Honorable Kenneth Schubert
LUPA Hearing: February 4, 2019

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 PETITIONERS' HEARING MEMORANDUM

I. INTRODUCTION AND RELIEF REQUESTED

Pursuant to the Land Use Petition Act, Chapter 36.70C RCW, Petitioners Irene Wall and Robert Morgan appeal the City Council's approval of a contract rezone for the "Shared Rood" project at 7009 Greenwood Avenue North in the Phinney Ridge neighborhood on grounds that the action violates numerous unambiguous provisions of the Land Use Code, exceeds the Council's quasi-judicial decision-making authority, and constitutes unlawful spot-zoning.

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Petitioners' memorandum is supported by documents in the Administrative Record ("AR") filed by the City and transcripts of the Hearing Examiner and City Council proceedings below. The Administrative Record and an Index to that record, prepared by the City, were filed with the court on November 29, 2018, and subsequently supplemented on December 20, 2018. Transcripts of the Hearing Examiner and City Council proceedings were prepared by Petitioners and filed on November 28, 2018. A Stipulation and Agreed Order entered on November 27, 2018 provided for the Administrative Record to be filed in electronic format and working copies of the decision record to be furnished to the court in electronic format as well, provided that paper copies of the decision record would be furnished to the court if requested by the assigned judge.[1] In this Memorandum, documents within the Administrative Record are designated by page number within the Record, and often by Document number listed in the Index. Appended to this memorandum as designated Attachments are: the Index to the Administrative Record (Att. 1),[2] the text of pertinent provisions of the Seattle Municipal Code (Att.2), and selected documents from the decision record (Att. 3-13), with the Attachment number immediately preceding the document number in the City's Index to the Record. An index to these Attachments immediately follows this memorandum.

The Shared Roof property lies in the middle of the mile long "tail" of the Greenwood-Phinney Ridge Urban Village where all the commercial parcels

[1] Stipulation and Order Authorizing Filing of Decision Record in Electronic Form, November 27, 2018.

[2] In preparing this memorandum, Petitioners noted that the City-produced Index filed with this Court contains numerous errors in page references attiributed to material documents in this case. For example, the Index indicates that Doc. No. 63, the Findings of the Hearing Examiner – which were adopted by the Council and form the basis of this appeal – begins at AR 1487. It does not. It starts at AR 1470. Petitioners have not attempted to clean up erroneous references with a new Index, but instead have identified the correct Record number where cited, and noted the discrepancy in the City's Index.

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along Greenwood are zoned uniformly at NC2-40 (Neighborhood Commercial with a 40 foot height limit), all commercial parcels have historically shared a uniform zoning designation, and all share their rear property lines with the adjacent single family zones (outside the urban village boundary) on each side of Greenwood Avenue. *See* Att. 3 (Zoning Map, annotated, showing Greenwood-Phinney Urban Village).[3]

The contract rezone appealed in this action changes the zoning from NC2-40 to NC2-55 and allows development of a specific, 55+ foot tall building rising, for almost its entire height right on the property line shared with the lots in the adjacent single family zone. Topped with a 12-foot high greenhouse and solar panels, the height of the resulting structure would reach nearly 70 feet. As demonstrated below, and in an illustrative exhibit that Petitioners presented to the City Council, the approved rezone and development violates numerous Land Use Code provisions that require a commercial building to be setback from the single family zone above the first floor, that prohibit access from a single family zone into an adjacent commercial building, and that require, as a condition of upzoning, a gradual transition between zones. *See* Att. 4 (Illustrative Exhibit).[4] The Hearing Examiner, whose Findings the Council adopted in its Decision, confirmed that there are no changed circumstances that warrant this rezone.

The Council action followed a cascade of errors that plagued this project from its inception. Throughout this process, the City – at every level -- unlawfully exploited the developers' common ownership of two separate single family lots along the rear boundary of its two commercial lots proposed for

[3] AR 1571, Doc. No. 70 (Wall-Morgan Reply w/Attachments, 7/16/18).
[4] AR 1778, Doc. No. 84 (Appellants' Illustrative exhibit for Counci).

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rezoning in order to approve a structure that the Code prohibits. In the early stages, SDCI allowed the developer to "create" a so-called "development site" – a term undefined in the Land Use Code – simply by drawing an imaginary line around its four separate tax parcels, and deeming it a "development site." From that fiction, SDCI unlawfully erased internal lot lines and allowed the project to evade unambiguous setback requirements in the Land Use Code that require buildings in commercial zones to be setback from their property lines separating commercial and single family lots. The result was a structure unlawfully large for its site, unlawfully close to the single family zone, and in violation of mandatory rezone criteria that should have prevented approval.

SDCI's decision to pursue the "development site" Code evasion technique -- even after repeated comments that it was unlawful – set this project on a collision course with the Land Use Code, a conflict that requires correction by this Court. From SDCI, which changed its position on the concept of "development site," to the Hearing Examiner who ignored the issue entirely despite extensive public testimony and written comments, and to the Council that embraced this approach even while formally documenting its unlawfulness on the face of the approving ordinance, the City shirked its responsibility to apply the Land Use Code as written. The Council not only turned a blind eye to the Land Use Code, but also acted outside the bounds of its quasi-judicial authority, where it sits as would any other quasi-judicial decision maker and must apply the law as written without any legislative capacity to change the law at that time. SMC 23.76.056.A (apply applicable law); SMC 23.76.004.C (existing legislative standards). With its *ultra vires* approval, the Council instead embarked on an uncharted and unlawful path of customized zoning by

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ownership, not based on lot lines and zoning lines as the Land Use Code requires. The Decision also amounts to an unlawful spot zone.

Petitioners do not seek to prevent construction of a mixed use building at this location; they pursue this appeal to highlight the problems that arise when SDCI misuses its authority as guardians of the Land Use Code, and the Council ignores the limitations on its quasi-judicial authority. Instead of applying unambiguous Code language in a transparent and unbiased way, SDCI acted as facilitators for the developer by crafting new rules -- found nowhere in the Code and directly at odds with unambiguous Code provisions – to usher through approval of the Shared Roof project, and the Council, regrettably, obliged.

The Council decision to grant this contract rezone and approve the accompanying PUDA is contrary to law, should be reversed, and the rezone denied.

II. FACTS

A. The proposed project approved by the Council

On August 6, 2018, the Seattle City Council, acting in its quasi-judicial capacity pursuant to SMC 23.76.056, approved a contract rezone for two commercial parcels at 7009 Greenwood Avenue North that upzoned those lots to NC2-55(M) (fifty-five foot height limit) from their current zoning of NC2-40 (forty foot height limit) and authorized the construction of a five story building right on the shared property line with the adjacent single family zone along the rear boundary, with only a minimal setback on the fifth floor. Att. 5 (Ordinance

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and PUDA).[5] The property is located in the middle of the "tail" of the Greenwood-Phinney Ridge Urban Village, where this one mile stretch of Greenwood Avenue is the only street in the Urban Village, and where no zone transition or buffers exist between the commercial lots on Greenwood Avenue and the adjacent family zones. *See* Att. 3.[6]

The Applicant's property, but not the extent of the contract rezone, involves four adjacent lots at the northwest corner of Greenwood Avenue North and North 70th Street in the Phinney Ridge neighborhood. Two of the lots are commercial properties that total approximately 12,000 square feet, front on Greenwood Avenue North in the "Phinney Tail" of the Greenwood Phinney Urban Village, and are the lots affected by the contract rezone. The two other lots are single family properties and abut the entire west (rear) boundary of the commercial lots where the property line separating the lots is the same as the zoning line for the whole block that separates the commercial lots on the east from the abutting single family lots to the west. One single family lot (Lot # 287710-4127) is a vacant, mid-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 single family 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).[7] The map below shows the four lots at issue.[8]

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[5] AR1760-75, Doc. No 81 (Signed Ordinance 125640 and accompanying PUDA), 8/6/18. *See also* AR248-308, Doc. No. 19 (HXM Ex. 16 Plan Set, version 9), 3/27/19.

[6] AR 1571 (Greenwood-Phinney Ridge Urban Village map annotated), at Doc. No. 70 (Wall-Morgan Reply Brief in Council appeal, Tab 1); *see also* AR1361-63, Doc. No. 58 (HXM Ex. 55, SDCI Analysis, Decision, and Recommendation), 4/9/2018 at pp 2-4.

[7] AR 1361-2, Doc No. 58 (HXM Ex. 55: SDCI Analysis, Decision, and Recommendation), pp. 2-3, 4/9/18).

[8] This is an annotated version of AR 1362, Doc. No. 58 (HXM Ex. 55: SDCI Analysis, Decision, and Recommendation, 4/9/2018, at Page 2).

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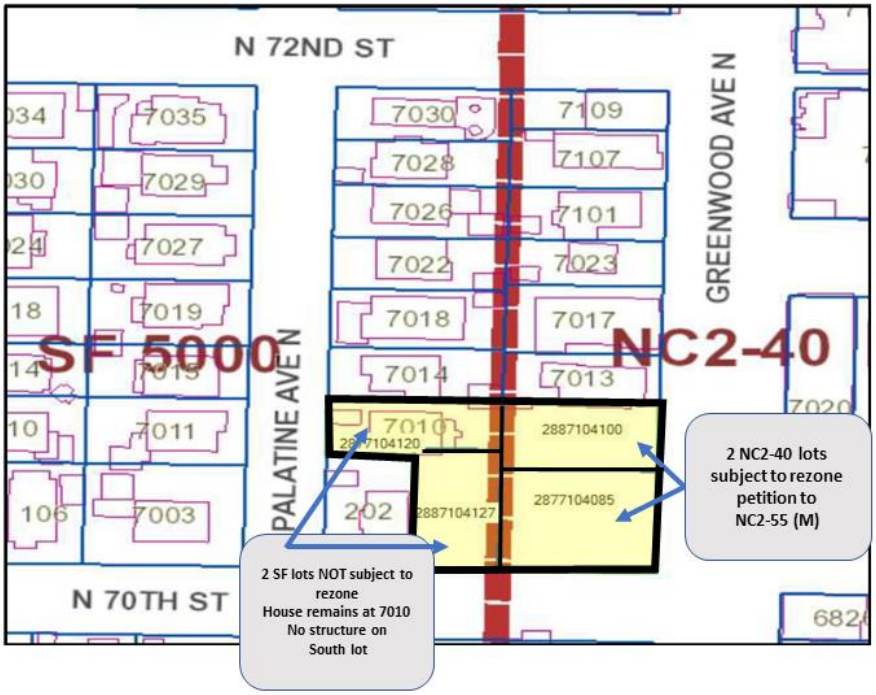

The Applicant applied for a contract rezone of the two commercial lots facing Greenwood Avenue North and expressly excluded the two single family lots from the application. SMC 23.34.004. Consequently, even though the two single family lots are part of the Applicant's ownership, they were not included in the contract rezone request. *See* Att. 5, Rezone Map set forth at Exhibit B to Contract Rezone Ordinance.

In the Land Use Code, an application for a "contract rezone" requires a "Type IV Council land use decision," a quasi judicial decision 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; SMC 23.76.036.A.1 (Amendments to Land Use Map are Type IV, quasi-judicial

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Council actions); SMC 23.76.056; *see also* SMC 23.34.002 (Standard rezone procedures). A contract rezone amends the Official Land Use Map subject to the execution, delivery, and recording of a Property Use and Development Agreement (also referred to as a "PUDA"). SMC 23.84A.032 ("Rezone, contract"). A PUDA, in turn, is an agreement executed by the owner of the property to be rezoned that subjects the property to restrictions on its use and development" that are ultimately imposed by the City Council. SMC 23.84A.030; *see also*, 23.34.004 -.009.

In this case, the Council approved a proposed 55+ foot building with 35 residential units on the upper 4 floors, retail space on the ground floor, and 26 onsite parking spaces. It 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* Land Use Petition at §§7.1.1 - 7.1.4.

A substantial portion of the building is proposed for a portion of the commercial lots where the Land Use Code prohibits such development due to the fact that the proposed and approved structure violates building setback limitations between commercial and single-family properties. As described more fully below, SDCI, and eventually the City Council, allowed the developer to draw a line around its four parcels, leave them as discrete and legally separate entities while calling them all a single "development site," and with that device be freed from limitations in the Land Use Code that would otherwise apply between commercial and single family properties.

Instead of complying with setback provisions in SMC 23.47A.014 that mandate all upper floors above the first floor to be set back at least 15 feet from

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the zoning line, along with other restrictions that ease the transition between commercial and adjacent single family zones, the approved project was a massive 55+foot 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 would rise right on the property line, it would rely 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" artifice was unlawful. The final project approved by the Council includes these fatal errors.

B. The Parties

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 and was a member of the committee that wrote the Greenwood Phinney Neighborhood Plan; Mr. Morgan is a retired member of Seattle City Council Central Staff.[9] 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.[10]

The rezone Applicant and project Developer initially was a group of friends who call themselves "Shared Roof" and planned to live on the upper floors of the building. In public presentations, this group has stated that they

[9] Land Use Petition, ¶6.1.

[10] AR 1228, 1068, 1104, 1182, Doc. No. 57 (Wall and Morgan comments in HXM Ex. 54, Public Comments received by SDCI); *see also* AR 0003, Doc. No. 2 (Hearing Minutes, with Wall testifying).

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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.[11]

C. Procedural History

1. Pre-Application and Early Design Guidance

This project appeared to begin in early 2016 when SDCI published a "Preliminary Assessment Report" identifying a proposal to construct a 38,000 square foot mixed use building with 25 units and 20 parking spaces.[12] Shortly before that time, a "Site Plan" was published on the SDCI website showing the commercial lots facing Greenwood and the vacant single family lot on N. 70th Street. Significantly, the Applicant's initial site plan showed the setbacks required for a building on the commercial lots adjacent to single family lots as required by SMC 23.47A.014.B, namely a 15-foot setback for portions of the building above the first floor and another 15-foot setback at the southwest corner of the building.[13]

Pre-submittal meeting notes dated March 28, 2016, which summarized a meeting among SDCI planners and other City representatives, the owner/developer Chad Dale, and his representatives, revealed the developer seeking ways to build on more of an already large commercial parcel than the Code allowed. Att. 6.[14] In the section entitled "Clarifying Questions for Ms.

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[11] Respondents' appear to have backed off the narrative that the owners would 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. Sub-file No. 13, Respondents' Motion for Partial Summary Judgment at 2, which motion was denied at Sub-file No. 32.

[12] AR 357, Doc. No. 26 (HXM Ex. 23: Preliminary Assessment Report), 1/14/16.

[13] AR 2103, Doc. No. 141 (Site Plan accompanying material dated 12/11/15).

[14] AR 2105, Doc. No. 142 (Presubmittal minutes from March 2016, with incorrect date of November 22, 2016); AR 2109, Doc. No. 143 (Redline version of minutes, showing March 28,

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King," [SDCI planner], the developer appears to be floating to SDCI different ways to avoid complying with the required setbacks. According to SDCI, if the owner "combined" the lots, the building setbacks in the commercial zone would be measured from the lot line, not zone line.[15] But if the Owner decided to keep the commercial and SF lots separate, the setback standards would be eligible for a departure through the design review process "if the reduced setback is shown to better address the design guidelines." *Id.*

According to the Land Use Code, a legally recognized combination of the lots would need to occur through a separate permitting process, either through a Lot Boundary Adjustment or through a Short Plat, neither of which was requested by the owner. As a result, the owner never combined his lots.

By the time SDCI published notice of an Early Design Guidance Meeting, the project had morphed into 6-story building containing 43 units, parking for 27 vehicles, and a request for a contract rezone to NC2-65 (65 foot height limitation) from the existing zoning of NC2-40 (40 feet). The Early Design Guidance meeting was the first stage of the design review process, SMC 23.41, where the applicant presents its project to a Design Review Board that opines on the project's compliance with applicable Design Guidelines (that are not within the Land Use Code), which in turns informs SDCI's Design Review Decision. However, the design review process is independent of any zoning review of a project.

2016 date in the history of the autocorrecting dates). The document the City included at AR 2105 has an incorrect date. Petitioners have attached the version available at the SDCI website, web6.seattle.gov/dpd/edms for Project No. 3023260, which shows the correct date of March 28, 2016.

[15] The Owner / Developer never legally combined the lots, as evidence by the PUDA approved by council, which identified four separate legal tax parcels in this project. Because the lots were never combined, the case does not address whether SDCI's advice on this situation was correct, and accordingly, that issue is not before the Court here.

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An Early Design Guidance Meeting was held on August 15, 2016. The proposal presented to the Design Review Board included a public park in the vacant single family lot on N. 70th behind part of the west side of the building.[16] The developer also specifically requested a "departure" to allow its building to intrude into the required setbacks.[17] By that point, the Applicant had changed its site plan to place its proposed building right on the zoning boundary (which was also the shared property line between the commercial and the single family lots. Accordingly, the building presented to the Design Review Board included four floors right on the property line, a setback on the fifth floor (substantially larger than what was ultimately allowed), and no setback at the building's southwest corner.

The Design Review Board expressed concerns about the building mass and shadow impacts from the increased height in relation to the adjacent single family zone and specifically requested a "thoughtful transition between the proposed structure and the adjacent zones/structures."[18] The Board also requested an "appropriate massing response based on the Height, Bulk and Scale deign guidelines."[19]

When SDCI later published its summary of the EDG meeting, it asserted that no departure would be required after all because the developer had acquired another adjacent single family lot that it intended to "incorporate into the overall development site."[20] But when SDCI reproduced this EDG Guidance

[16] AR 416-17, Doc. 27 (HXM Ex. 24: Early Design Guidance proposal), 8/15/2016.
[17] AR 433, Doc. 27 (HXM Ex. 24: Early Design Guidance proposal), 8/15/2016. SMC 23.41.012 allows SDCI to waive or modify the application of development standards to a proposal if the Director decides that the waiver or modification would result in a development that better meets the intent of adopted design guidelines, subject to certain exceptions.
[18] AR 563, Doc. No. 30 (HXM EX. 27: First Early Design Guidance), 8/15/2016.
[19] AR 564, Doc. 30 (HXM Ex. 27: First Early Design Guidance), 8/15/2016.
[20] AR 565-66, Doc. 30 (HXM Ex 27: Final Early Design Guidance), 8/15/2016.

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document in subsequent analysis and decisions, it omitted this – and only this – information from otherwise verbatim reproductions of this document.[21]

2. Rezone Application and Final Design Review meeting

The applicant submitted an initial rezone application on December 6, 2018, requesting a rezone to the NC2-65 (65-feet) zone from the current zoning of NC2-40 (40 feet), but "self-limiting" the building height to 55 feet.[22] The proposed building was reduced to five stories, and the public park was eliminated. The building would be built right on the shared property line with the adjacent single family lots, even though the Design Review Board had asked for a thoughtful transition to the single family zone. The prior request for a departure from Code-required setbacks was no longer included even though the lots had not been combined, and the project still contained four separate legal lots – the two commercial lots proposed for rezoning and the two adjacent single family lots that were specifically excluded from rezoning.[23]

SDCI received detailed comment letters that challenged its use of the so-called "development site" artifice to evade Code requirements regarding setbacks.[24] At least two SDCI correction notices informed the applicant that the setbacks of SMC 23.47A.014 were required.[25] In response, the Applicant claimed that the adjacent single-family zoned parcels were included in the proposal and therefore no setbacks were required.[26] Without ever articulating a

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[21] Compare Doc 28, Design Review Recommentation of 5/1/17 at 565-66, and Doc No. 58, SDCI Analysis, Decision, and Recommendation, 4/9/18 at 1380.
[22] AR 493, Doc. No. 29 (HXM EX. 26: Contract Rezone Application), 12/6/2016.
[23] AR 2105, Doc. No. 142 (Pre-submittal minutes from March 2016). See also Att. 6.
[24] AR 1186-91, Doc. No. 57 (HXM Ex 54 SDCI Comment Letters, E. Bartfeld, 2/9/2918)
[25] AR 1812, Doc, No. 95 (p2 of SDCI Correction Notice, Zoning) ¶7 (setback requirements); AR Doc. No. 97 (p2 of SDCI Correction Notice, Zoning), ¶7 (setback requirements).
[26] AR 1927, Doc. No. 103 (Correction Response), 3/15/17.

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rationale for its change in position, SDCI evidently obliged the Applicant. Subsequent Correction Notices dropped the setback issue entirely.

When SDCI published notice of a Design Review Board meeting scheduled for May 1, 2017, the proposed project still failed to comply with required setbacks. SDCI received a detailed letter asking that the meeting be rescheduled until this issue was addressed.[27] But SDCI forged ahead with a final design review meeting on May 1, 2017 anyway, where SDCI planner, Lindsay King, prohibited discussion on setbacks, and misled the Design Review Board into thinking it was powerless to require setbacks. *See* Att. 7.[28]

The proposal presented at the May 1, 2017 meeting was a five story building with no public park on the vacant lot, and an even smaller setback on the top floor than in the initial design that had prompted Board concerns. The Design Review Board, however, did not address its prior concerns about the building mass, or its prior request for a "thoughtful transition" to the single family zone, but instead advanced out of design review a project substantially different from the one it had reviewed at the prior Early Design Guidance meeting, requiring only a four-foot setback along the entire fifth floor, even though the Board had previously expressed concerns about a building with a larger setback. On the day after the Design Review Board meeting, the Board Chair, Dale Kutzera, expressed concern about the setback issue to SDCI.[29] SDCI, however, continued to advance the project.

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[27] AR 2078-84, Doc. 138 (Email to SDCI, and internal SDCI emails follow).
[28] AR 2093-94, Doc. No. 140 (Email 5/2/97 following Design Review Meeting).
[29] AR 274-76, Doc. 137 (email exchanage between Dale Kutzera (Design Review Board chair), and Lindsay King (SDCI planner), 8/2/17), included within the City's Supplement to the Administrative Record of December 20, 2018. Until the City added this internal communication to the Record, Petitioners had not been aware that the Mr. Kutzera had expressed concern and confusion about SDCI's directive that the Board could not consider setbacks in its review of the project.

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3. Revised Application and SDCI Analysis, Decision and Recommendation Documents

SDCI published its Analysis, Decision, and Recommendation on January 16, 2018.[30] Due to errors in its required Notice,[31] SDCI re-published its Analysis on January 25, 2018.[32]

Under the City's procedures, a public hearing on the proposed rezone is held before its Hearing Examiner. Initially a public hearing before the Hearing Examiner was scheduled for February 15, 2018. But, on February 12, 2018, SDCI abruptly cancelled the Hearing Examiner proceeding without explanation.[33] On February 20, 2018, SDCI rescinded and withdrew its Analysis, Decision, and Recommendation. [34] It separately announced that the Applicant had filed a revised application on which there would be a new notice and comment period.[35]

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, or to the height of the building.[36] The City had not yet enacted development standards for the "NC2-55" zone – a new zoning designation envisioned as part of the Mandatory Housing Affordability ("MHA")

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[30] AR 1424, Doc. No. 1461 (SDCI Analysis, Decision, and Recommendation), 1/16/2018. The City's Index states incorrectly that this document appears at 1468. That is the last page of the document, not the first page, and shows the January 16, 2018 date..
[31] AR 1410, Doc. 60 (SDCI Notice Documents)
[32] AR 1415, Doc. No. 60 (Re-Notice of Decision), 1/25/18; AR 0010, Doc. No. 4 (HXM Ex. 1: SDCI Analysis, Decision and Recommendation), 1/25/2018.
[33] AR 1417, Doc. No. 60 (SDCI Notice Documents: Cancellation of Public Hearing), 2/12/2018.
[34] AR 1419, Doc. No. 60 (SDCI Notiee Documents: Decision and Recommendation Rescinded), 2/20/18.
[35] AR 1420, Doc. No. 60 (SDCI Notice Documents: Revised Notice of Application), 2/20/2018.
[36] AR 0629, Doc. No. 34 (HXM Ex. 31, Updated Contract Rezone Application).

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legislation still being crafted -- and had only applied it in a handful of areas where the development standards were uniquely tailored to a specific area after community input. The NC2-55 zone did not – and does not – exist in the Phinney Ridge neighborhood where the Shared Roof project is located.

SDCI received public comments explaining, in detail, the myriad problems with the project, including specifically the unlawful reliance on the so-called "development site" artifice to avoid complying with the setbacks required in the Code, as well as the project's failure to meet the rezone criteria in SMC 23.34.[37]

On April 9, 2018, SDCI recommended approval of Shared Roof's amended contract rezone application, issuing a decision document indistinguishable from its January 16, 2018 document, except for including recognition that the proposed rezone was not supported by any change in conditions, when it had previously claimed that the proposed MHA legislation was a "changed condition" that supported this rezone.[38] The document published on April 9, 2018 contained three discrete components: (1) A Design Review Decision pursuant to SMC 23.41 (pages 2-23); (2) A Rezone Analysis and Recommendation for the Contract Rezone, ultimately to 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.[39] SDCI was required to prepare a written report that "shall include," among other requirements, responses to written

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[37] E.g. AR 1068-70 (Irene Wall), AR 1186-91, 1018-1024 (Bartfeld)Doc. No. 57 (HXM 54, comment letters received by SDCI).

[38] AR 0045, Doc. No. 4 (HXM Ex. 1, SDCI Analysis, Decision, and Recommendation) 1/25/2018, and AR 1395, Doc. No. 58 (HXM Ex. 55 SDCI Analyais, Decision and Recommendation), 4/9/2018 ("no evidence of changed circumstances").

[39] AR 1360-1404, Doc. No. 58 (HXM Ex. 55, SDCI Analysis, Decision, and Recommendation), 4/9/2018.

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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. But SDCI ignored that first requirement and did not address any of the public comments.

4. Hearing Examiner Open Record Hearing and Recommendation

On April 30, 2018, the Hearing Examiner held an open record hearing to consider SDCI's Analysis and establish the record for the Type IV Council Land Use decision. *See* SMC 23.76.052.A; SMC 23.76.052.F; *see also* SMC 23.76.052.E (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)(emphasis added).

A transcript of the Hearing has been filed with the Court and the Record contains "Hearing Minutes" that lists the start and end times for each speaker.[40] Every member of the public who opposed the project offered detailed reasons why the project failed to meet applicable Code requirements and rezone criteria. The few members of the public who spoke in favor of the project offered favorable comments on the building appearance and its provision of some parking spaces, but they did not address compliance with Code criteria.

[40] AR 0004, Doc. No. 2 ("Hearing Minutes"), 4/30/2018.

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Every written comment received by the Examiner offered detailed analysis why the project failed to comply with rezone criteria.[41]

The Hearing Examiner released his recommendation to approve the project on June 5, 2018. Att. 8[42] *See* SMC 23.76.052.H (in a contract rezone, the Examiner submits a written recommendation to the Council to approve, approve with conditions or deny an application). The Examiner's recommendation ignored the extensive public comment that detailed flaws in SDCI's analysis, and he ignored the development site issue entirely, despite detailed testimony and written comments on that topic, and he accepted SDCI's treatment of the Applicant's property as a single "development site" without even acknowledging that such treatment was contested.[43] In effect, he rubber-stamped SDCI's analysis. Because the Council adopted the Hearing Examiner's Findings as its own, the errors are incorporated into this appeal.

5. Petitioners' Appeal to Council, and Council Land Use Decision

On June 19, 2018, Petitioners timely appealed the Hearing Examiner's recommendation to the Council, pursuant to SMC 23.76.054 as part of the Council's quasi-judicial proceeding to consider the contract rezone request.[44] In a Type IV Council land use decision such as a contract rezone, the Council

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[41] AR 0815, Doc. No. 52 (HXM Ex. 49: Documents submitted by Esther Bartfeld; AR 0903, Doc. No. 56 (HXM Ex. 53: Public comments received by the Hearing Examiner's Office); *See also* AR 1573, Doc. No. 70 (Ex 3 to Wall Morgan Reply), email from Alayna Johnson (assistant to Hearing Examiner) to Irene Wall attaching all comments received by the Hearing Examiner), followed by a list of documents and the comment letters, at AR 1574-.1618

[42] AR 1470-87, Doc. No. 63 (Findings of the Hearing Examiner), 6/5/2018.

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

[44] AR 1489-1508, Doc. No. 65 (Wall-Morgan Appeal), 6/19/2018; *see also* AR 1544-1661, Doc. No. 70 (Wall-Morgan Reply w/Attachments 1-13), 7/16/2018; and AR 1664-1689, Doc. No. 72 (Wall-Morgan Corrected Reply), 7/17/2018. Petitioners' Corrected Reply brief relies on the same exhibits filed with the original reply brief. These exhibits begin at AR 1570.

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sits in a quasi-judicial capacity and makes a final decision 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.

On July 18,2018, the Planning, Land Use, and Zoning Committee (also referred to as the "PLUZ" Committee) of the Council heard argument on Petitioners' Appeal.[45] The claims regarding use by SDCI and the Examiner of the "development site" artifice to evade enforcement of zoning restrictions under SMC 23.42.030 and 23.47A.014 were squarely presented to the City Council. In addition to extensive briefing that detailed the Hearing Examiner's numerous factual and legal errors,[46] Petitioners supplied the Council with an illustrative exhibit that detailed, using the Developer's own site plan, the many errors the Examiner had made. Att. 4.[47]

The PLUZ Committee reconvened on August 1, 2018. In a July 30, 2018 memo to the Committee, Council Central Staff member Ketil Freeman summarized the project and presented the Council with only two options: approve the project, or approve it with modifications. Att. 9.[48] He did not present an option to reject the project, even though the Code expressly allows this. SMC 23.76.056.A. The "modify" option would have granted the rezone, but required applicable setbacks and use restrictions, an action that would have

[45] AR 1691, 1695, Doc. 73 (PLUZ Committee Agenda) 7/18/2018.
[46] AR 1489-1508, Doc. No. 65 (Wall-Morgan Appeal), 6/19/2018; *see also* AR 1544-1661, Doc. No. 70 (Wall-Morgan Reply w/Attachments 1-13), 7/16/2018; and AR 1664-1689, Doc. No. 72 (Wall-Morgan Corrected Reply), 7/17/2018. Petitioners' Corrected Reply brief relies on the same exhibits filed with the original reply brief. These exhibits begin at AR 1570.
[47] AR1778, Doc. No. 84 (Petitioners' (Appellants below) Illustrative Exhibit to Council).
[48] AR 1707, Doc. No. 76 (Council Central Staff memo, at AR 1705-19), 7/30/18.

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removed from this case the "development site" issue and all other errors that flowed from its unlawful application.[49]

The full Council approved the rezone request on August 6, 2018. To implement its decision, the Council adopted Findings and Conclusions, set forth at Att. 10,[50] and passed Council Bill ("CB") 119323 (which became Ordinance. 125640**)**, along with a Property Use and Development Agreement ("PUDA"),[51] copies of which are set forth at Att. 5.

The Council Findings adopted the Hearing Examiner's Findings and Conclusions in full, and, at the last minute, took the extra step of prohibiting development on the vacant single lot, [52] effectively changing its permissible land use even though the property was not included within the contract rezone site and the City did not follow proper procedures to do so.

In the Ordinance, the Council included recitals that confirmed SDCI's use of the "development site" artifice, and acknowledged its unlawfulness, but then claimed that it didn't matter because its decision had no precedential effect. Specifically the Council stated that

> The Council has not yet made a policy decision reflected in regulations or definitions in the Land Use Code about the implications of development sites when a project is proposed for a site that includes a single family zone designation and another more intensive zone designation.[53]

The Council did not discuss or pronounce a new policy or Code changes at that time; it left that decision for another day, stating that it "intends to

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[49] AR 1714, Doc. No. 76 (Council Central Staff memo; "Modify" version of Findings), 8/6/18, included within Attachment 9 to this memorandum.
[50] AR 1755-59, Doc. No. 80 (Council Findings), 8/6/2018.
[51] AR1760-1775, Doc. No. 81 (Council Ordinance and PUDA),8/6/2018.
[52] AR 1755, Doc. No. 80 (Council Findings), 8/6/18.
[53] AR 1760-61, Doc. No. 81 (Signed Ordinance), 8/6/18.

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address policy issues related to 'development sites,'" but with no additional clarification about the substance or timing of that issue. *Id.* The Council then tried to sweep this gaping flaw under the rug by asserting that "Council decisions related to contract rezone applications have no precedential effect."[54]

The Council decision became the City's "land use decision" on Shared Roof's contract rezone application, *i.e*., the "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); *see also* SMC 23.76.056.D (Council land use decision is final subject to judicial review, which shall be commenced as provided by state law).

6. Land Use Petition Act Appeal

Petitioners timely filed their LUPA appeal on August 27, 2018. The Petition seeks reversal of the Council Land Use decision on the grounds that the Council acted outside its authority, and the challenged decision authorizing the rezone and proposed building is an erroneous interpretation of the law, is not supported by substantial evidence, is a clearly erroneous application of the law to the facts, and constitutes an unconstitutional spot zone. Specifically, the Petition alleged that:

> §7.1: The Rezone is unlawful because it violates the one and only mandatory directive for contract rezones in the Land Use Code that "[a] gradual transition in height and scale and level of activity between zones

[54] AR 1762. Whether such actions have precedential effect is not an issue in the case. Petitioners note, however, that regardless of whether approval of a contract rezone has precedential effect, the practical effect of a Council memorializing the unlawfulness of its actions and then offering an excuse why its unlawful actions don't matter, is chilling. And, as applied to other contract rezones, the Council's actions here invites developers to purchase adjacent single family lots so they, too, can reap the windfall of an oversized structure that Council conferred on Shared Roof.

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shell be provided unless major physical buffers . . . are provided." SMC 23.34.009.D.2.

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

§7.3: The Council Action was issued in violation of Land Use Code because it violates provisions of the General Rezone Criteria in SMC 23.34.008

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

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

§7.6: The contract rezone was unlawfully enacted as a spot zone.

7. Respondents' Unsuccessful Motion for Partial Summary Judgment

For consideration at the initial hearing on procedural and jurisdictional matters under RCW 36.70C.080, Respondents filed a motion for partial summary judgment to dismiss Claim §7.4 of the LUPA Petition on asserted grounds that the claim challenging the "development site" issue was untimely; Respondents argued that SDCI's various analyses published on April 9, 2018 -- and not the Council's final decision approving the rezone on August 6, 2018 -- had triggered LUPA's 21-day limitations period under RCW 36.70C.040(3)&(4).

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On November 1, 2018, Judge McKee denied that motion and concluded that the Council Decision on August 6, 2018 was the "Land Use Decision" decision that triggered the 21-day LUPA clock under RCW 36.70C.040, and Petitioners' appeal was, therefore, timely.[55] The Court's Oral Decision was filed on November 19, 2018. In addition to ruling against Respondents, the Court stated expressly that "the Petitioner can litigate the application of the development site by SDCI, not just limited to whether or not the Council appropriately or inappropriately considered the development site."[56]

On November 29, 2018, the City shared with Counsel a PDF version of the record it intended to file that day and noted that a couple of additional documents had been added to the record, specifically Documents 137 and 138. Those two documents – internal SDCI email correspondence attempting to explain how SDCI was using the so-called "development site" artifice to evade applicable Code requirements regarding setbacks – had never been revealed publicly, and were not part of the decision record before either the Hearing Examiner or the City Council. Petitioners requested that the decision record be further supplemented with yet additional documents addressing the "development site" issue. The City filed a supplementation of the decision record agreed on December 20, 2018 and adds Document Numbers 139-43.[57]

III. ISSUES PRESENTED

1. Did the City act unlawfully – at SDCI and at the City Council – when it embraced and relied upon the "development site" artifice to allow construction of a multi-story building right on property line when the Code unambiguously prevents such a

[55] Sub-file. No. 32.
[56] Order Decision at 8.
[57] As noted above, the Index to the Record, including the index to the supplementation of the record, is set forth at Attachment 1 to this memorandum.

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structure and contains no "development site" or other exceptions allowing custom zoning by ownership, as admitted by the Council? (LUPA Claim §7.4)[58]

2. Did the City Council err when it approved the contract rezone with a massive building rising right on the shared property line with the adjacent single family zone when the Code requires a gradual transition between zones? (LUPA Claim §7.1)

3. Did the City Council err when it approved a project that did not meet the other mandatory rezone criteria for height increases in SMC 23.34.009 and the general rezone criteria in SMC 23.34.008? (LUPA Claims §§ 7.2, 7.3)

4. Did the City Council unlawfully restrict development on the vacant lot by, in effect, rezoning that lot without following proper procedure? (LUPA Claim §7.5)

5. Was the City Council's decision to rezone 7009 Greenwood for the Shared Roof project an unlawful spot rezone? (LUPA Claim §7.6)

IV. ARGUMENT

The Council's decision to approve a contract rezone for 7009 Greenwood Avenue North should be reversed because it violates myriad provisions of the Land Use Code as well as the Council's quasi-judicial decision-making obligations, and also creates an unlawful spot zone.

The City's Land Use Code, Title 23 SMC, sets forth regulations and procedures for the use of land that: are consistent with and implement the City's Comprehensive Plan; classify land within the City into various land use zones in order to regulate uses and structures; and include provisions designed to provide adequate light, air, access, and open space, and maintain a

[58] The memorandum addresses Claim §7.4 first because a ruling in Petitioners' favor on that issue would result in finding the contract rezone unlawful and would be dispositive of the Land Use Petition. However, should the court deny relief to Petitioners on Claim §7.4, their other claims would remain.

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compatible scale within an area. SMC 23.02.020. The Code dictates specific requirements that must be met before a property is upzoned through a site-specific contract rezone, SMC 23.34.007-009, and criteria for each zone, e.g., SMC 23.34.010 - .128. The Code also requires setbacks and transitions between commercial and residential properties that apply citywide, regardless of building height, SMC 23.47A.014.B, and mandates a gradual transition between zones as a condition of granting extra height in a contract rezone. SMC 23.34.009.D.2. It does not provide for customized zoning based on common ownership of adjacent parcels, as the Council embraced in its approval of this contract rezone.

This Court should not indulge SDCI's brazen disregard for the Land Use Code it is tasked with enforcing nor the Council's flagrant violations of its quasi-judicial decision-making authority that constrains its actions. The decision to grant a contract rezone for the Shared Roof project at 7009 Greenwood Ave N should be reversed and the rezone denied.

A. Standard of Review

LUPA governs review of land use decisions. RCW 36.70C.030. Under LUPA the court may grant relief if:

> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
>
> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
>
> (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

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> (d) The land use decision is a clearly erroneous application of the law to the facts;
>
> (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
>
> (f) the land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1).

Among the standards of review, the issues presented in this appeal are reviewable *de novo* as questions of law. Issues of statutory construction present questions of law and are reviewable *de novo,*[59] as are issues involving the construction of an ordinance.[60] Therefore, whether a land use decisions satisfies requirements of law presents a question of law, reviewable *de novo.*[61]

The issues presented for review are properly reviewed for error of law under the clearly erroneous standard. Approvals of the contract rezone and accompanying PUDA that authorizes a specific building at 7009 Greenwood Avenue North, and prohibitions on building on the vacant single family lot are challenged for violation of Land Use Code provisions under the error of law standard. An agency action is clearly erroneous if "the reviewing court on the record is left with a definite and firm conviction that a mistake has been committed."[62] Factual determinations relating to SDCI's and the Hearing Examiner's failure to address the development site issue in their

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[59] *State v. Evans*, 177 Wn.2d 186, 191, 298 P.3d 724 (2013).

[60] *Faben Point Neighbors v. City of Mercer Island*, 102 Wn.App. 775, 778, 11 P.3d 322, *review denied*, 142 Wn.2d 1027, 21 P.3d 1149 (2000)

[61] *Sunderland Family Treatment Services v. City of Pasco,* 107 Wn. App. 109, 117, 26 P.3d 955 (2001)("Issues of law are reviewed *de novo*.").

[62] *Anderson v. Pierce County,* 86 Wn. App. 290, 301, 936 P.2d 432 (1997).

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recommendations are challenged for lack of support by substantial evidence. Substantial evidence has been defined as evidence that would "convince an unprejudiced, thinking mind of the truth of the declared premise." *United Development Corp. v. City of Mill Creek,* 106 Wn. App. 681, 688, 26 P.3d 943 (2001).

B. The Land Use Code requires conformity with regulations, the Council is required to abide by existing Code provisions when it acts in its quasi-judicial capacity, and there is no "development site" in the Land Use Code nor any other Code provision that authorizes custom-zoning based on common ownership of adjacent parcels

The Land Use Code does not abide discretion in its application. It provides that "[t]he establishment or change of use of any structures, buildings or premises, or any part thereof, requires approval according to the procedures set forth in Chapter 23.76, Procedures for Master Use Permits and Council Land Use Decisions" except for listed actions not relevant here. SMC 23.40.002.A. For contract rezones, those procedures, in turn, require SDCI to evaluate a proposal's compliance with applicable Code provisions and transmit a written report to the Hearing Examiner. SMC 23.76.050. The Hearing Examiner conduct a public hearing, take evidence, establishes the Record, and applies the law to the facts of the case in a Recommendation to the City Council. SMC 23.76.052, and the City Council to make the final Land Use Decision on a contract rezone and the specific building authorized by such rezone. SMC 23.76.054, .SMC 23.76.056. Each decision maker is bound by the overarching principle that "no structure or part of a structure shall be erected, moved, reconstructed, extended, enlarged or altered, except in conformity with the regulations specified in this title for the zone and overly

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district, if any, in which it is or will be located." SMC 23.40.002.B (emphasis added) (chapter entitled "Conformity with regulations required").

Despite that clear and unambiguous directive, SDCI and the Council ignored the specific provisions of the Land Use Code – detailed below -- that require buildings in commercial zones that abut parcels (known as "lots") in a single family zone to be set back from the property line, and that prohibit a lot in a single family zone from being used to access commercial uses in the commercial zone. Instead, SDCI and the Council opted for a path uncharted in the Code, to wit: use of the so-called "development site" artifice by which an owner of adjoining, discrete lots (entirely separate legal tax parcels) in different zones would be allowed to draw an imaginary line around its collection of lots, to call them all a single "development site" while simultaneously retaining them as discrete legal lots (tax parcels), and the City then waves a magic wand, erases all internal lot lines, zoning boundaries, and Code provisions that regulate building setbacks and uses on those lots that the developer finds inconvenient, and then approves a building that the Code would otherwise prohibit. LUPA requires reversal under these circumstances

1. The Land Use Code unambiguously requires setbacks for buildings on commercial lots that abut lots in a residential zone

Questions of statutory interpretation are reviewed de novo. The "fundamental purpose in statutory interpretation is to ascertain and discern the legislature's intent. *Whatcom County v. The Western Washington Growth Management Hearings Bd*., 186 Wn.2d 648, 668, 381 P.3d 1 (2016). "The court discerns legislative intent from the plain language enacted by the legislature,

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considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole." *Id; see also Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-12, 43 P.3d 4 (2002)(explaining the plain meaning rule).

In this case, the Land Use Code, at SMC 23.47A, describes the authorized uses and development standards for commercial zones, including the NC240 zone in this case that is proposed for rezoning. SMC 23.47A.002.A. It is undisputed that the two parcels proposed for rezoning are located in the NC zone and that the provisions within SMC 23.47A.014 apply to the NC zone.240.

In SMC 23.47A.014. the Code describes various "setback requirements in the commercial zones. "Setback," is defined in the Land Use Code as follows:

> Setback "means the minimum required distance between a structure or portion thereof and a lot line of the lot on which it is located, or another line described in a particular section of this title." SMC 23.84A.036.

The terms "Lot" and "Lot line" used in the definition of "setback" are also defined terms:

> Lot "means . . . a parcel of land that qualifies for separate development or has been separately developed. A lot is the unit that the development standards of each zone are typically applied to. . . ."; SMC 23.84A.024
>
> Lot lines "means the property lines bounding a lot." SMC 23.84A.024.

At SMC 23.47A.014.B, the Code specifies several discrete "Setback requirements" that apply "for lots abutting. . . residential zones," SMC

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23.47A.014.B (emphasis added). These underlined words, too, have specific definitions in the Land Use Code, as follows:

> Abut "means to border upon, except that lots that touch only on a corner of another lot are not considered to abut." SMC 23.84A.002.
>
> Residential zone: "Zone, residential" means a zone with a classification that includes . . . SF5000 [single family]. . . ." SMC 23.84A.048. [63]

Importing the Code definitions into the specific language that triggers the mandatory setbacks in SMC 23.47A.014.B confirms that this provision applies when a parcel (a "lot") in a commercial zone shares ("abuts") a property line ("lot line") with a lot in a single family zone ("residential zone"). That is the situation here: the developer's two commercial lots proposed for rezone share their rear property line ("abut") with the developer's two separate and discrete lots in the single family (SF5000) zone.[64]

Therefore, this project was subject to the following setbacks in SMC 23.47A.014.B:

> **SMC 23.47A.014.B.1** [15-foot no-build triangle, in this case, at the southwest corner of the commercial lot on N. 70th]:
>
> A setback is required where a lot abuts the intersection of a side lot line and front lot line of a lot in a residential zone or a lot that is zoned both commercial and residential if the commercial zoned portion of the abutting lot is less than 50 percent of the width or depth of the lot. The required setback forms a triangular area. Two sides of the triangle extend along the street lot line and side lot line 15 feet from the intersection of the residentially zoned lot's front lot line and the side lot line abutting the residentially

[63] Because they are set forth here, these definitions are not included in the excerpts from the Land Use Code.
[64] AR 1699, Doc. No. 74 (PLUZ Committee Hearing Presentation by Ketil Freeman, Council Central Staff), 7.18.18

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zoned lot. The third side connects these two sides with a diagonal line across the commercially-zoned lot (Exhibit A for 23.47A.014).

SMC 23.47A.014.B.3 [minimum 15-foot setback on all floors above the first floor]:

> For a structure containing a residential use, a setback is required along any side or rear lot line that abuts a lot in a residential zone or that is across an alley from a lot in a residential zone, or that abuts a lot that is zoned both commercial and residential if the commercial zoned portion of the abutting lot is less than 50 percent of the width or depth of the lot, as follows:
>
> a. Fifteen feet for portions above 13 feet in height to a maximum of 40 feet; and
>
> b. For each portion of a strucure above 40 feet in height, an additiona. Setback at the rate of 2 feet of setback for every 10 feet by which the height of such portion exceeds 40 feet (Exhibit C. for 23.47A.013).

SMC 23.47A.014.B.5 [prohibiting windows and door on first floor unless there is a five-foot setback]:

> No entrance, window, or other opening is permitted closer than 5 feet to an abutting residentially-zoned lot

The Hearing Examiner received oral and written comments detailing these fatal flaws in SDCI's analysis.[65] But despite that clear and unambiguous language of SMC 23.47A.014.B, every decision-maker ignored these setback requirements. Instead, they relied on the fiction that the developer's ownership of four distinct and separate lots – two commercial lots and two single family lots – constituted a single "development site" to avoid these requirements, and they thereby approved a multi-story building right on the shared property line separating the lots in the commercial zone from the lots in the abutting single family zone that SMC 23.47A.014.B prohibits. *See e.g.,* Att.4.[66]

[65] AR 815, Doc. No. 52 (HXM Ex. 49: Document submitted by Esther Bartfeld), 4/30/2018, specifically 825-829 (Setback Violations); AR 3 (Hearing Minutes: (E. Bartfeld at 9:25.57).
[66] AR1778, Doc. No. 84 (Illustrative Exhibit).

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2. The Land Use Code does not include provisions for a "development site" or any other provision to evade the setback requirements of SMC 23.47A.014.B and SDCI ignored its own guidance when applying a "development sites" in this case.

There is no definition of "development site" in the Land Use Code. *See e.g.,* SMC 23.84A (Definitions). Nor is there any provision in the Code that allows a developer to acquire adjacent lots in different zones, casually "combine" them with an imaginary line drawn around legally discrete lots and obtain special dispensation from Code requirements it finds inconvenient. Nor is there any other mechanism for an owner of separate and discrete legal lots in the NC zone that abut lots in a single family zone to avoid the mandatory setback requirements of SMC 23.47A.014.B.

To the extent there is any mention of a "development site" in the administration of the Land Use Code, it is only in SDCI's guidance document, TIP 247. According to SDCI's website, "Tips are designed to provide user-friendly information on the range of City permitting, land use and code compliance polities and procedures that you may encounter while conducting business within the City." *See* http://web6.seattle.gov/DPD/CAMS/camlist.aspx, listing SDCI Tips, where TIP 247 is SDCI's "Development Site Permitting Guidelines," set forth at Attachment 12.[67] Even though TIPs are not part of the Code and cannot override the Code, SDCI ignored the provisions in TIP 247 as well.

TIP 247 explains that "a 'development site' is a piece of land within the boundaries of which we apply all the development standards for the land use,

[67] AR 1620, Doc. No. 70 (Ex.3 to Wall Morgan Reply, ("City of Seattle Development Site Permitting Guidelines")

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building, and electrical code . . .” In the section entitled “How do I Create a Development Site?” TIP 247 explains that “You must have an existing development site before you can submit your permit application or early design guidance application.” It then explains that “[a] development site is considered to be existing for permit application purposes if it is platted with **a** recording number or if a platting action or lot boundary adjustment is currently under review in the department.” (Emphasis added).[68] In other words, a “development site,” according to SDCI’s own guidance, must have a single recording number, that either already exists (e.g., for a development that comprises only one legal lot), or is formally and legally combined with another lot through the lot boundary adjustment process specified in the Land Use Code (SMC 23.28).

Here, it is undisputed that the Shared Roof “development site” contains four separate legal lots, each identified as a separate tax parcel in the King County Recorder’s office.[69] It is also undisputed that these four lots were never combined into a single lot as required by TIP 247.[70]

Although SDCI had previously advised the client that the lots needed to be combined to avoid setback requirements,[71] it abandoned that view in the end.[72] The lots were never combined. When the Design Review Board Chair Dale Kutzera had expressed concerns and asked for explanation why SDCI had prohibited discussion of setbacks at the design review, SDCI planner Lindsay King informed him that “[o]nce the parcels are combined for

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[68] *Id.*
[69] AR 1794, Doc. No. 90 (PUDA); also at AR 1766 (Legal Descriptions of parcels in PUDA), Doc. 81 (Council Ordinance and PUDA).
[70] *Id.*
[71] AR 2105, Doc. No. 142, 143 Pre-submittal meeting notes, March 28, 2016.
[72] Because the lots were never combined, this case does not address the issue whether a formal combining of lots in this situation would have been legal.

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development there will no longer be a lot line at the zoning change line." [73] But the lots had not been legally combined at the time of the design review meeting when planner Lindsay King prohibited discussion of setbacks. The lots had not been legally combined when SDCI issued its Analysis. And they had not been legally combined when SDCI Planner Lindsay King misrepresented to the Examiner that they had been:

> Those parcels were combined together to become one site considered for development. All development standard were applied to the totality of that site, and not the individual parcels that exist within that site.[74]

SDCI was unlawfully freelancing. Development standards are applied based on the zone in which a lot is located, SMC 23.02.020.A, and "all structures . . . shall be built or established on a lot or lots." SMC 23.02.020.C. The Shared Roof building is proposed for its two lots in the NC2-40 zone. Those lots abut the lots in the single family zone, and therefore the mandatory setbacks of SMC 23.47A.014.B apply. Ms. King's testimony made no sense because the lot lines and zoning boundaries between the commercial and single family properties had been retained.

This clear error was identified as a red flag since SDCI first announced its plans to rely on the so-called "development site" fiction to avoid these requirements. SDCI received numerous comment letters on this topic. This topic was raised in detailed testimony before the Hearing Examiner, it was the topic of a separate exhibit presented to the Hearing Examiner,[75] and it was

[73] AR 2074 Doc. No 137 (Emails Dale Kutzera and Lindsay King).
[74] Testimony of Lindsay King, Hearing Examiner Transcript at page 78 lines 15-16; 79, lines 1-4 (emphasis added).
[75] AR 815-29 Doc. No. 52 (HXM Ex. 49 (Documents submitted by Esther Bartfeld), 4/30/2018, set forth at Attachment 11.

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identified in Petitioners' Appeal to Council. The Council acknowledged there was no existing law or policy that allowed a "development site" to be used in this manner, but it approved the project anyway. It now falls to this Court to correct this clear legal error.

3. SDCI acted unlawfully when it approved the Shared Roof building in violation of several Land Use Code provisions[76]

"The acts of administering a zoning ordinance do not go back to the questions of policy and discretion which were settled at the time of the adoption of the ordinance. Administrative authorities are properly concerned with questions of compliance with the ordinance, not with its wisdom." *State ex rel. Ogden v. Bellevue*, 45 Wn.2d 492, 495, 275 P.2d 899, 902 (1954). "This rule is of equal force in the administration of a building code." *Eastlake Community Council v. Roanoke Associates, Inc.*, 82 Wn.2d 475, 482, 513 P.2d 36 (1973). "To permit another course of administrative behavior, thereby inviting discretion, may well result in violations of the equal protection of the laws." *Id.* The duty of those empowered to enforce the codes and ordinances of the city is to insure compliance therewith and not to devise anonymous procedures available to the citizenry in an arbitrary and uncertain fashion." *Id.*(emphasis added).

In a contract rezone, SDCI is tasked with the first step in the process: administering the zoning code to ensure that the project it advances to the Hearing Examiner complies with applicable Code requirements But as the project progressed, SDCI transformed into an advocate for the developer,

[76] In her Oral Decision denying Respondents' Motion for Partial Summary Judgment at 8, Judge McKee determined that "the Petitioner can litigate the application of the development site by SDCI, not just limited to whether or not the Council appropriately or inappropriately considered the development site."

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ignoring not only the Land Use Code it is charged with enforcing, but its own guidance document as well.

SDCI had been informed repeatedly throughout the process that its use of a "development site" for evading Code-required setbacks was unlawful.[77] SDCI was required to address public comments in its rezone recommendation report to the Examiner. But it ignored the development site issue entirely in its Decision to approve the project, even though that issue had been raised repeatedly in citizen comment letters.[78] In fact, where it reproduced the first EDG report as part of its Decision, it omitted the portion of the EDG report where it had first explained that no departure would be required because the developer had acquired both adjacent single family lots.[79] In the Rezone Recommendation portion of its Analysis, it similarly made no mention of the setback issue or the problems created by allowing development of a five story building on the shared property line where the rezone criteria requires a gradual transition between zones.[80] 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. . . .", SMC 23.34.009.D.2, SDCI says nothing at all. It omits that requirement entirely. [81]

If SDCI had applied the Code provisions on setbacks and its own guidance on "development sites," it would not have approved this project, and it

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[77] AR 815 *et seq.*
[78] AR 1360, Doc 58, SDCI Analysis at 22-23.
[79] Compare Doc 28, Design Review Recommentation of 5/1/17 at 565-66, and Doc No. 58, SDCI Analysis, Decision, and Recommendation, 4/9/18 at 1380.
[80] *Id.,* Analysis at 32-33.
[81] *Id.* Analysis at 38-39.

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is unlikely that the Examiner would have recommended approval or that the Council would have approved the contract rezone request.

4. The Council violated its quasi-judicial decision-making obligations when it confirmed that there was no basis in the Land Use Code to override Code provisions based on common ownership of adjacent lots

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.A (emphasis added).[82]

Thus, when the Council sits, as it did here, in its quasi-judicial capacity as opposed to its more routine legislative capacity, the rules are different. The Council is not making law as it does in its legislative capacity, it is applying the law as written, as an arbiter. "[W]hen a city council purports to act pursuant to its own zoning ordinance to issue special use permits, it is not legislating, but is acting in its administrative capacity." ." *Lund v. City of Tumwater*, 2 Wn. App. 750, 755, 472 P.2d 550 (1970). "The discretion permissible in zoning matters is that which is exercised in adopting the zone classifications with the terms, standards and requirements pertinent thereto, all of which must be by general ordinance applicable to all persons alike." *Ogden,* 45 Wn.2d at 495. "The city has broad legislative powers when it adopts or amends zoning classifications. But the authority to issue special permits must be controlled by standards, whether it is vested in legislative or administrative bodies." *Lund v. City of*

[82] *See also* SMC 23.34.002, "Standard rezone procedures" ("Procedures for amending the Official Land Use Map . . . shall be as provided in Chapter 23.76, Procedures for Master Use Permits and Council Land Use Decisions.")(Emphasis added).

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Tumwater, 2 Wn. App. at 755 (striking down Council action that violated applicable code requirements).

In this case, it is undisputed that the Council was acting in its quasi-judicial capacity when it made the Type IV contract rezone here. But when the Council approved the 7009 Greenwood contract rezone, it cast aside the limitations on its discretion. Instead, it specifically acknowledged its unlawful behavior on the face of its decision, and then tried to sweep it under the 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. Petitioners' claim at §7.4 of the Petition 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. *See also* RCW 36.70C.130(1)(e).[83] In effect, the Council action was *ultra vires*

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:

> WHEREAS, the appeal raised issues related to an administrative decision by the Seattle Department of Construction and Inspections to establish as a "development site," for the purposes of the applicaion of development standards, the rezone area and two adjacent single family parcels;

[83] 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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> WHEREAS, "the Council has not yet made a policy decision reflected in regulations or definitions in the Land Use Code about the implications of "development sites" when a project is proposed for a site that includes a single family zone designation and another more intensive zone designation."
>
> WHEREAS, the Council intends to address policy issues related to 'development sites,' [84]

But it proceeded to apply the concept and approved the project anyway, because it claimed that "Council decisions related to contract rezone applications have no precedential effect. . . ." *Id.*

The Amendment that added this language was specifically intended to "establish[] the Council's intent to take up policy issues related to designation of "Development sites, which confirms that the Council understood that, in accepting the development site artifice, it was not applying existing law or legislative standards."[85] "This is tantamount to administering the entire zoning ordinance upon a discretionary basis . . . ." *State ex rel. Ogden,* 45 Wn.2d at 495 (rejecting City's attempts to ignore Code provisions that otherwise would have allowed the proposed project); *see also Eastlake Community Council,* 82 Wn.2d at 482 ("The code is positive in its requirements and contains no exceptional procedures like those employed here; hence, no city officer was authorized to permit its violation.". "

The Council was also specifically informed that the proposal violated SMC 23.42.030 that prohibits a single family lot from being used to access commercial uses in a commercial zone**.**[86] The site plan presented to Council showed a walkway across the single family lots that would access the

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[84] AR 1763, Doc. No. 81 (Signed Ordinance); *See also* AR 1761l and AR 1777, Doc. No. 83 (Amendment 2 to CB 119323).
[85] AR 1777, Doc. No. 83 (Amendment 2 to CB 119323).
[86] AR 1778, Doc. No. 84 (Illustsrative Exhibit); AR 1489-1508 (Wall-Morgan Appeal), 6/19/2018; AR 1664-1689, Doc. 72 (Wall-Morgan corrected reply).

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commercial spaces in Shared Roof building. Since the building was built right on the property line with doors and windows on the west side (in violation of SMC 23.47A.014.B.5), the single family lots provided the only access to those doors. The Council ignored that clear legal error too.

This Court should reverse the Council action and confirm that the City Council, when acting in its quasi-judicial capacity, must apply the law as written, not ignore the law, or attempt to devise new standards.

C. The Council decision was unlawful because it violates the one and only mandatory directive for contract rezones in the Land Use Code at SMC 23.34.009.D.2 that "[a] gradual transition in height and scale and level of activity between zones shall be provided unless major physical buffers . . . are provided."

The constraints on the Council's quasi-judicial actions apply with equal force to the Council's application of the rezone criteria where the Council makes the final land use decision regarding a contract rezone. The Land Use Code identifies the criteria necessary to grant a contract rezone. SMC 23.34.007-009. "No single criterion or group of criteria shall be applied as an absolute requirement or test of the appropriateness of a zone designation, nor is there a hierarchy or priority of rezone considerations, unless a provision indicated the intent to constitute a requirement . . . " SMC 23.34.007.B (emphasis added). Where, as here, a contract rezone involves a height increase there is such a requirement: SMC 23.34.009.D.2 mandates that "[a] gradual transition in height and scale and level of activity between zones shall be provided unless major physical buffers, . . . are present." (Emphasis added). In fact, this is the only rezone criterion that mandates a specific result. But the Council failed that test too. Because the "development site" error had allowed a

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five story building right on the shared property line, there was no "gradual transition" between zones as required. In fact, there was no transition at all.

In its recommendation to approve the rezone, SDCI omitted this requirement entirely.[87] At the hearing before the Hearing Examiner, SDCI Planner Lindsay King admitted that "[a] gradual transition between zoning categories would not occur between the NC portion and the site of the single family zone to the west."[88] **(**Emphasis added). But she then tried to change the topic to buffers, offering the nonsensical explanation that "effectively a 55 foot buffer exists between the zoning designation and the shared property line with the neighboring property to the west. . . ."[89] In effect, she was attempting to rewrite the Code to claim that a vacant lot in the single family zone satisfied the clear and unambiguous Code language that required a gradual transition between zones. Obviously, the undeveloped character of a single family lot could not serve as a transition between zones.

The Hearing Examiner fell for this deception, and evidently exercised no independent review of either the site plan, the details of the proposal, or the unambiguous Code language of SMC 23.34.009.D.2. According to the Examiner:

> A gradual transition between zoning categories would occur between the mid-portion of the project site and the SF 5000 zoned properties to the west, as a private open space area will be landscaped to provide some separation between the five-story building and the single family zone.[90]

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[87] AR 1360, Doc 58, SDCI Analysis at 38-39.
[88] Hearing Examiner Transcript at 88:1-15.
[89] *Id.* The alleged "55' buffer" referred to SDCI's estimate of the width of the vacant single family lot, inside the single family zone.
[90] AR 1470, 1477, Doc 63, Examiner Recommendations. The Examiner wrote this analysis within his discussion of the general rezone criteria SMC 23.34.008.E, where the gradual

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For reference, the Examiner cited only to Hearing Examiner Exhibit 50, at page 37, which was a site plan prepared by the developer that clearly identified, in text and site plan, that the "private open space" was in the single family zone, not between zones as required.

Petitioners identified this fatal flaw in their appeal to the Council, and in their presentation to the PLUZ Committee on July 18, 2018. Petitioners' showcased this error with an illustrative exhibit that illustrated the Examiner's myriad errors using this very same document as its starting point. See Attachment 4.[91]

This error was not cured by the Council's decision to prohibit development on the vacant single family lot. Prohibiting development on a lot in the single family zone does not cure the fatal flaw of this project that lacks a required buffer between zones. *See* SMC 23.34.009.D.2. Moreover, substantial evidence confirms that even if the Council's prohibition on development of the single family lot created a valid buffer (it didn't), that effort would still fall short because the vacant single family lot occupies only a portion of the western boundary of the commercial lots. As shown in Attachment 4, there is no "buffer" separating the backyard of the house at 7010 Palatine (allegedly within the "development site") and the five story building right on its backyard border.

The Council's approval of the contract rezone, accordingly, violated the only mandatory requirement in the rezone criteria that dictated a specific condition for granting extra height in a contract rezone. The Council's approval should be reversed because it was an erroneous interpretation of the law, not

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transition is "preferred." At Conclusion 18 he stated the requirement in SMC 23.34.009.D.2 but offered no analysis.

[91] AR 1778, Doc. No. 84 (Appellans' Illustrative exhibit).

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supported by substantial evidence, and a clearly erroneous application of law to the facts in this case.

D. The Council's approval of the Shared Roof project violated the other mandatory rezone criteria for height increases in SMC 23.34.009 and the general rezone criteria in SMC 23.34.008.

Where, as here, a contract rezone involves a change to an existing height limit, the Code lists categories of additional criteria that "shall apply," in addition to the general rezone criteria of SMC 23.34.008. *See* SMC 23.34.009. Petitioner's appeal to the Council details the specific errors in the Hearing Examiner's Findings, which the Council adopted in full as their own, for each of these criteria. Several of the categories, when applied properly, doom this project and require reversal of the Council Decision. SMC 23.34.009.B requires consideration of view blockage, but the Examiner overlooked entirely the uncontroverted evidence in the record that the height of the proposed building would block views that are protected in the NC2-40 zone. SMC 23.34.009.C and .009D require compatibility with the surrounding area, which in this case is zoned uniformly at NC240 (40 feet) feet for the commercial lots on Greenwood Avenue, and SF5000 (single family) on the adjacent single family lots behind Greenwood Avenue, where the proposed building would pierce that uniformity with a nearly 70-foot high structure, the height it would reach with the massive greenhouse, solar array, and elevator shaft on the rooftop. SMC 23.34.009.A requires that the new height limits be consistent with the type and scale intended for each zone classification, but in this case, substantial evidence in the Record showed that the Council has not yet adopted City-wide development standards for the NC2-55 zone it granted Shared Roof. The

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Council committed clear error by adopting, without question the Examiner's findings on these issues.

1. Substantial evidence in the record confirmed that the Shared Project would block views that are protected in the NC240 zone

The Land Use Code protects certain specified views in the NC2-40 zone, which is the current zone of the Shared Roof property and all commercial lots on both sides of Greenwood Avenue in that area. Buildings in that zone may build up to four feet above the otherwise specified height limits, SMC 23.47A.012.A, but "[t]he Director **shall** reduce or deny the additional structure height allowed by this subsection . . . if the additional height would significantly block views from neighboring residential structures of any of the following: Mount Rainier, the Olympic and Cascade Mountains, [and other listed places]." (Emphasis added). SMC 23.47A.012.A.1.c.

For a contract rezone that would increase the height, SMC 23.34.009.B states that "[h]eight limits shall reinforce the natural topography of the area and its surroundings, and the likelihood of view blockage **shall** be considered." (Emphasis added.) The use of "shall" makes this consideration a mandatory criteria. SMC 23.34.007. The Code does not exempt rezones from the view protection that SMC 23.47A.012.A.1.c mandates for NC240 zones. The rezone to NC2-55 does not remove these provisions.

In this case, substantial and uncontroverted evidence in the record proved that a 55+ foot structure on the Shared Roof property would block protected Olympic Mountain views from neighboring lots. The Hearing Examiner received, as public comments, photographic evidence proving that

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the proposed 7009 building would block Olympic Mountain views, whereas a building built to the maximum height in the NC2-40 zone would not block those views

The photograph below was submitted to the Examiner in the comment period that followed the hearing and appears in the Record at AR 943:

As explained to the Examiner in comments at AR 951-52, the photograph was taken from the rooftop deck of the Hendon Condos at 6800 Greenwood Avenue North (on the east side of Greenwood Avenue, on the block immediately south of the 7009 site). It shows the Olympic Mountains visible over the rooftop of the Fini Condos directly across Greenwood Avenue (on the west side of Greenwood Avenue on the block south of the Shared Roof

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project). The Fini Condos and the Hendon Condos are each are built to the identical maximum allowable height in the NC2-40 zone. Each building enjoys the views protected by SMC 23.47A.012.A.1.c, and neither building blocks protected views from the other.

From the photo, however, it is obvious that increasing the height to 55 feet, as the City granted to Shared Roof, would wall off the Olympic Mountains view entirely. And the intrusion would be further increased by the massive solar array and 12-foot high rooftop greenhouse. The additional height of the Shared Roof building compared to the maximum height allowed in the NC2-40 zone is equal to, or greater than, the height of the elevator shaft and umbrella on the Fini rooftop that extend above the mountain view.

If the Owners of the 7009 site were building in the NC2-40 zone, they would be required to produce a view study proving that the additional height allowed in the NC2-40 zone. *See* SMC 23.47A.012.A.1.c. But as part of the rezone process, no one investigated the issue or required a view study.

The Hearing Examiner, however, ignored this issue entirely even though it was specifically singled out. Instead, when addressing this mandatory criteria, the Examiner stated only that no "public views" would be blocked because there were no public views in the vicinity.[92], while conceding that the project "may impact territorial views from adjacent properties."[93] The Council did not even discuss it, although it was raised explicitly on appeal, and its Findings and Conclusions simply adopt the Hearing Examiner's Findings and Conclusions in their entirety.[94]

[92] It is unclear what, exactly, the Examiner was referring too because there are public views of the Olympic and Cascade Mountains at every street intersection in Phinney Ridge.
[93] AR 1478, Examiner Conclusion 16.
[94] AR 1756.

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The Council Decision, therefore, sets up the incongruous situation where an owner of NC2-40 property in this portion of Phinney Ridge -- where all the commercial lots are on top of the hill and enjoy views protected by SMC 23.47A.012.A.1.c – could be denied an extra few feet of height if seeking to build within the maximum allowable height for the existing NC2-40 zone, but would be allowed to build an entire extra story plus rooftop features if it simply applied for a rezone where no one investigated potential blockage of protected views, even though there is no ievidence that specific provisions envisioned for the NC2-55 zoning category (which remains in draft form without specific City-wide development regulations even proposed for that zone) would alter the view protection provisions otherwise applicable to NC2-40 zoning. In such a case, the view protection mandated in SMC 23.47A.012.A.1.c, would not apply equally to all lots in the NC240 zone in Phinney Ridge. In the area at issue, the owners of NC2-40 lots across from the Shared Roof project would be denied the views that should be protected by the Code only because the Shared Roof lot was upzoned and no one looked at the Code requirements. Instead of looking over the rooftop to the Olympic Mountains as in the photograph taken from the Hendon Condo roof, the occupants of the lots across from Shared Roof will be looking into the fifth floor units of Shared Roof.

In this situation, the Code directive to consider "the likelihood of view blockage" from extra height cannot be ignored as it was here given the substantial and uncontroverted evidence showing the likelihood of blocking views that are otherwise specifically protected by the Code.

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2. Substantial evidence in the record demonstrated that allowing a lone 55+ foot structure ion an otherwise uniformly-zoned street surrounded by single-family zoned lots is not compatible with the predominant height and scale of existing development or the actual and zoned heights in the surrounding area

SMC 23.34.009.C.1 requires that height limits established by current zoning in the area be given consideration. Any permitted height increases "shall be compatible with the predominant height and scale of existing development, particularly where existing development is a good measure of the area's overall development potential." SMC 23.34.009.C.2. And SMC 23.34.009.D..1 further requires that "[h]eight limits for an area shall be compatible with actual and zoned heights in the surrounding areas. . . ." (emphasis added).

In this case, substantial evidence in the record showed that, in the vicinity of the Shared Roof site, Greenwood Avenue is the only street in the Urban Village, and that for its mile-long "tail" that encompasses the Shared Roof site, it is zoned uniformly at NC240, which allows four-story buildings See Attachment 3, Urban Village map. Every commercial parcel on Greenwood Avenue shares its rear boundary with single-family-zoned properties, a feature that occurs only in this portion of the Greenwood-Phinney Urban Village (and in a locations in West Seattle).

The Examiner, however, imported his own definition of "compatibility" into these Code sections when he concluded that, "[t]he requested height limit of 55 feet, would be compatible with most of the actual and potential zoned heights in the surrounding area.[95] But these Code sections do not look to potential future upzones that might – or might not ever occur. By their express

[95] AR 1478, Conclusion 18.

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terms, they look at existing development and existing zoning. In the area of Shared Roof, the existing zoning is all NC2-40 (four stories), and NC2-40 parcels right across the street were recently developed and / or approved with new, four-story mixed use buildings that the Code allows in this zone. The Council committed clear error when it adopted the Examiner's conclusions on these mandatory Code criteria that should have prohibited this project.

3. Substantial evidence in the Record demonstrated that the Council could not have determined whether the additional height would be consistent with the type and scale of development intended for the NC2-55 zone classification because it had not yet enacted development standards for the NC255 zone it granted to Shared Roof, and the surrounding commercial lots are all zoned uniformly to a lower height.

SMC 23.34.009.A requires that the new height limits be consistent with the type and scale of development intended for each zone classification. Here, too, the Examiner created his own version of this requirement, and the Council erred in adopting it. The Examiner declared that "[t]he proposal's mult-family residential uses with commercial elements would be consistent with the type and scale of development in the vicinity and the proposed NC2-55 zoning… ."[96] And he concluded that the requested height limit of 55 feet "would be consistent with the transition of zoned heights and scale of development in the area."[97]

Those conclusions, however, do not reflect the Code requirements and the actual conditions on the ground in the vicinity of the Shared Roof project. Although the Shared Roof project would not change the type of uses allowed on that site (it would maintain the NC zone designation), it would dramatically

[96] AR 1478, Examiner Conclusion 15.
[97] AR 1479, Conclusion 18.

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alter the scale. The stretch of Greenwood Avenue that includes the Shared Roof project site is atop Phinney Ridge and is zoned uniformly at the NC2-40 height, which maintains a consistent allowable height limit as new parcels re-develop to this maximum allowed height. The Shared Roof project, if allowed, would destroy that uniformity with a structure rising to almost 70 feet with its rooftop greenhouse and rooftop solar arrays. The Code does not look to potential future upzones for consistency, as the Examiner chose to do.

The Shared Roof project would also far exceed the scale of development allowed at the boundary between commercial and single family lots, as described above. The zoning lines separating the commercial parcels from their backyard single family neighbors preserve a uniform, open airspace for at least 15 feet back from the rear property lines of the commercial zones through the mandatory setbacks of SMC 23.47A.014.B. But the Shared Roof project would invade that protected light and air corridor for the block north of 70th street with its 5 story structure built where the Code otherwise prohibits.

The Council committed clear error when it adopted the Examiner's conclusions on these mandatory Code criteria that should have prohibited this project.

4. The Council committed clear error by adopting the Hearing Examiner's Findings and Conclusions regarding application of the general rezone criteria in SMC 23.34.008 without addressing its obvious legal and factual error raised by Petitioners in their appeals.

"In evaluating proposed rezones, the provisions of [SMC 23.34] shall be weighed and balanced together to determine which zone or height designation best meets those provisions." SMC 23.34.007.A. When the Council adopted

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all of the Hearing Examiner's Findings and Conclusions, it failed to address the numerous legal errors and factual errors that undermined the Examiner's recommendation to approve this project, nor did it seek to determine whether – apart from the fatal flaws identified above -- upzoning a single parcel in a one mile stretch of uniformly zoned parcels "best meets" the Code provisions.

Petitioners' Notice of Appeal to Council at pages 12-17 and Petitioners' Reply (corrected) Memorandum at pages 17-20 detail the numerous errors made by the Examiner, and are re-alleged here.[98] Those errors, became Council errors after the Council adopted the Hearing Examiner Findings in full.

From even the most cursory review of the Examiner's haphazard attempt to apply the general rezone criteria of SMC 23.34.008, It is abundantly clear that the Examiner fundamentally misunderstood the predominant land use pattern in the area of the Shared Roof project. For example, when describing the "predominant zoning pattern," he simply parroted SDCI's recommendation, and evidently did not realize (despite specific comments on this topic) that there was nowhere in the entire Greenwood Phinney Urban Village where a parcel zoned higher than 40 feet shared a property line with a single family lot.[99]

More troubling, the Examiner simply presumed that the NC2-55 zone – which exists as a uniform, City-wide application with actual development standards only in preliminary, draft legislation that had not even been transmitted to Council at that time -- would eventually blanket this portion of Greenwood Avenue.[100] The prospect of future upzoning, however tenuous it may be, evidently was good enough for the Examiner to recommend rezoning the 7009 parcel. But the prospect of a future area-wide upzone cannot override

[98] AR 1489, *et seq.*and 1664 *et seq.*
[99] AR 1476, Conclusion 7.
[100] AR 1476, Conclusion 6.

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the current conditions that show unequivocally that there is no other parcel for almost a mile away that is zoned higher than the NC2-40 zoning of the 7009 site.

E. The Council's last-minute prohibition on development of the vacant single family lot was unlawful because it rezoned that lot in violation of proper procedures and without any Findings and Conclusions.

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 . 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 below), that it would require that the vacant single family lot be permanently maintained as landscaped open space, in effect removing this lot, which is in a highly desirable location, from development. That option was not presented to the Design Review Board at the final design review meeting, and it was not mentioned in SDCI's analysis and rezone recommendation, nor was it presented by any party before the Hearing Examiner who developed the Record for this case. It was not included in the Hearing Examiner's Findings and Conclusions adopted by the Council and it was not mentioned at the appeal hearing before the PLUZ Committee where Petitioners had an opportunity to address the Committee. It emerged out of whole cloth, for the first time, at the full council meeting on August 6, 2018.[101]

The Council made no separate Findings or Conclusions on that decision. It simply added it as a "Rezone Condition" and included it in the PUDA. The Rezone Application did not mention any permanent open space in that area.[102]

[101] City Council Transcript at 30:10-32:13.
[102] AR 629, Doc. 34 (HXM Ex. 31: Updated Contract Rezone Application), 2/13/18.

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Although the original proposal at the EDG meeting in August 2016 had floated the idea of a public park on the vacant lot, that feature was withdrawn before the final Design Review meeting.. Moreover, the applicant had specifically excluded that lot from the Rezone Application. *See also* SMC 23.34.004 (PUDA applies to parcels to be rezoned). There was no record created on whether the vacant single family lot should be permanently removed from future residential development, nor opportunity for public comment to inform such a decision.

The Council's decision to maintain permanent landscaped open space on a vacant single family lot effectively rezoned that lot in violation of proper procedure and in violation of the substantive rezone criteria that should have been applied. SMC 23.34.010, SMC 23.34.011, SMC 23.34.007-009. The Council's action permanently removed that lot from housing stock in a highly desirable neighborhood. Instead of preserving that lot for housing of other single-family uses as required for lots zoned single family, the Council unlawfully converted that lot to commercial and multi-family uses because that lot will likely be reserved for the exclusive benefit of the retail and residential tenants of the Shared Roof building, which would include unlawfully using the single family zone to access commercial uses in a commercial zone in violation of SMC 23.42.030.

F. The Council's decision to rezone 7009 Greenwood Ave N for the Shared Roof project was an unlawful spot zoning because it granted special development privileges and a financial windfall to the owners based exclusively on their common ownership of adjacent parcels when no such privilege is authorized in the Land Use Code.

"Spot zoning is an attempt to wrench a single lot from its environment and give it a new rating that disturbs the tenor of the neighborhood, and which

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affects only the use of a particular piece of property or a small group of adjoining properties and is not related to the general plan for the community as a whole, but is primarily for the private interest of the owner of the property so zoned; and it is the very antithesis of planned zoning." *Pierce v. King County*, 62 Wn.2d 324, 338, 382 P.2d 628 (1963) (quoting 101 C.J.S. Zoning § 34). "Spot zoning has come to mean arbitrary and unreasonable zoning action by which a smaller area is singled out of a larger area or district and specially zoned for a use classification totally different from and inconsistent with the classification of surrounding land, and not in accordance with the comprehensive plan. ˆ *Smith v. Skagit County*, 75 Wn.2d 715, 743, 453 P.2d 832 (1969)(also noting that "[s]pot zoning is a zoning for private gain designed to favor or benefit a particular individual or group and not the welfare of the community as a whole.").

The Council's decision to approve the contract rezone and a PUDA that authorized construction of a five story building almost entirely on the shared property line with the adjacent single family lots granted to Shared Roof the rights to build an unlawfully large building unlawfully close to the lot line that would result in a windfall to the owners of thousands of additional square feet of commercial and residential space that the Code would not allow. The Hearing Examiner, whose Findings the Council adopted, admitted that no changed circumstances warranted the rezone.[103]

By singling out the 70th & Greenwood ownership from the larger Phinney Ridge Urban Village and creating for that ownership a special zoning classification existing nowhere else within the Phinney Ridge Urban Village whose requirements, including those for building height and setbacks, are

[103] AR 1477, Conclusion 12.

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different from and inconsistent with the requirements for other properties in the vicinity, and by abruptly changing long-established provisions for transition between single-family and the neighborhood commercial zone and view protection to serve one particular landowner, the City Council, through the approval of the contract rezone, has acted arbitrarily and unreasonably by bestowing special favors upon an individual property owner, by failing to act in the interest of the public at large in violation of prohibitions against spot zoning as arbitrary and capricious action. The rezone should be invalidated under RCW 36.70C.130(f).

V. CONCLUSION

The City Council's decision to approve the contract rezone for the Shared Roof project should be reversed as an unlawful application of the Land Use Code, an unlawful exercise of its quasi-judicial decision-making authority, and an unconstitutional spot zone. The Council's *ultra vires* actions in this case must be reigned in to maintain the meaning and legitimacy of the limitations applicable to the Council's quasi-judicial decision-making authority and the unambiguous language in the Land Use Code.

DATED this 26th day of December, 2018.

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/s/_____
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Attachments to Hearing Memorandum

Attachment Number	Document Number	Title / subject	Bates #
1	N/A	Index to record	
2	N/A	Code Provisions	
3	70	Urban Village Map	1571
4	84	Illustrative Exhibit	1778
5	81	Council Ordinance	1760-75
6	142	Pre-submittal minutes from March 2016	2105
7	140	Emails re Design Review Board	2093-2101
8	63	Hearing Examiner Findings & Recommendation	1470-80
9	76	Ketil memo of 7/30/18 w/alternative findings	1705-19
10	80	Council Findings	1755-59
11	52	Examiner Ex. 49	815-29
12	70	TIP 247	1620-21