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BEFORE THE SEATTLE CITY COUNCIL

<p>In the Matter of the Appeal of: Londi Lindell, Of the Hearing Examiner's Recommendation.</p>	<p>CF 314358 SDCI Reference: 3021980 APPLICANT'S RESPONSE TO APPEAL AND OPPOSITION TO MOTION TO SUPPLEMENT THE RECORD</p>
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I. FACTS

Brook V LLC ("Applicant") proposes a contract rezone to NC3P-75 M1, self-limiting height to NC3P-65, in order to construct a six-story, 85-unit mixed use building with 4,000 s.f. of retail ("Project"). The Project, in compliance with Director's Rule 14-2016, will comply with the affordable housing/MHA requirements contained in Chapter SMC 23.58C. Exhibit 28.

The Project site is located at 1600 Dexter Avenue North. CITE. It is located directly north of C1-65 zoned land, directly east of NC3-65 zoned land, and is half a block north of the South Lake Union Urban Center, which portion is zoned SM-SLU 100/95. Exhibit 2. A contract rezone to NC3P-65 from NC3P-40 was approved kitty-corner from the Project site for a Bellwether housing project. Exhibit 30, pp. 4-5 (see attached).

1 The Director recommended, with routine conditions, to approve the contract rezone, and
2 issued a Determination of Nonsignificance pursuant to the State Environmental Policy Act
3 (“SEPA”). Exhibit 16. The Appellant, Londi Lindell, filed a comment letter with the Seattle
4 Department of Construction and Inspections (“SDCI”) related to view impacts¹. Exhibit 15. No
5 SEPA appeal was filed. Hearing Examiner Recommendation, p. 1.
6

7 The Hearing Examiner held an open record public hearing on September 27, 2017. Id.
8 No members of the public attended or submitted evidence at the hearing. Id. The Appellant did
9 not attend the hearing or submit evidence for consideration before the Examiner. Id. SDCI
10 presented information supporting its recommendation to approve the contract rezone. The
11 Applicant presented information supporting its contract rezone application. Id. Specifically, the
12 Applicant presented information related to the relative surrounding height, bulk, and scale of
13 both existing conditions and of zoned conditions. Exhibit 30, pp. 4-7. The Applicant presented
14 detailed shadow studies comparing the proposed contract rezone with a no-rezone condition.
15 Exhibit 30, pp. 18-19. Finally, and most relevant to the current appeal, the Applicant presented
16 extensive view studies to show view impacts related to the Project. Exhibit 30 pp. 20-27.
17 Importantly, one of the view studies presented to the Hearing Examiner was a view study from
18 the Marcus Condominiums, the Appellant’s property. Exhibit 30, pp. 25-26. This view study
19 was developed using photos of the property from Zillow, and using the Project’s plans to place
20 the Project in the photo. Testimony of Jill Burdeen.²
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23 Following a site visit, and a full consideration of the evidence in the record, including the
24 impact to views from the Marcus Condominiums, the Hearing Examiner issued a
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27 ¹ / Though, it must be noted that the Appellant’s comment letter specifically states that it is to do with “SEPA
28 view impacts,” which are neither present nor relevant to this proceeding. Exhibit 15.

1 recommendation to approve the contract rezone, with a condition to self-limit the height of the
2 building to 65 feet through the use of Property Use and Development Agreement (“PUDA”).
3 Hearing Examiner Recommendation, p. 10. The Appellant filed a timely appeal of the Hearing
4 Examiner’s recommendation. The appeal included a motion to supplement the record with hand-
5 drawn view studies, and a motion for oral argument before the Hearing Examiner. The appeal
6 raises several claims, each of which is unsupported by the evidence in the record and the
7 applicable law. The Applicant respectfully requests the City Council: a) reject the motion to
8 supplement the record; and b) deny the appeal and approve the contract rezone with the Hearing
9 Examiner’s recommended conditions.
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12 **II. ARGUMENT**

13 **A. The City Council should reject the Appellant’s motion to supplement the record.**

14 A contract rezone is a Type IV decision. SMC 23.76.036.A. As a Type IV decision, the
15 record is created before the Hearing Examiner in an open public hearing. SMC 23.76.052.F.
16 The Hearing Examiner is required to accept evidence and comments related to the decision; the
17 Hearing Examiner may also consider written comments received prior to the close of the hearing.
18 SMC 23.76.052.G. The record is then forwarded to the City Council; Council action shall be
19 based on the record established by the Examiner. SMC 23.76.054.E. Council may only
20 supplement the record with new evidence or information
21

22 if the Council determines that the new evidence or information was not available or could
23 not reasonably have been produced at the time of the open record hearing before the
24 Hearing Examiner.

25 SMC 23.76.054.E.
26

27 ² / Note that the pictures used for the Applicant’s view study are the same photos used by the Appellant in her
28 “Exhibits.”

1 Here, the evidence sought to be added to the record clearly was available or could have
2 reasonably been produced at the time of the open record hearing. The Appellant used the same
3 photos used by the Applicant to create her “view study.” Exhibit 30, pp. 25-27. Clearly, because
4 the Appellant utilized the same pictures, the pictures were in existence at the time of the hearing
5 and could have been submitted by the Appellant. The information related to the zoning and
6 height of properties surrounding the Project is also clearly information that was in existence at
7 the time of the hearing. The fact that, for whatever reason, the Appellant did not attend the
8 hearing and did not submit the evidence at the hearing despite the opportunity to do so is not
9 relevant to the Council’s decision in the motion to supplement. Because this information was
10 available at the time of the hearing, the Council cannot grant the motion to supplement.
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13 Finally, to allow evidence to be entered into the record in this manner would be
14 prejudicial to the Applicant. If the Appellant had submitted this evidence at the hearing as she
15 was able to do, the Examiner could have asked her questions about how she completed her view
16 study, and could have asked her questions related to her claims. The Applicant could have asked
17 similar questions or could have presented information to rebut Appellant’s claims. Because the
18 record has already been made, no such opportunities exist for the Council to verify the veracity
19 of information, and no opportunity exists for the applicant to submit new evidence to rebut the
20 claims.³ The policy of the rule disfavoring supplementation is clear—without context it is
21 difficult for a decisionmaker to review information in a vacuum. The motion must be rejected.
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23 In short, Appellant has provided no evidence, explanation, or argument as to how her
24 motion meets the requirement of SMC 23.76.054.E. The evidence was clearly available at the
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28 ³ / Thus, the policy of the code is clear—this could become an endless “additional evidence loop.”

1 time of the hearing and it was incumbent upon the Appellant to submit the evidence then.⁴ The
2 Council must deny the motion to supplement.

3 **B. The City Council must reject the appeal, and must approve the contract rezone with**
4 **conditions.**

5 **1. Standard of Review.**

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

9 Courts interpret the "substantial weight" requirement as mandating the clearly erroneous
10 standard of review. *Indian Trail Property Owner's Ass'n. v. City of Spokane*, 76 Wn. App. 430,
11 431, 886 P.2d 209 (1994); *Brown v. Tacoma*, 30 Wn. App. 762, 764, 637 P.2d 1005 (1981).

12 Under the clearly erroneous standard, reviewing bodies do not substitute their judgment for that
13 of the agency but may invalidate the decision only when left with the definite and firm
14 conviction that a mistake has been committed. *Whatcom County Fire District No. 21 v.*
15 *Whatcom County*, 171 Wn.2d 421, 427, 256 P.3d 295 (2011), citing *Norway Hill Pres. and Prot.*
16 *Ass'n. v. King County Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976) (internal quotations
17 omitted).

18 An Appellant does not meet its burden to show a decision is clearly erroneous if the
19 evidence shows only that reasonable minds might differ with the decision. Mere complaints, or
20 claims without the production of affirmative evidence showing that a decision was erroneous, are

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27 ⁴ / Many of Appellant's claims relate to her contention that the Examiner "failed to consider" evidence related
28 to views. Appellant had the ability to submit this information for consideration, and had the ability to show up to the
hearing to advocate for her position. She did neither.

1 insufficient to satisfy an Appellant's burden. *Boehm v. City of Vancouver*, 111 Wn. App. 711,
2 47 P.3d 137, 140 (2002); *see also Moss v. Bellingham*, 109 Wn. App. 6, 13, 31 P.3d 703 (2001).

3 Because the City Council is considered an appellate body under SMC 23.76.065(A), its
4 determination is based "solely on the original record, it is not empowered to substitute its
5 judgment for that of the examiner, and it must sustain the examiner's findings of fact if they are
6 supported by substantial evidence." *PT Air Watchers v Dep't of Ecology*, 179 Wn2d 919, 319
7 P.3d 23, 27 (2014); *Maranatha Mining v. Pierce County*, 59 Wn. App. 795, 801-2, 801 P.2d 985
8 (1990). Substantial evidence is considered evidence that is sufficient "to persuade a fair-minded,
9 rational person of the truth of a declared premise." *Alejandre v. Bull*, 159 Wn.2d 674, 681, 153
10 P.3d 864, 867 (2007) (citations omitted). Appellant fails to demonstrate that the Examiner's
11 findings are not supported by substantial evidence in the record. The Appellant's claims must be
12 denied, and the rezone approved.

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15 **2. Appellant misunderstands the contract rezone request.**

16 The Appellant alleges that the contract rezone should be denied because the rezone from
17 NC3P-40 to NC3P-75 does not satisfy the locational criteria and area characteristics. Appellant
18 misunderstands the contract rezone request and the purpose of locational criteria and area
19 characteristics. The Applicant is not seeking to change the zone—indeed, the Property is already
20 zoned NC3P. Instead, the Applicant is seeking to change the height limit. There are not
21 different locational criteria and area characteristics for different height limits—see SMC
22 23.34.078 for the NC3 locational criteria. The Hearing Examiner rightly found that "the site and
23 its relation to adjacent zoning matches the NC3 zone function and locational criteria...so the
24 designation is appropriate." Conclusion 5. This conclusion is supported by substantial evidence
25 in the record; the Director's report outlines the function and locational criteria and how the site
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1 meets the NC3P criteria. Exhibit 16, pp. 30-34. The Appellant fails to cite to any substantial
2 evidence in the record that would support her claims. The Appellant's claim must be rejected.

3 **3. The rezone request meets SMC 23.34.008.E.1 (gradual transition).**

4 The Appellant alleges that the contract rezone does not meet SMC 23.34.008.E.1 related
5 to a gradual transition in height and intensity of zones. Appeal, p. 3. The Appellant alleges that
6 the surrounding NC3P-40 zone is the predominant zone and therefore a 65-foot height limit does
7 not create a gradual transition. Appellant alleges factual error related to the Examiner's finding
8 related to gradual transition, stating essentially that the Examiner was misled into thinking that
9 the Property is surrounded entirely by 65-foot tall zoning.⁵ Appeal, p. 3. The Appellant's
10 allegations are not supported by substantial evidence in the record and must be rejected.
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13 First, the Appellant cites to no evidence in the record to support her claims. On this basis
14 alone, her claims must be rejected. Second, the Appellant either misunderstands or purposely
15 misstates the evidence upon which the Examiner's conclusions are based. SMC 23.34.008.E.1
16 states:

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18 The impact of more intensive zones on less intensive zones or industrial and commercial
19 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.

20 SMC 23.34.008.E.1. The Examiner specifically concluded: "There is some effective separation
21 between the proposed and adjacent and nearby properties provided by topographic changes,
22 adjacent streets to the west and the south, and an alley to the east." Conclusion 8. The
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25 ⁵ / The Appellant cites to claimed errors in the Director's report to support her claim that the Examiner's
26 conclusions are in error. There are two things wrong with this approach: 1) while the Examiner obviously took the
27 Director's report into account, there was much more evidence in the record than simply the report, and 2) If the
28 Appellant had a problem with the Director's report and recommendation which is issued well prior to the hearing,
and she received notice of the Director's report, she had the opportunity to show up at the hearing and make her
comments known at that time. She did not do so.

1 Examiner's conclusion is supported by substantial evidence in the record. Indeed, the Property is
2 located directly north of a site zoned C2-65, directly east of sites zoned NC3-65, kitty-corner
3 from a site zoned NC3-65, and across the street from properties zoned NC3P-40. The only
4 directly adjacent condition of the Property with a 40-foot zone is with the property directly north
5 of the site. Exhibit 3. Substantial evidence also supports the Examiner's conclusion that
6 topography assists the gradual transitions. Exhibit 30, p. 4. Finally, the view studies completed
7 by the Applicant also show the appropriate gradual transitions in zoning height and intensity that
8 will occur with the contract rezone. Exhibit 30, pp 20-21 shows how the building's massing fits
9 with its neighbors along Dexter and to the east. Similarly, Exhibit 30 pp. 22-23 also shows the
10 gradual transition that will occur. Substantial evidence in the record supports the Examiner's
11 conclusion that the contract rezone meets SMC 23.34.008.E.1. The Appellant has failed to cite
12 to any substantial evidence in the record that would support her claim. It must be rejected.
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15 **4. The contract rezone proposal complies with SMC 23.34.008.E.4 as it is**
16 **consistent with the existing built character of the area.**

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18 Appellant claims that the rezone should be rejected because it is not located in an Urban
19 Center or Village, and SMC 23.34.008.E.4 does not permit zoning heights above 40 feet outside
20 Urban Centers or Villages. Appellant also claims that the contract rezone is not consistent with
21 the existing built character of the area. Appellant's claims are not supported by substantial
22 evidence in the record.

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24 First, the South Lake Union Urban Center ends one block to the south of the site, at Galer
25 Street. Exhibit 3. Despite this, the predominate zoning heights surrounding the property are 65
26 feet; clearly the City when it zoned these properties believed that 65 feet was an appropriate zone
27 outside the Urban Center or Village. Second, the proposal is consistent with the existing built
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1 character of the area. The Appellant has selectively chosen smaller buildings “as evidence” that
2 the proposal does not fit with the existing character. Substantial evidence in the record refutes
3 Appellant’s claims. The site is surrounded by 4 to 6 story buildings. The building to the south
4 of the site is 6 stories. The building to the east of the site is 6 stories. The building to be built
5 kitty-corner to the southwest is six stories. Exhibit 30, p. 4. Even the new building proposed in
6 the NC3P-40 zoning across the street is 4 stories with stepping as it moves up the hill. Exhibit
7 30, p. 5 (‘N’ Habit Dexter, located at 1701 Dexter Avenue North). See also Examiner’s Finding
8 3. Appellant’s claims related to this criterion are not supported by substantial evidence in the
9 record and must be rejected.
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11 **5. The Examiner properly considered view impacts; substantial evidence in**
12 **the record supports his conclusions.**
13

14 Appellant alleges that the Examiner failed to consider the likelihood of view blockage,
15 including view blockage specifically of views from the Marcus Condominiums, which she owns.
16 Appeal, pp. 4-5. Nothing could be further from the truth.
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18 SMC 23.34.009.B requires a rezone analysis related to a height limit to review the
19 topography of the area and consider the likelihood of view blockage:

20 Topography of the area and its surroundings. Height limits shall enforce the natural
21 topography of the area and its surroundings, and the likelihood of view blockage shall be
22 considered.

23 SMC 23.34.009.B. Importantly, the criterion does NOT say that a rezone shall not be approved
24 if any views are partially blocked.

25 The Examiner specifically addressed the substantial evidence in the record related to
26 views and topography in Finding 18:
27

1 The Applicant's analysis found that due to the topographical features of the site, and the
2 predominant view being Lake Union to the east development under the proposed zoning
3 would not significantly impact views. No SEPA-protected views would be impacted by
the proposal.

4 Hearing Examiner Recommendation, p. 7. The Examiner based his conclusion and
5 recommendation on this substantial evidence, in Conclusion 20:

6 The proposed structure steps down the west to east with the topography of the property,
7 minimizing view blockage while providing a large roof deck that will allow residents of
8 the proposal views of Lake Union.

9 Hearing Examiner Recommendation, p. 7. Indeed, the substantial evidence in the record
10 supports the Examiner's findings and conclusions. The Applicant completed no fewer than eight
11 separate view studies, including two from the Marcus Condominiums. Exhibit 30, pp. 25-26.

12 These view studies were presented to the Hearing Examiner at the hearing and were considered
13 in his decision. The view studies show that the Marcus Condominiums still enjoy a view from
14 the third floor of Lake Union even with the project, and from the top floor deck there is very
15 little view impact from the project on the Lake Union View. Id. ⁶

17 The Examiner's recommendation is supported by substantial evidence in the record; the
18 Examiner properly considered the likelihood of view blockage and correctly determined that
19 views would not be significantly impacted. Indeed, the substantial evidence in the record shows
20 that the views from Marcus Condominiums will be minimally impacted by the proposal. The
21 Appellant's claims related to views must be rejected.
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25 ⁶⁶ / The Appellant has submitted her own "view studies" as evidence that her views will be blocked. The view
26 studies consist of sharpie drawing over the same view study pictures completed by the Applicant in its exhibit 30.
27 There is no information submitted with the Appellant's "view studies" that tell us anything about her assumptions in
28 creating the studies—did she use a scale, has she completed a view study before, etc. As a result, the submittal of
this information without the ability to cross examine or rebut would be problematic for the Council to give the
evidence its proper weight, and is potentially very prejudicial to the Applicant.

1 **6. The Project is compatible with the height and scale of development in the**
2 **surrounding area.**

3 Appellant alleges that the Project should not be approved because is it not compatible
4 with the scale of surrounding existing development. The substantial evidence in the record
5 shows that Appellant’s allegations cannot stand.
6

7 SMC 23.34.009.C states:

8 C. Height and Scale of the area

- 9 1. The height limits established by current zoning shall be given consideration.
10 2. In general, permitted height limits shall be compatible with the predominant height and
11 scale of existing development, particularly where existing development is a good measure
12 of the area’s overall development potential.

13 Appellant argues that because four buildings in the surrounding area are fewer than 6 stories⁷
14 that the rezone should not be approved. But this is not the standard. As stated above, the
15 Examiner should give “consideration” to the current height limit. The Examiner did this by
16 acknowledging the current height limit for the property and surrounding properties. Hearing
17 Examiner Recommendation, p. 2, Finding 5. Then, the Examiner must determine whether a
18 height limit is compatible with the predominant height and scale of existing development,
19 “particularly where existing development is a good measure of the area’s overall development
20 potential.” SMC 23.34.009.C.2. Here, the Examiner outlined the scale of development
21 surrounding the site (see Hearing Examiner Recommendation, Finding 3, p. 2). He also
22 discussed a contract rezone approved kitty-corner from the site to NC3P-65 (Hearing Examiner
23 Recommendation, Finding 8, p.2), and outlined the Citywide MHA rezone which will add an
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27 ^{7/} It should be noted that the City of Seattle’s zoning is not measured in stories, but is measured in feet; this is
28 a consistent issue related to Appellant’s allegations—the number of stories do not matter, a building could be two
stories but 65 feet tall.

1 additional 10 feet to all properties (Hearing Examiner Recommendation, Findings 9-10, p, 3).

2 Based on these findings of fact, the Hearing Examiner concluded:

3 The proposed development would be consistent with the predominant height and scale of
4 nearby newer development, which is representative of the area's overall development
5 potential.

6 Hearing Examiner Recommendation, Conclusion 21, p. 8.

7 Indeed, the Examiner's findings and conclusions are supported by substantial evidence in
8 the record. The predominant zoning designation in the area is 65-foot tall. There are several
9 buildings that are 65-foot tall in the area (see Exhibit 30, pp. 4-5). The newer developments are
10 what the Examiner focused on, because these newer buildings are more representative of the
11 area's overall development potential. The Appellant's statements are without support of the
12 substantial evidence in the record.

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14 Finally, the Appellant argues that a 65-foot tall building should not be considered
15 relevant, because the rezone is to NC3P-75 M1 and "there is no Property Use and Development
16 Agreement (PUDA) approved by the City Council at this time..." Appeal, pp. 5-6. This
17 statement reflects a misunderstanding of the process and the proposal. Contract rezones are a
18 "contract" between the City and the Applicant where an Applicant may agree to self-imposed
19 restrictions (in this case a height restriction) in exchange for a rezone. See SMC 23.34.004. It
20 would not be proper procedurally for a PUDA to have been completed yet, as it is only the City
21 Council who can approve a rezone and require the execution of a PUDA. Again, the Appellant's
22 claims are without support of the substantial evidence in the record or the code, and they must be
23 rejected.
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26 **7. The Proposed Height is Compatible with Surrounding zoning.**

1 Appellant alleges that the proposed project height of 65 feet is not compatible with
2 surrounding zoning. This is not supported by the substantial evidence in the record.

3 As previously stated, the Project site is on the border between existing 40-foot zoning to
4 the east and the north, and 65-foot tall zoning to the east and to the south. In addition, a contract
5 rezone was approved to change the zoning of a parcel kitty-corner from the site from NC3P-40 to
6 NC3P-65, essentially the same request as the current rezone. Exhibit 30, p. 4. Thus, half of the
7 border of the project site borders 40-foot zoning, and half of it borders 65-foot zoning. Clearly
8 the 65-foot height limit is compatible with existing zoning.

9 Appellant also makes an argument that the site is in a “view corridor” to the west of the
10 rezoned property because all of the buildings to the west are built to lower heights. There is no
11 evidence at all to support the idea of a view corridor; there are no SEPA-protected views
12 impacted by the Project, and there is no “view corridor” by which private views are magically
13 protected by zoning. This argument must be rejected.

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17 **8. Appellant misunderstands the contract rezone standards.**

18 Throughout the appeal, Appellant argues that because (in her opinion) a rezoned criterion
19 has not been met, the individual criterion alone is grounds for denial of the contract rezoned. The
20 code explicitly states the opposite. See SMC 23.34.007 (emphasis added):

21 Rezone evaluation.

- 22 A. The provisions of this chapter apply to all rezones except correction of mapping
23 errors. In evaluating proposed rezones, the provisions of this chapter shall be
24 weighed and balanced together to determine which zone or height designation best
25 meets those provisions. In addition, the zone function statements, which describe the
26 intended function of each zone designation, shall be used to assess the likelihood that
27 the area proposed to be rezoned would function as intended.
- 28 B. No single criterion or group of criteria shall be applied as an absolute requirement or
test of the appropriateness of a zone designation, nor is there a hierarchy or priority of

1 rezoning considerations, unless a provision indicates the intent to constitute a
2 requirement or sole criterion.

3 Thus, even if the contract rezoning did not meet a specific criterion, a contract rezoning can
4 be approved by weighing and balancing several factors; no individual criterion is given priority.
5 Appellant misunderstands the criteria outlined in SMC 23.34.008. Further, the Hearing Examiner
6 correctly found that the Project met all the criteria. The Appellants unsupported claims must be
7 dismissed.

8 **III. CONCLUSION**

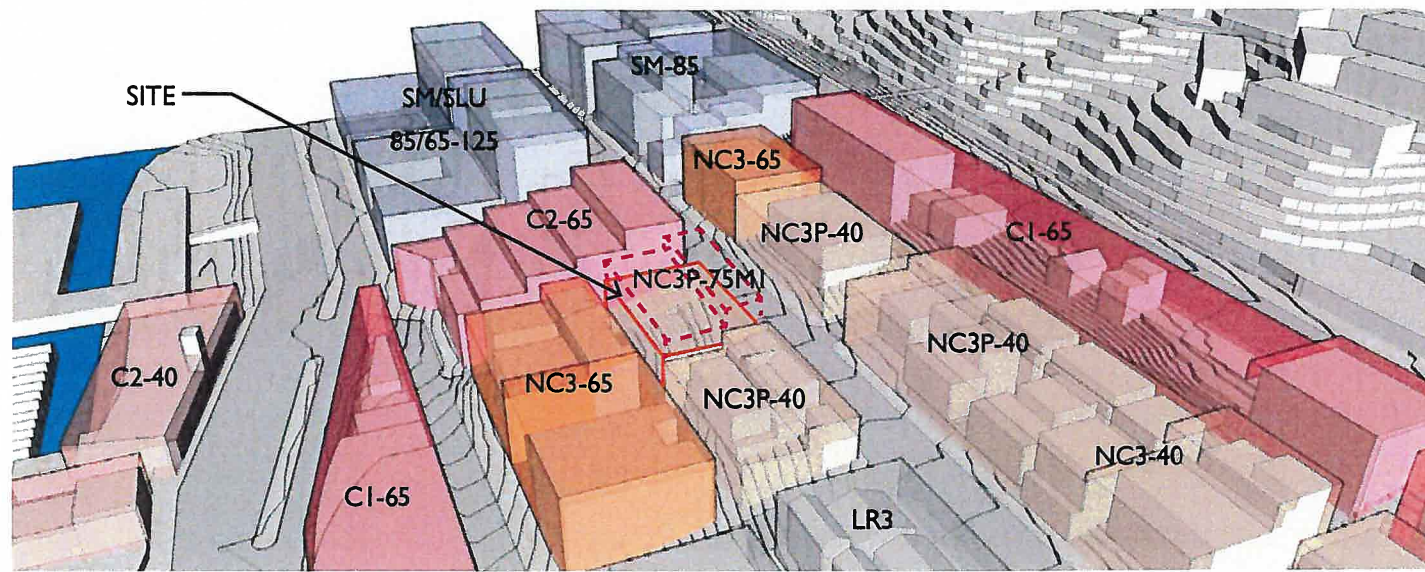
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10 The Hearing Examiner's recommendation is supported by substantial evidence in the
11 record. The Appellant has failed to support its allegations with clear and convincing evidence
12 that an error has been made. As a result, the appeal must be rejected, the motion to supplement
13 should be denied, and the contract rezoning must be approved.

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16 DATED this 27th day of November, 2017.

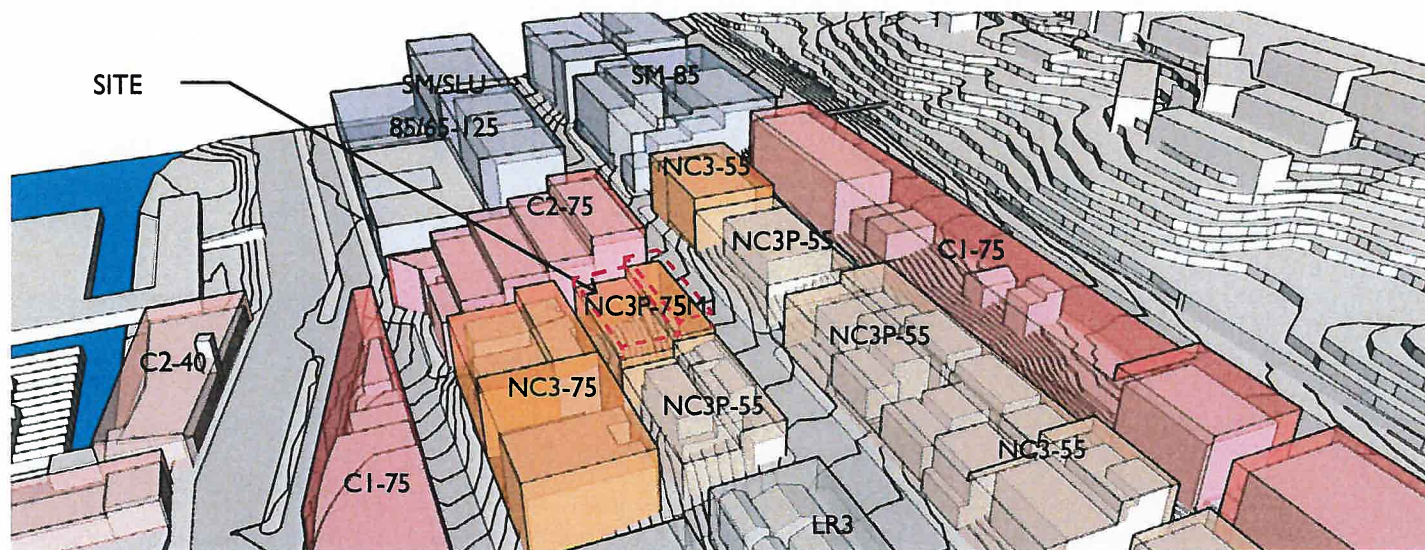
17 MCCULLOUGH HILL LEARY, P.S.

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19 By: 

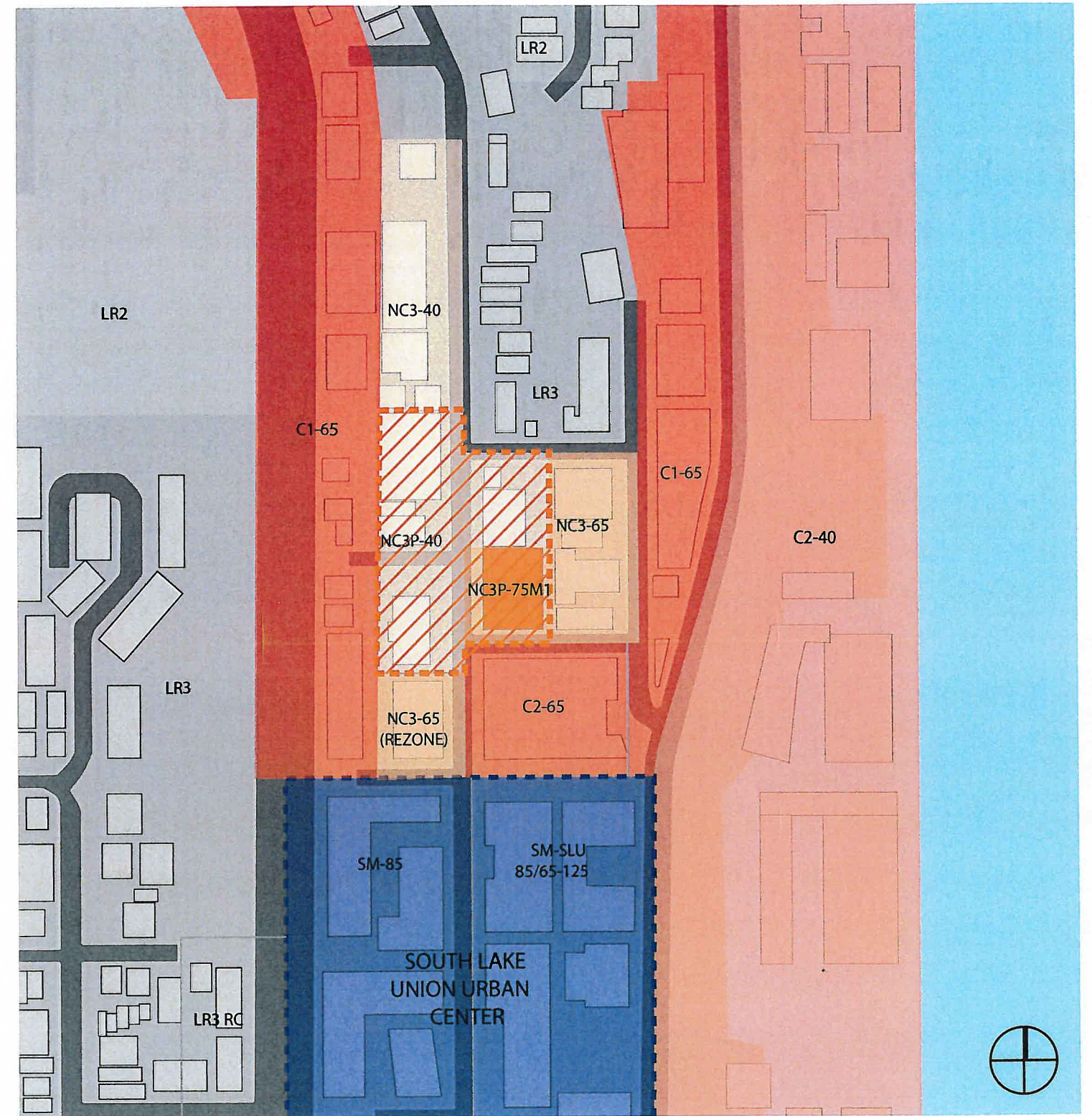
20 _____
21 Jessica M. Clawson, WSBA #36901
22 Attorneys for Applicant



MASSING WITH CURRENT NC3P-40 ZONING



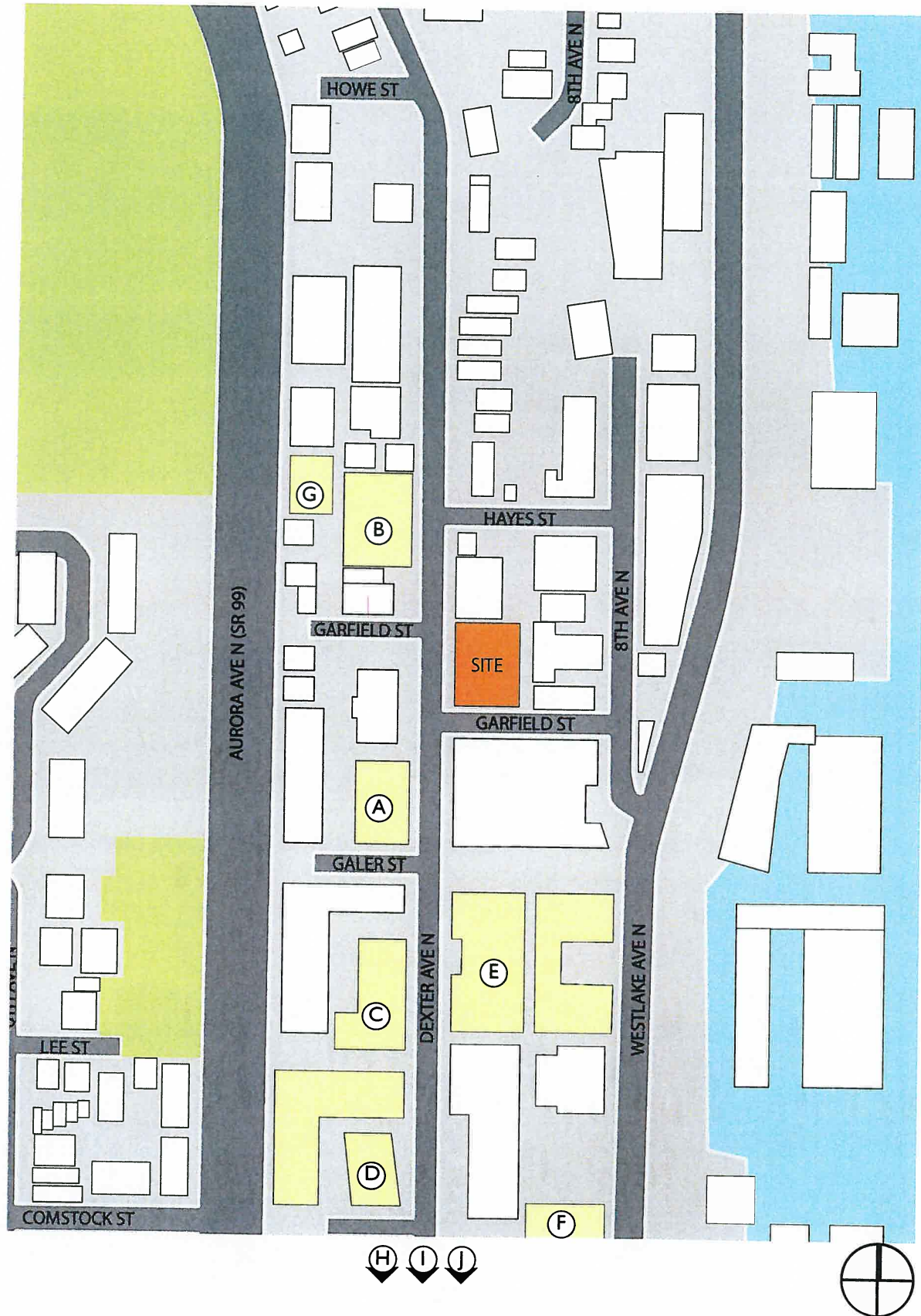
MASSING WITH PROPOSED MHA NC3P-75 MI ZONING



LR2	C2-40	NC3-40/NC3P-40	SM-85/SM-SLU 85/65-125
LR3/LR3 RC	C1-65/C2-65	NC3-65/NC3P-65	PEDESTRIAN-DESIGNATED ZONE

Zoning Map Key

NEIGHBORHOOD CONTEXT ANALYSIS



(A) 1511 Dexter Avenue N MIXED USE



(B) 'N' Habit Dexter 1701 Dexter Avenue N MIXED USE



(C) Shea Properties 1319 Dexter Avenue N MIXED USE



(D) 1405 Dexter Avenue N MIXED USE



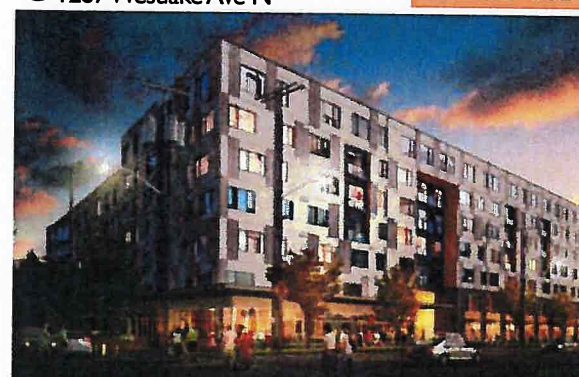
(E) Westlake Steps 1287 Westlake Ave N MIXED USE



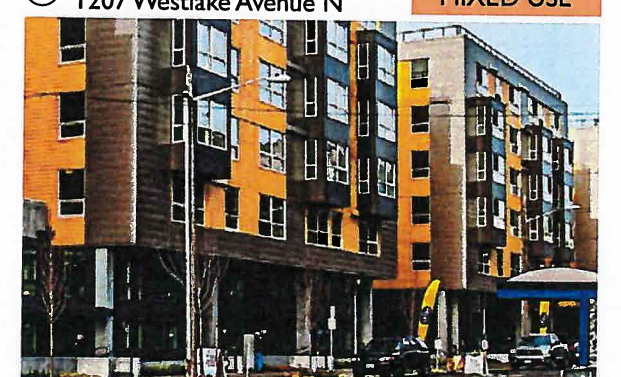
(F) Westlake Steps 1207 Westlake Avenue N MIXED USE



(G) 1622 Aurora Avenue N MIXED USE



(H) 810 Dexter Avenue N MIXED USE



(I) Union SLU 905 Dexter Avenue N MIXED USE



(J) Dexter Station COMMERCIAL