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I. Introduction

Pursuant to SMC 23.76.054 (Council consideration of Hearing Examiner recommendation on Type IV Council land use decisions), Irene Wall and Bob Morgan appeal the Hearing Examiner's Findings and Recommendation of CF314356 (SDCI Reference #3023260) to rezone the two commercial lots of 7009 Greenwood Ave N in the Phinney Ridge neighborhood to NC2-55(M) from the current zone designation of NC2-40.

The project site is located in the southern part of the" tail" of the Greenwood Phinney Urban Village, a 15+ block stretch where Greenwood Avenue North is the lone street in the mapped urban village, and where every parcel on Greenwood Avenue North is zoned uniformly at NC2-40. The nearest zone higher than 40 feet is almost one mile north of the project site.

The Hearing Examiner's Recommendation to approve the contract rezone for 7009 Greenwood Ave N should be rejected and the rezone denied because:

(1) the Examiner recommended a rezone to a zone that does not yet exist in the Land Use Code and does not appear on the Official Land Use map for the Phinney Ridge area that encompasses the project site, and no city-wide use and development standards for that zone have been adopted;

(2) the Examiner applied the rezone criteria in SMC 23.34.007-009 incorrectly, incorporating misrepresentations of material facts and omitting other material facts that undermine the analysis and recommendation; and

(3) the Examiner's recommendations for conditions in a Property Use and Development Agreement ("PUDA") that would apply to the requested rezone are inadequate because the Examiner failed to recommend that the building comply with applicable Land Use Code requirements for setbacks and other requirements where commercial lots abut lots in a residential zone (including the setbacks proposed in the draft MHA legislation for the NC55 zone), and failed to mention or consider the impact of a massive 12-foot high greenhouse on top of the upzoned building that further exacerbates the impact of this building on the adjacent single family properties.

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II. Appellants

Irene Wall is a qualified appellant because she submitted comments to SDCI regarding this project and also testified at the public hearing before the Examiner on April 30, 2018 and submitted written comments to the Examiner. SMC 23.76.054.A. Ms. Wall is a lifelong resident of the Phinney Ridge neighborhood, and a board member and former president of the Phinney Ridge Community Council.

Mr. Morgan is a qualified appellant because he submitted comments to SDCI regarding this project. SMC 23.76.054.A. Mr. Morgan is a resident of the Phinney Ridge neighborhood and a retired member of Seattle City Council Central Staff.

This appeal is timely because the Examiner's recommendation was issued on June 5, 2018, and this appeal is being filed on June 19, 2018, the 14th calendar day from the date of issuance of the Hearing Examiner's recommendation. SMC 23.76.054.B.

Following a description of the proposal, this appeal identifies specific objections to the Hearing Examiner's recommendation and the relief sought by appellants. SMC 23.76.054.C. The myriad errors that appellants identify in the Examiner's recommendation are based on applicable law and supported by substantial evidence in the record.

III. The proposed project at 7009 Greenwood Ave N

The appealed action is the recommendation for a contract rezone of two lots totaling approximately 12,000+ square feet on the northwest corner of Greenwood Avenue North and N. 70th Street from NC2-40 to NC2-55(M), a proposal that would upzone one of the largest commercial properties in this portion of Phinney Ridge. The lots proposed for rezoning abut a single family zone at the rear. The proposal includes a proposed 5-story building topped with a 12 foot high, 425-square foot greenhouse and a 10 foot high array of solar panels.

The requested zone designation, NC 2-55(M), does not yet exist in the Land Use Code in the Phinney Ridge Neighborhood, or anywhere except three discrete neighborhoods where that zone was imposed through separate legislation.

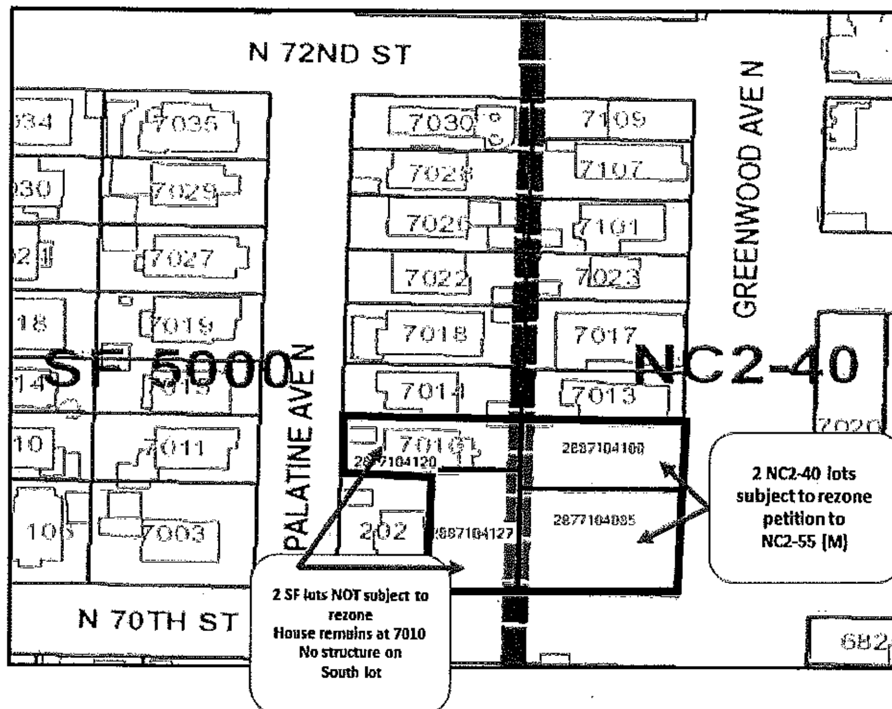
The owner / developer ("Developer") is a group of friends who call themselves "Shared Roof." This group has stated that it plans to occupy all of the units on the fourth and fifth floors of the proposed building. The only units that would be available to the public are those units located on the second and third floors of the proposed building. The units that would be offered to the public are substantially smaller than the units that the Shared Roof members are reserving for themselves.

The Developer also owns the two lots in the adjacent single family (SF5000) zone that together border the entire west side (rear property line) of the commercial properties proposed for rezone. One lot (Lot # 287710-4127) is a vacant, mid-block lot on N. 70th Street. The east side of that lot abuts the rear property line of the southern NC parcel (Lot # 287710-4085). The other lot (Lot # 287710-4120), at 7010 Palatine Ave N (the street west of Greenwood), contains a classic old craftsman house and shares a rear boundary with the northern NC parcel proposed for rezone (Lot # 287710-4100).

Figure 1 is an annotated version of the zoning and parcel map at Page 3 of the SDCI Decision.[1]

Figure 1:

[1] "The parcel numbers in the illustration at Figure 1 are copied from SDCI's map on Page 3 of the SDCI Decision. Appellants noticed that two of the parcel numbers contain typographical errors. The NE parcel should be 2877104100 and the SW, midblock parcel should be 2877104127. The parcel numbers are identified correctly in SDCI's chart on page 3 of the Decision.



The two single family lots are <u>not</u> proposed for rezoning, are <u>not</u> included in the rezone application, and therefore would not be subject to any PUDA restrictions imposed by the Council. SMC 23.34.004 (Contract rezones; PUDAs apply only to the property to be rezoned).

The Developer, however, calls all four parcels, which total 20,799 square feet, a "development site," a term that is not defined in the Land Use Code. As explained below, the Examiner mistakenly embraced this undefined term and infused it throughout the Findings and Recommendations, resulting in confused analysis and conclusions.

The proposed building has the first four floors built right on the shared rear property line that separates the two NC parcels proposed for upzoning from the two SF5000 parcels at the rear. The fifth floor is set back only 4-6 feet from the shared rear property line along

most of its length, but built right up to the property line at the southwest corner, in violation of the Design Review Board's recommendation.

The applicable Land Use Code, SMC 23.47A.014.B.1 prohibits building in a 15' triangle where the rear boundary of a commercial lot abuts the side boundary of a residential parcel. One of the NC lots proposed for rezone abuts the side boundary of the vacant mid-block SF5000 lot on N. 70th Street. The Examiner, however, recommended approval of a building that consumes this entire no-build area without acknowledging or analyzing this Code violation.

The applicable Land Use Code, SMC 23.47A.014.B.3, requires that all floors above the first floor be set back at least 15 feet from the property line, with an increasing setback of two feet per 10 feet of additional height. The proposed MHA legislation for the NC55 zone, CB 119184, retains the 15-foot setback for all floors above the first floor up to 40 feet and then increases the setback for all portions of a building above 40 feet to 3 feet per 10 feet of additional height.

However, the Examiner recommended approval of a building where all floors above the first floor would be constructed within the required setback area, resulting in a building far more massive than allowed under the current Land Use Code or that would be allowed under the most recent proposed MHA legislation. Such a building would also breach the consistent development pattern on that block and several blocks in the surrounding area where the zoning / propery line runs due north / south on all blocks.

The 55 foot tall building would be topped with a large 425 square foot "greenhouse," a structure larger than the studio apartments that would be offered to the public on the lower floors, and that would add approximately 12 additional feet to the building height, resulting in a building almost 70 feet high abutting a single family zone and with zero setback along most of that height. The Developer's drawings indicate that the greenhouse would be less than 15 feet from the rear property line and within the required setback where there should be no structure at all. The Examiner did not even mention, much less analyze, the impact of placing this large structure on the roof of an upzoned building that is adjacent to a single family zone, or the placement of the greenhouse within the required setback.

The building would also be topped with a large solar panel array facing Greenwood Avenue north, further increasing the height of the structure.

The applicable Land Use Code, SMC 23.47A.014.B.5, prohibits entrance, windows or other openings closer than 5 feet from an abutting residential lot. However, the Examiner recommended approval of a building where almost the entire west side of the building

violates this provision because it is infused with windows and other openings right on the shared property line with the adjacent single family residential zone.

The Developer has, at various times, stated an intent to impose a so-called "no-build easement" on the eastern portion of the two single family lots. The Examiner did not mention that aspect of the proposal or analyze the legality of blurring the boundaries between commercial and residential zones and incorporating parcels that are not subject to the rezone application (or PUDA) with those that are part of the application.

A comparison of the Land Use Code exhibits showing the required setbacks with the Developer's own renderings of the proposed buildings reveal the myriad Code violations that the Examiner (and SDCI) ignored when recommending approval of the proposed.

Figure 2 on the following page shows the illustration in the Land Use Code of the no-build triangle required in SMC 23.47A.014.B.1.

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Figure 2:

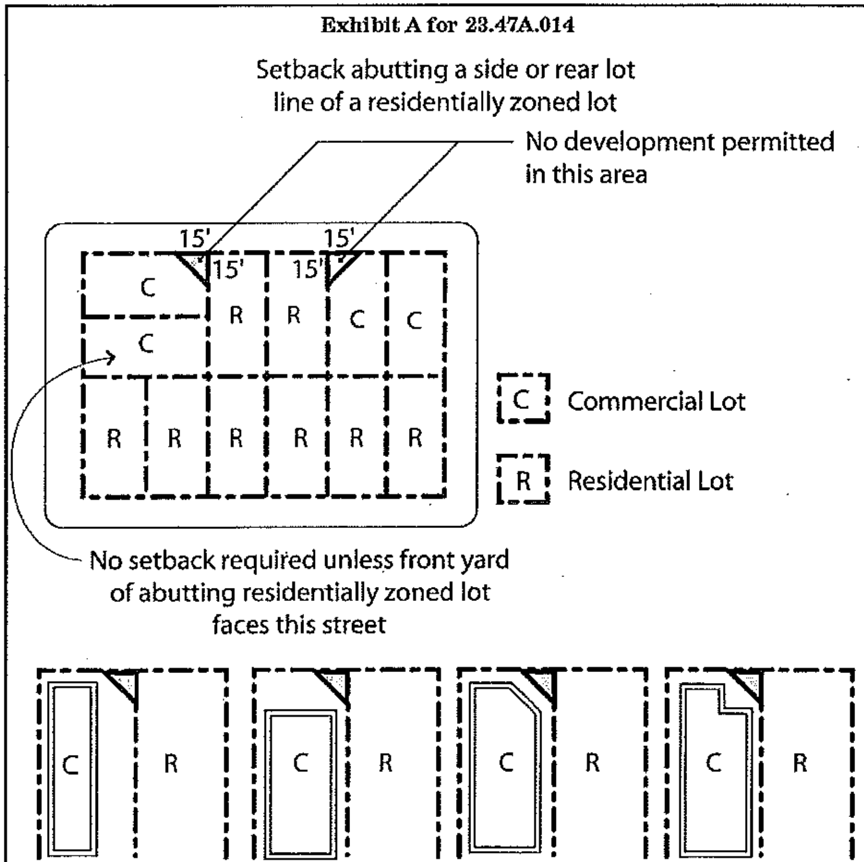

Figure 3 on the following page shows the illustration in the Land Use Code of the setbacks required in SMC 23.47A.014.B.3 on all floors above the first floor when the rear boundary of a commercial lot abuts a lot in a residential zone.

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Figure 3

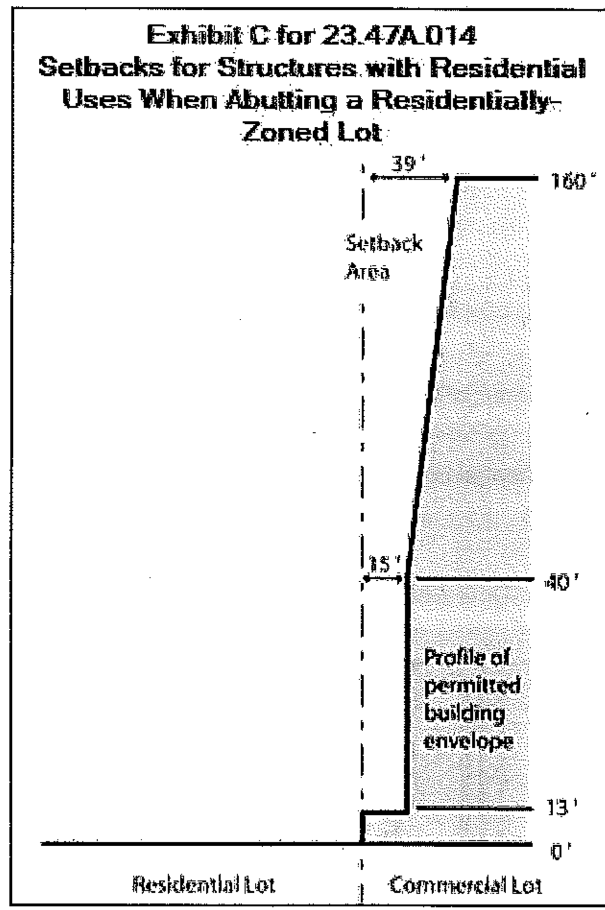

Figure 4 on the next page shows one of the Developer's images of a view looking northeast to the proposed building. The right side (south side) of the building faces N. 70th Street, and the left portion (west side) faces the single family zone. The entire corner with the driveway is in the 15 foot, no-build triangle required by SMC 23.47A.014.B.1. The grassy area and walkway adjacent to the building are in the single family zone. All floors above the first floor on the west side are at least 15 feet too close to the property / zoning line separating the NC parcels proposed to be upzoned from the single family lots at the rear in violation of the setback requirements in SMC 23.47A.014.B.3.

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Figure 4:

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

Figure 5 on the next page is another image from the Developer's material that shows the rear (west side) of the proposed building as viewed from the adjacent single family zone. Although the final version of the proposed building is slightly different, it retains the uniform wall of four stories built right on the shared property line, with only minimal setbacks for the fifth floor in violation of SMC 23.47A.014.B.3, and windows and other openings on the first floor in violation of SMC 23.47A.014.B.5. The shaded grey on the roof outlines the greenhouse that adds additional height.

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Figure 5:

WEST ELEVATION

IV. Specific objections to the Examiner's Recommendation

A. The Hearing Examiner erred by recommending a contract rezone to the prospective NC2-55(M), a zone that does yet exist in the Land Use Code, does not yet have use and development standards against which to measure the proposed project, does not exist in the Phinney Ridge area on the Official Land Use Map, and instead exists only as preliminary draft legislation that is currently being introduced at public forums throughout the City but has not even been presented formally to Council for consideration.

The proposal was initially an application to rezone to NC2-65, self-limited to 55 feet. SDCI recommended approval of that rezone, but a few days before a January 2018 public hearing in front of the Hearing Examiner, the Developer suddenly withdrew the application and resubmitted a new application for a rezone to NC2-55(M) in February 2018.

Although the Examiner acknowledged that the City was (and currently is) considering area-wide zoning changes, including applying the proposed NC2-55 zone at the 7009 Greenwood site, e.g., Finding of Fact #11, the Recommendation erroneously relied

almost exclusively on the potential of that area wide rezone and proposed legislation to justify the Recommendation. *See e.g.,* Conclusion #6, #11, #18.

The Land Use Code prohibits the use or erection of any structure "except in conformity with the regulations specified in this title for the zone . . . in which it is or will be located." SMC 23.40.002.B. The Examiner cited no authority for recommending a rezone to a zone that does not yet exist, has not yet been defined with use and development standards, and does not appear anywhere in the Land Use Code or official City Land Use Map except as applied in three unique and separately specified areas where the Council previously adopted specific legislation for those areas.

The Examiner cited no authority for recommending approval of a rezone to a zone that is described only in draft legislation that has not even been formally submitted to the Council, and where the EIS for that draft legislation is currently under appeal. The Recommendation is, in effect, a recommendation to upzone to a phantom zone.

The Examiner ignored entirely the specific rezone criteria in SMC 23.34.008.C, which requires that the locational criteria for the specific zone match the characteristics of the area to be rezoned better than any other zoning designation. *See e.g.,* Conclusion #4. Such an undertaking is impossible because the locational criteria for the prospective NC2-55 zone have not been specified.

The Examiner's willingness to recommend approval of a rezone to the phantom NC2-55 zone before the MHA legislation is codified will give every developer an incentive to apply for a contract rezone without waiting to see if, when, where, or how MHA and the proposed NC2-55 rezone is actually implemented. And that, in turn, would undermine the MHA legislation that the Council is in the process of creating.

The Examiner failed to inform the Council that the one known effect of the Developer's change in rezone designation to NC2-55 (instead of the originally proposed NC2-65 zoning) is a substantial reduction in the Developer's MHA obligation because a rezone from NC2-40 to NC2-55 results in an "M" suffix whereas a rezone from NC2-40 to NC2-65 results in an "M1" suffix. This is the result under Director Rule 14-2016 (Application of Mandatory Housing Affordability for Residential Development in contract rezones) which sets up categories for MHA obligations and specifies that a rezone from NC2-40 to NC2-55 is the same category whereas a rezone to NC2-65 is a different category; *see also* SMC 23.58C. By converting their rezone request to NC2-55(M), instead of NC2-65, self limited to 55 feet, the Developer thereby reduces its MHA obligation by 25% because in Phinney Ridge, the MHA contribution for a rezone NC2-40 to NC2-65 would be 3% of units (or $20/sq ft) but it would drop to 2% of units (or $13.25 /sq ft) for a rezone from NC2-40 to NC2-55.

B. The Examiner's Recommendation applied the rezone criteria improperly and its Facts and Conclusions were plagued with material factual errors and omissions

The Examiner's analysis of the rezone criteria in SMC 23.34.007- .009 was defective and reflected a misunderstanding (or mischaracterization) of the project proposal, the surrounding area, and the enforceability of the Developer's various promises regarding future use and development of its lots in the single family zone which are not part of the rezone application. The Examiner mistakenly accepted the Developer's characterization of its four separate lots as a single so-called "development site," which is not defined in the Land Use Code (e.g., Findings of Fact 3 and 12), instead of realizing that this was nothing more than a devise employed by the Developer to evade the setback and other requirements of SMC 23.47A.014, and that the Developer did not comply with the requirements for a "development site" described in applicable SDCI material.

From that critical error, the Examiner generated a confused description of the actual rezone application and muddled the distinction between the two single family lots that are not proposed to be rezoned, and therefore not subject to the PUDA or any other restriction on their future use, development or sale (e.g., Finding of Fact #18), and the two wholly separate NC2-40 lots that <u>are</u> proposed for rezone. The result was a Recommendation that erroneously incorporated the single family lots into the rezone analysis and allowed the Developer to obtain far more than it is entitled to under the current Land Use Code or the proposed MHA legislation based on representations by the Developer that are wholly unenforceable in a PUDA.

In addition, the Examiner misrepresented the nature of public comment to SDCI and to the Examiner and he failed to mention or address the numerous public comments that identified specific violations of the Land Use Code and lack of compliance with the rezone criteria. E.g., Findings of Fact 24 and 25. All of the written comments submitted to the Examiner were from individuals who opposed the project and offered specific analysis demonstrating why the project failed to comply with applicable rezone criteria. Not a single public comment made at the hearing in favor of the rezone proposal contained any analysis of the applicable rezone criteria.

1. The Examiner's analysis of the General rezone criteria in SMC 23.34.008 was flawed.

a. SMC 23.34.008.A, density and zoned capacity.

The Examiner erroneously concluded that the proposal with five floors instead of the currently zoned four floors, would provide "Six additional units." Conclusion #3. The Examiner failed to realize that: (1) the building will have only two floors of units

available to the general public because the Shared Roof group of owners will be occupying the top two floors exclusively for themselves; and (2) the notion of "similarly sized" units is too vague to use as a comparison because there is no standard unit size in the building, and the unit sizes available to the public are substantially smaller than the units that the Shared Roof owners have reserved for themselves. It was therefore impossible for the Examiner to conclude that the proposed zoning change would not result in less density, particularly where the Examiner ignored evidence in the record that immediately across the street, on a substantially smaller lot, is a newly constructed four-story building with 28 units, many of which are comparable in size to the public units proposed for 7009.

b. SMC 23.34.008.B, Match between Zone Criteria and Area Characteristics.

The Examiner erroneously truncated the analysis of the match between zone criteria and area characteristics. The Examiner viewed only the NC2 general criteria and then dismissed the height change without further analysis instead of attempting to explain just how the specific zone requested – the phantom NC2-55 zone – could match the characteristics of the area to be rezoned better than any other zone designation when the requested zone does not yet exist. *See* Conclusion #4.

c. SMC 23.34.008C, Zoning history and precedential effect.

The Examiner confused the analysis of zoning history and precedential effect. First, the Examiner's observation that the proposal would "match development expectations for the area when compared with the City's area wide up-zone proposal" because it would have the same height and FAR as the proposed NC2-55 zone is irrelevant to this criteria. Conclusion #6. As noted above, the NC2-55 zone does not presently exist for the Phinney Ridge neighborhood, nor has final legislation even been presented to Council.

Next, the Examiner ignored the zoning history and failed to acknowledge that the "Phinney tail" portion of Greenwood Avenue -- the approximately one mile stretch of Greenwood that includes the project site -- has always been zoned uniformly and that a rezone of one parcel would not only disrupt the historic uniform zoning of this area, but would entice other developers to apply for contract rezones of their lots even without knowing whether the proposed NC2-55 zone would ever be applied to the whole area.

The Examiner claimed that if the rezone were approved, its approval could somehow influence the Council's consideration of the area wide upzone, even though that proposal pre-dates the Application. A correct analysis of the precedential effect of approving this rezone would have examined the impact of approving a rezone of a single parcel in an

otherwise uniformly zoned area where there is no existing zoned height at or above the proposed new height for almost one mile (at 84th and Greenwood), and then would have recognized that such a result would expose every parcel in the City to rezone approval and risk undermining not only the proposed MHA legislation, but the Council's carefully considered zoning City-wide.

The Examiner also failed to acknowledge the precedential effect of upzoning a parcel to the phantom NC2-55 zone, when the use and development standards for that zone have not been defined, and the final draft legislation has not even been presented to Council for consideration. Such a decision could jeopardize the current and planned land use patterns if a parcel were upzoned prematurely and the final MHA legislation did not include that parcel or the surrounding area within the up-zone, or imposes additional standards as has been the case for the other neighborhoods where MHA has been implemented through specific ordinances.

The Examiner failed to note the precedential effect of accepting the Developer's so-called "development site" designation and allowing the owner of a commercial lot that abuts a single family parcel owned by that same owner to evade the setback and other requirements that otherwise would apply to commercial lots that abut single family lots. Such a result would embrace zoning by ownership, not Official land use map designations or code requirements, and would reward those developers able to acquire adjacent single family lots with a building far more massive than could be built by a different owner who did not happen to own adjacent single family parcels.

Even though "no single criterion is paramount," SMC 23.34.007.B, the Examiner's repeated references to consistency with the proposed MHA legislation reveals that the potential for a future area-wide up-zone trumped all other criteria, and any inconvenient facts appeared to have been brushed aside.

d. SMC 23.34.008.D, Neighborhood Plans.

The Examiner's analysis of the Greenwood/Phinney Ridge Neighborhood Plan was incomplete because he failed to acknowledge that the Greenwood/Phinney neighborhood plan did not anticipate a 55 foot zone and did not anticipate any variation to the uniform zoning that has always applied In this portion of Greenwood Avenue, a result that would occur if the 7009 parcel is up-zoned in isolation. Conclusion #5.

e. SMC 23.34.008.E, Zoning principles, including gradual transition and buffers between zoning categories.

The Examiner misrepresented and misstated the nature and relationship of the various zones in the Greenwood/Phinney Urban Village, as well as the zoning designations in the

area immediately surrounding the project site, and the relationship of the specific lots owned by the Developer. As a result, the Examiner erroneously concluded that there would be a gradual transition between zoning categories, including height limits, as well as physical buffers, instead of recognizing that there would be an abrupt change from a NC2-55 zone to a SF5000 zone right at the shared property line with no buffer whatsoever. See e.g., Conclusion #7.

The Examiner erroneously stated that there are "some examples of a 40 foot height zone located adjacent to a 65 foot height zone" when, in fact, the nearest 65 foot zone is almost one mile away at N. 84th Street, and there is no zoned height above 40 feet anywhere closer than that to the project site. Conclusion #7.

The Examiner erroneously claimed that there are examples of "65-foot height zones adjacent to the . . . single family zones" when, in fact, there is not a single place in the Greenwood/Phinney Urban Village, including the more intensely zoned Greenwood Town Center, where a NC2-65 parcel shares a rear property line with a single family lot. Conclusion #7. The Examiner failed to comprehend that upzoning the 7009 parcel would create the only place in the Greenwood/Phinney Urban Village where a single family lot shares a rear boundary with a zone greater than NC2-40.

The Examiner failed to mention that the rear property line of the two NC2 lots proposed for rezoning is shared with the rear property line of the two single family lots to the west and there is no transition at all because the proposal includes a five story building built right on that shared property line.

The Examiner erroneously concluded that a gradual transition between zoning categories occurs between "the mid-portion of the project site and the SF zoned properties to the west" because "a private open space area will be landscaped to provide some separation." Conclusion #7. To the contrary, there is no transition at all between the two NC lots proposed for rezoning and the two single family lots that abut the rear boundaries of those NC lots.

The Examiner further failed to comprehend that this alleged "landscaped open space" is located exclusively in the separate single-family-zoned lots that are not subject to the rezone application and therefore not subject to any PUDA or any other restrictions imposed by Council. Accordingly, there is no way for the Council to enforce the Examiner's conclusion that this currently vacant lot "will be landscaped" and not developed or sold off at a later date. The Examiner, therefore, mistakenly concluded that the Developer's unenforceable representation that a portion of the adjacent single family lots "will be landscaped" somehow counts as an "open space" and a buffer" as required in SMC 23.008.E.2.

The Examiner also failed to acknowledge that the Developer has previously stated that it might construct a new residence on the currently vacant SF lot that the Examiner claims is a buffer, and that neither the Council nor SDCI could prohibit such a building because that single family lot is not part of the rezone proposal. Construction of a building on that vacant lot, of course, would destroy the alleged "buffer" that the Examiner relied on to support the Recommendation.

The Examiner failed to explain how the Council could prohibit the Developer from selling off one or both of the single family lots that are part of the phantom "development site" when those parcels are not part of the rezone application and therefore not subject to any restrictions imposed through a PUDA.

f. SMC 23.34.008.F, Impact Evaluation.

The Examiner's evaluation of SMC 23.34.008.F was incomplete and inaccurate. The Examiner mistakenly concluded that the rezone would "positively impact the housing supply" by adding 35 new units without acknowledging that the owners are reserving the top two floors (and 12 units) for themselves, leaving only 23 units available to the public, a substantially smaller number than would be produced if all floors of the building had units available to the public. Conclusion #8.

The Examiner failed to discuss how the Developer substantially reduced its MHA obligation by converting its rezone application from a rezone to the NC2-65 zone to the phantom NC2-55 zone, and that the Developer's other representations about allegedly affordable units through the Multi-Family Tax Exemption program are not presently enforceable because they are subject to an entirely separate application process if they occur at all.

The Examiner failed to address the environmental factors such as glare and shadow effect that will result from a 55 foot building right on the property line that will have all of its upper floors built in the airspace where the Land Use Code requires a setback. Such a structure would cast shadows in that area on the properties to the north on that block, in addition to the light and glare that will occur from having a five story building so close to the single family zone.

g. SMC 23.034.008.G, Changed Circumstances.

The Examiner claimed there are no changed circumstances to be considered even though the entire Recommendation rests on the Examiner's speculation that the MHA legislation would be adopted and that this project would conform to it, whatever the yet-to-be-adopted NC2-55 provides.

The Examiner failed to explain why the Developer argued that the "changed circumstances" of MHA justify the rezone even when the Examiner claimed there to be no changed circumstances. The Examiner further failed to address SDCI's shifting position on this issue, when SDCI first claimed that changed conditions justified the rezone when it issued its first recommendation, but then later claimed there to be no changed circumstances when it issued its second recommendation.

2. The Examiner's analysis of the height limits criteria of SMC 23.34.009 was flawed.

The Examiner made material factual and legal errors throughout the analysis of the height limits criteria.

a. SMC 23.34.009.A, Function of the zone.

The Examiner erroneously concludes that this proposal would be "consistent with the scale of development in the vicinity and the proposed NC2-55 zoning." Conclusion 15. The Examiner failed to comprehend that the proposed building would be built out on almost all floors all the way to the rear property line on NC lots totaling almost 13,000 square feet, approximately 30 % larger than the recently completed NC2-40 building right across the street (Hendon Condominiums at 6800 Greenwood Ave N) that did <u>not</u> build all the way to the rear property line at any level. The Examiner also mistakenly claimed that the proposal would be consistent with the proposed NC2-55 zoning when, as noted above, that zone does not presently exist, nor does it have use and development standards that apply citywide. The Examiner, therefore, simply asserted, without a factual basis, that the proposal would be "consistent" with a non-existent zone.

b. SMC 23.34.009.B, Topography and view blockage.

The Examiner mistakenly concluded that the project may impact only territorial views from adjacent properties. Conclusion 16. But the Examiner ignored written testimony and photographic evidence that demonstrated that the extra height in a rezone would block protected views of the Olympic Mountains from properties across the street to the east, views that are specifically protected in the NC2-40 zone in which this project currently lies. SMC 23.47A.012.A.1.c.

c. SMC 23.34.009.C, Height and Scale of the area.

The Examiner mistakenly concluded that the proposed development would be consistent with the "predominant height and scale" of nearby newer development without acknowledging every single NC parcel for almost one mile along Greenwood is zoned uniformly to a maximum height of 40 feet, the nearest parcel zoned higher than 40 feet is

almost one mile away, and that a rezone of this parcel would destroy that uniformity of heights along this portion of the Phinney "tail."Conclusion #17.

d. SMC 23.34.009.D, Compatibility with surrounding area.

SMC 23.34.009.D.1 requires that "[h]eight limits for an area shall be compatible with the actual and zoned heights in surrounding areas," but the Examiner offered a confused and conclusory analysis of this criteria that is untethered to the facts on the ground. The Examiner asserted, without explanation, that the proposed 55 foot height "would" be compatible with "most" of the actual "and potential" zoned heights without explaining how a 55 foot zone is compatible with a 40 foot zone, or why compatibility with a "potential zoned height" should matter at all. "Potential zoned height" is not a criterion in this section. Conclusion #18.

The Examiner ignored entirely the directive in 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, as described in subsection 23.34.008.D.2, are present." Instead of analyzing and applying this mandatory criterion, the Examiner simply claimed, without any supporting evidence, that the requested 55 foot height limit "would be consistent with the transition of zoned heights and scale of development in the area." Conclusion #18.

Because there is no buffer, and obviously no "major physical buffer" between the proposed NC2-55 zone and the adjacent SF5000 lots in the rear, the Examiner's failure to adhere to this directive also violated SMC 23.34.007.B ("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 . . . "). Compliance with the "gradual transition in height and scale" in SMC 23.34.009.D.2 is intended to constitute a requirement because the text states that a gradual transition in height and scale "shall" be provided "unless" there is a major physical buffer. It is undisputed that there would be no major physical buffer separating the zones, and therefore a gradual transition in height and scale is required. This proposed rezone fails to meet that requirement.

As noted above, this proposal would result in the only 55-foot height in an almost one-mile stretch of parcels zoned uniformly at 40 feet where there is no transition whatsoever to the abutting rear single family lots. Furthermore, the scale of this building on an already large site is magnified because the Examiner approved a building that has all of its floors above the first floor built within the required 15 foot and greater setback making this building out of scale with the surrounding NC structures as well as the abutting single family lots.

The Examiner failed to note that there is no transition in the level of activity between zones because the proposal has the first floor of commercial uses built right on the property line with windows and doors that open directly onto the single family zone, a feature that not only violates the applicable Land Use Code but is also unlike any other NC building in Phinney Ridge where the first floor commercial uses are set back from the shared rear property line.

C. The Examiner's recommended conditions for a PUDA are inadequate because they do not require compliance with the applicable Land Use Code or with the proposed MHA legislation, they do not restrict the additional height resulting from an oversized greenhouse and solar array, and they do not memorialize the Developer's claims regarding the number of "affordable" units to be included in the building.

The Examiner required only that the PUDA require compliance with the provisions of SMC 23.58 and/or 23.58C and that the rezoned property be developed in "substantial conformance with the approved plans." Recommendation at p.10.

The Recommendation erred by not requiring compliance with: the no-build triangle described in SMC 23.47A.014.B.1; the upper level setbacks requiring a minimum 15-foot setback at all floors above the first floor as required in SMC 23.47A.014.B.3; and the prohibition against windows and other openings within 5 feet of a single family zone as required in SMC 23.47A.014.B.5.

The Recommendation erred by not eliminating or conditioning the greenhouse and solar panel array from the rooftop to limit the impact of the proposed building on the adjacent single family zone and on the east side.

The Examiner erred by allowing railings and planters at the perimeter of the roof, which further exacerbates the increased height of the proposed building.

V. Relief Sought

The appellants request the relief listed below.

(1) The Examiner's Recommendation should be rejected and the Rezone application should be denied.

(2) In the event the Council approves the rezone, the PUDA should include, at a minimum, the following requirements:

1. the proposed building comply with the requirements of SMC 23.47A.014.B.1, B.3, and B.5 regarding setbacks and other features and prohibitions on buildings located on NC lots that abut a lot in a single family zone;

2. the Greenhouse should be eliminated or moved to the ground level and the height of the solar array reduced;

3. All railings, planters, and any other perimeter features should be set back at least four feet from the edge of the building to further reduce the impact of any extra height resulting from those features.

(3) The Council should establish a briefing schedule to allow the parties of record to submit written analysis with supporting information from the record;

(4) The Council should allow oral presentations by the parties of record.

Dated this 14th day of June, 2018.

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