

The Honorable Patrick Oishi
Noted for Hearing: June 21, 2019, 10:00 a.m.
With Oral Argument
Moving Papers

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SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

1426 FIRST AVENUE LLC,		
	Plaintiff,	No. 18-2-21872-1 SEA
v.		
CITY OF SEATTLE,		
	Defendant.	

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

I. INTRODUCTION & RELIEF REQUESTED 1

II. STATEMENT OF FACTS 2

 A. The Property and Building 2

 B. Prior Zoning..... 3

 C. The Plan to Kill Redevelopment 4

 D. The City Took Control of Any Change in Use..... 7

 E. The Process for Historical District Controls Was Ignored 8

III. STATEMENT OF ISSUES 9

 A. Issues 9

 B. Procedural Setting 9

IV. EVIDENCE RELIED UPON 9

V. ARGUMENT 10

 A. The Ordinance Is an Illegal Spot Zone..... 10

 B. The Ordinance Violates Substantive Due Process 13

 1. The Ordinance Fails Each Test..... 14

 2. Similar Cases Resulted in Invalidation..... 17

 C. The Ordinance Violates Equal Protection Guarantees 19

 1. Strict Scrutiny Applies 19

 2. The Ordinance Fails Even Under the Rational Basis Test 20

 3. The Owner Was Not Afforded the Protection Other Owners
 Were Offered When the Historical District Was Formed 21

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

D. The City Violated Procedural Due Process 22

VI. CONCLUSION 25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
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I. INTRODUCTION & RELIEF REQUESTED

The City of Seattle enacted an ordinance on August 13, 2018, not to abate a safety crisis but because it wanted a private music venue – the Showbox on First Avenue – to be controlled by the City. Ordinance 125650 (“Ordinance”) attached hereto. To accomplish that goal, the City grabbed the parcel where the Showbox sits – and only that parcel – out of its own prior lawful zoning, which allowed for high-rise development, and subjected it instead to drastically more onerous Pike Place Market Historical District controls. The move prevented vesting under existing zoning and prevented an application for a permit to be processed by Seattle’s Department of Construction and Inspections (“SDCI”). The Ordinance was not a change that came about through slow, thoughtful “Seattle Process” – no. The well-planned, long term zoning for the property was undone in just two weeks with no meaningful public hearing.

The undisputable material facts show that in 2006 the property was zoned to 400’ in allowable height. In 2017, the year just prior to the Ordinance, the property and surrounding ones were upzoned by the City to allow for 440’ in support of increased affordable housing funding. That upzone process went through three years of analysis and public input. In contrast, the only thing that led to the 2018 ordinance was two weeks of poster waiving rallies led by Seattle Councilmember Sawant to “kill” a proposed redevelopment sale.

The City’s grab of control of the property was unlawful. This Court should void the Ordinance on grounds of spot zoning, substantive due process violation, equal protection violation, and for procedural due process violations. Spot zoning – applying a different set of rules to one property compared to existing comprehensive zoning – has been universally condemned both by Washington courts and other jurisdictions. Spot zones are illegal and void. Further, the Ordinance imposes too heavily on the owner’s ability to exercise and enjoy fundamental ownership rights in leasing, using and redeveloping the property. For this reason, it is void under Washington and federal substantive due process law. The Ordinance

1 also violates the federal and state equal protection guarantees. Finally, the usual process that
2 protects against illegal arbitrary and capricious actions were ignored in the City’s rush, and
3 the enactment violated federal and state procedural due process protections.

4 This motion seeks determinations on liability on these claims. Other claims and
5 amount of damages are reserved for trial, if needed. *See* Statement of Issues, *infra*.

6 **II. STATEMENT OF FACTS**

7 **A. The Property and Building.**

8 1426 First Avenue LLC owns a parcel of property on the east side of First Avenue in
9 Seattle. Decl. of Roger Forbes in Supp. of Mot. for Partial Summ. J. (“R. Forbes Decl.”) ¶ 2.
10 Its address is 1412-1426 First Avenue. Plaintiff leases subsections of the aged building on the
11 property to business operators of a performance hall (Showbox), the Blarney Stone Pub, a
12 pawn/jewelry shop and a Chinese-food restaurant. *Id.* ¶ 8. The property was purchased for
13 investment purposes as a redevelopment site because the current low slung-two story building
14 is of old unreinforced masonry rated by the City at high risk of collapse. *Id.* ¶ 3 & Ex. A. It
15 has been modified and remodeled many times since first constructed in (circa) 1916. *Id.* ¶ 3.
16 In 2006 the City of Seattle conducted a professional historical survey of the property and
17 determined it was not worthy of Landmark nomination and then in 2007 wrote a detailed
18 letter to the owner that redevelopment of the site would *not* need to go through the Landmark
19 process. Decl. of John Tondini in Supp. of Pl.’s Mot. for Partial Summ. J. (“Tondini Decl.”)
20 Ex. 1 at 3, Ex. 2 at 6; R. Forbes Decl. ¶ 4 & Ex. B. That survey was conducted by a former
21 Pike Place Historical District Coordinator (Kate Krafft)¹ and the letter was signed by the
22 City’s Chief Historic Preservation Officer. R. Forbes Decl., Ex. B. Not only was it not
23 Landmark-worthy, it was not even considered in the same class as “historic” theaters in
24 Seattle. In 2011, Seattle created a “Historic Theater District,” designating five performance

25 _____
26 ¹ *See* Ex. 3 (S. Sodt Dep.) at 13-14, 62 & Ex. 4. The coordinator is a City employee in charge
of organizing the activity of the Commission and attending each Commission meeting. *Id.*,
Ex. 3 (Sodt Dep.) at 15.

1 venues for special treatment under this classification. Tondini Decl., Ex. 5 (Resolution
2 31341). The Showbox was not worthy of designation. *Id.*

3
4 **B. Prior Zoning.**

5 When the area-wide zoning throughout downtown was modified in 2006, the site was
6 upzoned to 400 feet. Decl. of Richard Settle in Supp. of Pl.’s Mot. for Partial Summ. J.
7 (“Settle Decl.”) ¶ 6; Tondini Decl., Ex. 6 (Staley Dep.) at 43-44, 52. In 2017, the site was
8 upzoned again to 440 feet for residential use. Settle Decl. ¶ 5; Seattle Ordinance 125291;
9 Tondini Decl., Ex. 6 (Staley Dep.) at 36, 43-45, 52. That upzone was part of the Mandatory
10 Housing Affordability (“MHA”) ordinance, which incentivized taller development so that the
11 City could collect affordable housing dollars for housing programs. Seattle Ordinance
12 125291; Tondini Decl., Ex. 6 (Staley Dep.) at 45, 50-53 & Ex. 7. Public hearings and the
13 process for that upzone took place from 2014 to 2017. Tondini Decl. Ex. 6 (Staley Dep.) at
14 22 (2014 start), 44 (2017), 54-60 (process) & Ex. 8 at COS010926. None of the properties
15 across First Avenue from the Market was exempt from the upzone. *Id.*, Ex. 9.

16 During that MHA debate the specific parcel at issue here (the Showbox site) was
17 identified on City Planning Department maps and PowerPoints used with the City Council
18 and others and judged as “likely to be redevelopable” to 44 stories tall. *Id.*, Ex. 6 (Staley
19 Dep.) at 60-63, 69-70, 72-77, 98-100, Exs. 10-14 & Ex. 15 (“likely to be redevelopable”).
20 The City also projected that the redevelopment would create a payment of approximately \$5
21 million for affordable housing. *Id.*, Ex. 6 (Staley Dep.) at 91-92, Ex. 8 at COS010935.

22 Thus, the high likelihood of redevelopment for the property was anticipated, well-
23 known and the product of the City’s own incentives. And no one in City government or at the
24 Pike Place Historical Commission said anything at the time about expanding the Pike Place
25 Market Historical District. *Id.*, Ex. 3 (Sodt Dep.) at 67, 99.

26 Consistent with the 440’ comprehensive zoning plan for the site, other buildings have
been redeveloped and built into high-rises nearby. Within a few block radius, there are eight

1 buildings at or over 24 stories tall, including the 25-story Newmark Building immediately
2 adjacent to it and a 440' building called West Edge on the next block east. R. Settle Decl. ¶ 7.
3 The Hahn Building, on the corner of First and Pike is slated for demolition and redevelopment
4 into a 14-story hotel right at the entrance to the Market. Tondini Decl., Ex. 44; R. Forbes
5 Decl. ¶ 9. The Hahn Building was not Landmarked nor put into the Historical District.
6 Tondini Decl., Ex. 16 (McAuliffe Dep.) at 81-83 & Ex. 45. Yet, when news reached City
7 Hall on July 25, 2018 that plaintiff had contracted to sell its property for \$41 million to Onni
8 (a building developer) so that Onni could build that precisely-predicted 44-story residential
9 building (*id.*, Ex. 17), the City Council rushed to create a political, arbitrary barrier to this
10 redevelopment. *Id.*, Ex. 18 (Sawant press release), Ex. 19 (“Demands” and “Pain Point”
11 memo).

12 **C. The Plan to Kill Redevelopment.**

13 In just the space of time between August 3 and August 13, the City set about to pass
14 an ordinance for the blatant and express purpose to “kill” the Onni deal.² As a City document
15 bluntly puts it: “This is CM Sawant’s proposal to adjust the boundaries ... specifically for the
16 purposes of ‘killing’ the Omni [sic] Development potential development.” *Id.*, Ex. 22 at 2.

17 The Historical District Commission had never asked for an expansion to cover the
18 Showbox. A proposal in 1993 to cover certain east of First Avenue properties *did not* include
19 the Showbox. *Id.*, Ex. 4. But, even that 1993 expansion did not happen. In 2018, the Pike
20 Place Market PDA did not think expansion was a good idea and told the City Council just
21 that. *Id.*, Ex. 23 (PDA letter). The State office of Historic Preservation in Olympia also told
22 the City that the proposed Ordinance was procedurally improper and subject to attack as
23 arbitrary and capricious. *Id.*, Ex. 24 (State letter). The City’s own Chief Historic
24 Preservation Officer was out on vacation the two weeks prior to the vote. *Id.*, Ex. 3 (Sodt

25 _____
26 ² A broader expansion ordinance was first introduced on August 6. Tondini Decl., Exs. 20-21 (“[T]his is specifically to ensure that Onni can’t vest and do any development of the Showbox site.”).

1 Dep.) at 20. And the District Commission did not ask for expansion and took no position on
2 the expansion. *Id.*, Ex. 3 (Sodt Dep.) at 67, 99, Ex. 25 (8/8/18 Tr.) at 35, Ex. 16 (McAuliffe
3 Dep.) at 84-85.

4 The plan to kill the development was accomplished by down zoning just the one
5 property from an allowed 440-foot building to being essentially frozen in time by including it
6 in the Historic District where the Commission takes over effective ownership control of use
7 and any redevelopment. *Id.*, Ex. 26 at COS0114888 (“Historic District designation is one of
8 the few tools the City has to govern *use* of a site.” (emphasis in original)). *See also id.* Ex. 46
9 at 2 & Ex. 3 (Sodt Dep.) at 68-70 (Landmarking does not control use). The Council realizing
10 that Landmarking was unlikely to happen on the merits (given the reality of the lack of
11 historic integrity recognized in the 2006 survey and 2007 letter), and realizing that
12 Landmarking would not prevent redevelopment and preserve *the use* of the building as a
13 concert venue, decided to take just this one single lot on the east side of First Avenue and haul
14 it into the Historical District where it would be controlled by the City’s own Commission. *Id.*
15 (Sodt. Dep.) at 43-49. The plan to take control over the Showbox was made plain:

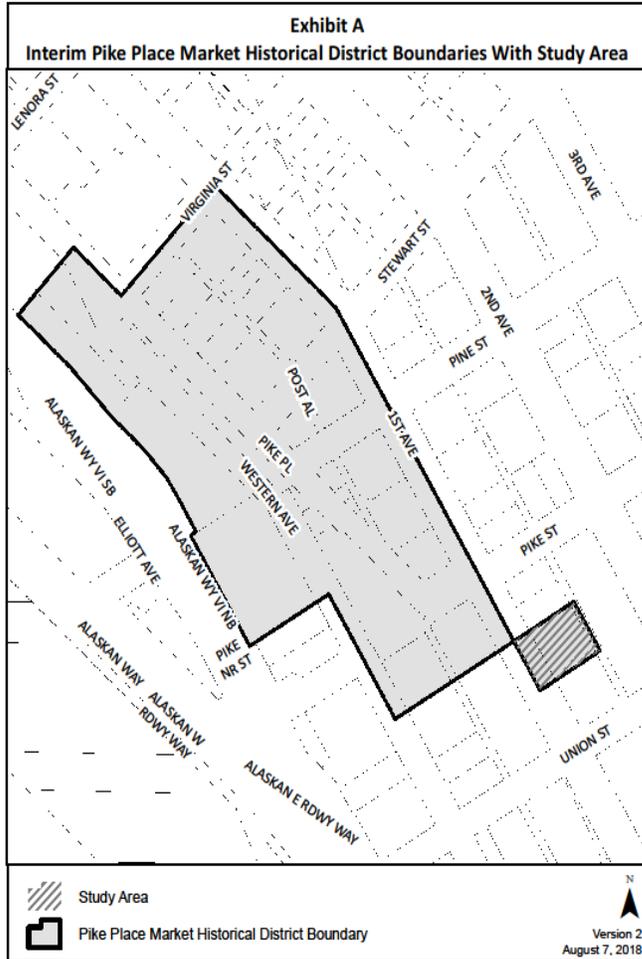
16 CHAIR BAGSHAW: So my understanding -- Erin, you may want
17 to dive in here and help us with this -- that in the landmark
18 provisions as we have them now, **that the use cannot be**
19 **controlled by the landmark designation. That we may be able**
to have exterior and interior, but landmarking does not
guarantee the continued use of music in that venue.

20 ERIN: That’s correct. So the Landmarks Board has purview over
21 making alterations to the physical features of a landmark but do
not have purview over a tenant or a type of use.

22 CHAIR BAGSHAW: **Right. And in contrast to that, we have**
23 **our Pike Place Market Historical Commission where the**
24 **controls of use could apply. Which is one of the reasons that**
Councilmember Sawant has been pushing so hard to get this
within the district, because the commission oversees use.

25 *Id.*, Ex. 25 at 78 (emphases added).
26

1 A map was included with the final Ordinance that showed by a hatch-marked box the
2 sole property subject to the Council’s action:
3



20 In creating the spot zone for just the one property on the east side of First Avenue,
21 various City Councilmembers flatly rejected the developer’s idea of potentially building a
22 new performance space within the new development. *See id.*, Ex. 27 at PRR_000767. The
23 developer’s idea was derided as a “hollow effort.” *Id.*, Ex. 28 at 33. Councilmember Herbold
24 echoed comments that called for a “drag out fight” against the redevelopment. *Id.*, Ex. 29
25 (Facebook 7/25/18). Councilmember Bagshaw said that the City would do everything in its
26 power to prevent the development with whatever tools were available, and “the ones we

1 haven't figured out yet." *Id.*, Ex. 25 at 90. The tool used was an illegal spot zone and other
2 invasions of constitutional rights.

3 At least one councilmember was acutely aware of the legal risks. *Id.*, Ex. 30 at
4 PRR_000669-70 (Councilmember Mosqueda text file). "If y'all vote today, the owner's
5 property value effectively plummets as a result of the effective downzone, opening the door to
6 a suit for that multimillion dollars loss in value." *Id.* at PRR_000670. *See also id.*, Ex. 31 at
7 PRR_000692, Ex. 47 (Maddux Dep.) at 34-39. A draft of the Mayor's signing statement on
8 the Ordinance also stated that the "Council's premature action ... may expose the City to
9 unnecessary legal risk." *Id.*, Ex. 32 at COS0114922.

10 But the Council acted and its ploy worked. Onni canceled the original \$41 million-
11 dollar contract after the Ordinance passed and went into effect. R. Forbes Decl., Ex. C
12 (Contract cancellation letter).

13 **D. The City Took Control of Any Change in Use.**

14 The District Commission (under the Seattle Department of Neighborhoods) rules as
15 overlord over all aspects of buildings in the District. SMC 25.24.030-060; Tondini Decl., Ex.
16 3 (Sodt Dep.) at 43-49. Any redevelopment, change in use, tenant, business ownership or any
17 other kind of change in regard to the property – *down to even interior paint color* – is
18 controlled by the Commission and its Guidelines for District properties. Tondini Decl., Ex.
19 16 (McAuliffe Dep.) at 29-33, Ex. 46 at 2, Ex. 33 attaching "Guidelines." And, the Ordinance
20 closed the permit application process at SDCI. *Id.*, Ex. 16 (McAuliffe Dep.) at 29-32, Ex. 3
21 (Sodt Dep.) at 45-46, SMC 25.24.060(B)(1). As the Guidelines plainly state: "The Pike Place
22 Market Historical Commission is responsible for preservation and protection of historic
23 uses...." *Id.* § 1.1. "Changes in use" including "changes in ownership" require Commission
24 approval. *Id.* § 1.3. "Compliance with use and design terms ... is required." *Id.* § 1.7. *See*
25 *also id.* Ex. 16 (McAuliffe Dep.) at 41-72, 107-08, 115-16. Historic buildings are to be
26 restored (Guidelines §§ 3.2.13, 3.9) and anything new is either prohibited (*id.* § 3.2.6) or must

1 be to “scale and form to surrounding structures.” *Id.* §§ 3.2.2, 4.2. Any lease by the owner
2 must now be reviewed and approved by the Commission. *Id.* § 2.10.2, Tondini Decl. Ex. 3
3 (Sodt Dep.) at 47-49.

4 Presently the Showbox concert venue is run under a lease to a subsidiary of the AEG
5 Group, a worldwide sports and entertainment conglomerate. R. Forbes Decl. ¶ 8; Tondini
6 Decl. Ex. 34.³ Because of the Ordinance, the Commission now controls any change in tenant,
7 change in business, and change in interior paint color for the property to name just a few of
8 the controls. The Commission even controls displays (Tondini Decl., Ex. 33 § 3.4.3) and
9 product choices and prices. *Id.*, Ex. 16 (McAuliffe Dep.) at 65, 70-72, 128-29. Thus, the
10 Ordinance strips away the owner’s control over who can be a tenant, the types of businesses
11 the owner wants to operate at the property, how the business is run, as well as how the
12 property is maintained, heated and cooled, let alone how it is to be used or redeveloped. As
13 the City’s own documents say, the Ordinance had its effect to “kill” the redevelopment of the
14 property to its highest zoned use to 440’. *Id.*, Exs. 20, 21 & 22 at 2.

15 **E. The Process for Historical District Controls Was Ignored.**

16 These strict Historical District controls began in the mid-1970s when the District was
17 formed under powers of eminent domain. R. Settle Decl. ¶ 10. The City acquired almost all
18 of the Market properties by eminent domain. *Id.* ¶ 11. The City was free to impose whatever
19 restrictions it wanted to impose on itself regarding properties that it had acquired and passed
20 along to the Market PDA. *Id.* In contrast, here the City did not offer to buy the property. *Id.*
21 ¶ 12; R. Forbes Decl. ¶ 7. Instead, the City yanked the property’s control from the owner and
22 placed that control into its own hands – the Mayor-selected Commission, each of whom must
23 have “a demonstrated sympathy” for “preservation” and “continuance of uses.” SMC
24 25.24.030.

25 _____
26 ³ The Showbox already runs afoul of the Guidelines because AEG is not an “owner operator”
at the Showbox. *Id.*, Ex. 33 § 2.6.1. Moreover, because AEG did not begin its entertainment
operations at the market, it cannot operate there because it has locations elsewhere. *Id.*

1 Long-established law protects private landowners from such over-reach by the
2 government. Plaintiff now seeks summary judgment as to some of its claims, which if
3 granted will void the Ordinance. Certain other, more claim-specific, facts are identified in the
4 legal analysis below.

5 **III. STATEMENT OF ISSUES**

6 **A. Issues.**

7 Pursuant to CR 56(a) questions of law and liability based on undisputed material facts
8 can be determined in advance of trial. These issues include:

- 9
- 10 1. Was the Ordinance an illegal spot zone?
 - 11 2. Does the Ordinance violate Plaintiff's substantive due process rights?
 - 12 3. Does the Ordinance violate the Equal Protection Clause?
 - 13 4. Did the Ordinance's passage violate Plaintiff's procedural due process rights?

14 **B. Procedural Setting.**

15 On October 19, 2018, Judge Roberts ruled on the City's Motion for Partial Summary
16 Judgment. Dkt. 13. The City did not move on all claims, instead moving on three. *Id.* The
17 Court granted dismissal of the Takings claim, but denied the motion as to the Appearance of
18 Fairness claim and Compelled Speech/First Amendment claim, finding as to both that that
19 there "are material issues of disputed fact." Dkt. 39, Order at 2. The claims at issue in this
20 motion are the claims not addressed in the City's earlier motion and the order.⁴

21 **IV. EVIDENCE RELIED UPON**

22 Prior pleadings herein; Tondini Declaration; Roger Forbes Declaration; Eric Forbes
23 Declaration and Richard Settle Declaration and all exhibits to each filed herewith.

24
25 _____
26 ⁴ The Appearance of Fairness claim and related due process claim of bias of the Council, and
Compelled Speech/First Amendment claim already are reserved for trial. Also reserved for
trial are issues related to Section 1983 damages.

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V. ARGUMENT

A. The Ordinance Is an Illegal Spot Zone.

In 2006 and in 2017, the parcel of property where the Showbox sits was zoned and then upzoned again to a residential use height of 440'. Tondini Decl., Ex. 6 (Staley Dep.) at 43-45. No zoning conditions in the area changed since the 2017 upzone. *Id.* at 33-34. In 2018, the City still needed affordable housing and still encouraged dense high-rise growth. *Id.* In fact, even after passage of the Ordinance at issue, the City continued to implement the MHA upzone throughout the City with the neighborhood upzone Ordinance being passed in March 2019. Seattle Ordinance 125791 (2019 MHA neighborhood upzone). Additionally, the preexisting zoning for all of the east side of First Avenue near the Pike Place Market shows a logical plan: the properties on First Avenue directly across from the Historical District have lower height limits than those adjacent, but not directly across the street from the Historical District. R. Settle Decl. ¶ 6; Tondini Decl., Ex. 6 (Staley Dep.) at 36-42, Ex. 35 (map). This systematic and longstanding difference was the product of thoughtful zoning and it contrasts with the rushed rezone based solely on popular opinion. Tondini Decl., Ex. 6 (Staley Dep.) at 40-42.

Despite no change in neighborhood conditions, the City in the span of two weeks spot zoned just one piece of property to prevent vesting and submission of a permit application to SDCI by putting the Historical District controls onto the property. *Id.*, Ex. 16 (McAuliffe Dep.) at 29-32.

In *Pierce v. King County*, 62 Wn.2d 324, 338, 382 P.2d 628 (1963), the State Supreme Court stated that spot zoning is “an evil in the field of municipal growth.” “It has generally been held that spot zoning is improper, and that one or two building lots may not be marked off into a separate district or zone and benefitted by peculiar advantages *or subjected to*

1 peculiar burdens not applicable to adjoining similar lands.” *Id.* When a City engages in spot
2 zoning, the ordinance is deemed void. *Id.*

3 This was the result in *Woodcrest Investments Corp. v. Skagit County*, 39 Wn. App.
4 622, 694 P.2d 705 (1985). Woodcrest owned land in Skagit County that was zoned for
5 residential development. Community residents filed a petition asking that some of that land
6 be down-zoned to rural to block development. The County approved the down-zone.
7 Woodcrest challenged the down-zone as an illegal spot-zone. The Superior Court and Court
8 of Appeals agreed: “The trial court concluded that the rezone constituted a ‘site specific
9 rezone’ and the record ‘fail[ed] to disclose that conditions had substantially changed since the
10 most recent zoning enactment.’” *Id.* at 628. The down-zone was declared null and void. *Id.*
11 at 628, 630. That case precisely fits the circumstances here, where just one year prior the
12 precise property and other likes it were upzoned pursuant to a comprehensive plan of zoning.
13 Indeed, on maps prepared by the City, the precise property was designed as likely to be
14 redeveloped to 44 stories. Tondini Decl., Ex. 6 (Staley Dep.) at 60-63, 69-70, 72-77, 98-100
15 & Exs. 10-15.

16 Public opinion is not a legitimate basis for a spot zone. In *Sunderland Family*
17 *Treatment Services v. City of Pasco*, 127 Wn.2d 782, 903 P.2d 986 (1995), the Court rejected
18 popular opposition as a basis for denying a permit. “In fact, the City’s denial appears to rest
19 upon neighborhood opposition.... While the opposition of the community may be given
20 substantial weight, it cannot alone justify a local land use decision.” *Id.* at 797. Washington
21 law is consistent with other states.

22 In *Ross v. City of Yorba Linda*, 1 Cal. App. 4th 954, 2 Cal. Rptr. 2d 638 (1991), the
23 City argued its spot zone was supported public opinion. That rationale was rejected.

24
25 If public opinion by itself could justify the denial of constitutional
26 rights, then those rights would be meaningless. The most arbitrary
treatment of an individual or irrational legislative classification
would pass constitutional muster under the “rational basis” test if
all that need be shown is support by some segment of the public.

1 *Id.* at 964.

2 In *City of Miami Beach v. Robbins*, 702 So. 2d 1329 (Fla. Dist. Ct. App. 1997), the
3 City passed an ordinance which rezoned Robbins’s land, as well as the two blocks adjacent to
4 his property. The court held that this rezoning constituted a reverse spot-zone. “Reverse spot
5 zoning occurs when a zoning ordinance prevents a property owner from utilizing his or her
6 property in a certain way, when virtually all of the adjoining neighbors are not subject to such
7 a restriction, creating, in effect, a veritable zoning island or zoning peninsula in a surrounding
8 sea of contrary zoning classification. Reverse spot zoning is invalid, as it is confiscatory.” *Id.*
9 at 1330.

10 Local governments cannot dictate specific uses of a property. *See Palmer Trinity*
11 *Private School, Inc. v. Village of Palmetto Bay*, 31 So. 3d 260 (Fla. Dist. Ct. App. 2010)
12 (voiding ordinance as spot zone):

13 The Village’s actions were legally impermissible.... A zoning
14 authority’s insistence on considering the owner’s specific use of a
15 parcel of land constitutes not zoning but direct governmental
16 control of the actual use of each parcel of land which is
17 inconsistent with constitutionally guaranteed private property
18 rights. *Porpoise Point P’ship v. St. Johns County*, 470 So. 2d 850,
19 851 (Fla. 5th DCA 1985). *See also Debes*, 690 So. 2d at 702.

20 *Id.* at 263.

21 Like the situation here, the New Jersey case of *PC Air Rights, LLC v. Mayor & City*
22 *Council of the City of Hackensack*, No. L-5350-05, 2006 WL 2035669 (N.J. Super. Ct. July
23 20, 2006), addressed a rezone that thwarted a high-rise apartment building even though other
24 such structures already were in the same area. “The area that surrounds the property in
25 question contains a mixture of residential uses of varying degrees of density. The focal
26 feature, however, of the neighborhood is the Prospect Avenue corridor of high-rise apartment
buildings that stretch north and south on both sides of the property in question.” 2006 WL
2035669, at *2. The City in response to redevelopment opposition enacted a new zoning

1 ordinance that down-zoned the property. The court held that this was an illegal reverse spot-
2 zone. *Id.*, at *6.

3 Each and all of these relevant authorities compels the legal conclusion that the
4 Ordinance is an invalid spot zone. Based on Washington law, and similar rulings across
5 jurisdictions, the City’s action here is indisputably an illegal spot zone. The illegal treatment
6 applied to just this one property should be voided immediately.

7 **B. The Ordinance Violates Substantive Due Process.**

8 Washington Courts follow the analysis laid out in *Presbytery of Seattle v. King*
9 *County*, 114 Wn.2d 320, 787 P.2d 907 (1990) and *Guimont v. Clarke*, 121 Wn.2d 586, 854
10 P.2d 1 (1993) to evaluate Washington and Federal constitutional substantive due process
11 claims. The U.S. Supreme Court has long held that restraints on fundamental property rights
12 are subject to heightened scrutiny under due process clause’s protection of substantive rights.
13 *See, e.g., Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S. Ct. 114, 71 L. Ed. 303
14 (1926) (A restriction on owner’s rights in property must substantially advance a legitimate
15 public purpose.).

16 Government “may not, under the guise of the police power impose restrictions that are
17 unnecessary and unreasonable upon the use of private property or the pursuit of useful
18 activities.” *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121, 49 S. Ct.
19 50, 73 L. Ed. 210 (1928) (voiding a Seattle ordinance that was used to block a private
20 redevelopment of property). *See also Manufactured Hous. Cmty. of Wash. v. State*, 142
21 Wn.2d 347, 363-65, 13 P.3d 183 (2000).

22 Because Washington’s due process clause is coextensive in language with the
23 Fourteenth Amendment, Washington courts have cited to various Supreme Court cases and its
24 own precedents to hold that a restriction on property must (1) address a public problem, (2)
25 tend to solve the problem, and (3) not be unduly oppressive upon the person regulated. *See*,

1 e.g., *Presbytery*, 114 Wn.2d at 330-31. If the regulation fails any of the three questions, it
2 violates substantive due process and is void.

3 **1. The Ordinance Fails Each Test.**

4 As to whether the Ordinance addresses a public harm and thus has a legitimate public
5 purpose, the answer is “no.” Redevelopment to 440 feet is precisely the public good that the
6 comprehensive downtown-wide MHA upzone was aiming for. Tondini Decl., Ex. 6 (Staley
7 Dep.) at 106-108, and Ex. 8 at COS010931. The property’s use as urban residences is
8 allowed and favored by City policy. Ex. 6 (Staley Dep.) at 33-34, 106-08. Indeed, the City
9 predicted that lawful redevelopment of the site was “likely.” *Id.*, Ex. 6 (Staley Dep.) at 60-63,
10 69-70, 72-77 & Ex. 15. Instead the aim of the Ordinance was to “kill” a private contract for
11 sale – hardly a legitimate governmental function. *Id.*, Exs. 20-22. Acting for the benefit of a
12 vocal lobby is not a legitimate use of police power when the property owner is not harming
13 the environment or neighboring properties. *Sunderland*, 127 Wn.2d at 797. “While the City
14 can regulate the use of property so as not to injure others, a law that undertakes to abolish or
15 limit the exercise of rights beyond what is necessary to provide for the public welfare cannot
16 be included in the lawful police power of the government.” *Yim v. City of Seattle*, King Cnty.
17 Super. Ct. Case No. 17-2-05595-6 SEA Order re Mots. for Summ. J. (“*Yim* SJM Order”) at 6
18 (March 28, 2018) (*citing Ralph v. City of Wenatchee*, 34 Wn.2d 638, 644, 209 P.2d 270
19 (1949)).

20 As to inquiry two: the means do not achieve any purpose other than “killing” the Onni
21 redevelopment contract. The purpose stated in the Ordinance is to preserve historical and
22 cultural value. Ordinance § 1 ¶ F. However, the purpose of preserving eligible historical
23 landmark buildings is already covered by Seattle’s Landmark Ordinance, which this
24 Ordinance attempts to trump. SMC 25.12.020 (Landmark Ordinance). Instead of following
25 the procedure for landmarking (SMC 25.12.380-580), the Council ignored that process and
26 the Landmark criteria to instead subject this one property to special burdens outside of the

1 scope of the Landmark laws – assuredly because its own neutral and unbiased analysis in
2 2006 and 2007 was that the property was not even close to being landmarkable. R. Forbes
3 Decl., Ex. B. If the Ordinance is aimed at preserving old buildings which are not landmark
4 worthy, but which are near the Market, then the Ordinance still fails because it grabs only *one*
5 property and *not* any of the others up and down First Avenue across the from the Market. The
6 Ordinance’s own Council briefing papers listed multiple properties that were of the same
7 vintage, but none of the others were given the same burden under the Ordinance as this one
8 property. Tondini Decl., Ex. 36. A 1993 unadopted proposal for expansion included some
9 First Avenue properties, but not the Showbox, and thus the Ordinance was not achieving even
10 what the Commission had once proposed as “justifiable.” *Id.*, Ex. 4.

11 If the purpose of the Ordinance is to preserve music venues, it likewise fails. Venues
12 nearby like the Triple Door, the Moore, the Crocodile, to name just three similar venues
13 within mere blocks, are not included. Decl. of Eric Forbes in Supp. of Mot. for Partial Summ.
14 J. (“E. Forbes Decl.”) ¶ 4. Nor is Tula’s or the El Corazon included, which are concert
15 venues slated for redevelopment. *Id.*, Exs. A-B. A rationally designed ordinance would have
16 included these similar types of venues. Thus, the means chosen do not reasonably advance
17 any legitimate goal of the Ordinance. In other words, the Ordinance is arbitrary and
18 capricious and is not rationally related to any legitimate purpose.

19 Regarding the third test, the Supreme Court in *Presbytery* listed a series of non-
20 exclusive factors to consider regarding “unduly oppressive”:

- 21
- 22 • On the public’s side, the court considers:
 - 23 ○ The seriousness of the public problem
 - 24 ○ The extent to which the owner’s land contributes to it
 - 25 ○ The degree to which the proposed regulation solves it
 - 26 ○ The feasibility of less oppressive solutions
 - On the landowner’s side, the court considers:

- 1 ○ The amount and percentage of loss in land value
- 2 ○ The extent of remaining uses
- 3 ○ Past, present and future uses
- 4 ○ Temporary or permanent nature of the regulation
- 5 ○ The extent to which the owner should have been able to anticipate the
- 6 regulation
- 7 ○ How feasible it is for the owner to alter present or currently planned uses

8 Minor factual disputes will not defeat summary judgment as to this part of the test,
9 which need not be reached. “A substantive due process claim need not show that *no* viable
10 use of the property remains, but rather that any interference with property rights was irrational
11 or arbitrary.” *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 21, 829 P.2d 765 (1992) (citation
12 omitted). That is demonstrably the case here.

13 Again, even if it is argued that the “public side” of the Ordinance is preservation of
14 concert space in Seattle, then the Ordinance fails to rationally do that because it puts all the
15 burden of that goal *on one property* and does not subject any other concert space property to
16 the burden of preserving entertainment space, i.e., the aforementioned historic El Corazon,
17 Triple Door, Moore, and Crocodile. Similarly, the goal of promoting concert space could
18 have been achieved by requiring replacement concert space within a new high-rise
19 development, but that common sense and rational solution was rejected by the City. Tondini
20 Decl., Ex. 28 at 33. Instead, the goal was simply and only to “kill” a lawful redevelopment.
21 *Id.*, Exs. 20-22.

22 On the landowner’s side the burden is huge. Creating a public bandstand by ordaining
23 that one and only one property owner must bear the burden of that by foregoing lawful high-
24 rise redevelopment value is not a legitimate police power goal. The Ordinance already
25 exacted a huge price on single property owner – the owner lost a \$41 million cash contract to
26 sell the property to a redeveloper. R. Forbes Decl. ¶¶ 5, 11. The effect, even without that lost

1 contract is significant in that the landowner lost almost all attributes of property ownership.
2 For example, the Ordinance has the effect of prohibiting any change in use. Functionally, the
3 Commission is now the entity that makes decisions about traditional ownership questions:
4 How do I use my property; who do I want to lease to; what businesses do I want to operate;
5 and even down to what color do I want to paint the walls?⁵ The landowner is simply stuck
6 with paying the taxes on the property and absorbing the loss of a \$41 million contract to sell
7 the property.

8 As to the factor of whether the regulation should have been anticipated, the City sent a
9 letter to the owner giving a bright green light to redevelopment. R. Forbes Decl., Ex. B. And,
10 the City itself mapped and anticipated that the property would be redeveloped to 44 stories.
11 Tondini Decl., Ex. 15.

12 Thus, under any reasonable consideration of the unduly oppressive test, the Ordinance
13 is unconstitutional beyond any reasonable doubt.⁶

14 **2. Similar Cases Resulted in Invalidation.**

15 Invalidity is confirmed by a review of prior cases. In *Sintra*, a Seattle ordinance
16 required a landowner who developed property to pay a displacement fee to get permits. The
17 Supreme Court found that the ordinance violated due process:

18 The oppressive nature of the regulation is itself violative of due
19 process.... In a strictly economic case, such as this one, certain of
20 these factors are more relevant than others. In particular, *Sintra*'s
21 property cannot be singled out as contributing to the problem of
22 homelessness in any pronounced way; the lack of low income
housing was brought about by a great number of economic and
social causes which cannot be attributed to an individual parcel of

23 ⁵ A leasehold, as Judge Parisien held in *Yim*, is simply one method of property disposition. A
24 property owner enjoys the right to lease to whom he or she wishes as a fundamental attribute
25 of property ownership. *Yim* SJM Order at 3. That same reasoning would apply to choice of
business uses, so long as they are otherwise lawful under generally applicable laws.

26 ⁶ To the extent that the City attempts to argue against controlling Washington case law and
seeks to argue a "rational basis" test, the Ordinance fails because it is arbitrary and capricious
as demonstrated above and not rationally related to curing a legitimate police power nuisance.

1 property.... A regulation with such an unbalanced impact violates
2 due process.

3 *Sintra*, 119 Wn.2d at 22 (citations omitted).⁷

4 In *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993), the Supreme Court held that
5 there was a substantive due process violation where a state law required payment to a mobile
6 home relocation fund by those who sold mobile home parks. The Court did not engage in a
7 ripeness analysis, instead ruling on the merits that the law was facially invalid. *Id.* at 608-13.
8 Significantly, the Court was of the opinion that a landowner should have an unfettered right to
9 sell property and get out of a line of business without being forced to either pay for that right
10 to sell or have that right taken away by the government. *Id.* at 612. That is precisely what is
11 at issue here.

12 As the Supreme Court recognized in *Guimont*, ripeness is not an issue where the
13 impact of the regulation is readily foreseeable. For example, in *Mission Springs, Inc. v. City*
14 *of Spokane*, 134 Wn.2d 947, 964-65, 954 P.2d 250 (1998), the Supreme Court stated that: “A
15 cause of action for deprivation of property without due process is ripe immediately because
16 the harm occurs at the time of the violation....”

17 Judge Parisien’s recent ruling in *Yim v. City of Seattle*, King Cnty. No. 17-2-05595-6
18 SEA, Order re Mots. for Summ. J. (Mar. 28, 2018), likewise was made on a facial challenge
19 and the court found that the Seattle ordinance at issue there violated substantive due process.
20 *Id.* at 5-6. As the court said: “Due process embodies a promise that government will pursue
21 legitimate purposes in a just and rational manner.” *Id.* at 5. Under the undeniable material
22 facts in the record, the Ordinance here violated the substantive due process rights of the
23 landowner and is void.

24
25
26 ⁷ The Court also approved Section 1983 damages for this violation. “Arbitrary, irrational
action on the part of regulators is sufficient to sustain a substantive due process claim under §
1983.” *Id.* at 23.

1 **C. The Ordinance Violates Equal Protection Guarantees.**

2 **1. Strict Scrutiny Applies.**

3 When an Ordinance infringes upon a fundamental right, the equal protection analysis
4 requires “strict scrutiny.”⁸ Under that standard, it would be the City’s burden to prove that the
5 Ordinance was “necessary to accomplish a compelling state interest.” *State v. Schaaf*, 109
6 Wn.2d 1, 17, 743 P.2d 240 (1987). The City could not meet this burden because precedent
7 has established that neither aesthetics nor historic value are “compelling.” *First Covenant*
8 *Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 222-23, 840 P.2d 174 (1992).

9 “Fundamental” rights are those that are “objectively, ‘deeply rooted in this Nation’s
10 history and tradition’ and ‘implicit in the concept of ordered liberty,’ such that neither ‘liberty
11 nor justice would exist if they were sacrificed.’” *Am. Legion Post #149 v. Wash. State Dep’t*
12 *of Health*, 164 Wn.2d 570, 600, 192 P.3d 306 (2008) (quoting *State v. Glucksberg*, 521 U.S.
13 702, 720-21 (1997)). The right to “acquire and hold property” are “fundamental rights which
14 belong to the citizens of the state by reason of such citizenship.” *State v. Vance*, 29 Wash.
15 435, 458, 70 P. 34 (1902).

16 Washington recognizes “fundamental attributes of property ownership,” such as the
17 right to exclude others, dispose of and/or transmit property. *See, e.g., Guimont*, 121 Wn.2d at
18 602. Property includes a collection of rights: “Property in a thing consists not merely in its
19 ownership and possession, but in the unrestricted right of use, enjoyment, and disposal.
20 Anything which destroys any of these elements of property, to that extent destroys the
21 property itself.” *Ackerman v. Port of Seattle*, 55 Wn.2d 400, 409, 348 P.2d 664 (1960)
22 (quoting *Spann v. City of Dallas*, 111 Tex. 350, 355, 235 S.W. 513 (1921)), *abrogated on*
23 *other grounds by Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 548 P.2d 1085
24 (1976). The Ordinance here invades and takes away from ownership control. By moving

25 _____
26 ⁸ When the equal protection analysis does not involve a challenge to a special grant of
privilege or immunity, the state and federal due process analysis is the same. *Ockletree v.*
Franciscan Health Sys., 179 Wn.2d 769, 776 n.4, 317 P.3d 1009 (2014).

1 fundamental ownership control away from the owner and placing it with the Commission, the
2 Ordinance destroys “part of ‘the bundle of sticks’ which the owner enjoys as a vested incident
3 of ownership.” *Manufactured Housing*, 142 Wn.2d at 367 (footnote omitted). Thus, the
4 Ordinance is subject to and fails the test requiring a compelling state interest before such
5 rights can be infringed. *See First Covenant*, 120 Wn.2d at 222-23.

6 **2. The Ordinance Fails Even Under the Rational Basis Test.**

7 Even when fundamental rights are not at stake, an ordinance must nonetheless pass a
8 rational basis test. *See, e.g., Convention Ctr. Coal. v. City of Seattle*, 107 Wn.2d 370, 730 P.2d
9 636 (1986). However, even under a rational basis test the Ordinance here fails. That test
10 involves the following three inquiries:

- 11 1. Whether the legislation applies alike to all members within the designated
12 class;
- 13 2. Whether there are reasonable grounds to distinguish between those within and
14 those without the class; and
- 15 3. Whether the classification has a rational relationship to the purpose of the
16 legislation.

17 *Id.* While *comprehensive* zoning or land use ordinances are presumed constitutional, and the
18 burden is on the party challenging the ordinance to prove its unconstitutionality under the
19 equal protection clause, that assumption only applies to *comprehensive* zoning—not rezones
20 or changes in treatment to *particular* parcels:

21 “All zoning actions must bear a substantial relation to the public
22 welfare. Comprehensive land use plans and promulgatory zoning
23 regulations are presumed valid and are invalid only for manifest
24 abuse of discretion.... *Rezoning actions, on the other hand, are not
25 given that presumption and will be upheld only if there is
26 substantial evidence indicating that the rezone furthers the public
welfare and that changed circumstances warranted its passage.*”

Cathcart-Maltby-Clearview Cmty. Council v. Snohomish Cnty., 96 Wn.2d 201, 634 P.2d 853
(1981) (emphasis added) (citations omitted). Here, there was no change in circumstances for

1 the property at issue. As described above, the Ordinance does not achieve a rational objective
2 of preserving concert space because only *one* such space is included. Nearby concert halls
3 were not treated alike. Nor does the Ordinance rationally preserve alleged historic properties
4 (if that is the claimed rationale) because adjacent Landmarked properties were not included in
5 the Ordinance. Tondini Decl., Ex. 36. And in 1993 a proposal for expansion included some
6 First Avenue buildings, but not the Showbox. *Id.*, Ex. 4. There is no rational basis for putting
7 this one property in the District and leaving other properties out. The Ordinance is the very
8 definition of arbitrary and capricious and thus a violation of the equal protection clause.
9

10 **3. The Owner Was Not Afforded the Protection Other Owners Were Offered**
When the Historical District Was Formed.

11 In addition, there is a second and independent variant for why the Ordinance at issue
12 violates equal protection: When Plaintiff’s property was placed under the strict District
13 controls in 2018, it was not given the same protections as landowners similarly affected in the
14 1970s were given when the District was created. R. Settle Decl. ¶¶ 11-12. In the 1970s,
15 property owners within the new District market were given a choice: voluntarily agree to be
16 bound by the new restrictions and controls, or if you do not agree to voluntarily give up
17 control, then you will get fair market value for your property by eminent domain proceedings.
18 *Id.* ¶ 11. This was described and implement for properties within the project area in the
19 1970s, but the City refused any such procedure in its 2018 Ordinance. *Id.* ¶¶ 11-12.

20 Fair is fair. “The equal protection clause requires that persons similarly situated with
21 respect to the legitimate purposes of the laws receive like treatment.” *Matter of Knapp*, 102
22 Wn.2d 466, 473, 687 P.2d 1145 (1984). Here the City has refused to do precisely what it
23 offered to do for other property owners when those properties were drawn into the District.
24 The “agree or be bought out” mechanism was not applied equally to all properties similarly
25 situated. There was no reasonable ground to treat the current property differently and thus the
26 Ordinance is void.

1 **D. The City Violated Procedural Due Process.**

2 “Procedural due process imposes limits on governmental decisions that deprive a
3 person of ‘liberty’ or ‘property’ interests within the meaning of a constitution’s due process
4 clause.” *Didlake v. State*, 186 Wn. App. 417, 425-26, 345 P.3d 43 (2015).⁹ Procedural
5 failings can be any failure to comply with statutory obligation and/or any failure to abide by
6 fundamental due process. Both result in voiding an ordinance. A substantial failure to give
7 proper notice is a legal ground to overturn a zoning decision. *Barrie v. Kitsap Cnty.*, 84
8 Wn.2d 579, 527 P.2d 1377 (1974); 17 William B. Stoebuck, John W. Weaver, *Washington*
9 *Practice, Real Estate* § 4.7 (2d ed.). “When a hearing is required on a zoning matter by
10 statute, the failure to hold any such hearing is a fatal defect.” 17 *Washington Practice, Real*
11 *Estate* § 4.7. *See also Glaspey & Sons, Inc. v. Conrad*, 83 Wn.2d 707, 711-12, 521 P.2d 1173
12 (1974).

13 Here, the City gave no prior written notice to the owner of the property for either the
14 August 8 Committee meeting (at which in any event only one minute per person was allowed
15 for public comment), Tondini Decl., Ex. 25 at 6, or for the August 13 Council meeting (where
16 again only one minute per person was allocated for public comment.) *Id.*, Ex. 28 at 3; R.
17 Forbes Decl. ¶ 6.¹⁰ The first written notice from the City regarding the Ordinance was sent to
18 the property owner on August 22, 2018 *after passage of the Ordinance on August 13*.
19 Tondini Decl., Ex. 38. That notice was sent in advance of a September 19 public hearing that
20 City staffers themselves said was in effect just window dressing and served no real purpose.
21 *Id.*, Ex. 39 (“Given that the Council already passed this legislation, the hearing likely won’t be
22 a big deal.”) and the City had no trouble sending a letter to the owner *after the fact*. The
23
24

25 ⁹ Procedural due process requirements in this context is no different under the state or federal
26 constitutions. *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 714, 257 P.2d 570 (2011).

¹⁰ On August 12, newly retained counsel for Plaintiff hurriedly sent a letter of protest to the
Council urging time for more due process. Tondini Decl., Ex. 37.

1 State’s Department of Historic Preservation staffers described Seattle’s public process as
2 “inadequate.” *See id.*, Ex. 40.

3 “Procedural due process requires notice which is reasonably calculated under the
4 circumstances to apprise affected parties of the pending action and to afford them an
5 opportunity to present their objections.” *Pease Hill Cmty. Grp. v. Cnty. of Spokane*, 62 Wn.
6 App. 800, 806, 816 P.2d 37 (1991); *Didlake*, 186 Wn. App. at 426. That did not happen.

7 In *Glaspey & Sons, Inc. v. Conrad*, 83 Wn.2d 707, 711-12, 521 P.2d 1173 (1974), the
8 Supreme Court invalidated zoning amendments for failure of proper notice and failure of due
9 process because the affected landowner was not given adequate notice and a fair opportunity
10 to oppose. *Id.*

11 Even if there had been notice, the hearings were inadequate. One minute for public
12 comment is flatly insufficient for a “fair” hearing. Tondini Decl., Ex. 25 at 6 & Ex. 28 at 3.
13 Due process requires notice and a hearing “so they [opponents] can participate *effectively*.”
14 *Responsible Urban Growth Grp. v. City of Kent*, 123 Wn.2d 376, 386, 868 P.2d 861 (1994)
15 (notice was insufficient under both state and municipal zoning requirements and therefore
16 failed to meet statutory and due process notice requirements) (emphasis added). The City
17 ensured that no “effective” hearing occurred.

18 The City Council President bluntly admitted to not caring about input from the
19 property owner. “I don’t even know who owns it. I don’t know who’s developing it. I don’t
20 even care.” *Id.*, Ex. 25 at 41.

21 Four cases demonstrate that the procedures here were inadequate under the law. First
22 is the aforementioned *Responsible Urban Growth Group v. City of Kent* case where the facts
23 are remarkably similar to the present case – a single parcel is rezoned to a different use than
24 what was allowed under the comprehensive prior zoning. The Supreme Court in *Responsible*
25 *Urban Growth* invalidated the ordinance for lack of procedural due process, just as this court
26 should do here. In *Barrie*, 84 Wn.2d 579, the Washington Supreme Court also analyzed the

1 sufficiency of the notice for a rezone, reiterating that “[t]he purpose of the notice required by
2 [the] statute is to fairly and sufficiently apprise those who may be affected by the proposed
3 action of the nature and character of the amendment so that they may intelligently prepare for
4 the hearing.” *Id.* at 584-85. The court invalidated the rezone because of failure of due
5 process. In *Berst v. Snohomish County*, 114 Wn. App. 245, 255, 57 P.3d 273 (2002), the
6 court held that a property owner’s procedural due process rights were violated when the
7 county imposed a building moratorium on their residential property without adequate
8 hearings. *Id.* And, in *Prosser Hill Coalition v. County of Spokane*, 176 Wn. App. 280, 309
9 P.3d 1202 (2013), the court likewise held that a notice was inadequate. The court rejected an
10 argument that notice was good enough even if it did not meet the letter of the law stating “it is
11 difficult to measure the impact the faulty notice had on concerned individuals.” *Id.*

12 Not only did Seattle here fail to afford basic constitutional procedural due process, the
13 City failed to follow its own procedural process. A number of Seattle Municipal Code
14 provisions, as well as documentation the City publishes, demonstrate that site-specific land
15 use decisions by the City Council are quasi-judicial government action. First is the Seattle
16 Municipal Code, which defines rezones as “quasi-judicial.” SMC 23.76.004(C). A change in
17 an “overlay” also is considered quasi-judicial. SMC 23.76.036(A)(1). The Historical District
18 regulations are an “overlay” because the Guidelines require “use” permits for properties in the
19 District, but not for those outside the District. Tondini Decl., Ex. 6 (Staley Dep.) at 21-22,
20 105-106, and Ex. 43 (additional layer of regulations is an “overlay”). As was stated in a
21 similar case, “regardless of the labels applied to the Ordinance, its effect is to require a use
22 permit for Jachimek’s C-2 property but not for C-2 property in other parts of the City. We
23 agree with the trial court that the Ordinance ‘in fact and in law [creates] an overlay zone.’”
24 *Jachimek v. Super. Ct.*, 169 Ariz. 317, 319, 819 P.2d 487 (1991) (voiding a special district
25 requirement as an improper overlay).
26

1 For either a single-property-specific decision or an overlay decision, the Seattle
2 Municipal Code requires notice and hearings. Under the City's own Code, impacted property
3 owners must be given formal written notice of land use rezones that affect their property by
4 posting and mail. SMC 23.76.052(C); *see also* 23.76.012(A)(2), 23.76.042.¹¹ Notice and
5 opportunity to be heard are also part of Seattle's local historical preservation law. SMC
6 25.12.380-580. None were followed, in letter or spirit.

7 The City failed to meet its procedural obligations under its own code and under the
8 federal and Washington Constitutions. For this further reason, the Ordinance is void.

9 **VI. CONCLUSION**

10 As shown above, the Ordinance was flawed in substance and in the way it was
11 adopted. Fundamental property and constitutional rights were knowingly ignored. Declaring
12 the Ordinance void is required by well-established Washington law. Voiding the Ordinance
13 will greatly assist in reducing the harm and injury inflicted upon the plaintiff.
14

15 DATED this 24th day of May, 2019.

16 BYRNES KELLER CROMWELL LLP

17 By /s/ John A. Tondini

18 Bradley S. Keller, WSBA #10665

19 John A. Tondini, WSBA #19092

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25 *Attorneys for Plaintiff*

26 **CERTIFICATION:** The above signature also certifies that this memorandum
contains 8,375 words, in compliance with the Local Civil Rules.

¹¹ A local decision to rezone specific tracts of land under a zoning code is considered an
adjudicatory, quasi-judicial act. *Bassani v. Bd. of Cnty. Comm'rs for Yakima Cnty.*, 70 Wn.
App. 389, 393, 853 P.2d 945 (1993).

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 24th day of May, 2019, a true copy of the foregoing was served on each and every attorney of record herein via King County E-Service:

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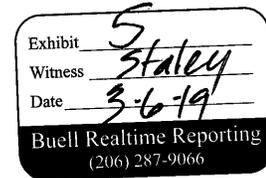
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED in Seattle, Washington, this 24th day of May, 2019.

/s/ John A. Tondini
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ATTACHMENT



CITY OF SEATTLE

ORDINANCE 125650

COUNCIL BILL 119330

AN ORDINANCE relating to the Pike Place Market Historical District; amending Chapter 25.24 of the Seattle Municipal Code to adopt an interim boundary expansion for the Pike Place Market Historical District.

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. The City Council makes the following legislative findings of fact and declarations:

A. The Pike Place Market Historical District (District) was created in 1971 through a Citizens' Initiative.

B. The boundaries of the District have been amended twice since it was created: (1) in 1986 through Ordinance 113199 and (2) in 1989 through Ordinance 114863.

C. The City's Historic Resources Survey identifies multiple structures in the vicinity of the District that may be eligible as landmarks but are not currently designated as landmarks.

D. Recent development activity adjacent to the District has put potentially eligible landmarks at risk of demolition or alteration before the protections of the district may be applied, thus constituting an emergency pursuant to WAC 197-11-880.

E. The Showbox Theater is a significant cultural resource to Seattle and the region with a history connecting it to the adjacent Pike Place Market;

F. The loss of the Showbox Theater would erode the historical and cultural value of the Pike Place Market neighborhood;

1 G. Adopting a boundary expansion on an interim basis will allow the City to consider
2 whether and to what extent to expand the boundaries of the District to include the Showbox
3 Theater.

4 H. The Council finds that the Pike Place Market Historical District ordinance is a
5 development regulation that is not subject to referenda and that the Council has the authority to
6 provide for the immediate effectiveness of this amendment to that ordinance.

7 Section 2. Section 25.24.020 of the Seattle Municipal Code, last amended by Ordinance
8 114863, is amended as follows:

9 **25.24.020 Historical District designated.**

10 There is created a Pike Place Market Historical District (hereafter called "Historical District")
11 whose physical boundaries are illustrated on a map attached as Exhibit "A" to Ordinance 100475
12 which is codified at the end of this chapter. These boundaries include an interim expansion that
13 encompasses a Study Area, which will be considered for a future permanent expansion.

14 Section 3. Exhibit A of Ordinance 100475, last amended by Ordinance 114863, is
15 amended and redrawn to expand the boundaries of the Pike Place Market Historical District to
16 include an interim Study Area, as shown on Exhibit A to this ordinance.

17 Section 4. Under RCW 36.70A.390, the Council approves the following work plan for
18 the development of regulations to address the issues in this ordinance and directs the Department
19 of Neighborhoods to transmit proposed legislation to the Council by June 2019.

Review the historic significance of the Showbox theater,
study the relationship between the Showbox theater and the
Pike Place Market, consider amendments to the Pike Place
Market Historical District Design Guidelines related to the

August 2018 - April 2019

Showbox theater, draft legislation, conduct outreach to stakeholders, and conduct State Environmental Policy Act (SEPA) Review on permanent expansion of the Historical District, as appropriate

Publish SEPA threshold determination if necessary March 2019

Mayor transmits legislation to Council May 2019

Council deliberations on proposed expansion of the Historical District June 2019

Permanent district expansion effective July 2019

1

2

Section 5. Sunset provision. Sections 2 and 3 of this ordinance shall expire on the earlier of: (a) ten months from the effective date of this ordinance or (b) the date an ordinance establishing the boundaries of a permanent expansion becomes effective.

3

4

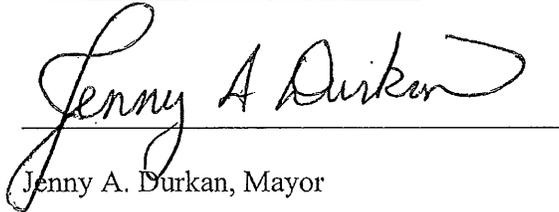
1 Section 6. This ordinance shall take effect and be in force 30 days after its approval by
2 the Mayor, but if not approved and returned by the Mayor within ten days after presentation, it
3 shall take effect as provided by Seattle Municipal Code Section 1.04.020.

4 Passed by the City Council the 13th day of August, 2018,
5 and signed by me in open session in authentication of its passage this 13th day of
6 August, 2018.

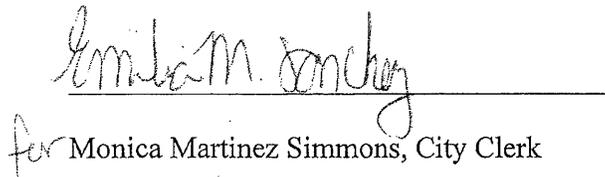
7 

8 President _____ of the City Council

9 Approved by me this 24th day of August, 2018.

10 
11 Jenny A. Durkan, Mayor

12 Filed by me this 24th day of August, 2018.

13 
14 for Monica Martinez Simmons, City Clerk

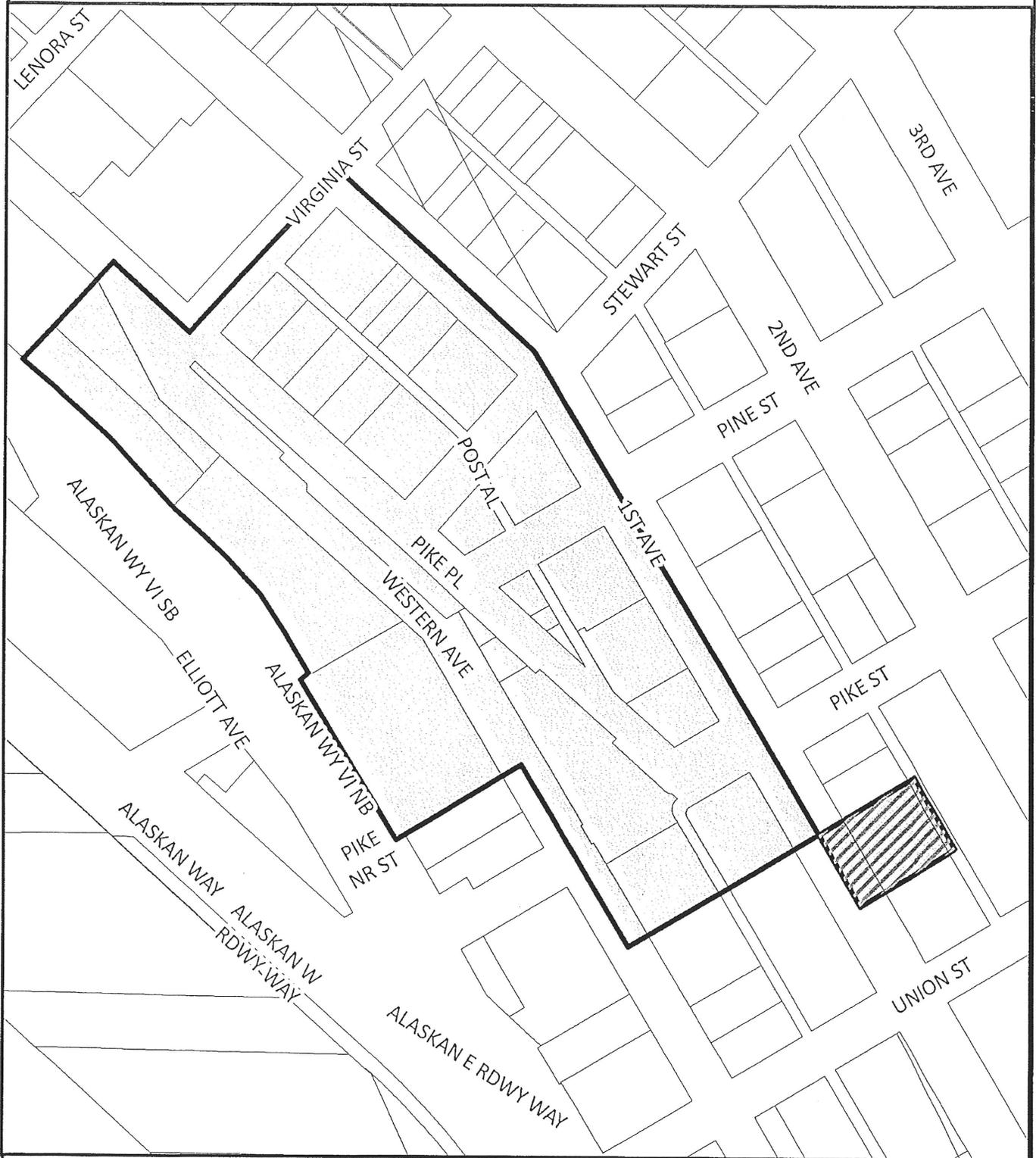
15 (Seal)

16 Exhibits:

17 Exhibit A – Interim Pike Place Market Historical District Boundaries with Study Area
18

Exhibit A

Interim Pike Place Market Historical District Boundaries With Study Area



Study Area



Pike Place Market Historical District Boundary

N



Version 2
August 7, 2018