



**Legislative Department  
Seattle City Council  
Memorandum**

Date: February 14, 2011

To: Mike O'Brien, Chair  
Tim Burgess, Vice-Chair  
Nick Licata, Member  
Planning, Land Use, and Sustainability (PLUS) Committee

From: Martha Lester, City Council Central Staff

**Subject: Quasi-Judicial Rezone Application for February 21 PLUS Committee meeting:**  
Clerk File (C.F.) 312973: Application of Midtown Limited Partnership to rezone land located at 2301 East Union Street from Neighborhood Commercial 2 with a 40 foot height limit (NC2-40) and Neighborhood Commercial 2 with a 40 foot height limit and pedestrian zone designation (NC2P-40) to Neighborhood Commercial 2 with a 65 foot height limit and pedestrian zone designation (NC2P-65) (Project Number 3005931, Type IV).

**Background**

Hugh Bangasser, for MidTown Limited Partnership, applied for a rezone of a full block at 2301 E. Union Street, at the southeast corner of the intersection of 23<sup>rd</sup> Avenue and E. Union Street. The existing zoning is NC2P-40 and NC2-40, and the requested zoning for the entire block is NC2P-65 – no change in the base zone (Neighborhood Commercial 2), but an increase in the allowable height from 40 feet to 65 feet, and application of the “P” (pedestrian zone) designation to the entire block.<sup>1</sup>

The applicant has not proposed any specific project for the site, so is not requesting a “contract” rezone, in which a contract (called a property use and development agreement, or PUDA) would impose conditions on the project to be built. The applicant has requested a “general” rezone, without conditions. However, the Council could decide to approve the rezone and impose conditions.

The Department of Planning and Development (DPD) analyzed the application, conducted environmental review under the State Environmental Policy Act (SEPA), issued a SEPA determination of non-significance (DNS) with no conditions, and recommended approval of the requested rezone.

The Hearing Examiner held an open-record hearing in December 2013, and recommended denial.

The applicant filed an appeal with the Council. The matter is now before the Planning, Land Use, and Sustainability (PLUS) Committee. On February 21, 2014, the PLUS Committee will have its initial briefing on this matter, but no decisions will be made. Additional discussion, and vote, will be scheduled for a future PLUS Committee meeting(s).

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<sup>1</sup> The original title of the C.F. was not quite right, so it has been revised as follows to accurately reflect that the area encompassed by the rezone application currently has two zoning designations (a portion without a P designation, and a portion with a P designation), and the requested zoning designation is NC2 (not NC3):

Application of Midtown Limited Partnership to rezone land located at 2301 East Union Street from Neighborhood Commercial 2 with a 40 foot height limit (NC2-40) and Neighborhood Commercial 2 with a 40 foot height limit and pedestrian zone designation (NC2P-40) to Neighborhood Commercial 2 ~~3~~ with a 65 foot height limit and pedestrian zone designation (NC23P-65) (Project Number 3005931, Type IV).

Per the Seattle Municipal Code, the Council must issue its decision within 120 days of receiving the Hearing Examiner's recommendation, meaning the Council must act by April 17, 2014.

### **Type of Action and Materials**

Because this rezone would affect one property, the matter is considered a quasi-judicial rezone under the Seattle Municipal Code. Quasi-judicial rezones are subject to the state Appearance of Fairness Doctrine prohibiting ex-parte communication. Council decisions must be made on the record established by the Hearing Examiner.

The Hearing Examiner establishes the record at an open-record hearing. The record contains the substance of the testimony provided at the Hearing Examiner's open-record hearing and the exhibits entered into the record at that hearing. The entire record including an audio recording of the Hearing Examiner's hearing is in my office and available for review at Councilmembers' convenience.

Attached to this memo are the following documents:

- DPD's recommendation (Hearing Examiner Exhibit 10)
- Written public comments submitted to DPD or the Hearing Examiner (all or part of Hearing Examiner Exhibits 9, 11, 12, 14, 15, and 16)
- Hearing Examiner's recommendation
- Applicant's appeal of the Hearing Examiner's recommendation
- DPD's response in support of the applicant's appeal

### **Standard of Review and Burden of Proof**

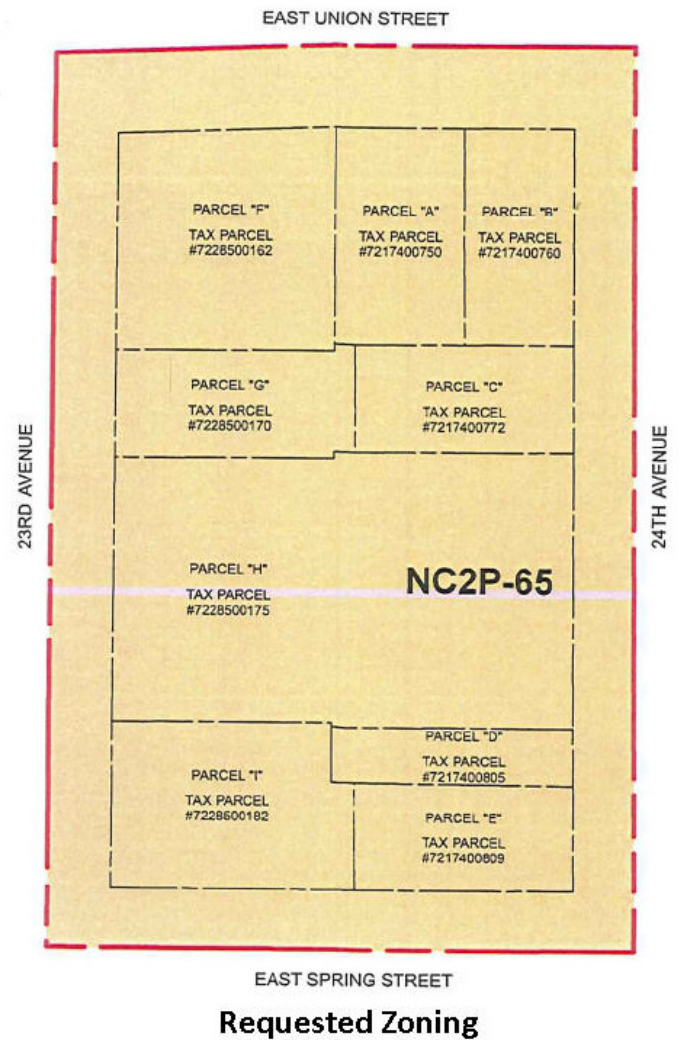
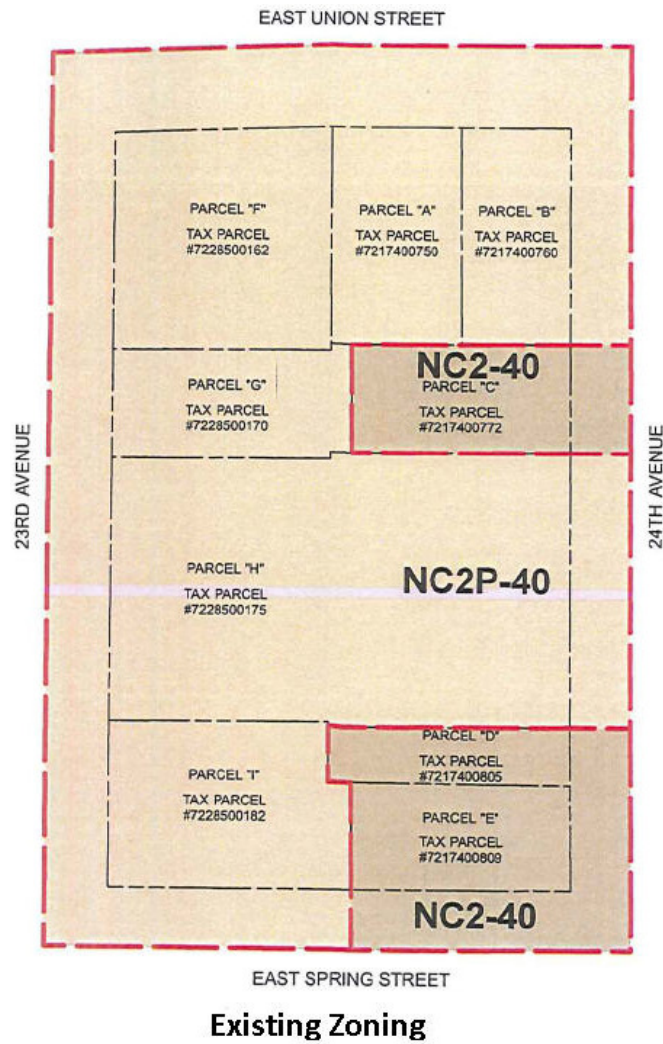
In making its decision on a quasi-judicial rezone application, the Council applies the *substantial evidence standard of review*. This means that the Council's decision to approve, approve with conditions, or deny the recommendation must be supported by substantial evidence in the record. The applicant bears the burden of proving that the Hearing Examiner's recommendation should be rejected or modified.<sup>2</sup>

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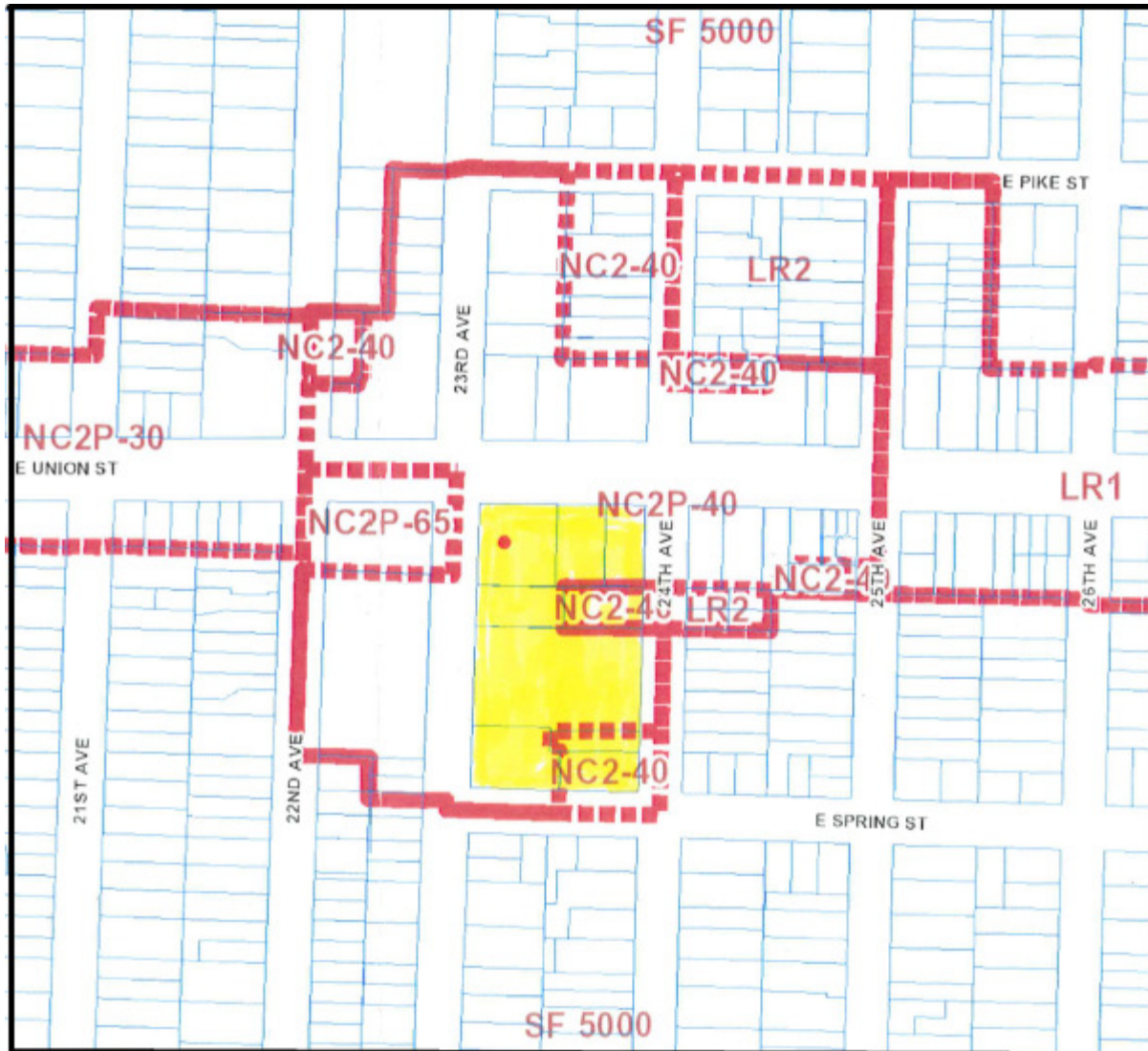
<sup>2</sup> S.M.C. § 23.76.056.A.

## Summary of Application and Existing Conditions

There are nine parcels on the block. These two diagrams (Hearing Examiner Exhibit 1) show existing and requested zoning:



The following map (excerpt from Hearing Examiner Exhibit 2) shows surrounding zoning, with the subject block highlighted in yellow. Most of the area to the west and north is zoned NC2P-40. A portion due west of the north end of the subject block is zoned NC2P-65, the result of a contract rezone approved by the Council in 2008. To the east, there is NC2P-40, a small area of LR2 (Lowrise 2), and SF 5000 (Single Family). The adjoining area to the south is similarly zoned SF 5000.



### Written Public Comments

Attached to this memo are the written public comments submitted to DPD or the Hearing Examiner (all or part of Hearing Examiner Exhibits 9, 11, 12, 14, 15, and 16).

### Main Issue on Appeal

#### Issue

The main issue of contention that has emerged can be stated as follows: If the rezone is approved, will there be a sufficient transition in height and scale and level of activity between the rezoned block with a 65-foot height limit and the areas to the south and east that are zoned SF 5000?

## Key Code Provisions

SMC 23.34.009 sets out rezone criteria related to height. Subsection 23.34.009.D focuses on “compatibility with surrounding area,” and states in part: “Height limits for an area shall be compatible with actual and zoned heights in surrounding areas” and “A gradual transition in height and scale and level of activity between zones shall be provided unless major physical buffers [such as streams, ravines, or major traffic arterials] are present.”

SMC 23.41.004 requires design review for any new multifamily, commercial, or industrial development in an NC zone that exceeds four dwelling units or 4,000 square feet of nonresidential gross floor area.

## Hearing Examiner’s Reasoning

The Hearing Examiner’s recommendation includes the following Conclusion 23:

“The proposed 65-foot height limit would not match the existing height in the surrounding area, but depending on what kind of development occurs on this site, the height limit could be compatible both with actual and zoned heights in the surrounding area. Similarly, although no major physical buffers are present, the design of future development at the site could provide gradual transition in height and scale and level of activity between the commercial and residential zones. But at this time, as noted by DPD, there are a number of different development scenarios that could occur on this large site, including individual development on the separate lots within the site; Ex. 10, p. 15. Even if it is presumed that design review will apply to future development of this site, it is not known what the outcome of that process would be in terms of project design or conditions. The future compatibility of a 65-foot height limit, or the gradual transition in height, scale and activity between zones, cannot be assumed on the basis of what is in this record.”

## Applicant’s Argument on Appeal

In its appeal of the Hearing Examiner’s recommendation, the applicant contends that “the City’s Design Guidelines are more than sufficiently specific to assure that any future development on the property is compatible with and appropriately complements/transitions to neighboring properties.”

In its response in support of the applicant’s appeal, DPD makes a similar claim: “Seattle’s design review process, which is designed to address, among other issues, appropriate transitions with development on neighboring properties, will review and condition future project-specific development proposals on the property.”

## Analysis

As stated above, the key issue is: If the rezone is approved, will there be a sufficient transition in height and scale and level of activity between the rezoned block with a 65-foot height limit and the areas to the south and east that are zoned SF 5000? Because the applicant has not proposed a specific project for the site, the Council cannot impose project-specific conditions to ensure a sufficient transition.

In its appeal, the applicant seems to make two assumptions. First, the applicant assumes that any development proposed for this site will be subject to design review. Second, the applicant assumes that the design review process will ensure a sufficient transition in height and scale and level of activity between the rezoned block and the SF 5000-zoned areas to the south and east.

However, neither of these assumptions is guaranteed. The type of future development that the applicant has informally described (but not an official part of the rezone request) is a large residential-over-ground-floor-commercial project, and such a project would be subject to design review under SMC 23.41.004.

However, there are development scenarios in which a project might not be required to undergo design review. One such example is an institutional use, such as a social services agency, which is neither multifamily nor commercial nor industrial and thus not subject to design review. Another such scenario would occur if separate projects were proposed on the individual lots that comprise the block, and one or more projects were to fall below the thresholds in SMC 23.41.004 for design review.

The applicant seems to acknowledge that such scenarios are possible when, at the very end of its appeal document, it states: “If the Council is concerned that there may be projects proposed on the property that are exempt from design review, the Applicant suggests that the Council condition its approval of the rezone upon a condition that any project developed on the property will be subject to the City’s design review process.”

Even if the first assumption were true, and any proposed development were to undergo design review, that does not necessarily mean that the Design Review Board and DPD would impose conditions that would avoid or mitigate potential adverse impacts on adjacent properties. One may hope and expect that this would occur, but reasonable people may differ regarding the adequacy of any conditions that might be imposed.

#### Council Options

Options for Councilmembers to consider include but are not limited to the following:

- a. Approve the rezone without conditions, because it is likely that a future project will undergo design review and that is an adequate process to address transition issues.
- b. Approve the rezone, but impose a condition that any future development proposal on the site must undergo design review.
- c. Approve the rezone, but impose conditions that restrict the allowable structure height in buffer areas adjacent to SF 5000-zoned properties.
- d. Deny the rezone.

#### Attachments:

- DPD’s recommendation (Hearing Examiner Exhibit 10)
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