## I. INTRODUCTION

The 7009 Greenwood rezone application is a creative shell game that exploits the applicants' common ownership of two separate single family lots along the western boundary of the commercial lots it has proposed to rezone, using those lots to unlawfully erase lot lines, evade unambiguous setback requirements in the Land Use Code, access retail space in the commercial building that lacks exterior access on the commercial lot, and create a building substantially larger than the Code allows, right on a property line shared with two single family lots in a manner that renders it ineligible for a contract rezone pursuant to numerous criteria in SMC 23.34.

In this case, the Applicant claims to have created so-called "development site" – a term undefined in the Land Use Code – because the Applicant drew an imaginary line around four legal lots it owns in the northwest corner of N. 70th and Greenwood Avenue North and deemed those four lots a single "development site," even though it did not comply with SDCI's own guidelines for creating a development site. Using that so-called "development site," and aided and abetted by SDCI, the Applicant insists it is immune from Code requirements that would apply to all other owners of commercial lots that abut lots in a residential zone, and from rezone criteria that requires transitions and buffers between zones, not between property owners. *See,* Appeal at 1-10, describing the project and applicable setback provisions that should have been applied to this project.

The application relies on linguistic sleight-of-hand throughout to create the misleading impressions that: (1) there are large setbacks and transitions between the massive commercial building and the adjacent single family zone, when in fact there are no buffers or transitions; (2) the Applicant is creating substantial "affordable housing" onsite through MHA compliant units when in fact the evidence confirms that it has chosen to comply with MHA through payments, not onsite units, and that by revising its application at the last minute to the NC2-55 zone instead of the original NC-65 zone, it has reduced its MHA payment obligation by over $250,000; and that (3) a property upzoned to 55 feet (with an actual height of almost 70 feet with the massive greenhouse on top) is somehow "compatible" and "consistent" with the existing zoning in the area despite substantial evidence in the record that shows the nearest parcel zoned higher than the uniform NC2-40 along Greenwood Avenue is almost a mile away.

The Examiner simply accepted these representations at face value despite substantial evidence in the Record that contradicts his findings of fact and conclusions of law. The Record also contains substantial evidence that reveals numerous material facts and applicable law that the Examiner omitted entirely in his Recommendation, facts and law that, together, undermine the Recommendation and require its rejection.

The Applicant and SDCI perpetuate these same techniques in their respective Responses. The Applicant's Response is rife with specious arguments that at first blush appear to be valid but in fact are fallacious. The Response is peppered with numerous unfounded accusations against the appellants as well as incorrect statements about Appellants' arguments and evidence in the Record that are easily exposed as untrue. SDCI's Response also misrepresents Appellants' arguments, as well as its own guidance on development sites and the applicable Code provisions that apply to this project. And, as often happens when multiple parties attempt to skirt the law, the various parties' stories are inconsistent and often contradictory.

Although the Examiner ignored substantial evidence in the Record and rendered a Recommendation that conflicts with substantial evidence in the record, the Council should not be similarly duped by the Applicant's and SDCI's creative efforts to disguise the realities of this project. Without the cloak of the fictitious "development site," the 7009 application is revealed as an unlawful, oversized building that breaches the protections of setbacks and upper level air corridors along zoning lines that separate commercial lots from single family lots, a situation that should not be blessed by the Council through the rezone process.

Similarly, the Council should not be misled by the Examiner's mischaracterization of the land use pattern in the immediate area of the project and his failure to acknowledge, despite substantial evidence in the record, that the nearest parcel with a height greater than the uniform NC2-40 zoning in the immediate project area is almost one mile north in the Greenwood Town Center. See Tab 1 (Greenwood /Phinney Urban Village Map, annotated). Instead of evaluating this project against the current zoning in the area (other than unsupported conclusory statements that a 55 foot zone was "consistent" and "compatible" with the surrounding 40-foot zone and adjacent single family zone (Conclusions # 15, 17, 18), the Examiner improperly based his Recommendation upon perceived consistency with the allegedly forthcoming MHA legislation even though: that legislation is still in draft form as the Council seeks public input throughout the City; it does not have established development standards; it has not been formally implemented City wide as envisioned by MHA; and it is the subject of pending litigation that prevents the Council from passing any such legislation at this time.

The substantial evidence in the record demonstrates that without the cloak of a MHA-enabled 55-foot zone all along Greenwood Avenue in this area, an upzone of this parcel would create a jagged point protruding almost 70 feet upward from the heart of the otherwise uniform NC2-40 zoning along this one mile stretch of Greenwood Avenue, destroying the historic zoning uniformity. Appellants are not aware of any other approved contract rezone application, based on MHA or otherwise, where there is not a

single parcel at or near the requested height in the immediate vicinity of the proposed rezone site.

The lone parcel that SDCI cites as proof that there is "at least one other property" zoned NC2-55(M) was not a contract rezone but instead is a part of the area-wide Central District upzone that applied the NC2-55 zone to several parcels in that area, including the cited parcel, and where the parcels across the street are zoned to 65 and 70 foot heights. The Applicant insists that "[a]n overall height difference of 15 feet can be considered 'compatible'" with the existing NC2-40 zoning. Response at 17. But if that kind of conclusory jargon carries the day, there is no parcel in the City that would be immune from contract rezoning, regardless of its surroundings, and the rezone criteria of SMC 23.34 would be rendered meaningless.

It is in the Council's interest to adhere to established legal standards and think holistically where the MHA upzones will actually be instituted, and what development standards will be associated with the proposed MHA zoning designations, including the proposed NC2-55 zone, instead of rushing to upzone an isolated parcel in an otherwise uniform zone when it is impossible to know what later-enacted development standards may apply in that zone to the surrounding parcels. If the Council rezones this isolated parcel now instead of waiting to see how, whether, and where a proposed NC2-55 zone is actually applied in the Phinney Ridge area, the Council would be getting ahead of itself and brushing aside established legal standards for contract rezones and application of the Land Use Code that would destroy the uniform zoning that this portion of Phinney Ridge has always enjoyed. Moreover, given the unique circumstances of this portion of Phinney Ridge, which is the only urban village in the City with a one-mile long, one street wide "urban village," where every commercial parcel shares a rear property line with a single family lot – the Council should instead be considering as a potential modification to MHA legislation, whether the NC2-55 zone is appropriate at all in this location.

The risks of allowing this rezone extend far beyond Phinney Ridge. If the Council lets this genie out of the bottle, it would be endorsing SDCI's decision to ignore unambiguous provisions in the Land Use Code and ignore its own guidance to enable projects that should have been denied. And the Council would bless the untenable concept of zoning by property ownership, rather than established zoning maps and Land Use Code provisions, where developers (or other owners) rich enough and lucky enough to acquire adjacent parcels would be exempt from Code provisions that would otherwise define the allowable uses of that property. Using the techniques that the Applicant is using here, that SDCI enabled and that the Examiner ignored entirely in this Recommendation, developers throughout the City could sweep up single family parcels adjoining their

commercial lots, use those parcels to extract a building larger than the Code would otherwise allow, and then discard those parcels after they have served their purpose. And, given that the 7009 parcel is located almost one mile away from any parcel of a higher zoned height, a location that previously would have rendered a rezone unthinkable, the Council will likely unleash a flood of rezone applications from developers like the 7009 applicants who seek to jumpstart legislation that is not yet fully formed and who have isolated parcels like the 7009 parcel that would never be considered for upzoning without the background presence of the MHA legislation. When established legal standards are cast aside as the Examiner has done in his Recommendation, the Council loses control to use the power of legislation and zoning to shape land use patterns in the City.

The 7009 rezone application should be denied.

## II. STANDARD OF REVIEW

The Council's decision to approve, approve with conditions, remand, or deny an application for a Type IV Council land use decision such as a contract rezone shall be based on applicable law and supported by substantial evidence in the record established by the Hearing Examiner. SMC 23.76.056.A. The appellant does bear the burden of proving that the Hearing Examiner's recommendation should be rejected or modified. *Id.*

But the applicant attempts to graft a "clearly erroneous" standard on this Code requirement, without citing a single case that supports that proposition. The Council is acting in a quasi-judicial capacity and must do as the Code requires: make its decision based on applicable law and supported by substantial evidence in the record. The "clearly erroneous" standard advocated by the applicant may apply at the superior court level, but it does not apply here.

The Appeal Statement identified numerous instances where the Examiner ignored, misstated, or misapplied material evidence in the Record and misconstrued or simply overlooked the applicable Land Use Code provisions in the Recommendation to approve the rezone application. Substantial evidence in the record, together with a proper application of applicable law, confirm that the 7009 rezone application fails to meet the rezone criteria in SMC 23.34.007-009, and that the proposed building violates numerous provisions of the Land Use Code that would further exacerbate the problems posed by upzoning this site.

## III. ARGUMENT

The Council should reject the Examiner's Recommendation because it is not supported by substantial evidence in the record and it ignored and / or misapplied applicable Land

Use Code provisions that undermine the recommendation to rezone this parcel. Instead, the Record includes substantial evidence that demonstrates that a rezone of the 7009 parcel does not meet applicable Code criteria and that the Examiner's Recommendation should be rejected.

First, the Examiner failed to comprehend the details or impact of the developer's reliance on a so-called "development site," a ploy that colors the entire application and the Examiner's Recommendation. No "development site" has been established in this case. As a result of this oversight, the Examiner misapplied several criteria in SMC 23.34 governing rezones and failed to even mention, much less analyze, the voluminous material in the record proving that the proposal violates numerous provisions of the Land Use Code.

Next, the Examiner did not mention or attempt to explain how a rezone could be granted to a NC2-55(M) zone when the specific details of that zone and the specific areas where it may be applied at a future date have not been determined.

Finally, the evidence in the record and the proper application of the rezone criteria in SMC 23.34.007-009 undermine the Examiner's recommendation. There is substantial evidence demonstrating that the rezone criteria are not met for this project, particularly the requirements for buffers and setbacks between zones (not between property owners as the Examiner mistakenly concluded), prevention of view blockage, and compatibility with the existing zoning in the area.

### A. The Examiner's Recommendation is not supported by substantial evidence in the Record or applicable law.

Every argument in the Appeal rested on facts and law presented directly to the Examiner before, during and after the open record hearing on April 30, 2017, as well as material presented to SDCI since the project's inception in 2016. The Applicant mistakenly challenges Appellant's statement that "all of the written comments submitted to the Examiner were from individuals who opposed the project," and accuses Appellants of "mak[ing] this wild claim," Response at 8-9 (citing Appeal at 12). But far from a "wild claim," Appellant's statement accurately represents the Record.

The statement refers to Exhibit 53 of the Hearing Examiner's Record, titled "Public Comments received by the Hearing Examiner's Office." That Exhibit includes all of the written comments submitted by the public after the hearing concluded but while the Record remained open. Every single one of those letters offered substantive analysis demonstrating that the 7009 Rezone application did not comply with applicable Code provisions. The Examiner's Recommendation did not acknowledge or address a single

one of the issues raised in those letters. The contents of Exhibit 53 are attached here at Tab 2 in the order and form that Appellant Irene Wall received them from the Hearing Examiner's Office.

The Applicant then makes the obviously unknowable claim that "the Examiner clearly read every public comment in the record and considered them," citing only to the Examiner's Conclusions #24 and #25, generic statements that generally confirm that comments were received in support of and opposed to the proposed rezone and could be easily replicated in any contract rezone case regardless of whether any, much less "every single" comment had been actually reviewed. Response at 8.

The Applicant also includes Exhibit 53 in its list of Exhibits that it claims to be "supportive of the Project." But as explained above, and easily confirmed by reviewing those letters at attached Tab 2, every one of those comments in Exhibit 53 opposed the project. Far from Appellants making a "wild claim" about the Record, it appears that the Applicant didn't bother to read the record before leveling that accusation.

Furthermore, it is not the quantity of public comments that matters, it is the content of those comments and whether they include substantive, material information that informs a decision about whether the project satisfies applicable Code provisions as well as the criteria in SMC 23.34.007-009 for contract rezones. The various exhibits titled "Support Letters (Ex 48) and "Public Support Letters" (Ex 51), supplied the Applicant, represented various versions of "I like this Project" letters that offer no relevant facts or law that relate to any criteria in SMC 23.34.007-.009 that guide rezone decisions.

Similarly, not a single public comment offered at the hearing in support of this project addressed the rezone criteria in SMC 23.34.007-.009. In contrast, every public comment at the hearing that opposed the project presented specific facts and law that showed why a rezone did not meet the Code criteria. At the hearing, the Examiner was provided detailed analysis of errors in SDCI's recommendation and he was presented evidence showing why the Project failed to comply with applicable laws and failed to meet the rezone criteria in SMC 23.34.007-009. *See* Ex. 49, "Documents submitted by Esther Bartfeld," and Hearing Transcript through 9:43 a.m. (the public comments occurred in the first 40 minutes of the hearing). But the Recommendation gave no indication whether the Examiner actually considered any of the public comment; in fact, the contents of the Recommendation reveal that the Examiner entirely ignored material information that was presented directly in multiple forms and at multiple times.

In addition, SDCI admitted at the hearing that it had not provided the Examiner with the public comments it had received throughout the process. *See* Testimony of Lindsay King, SDCI. SDCI eventually provided those public comment letters at the Examiner's

direction. *See* Ex 54 (Public Comments received by SDCI). Appellants are aware of numerous substantive comments submitted to SDCI that documented factual and legal reasons why the 7009 rezone application should be denied, but Appellants have not had the opportunity to review the full set of comment letters SDCI eventually provided to the Examiner.

**B. The applicant has not created a "Development Site" but has instead purloined the two adjacent single family lots it owns in an effort to construct an oversized building that rises directly on the shared rear property line with lots in the single family zone, in violation of several Land Use Code Provisions and numerous criteria in SMC 23.34 governing contract rezones.**

The Owners insist that the four discrete legal lots (tax parcels) they own at the northwest corner of Greenwood Avenue N and N. 70th Street were "combined into a single development site, as defined by SDCI TIP 247." Response at 3. But even a cursory reading of TIP 247 reveals that no development site was created for the 7009 project. Instead of following the requirements in TIP 247, the Owners merely drew a fictitious line around their four parcels, proposed the two commercial parcels for upzoning and claimed their ownership of the adjacent single family lots enabled them to avoid the setback and other Code requirements that apply to lots in the NC2-40 zones that abut lots in single family zones. The Owners also used this fictitious line to escape compliance with the rezone criteria that requires setbacks and transitions between zones. The Examiner evidently accepted this fiction, as the Recommendation makes no mention of these myriad errors. When unraveled, the Examiner's Recommendation unravels too and must be rejected.

**1. The so-called development site does not comply with published SDCI guidance on how to create a development site.**

"Development site" is not a defined term in the Land Use Code, but it the subject of an SDCI "Tip." According to SDCI's website, "Tips are designed to provide user-friendly information on the range of City permitting, land use and code compliance polities and procedures that you may encounter while conducting business within the City." *See* http://web6.seattle.gov/DPD/CAMS/camlist.aspx . TIP 247 is SDCI's "Development Site Permitting Guidelines." *See* Tab 3.

TIP 247 explains that "a 'development site' is a piece of land within the boundaries of which we apply all the development standards for the land use, building, and electrical code . . ." In the section entitled "How do I Create a Development Site?" TIP 247 explains that "You must have an existing development site before you can submit your permit application or early design guidance application." It then explains that "[a]

development site is considered to be existing for permit application purposes if it is platted with a recording number or if a platting action or lot boundary adjustment is currently under review in the department." (emphasis added).

In this case, the Owners possess four discrete lots (or tax parcels): two commercial lots front Greenwood Avenue and two single family parcels abutting the rear property line of the commercial lots. One is a vacant mid-block lot with an entrance on N. 70th Street, and the other is a craftsman home at 7010 Palatine Ave N. Each of the four parcels is a separate legal lot according to the Land Use Code, and each has its own recording number and its own legal description that is referenced in various plan sets for this project. *See* Appeal Statement at 2-5; *See also* SDCI Recommendation at 3. Appellants did not find any record of any lot boundary adjustments for any of those parcels.

Neither SDCI nor the Applicant has ever explained how four discrete legal lots, each with its own discrete recording number and an imaginary line drawn around the four of them meet the requirement that a development site be platted with "a" recording number. Instead, SDCI has enabled this so-called "development site" that violates its own guidance and its prior advice.

The Examiner ignored this issue entirely and simply parroted the applicant's proclaimed "development site" despite substantial evidence in the Record that exposed this ruse. *See* Recommendation at Finding #1 ("subject site is 20,799 square feet),#3, #12, #18 (describing features on the so-called development site); Conclusion #7 "(the entire development site abuts three streets"), etc.

The substantial evidence in the Record shows that the Applicant failed to properly create a "development site," and therefore all legal conclusions that flow from that fictitious site – such as the lack of compliance with setback requirements and allowing buffers between property owners not between zones -- are fatally flawed.

**2. The Hearing Examiner ignored substantial evidence in the Record and applicable Code provisions that prove that the proposed building violates numerous provisions of the Land Use Code, which the Applicant now attempts to dissuade the Council from investigating.**

Relying on the fictitious "development site" instead of the actual lot boundaries, the Examiner essentially erased legal boundary lot lines that are the basis for numerous Land Use Code provisions, and recommended approval of a building without legally required setbacks, in a location that offers no transition or buffers between zones as required in the rezone criteria of SMC 23.34. At the hearing, SDCI planner informed the Examiner that

SDCI had somehow applied development standards to the "totality" of the development site, not to the individual legal lots. *See* testimony of Lindsay King, SDCI; *see also* Applicant's Response at 3. But that approach subverts the Land Use Code and relies on zoning by property ownership not established legal boundary lines. *See e.g.,* SMC 23.02.020.A ("The Land Use Code classifies land within the City into various land use zones . . . in order to regulate uses and structures . . . .") and SMC 23.02.020.C ("All structures or uses shall be built or established on a lot or lots.")

As a result of the unlawful "development site" maneuver, the Owners produced an oversized building that did not comply with several provisions of SMC 23.47A.014 that requires several types of setbacks where commercial lots (such as the Applicant's two NC2-40 lots that are proposed for rezone) abut a lot in a residential zone (such as the two single family lots that abut the rear lot line of the two NC2-40 commercial lots.

Specifically, SMC 23.47A.014.B imposes setback requirements: (1) it requires a 15' triangular "no build" area where a commercial lot abuts the side and front yard of a lot in a single family zone (SMC 23.47A.014.B.1); (2) it requires all floors above the first floor to be set back at least 15 feet from the rear lot line (SMC 23.47A.014.B.3); and (3) it prohibits windows and doors on the first floor of a building within 5 feet of a property line when a commercial lot abuts a single family zone (SMC 23.47A.014.B.5). *See e.g.,* Appeal at 2-10, describing the applicable Code provisions and including illustrations showing how the 7009 building violates these provisions.

The Examiner's Recommendation made no mention of any of this despite substantial evidence in the record that exposed this unlawful action. *See e.g.,* Ex. 49 (Bartfeld documents), Ex. 53 (public comment letters to Examiner), Ex 54 (letters received by SDCI). By accepting an imaginary "development site" without question, the Examiner erroneously recommended approval of a building far in excess of what the Code allows.

The Owners now would prefer that the Council not investigate the matter. *See* Response at 8 (incorrectly stating that Appellants were required to seek a code Interpretation even though this is not an administrative proceeding and the Council changed the Interpretation Code several months ago) and Response at 18 incorrectly claiming that any "zoning determinations" are automatically valid now because the Appellants supposedly missed some unknown deadline. Nothing, however, prevents the Council from reviewing the entirety of the Examiner's Recommendation – including the material issues he overlooked entirely – as the Council decides whether the proposed rezone of 7009 should be granted. As a result, the Examiner's Recommendation allowed the Applicant to avoid complying with those setback requirements, just as he allowed a massive greenhouse on the rooftop near the single family zone in an area where there should be no building at all.

*See* SMC 23.47A.014.A (portions of structures including rooftop features are included in this section).

SDCI, in turn, injects needless confusion by using inaccurate Code definitions and mischaracterizing Appellants' argument. Contrary to SDCI's assertions, it is the lots defined by those tax parcels with discrete legal boundary lines against which Code requirements are measured and that inform how a development site is created, not the historic platted lines that do not define a boundary. *See e.g.,* SMC 28.28 Lot Boundary Adjustments; SDCI TIP 213B ("Application Requirements for Lot Boundary Adjustments," noting that "Washington State law allows adjustments of boundary lines if certain conditions are met." *See also* SMC 23.84A.024 ("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.).

The Examiner accepted this so-called development site at face value despite substantial evidence in the record showing why it was unlawful. *See e.g.,* Ex. 49 (Bartfeld evidence submitted at 4.30.18 hearing), also included in Ex. 53 (Public comments received by the Hearing Examiner's office, and attached here at Tab 2. As a result, the Examiner erroneously recommended rezoning the 7009 parcel to accommodate an oversized building that rises four stories right on the shared property line with the abutting single family lots, with the fifth floor set back only 4-6 feet, a placement that violates numerous provisions in the Land Use Code, and violates express provisions in the MHA proposed legislation for the NC2-55(M) zone that applicants seek, where Phinney Ridge is called out specifically as a reason for the greater setbacks that would be required for buildings over forty feet tall in the proposed NC2-55 zone the applicant seeks.

The history of the project application reveals that SDCI and the Applicant worked together to avoid setback requirements. In a letter dated August 15, 2016, SDCI transmitted to the City Clerk the required notice that an Early Design Guidance application had been accepted for a Type IV Council Land Use action. Tab 4. That letter included a site map that showed how a building could be constructed on the commercial parcels, adhering to the corner setbacks of SMC 23.47A.014.B.1 and the upper level setbacks of SMC 23.47A.014.B.3. It also showed how a house could be placed on the vacant single family lot.

In February 2017, SDCI issued two Correction Notices for Zoning that each flagged the need for compliance with the setback provisions of SMC 23.047A.014. *See* Tab 5, at #7; Tab 6, at #7. But afterwards references to compliance with setback provisions disappeared after that time.

### 3. With a fictitious development site, the Owners are unlawfully using the single family lot for the benefit of the commercial parcels proposed for upzoning.

Even though the Owners have acquired among the largest commercial parcels in the Phinney Ridge neighborhood, they are seeking to build more than allowed on those sites and they have reached unlawfully into the single family lots to do that.

#### a. Concrete walkway in single family zone

The building plans show a concrete walkway on the eastern edge of the single family properties that provides access from North 70th Street to a retail use in the commercial building that would be constructed right on the shared property line (in violation of SMC 23.47A.014.B.5 that prohibits windows and doors within five feet of a residential lot. See e.g., Ex. 16, Sheets A201, A303, A310 showing Level 1 floor plan and west elevations. But that access is unlawful. It violates SMC 23.42.030.A (Access to Uses) that allows pedestrian access to be "provided to a use in one zone across property in a different zone if the use to which access is being provided is permitted, either outright or as a conditional use, in the zone across which access is to be provided." Here the access is being provided across a single family zone to a retail use in a commercial zone. Retail use is not allowed in a single family zone, so access to such a use may not be provided over a single family zone.

#### b. Easement

The Applicant has also indicated at various times that they intend to record an access / no-build easement over the single family lots. But the existence of that easement seems to come and go in the various plan sets like an apparition. Earlier drawings labeled the space in the single family zones immediately west of the commercial properties as an easement but recent plan sets do not include that label although the drawings showing the west side do include an unlabeled line west of the commercial boundary line in the approximate location of the easement that had appeared in early design materials.

The easement is not mentioned in the Rezone Application, nor was it discussed at the hearing. As of July 13, 2018, Appellants were unable to find evidence of a recorded easement.

Moreover, it is unclear how such an easement could occur because an easement, by definition, is a nonpossessory property interest in land owned by another person. In this case, the Owners have relied on their common ownership of all four legal lots as the rationale for their fictitious development site. An easement cannot be granted to oneself.

But even assuming that the Owners could somehow grant themselves an easement, such an action supports Appellants' argument that the Owners' four parcels are wholly independent legal lots. An easement must be recorded on a legal lot, and in this case the two single family lots – allegedly part of the development site – would be burdened with this no-build easement for the benefit of the two commercial lots. If the Owners had created a development site according to SDCI's guidelines, there would be no need for such an easement because all four tax parcels would have been combined into a single development site.

The Owners evidently believe they may use this easement, if it exists at all, as another vehicle to evade a setback requirement in SMC 23.47A.015.B.5, which prohibits windows and entrances within five feet of a property line shared with a residential zone. A previous version of the Plans claimed that, notwithstanding a building with numerous windows right on the shared property line with the residential zone, the provision of SMC 23.47A.014.B.5 that prohibited such a location did not apply "due to 15' easement on adjacent residential properties to the west under common ownership." *See* Plan Set from February 2018. That explanation, however, was omitted from subsequent plan sets, including the version at Exhibit 16, which simply asserts that there are no windows or entrances at a prohibited location notwithstanding dozens of drawings in the plan set to the contrary. *See* Ex. 16 Plan Set, page G002, #13. Easements, however, may not be used to evade setback requirements – or any other Code requirement between the commercial and single family zones.

### c. Architectural cornice extension

The plans reveal that a cornice at the southwest corner of the building would extend over the single family zone. *See* Ex. 16, Plan Set, Sheet A301. Perhaps the "easement" is expected to authorize this intrusion as well.

### d. Green factor

The Street Level Landscape Plan in Ex 16 (Plan Set) appears to indicate that the Owners are using the separate lots in the single family zone to meet their Green factor requirements for their building in NC zone where they have built right up to the rear property line and left virtually no room for ground level landscaping anywhere else on those lots. *See* Tab 7 (Ex. 16, Street Level Landscape Plan, L1.10).

As with the Owners' other schemes for creating a larger building than the Code allows, the Council should carefully review these issues before deciding to uphold the Examiner's Recommendation.

**4. The Council could not bind the legally separate single family sites in the fictitious development site with a PUDA recorded on the commercial parcels because the single family lots are not part of the application for rezone.**

Of the Applicant's four legal lots, only the two commercial lots that face Greenwood Avenue are proposed for rezone. The applicant specifically excluded the two single family lots that share the rear boundary line of the commercial parcels. *See* Exh.31 (updated rezone application), p3, at Tab 8.

A Property Use and Development Agreement ("PUDA") would apply only to the two commercial parcels that are proposed for rezone. SMC 23.34.004 (authorizing the Council to approve a map amendment subject to the recording of a property use and development (PUDA) containing self-imposed restrictions upon the use and development of the property to be rezoned). The definition of a contract rezone also confirms that PUDAs apply to the property that will be rezoned. SMC 23.84A ("Rezone, contract") amends the Official Land Use Map to change the zone classification "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 rezoned.")

Because only the two commercial lots will be subject to the PUDA, and the fictitious development site did not legally bind the two single family sites to anything, those two lots remain out of the Council's reach. If the rezone is granted, the Owners could easily built whatever is legally allowed on those lots or sell them altogether, since they would have served their purpose of enabling an oversized building for the owners.

Neither SDCI nor the Owners has explained what would legally prohibit the applicant from developing or redeveloping those single family lots in any manner allowed by the Code, or selling them off at a later date after they have served their useful purpose of enabling an oversized building on the 7009 site since they are tied together only by the fictitious "development site." The two single family lots remain discrete legal lots with unique recording numbers, and they meet the definition of "lot" as it is used to apply to the development standards in the single family zone.

SDCI's largely indecipherable response ignores the fact that the single family parcels are not legally part of the two commercial lots proposed for rezone, and that the PUDA may, by definition, only apply to the property to be rezoned. SDCI Response at 2.

Moreover, the Owners and SDCI have offered inconsistent and contradictory explanations for how – and whether – the current vacant lot would remain open space if a rezone is granted.

The Owners insist that the PUDA would also control the future uses of the single family lots because the MUP drawings contain a map showing those lots and the Examiner's recommended substantial conformance with the MUP as a condition for the PUDA. Response at 4. According to the Owners, a MUP drawing showing open space on the vacant lot requires that open space to be "maintained as long as the building exists." *Id.*

SDCI, however, informed the Examiner that an Accessory Dwelling unit could be built on that site, and the Owners have repeatedly expressed an interest in building something on that vacant lot.[1]

SDCI also testified at the hearing that the lots could not be separated. *See* Testimony of Lindsay King. But the SDCI planner who wrote SDCI's response in this appeal explained how the single family parcels could be carved off: "In order for the [single family] parcel to be split off for separate development, a lot boundary adjust would be necessary." SDCI Response at 2. These various stories cannot be reconciled for the simple reason that the PUDA will be recorded against only the two commercial lots that are part of the rezone application, and the single family lots will remain unburdened.

**C. Substantial evidence in the record demonstrates that the NC2-55 Zone, as envisioned by MHA, exists only in preliminary draft form and has not reached even final draft legislation formally presented to Council, and as such it lacks established development standards, and has not been mapped or applied anywhere in the City except in limited areas by special legislation, and therefore rezoning an isolated parcel in a uniformly zoned area based on presumed compliance with an undefined zone is premature.**

The Examiner repeatedly claimed that the 7009 project would be consistent with allegedly forthcoming MHA upzones even though it is not possible to determine whether that zone will actually be applied in this portion of Phinney Ridge, what the development standards of that zone will entail, and whether the 7009 project would comply with those yet-to-be-determined development standards.

The Applicant and SDCI mischaracterized Appellants' argument on this issue and neither offered any evidence to rebut the undisputed fact that the proposed MHA legislation upon which the Examiner relies exists now only as draft legislation that has not even been

[1] It is unclear how an ADU could be built on the vacant single family lot because an ADU, by definition is accessory to a principal use, and there is no principal use on that site. The principal use (house) exists on the entirely separate 7010 Palatine site. There is no provision in the Land Use code that allows a principal use on one site to have an "accessory" use on another site.

finalized for Council consideration, much less enacted into law. There are no development standards established for the NC2-55 zone because the zone has not been enacted Citywide. There was no way for the Examiner to ensure that a rezone of the 7009 parcel, which lies in the middle of a uniformly zoned area, would grant to the Applicant what might ultimately be allowed for all other NC2-40 parcels in that zone that might, or might not, be upzoned through MHA.

In fact, the presentation materials for the July 16, 2018 meeting of the Select Committee on Citywide Mandatory Housing Affordability (MHA) confirms that (1) the current version of MHA legislation is in draft form only and subject to future discussion and amendment by the Council, and (2) that the Council is expressly prohibited from voting on MHA legislation as long as the current EIS appeal is ongoing, and it is precluded from acting on the proposed rezones, land use regulations, and Comprehensive Plan amendments until the appeal of the Final Environmental impact Statement has been resolved. The materials also describe a two-phased Council Review Process for this legislation noting that Phase 2 includes "development of Potential Amendments for Committee Discussion and Vote." And the material confirms that "[t]he Committee may begin to discuss issues and review additional information identified through public hearings or other outreach related to potential changes to the proposed rezones, land use regulations, and Comprehensive Plan amendments."[2]

1. **The Director's Rule on MHA contribution requirements makes no mention of development standards that may be applied in the MHA zones identified in the draft legislation, but it does confirm the substantial windfall the Owners gave themselves when they changed their application to request a rezone to NC2-55 instead of the NC2-65 zone in the original.**

The Applicant claims it is "notable" that "the Director's Rule 14-2016 specifically references rezones to NC-55" and that is proof the NC55 zone exists. But that Director's Rule only refers to the required MHA contributions – either units or dollars. It says nothing about development standards for the NC2-55 zone.

What is "notable" about Director's Rule 14-2016 is that it confirms that Applicant's last minute decision to withdraw its original rezone application just days before the originally scheduled open record and re-submit it days later as a rezone to NC2-55(M) instead of

[2] The presentation materials are available on the Council website for CB 119184. The Council may take notice of its own materials without a Request to Supplement the Record.

the original NC2-65, self-limited to 55 feet generated a windfall to the Applicant and a substantial reduction in its required MHA contribution.

Rule 14-2016 establishes that rezones from NC2-40 to NC2-55 remain in the same category of MHA contributions, whereas rezones from NC40 to NC65 move up to a higher category. According to the tables in Rule 14-2016, therefore, Applicant reduced its MHA obligation by 25 percent when it withdrew its original NC2-65 application and resubmitted a virtually identical application to the NC2-55 zone instead. *See* Appeal at 11; and *see* Director Rule 14-2016.

In this case, the Owners saved themselves $263,790 by playing the MHA money game. This is revealed in the MHA-R Payment Option chart in the Owner's material. *See* Tab 9 (Ex. 16, Sheet G006.1). The MHA-R Payment Option table confirms that the Owners are intending to satisfy their MHA obligation through payment instead of onsite units. The MHA fee is calculated by multiplying the floor area (39,080 square here) by the required payment amount per square foot. Here the required payment amount was $13.25/square foot, resulting in a payment of $517,810 shown in the "MHA-R Payment Option Table." But if the Owners had retained their original rezone request – NC2-65, self-limited to 55 foot height – instead of withdrawing it in February, days before the originally scheduled open record hearing, their payment obligation would have been $20/square foot, resulting in a total payment of $781,600. *See* Director Rule 14-2016. By recharacterizing their application to a different name for the same requested building height, they have deprived the City of $263,790 that could have been used for much needed affordable housing objectives.

SDCI's argument that there are "standards" for the NC-55 zone, citing only to SMC 23.47A.017 which specifies floor-area ratios (FAR) for the NC-55 zone, misses the point entirely. There are no development standards confirming the setbacks that will apply in this zone or any other development standards against which to measure the present proposal.

SDCI proclaims that there is "[a]t least one other property in the city" zoned NC2-55(M). But the lone address that SDCI cites is not a contract rezone, it is a property in the Central District where the entire block was zoned to NC2-55 in separate, special legislation created for that area. *See* Ord. 125360 Map, showing areawide rezone, and Land Use Map 113, showing this area in context, attached at Tab 10. Finally, the parcels across the street from the cited NC2-55 parcel are all zoned to 65 and 75 foot heights, and the parcel does not abut a single family zone as does the 7009 cite. In other words, SDCI's one example merely confirms Appellants' argument: The NC2-55 zone does not

exist outside the few specific neighborhoods where the Council enacted special legislation that tailored that zone to that Community.

**D. Substantial evidence in the Record confirms that the Examiner applied the rezone criteria incorrectly and, accordingly, his Recommendation should be rejected.**

SMC 23.34.007 confirms 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. . . ." The Appeal at pages 12-19 detailed the Examiner's numerous errors of fact and law that undermined his Recommendation. It is abundantly clear that the Examiner simply presumed that the NC2-55 zone would blanket this area of Phinney Ridge eventually – and that was good enough to recommend rezoning the 7009 parcel. But the prospect of a future area-wide upzone cannot override the current conditions that show unequivocally, that there is no other parcel for almost a mile away that is zoned higher than the NC2-40 zoning of the 7009 site. On those facts, it is impossible to conclude, as the Code requires, that a rezone of the 7009 parcel is "compatible" with the height limits for the area or that the balance of the rezone criteria favor rezoning this parcel.

**1. SMC 23.34.008.A – Urban villages and zoned capacity**

The Owners' Response to the Appeal on this issue is puzzling. It attributes a quoted term to Appellants that appears nowhere in this section of the Appeal Statement, and then accuses Appellants of citing no evidence to support its claims. Response at 9. For this zoning criterion, however, the Appellants questioned the Examiner's Conclusion in his analysis of this section because it simply assumed the obvious: that an existing proposal for a five story building would obviously yield more housing units than would the same building at four stories. Appeal at 12-13. Appellants challenged that approach, pointed out that only a portion of the Shared Roof building would be available to members of the public, and reiterated evidence in the record that a recently completed building right across the street, on a substantially smaller lot offered more publicly available units than would Shared Roof.

**2. SMC 23.34.008C -- Zoning History and Precedential Effect**

The Appeal at 13-14 details Appellants' specific objections to the Examiner's conclusions regarding this criteria. The Owners erroneously assert that the rezone must be approved based on this criteria alone, evidently because it "matches the proposed legislative rezone." Response at 11. That argument, however, flies in the face of

23.34.007 that species "no single criterion . . . shall be applied as an absolute requirement . . . unless a provision indicates the intent to constitute a requirement." SMC 23.34.007.B.

The Zoning History and Precedential Effect criterion is not intended as an absolute requirement. It merely states that "Previous and potential zoning changes both in and around the area proposed for rezone shall be examined." SMC 23.34.008.C. The 7009 rezone does not "match the proposed legislation" as the Owners allege because a substantial chunk of the west side of the building, including the rooftop greenhouse, is built within the light corridor adjacent to the single family zone that the Director specifically wanted to protect in the Phinney Ridge area if the NC2-55 zone was implemented there. *See* Tab 11. But even if the 7009 rezone did match the proposed legislation as the Owners allege (it does not), the current draft legislation is far from final, as evidenced presentation materials for a July 16, 2018 presentation to the Council Select Committee on MHA that confirms the Council will soon begin considering modifications to the current proposal. The MHA legislation is too far from final to be used as a basis for upzoning a parcel that doesn't otherwise meet the rezone criteria.

### 3. SMC 23.34.008.D -- Neighborhood Plans

Page 14 of the Appeal details Appellants' specific objections to the Examiner's conclusions regarding this criterion. The Owners assert that the Greenwood /Phinney Neighborhood Plan was "re-adopted in 2016 after MHA upzones had been drafted and publicly discussed." But that assertion is false. The Greenwood Phinney Neighborhood Plan has never been "re-adopted" after it was originally adopted in 1999. *See* Tab 12 at p585 (Legislative History of the Seattle 2035 Comprehensive Plan , showing Greenwood Phinney Ridge neighborhood plan adopted on November 15, 1999, and no "re-adoptions" after that date.). When the Plan was adopted in 1999, there was no discussion of area-wide rezones and no need for the Plan to address such a concept.

### 4. SMC 23.34.008.E – Zoning Principles, including a gradual transition between zoning categories and physical buffers

Pages 14-16 of the Appeal detail Appellants' specific objections to the Examiner's conclusions regarding this criterion.

The Owners claim that the Appeal "stat[ed] that the Examiner said that 65 foot zoned parcels share property line with single family parcels," and then the Owners assert that "[t[he Examiner never said that." Response at 12. The Examiner never made that invented statement and neither did Appellants. *See* Appeal at 14-14-15. Instead, the

Owners regrettably invented a statement that misstates Appellants argument, and then attributed that falsehood to Appellants.

What Appellants actually argued, based on substantial evidence in the Record, is that the Examiner misstated the nature and relationship of the various zones. Appeal at 14-15, citing Recommendation at Conclusion #7. The Appeal demonstrated that when the Examiner referred to "some examples of a 40 foot height zone located adjacent to a 65 foot zone," he failed to recognize that the nearest 65 foot zone is almost one mile away from the project site. And the Appeal demonstrated that when the Examiner claimed there were examples of 65 foot zones adjacent to single family zones, he failed to recognize there is nowhere in the Greenwood/Phinney Urban Village where a 65 foot zone shares a property line with a single family zone. Those statements are supported by substantial evidence in the record, specifically the City's own zoning maps that prove these points.

The Owners next challenge Appellants' argument that the vacant NC lot cannot be a buffer between zones as the Code requires because it is in the single family Zone. The drawings in the Owners' Plan Set clearly indicate that the so-called "private open space area" located at the "mid-portion of the project site" is the presently vacant single family lot that, obviously is located in the single family zone, not "between the five-story building and the single-family zone" as the Examiner mistakenly concluded. Recommendation at 8, Conclusion #7; Appeal at 15.

Moreover, the "Open space" that SMC 23.34.008.E.2 requires as a buffer between zones does not appear to meet the definitions of "open space" or "landscaped open space" in the Code. SMC 23.84A.028.

The Owners next allege that a PUDA recorded on the commercial lots could would somehow "guarantee[]" the physical buffers "as a condition of the rezone / PUDA" because the MUP drawings show landscaped open space " Response at 14. But that position cannot be reconciled with SDCI's testimony at the hearing that an ADU could be built on the presently vacant lot. Testimony of Lindsay King. And it certainly cannot be reconciled with SDCI's Response that outlines how a portion of allegedly "guaranteed" buffer could be "split off for separate development." SDCI Response at 2, or that site could be transferred to the commercial lot through a lot boundary adjustment.

On these facts, the 7009 rezone proposal obviously does not provide the physical buffers envisioned in SMC 23.34.008.E.

### 5. SMC 23.34.008.F – Impact Evaluation

Page 16 of the Appeal details Appellants' specific objections to the Examiner's conclusions regarding this criterion.

The Owners do not rebut these objections, but instead create and approve their own points. Response at 15. The fact that the project "is compliant with the MHA program" is irrelevant because that is a requirement for any property attempting to secure a contract rezone with the (M) designation. Response at15. In this case, the Code favors the provision of low-income housing in the area proposed for rezone. SMC 23.34.008.F.1.a. The 7009 project is not providing any MHA units onsite. It chose to comply with MHA through payments, and saved itself $250,000 when it converted its application to the NC2-55(M) zone instead of the NC2-65 zone, self-limited to the same 55 foot height it now seeks. *See* Argument *infra*.

The Owners' remaining claims about views, which is not a factor in SMC 23.34.008.F, are addressed and proven false, in the section discussing SMC 23.34.009.B below.

### 6. SMC 23.34.008.G – Changed Circumstances

Pages 16-17 of the Appeal details Appellants' specific objections to the Examiner's conclusions regarding this criterion and the inconsistent positions the Owner and SDCI have taken on this issue. Whether or not the Examiner concluded that changed circumstances existed for purposes of this specific section, he obviously relied on the potential for area-wide legislative changes when recommending approval of this rezone.

### 7. SMC 23.34.009.A – Height limits of the proposed zone: Consistency

Page 17 of the Appeal details Appellants' specific objections to the Examiner's conclusions regarding this criteria. SMC 23.34.009.A states that "Height limits shall be consistent with the type and scale of development intended for each zone classification." The use of "shall" makes this a mandatory criterion. SMC 23.34.007.

The Examiner observed that the proposal's residential "uses" would be consistent with the type and scale of development in the vicinity and the proposed NC2-55 zoning but he said nothing about consistency of the height limits that are the subject of this criteria. The Owners again misstated one of Appellants' arguments and entirely ignored the other. Response at 16.

Because the NC2-55 zone does not yet have final development standards, there is no way to know whether a 55-foot building topped with a massive 12-foot greenhouse would be "consistent with" or even allowed in the final NC2-55 legislation if such legislation ever is implemented in this area. But the building as presently designed in not consistent with the current draft NC2-55 legislation because it does not comply with the setbacks that would be required to minimize the impact of the additional height of a 55 foot zone adjacent to a single family zone.

### 8. SMC 23.34.009.B – Topography of the area and its surroundings

Page 17 of the Appeal details Appellants' specific objections to the Examiner's conclusions regarding this criterion. SMC 23.34.009.B states that "[h]eight limits shall reinforce the natural topography of the area and its surroundings, and the likelihood of view blockage **shall** be considered." (Emphasis added.) The use of "shall" makes this a mandatory criteria. SMC 23.34.007.

The Examiner concluded that the proposed structure "may impact territorial views from adjacent properties. But he provided no discussion of the views of the Olympic Mountains that would be unlawfully blocked by this project (but not by projects built to the current NC2-40 Zone.) in violation of SMC 23.47A.012.A.1.c, nor did he acknowledge photographic evidence submitted directly to the Examiner that proved the 7009 project would block Olympic Mountain views from neighboring properties, views that would not be blocked by construction of a NC2-40 building on that site.

SMC 23.47A.012.A.1.c states 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 neighborhood residential structures of any of the following [including] the Olympic and Cascade Mountains. . . ." (Emphasis added.)

The Owners once again employ a sleight-of-hand misrepresentation to avoid Appellants' inconvenient proof of view blockage. The Owners quote only three words of the Appellants' appeal on this topic and leave off the remaining material portion. Specifically, the Owners say only that Appellants allege error because the Examiner "ignored written testimony." But they omit the remainder of the quoted sentence: "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." (Emphasis added).

The Owners then offer only a laugh-out-loud defense that Appellants claim that this section "creates 'protected' views" and that "This is a zoning provision and does not create 'protected' views, and is not relevant to the rezone discussion." Response at 17.

Elsewhere, the Owners make the demonstrably false statements that "[a]ll substantial evidence in the record shows that views will not be blocked as a result of the rezone (or, to put it differently, as a result of the difference between a 40-foot tall and a 55-foot tall building);" and that "Any views would be at least partially blocked as a result of a 40-foot tall building, so the 55-foot tall building has no significant impact to views." Response at 15.

Perhaps the Owners did not review the Record before writing those statements. Exhibit 53, the Public Comments Received by the Examiner, contains photographic evidence proving that the proposed 7009 building would block Olympic Mountain views where a building built to the maximum height in the NC2-40 zone would not block those views. *See* Tab 2 (Ex. 53, at 11, a photograph of the view from the rooftop of Hendon Condos at 6800 Greenwood Avenue North (one block south of the 7009 site) showing the Olympic Mountains visible over the rooftop of the Fini Condos directly across Greenwood Avenue, which is built to the identical maximum height in a NC2-40 zone as the Hendon Condos, and showing how the additional height of the 7009 building would wall off that view entirely because that additional height is equal to or greater than the height of the elevator shaft and umbrella on the Fini rooftop that extend above the mountain view. *See also id.* at 7-9 (applicable pages of Supplemental Comments from Esther Bartfeld regarding the unlawful view blockage and explanation of accompanying photo of westward Olympic Mountains view taken from the roof of Hendon Condos).

If the Owners of the 7009 site were building in the NC2-40 zone, they would be required to produce a view study proving that the additional height allowed in the NC2-40 zone. But with their rezone application, no one investigated the issue or required a view study. The owners of properties east and northeast of the 7009 site would continue to enjoy views of the Olympic Mountains if the 7009 site were developed as an NC2-40 parcel. But if the site contract rezone request is approved, those same owners would be denied those views (and the substantial value associated with them) and left looking into the fifth floor units with their soaring ceiling heights, and a massive rooftop greenhouse instead of the otherwise protected Olympic Mountain views. SMC 23.34.009.B. is a mandatory rezone criterion that cannot be ignored as it was here given the substantial and uncontroverted evidence showing the likelihood of view blockage.

## 9 SMC 23.34.009.C, D – Height and Scale of the proposed rezone

Pages 17-19 of the Appeal details Appellants' specific objections to the Examiner's conclusions regarding this criteria. SMC 23.34.009C. 2 requires permitted height limits to be compatible with the "predominant height and scale of existing development". And SMC 23.34.009.D states that "Height limits **shall** be compatible with **actual and zoned heights** in surrounding areas" and that "a **gradual transition in height and scale** and level of activity between zones **shall** be provided unless major physical buffers, as described in 23.34.008.D.2 are present." The use of "shall" makes this a mandatory criteria. SMC 23.34.007.

The Examiner simply asserted without support, that the proposed development -- at a zone height of 55 feet but actual height of almost 70 feet with the rooftop greenhouse that the Examiner failed to mention -- would be "consistent" with the nearby height of nearby development when substantial evidence in the record readily undermines that conclusion. *See e.g.,* Tab 1 (map of Greenwood Phinney Urban Village showing uniform zoning of NC2-40 all along Greenwood, with the nearest 65 foot zone almost a mile to the north, and all NC2-40 parcels backed by lots in the single family zone.).

The Examiner also asserted, again with any support and in spite of substantial evidence to the contrary, that the 7009 building would be "compatible" with "most" of the actual and "potential" zoned heights in the area. That analysis is not what this mandatory provision requires and it is a fatal error. The Examiner also made another fatal flaw by failing to even mention the mandatory gradual transition in height and scale that SMC 23.34.D.2 requires absent a "major physical buffer." *See* Appeal at 18-19. As the substantial evidence in the record indicates – specifically the Owners own plan sets – there is no transition whatsoever between **zones**. The five story building is built right on the shared property line. Moreover, SDCI had indicated in a Correction Notice dated Aril 4, 2017, that "it is unclear how the proposed rezone meets this criteria. The code states permitted heights shall be compatible with predominant height and scale of existing development, actual and zoned heights in the surround[sic] area." *See* Tab 13. Nothing has changed since that time. But both SDCI and the Examiner decided to simply deem the project "compatible" regardless of the evidence. The Council should not be fooled.

The Owners yet again misrepresent Appellants' argument, claiming that Appellants object because the 7009 building would be "taller than the 40 foot zone" and then assert their building isn't that much taller. Response at 17. And the best they offer as a defense is that an overall height difference of 15 feet "can be considered "compatible." Response at 17. That conclusory observation would wipe out all need for rezone criteria, including mandatory criteria, if every 15 foot height difference was deemed "compatible"

regardless of the surrounding area. Similarly the Owners proclaim the Examiner's analysis of SMC 23.34.009.D "spot-on" even though he failed to mention one of the mandatory criteria – gradual transitions unless major physical buffers exist – a missing mandatory criteria that dooms this rezone application.

Weighing all of the rezone criteria in SMC 23.34.007-009, it is clear that the Examiner erred. The rezone application should be denied.

**E. If the Council decides to grant the 7009 rezone despite the substantial evidence in the record proving such a decision unlawful, it should shrink the building size by requiring compliance with all Code provisions for Commercial lots, and remove the greenhouse and prohibit any use of the single family lots for access, or any other uses that expand the envelope of allowable uses on the NC parcels alone.**

The Owners make the preposterous allegation that Appellants "forgot" that the Council makes the rezone decision and that the Council may condition a rezone consistent with SMC 23.34.004. Response at 18. To the contrary, Appellants specified the deficiencies in the Examiner's recommended conditions for a PUDA in Section IV.C, Appeal at 19, and then offered specific conditions for the Council to incorporate into a PUDA in the event the Council decides to rezone this parcel. Appeal at 9-10 (Item #2). Of course the Owners contradicted their absurd accusation two sentences later by urging the Council to reject the conditions that Appellants suggested. Response at 18.

The Owners also accuse Appellants of attempting "an end-around to evade their failure to appeal the zoning decision." Response at 18. Although it is unclear what deadline Appellants allegedly missed given that this is a quasi-judicial appeal of the Examiner's Recommendation, not an administrative MUP appeal, it is very clear that the Owners desperately want to avoid having the Council review their fictitious development site ruse that SDCI enabled and the Examiner ignored entirely. There is no portion of the Examiner's Recommendation that is unreviewable by the Council and automatically deemed valid as the Owners allege.

But even if the Owners were correct that these unspecified "zoning provisions" were "now valid," nothing prohibits the Council from imposing, through a PUDA, the same Code requirements that should have been applied in the first instance to prohibit a building of this size. SMC 23.34.004.A authorizes the Council to require the recording of a PUDA containing "restrictions upon the use and development of the property in order to ameliorate adverse impacts that could occur from unrestricted use and development permitted by development regulations otherwise applicable after the rezone." The

restrictions imposed by the PUDA shall be directly related to the impacts that may be expected to result from the rezone." *Id.*

All of Appellants' proposed PUDA conditions adhere to this requirement. Appellants suggested three conditions at a minimum for the PUDA. Appeal at 20. First, Appellants suggested that the PUDA require that the building comply with the requirements of specified sections of SMC 23.47A.014.B regarding setbacks and other features on buildings located on NC lots that abut a lot in a single family zone. This would require shrinking the building to fit the NC parcels that are proposed for rezone.

Under Appellants' proposed PUDA conditions, the Owners would be: (1) prohibited from building in the 15-foot setback triangle adjacent to the vacant single family lot at the southwest corner (where it now has a driveway); (2) required to set back the second through fourth floors on the west side 15 feet from the property line instead of being built right on the property line in the current proposal, and the fifth floor and all rooftop features would have to be set back even further, at a rate of 2 feet per 10 feet of height above 40 feet; and (3) prohibited from having windows and doors on the first floor of the west side adjacent to the single family zone unless the first floor was set back at least five feet from the property line. Such restrictions on the size of the building would preserve the setbacks and air and light corridors in that block (and the blocks to the north), where the zoning boundary runs due north/ south and aligns exactly with the rear property lines of the commercial lots fronting Greenwood and the single family lots in the adjacent single family zone.

To comply with the currently proposed MHA legislation for NC2-55 zones, the Council should consider imposing even greater upper level setbacks consistent with the proposed MHA legislation. This would require setbacks of 3 feet per 10 feet of height above the 40 foot building height instead of the 2 feet rate in the current Code. As noted in the Director's Report on MHA, which specifically called out the unique Phinney Ridge edge condition, these greater setbacks would help "preserve more light into adjacent property when NC zones abut single-family zones." *See* Tab 11; *see also* Tab 1 (Greenwood/Phinney Urban Village Map).

Next Appellants recommended that the massive rooftop greenhouse that raises the height of the building to almost 70 feet, be eliminated or moved to the ground, and the height of the solar array reduced. These requests, too, directly relate to the impacts of these rooftop features. The greenhouse appears to be less than 15 feet from the adjacent single family zone, a location where no portion should be at all pursuant to SMC 23.47A.014.B.3. It should also be obvious that, regardless of this Code provision, a discretionary rooftop feature that creates an almost 70-foot tall building adjacent to a

single family zone is inappropriate and intrusive and should be curtailed through a PUDA. Appellants are not aware of any other building in the City where a 425 square foot, 12-foot high greenhouse (allegedly devoted to food production) has been placed anywhere on the rooftop of a commercial lot adjacent to a single family zone.

The solar arrays, too, add substantial height on the Greenwood Avenue side to what would already be the tallest building within almost a mile of uniformly zoned buildings. A PUDA condition limiting the height even further would directly relate to the impacts of this rooftop feature.

The Owners claim that the greenhouse and solar panels were "already adjusted to minimize any potential impacts," but that is merely their assertion Consistent with SMC 23.34.004.A. the Council may – and should – impose Appellants' requested conditions in a PUDA. The applicable criteria for PUDA conditions is stated in SMC 23.34.004.A, and Appellants' request meets that criteria and would help mitigate the impact of upzoning an isolated parcel in an otherwise uniformly zoned area that should have no individual rezones at all.

## IV. CONCLUSION

The Examiner's Recommendation is not supported by substantial evidence. To the contrary, there is substantial evidence in the record that demonstrates the Examiner's numerous errors of fact and law and undermines the Examiner's Recommendation. The substantial evidence in the record, combined with a proper application of the applicable Land Use Code provisions confirms that the Council should deny this rezone.

But in the event that the Council decides to approve the rezone, it should adopt Appellant's proposed rezone conditions, as further enhanced in this Reply, to mitigate the impacts of rezoning an isolated parcel in a uniformly zoned area that is surrounded by single family zoning.

Dated this 17th day of July, 2018.

ARAMBURU & EUSTIS, LLP

By_____
Jeffrey M. Eustis, WSBA #9262
Attorneys for Irene Wall and Bob Morgan