BEFORE THE SEATTLE CITY COUNCIL

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| In the Matter of the Appeal of: | CF 314356 |
| Irene Wall and Bob Morgan, | SDCI Reference: 3023260-LU |
| Of the Hearing Examiner's Recommendation. | OWNER'S RESPONSE TO APPEAL |

## I. FACTS

70th & Greenwood Ave LLC ("Owner") proposes a contract rezone to NC2-55(M) in order to construct a five-story mixed use building containing 35 apartment units with ground level retail and below-grade parking for 26 vehicles (the "Project"). The Project site is located at 7009 Greenwood Avenue North, on a currently-vacant lot covered in impervious asphalt. *Exhibit 31, p. 4.* The Project's proposed rezone is consistent with the Mandatory Housing Affordability ("MHA")-proposed rezone for the site, which also proposes to rezone the site to NC2-55(M).[1]

[1] / As the Council knows, the MHA legislation (CB 119184) was transmitted to the City Council in November 2017 and was referred to the Select Committee on Citywide Mandatory Affordable Housing on January 29, 2018. It has been discussed in Committee and public hearings held eight times to the date of this response.



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The Project is a unique project in which some of the owners of the Project will be occupy a small portion of the building's units.[2] This initial group of owners is a collection of friends who decided to build a building in which they could live collectively with their families and provide market rate and affordable housing and small business retail in the rest of the Project. *Exhibit 31, Testimony of Shannon Loew.* Due to the fact that the owners will reside on-site and therefore will become part of the Phinney/Greenwood neighborhood, the owners have given much thought and care to the design of the Project. The Project includes the following items:

- Participation in the Mandatory Affordable Housing program, in compliance with Director's Rule 14-2016. *Exhibit 31, p. 1.*
- 60% of the units are family-sized, including a mix of two, three, and four-bedroom units. Three and four-bedroom units are rare in new construction in the City of Seattle. *Exhibit 31, p. 2.* An emphasis is placed on family living.
- Participation in the MFTE program, which will provide one studio, two one-bedrooms, three two-bedrooms, and one three-bedroom units as affordable at the required levels under MFTE. *Exhibit 31, p. 1.*
- A publicly-accessible 2,110 s.f. courtyard for the community, and 6,160 s.f. of neighborhood small business retail. *Exhibit 31, p. 2.*
- 0.74 auto parking ratio despite no parking required, and compliance with new bike parking standards. *Id; Exhibit 16.*
- The building is LEED Platinum, despite no requirement that the building achieve any green building standard. This demonstrates the owners' deep commitment to a high-quality building incorporating progressive sustainability strategies. *Id.*

The Project is also a unique project in that the Project site includes two parcels zoned NC2-40 (fronting Greenwood Avenue North--proposed to be zoned to NC2-55(M)), and it also includes two adjacent single family-zoned lots to the west of the NC2-40 portion. *Exhibit 1, pp. 2-3 (map of Project site).* One of the lots (7010 Palatine) contains a single-family structure, and the other lot is currently vacant. The single family-zoned lots will remain zoned single family and cannot (and will not) include a multifamily use, but these lots have been included in the

[2] / Contrary to the Appellants' allegation (irrelevant to the rezone proceedings), the owners are not reserving the entire top two floors for themselves. *Testimony of Shannon Loew.*



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Project's development site for purposes of the Master Use Permit ("MUP") associated with the contract rezone. *Exhibit 16, Sheet G002.* As part of the MUP, the single-family home owned by the applicant at 7010 Palatine Ave. N. will remain, and the vacant single-family lot will be planted in grass. *Exhibit 16, Sheet L.500 (Landscape Plan).* The single-family lots and the NC2 lots were combined into a single development site, as defined by SDCI TIP 247. A development site is a project site which SDCI applies all of the development standards for the land use code and is required to be reviewed as such for the life of the building. *TIP 247, Testimony of Lindsay King, Senior Land Use Planner, SDCI.* As a result of the Project site being a single development site, certain development standards, such as setbacks and window placement were applied to the totality of the development site, consistent with TIP 247. *Testimony of Lindsay King, Senior Land Use Planner, SDCI.* The outcome of the Project in reality is that the acquisition of the two single family lots creates a 55-foot wide physical buffer along the entire western edge of the development site, buffering the single-family zoned properties not within the development site from the Project. *Exhibit 16, p. 10.* The Project created further appropriate zone transitions by:

- Creating large setbacks on all facades, with an emphasis on meeting transitions to lower zones—the upper floor of the west facades is setback 4 feet and 6' at the northwest corner, to create a transition to the NC2-40 zone.
- All of the facades of the building are broken down into four discrete, smaller elements that match the bulk and scale of the surrounding buildings and are strategically placed to align with features of surrounding context, including the jog in N 70th Street and the widths of nearby single-family parcels.
- Rooftop equipment, solar arrays, greenhouses and other elements are strategically placed away from the building perimeter to minimize shadows on neighboring parcels and avoid visibility from the street , further reducing height bulk and scale. Further, the greenhouse has been inset by perimeter planters to minimize visibility from the abutting SF lots. Lastly, following the Design Review Board's recommendation, the solar panels have been rotated toward flat as much as possible while maintaining their effectiveness so as to lower their overall height and visibility.


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- Perimeter planters, landscaping, and green roof have been designed and placed at the edges of the Project to reduce privacy concerns to abutting lots.
- The Project relies on 55' and 80' adjacent rights-of-way, as well as landscaped open space as physical buffers as required by 23.34.008.E
- The Project was initially proposed to be 65-feet tall (6 stories) but was reduced to 5 stories in response to community concerns, and to be consistent with the pending MHA rezone to 55 feet.[3]

*Exhibit 31, pp. 10-11, pp. 17-18.*

Due to the fact that the development site already contains one single family lot, SDCI has determined that no additional single-family home could ever be built on the vacant single-family lot. *Testimony of Shannon Loew, Testimony of Lindsay King*. The recommended rezone condition requires that development shall be in substantial conformance with the approved MUP plans, which include the retention of the single-family house, and the vacant lot being planted in grass. *Exhibit 1, p. 44; Exhibit 16, Sheet G002, Sheet L500.* The recommended rezone condition also requires a Property Use and Development Agreement ("PUDA") be recorded that incorporates the final approved MUP drawings for the proposal. *Examiner's Recommendation, p. 10.* As a result, the PUDA requires that the open space physical buffer as shown on the MUP be maintained as long as the building exists.

The Director issued a Master Use Permit decision and a rezone recommendation. The Master Use Permit decision approved design review, approved zoning, and issued a Determination of Nonsignificance pursuant to the State Environmental Policy Act ("SEPA"), with routine conditions. No appeals of these decisions were filed, and any such appeals would

[3] / The rezone application has had three different iterations. The first was a 65-foot tall building with a proposed rezone to 65 feet. This was revised to a 5-story building, with a proposed rezone to 65 feet but self-limiting to 55 feet. The reason why this was proposed was because the NC2-55 zone did not yet exist. The rezone was further revised to a 5-story building with a proposed rezone to NC2-55(M) when the 55-foot zone was created by SDCI and formally acknowledged by the Land Use Code. This is the current proposal.


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be untimely now. The Director recommended approval of the rezone, with routine conditions. *Exhibit 1, Testimony of Lindsay King.*

The Hearing Examiner held an open record public hearing on April 30, 2018. *Id.* Eight members of the public attended and offered testimony at the hearing. Of the eight, four were in favor of the project and four were not. *Hearing Record, 9:07-9:43.* SDCI presented information supporting its recommendation to approve the contract rezone. *Hearing Record, 11:30.* The Owner presented information supporting its contract rezone application. *Hearing Record, 9:45 – 11:30.* Specifically, the Owner reviewed every rezone criterion and outlined how the Project meets each relevant criterion. *Id.*

Following a site visit, and a full consideration of the evidence in the record, the Hearing Examiner issued a recommendation to approve the contract rezone, with the SDCI-recommended conditions. Consistent with 23.34.004.A, the Hearing Examiner recommended a condition that requires a PUDA be recorded against the property to be rezoned conditioning compliance with the approved Master Use Permit plans that are of record for the Project. *Hearing Examiner Recommendation, p. 10.*

The Appellants filed a timely appeal of the Hearing Examiner's recommendation. The appeal raises several claims, each of which is unsupported by the evidence in the record and the applicable law and are based on a fundamental misreading of the contract rezone criteria and omissions of several key facts. The Owner respectfully requests the City Council deny the appeal and approve the contract rezone with the Hearing Examiner's recommended conditions.

## II. ARGUMENT

### A. The City Council must reject the appeal and must approve the contract rezone with conditions.


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**1. Standard of Review.**

The Council's decision in a contract rezone shall be based on applicable law and supported by substantial evidence in the record. SMC 23.76.056.A. It is the Appellant's burden to prove why the Hearing Examiner's recommendation should be rejected or modified. *Id.*

Courts interpret the "substantial weight" requirement as mandating the clearly erroneous standard of review. *Indian Trail Property Owner's Ass'n. v. City of Spokane*, 76 Wn. App. 430, 431, 886 P.2d 209 (1994); *Brown v. Tacoma,* 30 Wn. App. 762, 764, 637 P.2d 1005 (1981). Under the clearly erroneous standard, reviewing bodies do not substitute their judgment for that of the agency but may invalidate the decision only when left with the definite and firm conviction that a mistake has been committed. *Whatcom County Fire District No. 21 v. Whatcom County*, 171 Wn.2d 421, 427, 256 P.3d 295 (2011), *citing Norway Hill Pres. and Prot. Ass'n. v. King County Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976) (internal quotations omitted).

An Appellant does not meet its burden to show a decision is clearly erroneous if the evidence shows only that reasonable minds might differ with the decision. Mere complaints, or claims without the production of affirmative evidence showing that a decision was erroneous, are insufficient to satisfy an Appellant's burden. *Boehm v. City of Vancouver,* 111 Wn. App. 711, 47 P.3d 137, 140 (2002); *see also Moss v. Bellingham,* 109 Wn. App. 6, 13, 31 P.3d 703 (2001).

Because the City Council is considered an appellate body under SMC 23.76.065(A), its determination is based "solely on the original record, it is not empowered to substitute its judgment for that of the examiner, and it must sustain the examiner's findings of fact if they are supported by substantial evidence." *PT Air Watchers v Dep't of Ecology,* 179 Wn2d 919, 319


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P.3d 23, 27 (2014); *Maranatha Mining v. Pierce County*, 59 Wn. App. 795, 801-2, 801 P.2d 985 (1990). Substantial evidence is considered evidence that is sufficient "to persuade a fair-minded, rational person of the truth of a declared premise.'" *Alejandre v. Bull*, 159 Wn.2d 674, 681, 153 P.3d 864, 867 (2007) (citations omitted). Appellant fails to demonstrate that the Examiner's findings are not supported by substantial evidence in the record. The Appellant's claims must be denied, and the rezone approved.

*2.* **The Hearing Examiner's recommendation to rezone to NC2-55(M) was proper.**

The Appellants allege that the contract rezone should be denied because the NC2-55(M) zone "does not exist." This claim is not supported by substantial evidence in the record, or by the Land Use Code, and fails for several reasons.

First, the Land Use Code and Director's Rule 14-2016 require the contract rezone to comply with MHA. *See* SMC 23.34.004.B and SMC 23.58C.015. It is notable that Director's Rule 14-2016 specifically references rezones to NC-55. *Director's Rule 14-2016, p. 4.* The zone does, in fact, exist.

Second, Appellants' arguments that the Examiner failed to apply the "locational criteria for the specific zone" are without merit. The Examiner did apply the locational criteria for the NC2 zone. *Hearing Examiner Recommendation, Conclusion 4:* ("the proposal does not seek a change in the existing NC2-zone designation. The NC2 zone criteria in 23.34.076 continue to match the characteristics of the area better than any other zone designation"). Note that Chapter 23.34 SMC does not require the review of each individual zone (NC2-40 versus NC2-55, for example), but simply the review of the underlying zone (in this case, remaining NC2), and the height limits of the zone (in this case 55 feet). The Hearing Examiner completed a review of both


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criteria, and recommended approval of the rezone. *Id., Conclusion 4, Conclusions 14-15.* The Appellants' claims are without merit and the rezone must be approved.

Third, Appellants' arguments that somehow because the NC2-55(M) zone does "not exist" that the Project could not comply with zoning standards is without merit and is also an argument that is untimely. Compliance with zoning standards is not a rezone criteria currently before the Council for consideration. *See* Chapter 23.34. SMC. Assertions that a project does not comply with a zoning standard is an appeal of a Type I decision and is only subject to administrative review through a land use interpretation. SMC 23.76.022.A.1. Here, the Appellants filed no such claim and the time to do so has now passed; this claim has been waived. In short, the Appellants fail to cite to any substantial evidence in the record or any code that supports their claims. The Appellants' claims must be rejected and the rezone approved.

3. **The Examiner's recommendation is factually supported by substantial evidence in the Record.**

The Appellants allege that the Examiner "misrepresented the nature of public comment to SDCI" and states that "all of the written comments submitted to the Examiner were from individuals who opposed the project." *Appeal, p. 12.* This allegation could not be based on the evidence in the record, as it is notably wrong. In fact, the Examiner clearly read every public comment in the record and considered them. *Examiner's Recommendation, p. 5.* In fact, the record fully supports the Examiner's findings related to public comment. Comments were received both before and after the hearing; the Hearing Examiner allowed the record to be left open for additional public comment specifically in response to the Appellants' request. In fact, several comments were received that were supportive of the Project, including dozens during the SDCI consideration period, four during the hearing, and several after the hearing. *Exhibits 48,*


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*51, 53, 54; Hearing Testimony.* . It is unclear why the Appellants make this wild claim, but it is wrong and without support in the record.

4. **The contract rezone proposal complies with SMC 23.34.008.A (density and zoned capacity).**

Appellants claim that the Examiner's recommendation related to density and zoned capacity was "flawed." The Appellants cite to no evidence to support its claims.

SMC 23.34.008.A states:

> To be approved a rezone shall meet the following standards:
> 1. In urban centers and urban villages the zoned capacity for the center or village taken as a whole shall be no less than 125 percent of the growth estimates adopted in the Comprehensive Plan for that center or village.
> 2. For the area within the urban village boundary of hub urban villages and for residential urban villages taken as a whole the zoned capacity shall not be less than the densities established in the Urban Village Element of the Comprehensive Plan.

The Project is in the Greenwood/Phinney Ridge Residential Urban Village. *Exhibit 31, p. 8.* Current density in the Urban Village is 21.7 housing units per acre (Seattle Comprehensive Plan, Land Use Appendix, Figure A-2). *Id.* The Comprehensive Plan adopts a residential density goal of at least 12 dwelling units per acre for Residential Urban Villages (2035 Comprehensive Plan, Citywide Planning, Growth Strategy Figure 1). *Id.* The rezone proposal complies with this criterion. The Project is not proposing a downzone, instead, it proposes to upzone to add capacity. Therefore, it could not reduce capacity below 125 percent of the growth estimates. Second, the density established for the Residential Urban Village is at least 12 units per acre. Currently the Residential Urban Village has a density of 21.7 housing units per acre, meeting this criteria. Third, the Project contributes to meeting zoned capacities. The Project site area to be rezoned is 12,185 s.f. or just more than 1/4 of an acre. *Exhibit 1, p. 2.* The Project proposes 35


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units on approximately 1/4 of an acre, supporting the density requirements of SMC 23.34.008.A. Appellants' claims are not supported by substantial evidence in the record and must be rejected.

5. **The contract rezone proposal complies with SMC 23.34.008.C (zoning history and precedential effect).**

Appellants claim that the Examiner's recommendation related to this criterion was "confused." Appellants claim that the proposed MHA rezone of the property to NC2-55(M) should not be taken into account when reviewing this criterion. Appellants are incorrect and this claim should be rejected given the clear code language that requires examination of potential zoning changes.

SMC 23.34.008.C states:

> Zoning History and Precedential Effect. Previous and potential zoning changes both in and around the area proposed for rezone shall be examined.

Appellants claim that "the NC2-55 zone does not presently exist for the Phinney Ridge neighborhood, nor has final legislation event been presented to the Council." *Appeal, p. 13.* As the Council knows, this is not correct. Council Bill 119184 was transmitted to the City Council in November 2017 and was referred to the Select Committee on Citywide MHA on January 29, 2018. It has been openly discussed and public hearings have been held for the legislation at least eight times. *Exhibit 31, p. 9.* To state that the MHA rezone of the property to NC2-55(M) is not "proposed" is not supported by substantial evidence in the record.

Further, it is required by the terms of SMC 23.34.008.C that the MHA proposed rezone of the property be examined to determine compliance with this criterion. The MHA rezone is a "potential zoning change"—it has been transmitted to Council and has been discussed publicly by the Council, current and former Mayors, and the public for two years. It was wholly


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appropriate and actually required that the Examiner consider the potential MHA rezone of the property to NC2-55(M). The proposed contract rezone matches the proposed legislative rezone, and therefore the consideration of the Appellants' claim must be rejected and the rezone approved.

Appellants claim that the Examiner should have considered the "precedential effect" of granting the rezone as it could "jeopardize the current and planned land use patterns if a parcel were upzoned prematurely." *Appeal, p. 14.* However, the code language does not require the Examiner to do this. It only requires him to compare the Project's rezone to the proposed MHA rezone; there are no other "proposed rezones" for him to consider. The Examiner followed the clear language of the code. The Appellants' claims are without merit. The rezone must be approved.

6. **The contract rezone proposal complies with SMC 23.34.008.D (Neighborhood Plans).**

Appellants claim that because the Greenwood/Phinney Neighborhood plan "did not anticipate a 55-foot zone" the contract rezone could not be consistent with this criterion. This argument is not consistent with the code criterion or the Greenwood/Phinney Neighborhood Plan and should be rejected.

SMC 23.34.008.D states:

1. For the purposes of this title, the effect of a neighborhood plan, adopted or amended by the City Council after January 1, 1995, shall be as expressly established by the City Council for each such neighborhood plan.
2. Council adopted neighborhood plans that apply to the area proposed for rezone shall be taken into consideration.
3. Where a neighborhood plan adopted or amended by the City Council after January 1, 1995 establishes policies expressly adopted for the purpose of guiding future


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rezones, but does not provide for rezones of particular sites or areas, rezones shall be in conformance with the rezone policies of such neighborhood plan.

4. If it is intended that rezones of particular sites or areas identified in a Council adopted neighborhood plan are to be required, then the rezones shall be approved simultaneously with the approval of the pertinent parts of the neighborhood plan.

Here, the Greenwood/Phinney Neighborhood Plan was adopted after 1995 and is part of the City's Comprehensive Plan. *Exhibit 31, p. 10.* It does not contain policies for guiding rezones, it does not cite to specific zones, and it does not contain information about rezones of particular sites. It does not speak to any heights at all; and in fact the Neighborhood Plan was re-adopted in 2016 after MHA upzones had been drafted and publicly discussed. been approved with the approval of the neighborhood plan. SMC 23.34.008.D.4.

The Examiner properly took into consideration the Greenwood/Phinney Neighborhood Plan. *Examiner's Recommendation, p. 3 (Findings 12, 13), p. 7 (Conclusion 5).* Indeed, all substantial evidence in the record shows that the Project supports the goals and policies of the Greenwood/Phinney Neighborhood Plan. *Exhibit 31, pp 21-31.* Appellants' claims are without merit and should be rejected.

**7. The contract rezone proposal complies with SMC 23.34.008.E (zoning principles, including gradual transition and buffers).**

The Appellants claim that the Hearing Examiner's recommendation erred in analyzing 23.34.004.E, including zoning principles and transitions. Appellants' claims are not supported by the record, and misrepresent the Examiner's recommendation.

Appellants claim that the Examiner erred when he described zoning transitions elsewhere in the Greenwood/Phinney Urban Village, stating that he said that 65-foot zoned parcels share property lines with single family parcels. The Examiner did not state this. In fact, the Examiner


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described the myriad of zoning transitions that occur generally in the Greenwood/Phinney Urban Village:

> The predominant zoning patterns in this neighborhood is a commercial zone with a 40-foot height limit in the urban village overlay located adjacent to a single-family zone. There are some examples of a 40-foot height zone located adjacent to a 65-foot height zone and 40-foot and 65-foot height zones adjacent to the LR3 RC and single--family zones. In some instances, the transition includes buffers, such as a right-of-way street/alley, but in other instances the transition occurs along a shared property line.

*Examiner's Recommendation, p. 7 (Conclusion 7).* It should also be noted that the Project is not proposing a rezone to 65 feet, but instead to 55 feet.

In fact, when one reads the code, the Project meets all of the criteria in 23.34.008.E, and the Examiner properly considered the criteria:

> E. Zoning Principles. The following zoning principles shall be considered:
> 1. The impact of more intensive zones on less intensive zones or industrial and commercial zones on other zones shall be minimized by the use of transitions or buffers, if possible. A gradual transition between zoning categories, including height limits, is preferred.
> 2. Physical buffers may provide an effective separation between different uses and intensities of development. The following elements may be considered as buffers:
> a. Natural features such as topographic breaks, lakes, rivers, streams, ravines and shorelines;
> b. Freeways, expressways, other major traffic arterials, and railroad tracks;
> c. Distinct changes in street layout and block orientation;
> d. Open space and greenspaces.
> 3. Zone boundaries.
> a. In establishing boundaries the following elements shall be considered:
> (1) Physical buffers as described in subsection E2 above;
> (2) Platted lot lines.
> b. Boundaries between commercial and residential areas shall generally be established so that commercial uses face each other across the street on which they are located, and face away from adjacent residential areas. An exception may be made when physical buffers can provide a more effective separation between uses.

The Examiner properly considered the potential impact of more intensive zones on less intensive zones. The rezone remains the same intensity of zone (NC2), so this will not change. However, the Examiner carefully discussed the gradual transition that the code prefers between


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height limits.[4] The Examiner notes the gradual transition that will occur between the 55-foot height and the 40-foot height. He notes the full height modulation to break down the mass of the building, and notes that the open space on the single-family parcel and the upper level setbacks will create a physical buffer as transition between the Project and single-family zones. *Examiner's Recommendation, p. 8.*

Appellants allege that the landscaped open space on the single-family lot cannot be considered a physical buffer because the PUDA cannot apply to the single-family zoned lots. This is based on a misunderstanding of PUDAs and MUPs. The code does not limit the right of a property owner to voluntarily bind his/her property by PUDA even if it is not being rezoned. SMC 23.34.004. In fact, a PUDA is specifically contemplated to impose restrictions that are "directly related to the impacts that may be expected to result from the rezone." SMC 23.34.004. Indeed, the contract rezone is conditioned upon compliance with the PUDA; the contract rezone may be revoked if compliance does not occur. SMC 23.34.004.C. Finally, the recommended conditions by the Examiner not only require a PUDA but require compliance with the MUP as a condition of the PUDA. The MUP plan show retention of the single-family house on the west, and also the landscaped open space; all lots are tied together as a development site and must be maintained as one development site as long as the Project exists. *Testimony of Lindsay King, Exhibit 9.* As a result, the physical buffers and gradual transition are guaranteed as a condition of the rezone/PUDA. The Appellants claims regarding gradual transition must be denied as they are not supported by the code or substantial evidence in the record.

8. **The contract rezone proposal complies with SMC 23.34.008.F (Impact Evaluation).**

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[4] / It should be noted here that the code does not require transition in height limit, but prefers it. It also does



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The Appellants allege that the Examiner's recommendation was deficient but fail to provide substantial evidence in the record that proves that his analysis related to impacts was wrong.

The facts do not support the Appellants' allegations. In fact, the Project increases the number of housing units in the neighborhood on this site from zero to 35.[5] *Exhibit 1.* In fact, the Project is compliant with the MHA program, increasing affordability in the City. *Exhibit 1.* In fact, the Project thoroughly addresses all listed environmental impacts. All of the factors listed in 23.34.008.F were analyzed by both the Applicant and the Department, and substantial evidence in the record shows that the Project does not create significant shadows or light and glare; these potential impacts were specifically walked through with the Examiner during the hearing as part of the Owner's presentation. *Exhibit 31, Exhibit 50, Testimony of Shannon Loew.* Views were also discussed during the hearing with the Examiner. All 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). The buildings surrounding the Project site are one, two, three, or four-story (40-foot) structures. *Exhibit 50.* 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. Further, the Project was subject to review under the State Environmental Policy Act ("SEPA"), which discloses and reviews environmental impacts of the Project; this fact was stated by the Examiner in his recommendation.[6] *Examiner's Recommendation, p. 8 (Conclusion 9).*

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not require physical buffers to be present.

[5] / It is irrelevant to the Examiner's or Council's rezone analysis, but the Appellants' allegation that the top two floors are designated for owners' use only is not true and is not supported by the record. *Testimony of Loew.*

[6] Shadows, views, and light and glare impacts are specifically disclosed and addressed in the SEPA checklist submitted to the City, reviewed and accepted by SDCI, and reviewed by the Examiner. *See Exhibit 3.* In addition,


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View

9. **The Appellants claims related to SMC 23.34.008.G (changed circumstances) are without basis.**

It is frankly difficult to understand the Appellants' arguments related to changed circumstances. The Examiner determined that there are no changed circumstances. *Examiner's Recommendation, p8, Conclusion 12.* The fact that SDCI and the Owner argued differently does not create error. This argument should be rejected.

10. **The contract rezone complies with SMC 23.34.009.A (function of the zone).**

Appellants claim that the Examiner's recommendation is in error because the Project will be larger than the currently built environment. But this allegation, even if true, is not relevant to the criterion required in SMC 23.34.009.A, which states:

> A. Function of the zone. Height limits shall be consistent with the type and scale of development intended for each zone classification. The demand for permitted goods and services and the potential for displacement of preferred uses shall be considered.

Thus, the code does not require the Examiner to analyze the existing development as it relates to this code criterion. Instead, the Examiner states that increased density in the Urban Village, the proposal's multifamily and commercial uses are consistent with the function of the zone, and it would not change the size of commercial uses allowed. He also specifically mentioned the lack of displacement that would occur from the Project of preferred uses in the zone (multifamily and commercial/retail). *Examiner's Recommendation, Conclusion 15.* The Examiner's recommendation was solid. The Appellants' arguments are without merit

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the NC2 zone requires the City to review light and glare specifically as part of zoning review. See SMC 23.47A.022. As a reminder, the Appellant did not file an appeal/interpretation of the zoning compliance



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11. **The contract rezone complies with SMC 23.34.009.B (Topography of the area and its surroundings).**

The Appellants argue that the Examiner's recommendation is in error because his conclusion that the Project may impact only territorial views "ignored written testimony." The Appellants' claims are not supported by the code or substantial evidence in the record. SMC 23.34.009.B states:

> B. Topography of the area and its surroundings. Height limits shall reinforce the natural topography of the area and its surroundings, and the likelihood of view blockage shall be considered.

Here, the Examiner considered the potential view blockage and stated that views could be blocked. There is no evidence in the record that the Examiner "ignored" written comments. This claim must be rejected. In addition, Appellants argue that SMC 23.47A.012.A.1.c creates "protected" views. This is a zoning provision and does not create "protected" views, and is not relevant to the rezone discussion. This claim should be rejected.[7]

12. **The contract rezone complies with SMC 23.34.009.C (Height and Scale of the Area).**

The Appellants assign error to the Examiner's determination that the Project is consistent with the predominant height and scale of nearby newer development, which is representative of the area's overall development potential. Appellants argue that the Project is not consistent because it is taller than the 40-foot zone. But evidence in the record shows that the Project is generally consistent with newer development in the area, which reaches to 59 feet (40 feet + 4-foot bonus

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determination, and did not file a SEPA appeal.

[7] As noted, the appellants failed to file an appeal of the zoning approval, any allegation that the project does not comply with zoning is untimely.



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+ 15-foot rooftop appurtenances). An overall height difference of 15 feet can be considered "compatible" per SMC 23.34.009.C. This argument is without merit and should be rejected.

13. **The contract rezone complies with SMC 23.34.009.D (Compatibility with Surrounding Area).**

Appellants argue that the Examiner's recommendation related to this criterion was in error. However, the Examiner's recommendation regarding this criterion was spot-on and tracks the analysis related to SMC 23.34.008.D.2 (see Section 7 above). All substantial evidence in the record shows that general transition occurs, and physical buffers are present and will be required in perpetuity. The Appellants' arguments are without merit.

14. **The Examiner's proposed conditions are adequate; however, the Council makes the final decision on the required conditions of approval.**

The Appellants allege that the Examiner's recommendation includes inadequate conditions of approval, and therefore it should be rejected. But the Appellants forget that it is the Council that makes the rezone decision and therefore the Council may condition a rezone consistent with SMC 23.34.004. In addition, the Appellants attempt an end-around to evade their failure to appeal the zoning decision. The Appellants' suggested conditions must be rejected.

First, the Appellants state that the recommendation should require compliance with certain zoning provisions. The zoning provisions have been applied to the overall development site. The Appellants failed to file an appeal of that zoning decision if they disagreed. The Appellants' time to file such an appeal has passed, and the zoning determination is now valid.

Second, the Appellants want the greenhouse and solar panel away from the rooftop edge to limit impacts on the single-family zone. But the record reflects that the greenhouse and solar array


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were already adjusted to minimize any potential impacts. The request is not supported by the record and should be rejected.

Third, the Appellants state that the railings and planters exacerbate height impacts of the building, but point to no evidence in the record that the railings and planters create impacts. The request is not supported by the record and should be rejected.

## III. CONCLUSION

The Hearing Examiner's recommendation is supported by substantial evidence in the record. The Appellants have failed to support their allegations with clear and convincing evidence that an error has been made. As a result, the appeal must be rejected, and the contract rezone must be approved.

DATED this 9th day of July, 2018.

MCCULLOUGH HILL LEARY, P.S.

By: _____
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BEFORE THE SEATTLE CITY COUNCIL

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| In the Matter of the Appeal of: | CF 314356 |
| Irene Wall and Bob Morgan, | SDCI Reference: 3023260-LU |
| Of the Hearing Examiner's Recommendation. | OWNER'S RESPONSE TO APPEAL |

I, Jessica M. Clawson, declare as follows:

I am employed with McCullough Hill Leary, P.S., which represents the Applicant for this matter. I served a copy of the APPLICANT'S RESPONSE TO APPEAL and this DECLARATION OF SERVICE via electronic mail service and by U.S. Mail on the following parties:

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

DATED this 9th day of July, 2018.

///

s/Jessica M. Clawson
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