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Honorable Kenneth Schubert  
Tuesday, March 26, 2019  
w/o oral argument

KING COUNTY SUPERIOR COURT

IRENE WALL and ROBERT MORGAN,  
Petitioners,  
v.  
CITY OF SEATTLE, a Washington  
Municipal Corporation; 70<sup>th</sup> &  
GREENWOOD AVE, LLC and OJD, LLC,  
Washington limited liability companies,  
Respondents.

NO. 18-2-21317-7 SEA  
PETITIONERS' MOTION FOR  
RECONSIDERATION

**I. INTRODUCTION AND RELIEF REQUESTED**

Pursuant to CR 59(a)(7), (9), and KCLR 7(b)(3), Petitioners Irene Wall and Robert Morgan (collectively, the "Petitioners") respectfully ask this Court to modify the terms of its Remand Order dated March 5, 2019 (and entered March 6, 2019). so that the City Council, not the developer or the Court, makes the

1 required factual and legal determinations necessary to support a revised  
2 Council Decision that complies with the requirements in SMC 23.34.009.D.2 for  
3 a “gradual transition in height and scale and level of activity between zones . .  
4 .unless major physical buffers” are present along the shared boundary between  
5 the single family Lot at 7010 Palatine and the adjacent commercial Lot.

6         Petitioners do not ask this Court to expand the scope or modify the  
7 substance of its ruling. Instead, Petitioners’ proposed modification would  
8 merely conform the Order to the requirements of the Land Use Code by  
9 allowing the Council – not the regulated property owner -- to make the  
10 necessary findings and conclusions that would inform its discretionary  
11 determination of how to achieve compliance with SMC 23.34.009.D.2 along the  
12 rear boundary of the Palatine property. Petitioners’ proposed modification also  
13 adheres to the LUPA requirement that the Court exercises appellate review in  
14 land use cases, not original jurisdiction or a fact-finding role as in other civil  
15 matters.

16         The Court acknowledged at the hearing that no determination had been  
17 made whether the Palatine backyard could be considered a “major physical  
18 buffer” within the meaning of the Land Use Code such that Shared Roof could  
19 evade the “gradual transition in height and scale between zones that SMC  
20 23.34.009.D.2 would otherwise require. Because the Code requires such  
21 determinations to be made by the Council, it is appropriate that, upon remand,  
22 these decisions actually are made by the Council. But the Remand Order  
23 requires the developer to choose its own remedy from a limited, specified list  
24 that includes one option (1.a) that is unlawful and presumes an answer to a  
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1 material factual and legal issue that has not been resolved. Wall Decl. at Ex. 1  
2 (Order at 3:1-15). The Order also requires the Council to accept the developer's  
3 chosen remedy even though the Code delegates to the Council exclusively the  
4 highly discretionary authority to grant a contract rezone and determine the  
5 terms of the accompanying Property Use and Development Agreement (the  
6 PUDA). The Order, in effect, prohibits the Council from crafting its own remedy  
7 on remand.

8 To enable the Council to make the necessary determinations to comply  
9 with this Court's ruling, Petitioners ask this Court to modify its Remand Order  
10 with the following changes to page 3 of the Order: (1) eliminate paragraphs 1.a  
11 and 1.b from the Order; (2) revise the remainder of paragraph 1 to read as  
12 follows: "Pursuant to RCW 36.70C.140, the contract rezone approval and  
13 Property Use and Development Agreement are hereby remanded to the City  
14 Council to address compliance with SMC 23.34.009.D.2, which requires that  
15 '[a] gradual transition in height and scale and level of activity between zones  
16 shall be provided unless major physical buffers, as described in subsection  
17 [23.34.008.E.2], are present' in the area where the commercial Lot 287710-  
18 4100 shares a rear boundary line with the single family Lot 287710-4120 at  
19 7010 Palatine Avenue." In all other respects, the Order remains the same.

## 20 21 **II. STATEMENT OF FACTS**

22 The Shared Roof project includes (1) two Lots in the NC2-40 zone that  
23 are presently zoned NC2-40 (Neighborhood Commercial, 40 foot height) and  
24 that the Council upzoned to NC2-55(M) (Neighborhood Commercial, 55-foot  
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1 height, Mandatory Housing Affordability suffix)(Lots 287710-4100 and 287710-  
2 4085), (2) a vacant single family Lot adjacent to the southern two-thirds of the  
3 commercial Lots that the Council required to be maintained as Landscaped  
4 Open Space in perpetuity (Lot 287710-4127), and (3) a single family Lot at  
5 7010 Palatine Avenue (Lot 287710-4120), presently developed with a garage  
6 and an old Craftsman house with an attached rear deck, that shares its rear  
7 boundary with the northern one-third of the commercial Lots. Wall Decl. at Ex.  
8 2 (AR1699). The proposed Shared Roof building would rise four stories (over  
9 40 feet) directly on the property line shared with the two adjacent single family  
10 lots, with minimal setbacks on the fifth floor.

11 Even though SMC 23.34.009.D.2 requires that “[a] gradual transition in  
12 height and scale and level of activity between zones shall be provided unless  
13 major physical buffers. . . are present” (emphasis added), neither the Hearing  
14 Examiner nor the Council, which adopted the Hearing Examiner’s Findings and  
15 Conclusions, made any determination whether the backyard of the Palatine  
16 property was (or could be made into) a “major physical buffer” that would  
17 enable the Shared Roof building to evade the requirement for a “gradual  
18 transition in height and scale and level of activity between zones” in that area.  
19 AR1755-59 (Doc. No. 80, Council Findings, 8/6/18); AR 1470-1486 (Doc. No.  
20 63, Findings of the Hearing Examiner, 8/5/18).

21 The Court granted Petitioner’s Land Use Petition Claim ¶7.1 that the  
22 Contract Rezone and Development Agreement were approved in violation of  
23 SMC 23.34.009.D.2 for failure to provide a gradual transition or a major  
24 physical buffer” between the upzoned commercial properties and the adjacent  
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1 single family residential property at 7010 Palatine Avenue North. Wall Decl.,  
2 Ex. 1 (Order at 2:16-24).

3 A survey in the applicant's Plan Set confirms that the vacant lot, which  
4 the Council required to be maintained as "landscaped open space," is 53 feet  
5 wide. Wall Decl. at Ex. 3 (AR 260). That survey also identifies the location of  
6 the house and attached above-grade deck on the 7010 Palatine property.  
7 Petitioners estimate that there is approximately 39 feet between the east edge  
8 of the Palatine house (not including the above-grade deck) and the rear  
9 boundary of the 7010 Palatine property; the above-grade deck extends  
10 approximately 8 feet into the backyard, leaving only 31 feet (approximately)  
11 remaining in the backyard (not including the stairs that extend into the  
12 backyard). Wall Decl. at ¶¶5-6. The survey also shows a one-story structure  
13 on the southeast corner of the property at 7014 Palatine (in the single family  
14 zone immediately north of the 7010 Palatine property), that is within 1-2 feet of  
15 its southeast corner near the intersection with the Shared Roof commercial lot.  
16 Wall Decl. at Ex. 3 (AR260). Shared Roof does not own that property.

17 The L1.11 Street Level Illustrative Plan for the Shared Roof project, upon  
18 which the developers' counsel relied at the hearing, reveals that the backyard  
19 of the Palatine property would be further truncated by a concrete wall running  
20 parallel to – and inside -- the property line along the entire length of the  
21 backyard (and continuing into the vacant lot that the Council required to be  
22 maintained as landscaped open space). Wall Decl. at Ex. 4 (AR279).  
23 Petitioners estimate that the concrete wall is approximately 15 feet inside the  
24 legal rear boundary of the Palatine property. Wall Decl. at ¶¶5, 7. In effect, this

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1 reduces the depth Palatine backyard by 15 feet. Petitioners estimate that the  
2 distance between the back of the Palatine house (not including the attached  
3 above-grade deck) and the concrete wall is approximately 24 feet, with only 16  
4 feet (approximately) of yard between the outer edge of the deck (which is  
5 approximately 8 feet deep) and the concrete wall. *Id.*

6 At the hearing, the Court repeatedly acknowledged problems with the  
7 Council's treatment of the Palatine property (identified as "Lot 3" see Ex. 2 to  
8 Wall Declaration):

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10 ". . . Lot 3 is not an adequate; is not a physical buffer, only Lot 2 is, and  
11 therefore, the failure to insist on a gradual transition adjacent to Lot 3 is  
problematic." Transcript at 5:17-19 (emphasis added).

12 "Well the problem is, is that no one has said that Lot 3 constitutes a  
13 physical buffer. . . . In fact I think you guys [Respondents] are conceding  
14 it doesn't. If it consider; if it doesn't constitute a physical buffer, I don't  
15 know how you can have an exemption to the otherwise required gradual  
16 transition adjacent to that." Transcript at 10: 13-18 (emphasis added).

17 "I think the solution is to provide the gradual transition adjacent to Lot 3.  
18 To me, that's the easiest solution there is. You don't need one adjacent  
19 to Lot 2, I'm sold on that. You do need one on Lot 3. Or Lot 3 needs to  
20 be treated like a landscaped open space and converted into one. At  
21 least significantly enough, a portion of it, so that it's consistent with Lot  
22 2." Transcript at 11:6-10 (emphasis added).

23 "[A] landscaped open space is not per se a physical buffer; so just  
24 because you have some open space in a portion of (lot) 3, maybe even  
25 that portion that abuts 1 – and you say "Well it's just a lawn right there,  
there's not a building there, it's a nice little open lawn.", if it doesn't  
constitute a physical buffer, you don't get to be exempt from the  
requirement that you have a gradual transition. You can't just kinda say,  
'well it looks kinda like a landscaped open space.' It's either a physical  
buffer or it's not. If it's not, you must have a gradual transition. If it is, you  
don't need one. That's how I read the law." Transcript at 11: 21-25;  
12:11-4 (emphasis added).

1           Regarding the Council's failure to comply with SMC 23.34.009.D.2 along  
2 the backyard of the Palatine property, the Court stated to Petitioners that:

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4           "You won on that, you understand which one you won on, right, 'cause  
5 we've been talking about that exhaustively. . . . So if you want to draft up  
6 that language that you won on in terms of how it needs to be remanded  
7 because the PUDA needs to be modified in my opinion and the master  
8 use permit needs to be made more clear as well. This only works if  
9 there is open space that becomes a physical buffer, that can count as a  
10 physical buffer, along the entire East-West boundary of [lots] 1, 2, and  
11 3. Or, once you're past the boundary of 2, there needs to be a gradual  
12 transition in that building. That's the only way it works. And that open  
13 space needs to run with the land of 2 and 3 for this to work in my  
14 opinion. That's why the PUDA is so important. So those are the things  
15 that are problematic. That's why I will remand this project back for  
16 further consideration to account for those problems." Transcript at 24:  
17 20-25; 25:1-10 (emphasis added).

18           The problematic language in the Remand Order that allows the  
19 developer to choose its own remedy from two specified options, was drafted by  
20 Respondents in their proposed order, and was not discussed at the hearing.  
21 Petitioners specifically objected to that language in a letter dated February 13,  
22 2019 submitted with their Proposed Order. Petitioners' Proposed Order  
23 accompanying this Motion remedies that error so that the Order of Remand  
24 would allow the Council – not the developer - to make the factual and legal  
25 determinations necessary to comply with this Court's ruling.

### 21           **III.     STATEMENT OF ISSUES**

22           1. Given the Court's conclusion that the Council Land Use Decision  
23 violated SMC 23.34.009.D.2 for failure to provide a gradual transition or  
24 a major physical buffer along the shared property line between the  
25 development approved on the upzoned commercial lots and the adjacent  
single family residential Lot at 7010 Palatine, should the Order of

1 Remand be modified to allow the City Council to make the necessary  
2 factual and legal determinations and specify the terms of a PUDA  
3 necessary to achieve compliance with SMC 23.34.009.D.2 in  
4 accordance with this Court's ruling?

5 **IV. EVIDENCE RELIED UPON**

- 6 1. Declaration of Irene Wall in Support of Petitioners' Motion for  
7 Reconsideration;  
8 2. Verbatim Transcript of Judge's Oral Decision ("Transcript"); and  
9 3. Other pleadings and evidence in the Record related to this matter on  
10 file with the Court.

11 **V. AUTHORITY**

12 **A. Petitioner's Proposed Order restores to the Council its exclusive**  
13 **right to determine first whether the backyard of the Palatine house**  
14 **constitutes a "major physical buffer" within the meaning of the Land**  
15 **Use Code and then to craft the terms of a PUDA necessary to achieve**  
16 **compliance with SMC 23.34.009.D.2 in the area behind the Palatine**  
17 **property.**

18 SMC 23.34.009.D.2 mandates that, where, as here, a rezone involves  
19 an increase in height, "[a] gradual transition in height and scale and level of  
20 activity between zones shall be provided unless major physical buffers, as  
21 described in subsection [SMC 34.34.008.E.2]<sup>1</sup> are present." (Emphasis added).  
22 The sole issue raised in Petitioners' Motion for Reconsideration is which entity  
23 determines the set of conditions necessary to comply with SMC 34.34.009.D.2  
24 at the boundary separating the proposed Shared Roof five-story building from  
25 the adjacent single family property at 7010 Palatine: the City Council as the  
fact-finding decionmaker to which the Land Use Code grants exclusive,

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<sup>1</sup> The Code cites to SMC 34.34.008.D.2, but an Editor's note in that section clarifies that the proper reference should be SMC 23.34.008.E.2, which Petitioner's have cited in brackets.

1 discretionary authority, or the regulated property owner/developer who must  
2 obtain specific Council approval and accept Council-imposed conditions before  
3 receiving a contract rezone.

4 A contract rezone is “an amendment to the Official Land Use Map to  
5 change the zone classification of an area, subject to the execution, delivery,  
6 and recording of a property use and development agreement<sup>2</sup> executed by the  
7 legal or beneficial owner of the property to be rezoned.” SMC 23.84A.032  
8 (“Rezone, contract”). It is a “quasi-judicial Type IV Council land use decision[]”  
9 that “shall” be made by the Council, SMC 23.76.036.A.1, and “shall be based  
10 on applicable law and supported by substantial evidence in the record,” SMC  
11 23.76.056.A, which is the record established by the Hearing Examiner. SMC  
12 23.76.054.E. The Council also decides major amendments to PUDAs (SMC  
13 23.76.036A.5) and minor amendments to PUDAs (SMC 23.76.036.B.1).

14 The Land Use Code authorizes the Council, at its sole discretion, to  
15 rezone a specific property through a contract rezone. SMC 23.34.004.A (“The  
16 Council may approve a map amendment . . . .”)(emphasis added). If the  
17 Council approves a contract rezone, the accompanying PUDA includes  
18 “restrictions upon the use and development of the property in order to  
19 ameliorate adverse impacts that could occur from unrestricted use and  
20 development permitted by development regulations otherwise applicable after  
21 the rezone.” SMC 23. 34.004.A. The PUDA “shall not be construed as a  
22 relinquishment by the City of its discretionary powers.” SMC 23.34.004.C.

23 \_\_\_\_\_  
24 <sup>2</sup> A “property use and development agreement” (PUDA), is “an agreement, executed by the  
25 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.” SMC  
23.84A.030 (Emphasis added.)

1           Nothing in the Code requires the Council to grant a contract rezone.  
2 SMC 23.34.004.A. Nothing in the Code requires the Council to accept a  
3 developer’s desired conditions in a PUDA, even if such conditions may be  
4 legal. And nothing in the Code constrains the Council from crafting PUDA  
5 conditions it deems appropriate to ameliorate the impacts of a rezone.

6           The Order is problematic because It forces the Council to accept the  
7 developers’ choice among two options listed in the Order before the Council  
8 determines whether one of those options (1.a) achieves compliance with SMC  
9 23.34.009.D.2 or whether other options may be more appropriate. SMC  
10 23.34.009.D.2 sets up a condition precedent: to avoid the requirement for a  
11 gradual transition in height and scale between zones, there must be a “major  
12 physical buffer between zones.” Because the Order allows the developer to  
13 select Option 1.a, which does not require a gradual transition in height and  
14 scale between zones, it essentially allows the developer to make the required  
15 finding that Option 1.a results in a major physical buffer between zones even  
16 though no factfinder has reached that conclusion.

17           The Code requires the Council to adopt written findings and conclusions  
18 in support a contract rezone decision. SMC 23.76.056.B. But the Order upsets  
19 that balance and the required analysis because it allows the developer to select  
20 Option 1.a (the likely outcome) before the Council has made the required  
21 analysis to determine whether any option involving the Palatine yard would  
22 achieve the required “major physical buffer” between zones. In effect, the  
23 Order defers to the developer where the Code requires Council analysis.

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1 Because the Order does not allow the Council to reject the developer’s chosen  
2 remedy, it makes any Council analysis meaningless.

3 The Order is also problematic because it strips away the discretion the  
4 Code reserves to the Council to craft a PUDA as it deems necessary to  
5 ameliorate impacts of the Shared Roof rezone. In the ordinary course, even if  
6 the Council concluded that the Palatine backyard could be considered a “major  
7 physical buffer,” the Code would allow it to also require a gradual transition in  
8 height and scale if it deemed that necessary to ameliorate the impacts of the  
9 project. SMC 23.34.004.A; see *also*, Wall Decl., Ex. 3 (AR 260, survey  
10 showing the close proximity of the 7014 Palatine property, not owned by  
11 Shared Roof, to the Shared Roof commercial lot). The Order, however,  
12 prescribes only two options, and allows the developer to select only one with no  
13 opportunity for the Council to supplement, modify, or reject that choice. Such a  
14 limitation unlawfully constrains the Council’s discretion to craft PUDA conditions  
15 that ameliorate the impact of the upzoned Shared Roof commercial lots.

16 In a LUPA case, unlike other civil matters, the scope of review is  
17 appellate, not fact finding. RCW 36.70C.120(1) (“When the land use decision  
18 being reviewed was made by a quasi-judicial body or officer who made factual  
19 determinations in support of the decision . . . judicial review of factual issues  
20 and the conclusions drawn from the factual issues shall be confined to the  
21 record created by the quasi judicial body or officer . . . .”) (Emphasis added).  
22 The Court may affirm or reverse the land use decision or remand it for  
23 modification or further proceedings. RCW 36.70C.140. But LUPA does not  
24 allow the Court to dictate the remedy when the factfinder has not made the  
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1 necessary factual determinations to support such a decision. Petitioners'  
2 Proposed Order restores those decisions to the Council as the Code requires.

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4 **B. Petitioner’s Proposed Order removes from the Court’s Order a**  
5 **potential “remedy” that conflicts with Land Use Code Requirements and**  
6 **would render the provisions of SMC 23.34.009.D.2 meaningless.**

7       Apart from the problems identified above, Option 1.a conflicts with Code  
8 requirements and would not remedy the deficiencies identified by the Court.  
9 Petitioners’ Order would remove Option 1.a, which was drafted by Respondents  
10 and does not accomplish this Court’s objective that “the back 40-feet of Lot 3  
11 [the Palatine property] [needs] to be considered open space in order for there  
12 not to be a gradual transition of the building immediately adjacent to it. . . . “  
13 Transcript at 20:3-5. Option 1.a merely memorializes the Street Level  
14 Illustrative Plan L1.11 of the proposed Shared Roof project (Wall Decl., Ex. 4  
15 (AR279) that the Council already approved and that this Court deemed to be  
16 insufficient. See *also* Transcript at 8:8-12 (developer’s counsel confirming that  
17 L1.11 is what the PUDA requires). It does not treat “Lot 3” like landscaped open  
18 space” that is “consistent with Lot 2.” Transcript at 11:6-10.

19       Rather than providing a “major physical buffer between zones” the  
20 L1.11 drawing shows a concrete wall that cleaves off the rear 15 feet of the  
21 currently existing Palatine backyard shown in the survey (compare Wall Decl.  
22 Ex.. 4 (AR279, L1.11 drawing) with Ex. 3 (AR260, survey). In effect, the wall  
23 removes the eastern 15 of the Palatine backyard (for the benefit of the Shared  
24 Roof commercial lots, where it will be covered with an 8-foot wide concrete  
25 walkway that extends south to N. 70<sup>th</sup> Street. Wall Decl. Ex. 4 (AR279). There

1 would be only 16 feet (approximately) remaining in the Palatine backyard  
2 between the east side of the above grade deck attached to the house, and this  
3 wall. Wall Decl. at Ex. 4 (AR279), Wall Decl. ¶¶5, 7. The wall, in effect, shifts  
4 the impact of the commercial zone into the eastern 15 feet of the adjacent  
5 single family zone. There does not amount to the extent of “open space or  
6 greenspace” that would provide the “major physical buffer” required by the  
7 Code.

8 While it is for the fact-finder to decide whether such an arrangement  
9 constitutes a “major physical buffer between zones, such a result seems highly  
10 unlikely. A “physical buffer” includes “open space and greenspace.” SMC  
11 23.34.008.E.2. “Open Space” is defined as “land and/or water area with its  
12 surface predominantly open to the sky or predominantly undeveloped, that is  
13 set aside to serve the purposes of providing park and recreation opportunities,  
14 conserving valuable natural resources, or structuring urban development and  
15 form.” (Emphasis added.) SMC 23.84A.028: “Greenspace” is not defined in the  
16 Code. SMC 23.34.009.D.2, however, requires more than just the “physical  
17 buffers” in the general rezone criteria of SMC 23.34.008.E.2. It requires “major  
18 physical buffers” between zones. Although “major” is not defined in the Code,  
19 its ordinary meaning implies that these buffers must be significant to satisfy this  
20 requirement. There is very little “open space or greenspace” between zones  
21 under Option 1.a, and therefore, it seems unlikely that any fact finder would  
22 conclude, when confronted with this Court’s ruling, that Option 1.a constitutes a  
23 major physical buffer between zones. Indeed, if maintaining an adjacent rear  
24 yard to a single family house is all that is required to provide a “major physical

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1 buffer”, then the requirement in SMC 23.34.009.D.2 for a major physical buffer  
2 between zones would be superfluous because the Code already requires rear  
3 yards in the single family zone. SMC 23.44.014.B. It is not appropriate to foist  
4 such an outcome on the Council.

5 Also, as a practical matter, it is unclear whether the restrictions  
6 contained in Option 1.a would add any new restrictions that address the Court’s  
7 concerns about development on that site. The Land Use Code limits the  
8 amount of a parcel that may be covered in buildings and other specified  
9 structures. SMC 23.44.010C, D. Based upon its dimensions, the 7010  
10 Palatine property is 3,844 square feet, substantially smaller than its SF5000  
11 zoning designation (single family, 5000 square feet). AR260 (Wall Decl. at Ex.  
12 3). The Palatine property is already covered with a garage that extends above  
13 grade in the front yard, a house with an enclosed front porch and a rear above-  
14 grade deck that extends 8 feet into the backyard. Wall Decl. Ex. 3 (AR260), ¶¶  
15 5, 6. Even without the wall carving out the rear 15 feet, it is unlikely that any  
16 additional structures of significant size could be added to that lot within  
17 allowable lot coverage limitations. And with the rear 15-foot cleared off  
18 pursuant to the MUP plans, it is even more unlikely that any new structures  
19 could impede the approximately 16 feet of greenspace separating the deck  
20 from the proposed concrete wall of the Palatine house.

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**VI. CONCLUSION**

For the reasons above, the Court should grant Petitioner’s Motion for Reconsideration to modify the Order of Remand. A proposed order accompanies this motion.

DATED this 15<sup>th</sup> day of March, 2019.

LAW OFFICES OF  
JEFFREY M. EUSITS, PLLC

/s/ \_\_\_\_\_  
Jeffrey M. Eustis, WSBA #9262  
Attorney for Irene Wall and Robert  
Morgan

I, Jeffrey M. Eustis, certify that according to Word this memorandum contains 4070 words (even including the caption and signature blocks), fully in compliance with the Local Civil Rules (KCLCR7(b)(5)(B)(vi).

/s/ \_\_\_\_\_  
Jeffrey M. Eustis

DECLARATION OF SERVICE

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I am a principal in the law offices of Jeffrey M. Eustis, PLLC, over eighteen years of age and competent to be a witness herein. On the date below, I served copies of the foregoing document upon parties of record, through e-filing upon their respective counsel of record:

Patrick Downs,  
Assistant City Attorney  
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 first class postage prepaid,  
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 hand delivery / messenger

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED: March 15, 2019.

/s/ \_\_\_\_\_  
Jeffrey M. Eustis