Honorable Maureen McKee
October 19, 2018 @ 10 am at Initial Hearing

KING COUNTY SUPERIOR COURT

IRENE WALL and ROBERT MORGAN, Petitioners, v. CITY OF SEATTLE, a Washington Municipal Corporation; 70th & GREENWOOD AVE, LLC and OJD, LLC, Washington limited liability companies, Respondents.	NO. 18-2-21317-7 SEA OPPOSITION BY PETITIONERS TO MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION AND RELIEF REQUESTED

The Motion for Partial Summary Judgment filed by the project Developer and the City (together, "Respondents") is plagued with material factual and legal errors and omissions that collectively misrepresent the contents of the document SDCI published on April 9, 2018, the applicable legal framework for

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contract rezone decisions, and the nature of the claim in Section 7.4 of Petitioners' Land Use Petition that Respondents seek to dismiss.

Respondents' motion should be denied because the section of the Petition they seek to dismiss does not present a jurisdictional issue at all and is therefore not appropriate for resolution at the initial hearing in a Land Use Petition Act ("LUPA") proceeding. *See* RCW 36.70C.080(2)(procedural and jurisdiction motions may be addressed at initial hearing). Section 7.4 alleges that the City Council decision was *ultra vires* because the Council lacked the authority to make a decision, sitting in a quasi-judicial capacity where it is required to apply applicable law and existing legislative standards, that the Council's decision admits have not been adopted. *See e.g.*, Petition at §7.4.8. Respondents, however, misrepresent this claim as a time-barred attack on a so-called administrative "Zoning Decision" they claim was made earlier in the process.

Even if Respondents' motion could somehow be construed to raise jurisdictional issues, the motion still should be denied because Respondents failed to offer any evidence of where or when the "Zoning Decision" (a title invented by Respondents for this motion and found nowhere in the Land Use Code or in the April 9, 2018 decision) was actually "issued" as required by LUPA. *See* RCW 36.70C.040(3)& (4). The document that SDCI published on April 9, 2018, had three – and only three – components: (1) Analysis and Decision related to Design Review where the Director accepted the Design Review Board's recommendations on the building design; (2) an Analysis and Recommendation on the Applicant's request to rezone the property to a 55-foot height pursuant to the contract rezone criteria in SMC 23.34; and (3) SEPA

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(State Environmental Policy Act) Analysis. There is no "Zoning Decision" in that document, nor did Respondents offer any other evidence of when the so-called "Zoning Decision" was issued as required by LUPA. RCW 36.70C.040(4). Without evidence to support their alleged jurisdictional defect, the Respondents' motion must be denied.

And finally, even giving Respondents the benefit of the doubt that their stated "Type 1" "Zoning Decision" was somehow issued on April 9, 2018 as they allege, that "decision" is not an appealable "land use decision" within the meaning of LUPA, so it could not trigger LUPA's twenty-one day appeal period under RCW 36.70C.040(3). On April 9, 2018 when SDCI published its report and the alleged "Zoning Decision" Respondents insist it contains, there had not yet been a "final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination . . . on [a]n application for a project permit or other governmental approval required by law before real property may be improved, developed [or] modified . . . ." RCW 36.70C.020(2)(a)(emphasis added). That final determination was rendered by the City Council on August 6, 2018, not by SDCI as Respondents contend. Even the April 9, 2018 document itself stated that the required Master Use Permit could not be approved for issuance until the Council land use decision was made.[1]

Where, as here, a developer requests a contract rezone to change the zoning of its property to allow a specific building, it is the City Council, acting in its quasi-judicial capacity that makes those final decisions whether to approve the rezone and require any specific limitations on the type of development that

[1] SDCI Analysis at 45.

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may occur. Accordingly in this case, the City Council is the local jurisdiction's body with the "highest level of authority" to make the "final determination" on a project permit application required for property to be developed. RCW 36.70C.020(2)(a). The Seattle Land Use Code and LUPA provide for a single consolidated judicial appeal, and that appeal period was triggered at the Council Land Use Decision on August 6, 2018, from which Petitioners timely appealed. Because the "Zoning Decision" that allegedly occurred on April 9, 2018 was not a "land use decision" within the meaning of LUPA, it did not trigger LUPA's jurisdictional clock and therefore Respondents have failed to establish that this court lacks jurisdiction to hear the Section 7.4 claim in the Petition.

Moreover, the bifurcated approach that Respondents advocate not only violates the consolidated appeal process outlined in SMC 23.76 and RCW 36.70B.060, but it would lead to absurd results and a waste of this Court's time reviewing a project that may never come to fruition. Until the City Council approves a contract rezone, no one – not the Developer or SDCI – knows whether the rezone would be approved, and if approved, the changes that would be requiredb .

For each of these reasons, Respondents' motion should be denied.

II. RELEVANT FACTS

A. SDCI Analysis, Decision and Recommendation Documents

On April 9, 2018, SDCI provided notice of and published a document that contained three discrete components related to Respondent Shared Roof's application for a contract rezone to build a very specific five-story building on

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land that allowed only a four-story building: (1) A Design Review Decision pursuant to SMC 23.41 (pages 2-23); (2) A Rezone Analysis and Recommendation for the Contract Rezone, to ultimately be decided by the City Council (pages 23-39); and (3) a Determination of Non Significance under the State Environmental Policy Act ("SEPA")(pages 39-44) (SDCI Analysis, Decision and Recommendation). *See* Declaration of Irene Wall ("Wall Decl."), **Ex. 1**, **SDCI Analysis**; *see also* Waldman Decl, Ex. A.

The document published on April 9, 2018 marked the second time that SDCI had issued an "Analysis, Decision, and Recommendation" for this project. Respondents omit that fact from their story and supporting documentation. SDCI initially recommended approval of this project on January 16, 2018.[2] Wall Decl, **Ex. 2 SDCI January Analysis**. A public hearing before the Hearing Examiner was scheduled for Feb 15, 2018. Wall Decl., **Ex.3 Notice documents**. The January 16, 2018 SDCI document, which was almost indistinguishable from the one SDCI published on April 9, 2018 that is at issue here, recommended approval of Shared Roof's contract rezone application dated December 6, 2016. Respondents provide that application[3] (e.g., Waldman Decl. at ¶6; Clawson Decl. at Ex. B). However, Respondents omit mention of the prior January 16, 2018 decision, presumably because acknowledgement of that decision would undercut the basis for their motion for partial summary judgment.

Both the initial December 2016 application and SDCI's January 2018 decision were withdrawn before the scheduled public hearing occurred. The

[2] SDCI issued a revised notice on January 25, 2018, but did not change its decision document or the date of the Hearing Examiner public hearing.
[3] That application requested a rezone to the NC2-65 zone.

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hearing scheduled for February 15, 2018 was cancelled on February 12, 2018, and SDCI rescinded and withdrew its Analysis, Decision, and Recommendation on February 20, 2018 with an explanation that the Applicant had filed a revised application on which there would be a new notice and comment period. See **Notice Documents at Ex. 3** to Wall Decl. SDCI published a new notice of the revised application on February 20, 2018, and it was that revised application that gave rise to the April 9, 2018 SDCI Analysis, Decision and Recommendation (or simply, "SDCI Analysis") at issue here.

The revised application sought approval to a forthcoming NC2-55 zone, instead of to the NC2-65 foot zoning category requested in the original application, but made no changes to the position of the building relative to the property and zoning lines. On the zoning compliance issues that Respondents challenge here, SDCI's Analysis of January 16, 2018 does not differ from its Analysis of April 9, 2018. Apparently, by Respondents' logic, the appeal period on the zoning compliance issues would have already run and become final and unappealed prior to the later rescission of that decision. Respondents' motion does not address the procedural conundrum resulting from treating SDCI staff review as somehow creating a final determination.

The April 9, 2018 SDCI Analysis started the last stages of the decision-making process for the Developer's requested Contract Rezone, a quasi-judicial Council Land Use Decision where the City Council, after receiving a recommendation from the Hearing Examiner, makes the final decisions on (1) whether to rezone the land, and (2) whether to impose conditions on the specific building that the Applicant seeks to build. [4]

[4] A contract rezone, described in more detail *infra*, II.E.

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B. The proposed project

This controversial project in the Phinney Ridge neighborhood is a request to upzone two lots totaling approximately 12,000+ square feet on the northwest corner of Greenwood Avenue North and N. 70th Street to create a five story building that would not otherwise be allowed. The 55+ foot building would be topped with a massive 12-foot high greenhouse on a street in Phinney Ridge where the nearest property zoned to more than four stories is almost a mile away, and every commercial lot, including the ones at issue in this appeal, share their rear boundaries with single family homes. *See* Petition at §7.1.1-§7.1.4.

The Developer is a group of friends who call themselves "Shared Roof." In public presentations and in their application, this group has stated that they and their families plan to occupy the units on the fourth and fifth floors of the proposed building, where the plan sets show units substantially larger than the second and third floor units that would be available to the public.[5] Respondents assert without proof that the project "includes affordable multifamily units," Motion at 2, when the published plan documents suggest this may not be accurate.

In addition to the two commercial lots proposed for rezone, the Developer owns the two lots in the adjacent single family (SF5000) zone that together border the entire west side (rear property line) of the commercial properties proposed for rezone. One lot (Lot # 287710-4127) is a vacant, mid-

[5] Respondents' appear to have backed off the narrative that the owners will live in the building with their families that they touted throughout this process, and now state that there is only one owner, Chad Dale, and he wants to build this for his family. Motion at 2.

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block lot on N. 70th Street. The east side of that lot abuts the rear property line of the southern NC parcel (Lot # 287710-4085). The other lot (Lot # 287710-4120), at 7010 Palatine Ave N (the street west of Greenwood), contains a classic old craftsman house and shares a rear boundary with the northern NC parcel proposed for rezone (Lot # 287710-4100). *See* Petition, §7.1.2; *See also* Wall Decl., **Ex. 1 SDCI Analysis** at 2-3.

The two single family lots are not included in the rezone request. But the Developer drew a line around all four lots (each has a separate legal description and tax parcel number), called all four lots a "Development Site," (a term that is not defined in the Land Use Code), and asserted that none of the Code requirements that require building setbacks on commercial lots that abut lots in residential zones, or that restrict access from single family to commercial zones applied to this project because all of the lots were a single "Development Site." Aided and abetted by SDCI, which allowed this artifice even though there was no law to support it, the Developer forged ahead with a building substantially larger than allowed by Code. Instead of complying with setback provisions in SMC 23.47A.014 that mandated all upper floors above the first floor be set back at least 15 feet from the zoning line, and other restrictions that eased the transition between commercial and adjacent single family zones, the approved project was a massive 55+ building with all but a few feet of the upper floor built right on the shared property line, blocking the light and air corridor for the whole block. Because the building rose right on the property line, it relied on access from the adjacent single family zone, which also is prohibited by the Land Use Code. SDCI received, but ignored, public comments demonstrating that this "Development site" gimmick was unlawful. Wall Decl. at **Ex. 4** (**Public**

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comments of 2/8/17), Ex. 5 (Comments of 5/1/17), and **Ex. 6 (Comments of 3/18/18)**.

C. Design Review Process

This project went through "design review" where, in public meetings, SDCI took public comment, the Developer presented its design to members of a Design Review Board, and the Board opined on the project's compliance with the City's Design Guidelines (which are not within the Land Use Code) and made design recommendations, pursuant to authority under SMC Chapter 23.41. The design review process informs SDCI's Design Review Decision, but the design review process is independent of any zoning review of a project. During the Design Review process and before SDCI issued its Design Review Decision, SDCI accepted public comments. *See e.g.,* Wall Decl. at Exhibits 4, 5 and 6, *supra.*

SDCI's Design Review Decision in its April 9, 2018 document is identical to what it published in its January 16, 2018. Compare Wall Decl **Ex. 1**. **SDCI April 9, 2018 Analysis** at 22-23 and **Ex. 2 January 16, 2018 Analysis**, at 22-23. Neither document mentions or contains any "Zoning Decision," nor does it contain any "analysis" of the project's compliance with development standards as SDCI Supervisor Cheryl Waldman asserts in her sworn declaration. Waldman Decl. at ¶12.

The SDCI Analysis states clearly on the last page that "Projects requiring a Council land use action shall be considered 'approved for issuance' following the Council's decision." Wall Decl., **Ex. 1 SDCI Analysis** at 45. That is because, unlike an application for a permit that does not require a Council land

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use action, SDCI's Design Review decision is not the end of the road for a project involving a contract rezone, such as the case at hand. This project requires a Council Land Use Decision before a permit is approved for issuance. SMC 23.76.028.C.1, C.3 (For a Type 1 or Type II Master Use Permit that also requires a Council land use action, the Master Use Permit is approved for issuance only after the Council land use decision is made). That is because the Land Use Code establishes different types of decisions, made by different decision makers, and the zoning for the site and applicable development standards are not resolved until the City Council acts on the rezone application.

D. Land Use decision framework

The Land Use Code, as required by RCW 36.70B.060, provides procedures for "an integrated and consolidated land use permit process," that integrates environmental review and provides "for the consolidation of appeals for all land use decisions." SMC 23.76.002 (emphasis added); SMC 23.76.004.G (consolidated process). The Land Use Code categorizes five types of decisions that may be made by different decision makers and under different processes. SMC 23.76.004.A. Three of those decision types – I, II, IV -- are relevant to this motion.

Type I and II decisions are made by SDCI (referred to as "the Director" and consolidated into a Master Use Permit (MUP). SMC 23.76.004.B. Type I and II decisions are components of Master Use Permits . SMC 23.76.006.A. Type I decisions (such as the "Zoning Decision" that Respondents claim to have been made), which include the application of development standards to a

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project,[6] are made by the Director and are not subject to administrative review by the Hearing Examiner without first requesting (and paying fees of over $3,000) an "Interpretation" where SDCI explains the basis for any Type ! decisions it has made. SMC 23.76.004.B; SMC 23.76.006.B; SMC 23.76.022; SMC 23.88.020. Until 2017, an Interpretation was a required administrative remedy before seeking judicial review. But the City Council eliminated that requirement through its enactment of Ordinance 125387, Wall Decl., **Ex. 7 (Interpretation amendment)** at 4, 5 (showing Code changes to SMC 23.76.022 and 23.88.020).; Wall Decl. **Ex. 8 (Staff memo for interpretation amendment).**

Type I decisions may be appealed directly to Superior Court under LUPA at the appropriate time. Even though no public notice is required for Type I decisions, SMC 23.76.020.C, in order to exist a Type I decision must be articulated in some form. In any event, SDCI's Analysis of April 9, 2018 contains only three approvals, not a fourth "Zoning Decision" as asserted by Respondents.[7]

Type II decisions are discretionary decisions made by SDCI that are subject to an administrative open record appeal to the Hearing Examiner. SMC 23.76.004.B; SMC 23.76.006.C. SDCI issued two Type II decisions on April 9, 2018: A Design Review Decision and a SEPA determination. Petitioners did

[6] At SMC 23.76.004, Table A, however, the Code states that this type of Type I decision is limited to "Application of development standards for decisions not otherwise designated Type II, III, IV, or V." (Emphasis added.)

[7] Even though Respondents' Motion uses the words "Zoning Decision" at least 28 times (by Petitioners' count), that term does not appear even once within the SDCI's Analysis Respondents claim contained such a decision.

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not appeal those decisions, and those decisions are not relevant to this motion or to the LUPA appeal.

Type IV decisions are "Council land use decisions," quasi judicial decisions made by the City Council pursuant to existing legislative standards and based on the Hearing Examiner's record and recommendation." SMC 23.76.004.C. This case involves a Type IV Council land use decision because the Developer requested an amendment to the Official Land Use Map to upzone its property. SMC 23.76.036.A.1. In a Type IV quasi-judicial proceeding the City Council sits as would any other quasi-judicial decision maker and applies the law as written, without any legislative capacity to change the law. SMC 23.76.056.A (apply applicable law); SMC 23.76.004.C (existing legislative standards).

The Council issued its Type IV Council Land Use Decision on August 6, 2018, which adopted the Hearing Examiner's Findings and Conclusions, modified certain aspects of the Project, and passed an ordinance that granted the requested rezone, subject to execution of a Property Use and Development Agreement (PUDA). Wall Decl., **Ex.9** (**Council Findings**) and **Ex. 10 (Ordinance & PUDA)**.

E. The Contract Rezone decision-making process

A contract rezone is an amendment to the Official Land Use Map subject to the execution, delivery, and recording of a Property Use and Development Agreement. SMC 23.84A.032 ("Rezone, contract"). A Property Use and Development Agreement is an agreement executed by the owner of the property to be rezoned that subjects the property to restrictions on its use and

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development" that are ultimately imposed by the City Council SMC 23.84A.030; *see also*, 23.34.004 -.009. Thus, the scope of the development is not set until the City Council acts. Coming at the end of the processs, the Council Land Use decision is the "final determination" that triggers LUPA's 21-day appeal period. RCW 36.70C.040(2)(a);RCW 36.70C.040(3); RCW 36.70C.040(4)(b). That decision was made on August 6, 2018 which Petitioners timely appealed.

1. SDCI Recommendation

For Type IV Council Land Use decisions, SDCI must prepare a written report that shall include, among other requirements, responses to written comments from the public; an evaluation of the proposal based on the standards and criteria for the approval sought and consistency with applicable City policies; all environmental documentation; and the Director's recommendation to approve, approve with conditions, or deny a proposal. SMC 23.76.050. SDCI published its report which recommended approval of the proposed rezone, on April 9, 2018, along with its Type II Design Review Decision and the Type II SEPA Decision published that same day. Wall Decl., **Ex. 1 SDCI Analysis**, at 23-39. But SDCI's report did not provide any responses to written comments from the public, even though it had received numerous comments relating to the proposal's failure to comply with development standards and SDCI's treatment of the Developer's assemblage of 4 parcels as a single "development site" as a device to evade compliance with those standards. *See e.g.,* Wall Decl., **Ex. 4, 5, & 6 (Comment letters to SDCI)**.

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2. Hearing Examiner Open Record Hearing

The Hearing Examiner holds an open record pre-decision hearing to consider SDCI's Analysis and establish the record for the Type IV Council Land Use decision. SMC 23.76.052.A; SMC 23.76.052.F. At the hearing, the Examiner accepts evidence and comments on "[t]he Director's report, including an evaluation of the project based on applicable City ordinances and policies" and SDCI's recommendation to approve, approve with conditions, or deny the application. SMC 23.76.052.E.1(emphasis added). In this case, substantial evidence was presented to the Examiner that SDCI's use of a "development site" to evade compliance with applicable development standards was unlawful. Wall Decl., **Ex. 11, 12 (Public comments on non-compliance with zoning)**.

3. Hearing Examiner Recommendation

From Information received at the Hearing, the Examiner submits a written recommendation to the Council to approve, approve with conditions or deny an application. SMC 23.76.052.H (Emphasis added.)**.** In other words, the Examiner is not supposed to simply rubber-stamp the material received from SDCI. But in this case, the Examiner ignored all evidence and argument challenging SDCI's improper use of the term "development site" and accepted SDCI's treatment of the Developer's property as a single "development site" without even acknowledging that such treatment was contested.[8] Instead, in a Recommendation dated June 5, 2018, the Examiner essentially rubber-

[8] The Hearing Examiner's Recommendation at Findings 2 and 3 and Conclusion 7, ¶¶3 and 4 employ and embrace the term "development site."

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stamped SDCI's flawed recommendation to approve the project, Wall Decl., **Ex. 13 Hearing Examiner Recommendation,** notwithstanding substantial evidence showing this recommendation was unlawful.

Any interested party may appeal the Hearing Examiner's Recommendation to the Council as part of the Council's quasi-judicial proceeding. SMC 23.76.054. The Petitioners in this case timely appealed the Hearing Examiner's recommendation. That Appeal at pp 4-9 and 19-20 included a challenge to SDCI and the Examiner's use of the artifice, "development site," as a means of allowing the Developer's project to evade the zoning restrictions within SMC 23.42.030 and 23.47A.014. Wall Decl., **Ex. 14** (**Appeal to City Council).**

4. Council Land Use Decision

In a Type IV Council land use decision, the Council makes the final decision, in a quasi-judicial proceeding, whether to approve, approve with conditions, remand, or deny the application, after considering the record, the Hearing Examiner's recommendation, and any appeal of the Examiner's Recommendation. SMC 23.76.054; SMC 23.76.056. That decision is required to be based on applicable law and supported by substantial evidence in the record established at the Hearing Examiner's open record hearing. SMC 23.76.004.C(decision made pursuant to existing legislative standards) and SMC 23.40.002.B(conformity with regulations). The Council issues Findings and Conclusions and separately approves an Ordinance that authorizes a very specific building and other requirements as a condition of the rezone. SMC 23.34.004.

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The claims regarding use by SDCI and the Examiner of the artifice of "development site" to evade enforcement of zoning restrictions under SMC 23.42.030 and 23.47A.014 were squarely presented to the City Council. Petitioners provided extensive material showing how the Examiner's Recommendation was wrong. Wall Decl., **Ex. 14 (Appeal to council) and Ex. 15 (Petitioners' Reply)** at pp7-11). Petitioners also supplied the Council with an exhibit showing the project's numerous zoning violations. Wall Decl., **Ex. 16 (Illustrative Exhibit)**

The Council considered, but ultimately rejected, a set of Findings that would have rejected Hearing Examiner Conclusion #7 and would have instead imposed the required setbacks and access limitations required by the Land Use Code. Wall Decl., **Ex. 17 Council Staff Memorandum**. If the Council had adopted those findings, the project would not suffer from its fatal flaw, as alleged in §7.1 of the Petition, of a 4+ story building rising right on the property line in violation of the mandatory rezone criteria in SMC 23.34.009.D.2. And any LUPA challenge would not contain the *ultra vires* allegation in §7.4 that Respondents now try to dismiss. Thus, the very issues Respondents claim were already resolved and decided by SDCI on April 9, 2018, remained alive and at issue before the City Council in its approval of the proposed development.

The Final Council Findings and the ordinance approving the rezone and accepting a PUDA imposed additional conditions on the project outside the scope of SDCI's "decision" on the project and it specifically acknowledged that SDCI's use of the term "development site" had no basis in law. Wall Decl, **Ex. 10 Ordinance** (third, fourth and fifth recitals). Effectively, the City Council

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equivocated, by in one breath adopting the Examiner's Findings and Conclusions that were predicated upon treating the Developer's entire ownership as a single "development site" that disregarded lot lines and zoning boundaries while stating in the next breath that the City Council had yet to adopt any regulations or definitions addressing the treatment of lots in different zones as a single "development site." The City Council's decision on that issue is the "final determination" by the City's decision-making body with the "highest level of authority to make that determination…" RCW 36.70C.020(2).

III. EVIDENCE RELIED UPON

This response is supported by the Declaration of Irene Wall in Opposition to Respondents' Motion for Partial Summary, and the attached documents.

IV. ARGUMENT

Respondents' Motion should be denied because the section of the Petition that Respondents seek to dismiss does not give rise to jurisdictional issues at all. Respondents' attempt to mischaracterize it as a jurisdictional issue fails as a matter of law because Respondents did not produce any evidence that the so-called "Zoning Decision" was "issued" in a manner required by LUPA. Nor did they demonstrate that the "Zoning Decision," even if deemed "issued," was actually a "Land use decision" within the meaning of LUPA because the "decision" on April 9, 2018 related to a project that could not proceed without a City Council approval that had not yet occurred on that date. Because there was no "Zoning Decision" made on April 9, 2018 that was a final

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determination by the highest authority to render a decision on the project application, there was no "deadline" that Petitioners "missed" that would deprive this Court of jurisdiction to hear the claim alleged in §7.4 of Appellants' LUPA Petition. Respondents' Motion should be denied.

A. The Motion should be denied because Respondents mischaracterized the claim in §7.4 of the Petition as a jurisdictional issue when, in reality, §7.4 raises a purely merits issue that the Council Land Use Decision was *ultra vires.*

Respondents have tried to create a jurisdictional issue where none exists. Only procedural and jurisdictional issues may be resolved at the initial hearing, not those seeking review of the merits of the challenged land use decision, RCW 36.70C.080, which is the object of Respondents' Motion.

Specifically, Respondents assert that "[a]mong other things in their LUPA petition, the Petitioners allege that the Project does not comply with certain zoning standards," Motion at 1,8-9, and they seek to dismiss §7.4 of the Petition on the grounds that a so-called "Zoning Decision" is somehow wholly separate from a "Rezone Approval" and is a stand-alone decision that was etched in stone before the Council considered the rezone, and was required to be appealed before the Council final decision. Motion at 10. But a review of §7.4 confirms it is <u>not</u> simply a claim that the Project does not comply with certain zoning standards. Rather, it is a claim based specifically on the Council's own admission that it behaved unlawfully, and it is a claim rooted in the doctrine of *ultra vires* actions.

It is highly unusual for a legislative body to publicly acknowledge its unlawful behavior on the face of its decision, and then try to sweep it under the

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rug by claiming, in that same document, that the decision that flowed from that unlawful action had no precedential effect and so, in effect, it didn't matter. But that is exactly what the Council did in this case. Indeed, Section 7.4 of the Petition is based on explicit text in the Ordinance that approved the PUDA for the Shared Roof project. The Council's Ordinance observed in three recitals that use of the concept of a "development site" had yet to be adopted in regulations or definitions, but it proceeded to apply the concept and approved the project anyway. Wall Decl**., Ex.10 Ordinance** at 1.

Because Type IV decisions such as the contract rezone issued here, "are quasi-judicial decisions made by the Council pursuant to existing legislative standards . . . . ", SMC 23.76.006.C, and the Council must "apply the applicable law based on substantial evidence in the record," SMC 23.76.056 (emphasis added). Petitioners' claim at §7.4 asserts, among other errors, that the Council engaged in unlawful procedure and acted outside its authority when it authorized this project despite specifically acknowledging that the "development site" artifice had no basis in law. Petitioners' claims at §7.4 do not present a jurisdictional question; the claims go to the substance of the City Council's decision and are not appropriate for resolution at an initial hearing reserved for questions of procedure and jurisdiction.[9]

Certain sections of §7.4 describe the "development site" artifice – an imaginary line drawn around the Developer's four contiguous lots that allegedly

[9] That defect was not cured by claiming the decision had no precedential effect, or claiming that the Council would later "address policy issues related to 'development sites'" . There is no "no-precedential-effect" exception in the requirements for quasi-judicial actions, and furthermore, the Council action in this case is likely to have the precedential effect of encouraging other developers to buy adjacent parcels in a different zone, drape them in a "development site," and run to Council for a "no-precedential-effect" contract rezone just like the Council gave to Shared Roof.

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caused all internal lot lines to disappear and free the owner from certain Land Use Code limitations it didn't like – and the Land Use Code provisions that were not applied as a result of this invented strategy. Petition at §7.4.1 - §7.4.5. Those descriptions provide context for the *ultra vires* allegation in §7.4, which squarely challenges the lawfulness of the City Council's action. Respondents, however, ignore the gravamen of the §7.4, the Council's *ultra vires* use of "development site" in a quasi-judicial setting, and instead seek to twist the use of that artifice into a challenge to a decision that Respondents claim was allegedly "made" four months before. *See* Motion. at 2, 9. The Court should reject this tactic.

B. Even if the §7.4 claim is considered jurisdictional, the Motion must be denied because Respondents offer no evidence that a "Zoning Decision" was "issued" on April 9, 2018 in a manner required by LUPA.

LUPA has strict requirements for when a land use decision[10] is deemed "issued." RCW 36.70C.040(4). The date of issuance is when the twenty-one day jurisdictional clock starts to run. RCW 36.70C.040(3). A "land use decisions" is "issued" at any of three events (a) three days after mailing or, if not mailed, upon notice the decision is available; (b) If made by ordinance or resolution, the date of enactment, or (c) the date the decision is entered into the public record. RCW 36.70C.040(4).

Respondents at 11 assert that the so-called "Zoning Decision" was "made publicly available on April 9, 2018, the date of publication of the City's MUP Decision." But, as noted above, that document does not contain any

[10] As noted *infra*, Petitioners do not believe there was any "land use decision" made in this case even if the so-called "Zoning Decision" could be deemed "issued".

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statement that the project complies with zoning or development standards. By case law, the decision claimed to have been issued must "have been memorialized in some tangible, accessible way, [without which] even the most diligent citizen cannot know whether the decision is objectionable or, if it is, whether there is a viable basis for a challenge." *Vogel v. City of Richland*, 161 Wn.App. 770, 780, 255 P.3d 805 (2011)(emphasis supplied).

Despite numerous pages claiming a "Zoning Decision" to have been made on April 9, 2018 and contained within SDCI's Analysis, Respondents fail to offer any evidence whatsoever of such a "Zoning Decision," *i.e,*, when it was made, by whom, where it was published, or in any way entered into the public record as required by LUPA. RCW 36.70C.040(4).

The only supposed "evidence" is in the sworn declaration of Cheryl Waldman, a SDCI supervisor who, notably, does not claim to have personally made such a decision. She explains that in general a SDCI zoning reviewer "makes a determination" that a project complies with development standards as part of zoning review, but she does not indicate who made that decision here or where that decision is documented in this case. Waldman Decl. at ¶8. Instead, she simply asserts that "SDCI will not publish a MUP Decision on the Type II Decisions until the zoning and other review disciplines are reviewed and approved or conditionally approved." Waldman Decl. at ¶9 In other words, she simply assumes that the so-called "Zoning Decision" must have been made.

LUPA contemplates review of the merits of the claims on the full decision record, not on a declaration – such as the declaration of SDCI supervisor Waldman – that was never part of the record. While Waldman may believe that "SDCI will not publish the MUP Decision on the Type II Decisions until the

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zoning and other review disciplines are reviewed and approved…" Respondents have not offered any proof that such a decision was actually "memorialized in some tangible, accessible way" so that Petitioners could "know whether the decision is objectionable or … whether there is a viable basis for a challenge." *Vogel, supra.* To be "issued," a land use decision must be more than a penumbra.

Waldman also proclaims that an "analysis" of the Project's compliance with development standards" was "included with a recommendation in the MUP Decision document and submitted to the Hearing Examiner." But there is no such analysis or even mention of the Project's compliance with development standards anywhere in the entire 45 page document published on April 9, 2018. The Design Review Decision portion states only that the Director agrees with the Design Review Board's conclusion that the proposed project results in a design that best meets the intent of the design review guidelines (which are not zoning regulations) and that SDCI accepted the recommendations of the Board. Wall Decl., **Ex.1 SDCI Analysis** at 22-23.

In the Rezone Recommendation portion of the April 9, 2018 document, where SDCI could have referenced any alleged "Zoning Decisions", it gives no hint of such a decision. In the section for the rezone criteria in SMC 23.34.008.E.2 discussing a preference for physical buffers as an effective separation between different zones, SDCI references only the design review process but nothing about compliance with development standards. *Id.* at 32-33. And where SDCI should have addressed the one and only mandatory rezone criteria that a "gradual transition in height and scale and level of activity between zones shall be provided unless major physical buffers are present. . .

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.", SMC 23.34.009.D.2, SDCI says nothing at all. It omitted that requirement entirely. *Id.* at 38-39.[11] This would have been one of several obvious places to attempt to explain that it had already made a "Zoning Decision" on building setbacks and other issues.

Respondents obviously cannot claim that their cherished "Zoning Decision" was made by ordinance or legislative body in a quasi judicial capacity, RCW 36.70C(4)(b), because the only decision that meets that criteria is the Council Land Use Decision issued on August 6, 2018 that Petitioners timely appealed. And Respondents offer no evidence – and no argument – that the so-called "Zoning Decision" was entered into the public record in some other manner or some other date. RCW 36.70C(4)(c). Without evidence to support their claim that a "Zoning Decision " "issued" on April 9, 2018, their motion fails.

In addition to offering no evidence of the "issuance" of a decision on April 9, 2018, Respondents fail to mention at all that SDCI had previously issued a virtually identical decision on January 16, 2018, when it recommended approval of the first application. Wall Decl., **Ex. 2 SDCI Analysis, 1/16/18.**. If, as Respondents allege, SDCI issued a jurisdiction-killing "Zoning Decision" on April 9, 2018, then surely that same "Zoning Decision" existed on January 16, 2018, which was, in parts relevant to Respondents' motion, identical to the Decision issued on April 9, 2018. But Respondents omitted mention of the earlier decision and the procedural problems posed by treating the initial SDCI

[11] The Council's failure to adhere to that requirement is enough to reverse the Council decision on the merits (see Petition at §7.1),

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decision as a final determination whose 21 day limitation period would have run (under Respondents' view) prior to the decision's withdrawal.

C. Even if the so-called "Zoning Decision" was "issued" on April 9, 2018, the Motion must be denied because the City Council had not yet made the final determinations required for project approval and therefore the "Zoning Decision" was not an appealable "Land Use Decision" within the meaning of LUPA at that time.

LUPA defines a "land use decision" as "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals…" RCW 36.70C.020(2)(a). Respondents at 7 cite the correct law, but misapply it.

"A 'final decision' is '[o]ne which leaves nothing open to further dispute and which sets at rest cause of action between parties." *Samuel's Furniture, Inc. v. Dept of Ecology*, 147 Wn.2d 440, 452 (2002). "When read in conjunction with RCW 36.70C.040(4), [LUPA] provides that a land use decision must be final before it can be issued." *Vogel*, 161 Wn. App. at 778.

1. The City Council made the final, appealable land use decision.

In this case, the City Council -- not SDCI -- made the final land use decisions because its approvals were required before any development occurred on the subject property. SMC 23.76.028.C.1 (Type I MUP cannot be approved for issuance until Council decision is rendered); SMC 23.76.028.C.3 (Type II MUP cannot be approved for issuance until Council decision is rendered); SMC 23.76.002 (consolidation of appeals); SMC 23.76.056.D

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(Council land use decision is final subject to judicial review , which shall be commenced as provided by state law).

Respondents instead offer a misleading and inaccurate explanation of the Land Use Code framework for contract rezones to create the false impression that the project that SDCI advanced on April 9, 2018 became final after twenty-one days passed without an appeal of that decision, even though the April 9th document itself confirms the Code requirement that a MUP is not approved for issuance until after the Council Land Use Decision is made, Wall Decl., **Ex. 1 SDCI Analysis** at 45, and the Code provides for both the Hearing Examiner and Council to make changes to that building based on applicable law. SMC 23.76.052-.056.

To fit the Code to their desired narrative, Respondents at 10 mistakenly portray the "Rezone Approval" as a "wholly separate approval" from the "Zoning Decision" they claim SDCI made on April 9, 2018. They claim at 3 that the contract rezone process is "a separate process tacked onto the end of a typical project permitting process," when in fact the whole contract rezone process was consolidated in this case. They go on at 11 to misstate the authority of the Examiner and Council to reshape the project design that SDCI advanced. They recite at 8 a list of cases where a LUPA petition was deemed untimely for failure to timely file an appeal, without noting that those cases involved a final permit decision and approval, a material fact lacking here on April 9, 2018 when Respondents insist an appealable "Zoning Decision" was made.

Respondents at 10 mistakenly assert that "The Zoning Decision made by SDCI on April 9, 2018 is a "final land use decision" because "SDCI is the body with the highest level of authority to make the determination." But they leave off

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the remainder of the definition of a "land use decision," which states that this "final determination" is for "an application for a project permit or other governmental approval required by law before the real property may be improved, developed, [or] modified. . . " RCW 36.70C.020(2)(a) (emphasis added). It is undisputed that for the instant contract rezone, no permit issuance was triggered by the alleged "Zoning Decision" on April 9, 2018 because the Council had yet to make its decision. *See* SMC 23.76.028.C.1 (A Type 1 MUP is approved for issuance after the Director's decision except where a council land use decision is also required, and then the MUP is approved for issuance only after the Council land use decision) and SMC 23.76.028.C.3 (a Type II MUP is approved for issuance following the expiration of the appeal period except that a Type II MUP that requires a Council land use decision is approved for issuance only after the Council land use decision, SMC 23.76.056.D. (Type IV Council land use decision shall be final and conclusive unless reversed on judicial appeal; judicial review shall be commenced as provided by state law).

Even if SDCI might have the authority in some situations to render a "final [Type 1] determination," in this case, on April 9, 2018, SDCI did not make any "land use decision" about the application of development standards to the proposed project. The project still required additional reviews by the Hearing Examiner and the City Council, each of whom had an opportunity to reshape the project as they deemed necessary, including whether to adopt or reject SDCI's use of the "development site" artifice to avoid applying the access and building setback restrictions of SMC 23.42.030 and 23.47A.014. The required approvals – a rezone and any conditions on the project – were not piecemealed

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and piggybacked, as Respondents at 10-11 allege. They occurred together as one consolidated process and that is evidenced in the Council Findings and in the Ordinance adopting the PUDA that approved the rezone and the proposed development. Wall Decl., **Ex. 9 (Council Findings**) **Ex. 10 (Ordinance & PUDA)**

The Council – not SDCI -- was required to make those decisions based on applicable law and supported by substantial evidence in the record. *Id.* The Council's hands were not tied by SDCI's determinations, if any, on compliance with development standards because the Council could only approve the project if it complied with applicable laws, based on substantial evidence before the Examiner. SMC 23.76.056.A ("The Council's decision to approve, approve with conditions, remand, or deny the application for a Type IV Council land use decision shall be based on applicable law and supported by substantial evidence in the record. . . ."). Respondents, notably, omit the "based on applicable law" requirement when they purport to describe the decision-making process for contract rezones. Motion at 11.

The Hearing Examiner, who makes the Record for the Council Land Use Decision, is also not constrained as Respondents allege. The Hearing Examiner's authority is not limited to "taking evidence related to the Director's report and analyzing rezone criteria." Motion at 11. To the contrary, SMC 23.76.052.E (Conduct of Hearing), specifically states that the Hearing Examiner shall accept evidence and comments regarding . . . .[the] director's report, including an evaluation of the project based on application of City ordinances and policies and the Director's recommendation to approve, approve with conditions, or deny the application. . ." The Hearing Examiner could have and

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should have considered evidence that the "development site" artifice was unlawful, and that allowing a five story building on the property line with a single family lot would violate the mandatory zoning criteria in SMC 23.34.009.D.2 (requiring "a gradual transition in height and scale" between zones) *See e.g.,* Wall Decl., **Ex. 11 & 12** (**Public Comments to Examiner)**. Similarly, the Council could have and should have rejected the contract rezone or conditioned the project pursuant to the "Modify" Findings, Wall Decl., **Ex. 17 (Staff memo)** instead of admitting they were acting unlawfully and attempting to excuse themselves by claiming their unlawful act had no precedential effect. Wall Decl, **Ex. 10 (Ordinance, sixth recital)**. Petitioner's claim in §7.4 offers this Court an opportunity to right the wrong that City officials so willingly overlooked, and to confirm that the City Council, when acting in its quasi-judicial capacity, must apply the law, not ignore the law, or attempt to devise new standards. The Petition is timely and Respondents have failed to show any jurisdictional error to warrant dismissal of that claim.

2. Because a Code Interpretation is no longer a required administrative remedy that must be exhausted, there was no requirement for administrative review.

The Council's change to the Interpretation requirements in 2017 also altered the appeal route in this situation. Before that Code change, Interpretations and a subsequent appeal to the Examiner were required administrative remedies that had to be exhausted before judicial review. Wall Decl. **Ex. 7 Interpretation amendment** (showing Code changes to SMC 23.76.020.A and SMC 23.88.020). The Examiner's decision was final and conclusive, subject to judicial review by state law. SMC 23.76.022.C.12. But

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the Council eliminated that exhaustion requirement, in part because of the financial hardship on Appellants. Wall Decl, **Ex. 8 (Staff memo on interpretation amendment)**. As a result of that Code change, the only way to seek review of a Type 1 decision, without paying over $3,000 for an Interpretation and then appealing that Interpretation to the Examiner, and then appealing an adverse decision to Court, is through direct judicial review, in a consolidated appeal. *See e.g.,* SMC 23.76.02 (consolidation of appeals for all land use decisions). But that can only occur after the final "land use decision" is made. Accordingly, Petitioners were not required to request (and appeal) an interpretation as part of the contract rezone proceedings, and were not otherwise required to seek any administrative review of a Type I Decision. And because SDCI had not issued any "final" decisions on April 9, 2018, there was no LUPA appeal clock that started on that date from a final decision to which the Type 1 appeal would be consolidated. To the extent Respondents wish to construe §7.4 as a challenge to the application of development standards, it was timely because there was no required administrative review of any Zoning Decision allegedly made on April 9, 2018, and there was no other decision that became final until the August 6, 2018 Council land use decision approving the rezone and the PUDA, conditioning the project.

3. S**DCI Documents dated after April 9, 2018 also confirm that SDCI had not yet made a Type I, appealable "Zoning Decision" pursuant to LUPA as of April 9, 2018.**

The SDCI file for this project contains two correction notices that undermine Respondents' argument that an appealable Zoning Decision was made on April 9, 2018. A Correction Notice dated April 23, 2018 states that "I

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am unable to review or approve the construction permit application until after the MUP decision has been published and the contract rezone approval process has ended." Wall Decl., **Ex. 18, April 23, 2018 Correction Notice**. And a Correction Notice issued over nearly a month later and dated May 17, 2018, after the Hearing Examiner's Record had closed, states that "The zoning review will start when MUP #3023280 has been approved and is ready to be issued. . . .All information provided in the MUP (zoning analysis and diagrams) should be included in the building permit drawings." Wall Decl., **Ex. 19, May 17, 2018 Correction Notice.**

There was not and could not have been a jurisdiction-killing Type I "Zoning Decision" made on April 9, 2018 when issues concerning use of the "development site" artifice employed to violate access and setback limitations remained in play before both the Hearing Examiner and the City Council. The City Council, not SDCI, made the final determination on this project.

D. Respondents' position would lead to an absurd result

Not only does Respondents' argument find no support in the LUPA jurisdictional requirements or in the Land Use Code provisions for contract rezone decisions, it would lead to an absurd result that is contrary to the purpose of LUPA.

The stated purpose of LUPA is "to reform the process for judicial review of land use decisions made by local jurisdictions, by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review." RCW

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36.70C.010 (Emphasis added.). There would not be uniform or expedited appeal procedures in a contract rezone case under Respondents' world order.

Under Respondents' reasoning in this case, Petitioners should have appealed the Type I Decision (if one had been made) to Superior Court within 21 days after the April 9, 2018 decision (even though it didn't meet the definition of a final decision appealable under LUPA). But meanwhile, would the Examiner still proceed with the open record hearing on the rezone? If the Examiner imposed conditions on the project that differed from SDCI's "Zoning Decision," would that too be appealable? Would City Council review of the contract rezone then be put on hold for the judicial process to run its course, even though the Council might again change the development? The piecemeal review of interlocutory decisions on projects that have not advanced to a final design would set up an unworkable scheme that would violate the purpose of LUPA and a rationale behind requiring exhaustion of administrative remedies.

There was no Type I Decision that was a "land use decision" within the meaning of LUPA that SDCI made on Aril 9, and accordingly, Petitioners did not miss any deadline that deprives this court of jurisdiction.

V. CONCLUSION

For the reasons above, Respondents' Motion for Partial Summary Judgment should be denied.

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DATED this 8th day of October, 2018.

ARAMBURU & EUSTIS, LLP

By _____
Jeffrey M. Eustis, WSBA #9262
Attorney for Irene Wall and Robert Morgan

I, Jeffrey M. Eustis, certify that according to Word this memorandum does not exceed 8400 words (excluding the caption and signature blocks), fully in compliance with the Local Civil Rules (KCLCR7(b)(5)(B)(vi).

_____

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