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KING COUNTY SUPERIOR COURT

IRENE WALL and ROBERT MORGAN,

Petitioners,

v.

CITY OF SEATTLE, a Washington  
Municipal Corporation; 70<sup>th</sup> &  
GREENWOOD AVE, LLC and OJD, LLC,  
Washington limited liability companies,

Respondents

No.

LAND USE PETITION  
(Ch. 36.70C RCW)

Pursuant to the Land Use Petition Act, Chapter 36.70C RCW, and Article IV,  
Section 6 of the Washington State Constitution, Irene Wall and Robert Morgan bring this  
action and allege as follows:

**1. NAME AND MAILING ADDRESSES OF PETITIONERS**

Irene Wall  
207 N. 60<sup>th</sup> Street  
Seattle, WA 98103

Robert Morgan  
559 N. 74<sup>th</sup> Street  
Seattle, WA 98103

1                   **2. NAME AND MAILING ADDRESS OF PETITIONERS' ATTORNEYS**

2                   Jeffrey M. Eustis  
3                   ARAMBURU & EUSTIS, LLP  
4                   720 Third Avenue, Suite 2000  
5                   Seattle, Washington 98104

6                   **3. NAME AND MAILING ADDRESS OF LOCAL JURISDICTION WHOSE**  
7                   **LAND USE DECISION IS AT ISSUE**

8                   City of Seattle  
9                   600 Fourth Avenue  
10                  Seattle, Washington 98104

11                  **4. THE DECISION-MAKING OFFICERS AND DECISIONS APPEALED**

12                  4.1    The decision-making officers reaching the appealed decision are:

13                  City of Seattle City Council ("Council")  
14                  Bruce Harrell, President  
15                  600 Fourth Avenue  
16                  Seattle, Washington 98104

17                  4.2    On August 6, 2018, The Seattle City Council, acting in its quasi-judicial  
18                  capacity pursuant to SMC 23.76.056, approved a contract rezone for two commercial  
19                  parcels at 7009 Greenwood Avenue North that upzoned those lots to NC2-55(M) (fifty-  
20                  five foot height limit) from their current zoning of NC2-40 (forty foot height limit) and  
21                  authorized the construction of a five story building right on the shared property line with  
22                  the adjacent single family zone along the rear boundary, with only a minimal setback on  
23                  the fifth floor. The Clerk File for this project is # 314356 entitled "Application of 70<sup>th</sup> &  
24                  Greenwood Ave LLC to rezone an approximately 12,188 square foot site located at  
25                  7009 Greenwood Avenue North from Neighborhood Commercial 2 with a 40-foot height  
26                  limit (NC2-40) to Neighborhood Commercial 2 with a 55-foot height limit and Mandatory  
27                  Housing Affordability suffix (NC2-55(M)) (Project No. 3023260; Type IV)."

1           4.3    To implement that decision, the Council adopted Findings and  
2 Conclusions and passed Council Bill (“CB”) 119323, along with a Property Use and  
3 Development Agreement (“PUDA”). The formal title is “An Ordinance relating to land  
4 use and zoning; amending Chapter 23.32 of the Seattle Municipal Code at page 39 of  
5 the Official Land Use Map to rezone property located at 7009 Greenwood Avenue North  
6 from Neighborhood Commercial 2 with a 40-foot height limit to Neighborhood  
7 Commercial 2 with a 55-foot height limit and mandatory housing affordability suffix, and  
8 accepting a Property Use and Development Agreement as a condition of rezone  
9 approval. (Petition by 70<sup>th</sup> & Greenwood Ave LLC, C.F. 314356, SDCI Project  
10 3023260).”

11           4.4    A copy of the Council’s Findings and Conclusions is set forth at Appendix  
12 A to this Petition. Copies of the Ordinance and the associated Property Use and  
13 Development Agreement (“PUDA”) and related documents are set forth at Appendix B  
14 to this Petition.

15           **5.       IDENTIFICATION OF PERSONS TO BE MADE PARTIES UNDER RCW**  
16           **36.70C.040(2)(B) THROUGH (D)**

17           5.1    The local jurisdiction is:

18                   City of Seattle  
19                   600 Fourth Avenue  
20                   Seattle, Washington 98104

21           5.2    Upon information and belief, the owner of the Property is 70<sup>th</sup> &  
22 Greenwood, LLC. The mailing address for this entity, according to the records at the  
23 Seattle Department of Construction and Inspections (“SDCI”) that processed this  
application, is:

1 Chad Dale, Registered Agent and Governor  
2 70th & Greenwood LLC  
3 3621 Stone Way N Unit #E  
4 Seattle, WA 98103

5 5.3 The Property Use and Development Agreement, which must be executed  
6 by the legal or beneficial owner of the property to be rezoned (SMC 23.34.004), was  
7 executed by 70<sup>th</sup> & Greenwood LLC, and signed by its manager OJD LLC and its  
8 Manager Chad Dale. Upon information and belief, the address for OJD LLC, according  
9 to the Secretary of State corporate office is:

10 OJD LLC  
11 7511 Greenwood Ave N, #710  
12 Seattle, WA 98103

13 5.4 The Application was filed by David Fuchs, the architect for and  
14 representative of the contract rezone applicant, 70<sup>th</sup> & Greenwood LLC To the extent  
15 necessary for the just adjudication of this Petition, David Fuchs and/or his architectural  
16 firm, shall be promptly joined as named parties to this Petition. Upon information and  
17 belief, the mailing address for the David Fuchs is set forth below, at which he is being  
18 served with a copy of this petition:

19 David Fuchs, Architect  
20 Johnston Architects  
21 100 NE Northlake Way, Suite 200  
22 Seattle, WA 98105

23 5.5 At all times in proceedings, the owner and applicant have been  
represented by counsel, who is listed as a party of record in the Hearing Examiner  
proceedings. Upon information and belief, the mailing address for Applicant's counsel  
is:

Jessica Clawson  
McCullough Hill Leary PS  
Columbia Center  
701 5th Avenue, Suite 6600  
Seattle, WA 98104

5.6 Pursuant to RCW 36.70C.050, Petitioners will join any additional parties identified to them as necessary for the just adjudication of this Petition.

**6. FACTS DEMONSTRATING STANDING PURSUANT TO RCW 36.70C.060**

6.1 Petitioners Irene Wall and Robert Morgan are longtime residents of the Phinney Ridge neighborhood in Seattle where the project at issue is located. Ms. Wall is a board member and former president of the Phinney Ridge Community Council. Mr. Morgan is a retired member of Seattle City Council Central Staff. Ms. Wall and Mr. Morgan provided comments during the various public processes that were required for this project and appealed the Hearing Examiner's Recommendation to the City Council pursuant to SMC 23.76.054.

6.2 Petitioners are aggrieved, adversely affected and prejudiced or likely to be prejudiced by the Decision challenged in this Petition. The approved rezone, and the project approved through the Council's action, would directly and adversely affect the Petitioners because: it allows development of a structure that would exceed the height and scale allowed in the unambiguous provisions of the City's Land Use Code; it produces a scale of development incompatible with the surrounding neighborhood; it unlawfully opens the door to Code application and zoning decisions based on property ownership instead of established Land Use Maps and Code requirements; it risks exposing all of the Phinney Ridge Urban Village in this area (and elsewhere in the City)

1 to similar outsized and unlawful buildings that would diminish residents' access to light,  
2 view and air and the required separation between buildings in commercial zones and  
3 abutting single family residence zones, all of which impact petitioners by increasing  
4 traffic congestion and diminishing their aesthetic enjoyment of the Phinney Ridge  
5 neighborhood. The Council's action also adversely affects the Petitioners procedurally  
6 because the Council knowingly violated the law to approve this project, admitted as  
7 much in the approving Ordinance, and such action undermines the Petitioners' ability to  
8 rely on the function and purpose of a Land Use Code that is intended to shape  
9 development of all areas of Seattle.

10       6.3     The interests of Ms. Wall and Mr. Morgan are among those that the local  
11 jurisdiction was required to consider when it made the land use decision. When SDCI  
12 wrote its Recommendation on the Rezone, it was required to (but failed to) respond to  
13 public comments. Petitioners had submitted comments to SDCI. The Hearing  
14 Examiner was required to consider the public comments received by SDCI in addition to  
15 comments and public testimony received at the open record hearing on this project.

16       6.4     Ms. Wall and Mr. Morgan were qualified appellants in their appeal to the  
17 City Council because they had submitted comments to SDCI regarding this project and  
18 Ms. Wall also testified at the public hearing before the Hearing Examiner on April 30,  
19 2018, and their appeal was timely. SMC 23.76.054.A. The City Council was required to  
20 consider the Record before issuing its decision. The issues raised on appeal by Ms.  
21 Wall and Mr. Morgan mirrored the legal issues that had been raised before – but  
22 ignored by – SDCI and the Examiner in their recommendations to upzone and approve  
23 this project.

1           6.5     Among other purposes, the Seattle Land Use Code sets forth regulations  
2 and procedures for the use of land that are consistent with and implement the City's  
3 Comprehensive Plan, classify land within the City into various land use zones in order to  
4 regulate uses and structures, and include provisions designed to provide adequate light,  
5 air, access, and open space, and maintain a compatible scale within an area. SMC  
6 23.02.020. The Land Use Code dictates specific requirements that must be met before  
7 a property is upzoned through a site-specific contract rezone, SMC 23.34.007-009, and  
8 criteria for each zone, e.g., SMC 23.34.010 - .128. The Land Use Code also requires,  
9 through various Code provisions and in its mandatory rezone criteria, setbacks and  
10 transitions between commercial and residential properties that apply citywide,  
11 regardless of building height. The Council's approval of the 7009 contract rezone  
12 defeats those purposes because: it allows for construction of a five story building right  
13 on the property line shared with the single family zone (except for a minimal setback on  
14 the fifth floor) when the Code requires a gradual transition between zones and specifies  
15 substantially greater setbacks; it conflicts with the uniform zoning that has always been  
16 in place in the immediate vicinity of the project; it creates a structure out of scale with  
17 the surrounding neighborhood that conflicts with the requirements of the City's Land  
18 Use Code; and it effectively rezones a vacant single family lot without following proper  
19 procedures by removing that lot from future use for a single family dwelling, but instead  
20 incorporating it into a multi-family development for use as a buffer to the single-family  
21 zone and to provide pedestrian access for retail uses on the abutting commercial lots.

22           6.6     A judgment in favor of Ms. Wall and Mr. Morgan would eliminate the  
23 prejudice caused or likely to be caused by the Decision because, without the Council

1 approval of this project, the Project in its current form could not be built under the Land  
2 Use Code. A ruling that the Council Decision is unlawful and the proposed construction  
3 impermissible would also confirm that the Council, acting in its quasi-judicial capacity, is  
4 bound by existing legislative standards and may not knowingly acknowledge that a  
5 proposal is untethered to any law, definition, or City policy but authorize that project  
6 regardless of those legal deficiencies.

7         6.7 Ms. Wall and Mr. Morgan have exhausted their administrative remedies to  
8 the extent that such remedies exist. Ms. Wall and/or Mr. Morgan submitted numerous  
9 comments to SDCI regarding this project since the project was first proposed in August  
10 2016; they testified at the Hearing Examiner open record hearing on April 30, 2018; they  
11 submitted written comments to the Hearing Examiner; and they timely appealed the  
12 Hearing Examiner's Recommendation to the Seattle City Council pursuant to SMC  
13 23.76.054 (Council consideration of Hearing Examiner recommendation on Type IV  
14 Council land use decisions).

## 15         7.         **STATEMENTS OF ERROR AND SUPPORTING FACTS**

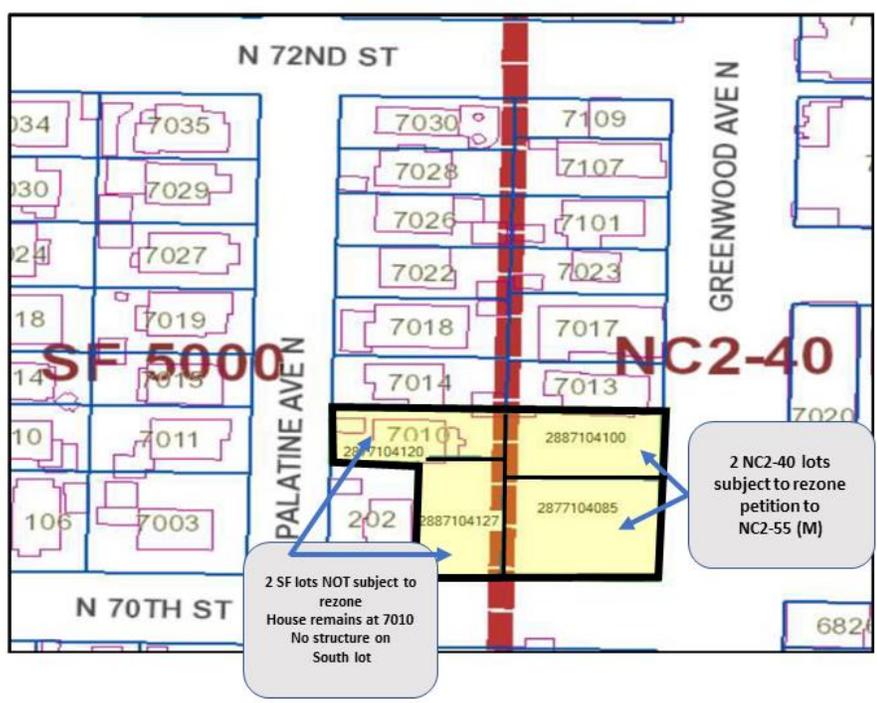
16         7.1         **The Rezone is unlawful because it violates the one and only**  
17 **mandatory directive for contract rezones in the Land Use Code that “[a] gradual**  
18 **transition in height and scale and level of activity between zones shall be**  
19 **provided unless major physical buffers . . . are provided.” SMC 23.34.009.D.2.**

20         7.1.1 The appealed action involves four adjacent lots at the northwest  
21 corner of Greenwood Avenue North and North 70<sup>th</sup> Street in the Phinney Ridge  
22 neighborhood, all owned by the Applicant. Two commercial lots totalling approximately  
23 12,000 square feet front on Greenwood Avenue North in the “Phinney Tail” of the  
Greenwood Phinney Urban Village. The two single family lots abut the entire west

1 boundary of the commercial lots where the property line separating the lots is the same  
2 as the zoning line for the whole block that separates the commercial lots on the east  
3 from the abutting single family lots to the west. One single family lot is a vacant, mid-  
4 block lot. The other, at 7010 Palatine Avenue North, is developed with a house, garage,  
5 and rear deck.

6           7.1.2 The Applicant applied for a contract rezone of the two commercial  
7 lots facing Greenwood Avenue North and expressly excluded the two single family lots  
8 from the application. SMC 23.34.004. The original application sought a rezone from  
9 NC2-40 to NC2-65, self-limited to 55 feet in height. In February 2018, the Applicant  
10 withdrew the original application and resubmitted a revised application that sought a  
11 rezone to NC2-55(M), the new proposed fifty-foot height limit that is part of proposed  
12 legislation but has not been implemented citywide, and does not exist in the Phinney  
13 Ridge neighborhood. The revised application did not materially change the proposed  
14 building or its location, scale, or height. The map below shows the four lots at issue:

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7.1.3 The proposed five-story building would contain commercial uses on the ground floor and residential units on the four upper floors; it would rise four stories directly on the shared property line with the adjacent single family-zoned lots along the rear boundary, with the fifth floor setting back approximately six feet from the zoning boundary. The building would be topped with a massive greenhouse structure with a twelve foot high roof, along with a massive solar array, raising the effective height of the building to almost seventy feet. In several public meetings, the owner representative, Chad Dale, explained that a group of friends would own the building and live in the units on the top two floors, and the lower two floors would be rentals available to the public.

1           7.1.4 The 7009 Greenwood site is located in the middle of the one-mile  
2 long, one-street wide “Phinney Tail” of the Greenwood Phinney Ridge Urban Village. All  
3 of the lots along Greenwood Avenue North are now zoned NC2-40 (forty foot height  
4 limit). This stretch of Greenwood has historically been consistently and uniformly zoned  
5 to the same height limit. The nearest lot at a height greater than 40 feet is almost one  
6 mile away in the Greenwood Town Center area. Petitioners are not aware of any other  
7 contract rezone that was approved where there were no other lots of a higher height in  
8 the immediate area.

9           7.1.5 Although this area is listed among the areas proposed for upzoning  
10 to NC2-55 in the proposed Mandatory Housing and Affordability (MHA) legislation, and  
11 the Examiner made frequent reference to that potential area-wide upzone, that  
12 legislation is still in draft form that has not enacted by the Council, and has not even  
13 been formally presented. The EIS for this proposed legislation is currently in litigation  
14 and as a result, the Council may not lawfully act on any MHA legislation until that  
15 litigation is resolved.

16           7.1.6 Contract rezones are Type IV quasi-judicial decisions made by the  
17 City Council. In a Type IV proceeding the Hearing Examiner conducts an open record  
18 hearing to establish a Decision Record, and issues a Recommendation along with  
19 Findings and Conclusions for the Council’s review.

20           7.1.7 The Land Use Code identifies the criteria necessary to grant a  
21 contract rezone. SMC 23.34.007-009. “No single criterion or group of criteria shall be  
22 applied as an absolute requirement or test of the appropriateness of a zone designation,  
23 nor is there a hierarchy or priority of rezone considerations, unless a provision indicated

1 the intent to constitute a requirement . . . “ SMC 23.34.007.B (emphasis added). But  
2 when a contract rezone involves a height increase, as in the case of the challenged  
3 development, SMC 23.34.009.D.2 mandates that “[a] gradual transition in height and  
4 scale and level of activity between zones shall be provided unless major physical  
5 buffers, . . . are present.” (Emphasis added).

6 7.1.8 But in the case at hand, despite substantial evidence to the  
7 contrary, the Examiner recommended approval of the rezone. The Examiner’s Findings  
8 and Conclusions are set forth at Appendix C. The Examiner, citing only to a site-plan  
9 drawing provided by the Applicant, claimed that “[a] gradual transition between zoning  
10 categories would occur between the mid-portion of the project and the SF 5000 zoned  
11 properties to the west, as a private open space area will be landscaped to provide some  
12 separation between the five story building and the single family zone.” (Examiner  
13 Conclusion #7 (emphasis added). The referenced map, however, reveals that the  
14 vacant lot that the Examiner claimed provided a “gradual transition between zoning  
15 categories” is wholly within the single family zone itself and it is not an open space  
16 separating zoning categories. Moreover, even if it could be considered a qualifying  
17 open space, it occupies only two thirds of the rear boundary line. There is no “open  
18 space” in the northern third of the property line. That area is the small backyard of the  
19 single family lot at 7010 Palatine. And there is no open space separating the northwest  
20 corner of the commercial building from the single family house and yard on Palatine  
21 Avenue that abuts the northwest corner of the commercial lot with the five story building.

22 7.1.9 At oral argument to the Council Planning, Land Use, and Zoning  
23 Committee (“PLUZ Committee”) on August 1, 2018, Petitioners presented – and the

1 Committee accepted and considered – an illustrative exhibit that showed, using the  
2 same site plan drawing that the Examiner had relied on and that Council Central Staff  
3 had incorporated into his presentation, that the vacant single family lot referenced by  
4 the Examiner was in the single family zone, not an open space between zones as the  
5 Code required. A copy of the illustrative exhibit that was presented to – and accepted  
6 and considered by -- the PLUZ Committee and made available to all Council members  
7 is set forth at Appendix D. The illustrative exhibit summarized several key arguments  
8 raised on appeal and in Petitioners’ briefing to the Council.

9           7.1.10 The Council’s decision on a Type IV land use decision including a  
10 contract rezone is required to be based on applicable law and supported by substantial  
11 evidence in the record. SMC 23.76.056. The appellant bears the burden of proving the  
12 Hearing Examiner’s recommendation should be rejected or modified. *Id.* Although the  
13 Council recited this standard in its Findings and Conclusions, it simply adopted the  
14 Examiner’s Findings and Conclusions without question and without any changes.

15           7.1.11 The Council’s decision to approve the Rezone was an erroneous  
16 interpretation and application of the law, even after allowing for such deference as is  
17 due the construction of law by a local jurisdiction with expertise. RCW 36.70C.130(b).  
18 The Council was provided specific legal and factual analysis that demonstrated the fatal  
19 error in the Examiner’s Recommendation to grant the Rezone.

20           7.1.12 For the reasons noted above, the Council’s Decision was not  
21 supported by evidence that is substantial when viewed in light of the whole record  
22 before the court, RCW 36.70.130(c), and was a clearly erroneous application of the law  
23 to the facts. RCW 36.70C.130(d).

1           **7.2     The Council Action was unlawful because it violated additional**  
2           **mandatory rezone criteria for height increases in SMC 23.34.009.**

3                     7.2.1   The facts alleged at §7.1.1 to 7.1.12 are re-alleged here.

4                     7.2.2   Where here, a rezone request involves a height increase, SMC  
5           23.34.009.A states that “Height limits shall be consistent with the type and scale of  
6           development intended for each zone classification.” As noted above, the 7009  
7           Greenwood site is in the middle of the one-mile long, one-street wide “Phinney Tail” of  
8           the Greenwood Phinney Ridge Urban Village, where all commercial lots are zoned  
9           uniformly to NC2-40, and the nearest zone of greater height is almost one mile away.

10                    7.2.3   SMC 23.34.009.B states that “the likelihood of view blockage shall  
11           be considered.” (Emphasis added.). The Examiner failed to evaluate the impact of this  
12           project on views of the Olympic Mountains that are specifically protected in SMC  
13           23.47A.1.c, despite uncontroverted photographic evidence in the Record that proved  
14           that construction of a 55+ foot building on this site would block Olympic Mountain views  
15           from the commercial lots to the east, and written and oral testimony that such  
16           construction would be prohibited if proposed in the existing NC2-40-zone pursuant to  
17           SMC 23.47A.012.A.1.c.

18                    7.2.4   SMC 23.34.009.C.1 requires that height limits established by  
19           current zoning in the area shall be given consideration. In the area of the 7009 project,  
20           the commercial stretch of Greenwood Avenue is zoned uniformly at NC2-40. Every  
21           commercial lot shares a rear boundary with a single family lot in the abutting single  
22           family zones on both the east and west sides of Greenwood Avenue North. SMC  
23           23.34.009.C.2 requires that “permitted height limits shall be compatible with the

1 predominant height and scale of existing development” and SMC 23.34.009.D.1  
2 requires that height limits for an area shall be compatible with actual and zoned heights  
3 in surrounding areas.

4 7.2.5 The Council’s decision to upzone an isolated parcel in a uniformly  
5 zoned area is not supported by substantial evidence in the record and represents a  
6 clearly erroneous application of the law to the facts. RCW 36.70C.130(c)&(d).

7 7.2.6 The Council’s decision to allow a 55+ foot building on a site where  
8 the substantial and uncontroverted evidence proves it would block views of the Olympic  
9 Mountains from commercial lots in the NC zone is not supported by substantial  
10 evidence in the record and represents a clearly erroneous application of the law to the  
11 facts. RCW 36.70C.130(c)&(d).

12 7.2.7 The Council’s decision to allow a 55+ foot building, with an effective  
13 height of almost 70 feet given the rooftop greenhouse and solar panels, in an area that  
14 is zoned uniformly at NC2-40 on the commercial street and uniformly at SF-5000 along  
15 the rear boundaries of every commercial lot is not supported by substantial evidence in  
16 the record and represents a clearly erroneous application of the law to the facts. RCW  
17 36.70C.130(c)&(d).

18 **7.3 The Council Action was issued in violation of Land Use Code**  
19 **because it violates provisions of the General Rezone Criteria in SMC 23.34.008.**

20 7.3.1 The facts alleged at §7.1.1 to 7.2.7 are re-alleged here.

21 7.3.2 .SMC 23.34.008 specifies general rezone criteria that must be  
22 considered before a contract rezone is granted.  
23

1           7.3.3 As alleged in Petitioners' appeal to the Council, the Hearing  
2 Examiner's Findings and Conclusions, which the Council adopted in full without any  
3 changes, reflected an incorrect understanding of the project, the lots involved in the  
4 project, and the development in the surrounding area.

5           7.3.4 The Council decision is an erroneous interpretation of the law and a  
6 clearly erroneous application of the law to the facts because it ignores the numerous  
7 short-comings and mischaracterizations in the Examiner's decision.

8           7.3.5 The Council decision is not supported by substantial evidence  
9 because it adopted the Examiner's Findings and Conclusions despite numerous  
10 evidentiary and legal errors identified by Petitioners in their appeal.

11           **7.4 The Council Action that allowed construction of a five-story building**  
12 **rising several stories right on the shared boundary line dividing the commercial**  
13 **lots from the adjacent single family lots was unlawful because the Council**  
14 **knowingly authorized a building that violated various Land Use Code provisions**  
15 **governing setbacks between commercial and residential zones, and access**  
16 **across zones, and the Council admitted that the rationale SDCI had used to allow**  
17 **this building to evade Land Use Code requirements had no basis in the Land Use**  
18 **Code regulations or definitions or in Council policy.**

19           7.4.1 The facts alleged at §7.1.1 to 7.3.5 are re-alleged here.

20           7.4.2 After the original Application had been submitted, and in response  
21 to a SDCI Correction Notice that required the proposed building to comply with setback  
22 requirements in SMC 23.47A.014, the project applicant drew an imaginary line around  
23 its four separate legal lots and deemed the area a "development site," a term undefined  
in the Land Use Code. With the approval of a complicit SDCI, a Hearing Examiner that  
ignored this issue entirely, and a Council that knowingly looked the other way, the  
Applicant then claimed that numerous unambiguous Code requirements did not apply

1 because the so-called “development site” had, in effect, erased all legal lot lines  
2 separating its four legally separate lots, even though each lot had a separate tax parcel  
3 number and only the two commercial lots were included in its contract rezone  
4 application. The net result is approval of a building substantially larger than the Code  
5 allows, that consumes the light and air corridor that should have separated this building  
6 from the adjacent single family zone, and that relies on unlawful access across the  
7 single family zone for entry and egress for commercial uses.

8           7.4.3 SMC 23.47A.014 mandates three discrete setback requirements for  
9 mixed use buildings when the commercial lot abuts a lot in a single family zone: (1)  
10 SMC 23.47A.014.B.1 mandates a fifteen-foot, no-build triangle at the corner of a  
11 commercial lot that abuts a side lot line of a residential lot; (2) SMC 23.47A.0154B.3  
12 requires a fifteen-foot setback for all floors above the first floor when a commercial lot  
13 abuts a lot in a single family zone, and an additional setback of two feet per ten feet of  
14 additional height above forty feet; and (3) SMC 23.47A.014.B.5 prohibits windows and  
15 doors on a commercial building within five feet of the lot line. In addition, the proposed  
16 MHA legislation recommends an additional setback for all heights above 40 feet to  
17 preserve the light and air corridor for the adjacent single family zone. The approved  
18 building at 7009 Greenwood violates all of these provisions because SDCI deemed all  
19 four parcels a so-called “development site” even though that term is undefined in the  
20 Land Use Code and this project did not comply with SDCI’s own guidance on how to  
21 establish a “development site.”

22           7.4.4 The image below, from the Applicant’s material in the record, shows the  
23 rear (west) side of the building rising right on the property line at the walkway and

1 grassy area on the left side. Based on scaled drawings, all portions of the approved  
2 building above the first floor, approximately back through the first window on the side  
3 facing right, are unlawful, as are the entire corner of the building at the driveway and the  
4 first floor itself , because it is five feet too close to the west side property line.



14 ▲ looking NE to project from N 70th St with upper  
15 floor setback and mid-block modulation

16 7.4.5. SMC 23.42.030.A (Access to Uses) prohibits a single family lot  
17 from providing pedestrian access to a commercial use in a commercial zone because  
18 commercial uses are not allowed in single family zones. But the 7009 Greenwood  
19 building, with its retail doors right on the zoning boundary line, relies on a pedestrian  
20 walkway across the single family zone to access the retail use in that area. See e.g.,  
21 Illustrative Exhibit at Appendix D. Because SDCI called all four lots a “development  
22 site,” it allowed this unlawful access.

1           7.4.6 The Council rejected Findings and Conclusions that would have  
2 upzoned the commercial lots as requested but would have required compliance with  
3 these Code provisions. Instead the Council admitted that SDCI’s so-called  
4 “development site” had no basis in law, and then allowed the Code violations anyway.

5           7.4.7 In CB119323 that upzoned the 7009 property and approved the  
6 proposed building, the Council specifically stated that “the Council has not yet made a  
7 policy decision reflected in regulations or definitions in the Land Use Code about the  
8 implications of development sites when a project is proposed for a site that includes a  
9 single family zone designation and another more intensive zone designation.”

10 (Emphasis added). The Council did not discuss or pronounce a new policy or Code  
11 changes at that time; it left that decision for another day, stating that it “intends to  
12 address policy issues related to ‘development sites,’” but with no additional clarification  
13 about the substance or timing of that issue. *Id.*

14           7.4.8 The Council engaged in unlawful procedure and acted outside its  
15 authority when it upzoned 7009 Greenwood and knowingly authorized a building that  
16 violated the Land Use Code when it admitted that SDCI’s rationale for ignoring  
17 unambiguous Code requirements was unfounded in Land Use Code regulations or  
18 definitions or City policy. The Council’s Decision was classified as a Type IV Decision  
19 under the Land Use Code. “Type IV decisions are quasi-judicial decisions made by the  
20 Council pursuant to existing legislative standards and based upon the Hearing  
21 Examiner’s record and recommendation.” SMC 23.76.004.C (emphasis added). As the  
22 Council admitted in CB 119323, there are no legislative standards that allow a so-called  
23 “development site” to be used to erase legal lot lines between lots in different zones and

1 allow an Applicant to evade compliance with unambiguous Code provisions that apply  
2 to those lots.

3 7.4.9 The Council decision is an erroneous interpretation and application of the  
4 law because it admits there to be no basis for the 7009 project to evade unambiguous  
5 Code requirements, and accordingly no deference is due to SDCI's construction of the  
6 law because the Council specifically found there to be no regulations, definitions, or  
7 policy to support SDCI's determination.

8 7.4.10 The Council decision is not supported by substantial evidence because,  
9 apart from the pure legal issues involved here, the record contains numerous comment  
10 letters, testimony, and briefing showing these obvious errors and proving that, to the  
11 extent "development site" has been used at all, SDCI ignored its own guidelines when it  
12 relied on a "development site" here; the Hearing Examiner ignored this issue entirely;  
13 and the Council considered it, recognized the problems with the proposed building, and  
14 chose to ignore the evidence.

15 7.4.11 The Council decision is a clearly erroneous application of the law to the  
16 facts for the reasons given above. RCW 36.70C.130(b),(c)&(d).

17 **7.5 The Council Action was unlawful because it, in effect, rezoned the**  
18 **vacant single family lot in violation of the proper procedures, and without any**  
19 **findings and conclusions on that matter, even though: (1) such action was not**  
20 **among the findings and conclusions of the Hearing Examiner; (2) it was not part**  
21 **of SDCI's Recommendation; (3) it was not requested by the Applicant; and (4) it**  
22 **affected a lot that Applicant had specifically excluded from its rezone application.**

23 7.5.1 The facts alleged at §7.1.1 to 7.4.11 are re-alleged here.

7.5.2 At the full Council meeting on August 6, 2018, the Council decided  
for the first time, without any advance notice or input from Petitioners (the Appellants

1 below), that it would require that the vacant single family lot be permanently maintained  
2 as landscaped open space. The Council made no separate Findings or Conclusions on  
3 that decision. It simply added it as a “Rezone Condition” and included it in the PUDA.  
4 The Hearing Examiner’s Findings and Conclusions do not reference, discuss, or require  
5 a permanent landscaped open space on that lot. The Rezone Application did not  
6 mention any permanent open space in that area, and to the contrary, the Applicant had  
7 specifically excluded that lot from the Rezone Application. See also SMC 23.34.004  
8 (PUDA applies to parcels to be rezoned). There was no record created on whether the  
9 vacant single family lot should be permanently removed from future residential  
10 development.

11           7.5.3 The Council’s decision to maintain permanent landscaped open  
12 space on a vacant single family lot effectively rezoned that lot in violation of proper  
13 procedure and in violation of the substantive rezone criteria that should have been  
14 applied. SMC 23.34.010, SMC 23.34.011, SMC 23.34.007-009. The Council’s action  
15 permanently removed that lot from housing stock in a highly desirable neighborhood.  
16 Instead of preserving that lot for housing of other single-family uses as required for lots  
17 zoned single family, the Council unlawfully converted that lot to commercial and multi-  
18 family uses by permitting otherwise unlawful uses on that lot, namely the use of the  
19 single family zone to access commercial uses in a commercial zone in violation of SMC  
20 23.42.030.

21           7.5.4 The Council engaged in unlawful procedure when it effectively  
22 rezoned the vacant single family lot without following the prescribed process for  
23

1 rezones, which error was not harmless because it determined the use of that single  
2 family lot to be other than single family development.

3 7.5.5 The Council decision is an erroneous interpretation and application  
4 of the law to the facts because mandating that a single family lot in a single family zone  
5 serve as a buffer for an adjacent mixed-use multi-family and commercial development  
6 does not cure the fatal flaw of allowing a five story building right on the zoning boundary  
7 line when the Code requires a “gradual transition between zones.” (Emphasis supplied.)

8 7.5.6 The Council decision is not supported by substantial evidence  
9 because it was presented specific information that the Examiner had misinterpreted the  
10 specific site plan map on which he had relied and there was no evidence in the record  
11 that supported or even mentioned permanent landscaped open space for the  
12 application under consideration.

13 **7.6 The contract rezone was unlawfully enacted as a spot zone.**

14 7.6.1 The facts alleged at §7.1.1 to 7.5.6 are re-alleged here.

15 7.6.2 By singling out the 70<sup>th</sup> & Greenwood ownership from the larger  
16 Phinney Ridge Urban Village and creating for that ownership a special zoning  
17 classification existing nowhere else within the Phinney Ridge Urban Village whose  
18 requirements, including those for building height and setbacks, are different from and  
19 inconsistent with the requirements for other properties in the vicinity, and by abruptly  
20 changing long-established provisions for transition between single-family and the  
21 neighborhood commercial zone and view protection to serve one particular landowner,  
22 the City Council, through the approval of the contract rezone, has acted arbitrarily and  
23 unreasonably by bestowing special favors upon an individual property owner, by failing

1 to act in the interest of the public at large, by enacting spot zoning in violation of Article  
2 I, Section 3 of the Washington Constitution and the rezone should be invalidated under  
3 RCW 36.70C.130(f).

4 **8. REQUESTED RELIEF**

5 Petitioners request that the Court grant the following relief:

6 8.1 Grant a stay of the Council's Rezone approval pending judicial review  
7 pursuant to RCW 36.70C.100 because: (a) petitioners are likely to prevail on the merits;  
8 (b) without a stay, the developer is likely to begin construction immediately, which will  
9 cause irreparable harm to Petitioners and the entire Phinney Ridge neighborhood if the  
10 presently paved lots are excavated and Petitioners prevail and the Rezone is then  
11 denied; (c) a grant of a stay will not substantially harm the other parties to the  
12 proceedings because (1) this project has already been pending for two years, (2) the  
13 Applicant voluntarily caused a two month delay in the open record hearing when it  
14 voluntarily withdrew its application just days before the originally scheduled hearing and  
15 resubmitted a virtually identical proposal shortly afterwards, and (3) the Applicant did  
16 not have a reasonable expectation of a Council Decision at this time because the  
17 Council issued its decision months before its required deadline of 120 days after the  
18 Hearing Examiner Decision (SMC 23.76.005.D.3.1.3); and (d) the request for the stay is  
19 timely in light of the circumstances because the Applicant has indicated its intent to  
20 begin construction this fall after it receives required approvals.

21 8.2 Find and conclude that the Council engaged in unlawful procedure and  
22 acted outside its authority by approving a project that did not comply with Land Use  
23

1 Code criteria or City Policy and was instead based on rationale that had no basis in  
2 regulations, definitions, or City Policy.

3 8.3 Find and conclude that the challenged Decision authorizing the Rezone  
4 and proposed building is an erroneous interpretation of the law, is not supported by  
5 substantial evidence, is a clearly erroneous application of the law to the facts, and  
6 constitutes an unlawful spot zone.

7 8.4 Reverse the Council's approval of the Rezone and deny the Rezone;

8 8.5 Award Petitioners their allowable costs and attorney fees; and

9 8.6 Grant such other and further relief as the Court may deem appropriate.

10 Dated this 27<sup>th</sup> day of August 2018.

11 ARAMBURU & EUSTIS, LLP

12 /s/ \_\_\_\_\_  
13 Jeffrey M. Eustis, WSBA #9262  
14 Attorney for Petitioners  
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