

RESOLUTION NO. 1080

A WILSONVILLE CITY COUNCIL RESOLUTION ACCEPTING THE APPEAL OF THE PLANNING COMMISSION'S CONDITION OF APPROVAL NO. 17 FOR THE WILSONVILLE AUTOPARTS WHOLESALE (CASE FILE NO. 93 PC 35) BY REBCO PROPERTIES, APPLICANT, AND SETTING A PUBLIC HEARING DATE.

WHEREAS, RebcO Properties is the developer of a Planned Development Industrial (PDI) project commonly known as "Wilsonville Autoparts Wholesale" which is proposed to be sited on a 14.8 acre property that is located generally east of 95th Avenue, west of Boones Ferry Road/Interstate 5 and north of Camping World; and

WHEREAS, the Wilsonville Planning Commission considered this matter, after providing the appropriate public notice, at their regular hearing held on November 8, 1993 and, at that time, the Commission approved a Stage I Master Plan and Stage II Site Development Plans for a 200,000 sq. ft. warehouse; a storage lot for new automobiles and light trucks; and for three automobile sales buildings; and

WHEREAS, the Planning Commission, as a part of their approval, adopted thirty-seven (37) Conditions of Approval, including 19 planning conditions, that were applied to this project; and

WHEREAS, Mr. Jeffery H. Keeney, attorney for REBCO Properties, by his letter dated November 22, 1993, has filed a formal appeal of the Planning Commission's Condition of Approval No. 17; and

WHEREAS, the appeal letter was filed in a timely manner in accordance with Section 4.017, Appeal Procedures, of the Wilsonville Code and set forth the reasons for appeal of this matter and, additionally, said letter was received and accompanied by the appropriate appeal fee; and

WHEREAS, Mr. Keeney requests that City Council limit the public hearing of this appeal to consideration of Condition No. 17 (Case File No. 93 PC 35), the evidence in the existing record of the Commission's proceedings and that REBCO be permitted to introduce new and additional evidence regarding traffic issues; and

WHEREAS; Section 4.017 (6) Review Consisting of Additional Evidence or De Novo Review of the Code provides the following objective standards for the City Council to follow when exercising its discretion to limit the hearing to the record or to hear additional evidence or de novo review:

"(a) The reviewing body may hear the entire matter de novo; or it may admit additional testimony and other evidence without holding a de novo hearing if it is

satisfied that the additional testimony or other evidence could not reasonably have been presented at the prior hearing. The reviewing body shall consider all of the following in making such a decision:

- (1) Prejudice to the parties.
- (2) Convenience or availability of evidence at the time of the initial hearing.
- (3) Surprise to opposing party.
- (4) The competency, relevancy and materiality of the proposed testimony or other evidence.”.

NOW, THEREFORE, THE CITY OF WILSONVILLE RESOLVES AS FOLLOWS:

1. Based on the above recitals and Mr. Keeney's appeal letter, the City Council orders that the appeal hearing on 93 PC 35 - Wilsonville Auto Parts Wholesale - be set for February 7, 1994.
2. The appeal hearing, and notice thereof, shall be limited to consideration of Condition No. 17, as amended and adopted by the Planning Commission, and this issue will be heard de novo thereby allowing REBCO Properties and staff, any interested or affected parties to introduce additional evidence regarding traffic issues to supplement the existing record.

ADOPTED by the City Council of the City of Wilsonville at a regular meeting theror this 20th day of December, 1993, and filed with the Wilsonville City Recorder this same date.



GERALD A. KRUMMEL, Mayor

ATTEST:



VERA A. ROJAS, CMC/AAE, City Recorder

SUMMARY of Votes:

Mayor Krummel	<u>AYE</u>
Councilor Van Eck	<u>AYE</u>
Councilor Carter	<u>AYE</u>
Councilor Hawkins	<u>AYE</u>
Councilor Lehan	<u>AYE</u>



City of
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MEMORANDUM

TO: HONORABLE MAYOR and CITY COUNCIL

FROM: Michael E. Kohlhoff, City Attorney

DATE: December 20, 1993

RE: REBCO Properties - Wilsonville Auto Parts Wholesale
93PC35

REBCO Properties has appealed condition No. 17 of its approval in 93PC35. Its appeal is attached.

Once appealed, the Council has the discretionary authority to hear the whole application *de novo*, or on the record or limit the appeal to certain issues, such as condition No. 17 and hear the issues either *de novo* as requested or limited to the record. I so advised the attorney for the applicant (letter attached).

Hearing the whole application *de novo* raises a number of policy issues. One is based on your level of comfort with the Planning Commission making overall sound decisions in applying criteria to the facts. If you are generally comfortable with their decision making, then you may not wish to hear the whole application *de novo*, but rather limit your oversight to matters as they come to you on appeal or by call-up for issues of special concern.

However, if you are looking for further policy analysis as whether to hear this matter fully and *de novo* on appeal, then you may wish to consider whether you are doing so in a manner which means you are setting a precedent for all other appeals, i.e. all appeals as a custom and practice will be heard fully and *de novo*, and if so, will you be placing yourself in a position of appearing to be second guessing the Planning Commission and undermining their performance; or, are you doing so in a manner which communicates that this particular project is distinguishable by itself as precedent setting and thereby presents a special or unusual case that merits such an approach? This latter rationale needs to be carefully developed; otherwise you may be perceived as selectively causing the use of property to jump through more hoops because it is not a favored use as opposed to measuring the use against clear and objective land use criteria which may be precedent setting in application or interpretation.

For example, whether a vehicle staging area to detail new vehicles prior to being sent to distributorships with accompanying new car sales is a needed or even a wanted use is not a Stage I or Stage II land use decision. When zones are established, they categorize applicable uses. The City zoning code authorizes mixed uses. Therefore, an example of objective criteria is whether the commercial use is limited to 20% of the property site or if the retail or sales are designed to take place in wholly enclosed areas. Another example is whether the car storage area as an industrial use is adequately screened and buffered. Given that the site is primarily industrial and has certain constraints because of overhead B.P.A. power lines and restrictions of height limitation for landscape materials, is there adequate screening and buffering? Taking these examples of objective criteria, then whether you wish to review the application as a whole or even select certain issues of the Planning Commission application and interpretation of criteria, you would be well served to do so in terms of first making a policy determination of whether the issue(s) merit a review because it is/they are of such precedent setting value as to outweigh other policy considerations.

This apparently is also the approach that the petitioner has taken. The appeal, in effect, accepts that the Planning Commission appropriately interpreted and applied all clear and objective criteria in imposing conditions of approval even if the applicant disagrees to some extent with the conditions, but for condition No. 17. The appellant's seminal argument is that the application of WC 4.139(4)(b) is limited to the level of service "of existing or immediately planned arterial and collector streets" which the City has jurisdiction over and using the level of service at Boones Ferry Road/Commerce Circle as a standard of measurement is inappropriate because the City does not have jurisdiction over this intersection. The precedent that you are determining is whether it is appropriate to measure level of service of City streets at an intersection which the City has no jurisdiction over. Secondly, the applicant is arguing that even if Condition No. 17 is appropriate to impose such a condition, the timing involved amounts to nullification of the approval. However, the Code does provide for an extension of such an approval

The nexus of the level of service standard ties into the Comprehensive Plan to measure the adequacy of the City's street capacity. It envisions exactions such as street dedications or signal light installations. If the City has no jurisdiction over the intersection, it has no jurisdiction to require a developer to correct the problem as permission must be secured from the third party in control. The appeal appears to have merit on its face.

This has an obvious ramification on whether any other issues should be examined. Nevertheless, in balance, you may determine that only condition No. 17 should be heard. Staff supports that this condition be heard *de novo*.

Staff recommends that in balance Council hear the appeal only as to condition No. 17 and to do so *de novo* to any interested party on this issue only.

mek:dp
enclosures

TONKON, TORP, GALEN, MARMADUKE & BOOTH

ATTORNEYS AT LAW

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JEFFREY H. KEENEY

COPY

November 22, 1993

VIA MESSENGER AND
FIRST-CLASS MAIL

City of Wilsonville
Planning Department
Community Development Building
8445 SW Elligsen Road
Wilsonville, OR 97070

Re: Notice of Appeal / Wilsonville Autoparts Wholesale
File No. 93PC35 / Decision Dated November 16, 1993

Ladies and Gentlemen:

We represent REBCO Properties, the applicant with respect to the above-referenced matter.

On November 8, 1993, the Wilsonville Planning Commission approved REBCO's Stage I Master Plan and Stage II Site Development Plans for a 200,000 square-foot wholesale auto parts warehouse, three new automobile dealerships and an automobile storage lot to be constructed on a 14.8 acre site located on 95th Avenue (the Project). As set forth in the Notice of Decision dated November 16, 1993 (the Decision), approval of the Project was subject to 19 conditions of approval, 14 of which were previously recommended by Planning Staff and 5 of which were added by the Planning Commission at the hearing.

The Decision, and all but one of the conditions of approval, are acceptable to REBCO. The sole purpose of this letter is to appeal Condition No. 17 to the Wilsonville City Council. Condition No. 17 states:

The applicant shall delay construction of this project until the 95th Avenue link to Commerce Circle is completed by ODOT and construction

*started on the Stafford Road/I-5 Interchange.
(Emphasis added.)*

For the following reasons, REBCO requests that this condition be deleted in its entirety:

- Primary jurisdiction for traffic-related issues is delegated to the Traffic Advisory Committee. At its September 22, 1993 hearing, the TAC, relying on a Traffic Report prepared by the City's traffic consultant, DKS Associates, voted *unanimously* to approve the Project without conditions relating to traffic impacts.

- Under Section 4.139(4)(b) of the Wilsonville Zoning Code, the Planning Commission's jurisdiction with respect to traffic-related issues is limited to impacts on "existing or immediately planned arterial or collector streets". As noted below, all intersections in the vicinity of the Project on City arterial and collector streets, i.e., 95th Avenue/Ridder Road and 95th Avenue/Commerce Circle North, will continue to operate at acceptable LOS following construction of the Project. The Planning Commission erred in imposing a condition based on the LOS at the Boones Ferry Road/Commerce Circle North intersection, as this intersection is solely within the jurisdiction of ODOT, not the City.

- As set forth in the Traffic Report, while the Project will add traffic to existing conditions, it will not by itself significantly change operating conditions at the affected intersections, even prior to the construction of the Stafford Interchange Improvements. This conclusion was based upon the following findings:

- Four of the five affected intersections (i.e., 95th Avenue/Ridder Road, Boones Ferry Road/Commerce Circle North, 95th Avenue/Commerce Circle North and 95th Avenue/Commerce Circle South) will continue to operate at acceptable LOS following construction of the Project, even at peak hours.
- Only one intersection, i.e., Boones Ferry Road/Commerce Circle North, will operate at an unacceptable LOS during peak periods following construction of the Project. Even assuming the Planning

Commission had authority to take this intersection into account in making its decision, (i) this intersection will only operate at an unacceptable LOS for left turn movements from Commerce Circle North to Boones Ferry Road (only 10 percent of total peak hour traffic and five percent of the anticipated Project traffic will be making this turn movement)--the majority of traffic through the intersection will continue to operate at LOS A, with little or no delay; (ii) LOS F does not result in failure of an unsignalized intersection; and (iii) following construction of the Stafford Interchange Improvements, this intersection will operate at LOS C.

- o A substantial amount of the traffic generated by the Project will be non-peak, i.e., Saturday and evenings. During these non-peak hours, all intersections in the vicinity of the Project, including the Boones Ferry Road/Commerce Circle North intersection, will continue to operate at acceptable LOS following construction of the Project.

• By its terms, the Decision will expire on November 8, 1995 unless development commences prior to such date. As acknowledged by the Planning Commission, it is unlikely that the Stafford Interchange Improvements will be commenced before November 8, 1995. As such, Condition No. 17 virtually nullifies the Decision and, in essence, imposes a development moratorium on the property.

Pursuant to Section 4.017 of the Wilsonville Zoning Code, REBCO hereby requests that the appeal be limited to consideration of Condition No. 17 and the evidence contained in existing record, with the exception that REBCO be permitted to introduce additional evidence regarding traffic issues.

City of Wilsonville
November 22, 1993
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Kindly advise me of the scheduled hearing date as soon as possible.

Sincerely,

Jeffrey H. Keeney

JHK/mmd

copy: Mr. Ronald B. Tonkin
Mr. Edward C. Tonkin
Mr. Robert W. Price
Mr. William E. Ruff
Mr. Mel J. Stoudt
Mr. Robert M. Dant
Schneider National, Inc. (Attn. Mr. Stephen M. Ferris)
Mr. Stu Peterson

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December 8, 1993

Mr. Jeffrey H. Keeney
Tonkon, Torp, Galen, Marmaduke & Booth
Attorneys at Law
1600 Pioneer Tower
888 SW Fifth Avenue
Portland, OR 97204-2099

Re: Wilsonville Auto Parts Wholesale - 93PC35

Dear Mr. Keeney:

At its December 20, 1993 meeting, the City Council will determine whether the appeal of the condition #17 of the Planning Commission approval should be (1) limited to only that condition appealed, and (2) whether the hearing should be *de novo* or on the record. Your client has the right to be heard in argument in this regard.

It also appears that the earliest time the City Council could hear the appeal matter is at a February '94 meeting due to the holidays and the fact there is a scheduling conflict caused by a holiday for the second meeting in January, 1994. Please advise if this meets with your client's consent as while you have an approval and the 120-day rule does not appear to apply, I think it best that you are in agreement.

Thank you.

Very truly yours,

Michael E. Kohlhoff
City Attorney

mek:dp

cc: Wayne Sorensen