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The Honorable Mary E. Roberts
Noted for Hearing: October 18, 2018
KING COUNTY
SUPERIOR COURT CLERK
Moving Papers
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CASE NUMBER: 18-2-21872-1 SEA

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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.	PLAINTIFF’S MOTION FOR DISCOVERY UNDER LUPA
CITY OF SEATTLE,	
Defendant.	

I. INTRODUCTION & RELIEF REQUESTED

Plaintiff filed this land use petition seeking, among other things, review under LUPA of an August 13, 2018, Seattle ordinance that Plaintiff contends improperly and unlawfully spot zoned its property by designating it (and only it) part of the Pike Place Market Historical District. The City Council held two public comment sessions with only short comments (limited to one minute) permitted. Plaintiff, the owner of the only property spot zoned, was not provided notice, nor was Plaintiff provided any meaningful opportunity to provide factual or legal clarification in the process of consideration of the spot zone. Instead, the Seattle City Council passed the ordinance on a claimed “emergency” basis – when no emergency existed – and it did so without providing Plaintiff any advance notice. The Council’s actions constitute a manifest abuse of discretion, and (as detailed in the Land Use Petition and Complaint) violated both procedural and substantive requirements governing the rezoning of property. The LUPA hearing to address these issues is currently scheduled for February 4, 2019.

1 The City has moved for partial summary judgment. With respect to the LUPA claims,
2 Plaintiff made ten public record requests. Thus far, the City has responded to only one of
3 those requests – another nine remain outstanding. The City contends that LUPA is
4 inapplicable because it claims that an ordinance it enacted to halt redevelopment of an
5 individual parcel of land is somehow not a “land use decision.” Its pending summary
6 judgment motion also seeks dismissal of Plaintiff’s First Amendment infringement and
7 Appearance of Fairness violation claims. As explained in Plaintiff’s opposition to the City’s
8 motion, the City’s contentions are legally unsound, procedurally improper in part, and at the
9 very least there are disputed issues of material fact.

10 Plaintiff now seeks leave to conduct limited, focused discovery to (among other things)
11 rebut the City’s contentions and use the evidence garnered through discovery to supplement the
12 record in advance of the early February LUPA hearing. Because the City bypassed the typical
13 channels for considering a rezone, there is not the typical Hearing Examiner’s record in this
14 instance. More specifically, Plaintiff seeks information on the decision to single out this
15 property, and only this property, for inclusion in the Pike Place Market Historical District, the
16 process that the City employed in drafting, introducing and passing the ordinance, and the
17 City’s real intentions in passing the ordinance (to maintain the property as a music venue in
18 perpetuity). This information is relevant to Plaintiff’s contentions that the ordinance is invalid
19 as an illegal spot zone, is otherwise procedurally invalid, was improperly passed because the
20 Council violated the Appearance of Fairness statute, and violates Plaintiff’s First Amendment
21 rights by forcing Plaintiff to maintain the property as a music venue.

22 Accordingly, and for the reasons discussed below, Plaintiff requests that the Court
23 permit certain limited depositions, lasting a maximum of three hours each, of the following
24 individuals or representatives:
25
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- Council Member Kshama Sawant;
- Council Member Sally Bagshaw;
- A representative of Seattle’s Department of Construction and Inspections (“SDCI”);
- A representative of the Pike Place Historical Commission; and
- A representative of the Landmark Preservation Board.

II. STATEMENT OF FACTS

Many of the background facts have been discussed in the briefing on the City’s Motion for Partial Summary Judgment. Below is a brief summary of the facts relevant to this discovery motion:

Plaintiff purchased the property at 1426 First Avenue in 1997. At the time, the property was zoned for approximately 24 floors. In 2006, the property and other similarly situated properties in the area were rezoned to 40 floors. Then, in 2017 it was upzoned again to up to 44 floors.¹ In April 2018, Plaintiff entered into a contract to sell the property to Onni Group. In July 2018, Onni applied for a project number at Seattle City Hall to build a high-rise apartment building on the property. Dkt. 1, Land Use Pet. & Compl. ¶¶ 9-11; Dkt. 17, Answer & Affirmative Defenses ¶¶ 9-11.

Following a number of reports in the press, City Council member Kshama Sawant became a vocal proponent of preventing the redevelopment of this specific site and forcing the property to remain a music venue. She expressed her opinion on social media, and she rallied opposition to the redevelopment. She also had multiple ex parte communications with supporters of the group whose aim was to “Save the Showbox.” Dkt. 27, Decl. of John A. Tondini in Supp. of Opp’n to Def.’s Mot. for Partial Summ. J. (“Tondini Decl.”) ¶ 9 & Ex. 8.

¹ If developed, the property would also generate approximately \$5 million in affordable housing funds for the City. Dkt. 1, Land Use Pet. & Compl. ¶ 9.

1 Councilmember Sawant’s office also created a poster for public distribution titled “SAVE
2 THE SHOWBOX: MUSIC & HOUSING FOR PEOPLE NOT PROFIT.” *Id.* ¶ 10 & Ex. 9.

3
4 This activity culminated in an August 8 meeting of the Council’s Finance and
5 Neighborhoods Committee chaired by Councilmember Sally Bagshaw, at which numerous
6 members of the Council expressed their clear intent to prevent redevelopment of the property
7 and to maintain it as a music venue. *See id.* ¶ 4 & Ex. 3. In the subsequent meeting of the full
8 Council on August 13, Councilmembers again voiced their intent to prevent Onni’s
9 redevelopment of the property and to keep the Showbox as a music venue, for perpetuity, by
10 any means necessary. *See id.* ¶ 13. The Council then voted unanimously to improperly spot
11 zone the property by including it (and only it) in the Pike Place Historical District, which
12 prevented the planned redevelopment and thereby instantly and dramatically devalued the
13 property.²

14 The August 13 land use decision was made without any regard for past zoning
15 decisions, and without providing any meaningful opportunity for opposition. Rezones of a
16 specific parcel are defined by the Seattle Municipal Code as "Type IV" land use
17 decisions. SMC 23.76.004. A change in an "overlay" is also a Type IV, quasi-judicial
18 decision. SMC 23.76.036(A)(1). Type IV decisions are quasi-judicial and are supposed to be
19 decided first on the recommendation of the Director of the SDCI and the follow-
20 on recommendation of a Hearing Examiner. SMC 23.76.004(C). Applications for Type IV
21 decisions must be made to the Director in the first instance and not to the Council directly.
22 SMC 23.76.038(A). There should be a public comment period, evidence taken and a record
23 created. SMC 23.76.052. The City followed none of these procedures – all of which are
24 required by law under the Seattle Municipal Code.

25 ² As detailed in the Land Use Petition and Complaint, the property sits in the middle of the
26 block, on the east side of First Avenue between Pike and Union Streets. None of the other
properties on that same block were rezoned into the Pike Place Historical District – only
Plaintiff’s property was. Dkt. 1, Land Use Pet. & Compl. ¶¶ 12-14.

1 Instead, the general public en masse were permitted to make limited public comments
2 on the record at the August 13 meeting. Indeed, in its motion for partial summary judgment,
3 the City concedes that it failed to hold “a local contested case hearing” that would have
4 permitted Plaintiff to challenge the spot zone. Dkt. 13, City’s Mot. for Partial Summ. J. at 1.
5 The Council also made no disclosures regarding the ex parte communications its members
6 had with proponents on the record at either the August 8 or August 13 meeting.³

7 The City’s pending partial summary judgment motion contends that Plaintiff cannot
8 maintain a LUPA action arguing that its illegal spot zone of the property—the very purpose
9 and effect of which was to prevent redevelopment— somehow was not a “land use decision.”
10 Plaintiff’s opposition to that motion shows why the City’s contention flies in the face of the
11 plain language of LUPA and controlling case law. The spot zone was a land use decision
12 because it was: “an interpretive or declaratory decision regarding the application to a specific
13 property of zoning or other ordinances or rules regulating the improvement, development,
14 modification, maintenance, or use of real property.” RCW 36.70C.020(2)(b). Additionally,
15 the City has moved to dismiss Plaintiff’s claims under the First Amendment and the
16 Appearance of Fairness statutes. More specifically, the City contends that Plaintiff’s First
17 Amendment claim fails because it has not required Plaintiff to maintain the property as a
18 music venue, and it argues Plaintiff has waived the Appearance of Fairness claim. For the
19 reasons discussed in Plaintiff’s opposition to the City’s motion, both contentions are legally
20 and factually wrong. In any event, the claims raise disputed issues of fact that some of the
21 discovery now sought is aimed at.

22 Plaintiff brings this motion seeking limited, targeted discovery concerning the factual
23 background that led up to the August 13 decision to spot zone the property, and what the
24

25 ³ Indeed, Dana Robinson Slote, the City Council’s Director of Communication, provided local
26 prominent musician Ben Gibbard with scripted comments to be presented at a City Council
hearing. Attached as Exhibit 1 is an email from Slote to Gibbard that the City produced in
response to one of Plaintiff’s public records requests.

1 City's intentions were in passing the August 13 ordinance. Such discovery is necessary for at
2 least the following reasons: (1) to rebut the City's contention that it did not make any land use
3 decision for purposes of LUPA; (2) to establish that the Council's passage of the ordinance
4 was procedurally unlawful because it failed to comply with the requirements of the Seattle
5 Municipal Code; (3) to establish that the ordinance is invalid because the Council violated the
6 Appearance of Fairness statutes by showing obvious bias against Plaintiff and engaging in ex
7 parte communications with outside proponents of the ordinance; and (4) to establish that the
8 purpose of the ordinance was to maintain the property as a music venue indefinitely,
9 compelling plaintiff to engage in speech in violation of the First Amendment.⁴

10 As this Court well knows, LUPA hearings are generally decided based on the record
11 created by the quasi-judicial body that made the land use decision. RCW 36.70C.120(1).
12 Parties to LUPA hearings usually have no opportunity to introduce additional evidence
13 outside the record provided they had an opportunity, consistent with due process, to make a
14 record before the quasi-judicial body. *Id.* As discussed above, that did not happen here
15 because the City did not follow its own processes. Plaintiff thus needs – and is legally
16 entitled to – this additional, limited discovery to supplement the record in advance of the
17 LUPA hearing in February.

18 **III. STATEMENT OF ISSUES**

19 Should Plaintiff be permitted to conduct limited, targeted depositions of certain City
20 officials where Plaintiff contends the City engaged in an opaque, unfair process in violation of
21 its own rules and regulations to illegally spot zone Plaintiff's property, and Plaintiff needs
22 discovery to garner further information regarding that spot zone to supplement the record that
23 will be the basis for the upcoming early February LUPA hearing?
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⁴ The City contends the First Amendment claim is a LUPA claim.

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IV. EVIDENCE RELIED UPON

Plaintiff relies on the Declaration of John A. Tondini (and attached exhibits) filed in support of Plaintiff’s Opposition to the City’s Motion for Partial Summary Judgment (Dkt. 27), and the other pleadings and papers on file.

V. ARGUMENT

In a LUPA action, a party may seek pretrial discovery “at any time after service of the petition.” RCW 36.70C.120(5). The court should grant permission when “the party requesting it makes a prima facie showing of need.” *Id.* Such need is shown where a party seeks evidence that was “not made part of the local jurisdiction’s record.” RCW 36.70C.120(3). Additionally, need is shown where the discovery sought relates to “[g]rounds for disqualification of a member of the body or of the officer that made the land use decision.” RCW 36.70C.120(2)(a).

That is the case here. Rather than providing Plaintiff with any opportunity to investigate or challenge the August 13 ordinance, the City Council held a meeting at which citizens voiced their support to “Save the Showbox,” and the Council then proceeded to vote unanimously to pass the ordinance. The City Council did not disclose on the record (or elsewhere) the ex parte contacts that members had with proponents of the ordinance which would have shown grounds for disqualification of certain Council members. Likewise, it did not reveal any information concerning the process (or lack thereof) it employed in drafting or introducing the ordinance. It did not explain why it chose to ignore clearly applicable provisions of the Seattle Municipal Code relating to the sort of spot zoning at issue here. And while the City argues that Plaintiff has no First Amendment claim because it is not requiring Plaintiff to maintain a music venue, the evidence suggests that the plan all along was to “Save the Showbox” in perpetuity. Plaintiff thus seeks depositions of the following individuals for the following reasons:

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- **Council Member Sawant:** Ms. Sawant was the sponsor of the ordinance, and has information concerning the origin of the ordinance, and the process that the Council went through in determining how to draft, structure and ultimately pass the ordinance. Ms. Sawant also engaged in ex parte communications with proponents of the “Save the Showbox” movement, and thus has information relevant to Plaintiff’s Appearance of Fairness claim. Plaintiff also seeks to establish that Ms. Sawant’s shared goal and intent with other Councilmembers was to maintain the property as a music venue indefinitely. She thus has evidence on the ultimate purpose of the ordinance – to keep the Showbox operating in perpetuity.
 - **Council Member Bagshaw:** Ms. Bagshaw was the Chair of the Council’s Finance and Neighborhoods Committee. She has information concerning the origin of the ordinance, and the process that the Council went through in determining how to draft, structure and ultimately pass the ordinance. She also has information concerning the ultimate purpose of the ordinance – to keep the Showbox operating in perpetuity.
 - **A Representative of the SDCI:** As discussed above, the sort of spot zone that the City Council enacted here was required to go through the SDCI pursuant to the Seattle Municipal Code. Plaintiff needs to depose a representative of the SDCI to establish this requirement, to show that the City did not go through the SDCI when it spot zoned the property at issue, and that the SDCI may not even have been consulted.
 - **A Representative of the Pike Place Market Historical Commission:** Plaintiff needs to depose a representative of the Historical Commission to establish that the property was not spot zoned at the Commission’s recommendation or request; that at no time prior to the City Council taking up this cause did the Historical Commission identify the property as a property to be rezoned or otherwise being

1 important to preserving the Pike Place Market’s mission; and that the initiative and
2 catalyst for the ordinance came entirely from the City Council and its desire to
3 preserve the property as a music venue. Plaintiff also needs information to
4 establish its claim that the property – which is across the street from the Pike Place
5 Market and is the only property on the east side of First Avenue to be impacted by
6 this rezone – is not consistent with the market, such that the City Council’s
7 decision was arbitrary and capricious.

- 8 • **A Representative of the Landmark Preservation Board:** At the August 8
9 hearing, Erin Doherty of Seattle’s Department of Neighborhoods stated that the
10 Landmark Preservation Board could not regulate use of property that had been
11 designated as a landmark. Plaintiff needs to depose a representative of the Board
12 to explore what conversations the Board had with members of the City Council
13 regarding the possibility of designating the property a city landmark, what effect
14 that designation would have had, and whether the Board’s inability to regulate use
15 led to the decision to spot zone the property into the Pike Place Historical District.

16 **VI. CONCLUSION**

17 For the reasons discussed, Plaintiff’s motion for leave to take the requested discovery
18 should be granted.

19 DATED this 10th day of October, 2018.

20 BYRNES KELLER CROMWELL LLP

21 By /s/ John A. Tondini

22 Bradley S. Keller, WSBA #10665

23 John A. Tondini, WSBA #19092

24 1000 Second Avenue, 38th Floor

25 Seattle, WA 98104

26 Telephone: (206) 622-2000

bkeller@byrneskeller.com

jtondini@byrneskeller.com

Attorneys for Plaintiff

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CERTIFICATION: The above signature also certifies that this memorandum contains 2,648 words, in compliance with the Local Civil Rules.

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 10th day of October, 2018, a true copy of the foregoing was served on each and every attorney of record herein via email:

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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 10th day of October, 2018.

/s/ John A. Tondini _____
John A. Tondini
Byrnes Keller Cromwell LLP
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Seattle, WA 98104
Telephone: (206) 622-2000
Facsimile: (206) 622-2522

EXHIBIT 1



Kshama Sawant <kshamaatcouncil@gmail.com>

Fwd: Suggested talking points, proposed agenda for Monday

1 message

Robinson Slote, Dana <Dana.RobinsonSlote@seattle.gov>
To: "kshamaatcouncil@gmail.com" <kshamaatcouncil@gmail.com>

Fri, Aug 3, 2018 at 4:42 PM

Dana Robinson Slote
206.615.0061
206.423.3220

Begin forwarded message:

From: "Robinson Slote, Dana" <Dana.RobinsonSlote@seattle.gov>
Date: August 3, 2018 at 12:08:17 PM PDT
To: "Bengibbard@mac.com" <Bengibbard@mac.com>
Subject: **Suggested talking points, proposed agenda for Monday**

Ben --

Thanks for your time by phone yesterday. As promised, below you'll find suggested talking points for Monday's Full Council meeting. In short, I summarized many of the themes from an [interview you gave in June](#) this year, which seems to fit well with the Resolution and Ordinance CM Sawant will introduce to #SaveTheShowbox

Also as discussed:

- I'll plan to meet you on the first floor of the **City Hall lobby approx. 1230p (Lyft can bring you to the 5th Ave entrance)**, and feel free to call if I can help guide you here.
- We'll meet first with Sawant for fewer than 15:00; and,
- Then I'll take you to O'Brien (Ballard, Fremont) and Herbold (West Seattle), followed by Citywide elected Gonzalez & Mosqueda (and the remaining [Councilmembers](#) Johnson, Juarez, Bagshaw and Harrell) as time allows.

Public **comment begins at 2:00 p.m.**, so we can decide in advance if you'd still like to speak (and sign you in) or watch from the Green Room.

Thank you once again for sharing your time and talent on this important occasion and for this critical cause.

Dana Robinson Slote
Director of Communication, Seattle City Council
O: 206.615.0061 | M: 206.423.3220 | L: 206.684.8566

**

Monday, August 6

2:00 p.m.

(Two minutes)

Thank you President Harrell and members of the City Council. My name is Ben Gibbard. I'm a long time resident of Capitol Hill (CM Sawant's district) and lead singer for the band Death Cab for Cutie. I'm also an artist who cares deeply about Saving the Showbox.

I'm here today to register my support for the Resolution and Ordinance before you to Save the Showbox.

Seattle has been transformed into an almost unrecognizable city over the past 15-20 years with the tech boom and especially with the rise of Amazon, we've undergone some really rapid changes in the landscape itself -- in the buildings going up and coming down -- and the cultural landscape has changed as well.

A lot of the corners of my neighborhood that were less populated - there are now restaurants and bars and people on the street. It's both a blessing and a curse. I think also for me what has been the most painful is seeing the displacement of both people of color and creative communities from not only this neighborhood but this City.

You know, it seemed like in the 90s when you juxtaposed San Francisco and Seattle, San Francisco was going through its first wave of people leaving, with practices spaces being closed and turned into whatever they got turned into. There was a creative class that started to leave SF for Portland or even Seattle. And I think in my naivete at the time I thought that would never happen to Seattle but it certainly has...

It's really difficult to talk about these things without sounding like I'm a "get off my lawn" type of guy. Or because I moved to Seattle in 1999 that someone I have precedence over someone who moved here in 2009. But I think it's true that what gives cities such as Seattle their vibrancy and their appeal are the creative communities that exist and have existed - and hopefully continue to exist -- in those cities.

I want Seattle to sustain a vibrant creative community. I think we doing our best collectively to protect that, but when a studio is creeping up to \$1500-2000 it's very difficult for someone to make a living waiting tables and playing in the band.

There have been a number of moments -- as I've gotten older I've become acutely aware of how I connect my memories to my geography. As the landscape of this city changes I'll walk down Broadway and past a location that used to be a bar I'd frequent with friends or somewhere where I had a beautifully intense conversation...and what was once a dive bar is now a Pilates studio.

I didn't want this to come off as the perspective of someone who is now middle aged complaining about how the city has changed and how it's not as good as it once was (although that might be my perspective.) But what I want to say is that I've noticed as I've moved into middle age that I connect my memories to my geography to such an extent that it is as if I have to come to terms with not only the passage of time but coming to terms with losing the people and moments of my life as I walk down a street that is so unfamiliar and so different from how I remember it even ten years ago.

Cities are in a constant state of flux, they are constantly changing and they are very difficult to come back to. It can be painful to see your memories so unceremoniously erased from the landscape.

Please work with the members of Historic Seattle, and the Landmark Preservation Board and Save the

Showbox.

Thank you.

###

-----Original Message-----

From: Robinson Slote, Dana

Sent: Thursday, August 02, 2018 7:56 AM

To: Bengibbard@mac.com

Subject: Sawant joins the Showbox fight | Crosscut

Superb summary, below—and good morning!

<https://crosscut.com/2018/08/sawant-joins-showbox-fight>

Dana Robinson Slote

206.615.0061

206.423.3220

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SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY	
1426 FIRST AVENUE LLC, <div style="text-align: right;">Plaintiff,</div>	No. 18-2-21872-1 SEA [PROPOSED] ORDER GRANTING PLAINTIFF’S MOTION FOR DISCOVERY UNDER LUPA
v.	
CITY OF SEATTLE, <div style="text-align: right;">Defendant.</div>	

THIS MATTER came before the Court on Plaintiff’s Motion for Discovery Under LUPA. Proper notice of said motion having been given to all counsel of record, the Court having considered the pleadings offered in support of and in opposition to the motion, and being fully advised, it is hereby

ORDERED that Plaintiff’s motion is GRANTED. The Court will permit limited depositions, not to exceed three hours each, of the following individuals or representatives:

- Council Member Kshama Sawant;
- Council Member Sally Bagshaw;
- A representative of Seattle’s Department of Construction and Inspections;
- A representative of the Pike Place Historic Commission;
- A representative of the Landmark Preservation Board.

DATED this ___ day of October, 2018.

Honorable Mary E. Roberts

1 Presented by:

2 BYRNES KELLER CROMWELL LLP

3 By /s/ John A. Tondini

4 Bradley S. Keller, WSBA #10665

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 10th day of October, 2018, a true copy of the foregoing was served on each and every attorney of record herein via email:

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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 10th day of October, 2018.

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