must demonstrate that a preponderance of the evidence
21 supports the conclusion that the application merits approval or approval with
22 modifications. In all other cases, the Hearing Examiner shall recommend denial of
23 the application.

24 2. Under LUC 20.35.340.C, the Hearing Examiner may include conditions to
25 ensure the proposal conforms to the relevant decision criteria.

3. LUC 20.35.340.D provides the relevant requirements for the Hearing
Examiner’s recommendation to the City Council:

D. Written Recommendation of the Hearing Examiner. The Hearing
Examiner shall within 10 working days following the close of the record
distribute a written report including a recommendation on the public hearing. The
report shall contain the following:

1. The recommendation of the Hearing Examiner; and

2. Any conditions included as part of the recommendation; and
3. Findings of facts upon which the recommendation, including any conditions, was based and the conclusions derived from those facts; and
4. A statement explaining the process to appeal the recommendation of the Hearing Examiner; and
5. The date on which the matter has been scheduled for consideration by the City Council and information on how to find out whether the Examiner's recommendation has been appealed.

4. A property may be rezoned if the proposal meets the criteria contained in LUC 20.30A.140:

- A. The rezone is consistent with the Comprehensive Plan; and
- B. The rezone bears a substantial relation to the public health, safety, or welfare; and
- C. The rezone is warranted in order to achieve consistency with the Comprehensive Plan or because of a need for additional property in the proposed land use district classification or because the proposed zoning classification is appropriate for reasonable development of the subject property; and
- D. The rezone will not be materially detrimental to uses or property in the immediate vicinity of the subject property; and
- E. The rezone has merit and value for the community as a whole.

5. The Staff Recommendation has done a very thorough job of documenting how the proposal meets the requirements for rezone approval and the Hearing Examiner incorporates the discussion contained in Exhibit 1 at 35-37 by reference in its entirety as a part of this recommendation. The only criteria that requires more discussion is LUC 20.30A.140.D: whether the rezone will be materially detrimental to uses or property in the immediate vicinity.

6. A claim of material detriment can be demonstrated if the loss can be measured and is based on well-founded concerns. *City of Medina v. T-Mobile USA, Inc.* 123 Wn. App. 19, 32, 95 P.3d 377 (2004) (relying on market studies to determine whether loss will occur). However, the proffered evidence must be particularized; it cannot be based on generalized fears. *Washington State Dept. of Corrections v. City of Kennewick*, 86 Wn. App. 521, 532, 937 P.2d 1119 (1997). There must be more than speculative concerns about the possible

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1 impacts; with no specific plans to review, the impacts are unknown. *Henderson v. Kittitas Cy.*,
2 124 Wn. App. 747, 757, 100 P.3d 842, 847 (2004).

3 7. While the appraisal submitted by Kasar raises the possibility of loss in value to
4 the Ivar's site due to this rezone, it does not provide more than speculation on how the property
5 might be developed and how the setback requirements of the Transition Overlay District might
6 affect future specific development plans for the property, as there were none provided as
7 evidence. Kasar has not submitted a development proposal, even though it had over a decade
8 to do so after the comprehensive plan designation changed on the adjacent Toll property. In
9 addition, when and if Kasar decides to redevelop, the City's requirements may differ and it is
10 impossible to know how the Ivar's site may be affected by the Transition Overlay District, or
11 even whether the requirement will still be applicable at that time. In addition, Kasar may
12 petition the City to re-designate and rezone its property if it wishes to develop multi-family
13 housing on its property, as the appraisal it submitted indicates.

14 8. Kasar's appraisal was submitted to establish asserted material detriment. The
15 value was determined by assuming Kasar would develop at 30 units per acre, which would
16 more than likely require a rezone. Exhibit 1 at 268. In the event Kasar's property is rezoned
17 to R-30, the Transition Overlay District would no longer be applicable to its property.

18 9. Even if the rezone approval were to result in some loss of value to the Ivar's
19 site, the gravamen is the City's 2007 comprehensive plan amendment. This proposal is for an
20 implementing rezone to effectuate that plan designation. Kasar could have but did not appeal
21 the CPA within 60 days to the Growth Management Hearings Board. Kasar could have also
22 appealed the City's implementing development regulations in the Transition Area Overlay
23 District ordinance within 60 days to the Growth Management Hearings Board, but did not.
24 This rezone conforms to those prior-adopted designations and policy choices; therefore, the
25 Hearing Examiner recommends approval of the rezone.

10. Based on the evidence in the record, the Applicant has met its burden to show
that the rezone application should be approved. The adjacent property owner, Kasar, has not
demonstrated that approval of the rezone will result in material detriment to its property.
Kasar's claims are too speculative and remote to require denial of the rezone application.

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1 11. Any conclusion herein which may be deemed a finding is hereby adopted as
2 such.

3 **ORDER**

4 The Hearing Examiner **RECOMMENDS APPROVAL** of the rezone to the Bellevue
5 City Council with the following condition:

6 Approval of this Rezone does not constitute approval of any Land Use Code
7 amendments, project specific SEPA review, building permit approval or any
8 other ancillary permits that may be required for construction of any proposed
9 redevelopment on the rezone site.

10 **SO ORDERED**, this 26th day of November, 2018.

11 
12 Barbara Dykes Ehrlichman
13 Hearing Examiner

14 **NOTICE OF RIGHT TO APPEAL AND TIME LIMIT**

15 (Pursuant to Resolution No. 9473)

16 A person who submitted written comments to the Director prior to the hearing, or
17 submitted written comments or made oral comments during the hearing on this matter, may
18 appeal the recommendation of the Hearing Examiner to the Bellevue City Council by filing a
19 written statement of the Findings of Fact or Conclusions of Law which are being appealed, and
20 paying an appeal fee, if any, as established by ordinance or resolution, no later than 14 calendar
21 days following the date that the recommendation was mailed. The appeal must be received by
22 the City Clerk by **5:00 p.m. on Monday, December 10, 2018.**

23 **CITY COUNCIL CONSIDERATION**

24 Unless appealed, this matter has tentatively been scheduled to go before the City Council
25 on **Monday, January 28, 2019 at 6:00 pm** for discussion, and **Tuesday, February 19, 2019 at**

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8:00 pm for legislation. After **Monday, December 10, 2018**, interested persons may contact the Hearing Examiner's Office at (425) 452-6934 to find out whether an appeal has been filed.

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