The Honorable Mary E. Roberts
Noted for Hearing: October 19, 2018, 8:30 a.m.
Opposition Papers

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

1426 FIRST AVENUE LLC, Plaintiff, v. CITY OF SEATTLE, Defendant.	No. 18-2-21872-1 SEA OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT AND OTHER RELIEF

I. INTRODUCTION

This case has all the hallmarks of eminent domain, but instead of compensating the property owner, the City reverse "spot zoned" the property making its action a classic taking. Spot zoning – applying a different set of rules to one property compared to other similarly situated parcels – has been universally condemned both by Washington courts and in other jurisdictions.

Violating almost all of its own rules for a property use decision, the City enacted an "emergency" ordinance – not to abate a public nuisance – but rather because it wanted a private music venue to be an asset of the City. To try and accomplish that, it had to circumvent and carve this parcel – and only this parcel – out of its own prior and lawful zoning actions that previously upzoned the property and surrounding properties twice for high-rise development. The most recent upzone occurred just last year when the property (and other similarly situated properties) were upzoned by the City to allow additional floors if property owners provided certain financial support to the City's efforts to increase affordable

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housing. The City's reverse spot zoning of this property, stripping only this property of the same development potential similarly situated parcels enjoy, was not an exercise of "police power" to protect the public. It was instead an eminent domain powerplay to appease a vocal "Save the Showbox" group at the expense of a single property's development and use rights.[1]

There are significant parallels between this case and two other recent cases. One is a Washington Supreme Court decision involving the City of Puyallup, which the City mentions in passing but seeks to avoid by unconvincingly trying to distinguish the case on a basis not even remotely relevant to why the Supreme Court held Puyallup's ordinance was a land use decision and not legislative action. The other case is a King County Superior Court decision declaring unconstitutional the City of Seattle's "first in time" leasing ordinance – a decision the City tellingly ignores even though it was decided *against* the City just months ago. Both cases support the owner's claims here and both should guide this Court on the present motion and the merits.

The City's motion should be denied because:

- LUPA's statutory language, as well as controlling case law, demonstrate unequivocally that certain claim falls squarely within LUPA.
- LUPA only permits "jurisdictional" and "procedural" challenges at an initial hearing. RCW 36.70C.080(2) and (3). Partial summary judgment on merits issues are not permitted and for this reason the remaining aspects of the City's motion are premature and should be denied.

If the merits of partial summary judgment are considered by the Court, and under RCW 36.70C.080(2) and (3) they should not be, the issues should be resolved in favor of Petitioner and the motion denied because:

[1] *See Eggleston v. Pierce Cnty.*, 148 Wn.2d 760, 767-68, 64 P.3d 618 (2003) (distinguishing between police power and eminent domain power).

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- The taking claim is ripe for adjudication now both under LUPA and case law precedent.
- The Declaratory Judgment Act claim should remain because it is not duplicative of LUPA and, precisely because the City is procedurally challenging LUPA jurisdiction, it ensures that this controversy will get fully resolved on the merits.
- The Appearance of Fairness Doctrine claim was not waived and the City should be estopped from claiming waiver because it did not follow its own procedures and give notice to the owner. There are inherent and material fact issues regarding waiver.
- Because the ordinance's goal was to compel speech, and because the effect of the ordinance is to place the use of the property within the control of the Pike Place Historical District ("Historical District"), a sufficient basis exists for the First Amendment violation claim. At a minimum, there are disputed material factual issues that deserve more discovery, and which preclude summary judgment.
- A decision on bifurcation should await a determination of the present motion.

The discussion below follows the order of arguments presented in the City's motion.

A. The Ordinance Is Covered by LUPA.

1. The Case for LUPA Jurisdiction Is Clear.

The City argues that its *decision about the use of land* regarding this property (and only this property) is really not a land use decision. The argument defies common sense, and more importantly, it flies in the face of LUPA's statutory language.

Contrary to what the City surprisingly argues, the Land Use Petition Act, RCW 36.70C, applies to far more than just permit applications and denials. LUPA's plain language demonstrates it also applies to a "declaratory decision regarding the application to a specific

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property [1426 First Avenue] of zoning or other ordinances or rules [Pike Place Historical District ordinance and rules] regulating the improvement, development, modification, maintenance, or use of real property." RCW 36.70C.020(2)(b). The City's ordinance precisely fits the definition of a "land use decision" in the statute under part .020(2)(b). It cannot be seriously contended otherwise. The City's discussion of LUPA in its motion never addresses, and never even refers to section .020(2)(b).

The time-to-bring-suit clause of RCW 36.70C.040 buttresses that City spot zoning ordinances affecting land use (and not just permit denials) are subject to LUPA. Section .040(4)(b) specifically references "land use decision[s] made by ordinance or resolution." RCW 36.70C.040(4)(b). There would be no need for the legislature to set time limits for challenging land use decisions implemented by "ordinance or resolution" if, as the City unpersuasively argues, the only land use decisions subject to LUPA were appeals from denials of or grants of permits. The timeliness of permit challenges under LUPA are covered by a separate provision in subpart .040(4)(a). That the legislature enacted a separate provision in LUPA squarely setting time limits for challenges to land use decisions implemented by "ordinance or resolution" establishes that they are a "land use decision" within subpart .020(2)(b).

The disjunctive interpretation of RCW 36.70C.020(2) was made clear in *Post v. City of Tacoma*, 167 Wn.2d 300, 309, 217 P.3d 1179 (2009). The Court there stated that a "land use decision" is "one of three subjects," with one of those being what is now RCW 36.70C.020(2)(b), i.e., a land use decision made by ordinance or resolution. *See also Asche v. Bloomquist*, 132 Wn. App. 784, 781, 133 P.3d 475 (2006) (LUPA covers both permits and interpretations); *Cave Props. v. City of Bainbridge Island*, 199 Wn. App. 651, 660, 401 P.3d 327 (2017) (evaluating whether decision at issue there fell into "(2)(a) or (2)(b)").[2]

[2] *See also*, *State v. Keller*, 98 Wn.2d 725, 729, 657 P.2d 1384 (1983) (disjunctive statutory interpretation); *State v. Kozey*, 183 Wn. App. 692, 334 P.3d 1170 (2014) (same).

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Cave Properties, cited above, specifically explained RCW 36.70C.020(2)(b):

> The second category of land use decision, defined in RCW 36.70C.020(2)(b), requires: (1) an interpretative or declaratory decision, (2) regarding the application to a specific property, (3) of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property.

Cave Props., 199 Wn. App. at 663.

In that case, the Court of Appeals held that the city council resolution applying a "late comers" agreement to a specific parcel of property was a "land use decision" under LUPA. *Id.* at 663-67 (citing and discussing *Vern F. Sims Family Ltd. P'ship I v. City of Burlington*, No. 73608-6-I (Wash. Ct. App. July 5, 2016) (unpublished)). The City's motion does not even attempt to explain why this reasoning is not applicable here. The City's motion pretends none of these controlling authorities exist.

When statutory language is clear, the plain terms of the statute control without need to review other provisions in other statutes. "When a statute is unambiguous, we apply the statute's plain meaning as an expression of legislative intent without considering other sources of such intent." *Id.* at 657.

2. *Schnitzer West* Confirms the Ordinance Here Is a Land Use Decision.

The final "nail in the coffin" dispensing with the City's argument that LUPA is inapplicable is the Washington Supreme Court's decision in the *Schnitzer West* case. Separate and apart from subpart (b), the City's ordinance here is also subject to LUPA review under subpart (a). The City ordinance applies to a specific parcel, and it changed a classification for that parcel, putting it into the Historical District, at the request of a party, the City of Seattle. *See Schnitzer West, LLC v. City of Puyallup*, 190 Wn.2d 568, 576, 416 P.3d 1172 (2018) (opinion text at ¶ 22).

The lead four justices and Justice Gonzalez had no difficulty viewing the City of Puyallup, which had enacted the ordinance on its own initiative, as the "specific party making the request," the grant of which was a land use decision. *Id.* at 577-78.

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Despite the City's unpersuasive effort to reduce the significance of the Supreme Court's decision, the *Schnitzer West* decision is binding precedent regarding the issues it reaches.[3] Justice Gonzalez's concurrence gives the lead opinion five supporting justices, all of whom held that an ordinance passed by a municipality that is applicable to how just one tract of land can be used is a "land use decision" within LUPA.

Schnitzer West addressed primarily two issues: (1) did the ordinance there qualify under RCW 36.70C.020(2)(a), and (2) is an ordinance that affects one specific parcel a site-specific rezone? 190 Wn.2d at 574-75.

The City Ordinance at issue here meets the same criteria that both the *Schnitzer West* lead opinion and Justice Gonzalez's concurring opinion. *Id.* at 583-84. Justice Gonzalez concurred that a site-specific ordinance that targets a particular parcel restricting its use is a land use decision within LUPA jurisdiction. *Id.* Thus, there is no difference between what Puyallup did and what the City of Seattle did. That Schnitzer had applied for a permit was neither dispositive nor even germane to either the four justice's lead opinion or Justice Gonzalez's concurring opinion. The majority did not focus at all on the fact that Schnitzer had applied for a permit in its opinion. Instead, both the four justices lead opinion and Justice Gonzalez's concurring opinion focused on the fact that it was the *City of Puyallup's* request to itself to make an ordinance change that was the land use decision subject to LUPA – just like the City of Seattle's request here to itself to enact an ordinance affecting use of one land parcel is a land use decision subject to LUPA.[4] As shown above, the City's argument is not supported by any law.

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[3] As Judge Parisien held in *Yim*, plurality opinions are "often regarded as highly persuasive." *Yim v. City of Seattle*, King Cnty. No. 17-2-05595-6 SEA, Order re Mots. for Summ. J. at 3:10-14 (Mar. 28, 2018) (citing *Texas v. Brown*, 460 U.S. 730, 737 (1983)) (attached as Ex. 1 to Decl. of John Tondini in support of this opposition).

[4] *Schnitzer West*, also confirmed prior cases holding that site-specific ordinances are not "legislative." *Id.* at 580-83. This is of great significance to the Appearance of Fairness Doctrine. *See* discussion *infra* at 17.

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B. No Merits Issue Should Be Heard by the Court at This Stage.

LUPA only permits "jurisdictional" and "procedural" challenges at an initial hearing. *See* RCW 36.70C.080(2) and (3). Partial summary judgment on merits issues are not permitted and for this reason the remaining aspects of the City's motion are premature and should be denied. If they are considered, the remaining aspects of the motion nevertheless should be denied for the reasons set out below.

C. The Declaratory Judgment Claims Should Remain.

1. Because the City Challenges LUPA Jurisdiction, the Declaratory Judgment Jurisdictional Platform Should Be Retained.

Petitioner contends that jurisdiction exists under LUPA. However, it also is abundantly clear that the City *is contesting LUPA jurisdiction*. It would be imprudent to dismiss the alternative jurisdictional platform of RCW 7.24, when the City is contesting the other jurisdictional platform. If the Court rules that LUPA provides jurisdiction (as Petitioner contends), but then grants the City's request to dismiss the alternative declaratory judgment jurisdictional basis, *all* of the Court's subsequent efforts addressing the substantive issues in this dispute *could be for naught* if a reviewing court later agreed with the City's LUPA jurisdictional challenge. *Bresolin v. Morris*, 86 Wn.2d 241, 245, 543 P.2d 325 (1975) ("A judgment is void only where the court lacks jurisdiction of the parties or the subject matter or lacks the inherent power to enter the particular order involved."). Such a wasteful outcome should be guarded against especially where there is *no prejudice* to proceeding alternatively on both jurisdictional bases. The City's position is that there is complete overlap, so it concedes that nothing more would need to be done if both remained in the case.

If the City *conceded* LUPA jurisdiction, rather than challenging it, that would be a different question. But, here, the City is trying to in effect get two bites at the apple. If it later loses the LUPA claim on the merits, on appeal it will argue that the Court's LUPA ruling is void claiming that there was no LUPA jurisdiction and seek a complete "do over." In the case cited by the City, *Grandmaster Sheng-Yen Lu v. King Cnty.*, 110 Wn. App. 92, 98-99 38 P.3d

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1040 (2002), the County *was contending* that there *was* LUPA jurisdiction, not fighting it. In the other case cited by the City, the opinion was simply observing that if LUPA applies, it is the exclusive avenue for reviewing land use decisions. *Durland v. San Juan Cnty.*, 182, Wn.2d 55, 64, 340 P.3d 191 (2014). The reasoning there is self-fulfilling, and it does not speak to prudentially keeping multiple jurisdictional bases in play where LUPA jurisdiction is being challenged.

2. <u>Because the Declaratory Relief Claims Are Not Fully Duplicative It Should Remain</u>.

While the City claims that all claims could be LUPA claims or declaratory judgment claims, Petitioner disagrees. The challenge to Free Speech is not necessarily tied to a ground for relief in LUPA. While LUPA's list of issues includes "constitutional" issues (RCW 36.70C.130), the issues referenced there are more likely traditional land use constitutional claims such as takings, and denial of due process and equal protection violations, and other constitutional claims commonly raised in land use litigation prior to the enactment of LUPA. *See, e.g., Presbytery of Seattle v. King Cnty.*, 114 Wn.2d 320, 787 P.2d 907 (1990). It is the rare land use action that would compel or regulate speech as the City ordinance does here.

In the *Grandmaster Sheng-Yen Lu* case cited by the City, there was no First Amendment claim. Nor was there a First Amendment claim in the *Durland* case. If a claim touches on or relates to a land use decision, *but is legally independent of the LUPA claim*, then the normal rule of *Grandmaster Sheng-Yen Lu* does not apply. In other words, such independent claims are not barred even if they were not brought as LUPA petitions within the LUPA limitations period. For example, in *City of Union Gap v. Printing Press Props., LLC*, 2 Wn. App. 2d 201, 409 P.3d 239, *review denied*, 191 Wn.2d 1003, 422 P.3d 914 (2018), the court held that "claims that do not depend on the validity of a land use decision are not barred." *Id.* at 220. Even if the ordinance at issue here was perfectly valid procedurally and as a land use decision (which it is not), the ordinance is independently subject to attack as a

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First Amendment violation. Thus, the First Amendment violation claim is an independent claim for which Petitioner is entitled to have an independent declaration of rights issued under the Declaratory Judgment Act, RCW 7.24.

Concurrent jurisdiction and pendency of other non-LUPA claims is expressly contemplated by LUPA. *See* RCW 36.70C.030(1)(c).

The Declaratory Judgment Act claim should remain in the case.

D. The Takings Claims Are Justiciable Now.

The City also contends Petitioner's takings claim is not ripe. Mot. at 10 (Dkt. 13). However, the City's argument fails to address either (i) all the types of takings alleged here, or (ii) the change in law driven by the LUPA statute making constitutional takings issues ripe immediately by operation of RCW 36.70C.030 and 36.70C.130.

1. LUPA Makes All Taking Variants Justiciable Now.

The City is proposing a catch-22: A party must raise in state court all taking related claims *within 21 days of a land use decision*, but the responding party can then seek dismissal by saying part of the taking claim is unripe. Then, later, when the City contends a taking claim would be ripe, it can argue that the claim is untimely because it was not made within 21 days of the land use decision. The law is not a game of "gothcha" nor is it that unfair.[5]

The City acknowledges that LUPA makes claims regarding whether a land use decision "is unlawful or unconstitutional" justiciable on an accelerated basis. Mot. at 10:1. It would be absurd to argue that constitutional takings claims must be brought within 21 days of an ordinance's enactment (RCW 36.70C.040(4)(b)), yet simultaneously that the challenge is unripe.

LUPA itself makes the claim ripe as a matter of statutory law. "Ripeness" is a form of justiciability. *See Asarco, Inc. v. Dep't of Ecology,* 145 Wn.2d 750, 759-60, 43 P.3d 471

[5] Indeed, the City's proposed order seeks to make the dismissal of the takings claim *with prejudice*, which is entirely inappropriate even if its erroneous ripeness argument were to prevail.

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(2002). LUPA statutorily makes takings challenges arising from a land use decision justiciable.

The City cites three Washington cases in support of its ripeness argument. None of the cases the City cites deal with LUPA's effect on the justiciability of takings claims arising from a land use decision. Two of them (*Sintra* and *Presbytery of Seattle*) predate the 1995 enactment of LUPA. The third also was not a LUPA case; it was instead an environmental cleanup regulation case. *Asarco,* 145 Wn.2d 750.[6]

Moreover, the ripeness discussion in *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992) and *Presbytery of Seattle v. King Cnty.*, 114 Wn.2d 320, 787 P.2d 907 (1990), expressed concerns that do not exist here. The ordinance here is a taking because the written rules for development are known and pre-established (the Pike Place Historical District Guidelines)[7] and the ordinance had the effect of closing the permit window for non-Historical District development of the property – a right to which existed under the status quo and zoning prior to the ordinance.[8] The ordinance here on its face applies to only one property, the effect is known, and that effect exists now.

The Historical District Guidelines, which are specifically authorized by the Seattle Municipal Code, do not allow for redevelopment. *See* Ex. 2, Guidelines §§ 3.1.1, 3.9.1 and

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[6] *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) does not address itself to LUPA or state constitutional claims, but rather proceedings in federal court. Moreover, that case held that where there was an unequivocal regulation governing a property, a claim was ripe because there was no room for discretion. *Id.* at 619-21. Here the ordinance does not give anyone the power to determine the property is not part of the Historical District. There is no discretionary power in the ordinance to release the property from the District. There can be no debate about "the reach" of the ordinance. *Id*. In addition, the *Palazzolo* court held that the "imposition" of "unfair land use procedures" cannot be a tool to avoid review. *Id.* at 621. Here the City of Seattle did just that – it created an unfair land use procedure – taking this property (and only this property) and adding it to the Historical District and making it subject to the Historical District's procedures – to avoid having to accept a permit application for a high rise development on property zoned for high rise development.

[7] Tondini Decl. Ex. 2. All exhibits referenced herein are attached to the Tondini Decl. filed in support of this opposition brief.

[8] The City admits that in July 2018, Onni initiated the pre-application process with SDCI. Answer to ¶ 11, Dkt. 17.

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3.9.2. "Within the District it is generally better to preserve than to repair, better to repair than to restore, better to restore than construct." *Id.* § 3.1.1. That mandate does not allow for construction of a 40+ story building on this property. Indeed, that is exactly why the City did what it did – to prevent the development authorized by the prior zoning. There is nothing speculative about the effect of the ordinance. Thwarting the development and circumventing the prior zoning was precisely the goal of the "Save the Showbox" ordinance.

In any event, LUPA provides for expedited review now and requires that the taking claim be filed within 21 days of the land use decision. This statutory framework now governs. Older, prior case law that either predates or does not even address LUPA cannot usurp the newer statutory scope and jurisdiction of LUPA review. Much like the comprehensive change to common law tort liability brought about by the Tort Reform statutes of RCW 4.22,[9] the Legislature changed the rules for the timing of challenges to land use decisions, including constitutional takings challenges when it enacted the comprehensive LUPA statutes. As expressly set out by the Legislature:

> [T]his chapter is to *reform the process for judicial review* of land use decisions made by local jurisdictions, by establishing uniform, *expedited* appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and *timely* judicial review."

RCW 36.70C.010 (emphases added). The City cannot create a catch-22 of requiring immediate filing under LUPA, but also claiming such a taking claim is unripe.

2. <u>There Is No Ripeness Component to the Type of Taking Alleged Here</u>.

The City also misses the mark by assuming the <u>only</u> taking claim in this case is a *regulatory taking* as opposed to the *taking of a fundamental attribute of property ownership*. The City cites no authority that "ripeness" has *any* application where, as here, the taking

[9] *Scott v. Cascade Structures*, 100 Wn.2d 537, 543, 673 P.2d 179 (1983) (Tort Reform Act overruled prior common law cases).

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involves a fundamental attribute of property ownership. For this independent reason, which we demonstrate below, the taking claim is a justiciable controversy now.

Earlier this year, on March 28, 2018, Judge Parisien of this Court ruled that a City of Seattle "first-in-line" ordinance was an unconstitutional taking, not because someone applied for an apartment first and was denied, and not because someone was charged with a violation of the ordinance, but rather because on the face of the statute its effect was to deprive property owners of a *fundamental attribute of property ownership – the right to lease a property or portion of a property to whom the landlord chooses*, not who the government dictates. *Yim v. City of Seattle*, King Cnty. No. 17-2-05595-6 SEA (Mar. 28, 2018).[10] In this kind of taking case, neither permit applications, enforcement charges nor other concerns regarding "ripeness" are required. The ordinance's effect, if permitted to stand, is the taking.

The Petition filed in the present matter alleges this kind of taking of fundamental attributes of property ownership. Petition ¶¶ 31, 67.

The ordinance here makes the Historical District Guidelines applicable to this property. Right now, the property owner leases to business operators of a performance hall, the Blarney Stone Pub, a pawn shop and a Chinese restaurant. The Showbox is a business run by a subsidiary of the AEG Group, a world-wide sports and entertainment conglomerate. https://en.wikipedia.org/wiki/Anschutz_Entertainment_Group.

However, the ordinance strips away the owner's control over the leases it wants to enter into and the types of businesses the owner wants to operate at the property. Under the ordinance, and because of the Historical District Guidelines, any lease by the owner must now be reviewed and approved by the Historical District. Guidelines § 2.10.2 (Ex. 2). The Guidelines' restrictions on who may operate a business are strict and uncompromising. Guidelines § 2.[11] Any business use is required to be scrutinized. No business use can *change*

[10] Ex. 1.

[11] The Showbox already runs afoul of the Guidelines because AEG is not an "owner operator" at the Showbox. Guidelines § 2.6.1. Moreover, because AEG did not begin its entertainment

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without the government's permission. As the Guidelines plainly state: "The Pike Place Market Historical Commission is responsible for preservation and protection of historic uses…." *Id.* § 1.1. "Changes in use" including "changes in ownership" require Commission approval. *Id.* § 1.3. "Compliance with use and design terms … is required." *Id.* § 1.7.

These heavy controls on the property rights within the District began in the mid-1970s when the Historical District was formed under powers of eminent domain. The City was free to impose whatever restrictions it wanted to impose on itself regarding properties that it had acquired. In contrast, here, the City did not acquire 1426 First Avenue by power of eminent domain. It does not own this property. Petitioner does. According to a review of tax records the properties in the Pike Place Historical District are almost universally owned by the Pike Place PDA, including every property fronting First Avenue from the District's southern boundary north to Pine. Tondini Decl. ¶ 11. As publicly owned, the Historical District can do whatever it wants with its own business tenants.

The limits the ordinance imposes on Petitioner's ability to exercise and enjoy fundamental ownership rights in leasing the property, choosing business tenants and choosing uses, individually and collectively interfere with and take away fundamental property rights *to a far greater extent* than the "first in-line" ordinance stricken as an unconstitutional taking by Judge Parisien in *Yim.*

As can be seen from Judge Parisien's decision and the Washington Supreme Court case it principally relies on, *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 363-65, 13 P.3d 183 (2000), "ripeness" is not an issue for this kind of taking. The City's motion here simply fails to address the type of taking claim Petitioner is asserting in this case. The takings claim is justiciable now just as it was in *Yim* and just as it was in

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operations at the market, it cannot operate there because it has locations elsewhere. Starbucks and Sur La Table are the businesses that were the genesis of the provision's odd wording. Both originated in the market, but now have locations elsewhere.

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Manufactured Housing. *See also, Fowler v. Guerin*, 899 F.3d 1112, 1117 (9th Cir. 2018) (ripeness does not apply to per se takings).

While the City does not challenge the merits of the takings claim, a brief background helps to show why "ripeness" has never been a prerequisite for a takings claim based on the stripping away of one or more of the fundamental rights private property owners enjoy. The Washington Supreme Court has held that an owner's right to sell a property interest to whom he or she chooses is a fundamental attribute of property ownership, which cannot be taken without due process and payment of just compensation. *See Manufactured Housing*, 142 Wn.2d at 363-65. The City of Seattle, however, appropriated this right when it demanded that the 1426 First Avenue property owner only lease to whom the Historical District approves and for uses that the District, not the property owner chooses. That is unlawful and that cannot stand under the rationale of *Yim* and *Manufactured Housing*.

Over the years, the Washington Supreme Court has developed several distinct tests to identify when government regulation of property goes too far and effects a regulatory taking. *Guimont v. Clarke*, 121 Wn.2d 586, 605, 854 P.2d 1 (1993). Among those tests, the Court has held that a property owner proves a "per se" or "categorical" taking if he or she can show that a regulation destroys one or more of the fundamental attributes of property ownership – e.g., the right to possess property, exclude others, dispose of property, or make some economically viable use of property. *Guimont*, 121 Wn.2d at 602; *see also Manufactured Housing*, 142 Wn.2d at 355. In this circumstance, a taking has occurred, and no further analysis is required. *Guimont v. City of Seattle*, 77 Wn. App. 74, 81, 896 P.2d 70 (1995) (citing *Guimont v. Clarke*, 121 Wn.2d at 600). In these kinds of cases, the landowner is entitled to "categorical treatment," which may include an order enjoining the regulation's enforcement. *Id.*; *Manufactured Housing*, 142 Wn.2d at 355.

The Washington Supreme Court's opinion in *Manufactured Housing* held that a state law constituted a facial taking because it took "from the park owner the right to freely dispose

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of his or her property and [gave] to tenants a right of first refusal to acquire the property." *Id.* at 361. The right to freely dispose of property, the Court reasoned, is a fundamental attribute of property ownership, and the right of first refusal law caused a taking when it destroyed that attribute. *Id*. at 361, 364.

The doctrine stems from the principle that property includes a family of rights: "Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment, and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself." *Ackerman v. Port of Seattle*, 55 Wn.2d 400, 409, 348 P.2d 664 (1960) (quoting *Spann v. City of Dallas*, 111 Tex. 350, 355, 235 S.W. 513 (1921)), *abrogated on other grounds by Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 548 P.2d 1085 (1976).

A leasehold, as Judge Parisien held in *Yim*, is simply one method of disposing of a property interest. A leasehold is more than a contractual right; the leasehold itself is a property interest that cannot be taken without just compensation. *See Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 303 (1976). A property owner enjoys the right to lease to whom he or she wishes as a fundamental attribute of property ownership. That same reasoning would apply to choice of business uses, so long as they are otherwise lawful under generally applicable laws.

The ordinance here invades and takes away from the bundle of sticks that is owned by the property owner. By taking that stick and others and handing it over to the Historical District, the ordinance destroys "part of 'the bundle of sticks' which the *owner* enjoys as a vested incident of ownership." *Manufactured Housing*, 142 Wn.2d at 367 (footnote omitted). The ordinance, therefore, gives rise to a categorical taking. In neither *Yim*, nor *Manufactured Housing* did the courts require the issue to ripen by waiting for the ordinance's procedures to inevitably play themselves out.

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E. <u>The Appearance of Fairness Doctrine Applies and Was Not Waived</u>.

Rezones are quasi-judicial and the doctrine applies. The City's own Municipal Code and other statements confirm this. Nevertheless, the Council failed to follow the doctrine and the owner promptly objected and asserted a violation. The claim should not be dismissed. Moreover, the claim is fact-dependent and material issues of fact exist, and remain to be discovered, such that summary judgment now should not be entered. CR 56(c) and (f).

The City argues the Appearance of Fairness Doctrine only applies to contested hearings where parties are present and stating their case. In effect, because the City was operating so out of bounds in the way it reached a decision, it is arguing it should not be flagged for a penalty. However, the doctrine should apply with that much more force when the City violates its own Municipal Code procedures causing its decision-making here to barely resemble the hearing that should have happened.

Rezones of a specific parcel are defined by the City as "Type IV" land use decisions. SMC 23.76.004. A change in an "overlay" is also a Type IV, quasi-judicial decision. SMC 23.76.036(A)(1). Type IV decisions are quasi-judicial and are supposed to be decided first on the recommendation of the Director of Seattle Department of Construction and Inspections and the follow-on recommendation of a Hearing Examiner. SMC 23.76.004(C). Applications for Type IV decisions must be made to the Director in the first instance and not to the Council directly. SMC 23.76.040; 23.76.038(A). There should be a public comment period, evidence taken and a record created. SMC 23.76.052. None of these procedures were followed by the City.

As detailed below, the undisputed fact is that the City never gave the owner the kinds of notice of hearing that the Seattle Municipal Code *requires* for this kind of decision. Nevertheless, having seen press stories that the City was going to delay any ordinance until after the August recess of the Council, the owner still gave voice to its objection to the way

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the Council was proceeding immediately before what eventually turned out to be the decisive August 13, 2018 Council meeting.

The owner then formalized its claim of an Appearance of Fairness violation by suing *prior to the effective date of the ordinance* and within seven days of the Mayor signing the ordinance (four days after the fact of signing was posted on the City Clerk's website). The City should not be heard to complain that a timelier objection should have been made. Moreover, by not giving the kinds of notice required by its own rules, the City should be estopped from raising an argument of waiver.

In the case cited by the City for waiver, the party subject to waiver was present at a hearing and gave counter-testimony presumably because they had been given notice. That simply is not the case here.

1. <u>The Doctrine Applies</u>.

Schnitzer West, 190 Wn.2d at 576, specifically held that the kind of ordinance enacted by the City is a land use decision and a spot zone because it is applicable only to one parcel of property.[12] *Schnitzer West* also confirmed prior cases holding that site-specific ordinances are not "legislative." 190 Wn.2d at 580-83. Therefore, this is precisely the type of decision by a Council that is quasi-judicial and not legislative under RCW 42.36.010. A local legislative body's decision to rezone specific tracts of land under a zoning code is considered an adjudicatory, quasi-judicial act. *Bassani v. Bd. of Cty. Comm'rs for Yakima Cnty.*, 70 Wn. App. 389, 393, 853 P.2d 945 (1993).

A number of Seattle Municipal Code provisions, as well as documentation the City publishes, demonstrates that site-specific land use decisions by the City Council are quasi-

[12] The proposal on the table for discussion at the August 8, 2018, committee meeting was a different version of the ordinance. The early version would have been applicable to other properties fronting the eastside of First Avenue. The proposed ordinance was amended only at the end of the August 8 Committee meeting, to be reduced down to just the Showbox property site. No final decision on the ordinance was reached at the August 8 meeting. Ex. 3 at 86:14-87:23.

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judicial government action. First, is the Seattle Municipal Code, which defines rezones as "quasi-judicial." SMC 23.76.004(C). A change in an "overlay" also is considered quasi-judicial. SMC 23.76.036(A)(1).

If the Code was not enough, an informational sheet from the City of Seattle Clerk's Office describes the types of actions the City Council can take and confirms that "requests to rezone property" are "quasi-judicial." Ex. 4. The "request" here came from the Council itself, or the sponsoring Councilmember, Ms. Sawant. *See Schnitzer West*, 190 Wn.2d at 577-78 (holding that the City of Puyallup was the party requesting the re-zone at issue there). The Seattle Department of Construction and Inspections, in an official publication (#228), also takes the position that the Appearance of Fairness Doctrine applies to "rezone applications." Ex. 5. Because this particular rezone only applied to one property, the City cannot credibly claim that it is an "area-wide" rezone not subject to the doctrine. *See* RCW 42.36.010. Instead, the City Council hearing on August 13 was a "legislative body" hearing a matter determining the legal rights of "specific parties," here, the property owner. This makes it quasi-judicial under RCW 42.36.010. The map attached to the ordinance, showing that the ordinance only applies to one property, makes this abundantly clear.

2. <u>The Owner Timely Objected</u>.

Having seen press stories that the City was going to *delay* any ordinance until after the August recess of the Council, the owner still gave voice to its objection to the way the Council was proceeding immediately before what eventually turned out to be the decisive August 13, 2018, Council meeting. Ex. 6. The City complains that this August 12, 2018, letter did not raise concerns about appearance of fairness. The City is wrong. The letter, in part, states:

> Our client has retained us because *it is increasingly concerned about some of the recent statements, proposals and actions taken by certain Council members regarding the zoning of this property.* These actions have occurred over the last several days without slowing down to hear from the property owners along First Avenue

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> and other parts of the City who might be affected adversely should the City take action against properties.
> ….
>
> It is important for all parties involved *to be heard fairly* and accorded consideration and for rights to be recognized and protected. Process should be afforded and both procedural and substantive fairness observed.

Ex. 6, August 12, 2018 letter (emphases added).

The owner then formalized its claim of an Appearance of Fairness violation by suing on August 31, 2018 ***prior to the effective date of the ordinance*** and within seven days of the Mayor signing the ordinance (four days after it was posted on the City Clerk's website). The Mayor signed the ordinance on Friday August 24, 2018. However, the City Clerk's office did not post notice of the Mayor's signing until Monday August 27, 2018. Tondini Decl. ¶ 17. The lawsuit was filed four days later, on August 31, 2018.

By its own terms, the ordinance did not become effective until 30 days after the Mayor's signature, which would be September 23, 2018. Further, if the Mayor had vetoed the ordinance on August 24, there would not have been a final decision to seek review of under LUPA. Under no stretch of the authorities can there be a valid waiver of the doctrine when (i) no notice was given to the property owner, (ii) the property owner nonetheless objected to the lack of fairness to the proceedings, and (iii) the property owner filed a lawsuit, making an Appearance of Fairness claim prior to the effective date of the offending ordinance and within days after the Mayor signed it.

3. <u>Given the City's Failure to Give Proper Notice, the City Should Be Estopped From Arguing Waiver</u>.

Because the City failed to follow its own ***law*** on providing notice, it should not be heard to complain that the owner was not present to object. The City should be estopped from arguing waiver.

Pursuant to Seattle Municipal Code, impacted property owners must be given notice of land use rezones that affect their property by posting and mail. SMC 23.76.052(C); *see also*

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23.76.012(A)(2); 23.76.042. This was not done either for the August 8 Committee meeting or the August 13 City Council meeting. Forbes Decl. ¶ 2. The City does not contend otherwise. Yet, the City tries to fault the owner for not being at the August 8 Committee meeting, which was inconsequential anyway because it was not a final decision. And tries again to fault the owner for not being at the Council meeting on August 13, 2018, even when the Code-required notice was not given and when the press reported that no action would be taken except tabling the matter until after the August Council recess. Ex. 7. It was not announced that the Council would vote on the revised and amended ordinance until after the meeting on August 13 began:

> [Councilmember Herbold:] One of the things that we have been talking about since last Wednesday was the talk about whether or not we should hold the legislation. And I'm glad that it appears that we have decided not to hold it. But I do want to -- yeah. I really want to sunlight the issue, the fact that the developer of this site agreed to voluntarily take steps to delay vesting in the hopes that this council would delay the vote. And happily, again, it appears that we are not doing that.

Tondini Decl. ¶¶ 12-13.

At the meeting, each public comment was limited to one minute. *Id.*

Given the failures of the City to abide by its own Code, the City should be estopped from claiming waiver:

> Equitable estoppel arises when a person's statements or conduct are inconsistent with a claim afterward asserted and another has reasonably relied on the statements or conduct and would be injured by a contradiction or repudiation of them. **The effect of equitable estoppel is to preclude a party from offering** an explanation **or defense that the party would otherwise be able to assert**. Unless only one reasonable inference can be drawn from the evidence, equitable estoppel is an issue of fact.

Shows v. Pemberton, 73 Wn. App. 107, 110-11, 868 P.2d 164 (1994) (emphases added) (citations omitted).

At a minimum, there are issues of material fact that preclude summary judgment on the Appearance of Fairness Doctrine's application and waiver, including fact issues regarding estoppel that must await further discovery. *See* CR 56(f) and Tondini Decl. ¶ 9. Notably, the

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City does not contest that the Councilmembers' actions violated the doctrine. *See* Answer, Dkt. 17, ¶¶ 43-46, including meeting video. *See* Tondini Decl. ¶ 13. Emails, and social media posts show the ex-parte contacts, prejudgment and bias. Exs. 8, 9, 11, 12, and 13.

F. <u>The First Amendment Claims Are Well-Pled</u>.

In what might be the ultimate modern day example of "the emperor has no clothes," despite the City Council having publicly taken credit for saving the Showbox as a music venue, the City now argues in its motion that the ordinance does nothing of the kind. The City now asserts that "the Ordinance does not, as Plaintiff alleges, 'require[e] continued performances at the Showbox.'" Mot. at 11:20-21. If that is true, then the City Council has been fooling the public by claiming that the ordinance "saved" the Showbox. *See* Exs. 10, 11.

However, if you take the word of the City Council and not what its lawyers now claim to try to avoid liability, then it is clear that the object and effect of the "Save the Showbox" ordinance was to save the Showbox and its musical performances. The undeniable goal and effect of the ordinance is to compel music. If what the City wanted to do was save the building, then the Landmark law and procedure already exists to achieve that if the building otherwise qualifies. The City had already concluded it lacked such qualities. Ex. 14

But the City recognized that saving the walls was not the goal. In an email regarding "Landmarking," the Council was told by Historic Seattle (the landmark nominator) that *uses* inside a building could not be preserved under the Landmark statute and that something else would need to be done to preserve musical performance. Ex. 8 at 11-12. Because the City wanted to keep the music playing, it needed a new ordinance beyond Landmark and that is why they rushed to reverse-spot zone the Showbox site into the Pike Place Historical District – because the District regulates *uses* and the District can force continued use of the venue as a music performance site.[13]

[13] The Historical District Commission is a sub-unit of the City of Seattle. SMC 25.24.030. And the Guidelines (Ex. 2) are authorized by the Code. SMC 25.24.030(C).

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Within the District, any *use* of a property is required to be approved. No business *use* can change without the government's permission. As the Guidelines state: "The Pike Place Market Historical Commission **is responsible for preservation and protection of historic uses**…." Ex. 2 § 1.1 (emphasis added). "Changes in use" require Commission approval. *Id.* § 1.3. "Compliance with use and design terms … is required." *Id.* § 1.7. The City found a way to compel musical performance – the District Guidelines. And the City Code itself makes it a duty of the Commission to mandate "continuance of uses." SMC 25.24.030(C).

The City has only responded to one of Petitioner's ten Public Records Requests, but that limited production reveals clearly that the ordinance's sponsor wanted to preserve the continued performance of music. *See* Ex. 8 at 2-3, 7, 9. Other requests remain outstanding and at a minimum under CR 56(f) this issue should not be decided against Petitioner until the City's production is completed and reviewed. Tondini Decl. ¶ 9.

The City Council's scheme and goal were plainly revealed by reviewing just the initial documents produced by the City and their statements at the Committee meeting to "Save the Showbox" confirm this. Exs. 8, 11 and 12. For example, on August 8, Councilmember and Committee Chair Bagshaw stated:

> CHAIR BAGSHAW: So my understanding -- Erin, you may want to dive in here and help us with this -- that in the landmark provisions as we have them now, **that the use cannot be 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.**
>
> ERIN: That's correct. So the Landmarks Board has purview over making alterations to the physical features of a landmark but do not have purview over a tenant or a type of use.
>
> CHAIR BAGSHAW: **Right. And in contrast to that, we have our Pike Place Market Historical Commission where the 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.**

Ex. 3, August 8, 2018, transcript at 77:25-78:15 (emphases added).

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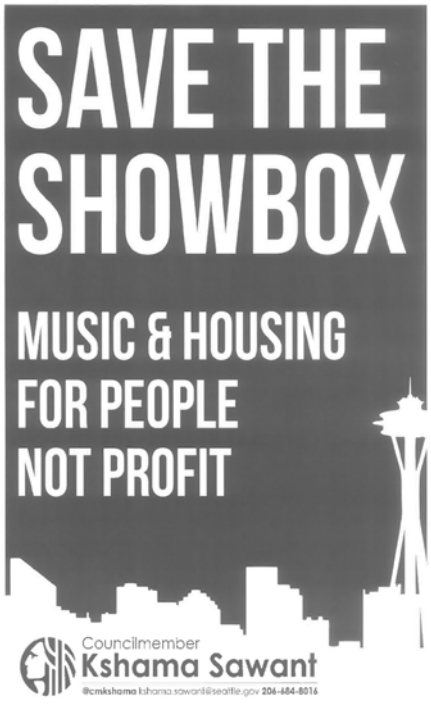
Councilmember Gonzalez stated that the goal plainly was to preserve the current music performance use:

> I think what people are really asking us to do is to **preserve the use of the Showbox and what it does on the inside** much more so than what it looks like on the outside. So the landmarks piece takes care of what's happening on the outside. And I think what we're struggling with is **what's the best tool to use for purposes of controlling or considering controls for the actual use of the Showbox as it currently exists. …**

Id. at 88:6-13 (emphases added).

When it comes to articulating what the City is compelling by ordinance, the City Council has greater say than the lawyers representing the City in this lawsuit. It is apparent that the ordinance compels speech in the form of continued musical performance and that desire to compel speech is precisely why this property and only this property was spot-zoned into the Historical District. As a City-funded poster makes plain, the end-result of the ordinance is saving music:



Ex. 9.

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The Supreme Court has specifically held that music and performance art are forms of expressive activity that fall under the purview of First Amendment protection. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989); *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 871 P.2d 1050 (1994) (music is speech).

Further, "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). "The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind." *Id.* (internal quotation marks omitted). "Just as the First Amendment may prevent the government from prohibiting speech, [it] may prevent the government from compelling individuals to express certain views...." *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001).

Nor can the City argue that it is not compelling speech because the Showbox is merely a conduit for the speech of others. This argument was rejected in *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Grp. of Boston*, 515 U.S. 557, 575-76 (1995) and also *Miami Herald Pub'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974), where the Court held that parade organizers and a newspaper, respectively, were more than "passive receptacles" or "conduits" for speech because the choice of content and participants constitute the exercise of editorial control and judgment upon which the state may not intrude.

Likewise, laws that require certain speakers to publish others' messages, if the requirement hinders the speakers' ability to express their own message require heightened scrutiny. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 13-14 (1986); *Miami Herald Publ'g*, 418 U.S. at 258.

Furthermore, "the general public does not generally have a First Amendment right to access private property for expression." *Wright v. Incline Village Gen. Improvement Dist.*, 665 F.3d 1128, 1137 (9th Cir. 2011). Similarly, government action "[r]equiring private

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property owners to allow the general public to access their property to express messages the property owners may oppose could violate the property owners' First Amendment rights." *Id.*; *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 676 (1994) (O'Connor, J., concurring in part and dissenting in part) ("Under the First Amendment, it is not normally within the government's power to decide who may speak and who may not, at least on private property or in traditional public fora.").

Here, of course, there is *no justification for placing the burden of supplying music to a city upon one property-owner*. If the City wants musical performances, the City should purchase the property or build its own concert hall and host its own musical performances. The ordinance violates the First Amendment.

In addition, the District Guidelines impermissibly restrict commercial speech because the sign regulations are not narrowly tailored, nor legitimate when applied to a single piece of property *on the eastside of First Avenue*. Ex. 2, Guidelines §§ 3.6.1-3.6.7.

G. Bifurcation of Proof of Damages and Fees Should Await LUPA Determinations, But Not If LUPA's Expedited Proceedings Are Rejected.

If this case proceeds to consider the invalidation of the ordinance on an expedited basis under LUPA, then it makes sense to put proof of damages and fees on hold until a determination on validity of the ordinance. However, if the motion to dismiss the LUPA process is granted (it should not be granted), then it is better to proceed under one unitary action with liability and damages tried together.

DATED this 8th day of October, 2018.

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CERTIFICATION: The above signature also certifies that this memorandum contains 8,396 words, in compliance with the Local Civil Rules.

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 8th 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 8th day of October, 2018.

ECB

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