Honorable Kenneth Schubert
LUPA Hearing: February 8, 2019 @ 10 am

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' REPLY BRIEF

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I. INTRODUCTION

The parties agree on one point: the Code definition of "Lot" is not ambiguous. But no amount of creative wordsmithing and mischaracterization of the applicable code provisions and legislative history that plague Respondents' brief can make that definition say what it clearly does not: A "development site," as used in this case, is not synonymous with defined term "Lot," and the Code makes that abundantly clear.

As explained at length in Petitioners' Opening Brief, the unambiguous definition of "Lot" and other Code provisions, as applied in this case, confirms that: (1) the developer/owner/applicant (referred to as "Shared Roof") owns two Lots in the NC2-40 zone; (2) those two Lots share their rear property line with two Lots in the single family zone; (3) SMC 23.47A.014.B requires three discrete setbacks in the building on the NC2-40 Lots because they abut Lots in a Residential Zone; (4) SDCI and the Council approved a building without those mandatory setbacks; and (5) the Council admitted on the face of its approving ordinance that it "has not yet made a policy decision reflected in regulations or definitions in the Land Use Code about the implications of 'development site' when a project is proposed for a site that includes a single-family zone designation and another more intensive zone designation, and that it "intends to address policy issues related to 'development sites.'"[1] Because the Council was acting in its quasi-judicial authority, it was required to apply the law

[1] Respondents distort this text and assert that the Council "explained that [it] would review development sites that include single family zones and a more intensive zoning designation[,]" Response at 9, but that is not what the Ordinance stated.

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pursuant to existing legislative standards, not invent a new Code provision to apply to this project. The Council's approval was *ultra vires*.

As a direct result of its *ultra vires* action approving a five-story building that rises almost its entire height right on a property line adjacent to single family Lots, the Council also violated the mandatory rezone criteria of SMC 23.34.009.D.2 that mandates a gradual transition between zones.

Remarkably, Respondents attempt to dissolve this entire issue by claiming that "[t]he fact that the parcels are in different zones is irrelevant." Response at 16. This litigation arose precisely because the Council has erroneously allowed Lots in different zones to be informally "combined" into a "development site" where the single family Lots serve no purpose other than enabling the NC2-40 Lots to evade Code requirements that impose limitations on the mass of a multi-story mixed use building on a property line shared with single family Lots. Shared Roof's ownership of those Lots does not cause the zoning boundary to disappear. Respondents also recycle for this court their failed arguments about the Council lacking authority to make a "Zoning Decision,"[2] a term they invented and an argument that Judge McKee already rejected entirely when denying Respondents' earlier motion for summary judgment. This Court should reject those proclamations.

Moreover, there are no recent amendments to the definition of "Lot" that have anything to do with the development site issue in this case, contrary to Respondents' allegations. Respondents simply latch onto the words "building site" in the Director's Report accompanying that legislation, assert that it means

[2] Response at 9.

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the same as "development site" here (it does not), but they don't bother to read, cite, or provide the Court with the actual Code language upon which they rely.

Similarly, Respondents' efforts to discredit Petitioners' arguments relating to the Council's violations of the mandatory rezone criteria in SMC 23.34.009 -- which apply when a contract rezone proposal seeks increased height,[3] and the general rezone criteria of SMC 23.34.008 -- fare no better than their attempt to fit their square peg development site argument into the round hole of the defined term "Lot." Respondents' arguments hold together only if one accepts their statements at face value without confirming the actual Code language, the material Code sections that are omitted entirely, the accuracy of the citations, and the facts in the Record.[4] On closer examination, Respondents' arguments fail. In every instance, the Code speaks for itself, and the Code does not allow the project the Council approved. The Council decision should be reversed and the rezone denied.

II. ARGUMENT

In a LUPA action, a court may overturn a land use decision that 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." RCW 23.70C.130(1)(b). But deference does not mean rubber-stamping an

[3] Notably, when purporting to describe the contract rezone process, Respondents state that the Examiner makes a recommendation to the Council pursuant to the criteria listed in SMC 23.34.008 and 23.34.007, but they leave out the mandatory criteria of SMC 23.34.009 that only apply where, as here, a rezone proposal seeks additional height.

[4] Respondents boast about the "family-sized" units, amenities, and retail space for small local businesses, but they conspicuously omit that the Developer intends to open a 100-seat restaurant in his building, *see e.g.,* AR 314.

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erroneous agency decision or a Council decision that embraces an erroneous decision. Judge McKee already recognized that Respondents' arguments in their ill-conceived Motion for Partial Summary Judgment "simply just [didn't] make sense," and that "[w]hat does make sense . . . is exactly what [Petitioners' attorney] is arguing. . . ."[5]

The same is true on the merits. The applicable Code provisions are unambiguous and they prohibit the project the Council approved. The Land Use Code unambiguously defines "Lot," and that definition does not include an informal "combination" of discrete parcels in different land use zones as Respondents claim. Where the Code references a "development site" it makes clear that a "Lot" is a subset of a development site. The terms are not interchangeable.

Even if the Code provisions were deemed ambiguous (which they are not), there is no Code provision or City policy to informally combine legally separate Lots across different zones for the purpose of evading otherwise applicable (but perceived as undesirable) Code provisions. The Council admitted as much. Accordingly, nothing in the Code erases the required setbacks in SMC 23.47A.014.B that should have been applied in this case.

Similarly, there is no longstanding policy enabling the City to specially rezone a single site from an otherwise uniformly zoned area in a manner that destroys the historic uniformity of the area's zoning. The Council decision should be reversed and the rezone denied.

[5] Judge McKee Order Denying Partial Summary Judgment (Oral Ruling, Nov. 1, 2018) at 6.

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A. The Land Use Code Defines "Lot" unambiguously and confirms that the so-called "development site" of the Shared Roof project contains four separate and discrete "Lots."

The Council committed legal error when it disregarded the unambiguously defined term "Lot," and instead accepted SDCI's invented use of the so-called "development site" term to erase the interior Lot lines and zoning boundaries separating the Developer's four discrete legal Lots in two different zones, and thereby allowed the development of a multi-story, mixed use building that violates numerous, unambiguous Code requirements that prohibit such a building on the shared property line with the single family zone.

Interpretation of a municipal ordinance is a question of law reviewed *de novo*. *Ellensburg Cement Prods., Inc. v. Kittitas County*, 179 Wn.2d 737,743 317 P.ed 1037 (2014). "The court discerns legislative intent from the plain language enacted by the legislature, 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." *Whatcom County v. The Western Washington Growth Management Hearings Bd*., 186 Wn.2d 648, 668, 381 P.3d 1 (2016) *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).

1. The definition of Lot means what it says, and it does not mean "development site" as Respondents contend.

"Lot" is a defined term in the general definitions of SMC 23.84A that are applicable to the entire Land Use Code. SMC 23.84A.001.A ("The definitions in

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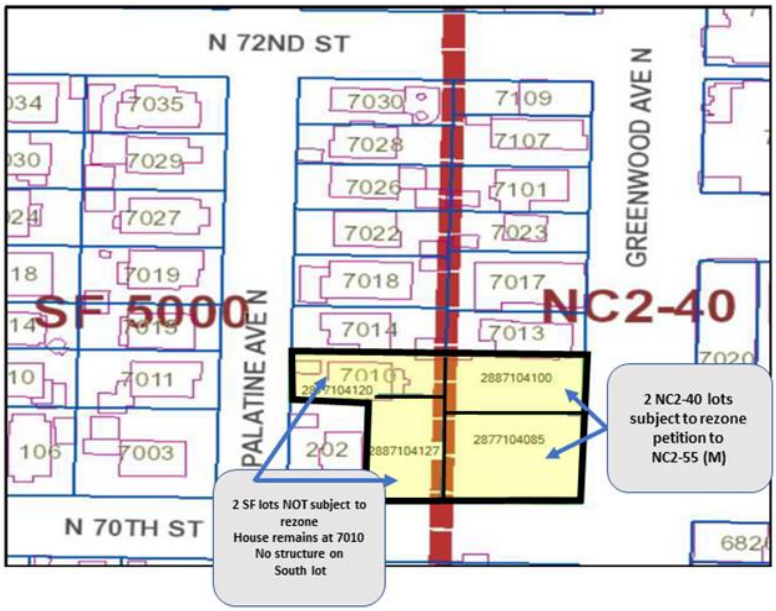
this chapter provide the meanings of terms used in this title, except as otherwise provided by this title or as the context may otherwise clearly require."). But "development site" is not a defined term in the Land Use Code.

> 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.

(Emphasis added.) Read together, these definitions make clear that the Shared Roof project includes four Lots, as shown in the image below, which is reprinted here from Petitioners' Opening Brief for ease of reference.



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The Developer initially acquired the two NC2-40 Lots and the vacant single family Lot and submitted an initial Site Plan showing a building on the commercial lots with the setbacks required in SMC 23.47A.014.B.[6] The commercial lots – two separate tax parcels -- qualified for separate development, are both within in the NC zone, and are subject to the development standards of that zone. The vacant single family lot, was a separate lot, subject to the development standards of the single family zone, and did not become a commercial lot by Shared Roof's purchase.

At a later date, Shared Roof acquired the single family Lot of 7010 Palatine Avenue that contains an old craftsman house.[7] That, too, was a Lot: it was surrounded by Lot lines, had already been separately developed, and was subject to the development standards of the single family zone. As well, the zoning of that lot was not converted to commercial use by Shared Roof's purchase. Shared Roof's initial rezone application confirmed that "the project owners have acquired both **lots** abutting the entire western boundary of project site," and acknowledged that a "single family house may be built in the future" on the vacant lot in the single family zone."[8] (Emphasis added.)

These four Lots were never formally combined and remained entirely separate, even after the Council's approval of the rezone.[9] In other words, they never lost their identity as separate lots. After approval of the contract rezone,

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[6] AR 2103, Doc. No. 141 (Site Plan accompanying material dated 12/11/15).
[7] AR 565-66, Doc. 30 (HXM Ex. 27; Final Early Design Guidance), 8/15/18, confirming that Developer had acquired another adjacent single family lot that it intended to "incorporate into the overall development site.
[8] AR 493 (page 12 of rezone application), Doc. No. 29 (HXM Ex. 26: Contract Rezone Application), 12/6/2016.
[9] AR 1788-1800 (various copies of PUDA and attachments).

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each remains "a parcel of land that qualifies for separate development or has been separately developed." SMC 23.84A.024. Each Lot remains in its original use category – the two single family lots in residential use; the two commercial lots in commercial zoning -- and each lot remains as "the unit that the development standards of **each zone** are typically applied to." (Emphasis added.) Each lot remains surrounded by Lot lines. Neither the contract rezone nor the PUDA combined or merged the lots. Obviously, the two commercial Lots will, in effect, be joined if a mixed use building is built on them, just as are the lots over which the courthouse and Benaroya Hall are built. And if the mixed-use building is ever developed, the vacant, single family Lot would be encumbered by the PUDA condition that it remain as a landscaped open space.[10] But nothing within the contract rezone ordinance or the PUDA prevents either of the two single family Lots from being sold off after having served their useful purpose of enabling the oversized, mixed use building. While use of the vacant single family lot may be limited to landscaped open space for as long as the PUDA remains in place, use of the 7010 Palatine Lot is not so encumbered.

Even SDCI recognized that ownership of the lots that comprise the so-called "development site" is only temporary, with the single family lots sold-off after having served their purpose of advancing the rezone of the NC2-40 Lots. On this point, SDCI land use supervisor Roberta Baker directed SDCI planner Lindsay King to explain to the Design Review Board before the Final Design Review Meeting, that "the [vacant] lot could be sold off in the future if all

[10] AR 1769.

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development standards are being met (other than this setback) on the commercial site."[11] Neither the rezone ordinance nor the PUDA prevent either of the single family lots from being sold off.

Respondents can point to no authority that supports what the Council has allowed here: the informal connection of Lots in a single family zone to Lots in a commercial zone, by virtue of declaring those Lots to be a single "development site"; use of the "development site" artifice to remove building setbacks requirements otherwise applicable between commercial and residential properties; and the eventual re-sale of the single family Lots and their resumption as separate residential properties. That authority does not exist and the contract rezone did not create such authority. The contract rezone did not alter, adjust, or remove the zoning boundaries between the single family and NC2 properties (the contract rezone site excluded the single family properties) and the rezone from NC2-40 to NC2-55(M) did not amend the setback restrictions within SMC 23.47A.014.B.

As a matter of policy, that authority should not exist because it would encourage developers to acquire single family Lots adjacent to commercial zones, hold those Lots long enough to fabricate a "combination" that the single family lot is part of a "development site," use that artifice to evade Code requirements that otherwise apply between commercially and residentially zoned properties, gain project approval under that pretense, and then sell off the residential lots (here, particularly the 7010 Palatine lot subject to no PUDA conditions), leaving the neighborhood with an intrusive building that violates

[11] AR 2077, email from R. Baker to L. King, 4/27/2017.

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building setback requirements that would apply to the development of any other NC2 property adjacent to residential property. Neither by Code nor by policy, can the transient ownership of property be used to amend zoning regulations.

While Respondents accuse Petitioners of "misreading" the definition of Lot, and "brush[ing] over" the definition, and a host of other accusations, Response at 12, it turns out that Respondents simply choose to overlook the inconvenient parts of the "Lot" definition. For example, Respondents assert that "[t]here is nothing in the definition of lot that would treat parcels in the same zone differently than parcels in different zones if they are combined as part of the lot." Response at 16. But the definition of "Lot" specifically states that, among other requirements, a Lot is the "unit that the development standards of **each zone** are typically applied to… ." SMC 23.84A.024 (Emphasis added.) The development standards for the commercial zones are different than the development standards for the single family zone. *E.g., compare* SMC 23.47A (commercial) and SMC 23.44 (single family). And when the inconvenient zone requirements get in the way of their argument, Respondents simply ignore them. For example, they assert that a "plain language reading" of this definition is "a parcel of land to which development standards are typically applied (in other words a development site) . . . ." But Respondents simply interject the term "development site"; it is not part of the definition.

Development standards vary by zone. That part of the definition cannot simply be written out, as Respondents propose. There is no provision in the Code that allows the "combination" of Lots in different zones into a single "Lot" for purposes of evading inconvenient setback requirements as the Council

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enabled here. Besides, Respondents have never explained how these four Lots were ever "combined" other than by saying they were.

Because the defined term "Lot" unambiguously confirms that the developer's Lots in the single family zone are discrete from its Lots in the NC2 zone, the mandatory setbacks of SMC 23.47A.014.B should have been applied in this case because the NC lots abut lots in the residential zone. 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); SMC 23.47A.014.B.3 (minimum 15-foot setback on all floors above the first floor); SMC 23.47A.014.B.5 (prohibiting windows and door on first floor unless there is a five-foot setback). *See also* SMC 23.84A.036 (defining "Setback" as "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(emphasis added)); SMC 23.84A.002 (defining "Abut" at to border upon, except that lots that touch only on a corner of another lot are not considered to abut.") ; SMC 23.84A.048 (defining "Residential zone" as "a zone with a classification that includes . . . SF5000 [single family]. . . .". *See also* Petitioners' Opening Brief at 27-40 and its Attachment 4.[12]

2. Respondents' declaration that they have somehow established one single Lot means that no mixed use building can be built at all on that Lot.

Respondents' evidently did not think through the consequences of insisting that they have only one "Lot." *See e.g.,* Response at 19 ("As discussed

[12] AR1778, Doc. No. 84 (Illustrative Exhibit).

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above, the lot is the development site"). Respondents should be careful of what they wish for.

If indeed, they have established one – and only one – Lot, then the provisions of SMC 23.44.006 would apply, because they would have a Lot in a single family zone. SMC 23.44.006 identifies principal uses permitted outright in a single family zone. Principal use means "a use that is not incidental to another use." SMC 23.04A.040 (Use, principal). SMC 23.44.006.A allows as a principal use, "One single-family dwelling unit per lot" along with an accessory dwelling unit. A "single family dwelling unit" is a "detached structure having a permanent foundation, containing one dwelling unit… ." SMC 23.84A.032.

This restriction is per Lot. It is not per single-family-zoned-portion of a Lot. Shared Roof's Lot (according to Respondents' definition) already contains a principal use, the single-family dwelling unit at 7010 Palatine. At most this "Lot" could add an accessory dwelling unit. But it could not add another principal use of a mixed use building. And so, if Shared Roof's efforts result in the creation of a single "Lot," as it claims, it has effectively written out of existence the very project it seeks to defend.

And in even further irony, when Respondents try to defend the Council's action on the PUDA, they assert directly that "there is already a single-family home on the lot, so no other home would be permitted under the Code," and they cite to the same provision of SMC 23.44.006.A. See Response at 31.But in that argument, the "lot" they speak of is only the single family portion, not the whole lot (separately claimed to be the "development site") because, as noted

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above, the restriction in this section is on the principal use structures allowed on the lot in its entirety, not just the single family portion.

3. The development site cannot be a single "Lot" for some purposes, but not-a-Lot for others.

SDCI trips over itself when trying to explain how Shared Roof's four tax parcels are sometimes-a-Lot and sometimes-not, depending on the circumstance. For example, when SDCI Planner Lindsay King responded to the Design Review Board Chair Dale Kutzera's concerns about why the Board was prohibited from addressing the lack of setbacks, King tried to explain that: "[o]nce the parcels are combined for development there will no longer be a lot line at the zoning change line. The lot line will be established around the perimeter of the development site." Accordingly, she represented that "setbacks are required along a lot line not a zoning boundary."[13]

But then, after explaining how the "combined parcels" would remove any existing lot lines at the zoning boundary, King stated that "setbacks required in the Single Family zone will apply in the single family portion of the lot."[14] In other words, SDCI apparently claims there to be no Lot line separating the commercial parcels from the single family parcels for purposes of the required setbacks of SMC 23.47A.014.B, but there would be a Lot line at the same boundary from which to apply the setbacks in the single family zone (i.e., the vacant lot which shares a side yard boundary, and the Palatine property which shares a rear yard boundary with the commercial properties). Apart from

[13] AR 2074, email, L. King email to D. Kutzera, 5/3/2017.
[14] *Id.*

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lacking any support in the code, King's explanation is internally contradictory. Her own words are all that is needed to show that no deference is owed to SDCI's development site ploy in this case, and the Council erred in accepting it. Respondents cannot have it both ways; the "development site" cannot be both a single Lot and a collection of discrete Lots at the same time.

B. Respondents misrepresent the legislative history upon which they rely to claim that the Code was recently amended to clarify that a Lot equals a development site.

The definition of Lot has never been amended to embrace the so-called "development site" concept alleged by Respondents, or to make the two terms synonymous as Respondents claim. Response at 13 (the "legislative history clarifies that the definition of lot was recently amended to clarify that lot means, and has always meant, the development site.") *See also id.* at 16-17. Respondents announced this red flag warning about their argument when: (1) they repeatedly mis-identified this legislation by using the Council Bill number as the Ordinance number;[15] (2) they only included a substantially outdated first page of the Council Bill that did not include the "Whereas" clauses of the final version of the Ordinance; and (3) they failed to cite or quote any actual Code language amended by Ordinance 124475 to show how the changes supported their argument. The reasons for these deficiencies are obvious: This legislation does not say or do what Respondents claim. For the Court's review, a complete copy of Ordinance 124475 that includes the complete legislative

[15] Response at 16; Decl. of Katie Kendall at ¶3. The Council Bill CB 118052; the Ordinance is Ord. 124475.

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history and Clerk File 313652 are attached to the accompanying declaration of Irene Wall in Support of Petitioner's Reply.

Respondents note correctly that the legislation upon which they rely was passed in 2014 to address concerns raised by residents in single family neighborhoods who were surprised about the development on undersized lots. The Council made several amendments to the Code, including changes to the definition of Lot (SMC 23.84A.024), which are included in the definition that exists today. The attached Clerk File contains the redline amendments that show the various changes made to different Code sections. Respondents offer none of that, even though they devote several pages of their brief arguing that this legislation supports their position that a Lot is the same as a development site as that term is used here.

As primary support, Respondents focus on one section of the Director's Report titled "Amend the definition of 'lot' to allow it to mean 'building site' in the proper context."[16] There may be some instances where "development site" and "building site" mean the same thing, but the referenced Code section, and this accompanying explanation is not one of them. As stated in the quoted section of the report, the purpose of the proposed change to the definition of Lot was to ensure that undersized historic lots could not be separately developed unless they met the current definition of Lot. This is also evidenced by changes in the

[16] Response at 17. Respondents claim the bold face type represents "emphasis in original" but they have doctored how that material is presented in the original. The bolded sentence is the title of Item #18 in the Director's Report, and it is separated by spacing from the paragraph below in the same manner as every other section title and text. There is no emphasis as Respondents' claim.

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Historic Lot Exception at SMC 23.44.010.A.1.d in that same legislation, which was included to prevent unwanted surprises from development of historic lots.

No part of this legislation nor anything in the legislative history "makes clear" that the City "codified its interpretation of the term "lot" and its past application of building site into the definition of "lot," as Respondents contend. Response at 17. And when Respondents describe how this legislation amended the definition of "lot," they write only that it is "the unit that development standards are each applied to, and left out "of each zone." And from that conveniently mis-stated definition, Respondents state the impact exactly backwards, claiming that "[t]his encourages and sometimes necessitates that a lot be more than one tax parcel, platted lot or unplatted lot." But the definition does not do that at all. In conjunction with other Code provisions that reference "lot," the new Lot definition and other amended sections make clear that a historic platted lot standing on its own, may not qualify as a "lot" for separate building, but there are plenty of platted lots throughout the City that are of ample size on their own.

Not only do Respondents misrepresent the legislative history upon which they rely, they are unable to produce a single instance where discrete Lots in different zones have been informally combined into a single development site to allow the removal of land use restrictions that would otherwise apply between different zones. Under LUPA, a court may overturn a land use decision that 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." RCW 36.70C.130(1)(b). But "deference is not always due. In fact, even a local entity's

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interpretation of an ambiguous local ordinance may be rejected." *Ellensburg Cement Prods.*, 179 Wn.2d at 753,. "[T]he interpreting local entity 'bears the burden to show its interpretation was a matter of preexisting policy.'" Id. (internal citations omitted). To the extent that Respondents seek shelter in the deference that may be due an agency's interpretation of an ambiguous statute (*see* Response Brief at 16-18), no deference is due in this case.

Instead of on-point examples of longstanding policy proving that the City routinely combines NC2-40 and single-family Lots into a single "development site" without requiring any formal combination of the type described in TIP 247, or some other manner, and that the City routinely waives the applicable Code requirements that would otherwise apply to a Lot in a specific zone, Respondents' attempt to confuse the issue by offering up the King County Courthouse as a single structure built over several historically platted lots. So what? Shared Roof's own Lots cover 10 historically created lots, as indicated by the legal descriptions given for the four separate Lots (tax parcels).[17] But the historic lots in this case are not necessarily Lots as defined in the Code if, as in the case of the historic platted lots contained in Shared Roof's two single family Lots, they are smaller than the minimum allowable Lot in a given zone.[18] The rear boundaries of the historic lots do, however, coincide with the current

[17] AR 1766, Attachment A to contract rezone ordinance containing legal descriptions, included within Attachment 5 to Opening Brief.

[18] AR 1786 (PUDA legal descriptions). The two commercial Lots include five historic platted lots, the vacant single family Lot includes all or part of four platted lots, and the 7010 Palatine lot also contains all or part of two platted lots, one of which is shared with the vacant SF lot. Respondents, however, claim erroneously that the project site includes "four tax parcels and six platted lots." Response at 4,

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rear property and zoning lines of the developer's four Lots (tax parcels), so none of the current or historic lots carry split zoning.

Similarly, Respondent's examples of Benaroya Hall and Safeco Field built over several tax parcels and platted lots are irrelevant to the issue in this case: whether a so-called "development site" may span pre-existing Lots in different zones for the purpose of erasing internal "Lot lines" that would otherwise result in development restrictions. See Response at 17. All of the tax parcels underneath Benaroya Hall are in the same zone, and all of the tax parcels underneath Safeco Field are also in the same zone. And all of the immediate areas surrounding each of those buildings are in the same zones as those buildings. By contrast, Shared Roof's Lots are in two different zones, NC2-40 and single family. The Benaroya Hall and Safeco Field examples do not support the contention that sweeping lots under common ownership erases zoning boundaries.

In the case of Benaroya Hall, the building consumes the entire block, and the entire block is the same zone. Whether, at the time it was built, the underlying tax parcels should or could have been formally consolidated, is irrelevant because there is a single building spanning the entirety of those Lots. As applied to Shared Roof's project, the proper analogy from the Benaroya Hall example would be a "development site" comprised only of Developer's two NC2-40 Lots, which are the only two Lots subject to the contract rezone and the only Lots that would be covered by the proposed mixed use building.

Neither the 2014 amendment to the definition of "Lot" nor the cited examples of the King County Courthouse, Benaroya Hall and Safeco Field

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support Respondents' contention that a developer's treatment of a collection of single family and commercial properties as a single "development site" results in the removal of zoning boundaries. No provision of the land use code allows a developer to remove zoning regulations through the purchase of adjacent properties.

For at least two reasons, SDCI's claimed application of "Lot" to mean a collection of Lots within a claimed "development site" is not accorded any deference.

First, an agency interpretation of code, like a statute, is only entitled to deference if the provision at issue is ambiguous.[19] However, nothing is ambiguous about the definition of "Lot" and Respondents do not claim there to be ambiguity.

Second, an agency interpretation of code is only entitled to deference if the agency has developed an interpretation of the provision claimed to be ambiguous.[20] SDCI has cited to no interpretation to support the internally contradictory explanation given by Lindsay King to the chair of the Design Review Board spelled out in her email of May 3, 2017[21] and the cited examples of the King County Courthouse, Benaroya Hall and Safeco Field are inopposite. SDCI's claimed interpretation of "Lot" is entitled to no deference.

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[19] *Hama Co. v. Shorelines Hearings Bd*., 85 Wn.2d 441, 448, 536 P.2d 157, 161 (1975).
[20] *Cowiche Conservancy v. Bosley*, 118 Wn.2d 801, 815-16, 838 P.2d 549 (1992)("If an agency is asserting that its interpretation of an ambiguous statute is entitled to great weight it is incumbent on that agency to show that it has adopted and applied such interpretation as a matter of agency policy. … [The agency may not attempt[] to bootstrap a legal argument into the place of agency interpretation.")
[21] AR 2074.

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C. The Council's embrace of SDCI's use of "development site" to evade unambiguous Code requirements was an *ultra vires* action that should be reversed.

Respondents at 20 correctly point out that an action is ultra vires "only if the agency [is] without authority to perform the action." Citing to *S. Tacoma Way, LLC v. State*, 169 Wn.2d 118, 122, 233 P.3d 871, 873 (2010) and *Bd. of Regents v. City of Seattle*, 108 Wn.2d 545, 552, 741 P.2d 11 (1987), and then argue that as imprudent as Petitioners may contend the contract rezone to be, it lay within the Council's authority to approve.

Certainly, the Council had the authority to rezone Shared Roof's commercial lots from NC2-40 to NC2-55, subject of course to compliance with rezone criteria. But what it lacked authority to do was to remove the setback restrictions within SMC 23.47A.014.B while sitting in a quasi-judicial capacity in reviewing an application for a zoning map amendment. The rezone application did not include a text amendment to remove the SMC 23.47A.014.B setback regulations. However, by not only approving a contract rezone, but approving a PUDA that allows the placement of a mixed use development on the residential-commercial zoning boundary, the Council acted in violation of its own zoning regulations. Should it wish to do so, the Council sitting in a legislative capacity would have the power and the authority to amend or eliminate the setback requirements within SMC 23.47A.014.B. But in the review of a contract rezone application, the Council sits in a quasi-judicial capacity and must apply the law as written. SMC 23.76.006.C, SMC 23.76.056.A, and *Lund v. City of Tumwater*, 2 Wn. App. 750, 755, 472 P.2d 550 (1970), cited within Opening Brief at 37-38. In that capacity, the Council simply lacks the authority

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to amend, waive, or disregard zoning regulations that otherwise apply. Lacking that authority, the Council's approval of contract rezone and PUDA were *ultra vires.*

D. The Council's approval of the Shared Roof building violated 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 Council's decision to approve a five-story building rising over 40 feet right on the shared property line with the single family zone was a clearly erroneous application of the law to the facts in this case. RCW 36.70C.130(1)(d). When a contract rezone involves additional height as Shared Roof requested, the criteria of SMC 23.34.009 are triggered, in addition to the general rezone criteria of SMC 23.34.008. And SMC 23.34.007.B further dictates that "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 . . ." (Emphasis added.)

In this case, the mandatory criteria of SMC 23.34.009.D.2 was triggered. It requires "[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 ignored that requirement entirely, even though Petitioners presented an Illustrative Exhibit that demonstrated that the "buffer" was in the single family zone instead of a buffer between zones,

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and that that "buffer" only extended along part of the boundary separating the single family and NC zones. The 7010 Palatine property contains no such buffer.

Respondents assert without support that "[nothing in the Code requires a physical buffer along the entire zone border, especially when the single family home is part of the development site and is part of the Project." Response at 23. Where the Code prohibits an upzone, without evidence of a "major physical buffer," SMC 23.34.009.D.2, it not only requires that the buffer be within the Lot that is up-zoned, but it contains no allowance for only a partial buffer where some Lots in the less intense zone benefit from a gradual transition and others do not. In this case, the lack of buffer extends beyond Shared Roof's own Lots because the southeast corner of the single family Lot north of 7010 Palatine shares a corner with the Shared Roof's NC2-40 Lot. For that lot, there is not only no "gradual transition" as the Code mandates, but no transition at all.

E. 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.

Respondents' efforts to rebut Petitioners' arguments regarding the mandatory rezone criteria of SMC 23.34.009 and general rezone criteria in SMC 23.34.008 follow their well-trod path of misrepresenting the underlying facts and omitting the inconvenient portions of the Code. Response Brief at 24-30. Most important, when challenging Petitioners' "treatment" of these issues, Respondents leave out of their quotation of SMC 23.34.007.B, the last phrase that provides direction on how the Rezone criteria must be applied; when

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included, that phrase undermines their arguments on these topics. In full, SMC 23.34.007 states that:

> "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 indicates the intent to constitute a requirement** or sole criterion."

SMC 23.34.007 (Emphasis added to phrase omitted from Respondents' brief at 24, line 23).

Section 23.34.009 (Height limits of the proposed rezone) states unambiguously that its criteria "shall apply" in addition to the general rezone criteria of SMC 23.34.008. And each provision of SMC 23.34.009 that Petitioners challenge is, in turn, marked by the use of "shall" and includes specific directives that the Council violated. *See* Petitioners' Opening Brief at 43-52. These provisions, through directives that use the word "shall," "indicate[] the intent to constitute a requirement." SMC 23.34.007. Respondents' strategic use of ellipses to alter the unambiguous language of SMC 23.34.007 does not remove this material phrase.

1. Respondents' effort to defend the Council's violation of SMC 23.34.009.B (likelihood of view blockage) misrepresents the unrefuted evidence in the record.

Respondents at 25-26 argue that zoning provisions do not create protected views and that a 40-foot building would block the views in the same manner as a 55-foot building, and that a 55-foot tall building would have no

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significant additional impact to views. Respondents are wrong on the law and the facts.

As Petitioners demonstrated within their Opening Brief at 44-47, where a contract rezone involves a change to an existing height limit, additional criteria "shall apply," SMC 23.34.009, among which is the provision at SMC 23.47A.012.A, that "[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. Through a photograph[22] taken from the roof of a four-story, NC2-40 structure at 6800 Greenwood Avenue North looking westerly across another four-story, NC2-40 structure across Greenwood Avenue street, the substantial (and unrebutted) evidence in the record shows that increasing the height of a structure to that of the Shared Roof building (55 feet at the roof level, 59 feet with railings, and almost 70 feet with the greenhouse and other rooftop structures) on the westerly side of Greenwood Avenue would completely (not just significantly) block views of the Olympics from the NC2-40 structure on the easterly side of Greenwood. Respondents have offered no argument to explain why a developer planning to build to the maximum 48-foot height allowed in a NC2-40 zone would be required to show that the additional height would not block specified mountain views, but a developer seeking a contract rezone to an even greater height

[22] AR 943, see also Petitioner's Opening Brief at 45-46.

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would not need to make that same showing. By code, the height restriction would apply equally to both.

In a futile effort to escape this contradiction, Respondents simply assert that substantial evidence shows that views are not likely to be blocked, but point to no such evidence. Response Brief at 25. Moreover, Respondents accuse Petitioners of "distort[ing] the record by using existing views from three blocks away on 67th Street." *Id.* But Respondents evidently did not look at a map or visit the project site and its immediate vicinity.[23]

First, as stated in Petitioners' Opening brief at Page 45, the photograph at issue was taken from the rooftop deck of the Hendon Condos at 6800 Greenwood Avenue North. The address of the property speaks for itself. It is located on the northeast corner of Greenwood Avenue and North 68th Street, not "67th Street" as Respondents allege (Response at 25), and it is on the block immediately south of the Shared Roof site, not "three blocks away." *Id.*

Next, Respondents offer the unhelpful and irrelevant observation that the buildings across the street are one and two story buildings. Response at 25. The required view study in SMC 23.47A.012.A.1.c would need to show that a project on the Shared Roof site, built to the maximum allowable height of the NC2-40 zone, would not block the specified mountain views from those properties across the street, also zoned NC2-40, even if they are not yet built to that maximum height. And even if Respondents could show that no such study would be required (possibly on the asserted, but indefensible ground that those

[23] The photograph also proves the proximity to the Shared Roof site. The tall brick building at the right edge (behind the street pole) is the church on the SW corner of Greenwood and N.70th immediately across N. 70th from the Shared Roof site.

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buildings are not yet developed to the height allowed by existing zoning), it is undisputed such a study would be required for the potential view impacts to the four story building across the street and to the northeast of the Shared Roof site (the Infinity Condo at 7116 Greenwood Avenue North), whose views would be blocked by the Shared Roof project, but would not be blocked by maximum development in the existing NC2-40 zone.

The photo in the Record at AR 943 [24] shows how buildings that are built to the maximum height of the NC2-40 zone do not block the protected views of SMC 23.47A.012.A.1.c from other buildings built to the same maximum allowable height, but that an additional 7+ feet (55 foot rooftop height of NC2-55 without railings, less the 48 foot maximum in NC2-40 zone, including railings) would block views of the Olympics, AR 943, which are protected under SMC 23.47A.012.A.1.c. Respondents' reliance on gibberish about "building on the ridgeline," offered by the Shared Roof's representative, Shannon Loew, Response at 25, does not change that unrefuted evidence.

The Examiner completely ignored this issue, and only conceded a potential impact to "territorial" views."[25] Petitioners' Opening Brief at 16. Respondents further confuse the issue by arguing that if the Council wanted to limit height increases "if territorial views are blocked, it would have done so." Response at 26. Petitioners have not challenged blockage to "territorial" views; they have expressly challenged the failure of the Examiner to address the unrebutted view impacts of building above the maximum height allowed in the NC2-40 zone in light of the unique view protection provisions of SMC

[24] Petitioners' Opening Brief at 45.
[25] AR 1478, Examiner Conclusion 16.

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23.47A.012.A.1.c that specifically apply in the NC2-40 zone, which is the existing zone of the Shared Roof site and all the properties along Greenwood Avenue in its immediate vicinity. Respondents' claim that a "zoning provision cannot create 'protected views'" does not change the unambiguous language of SMC 23.47A.012.A.1.c, which specifies exactly what views are protected in the specified zones. The Examiner's conclusion was in error as is the Council's adoption of his conclusion.

2. Respondents have not explained how the Shared Roof building is consistent or compatible with the surrounding area when all of Greenwood Avenue in the immediate area is zoned uniformly at NC2-40, and the closest higher zone is almost one mile to the north in Greenwood Town Center.

Respondents also ignore the mandatory provisions within other contract rezone criteria. Response Brief at 26-28. As shown in Petitioners' Opening Brief at 48-50, 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… ." SMC 23.34.009.C.2; SMC 23.34.009.D.1 requires that "[h]eight limits for an area **shall be compatible** with **actual and zoned heights** in the surrounding areas… ."; and SMC 23.34.009.A requires that "[h]eight limits **shall be consistent** with the type and **scale** of development intended for each zone classification." (Emphasis added.)

Respondents brush over Petitioners' argument that the Council ignored the mandatory consistency requirements of SMC 23.34.009.A and SMC 23.34.009.C.1 by recasting and misrepresenting that argument as claiming that

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a 40 foot height limit is a red line that would prevent any property from being up-zoned by contract rezone. Response at 26-27. But Respondents never bothered to explain how the Council's decision to pluck a single parcel out of an otherwise uniformly-zoned area and single it out for customized up-zoning when no property zoned higher than NC2-40 exists for almost a mile away (in Greenwood Town Center, where there are a few NC2-65 parcels), meets the consistency and compatibility requirements of the Code. Petitioners' Opening Brief at 48-50. That is the gravamen of Petitioners' arguments on these Code sections and it remains unanswered for the simple reason that the Shared Roof is neither consistent nor compatible with the surrounding area as the Code requires.

Respondents at 27 also argue that a 15 foot height increase (from 40 to 55 feet) would not be incompatible with zoned heights in the surrounding area on grounds that the NC2-40 would already allow buildings up to 59 feet (40' base height + 4' bonus + 15' rooftop structures, under their calculations). But respondents ignore that the rezone to 55 feet allows an additional 15 feet on top of what would otherwise be allowed and that apart from other rezones in the area, no other buildings have been allowed to be developed to such heights. Respondents ignore the inconvenient fact that the Examiner claimed to have considered "potential zoned heights" in the area when concluding that the Shared Roof building was compatible. (Emphasis added.)[26] Petitioners' Opening Brief at 48-49. But a potential areawide upzone is not among the factors the SMC 23.34.009.D.1 allows. And even if it were, there are no city-

[26] AR 1478, Examiner Conclusion 18.

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wide development standards for the NC2-55 zone granted to Shared Roof, and to the extent that draft development standards exist, the Shared Roof project violates them.

Without specifying where such a claim was made, Respondents assert that Petitioners "'[c]onfusingly' argue that the NC2-55 zone does not exist" and from that false premise, Respondents proceed to recite a few, irrelevant Code provisions that specify the affordable housing requirements that would be required and the floor area ratios that would be allowed for the NC2-55 zones under the Mandatory Housing Affordability legislation should such zoning be adopted for the area. Response at 28. Assuming that Respondents are referring to the single sentence on page 51 of Petitioners' Opening Brief where Petitioners note city-wide development of standards for the NC2-55 zone exist only in draft legislation, Respondents once again misrepresent Petitioners' argument. The provisions cited by Respondents have nothing to do with actual, on-the-ground development standards that affect the height, bulk, scale, and other features that may be allowed in a forthcoming NC2-55 zone, even if such a zone were applied along Greenwood Avenue at some point in the future.

It is undisputed that the few areas currently zoned NC2-55 are specified in the Code and that there is no city-wide zone designated NC2-55, as there is for example, for the NC2-40 and the NC2-65 zones. It is undisputed that the MHA legislation remains in draft form and that the Council is still considering amendments to that legislation, including its specific details and locations where the zone would be applied. Thus, it is unknown whether the final legislation will include any specific development standards that apply to the

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NC2-55 zone as, for example, the view protection provisions of SMC 23.47A.012.A.1.c (discussed above) that apply only in specified NC zones.

Similarly, the Code has requirements for allowable solar panel heights that vary by zone height. Moreover, to the extent that the City has put forth draft development standards that affect the scale of buildings in NC2-55 (and higher) zones, Shared Roof would violate them. The proposed legislation would increase the setbacks required in SMC 23.47A.014.B.3 for heights above 40 feet when a Lot in a commercial zone abuts a Lot in a residential zone. The Shared Roof is not only incompatible and inconsistent with existing zoning, it would be inconsistent and incompatible if NC2-55 zoning is ever applied along Greenwood Avenue (recognizing that its application there is also uncertain).

3. Petitioners have not waived any arguments relating to errors in the application of the rezone criteria in SMC 23.34.008, and substantial evidence in the Record shows that those provisions were not applied.

Respondents make the absurd claim that Petitioners have somehow "abandoned" their claims of error regarding application of the rezone criteria in SMC 23.34.008 because they directed this Court to the specific pages of Petitioners' Notice of Appeal to Council and Petitioners' Reply Memorandum (corrected) that detail those myriad factual errors. Response at 28-29. *See* Petitioners' Opening Brief at 50-52 where Petitioners describe these errors. The cited cases, however, have nothing to do with the situation here, and Respondents have offered no relevant authority to support their allegation. Instead, they make a futile attempt to rebut two of the egregious errors in the

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Examiner's Findings and Conclusions that the Council adopted without question, and then offer their conclusory assessment that Petitioners have not met their burden to prove clear error because some unspecified "substantial evidence" proves that the Council "determined that the Project met the contract rezone criteria." Response Brief at 29-30.

First, Respondents get tangled up in their own clumsy effort to recast Petitioners' argument and pretend that the Hearing Examiner did not mean what he wrote. Response at 29. As Petitioners explained at page 51 of their Opening Brief, the Examiner misunderstood the land use pattern in the area of the Shared Roof project. At Conclusion 7, the Examiner wrote that "[t]here are some examples of a 40-foot height zone located adjacent to a 65-foot height zone and 40-foot and 65-foot height zones adjacent to the LR3, RC and single-family zones." But in the immediate vicinity of the Shared Roof project there are no 65-foot zones. The nearest 65-foot zone is in Greenwood Town Center, almost a mile to the North and in an area zoned and developed totally differently than the "Phinney Tail" portion of Phinney Ridge where Shared Roof is located. Moreover, the Examiner also wrote that there are instances where "the transition occurs along a shared property line."[27] But there is not a single place in Greenwood Town Center where a 65-foot zone shares a property line with a single family zone. In other words, the Examiner failed to realize that the Shared Roof property, if up-zoned, would be the only parcel in the entire Greenwood-Phinney Urban Village where a commercial zone higher than 40 feet would share a property line with the single family zone.

[27] AR 1476, Conclusion 7.

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Respondents' effort to undermine Petitioners' argument that the Examiner assumed erroneously that all of Greenwood Avenue in the vicinity of the Shared Roof project would be up-zoned through MHA also fails. Although SMC 23.34.008.C requires "examination" of "previous and potential zoning changes," it does not authorize the Examiner to assume that draft zoning legislation may actually come into force in a specific area.

And finally, Petitioners redirect this Court to pages 12-17 of Petitioners' Notice of Appeal to Council, and pages 17-20 of Petitioners' Reply Memorandum (corrected) where these detailed errors are alleged,[28] and to Attachment 11[29] to Petitioners' Opening Brief, which includes a detailed table showing the flaws in SDCI's analysis of each of the rezone criteria in SMC 23.34.008, flaws that were later adopted (and often parroted) by the Examiner, and then by the Council when it adopted the Examiner's Findings and Conclusions without question.[30] The Council committed numerous errors when it adopted the Hearing Examiner's Findings and Conclusions as its own.

F. The Council erred when it required the vacant single family Lot – located in a highly desirable close-to-downtown neighborhood – to remain as Landscaped Open Space even though the applicant had expressly excluded that Lot from its contract rezone application

Petitioner's Opening brief at 52-53 explains how the Council decided at the last minute -- after its appeal hearing – but without any advance notice, without an opportunity to build a record, and without any Findings and

[28] Petitioners' Opening Brief at 51; AR 1489, *et seq*, and AR 1664 *et seq.*
[29] Also set forth at AR 825-32.
[30] AR 815-829, Doc. No. 52 (HXM Ex. 49 (Documents submitted by Esther Bartfeld), 4/30/2018

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Conclusions, to expand the PUDA to the vacant single family by requiring that it remain "landscaped open space." In effect, the Council prohibited that lot from being used for its stated, zoned purpose: single family development. It was a *de facto* rezone to change that property to a zone that does not exist in the Code, that of "landscaped open space." The single family zoning classification did not change on the Official Land Use Map, but its allowable uses have been curtailed. In effect, that single family Lot was used, unlawfully, to try to mitigate the impact of the mixed use building on the rezoned NC2-40 Lots. The Code however, requires the PUDA to mitigate the impacts of the rezone with restrictions "upon the use and development of the property" to be rezoned. SMC 23.34.004.

Respondents cite snippets of text from SMC 23.34.004, out of order and out of context, to support their proposition that "[t]he code does not limit the right of a property owner to voluntarily bind his/her property by PUDA even if it is not being rezoned."[31] But, when that section is read in its entirety, it is abundantly clear that the "self-imposed restrictions" must occur on the property that is being rezoned, not on an adjacent Lot.

SMC 23.34.004.A states:

> Property Use and Development Agreement. <u>The Council may approve a map amendment subject to</u> the execution, delivery, and recording of a property use and development agreement (<u>PUDA</u>) executed by the legal or beneficial owner of the <u>property to be rezoned</u> containing <u>self-imposed restrictions upon the use and development of the property</u> in

[31] Respondents' Brief at 30. Respondents also make the demonstrably false statement that the Developer "did not propose development on the single family zoned portion of the lot." Response at 31. But the initial Rezone application explained that the vacant lot "currently has no structures on it, and a single family house may be built in the future." AR 0139, (Doc. #7, Contract rezone application).

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> order to ameliorate adverse impacts that could occur from unrestricted use and development permitted by development regulations otherwise applicable after the rezone. All restrictions imposed by the PUDA shall be directly related to the impacts that may be expected to result from the rezone.[32]

In other words, a PUDA may be used when the Council approves a map amendment for a specific project, and in exchange, the Council requires certain restrictions on the property that benefitted from the rezone to ameliorate the impacts of that rezone on adjacent properties. A PUDA is not used as it was here, to restrict development on an adjacent Lot in a different zone, that was not subject to the map amendment, effectively using that Lot to mitigate the impacts caused by the Lots that benefitted from a site-specific rezone.

Moreover, following their consistent pattern of omitting inconvenient Code sections, Respondents overlook entirely the definition of a PUDA in SMC 23.84A.030 which further undercuts their argument:[33]

> "Property Use and Development Agreement" means an agreement, executed by the legal or beneficial owner of property whose zoning classification is changed by a contract rezone, which subjects the property to restrictions on its use and development."

(Emphasis added.) And "contract rezone," in turn, means "an amendment to the Official Land Use Map to change the zone classification of an area, subject to the execution, delivery, and recording of a property use and development agreement executed by the legal or beneficial owner of the property to be

[32] Emphasis added.
[33] Respondents gratuituously quote that definition at 34, without attempting to explain how a Lot whose classification is not changed by contract rezone, fits the definition.

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rezoned. SMC 23.34.032 ("Rezone, contract")(emphasis added). These two definitions match the explanation of PUDA in SMC 23.34.004.A.

In this case, only the two Lots in the NC2-40 were rezoned; Shared Roof specifically excluded the single family lots from the contract rezone. Here, the Council could have (and should have) imposed PUDA restrictions that prohibited the rooftop greenhouse that will result in a building almost 70 feet high towering over the adjacent single family lots,[34] that limited the height of the solar panels, and that imposed other restrictions to address lack of setbacks. But removing the building capacity of the single family lot to "guarantee … the physical buffers and gradual transition" as Respondents at 31 allege, was an unlawful use of the PUDA. In so doing, the Council has effectively changed the zoning classification of the vacant single family lot to a non-existent zone without following the proper procedures for rezoning, without granting any benefits to that Lot, and without mitigating the impacts of the rezone on the rezoned Lots themselves.

G. The Council's decision to rezone of 7009 Greenwood Ave N for the Shared Roof project created an unlawful spot zone that gifted thousands of extra square feet of commercial and residential building space to the Developer and interrupted the historic uniformity of the zoning pattern in this portion of Phinney Ridge.

As Petitioners explained in their Opening Brief, "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 affects only the use of a

[34] The greenhouse is also located in a rooftop area that is within the required setbacks that should have been applied to this project.

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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).[35] That is exactly what the Council did here by choosing not only to up-zone property that is located on an otherwise uniformly zoned street, to a new zone (NC2-55) for which the City has not yet developed uniform development standards, and most importantly, by enabling Shared Roof to construct portions of every floor of its building in violation of setback requirements that prohibit any structure in those areas.

In response to Petitioners' spot zoning claim, Respondents at 32-33 contend that rezoning two lots from NC2-40 to NC2-55 would not be "totally different from and inconsistent with" the zoning of adjacent NC2 zoned properties, that the rezone's effect of allowing a taller builder would effectively rule out any contract rezone that would increase the "scope of potential construction on rezoned property," and that Petitioners' argument lacks legal support. But once again, Respondents misrepresent the underlying facts and Petitioners' arguments, and overlook Petitioners' cited authority on spot zoning that is inconvenient to Respondents' arguments.

As the Washington Supreme Court recognized in *Pierce v. King County*, spot zoning is characterized by seven elements: 1) it's an attempt to wrench a single lot from its environment, 2) give it a new rating, 3) in a way that disturbs the tenor of the neighborhood, 4) which affects only the use of a particular

[35] Petitioners' Opening Brief at 53-55, §IV.F.

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piece of property or a small group of adjoining properties, 5) is not related to the general plan for the community as a whole, 6) but is primarily for the private interest of the owner of the property so zoned; and 7) is the very antithesis of planned zoning. *Pierce v. King County*, 62 Wn.2d at 338. These indicators of spot zoning directly apply to the zoning change bestowed upon Shared Roof.

First, the Shared Roof property has been given special treatment not accorded to other properties in the vicinity. It is not just the increase in base height to 55' (70' with bonuses) in an area of 40' heights that accords preference, but the departure from building setback requirements, access limitations, and height restrictions that single the development out for special treatment. No other NC2 zoned property in the Phinney Ridge Tail of the Urban Village has been allowed to increase its building height up to 70 feet, to violate protections for views of the Olympic Mountains, to evade upper level and building corner setback requirements, and to use the adjacent single family property for access and as a buffer for commercial development, unless of course the City approves yet another spot zone.

Second, the rezone does give the Shared Roof property a new rating, by rezoning it to a special customized version of NC2-55, a category which exists nowhere else along the tail of the Phinney Ridge Urban Village and one which removes setback and building height restrictions that would otherwise apply if the only change were an increase in base height from 40 to 55 feet.

Third, the rezone does disturb the tenor of the neighborhood, by allowing a much higher building to be placed right on the commercial/residential zoning boundary without upper level and corner setbacks that would provide

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some transition and allow for greater light and air between the separately zoned properties and without respecting height limitations that would protect views of the Olympics to the west.

Fourth, the approved rezone affects only the Shared Roof property. As regards the use of the "development site" artifice, Respondents give no examples of its use to effectively remove zoning boundaries between commercial and residential properties. No other NC2 zoned property along Phinney Ridge has been allowed to exempt itself from building setback, access and height limitations.

Fifth, the rezone is not related to, and in fact departs from the general plan for the Phinney Ridge community as a whole in at least three ways: it departs from the uniform height of 40' adjacent to single-family properties along the Phinney Ridge Urban Village south of the Greenwood area; it removes the transition provided by the setback and access limitations under SMC 23.47A.014; and it creates a precedent of allowing a developer to expand a building by buying up adjacent single family property and using that residential property as a transition for the commercial development when the transition is required to be provided within the commercial property through upper level and building corner setbacks. *See e.g., Smith v. Skagit County*, 75 Wn.2d 715, 743, 453 P.2d 832 (1969)(spot zoning exists when "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.")

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Sixth, the City's waiver of setback, access, and height restrictions benefits the particular developer of Shared Roof through the increase in building mass that the City has allowed where the Code prohibits any structure whatsoever. This windfall to the developer is at the specific detriment of adjoining owners, through the loss of light, air, views, and privacy (particularly, from a building rising nearly 70 feet right at the lot line of the 7010 Palatine property).

And seventh, waiving setback, access, and view restrictions for a single developer is the antithesis of planned zoning and it opens the City up to requests for similar treatment by other developers outside of a larger discussion as to whether such increases in intensity should be allowed along Phinney Ridge. Only requests for similar treatment could justify such consideration since the Hearing Examiner (whose findings the Council adopted) admitted that no changed circumstances warranted the rezone.[36] The contract rezone approved for Shared Roof is the epitome of spot zoning.

Respondents' efforts to escape the Council's obvious spot-zoning not only misrepresent Petitioners' arguments but also concede their "development site" defense. Despite obvious efforts to cleanse their brief of any reference to their up-zoned commercial parcels as "lots," Respondents' cleansing failed when it mattered most. Respondents at 32 write that "Petitioners provide no explanation for how rezoning **two lots** from NC2-40 to NC2-55 changes their

[36] AR 1477, Doc. No. 63 (Findings of the Hearing Examiner), 6/5/2018.

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use classification in any way, let alone in a manner that is "totally different from and inconsistent" with adjacent NC2-zoned properties."[37]

The Council's "rezoning of two Lots", is, of course, the crux of Petitioners' case. Petitioners' "development site" argument is based on the obvious fact that the two rezoned parcels are separate Lots as defined in the Code, and that they did not lose their identity as separate Lots simply because Shared Roof acquired the single family parcels along the rear boundary line of the commercial lots, drew an imaginary line around all four Lots and called them all a single "development site." Respondents' entire defense is built on the false premise that the rezoned commercial Lots are somehow not lots at all, but part of a single development site which Respondents claim to be a single Lot. But here, they admit that the Council action involved the "rezoning [of only] two lots."

This case has never been about "use classification" as Respondents insist. And spot-zoning claims are not -- and never have been – limited to

[37] Respondents made a similar (even if inadvertent) concession at page 20 when attempting to argue that Petitioners failed to show that the Council erred in accepting SDCI's invented notion of a development site as applied in this case. There, Respondents insisted that the Council acted within its authority "to rezone two commercial lot [*sic*] pursuant to its review authority under SMC 23.76.056." The issue in this case, of course, is not whether the Council has authority to rezone commercial "lots." It does. Petitioners have never claimed that the Council lacked authority to approve contract rezones pursuant to the Code specified requirements for such actions. Instead, as is obvious from the LUPA Petition and Petitioners' Opening Brief, this case turns on (1) whether the Council, when acting within its specified quasi-judicial authority to approve a contract rezone, may knowingly ignore the applicable law that requires specified building setbacks on every commercial Lot that abuts a Lot in a residential zone; (2) whether the Council may ignore the mandatory rezone criteria in SMC 23.34.009.D.2 that requires a gradual transition between zones; (3) whether the Council may ignore other mandatory Code requirements regarding view protection in the NC2-40 zone and mandatory rezone criteria in SMC 23.34.009 for additional height; and (4) whether the resulting rezone was an unlawful spot zone. The Council's approval of the contract rezone was unlawful on all of these points.

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those cases where a "use classification" is changed.[38] In this case, the requested rezone changes the height – to NC2-55 (55-feet) from the existing NC2-40 (40 feet). The NC2 (neighborhood commercial) classification remains unchanged and the NC2 use classification has never been an issue. Respondents' straw-man "use classification" argument is irrelevant to this case.

Similarly, Respondents misrepresent Petitioners' windfall argument by claiming that the argument relates only to the extra height granted in the rezone, and that extra height allowed in a contract rezone could not, as a matter of law, be considered a "windfall" because that would "foreclose any contract rezones that increase the scope of potential construction on a rezoned property . . . ."[39] Once again, however, Respondents invent a straw argument to knock down.

Petitioners' windfall argument is not limited to the extra story that would be allowed in a lawfully approved contract rezone.[40] It is based on the thousands of square feet of additional space that the City has gifted to Shared Roof on every level of the building by allowing construction of five stories of its building within the space that the Code prohibits any such building. Petitioners' Opening Brief at 53-55.

Because the two commercial Lots abut Lots in a residential zone, the mandatory setback requirements of SMC 23.47A.014.B should have been applied; because the approved building lacks all of those setbacks, it is unlawful; and because the setbacks were not applied, a substantial portion of

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[38] Respondents' Brief at 32.
[39] Respondents' Brief at 32. Respondents, however, then claim that such an outcome is "clearly to the intent of the Land Use Code," leaving out a crucial word.
[40] Petitioners' Opening Brief at 54.

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the proposed building would be unlawfully constructed within those setbacks, resulting in an unlawful windfall of thousands of square feet of additional space in its building where the Code requires no building at all.

As noted above, the approved building violates the mandatory setback provisions: (1) SMC 23.47A.014.B.1 (15-foot no build triangle that should have prohibited any building at all within the specified 15-foot triangle of the southwest corner of the building (where the driveway and building above are located)); (2) SMC 23.47A.014A.014.B.3 (requiring a 15-foot setback from the Lot line for all floors above the first floor up to 40 feet in height, and then an additional two feet per 10 feet in additional height for all parts of the building above 40 feet in height that should have prohibited a multi-story building right on the property line;[41] and (3) SMC 23.47A.014.B.5 (requiring the ground floor of a commercial building to be set back at least five feet from the property line if there are windows and doors on the wall that faces the adjacent single family zone.[42]

From Shared Roof's own material, it is evident that **it received a windfall of over 7,500 square feet of commercial and residential space** only because the Council embarked on an unlawful zoning-by-ownership to

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[41] Specifically, SMC 23.47A.014.B.3 required floors 2-4 to be set back at least 15 feet, and Floor 5 to be set back at least 17 feet (because that floor and rooftop and rooftop features are all more than 40 feet high).

[42] Respondents claim that the late addition of a "railing removing access to single family zone"[*sic*] is irrelevant to this argument. Respondents' Brief at 19, n.12, attempting to counter Petitioners' argument at pages 39-40 of their Opening Brief. The wall of windows on the west side of the building, alone, means that the first floor must be setback 5-feet from the property line. *See* SMC 23.47A.014.B.5. And furthermore, even if the Developer allegedly intends a railing to somehow prevent access from the building to the landscaped open space of the adjacent single family lot (*see* SMC 23.42.030, prohibiting access from a single family zone to a commercial use in a commercial zone), it begs the question of how the residents would access that property without walking all the way around to N. 70th street and opening a gate.

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allow a multi story building right on a shared property line with a single family zone.

Table A set forth at the end of this memorandum shows the approximate square footage on each floor that is within the required setbacks where there should be no building at all.[43] The net result, based on the unlawful extra residential space alone, is an astonishing 20% of the total residential space in the building, in addition to the unlawful commercial space on the ground floor.

The windfall granted by the contract rezone and its waiver of various zoning limitations bestows on Shared Roof benefits for its private gain available to none others and is the essence of spot zoning. See *Smith*, 75 Wn.2d at 743 ("[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.")

III. CONCLUSION

For the reasons above, as further elaborated in Petitioners' Opening Brief and in their LUPA Petition, the City Council's decision to approve the contract rezone for the Shared Roof project should be reversed as an unlawful

[43] The calculations are based on (1) the Developer's own drawings that show the building spanning 123.5 feet along its east Lot line (Greenwood Avenue), which for purposes of these calculations is assumed to be the length of the parallel, rear west property line along the single family zone; (2) SMC 23.47A.014.B.3 that requires a 15-foot setback from the Lot line for all floors above the first floor up to 40 feet in height, and then an additional two feet per 10 feet of additional height for all parts of the building above 40 feet in height; and (3) SMC 23.47A.014.B.5 that requires a five-foot setback on the ground floor when windows and doors are present. For ease of calculation, these estimates do not include the required 15-foot no-build triangle at the southwest corner required by SMC 23.47A.014.B.1, because most of that is already captured within the required 15+ foot upper level setbacks in SMC 23.47A.014.B.3, and the impact on ground-level calculations is negligible for the windfall argument. In addition, these calculations do not attempt to subtract the few feet of the driveway from the first floor calculations because that is negligible and does not affect the impact of the approximate calculations or legal conclusions.

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application of the Land Use Code, an unlawful exercise of its quasi-judicial decision-making authority, and an unconstitutional spot zone.

DATED this 29th day of January, 2019.

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Table A: Windfall granted to Shared Roof

Plan Set Page	Page in AR	Detailed Drawing	Page in AR	Use (by Floor)	Required setback (ft).	Windfall (sq. ft)
G006.1	000255	A201	000288	First Floor (commercial) l	5	618
G006.2	000256	A202	000289	2nd floor (residential, total 9,377 sq. ft)	15	1,853
G006.2	000256	A203	000290	3rd floor (residential, total 9,377 sq ft)	15	1,853
G006.2	000256	A204	000291	4th floor (residential, total 9419 sq ft)	15	1,853
G006.2	000256	A205	000292	5th floor (residential, total 8029 sq ft)	13[44]	1,606
				TOTAL WINDFALL		**7783**
			Total residential sq. feet windfall (out of 36,202 residential sq. ft on Floors 2-5)			7165
			Total percentage RESIDENTIAL WINDFALL (based on 36,202 total residential sq. ft **on Floors 2-5**)			7165 / 36,202 = **19.79%**

[44] The fifth floor of the building is above 40 feet, so it is subject to the additional setback required in SMC 23.47A.014.B.3. The 13 feet used here is an approximate calculation based on the fifteen feet setback required in SMC 23.47A.014.B.3 plus an additional two feet for every 10 feet in additional height, minus four feet to account for the existing setback on some, though not all of the fifth floor (the southwest corner is built right on the property line, in violation of the Design Review Board directive).

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