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No. 63466-6-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

MAGNOLIA NEIGHBORHOOD PLANNING COUNCIL,

Respondent,

v.

CITY OF SEATTLE,

Appellant.

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RESPONDENT'S ANSWERING BRIEF

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Respondent Magnolia Neighborhood Planning Council (“Magnolia”) respectfully submits this brief in response to The City of Seattle’s Opening Brief.

I. INTRODUCTION AND SUMMARY

In this case a neighborhood community organization, the Magnolia Neighborhood Planning Council (“MNPC”), challenges a decision by the City of Seattle to adopt the Fort Lawton Redevelopment Plan (“FLRP”). The FLRP establishes the uses for a 29-acre property that the federal government has recently decided to surplus. The Superior Court agreed with the MNPC that the City acted illegally because it failed to consider the environmental impacts of the “Redevelopment Plan” as required by the State Environmental Policy Act, ch. 43.21C RCW (“SEPA”), and because the City failed to consider the City’s own Discovery Park Master Plan (“DPMP”) adopted in 1986.

In a nutshell this is what this case is about (it is not as complicated as it might seem from the City of Seattle’s brief): The City is acquiring property from the federal government, the Army Reserve property at Fort Lawton. The property is located in an environmentally sensitive area, Discovery Park (“one of the great urban parks of the world”). The City plans to develop the site into high density residential property. The City is functioning like a private developer. A private developer doing the same

thing would have to comply with SEPA and the DPMP. In this context, SEPA requires that the City comply with SEPA. SEPA also applies to strictly municipal actions such as new legislation, planning and zoning decisions, the construction of new municipal facilities, and what amounts to a City's venture into the private development business. However, the City contends that federal legislation known as the Base Closure and Realignment Act (also known as "BRAC") preempts SEPA and otherwise applicable state and local rules.

As shown below, the City's entire case depends on its preemption argument. First, the City does not really argue that MNPC "lacks standing." Rather, it concocts an incomprehensible "standing" argument that is in reality a disguised preemption argument. The City contends that MNPC lacks standing here because "MNPC's [sole] recourse must be to a federal court to seek relief under federal law from the federal agency with the sole authority to dictate the future use of the Reserve." This is a preemption, not a standing argument.

The City also asserts that environmental review must take place under the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* ("NEPA"), not under SEPA, because BRAC preempts all local laws including SEPA. The City urges this Court to apply an inapposite SEPA exemption for "a series of connected project actions" requiring federal

approval because, it contends, otherwise this Court would have to hold that BRAC preempts SEPA.

The City cannot overcome its heavy burden of establishing preemption beyond doubt. The federal Final Rule that implemented the regulations under BRAC that apply to the surplus of Fort Lawton contains language conclusively establishing absence of preemption. The City does not rely on a single citation to a statute, case, rule or other law in arguing preemption.

Moreover, the City has not shown that enforcement of SEPA makes compliance with BRAC impossible, nor could it. BRAC provides for environmental review under NEPA, but Congress specifically contemplated that NEPA would act in tandem with analogous state laws. There is no reason that cannot happen here. The City just wants to postpone environmental review as long as possible, and eliminate local interests from the process as much as possible, in order to bring about the very “snowball effect” thwarting meaningful and rigorous environmental review against which Washington courts have cautioned.

Ironically, the purpose of treating a series of connected actions as a single nonproject action is to enable agency review to capture cumulative impacts that might be missed in piecemeal review. It is not intended as a means to avoiding application of SEPA altogether. If the exemption upon

which the City is relying applies, the alleged connected actions would be reviewed under SEPA as individual project actions. In no event does SEPA intend that a single project action be *ex post facto* segmented in order to avoid environmental review. Washington courts have as well cautioned against these tactics. In any event, this Court could not but reach the common sense conclusion that the FLRP constitutes a single “project action” which means that the definition of nonproject actions is not implicated.

The City wishes to pursue its land acquisition and land development objectives free of the procedural and substantive burdens of SEPA. But the Court should affirm the Superior Court’s conclusion that the City is not prohibited from compliance with SEPA, nor exempted from it, and that the City must consider the DPMP for the reasons set forth below.

II. COUNTERSTATEMENT OF THE ISSUES

The issues presented in this appeal are as follows:

1. Did the Superior Court correctly decide that the MNPC, as a local neighborhood community organization, representing its members who live adjacent to the property in question, have standing to challenge the City’s failure to comply with SEPA and the DPMP?

2. Did the Superior Court correctly decide that the City, for its proposal to acquire property and develop it as described in the Fort Lawton Redevelopment Plan, must comply with SEPA by preparing an

environmental checklist and a threshold determination? Does BRAC preempt SEPA?

3. Did the Superior Court correctly decide that the City must at least consider the requirements of the Discovery Park Master Plan in deciding on the development plan?

III. COUNTERSTATEMENT OF THE CASE

A. Factual Background.

1. The Fort Lawton Military Development and Property Surplusing.

In 1898, the City of Seattle deeded a 700-acre parcel of property that presently comprises Discovery Park and what remains of Fort Lawton to the United States government as a site for a new Army base. Seattle residents intended the donation as a means of economic development for the community. The conveyance was accepted and the United States named the property Fort Lawton. *See generally* R24-29, 197.

During the intervening wars the army used Fort Lawton for various military purposes until, in 1972, the federal government surplused the property. The City of Seattle expressed interest in the property. In response, the federal government required the City to adopt a plan for the subsequent use of the land. Thus, in 1972 the City adopted the “Fort Lawton Master Plan” (FLMP). The FLMP devoted most of the surplused property for park purposes. R2-41. The government approved the FLMP, and on this basis

transferred the majority of Fort Lawton to the City of Seattle. Subsequently, the portion re-conveyed to the City became Discovery Park. *Id.*

In 1974 the FLMP was retitled the Discovery Park Master Plan (“DPMP”). R47-52. The DPMP was again revised in 1986 by the passage of City of Seattle Resolution 27399 (R72-108). The 1986 Master Plan stated that it was “intended that all features and policies of the November 1972 and February 1974 Plans shall be part of the Plan for Discovery Park except where herein revised.” R80. Further, the 1986 Plan provided:

The details of the plan may require revisions in order to achieve the overall objectives. However, the guiding principles which were valid in 1972 are still valid today and will retain validity in the future.

Id.

The Long Range Plan for Discovery Park that was a part of the 1972 Master Plan remained valid. R16. To this day the Master Plan continues to be included, with the same layout, on the Seattle Parks and Recreation Web site. *See* R316-18.

The federal government retained what is presently known as Fort Lawton. While most of the Fort was returned to the City, the Department of Defense retained approximately 45 acres in the northeast corner of the property, utilized as an Army Reserve Center (“ARC”). The ARC is

immediately adjacent to a single family neighborhood to the northeast.
See map of the area in the FLRP at R223.

In approximately 2006, the Department of Defense decided to surplus the ARC as it was no longer necessary for military purposes. In surplusing the ARC, the United States has proceeded under federal legislation known as the Base Closure and Realignment Act, Title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Pub. L. 100-526, 102 Stat.2623, 10 U.S.C. § 2687 note), or the Defense Base Closure and Realignment Act of 1990 (Pub. L. 100-526, Part A of Title XXIX of 104 Stat. 1808, 10 U.S.C. § 2687 note) (also known as “BRAC”). BRAC requires that when a military facility such as the ARC is surplus, a “local redevelopment agency” may be selected to receive the property and a plan for development of the property must be prepared. The City of Seattle sought and was approved for designation as the LRA.

After the City was designated the LRA, it began a process for approval of a redevelopment plan. According to the City, it began public hearings on September 26, 2006. R179. At the outset, the City expressed its desire to use the ARC property for residential development, a majority of which was a standard subdivision including residential duplex/townhouses. The FLRP stated that the “Project Vision” was for a housing community, mostly with market rate housing. R179. The plan

for the property was summarized in the Executive Summary of the FLRP as follows:

The proposed Redevelopment Plan is for a new mixed-income neighborhood that will be laid out on a north-south street grid following the pattern of the adjacent Kiwanis Ravine neighborhood. There will be between 108 and 125 market-rate units; a 55-unit building for homeless seniors; 30 units for homeless families; and six self-help homeownership [sic] units to be developed by Habitat for Humanity.

R183. A drawing of the development is set forth in the Executive Summary. R188.

Initially in this process, the City had to change its comprehensive plan land use designation from single family to multifamily. The City prepared an Environmental Checklist (R135-154) and Threshold Determination (R156-164) under SEPA for the comprehensive plan amendment. In its checklist, the City identified possible environmental impacts from the development of the ARC property and stated that the project would be subject to SEPA review:

The proposed map change could indirectly lead to increased development activity and associated potential short-term construction impacts on air quality. **If the City as the Designated Local Reuse Authority, selects a project proposal for the Fort Lawton site, that project will be subject to SEPA review.**

See R150 (emphasis added). In the section of the checklist related to “land and shorelines use,” the City said:

Future Land Use Map change related to Fort Lawton. The proposed map change could indirectly lead to the conversion of a

federal facility into a project providing housing and services to homeless people. That project will be subject to environmental review under SEPA.

R153.

During and following the SEPA compliance for the comprehensive plan revision, the City continued its work on the FLRP. Finally, in September 2008, the City finalized the FLRP and the City Council passed Resolution 31086 “which adopted and approved” the attached FLRP. *See* R320-322.

The heart of the City’s plan is the development and sale of portions of the property as “market rate housing.” This concept is explained in the FLRP at page 295: “The income source for the project will be the sale of single family and duplex townhome lots to market-rate developers.” Thus, the City will literally become a land developer for this project, using its own funds or loans to acquire the property. It will then build out all of the necessary infrastructure for the new residential development including roads, utilities and other public services to pave the way for builders to buy the lots and build single family homes and townhouses. The City’s plan is little or no different from that of a private developer who buys property, gets approvals for subdivision and development, puts in roads and utilities and then sells the final product to a builder, who in turn builds a home for sale to a private owner.

As may be seen from the project layout, market-rate housing is the predominate use in the FLRP. R285. Thus, while the City is the LRA, after conveyance from the federal government, the City plans to sell the ARC property to private developers who will develop expensive housing. According to Appendix H of the FLRP (R325), the “Financial Model” for the FLRP, the houses on the large lots to be developed will have an average sale price of \$829,450, the medium lots \$733,500 and the small lots \$575,000. The townhouse development will include some “luxury townhomes” (FLRP Executive Summary, R182) with an average sale price of about \$525,000. *See* R318.

However, at no time during the process leading to the adoption of Resolution 31086 and the adoption of the FLRP did the City even attempt to comply with SEPA procedural requirements. The City specifically decided that it would not comply with SEPA for the adoption of the FLRP, but rather it would delay compliance to a later time. As the FLRP stated:

SEPA is the responsibility of the local jurisdiction, in this case, the City of Seattle. SEPA is triggered by certain land use actions, including the request for a rezone or for development permits for projects over a specific size threshold (typically 20 units). SEPA determinations are made at the time of application for rezone or land use permit.

R299.

2. Content of the FLRP.

The FLRP is a lengthy (126 pages), detailed document that sets forth a precise plan for the ARC property and contains significant detail of proposed development.

First, the plan states that it will have a carefully defined number of units of various types. (R185, 284). These units include specific numbers of large, mid-size and small single family lots as well as townhouses. In addition, there will be senior and homeless housing. In total, there will be between 199 and 216 new residential units, depending on whether more townhouses or single family houses are built. *Id.*

The plan never considered whether the ARC property might be used for park purposes rather than residential purposes, though this use was strongly suggested by a number of organizations, including the Magnolia Community Council. R305-310.

Second, the plan describes the layout for the residential uses, including lot sizes. *See* R188, 285. The layout is particularized both as to housing types and as to the location of streets, parks and other open space. This layout plan is comprehensive and detailed.

Third, significant environmental impacts are identified. Indeed, the FLRP identifies, as does the earlier DNS for the comprehensive plan amendment, that the development approved by the Plan will have impacts

upon traffic and transportation which includes more than 1000 daily vehicle trips for housing, and as many as 80 to 115 new afternoon peak hour trips. R260.

The project will also impact a heron rookery located near the site. R180. As the FLRP admits, the site has both great blue heron habitat and buffer area (where there is a breeding colony of approximately 40 nesting pairs), R212-214, and states that “a great blue heron rookery in the Kiwanis Memorial Preserve Park (east of the Fort Lawton property) is of particular concern for this site.” R212. The FLRP also admits that there are serious concerns regarding the interface between the new development and the existing neighborhood to the east along 36th Avenue West. *See* R247-251.

Fourth, the City’s plan is that some of the property will be conveyed by “public benefit conveyance” to agencies for construction of homeless and self-help housing. R289. However, most of the site will be purchased by the City and reconveyed to private developers for new subdivisions or residential townhouses.

The plan is presented in extensive detail, right down to the retention of such mundane items as desks and chairs:

6.4 Personal property necessary to support redevelopment

After reviewing the personal property listing for Fort Lawton, the LRA is requesting the following items to support the homeless uses in this Redevelopment Plan: all commercial grade kitchen

equipment, two desks, two desk chairs, six visitor chairs, and two four-drawer legal filing cabinets.

R293.

B. Summary Judgment Proceedings.

On March 13, 2009, after hearing oral argument, the Superior Court granted MNCP's summary judgment motion, ruling that the City must conduct SEPA review on the FLRP. The Court also ruled that the City must "publicly determine" the applicability of the Discovery Park Master Plan to the FLRP. CP 138 (minute entry); CP 158 (transcript of oral ruling); CP 189 (order on cross motions for summary judgment).

IV. ARGUMENT

A. The Trial Court Properly Granted MNPC's Motion For Summary Judgment Requesting That the Court Order the City to Comply With SEPA.

1. MNPC Has Standing to Assert Violations SEPA in the Adoption of the FLRP.

The City argues that the MNPC, comprised of residents nearby the property to be acquired and developed, does not have standing to bring this action. But it does not argue that MNPC demonstrates no injury from the action challenged. Indeed, as nearby residents, MNPC and its members clearly have standing to challenge the action.

"In general, parties owning property adjacent to a proposed project and who allege that the project will injure their property have standing." *Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 829-830, 965 P.2d 636, 643 (1998); see also, *Save a Valuable*

Environment v. City of Bothell, 89 Wn.2d 862, 868, 576 P.2d 401 (1978) (neighbors of proposed shopping center had standing where they alleged that a rezone to permit construction of the center would have serious detrimental effects on the environment and economy of the area). In *SAVE* our Supreme Court “adopt[ed] the federal approach to the requirements of standing to gain review” of a land use action. *Id.* at 866. In a directly analogous situation to the case at bar, the Court held that “SAVE has adequately alleged direct and specific harm to its members which would flow from the building of a shopping center near their homes in North Creek Valley.” *Id.*

Id. at 866-67. The Declaration of Elizabeth Campbell, filed with the trial court in response to the City’s summary judgment motion, makes clear that MNPC, as a local neighborhood group representing its members, meets these criteria and therefore has standing to bring this action and allege that the City has not complied with its own laws and regulations. CP 108-09.

2. The City’s Entire Case Is Premised Upon a Contention That BRAC Preempts All Local Laws Including SEPA.

The City’s contention that BRAC preempts all local laws including SEPA is a thread that runs continuously through its brief. The outcome of this appeal hinges on that question. The City alleges that MNPC “lacks standing” because “MNPC’s claimed injuries depend on speculation about what the federal government might do.” City’s Opening Brief, p. 24 (sub-heading V.A.1.). The City alleges, “A fundamental premise to this dispute is that the City’s authority to control the use of a military base is extremely limited.” City’s Opening Brief, p. 25.

The City also argues that “MNPC’s interests are outside the zone protected by SEPA and the 1986 Park Plan” (City’s Opening Brief, p. 27, sub-heading V.A.2.) because “SEPA does not protect anyone where, as here, a city adopts a plan that must be approved by the federal government before it may be implemented.” City’s Opening Brief, p. 30. The City elaborates:

If, after [the Department of Defense] completes the Congressionally-mandated process and issues its decision about the fate of the Reserve, MNPC feels that its interests were not properly protected by this law, MNPC’s recourse must be to a federal court to seek relief under federal law from the federal agency with the sole authority to dictate the future use of the Reserve.

City’s Opening Brief, p. 30. The City is arguing federal preemption, not standing, to the extent its arguments make any sense at all.

The City also asserts that environmental review must take place under NEPA, not under SEPA, because BRAC preempts all local laws including SEPA. The City urges this Court to apply an inapposite SEPA exemption for “nonproject actions” instead of reaching the common sense conclusion that the FLRP constitutes a single “project action.” The City contends that otherwise this Court would have to hold that BRAC preempts SEPA. *See* City’s Opening Brief, pp. 33-34 (discussing WAC 197-11-704(2)(a)(ii)), 35 (“MNPC’s misinterpretation of SEPA would set it on a collision course with the BRAC Act--a collision from which only the federal law would survive”), 43-44 (“Fortunately, SEPA precludes a finding

of federal preemption by excluding adoption of plans like the LRA Application from SEPA’s definition of ‘action.’ Unfortunately, the trial court charted a collision course for Washington and federal law without even acknowledging the consequences.”)

This is the crux of the City’s argument that SEPA does not apply. Likewise, the City’s argument that NEPA preempts SEPA depends upon a conclusion that BRAC preempts all state and local laws such as SEPA. *See* City’s Opening Brief, pp. 38-39 (“Congress has occupied the field of base closures and dictated that environmental review, and challenges to that review, must occur pursuant to NEPA and a unique set of deadlines”). As discussed below, the City could not credibly argue that NEPA *per se* preempts SEPA.

The City mischaracterizes the law in saying SEPA “excludes a finding of federal preemption by excluding adoption of plans like the LRA Application from SEPA’s definition of action.” But MNPC will first address the City’s premise—that BRAC preempts SEPA.

3. There Are No Conflicts With Federal Law and No Preemption of SEPA or Other State Statutes.

“Federal preemption is required when Congress conveys an intent to preempt local law by: (1) ‘express preemption’, where congress explicitly defines the extent to which its enactments preempt laws; (2) ‘field preemption’, where local law regulates conduct in an area the federal government intended to exclusively occupy; and (3) ‘conflict preemption’, where it is impossible to comply with both local and federal

law. *City of Seattle v. Burlington Northern R. Co.*, 145 Wn.2d 661, 667, 41 P.3d 1169 (2002) (citing *S. Pac. Transp. Co. v. Pub. Util. Comm'n*, 9 F.3d 807, 810 (9th Cir.1993)).

“In evaluating a federal law’s preemptive effect, however, [courts] proceed from the presumption that the historic police powers of the state are not to be superseded by a federal act ‘unless that [is] the clear and manifest purpose of Congress.’” *S. Pac. Transp. Co. v. Pub. Util. Comm’n*, 9 F.3d 807, 810 (9th Cir.1993) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, (1992) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))). Likewise, Washington courts

have also repeatedly emphasized that ‘there is a strong presumption against finding preemption in an ambiguous case and the burden of proof is on the party claiming preemption. . . . State laws are not superseded by federal law unless that is the clear and manifest purpose of Congress.’

Progressive Animal Welfare Soc. v. University of Washington, 125 Wn.2d 243, 265, 884 P.2d 592 (1994) (quoting *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 326, 858 P.2d 1054 (1993) (citing *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604-05 (1991))).

The City cannot possibly meet this heavy burden. There is no preemption of any kind here for several very obvious reasons. Neither BRAC nor NEPA contains an express preemption provision. *See*

10 U.S.C. § 2687 note; NEPA, 42 U.S.C. 4321 *et seq.* To the contrary, both statutes apply by their terms only to federal agencies. *See id.*

Nor does either BRAC or NEPA “so comprehensively or pervasively occupy the field” of environmental regulation “as to raise a colorable claim of field preemption or conflict preemption.” *See PAWS*, 125 Wn.2d at 266 (“Nor does FOIA so comprehensively or pervasively occupy the field of public disclosure as to raise a colorable claim of field preemption or conflict preemption”). As discussed more fully below, Congress has anticipated that NEPA would work hand in hand with analogous state laws, and there is nothing in BRAC saying or suggesting that surplusage of bases mandates a situation different from the norm.

Indeed, the City does not base its preemption arguments on any provision of federal law, i.e., there are no citations to statute or case law that provide for federal preemption by BRAC or NEPA. There are no statutes or regulations that say that a state or city seeking to acquire federal property is prohibited from applying state environmental laws in making its decision.

On the contrary, the Department of Defense has explicitly stated that there is no preemption. The *Federal Register* announcing the applicable amendments to the regulations at 32 C.F.R. Parts 174, 175, and 176 governing the BRAC process at issue here states as follows:

G. Federalism Considerations Under Executive Order 13132

The rule does not have federalism implications **because it will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.** The only role the rule assigns to state or local government is for the establishment of an LRA and that action is entirely voluntary on the part of local government and explicitly provided for in the base closure laws. **This rule does not change the relationship between the Federal Government and state or local government nor does it change the distribution of power between those entities.**

Revitalizing Base Closure Communities and Addressing Impacts of Realignment, 71 Fed. Reg. 9910, 9919 (February 28, 2006) (Final Rule) (emphasis added). This conclusively establishes absence of any kind of preemption.

Nor does is there conflict preemption between SEPA and NEPA or BRAC. Applying the standard, there is no conflict between SEPA and BRAC because SEPA does not make it impossible for the City to Comply with NEPA under the umbrella of BRAC. *See Burlington Northern R. Co.*, *supra*, 145 Wn.2d at 667 (“‘conflict preemption’ [arises] where it is impossible to comply with both local and federal law”). The adopted regulations for NEPA, found at 40 C.F.R. Part 1500-1508, fully recognize that many states also have environmental review statutes, some very close to NEPA in content, including requiring preparation of an environmental

impact statement. Thus, the adopted NEPA regulations require recognition and consistency with local regulations, not preemption:

1506.2 Elimination of duplication with State and local procedures.

(a) Agencies authorized by law to cooperate with State agencies of statewide jurisdiction pursuant to section 102(2)(D) of the Act may do so.

(b) **Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements**, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include:

Joint planning processes.

Joint environmental research and studies.

Joint public hearings (except where otherwise provided by statute).

Joint environmental assessments.

(c) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include joint environmental impact statements. In such cases one or more Federal agencies and one or more State or local agencies shall be joint lead agencies. **Where State laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, Federal agencies shall cooperate in fulfilling these requirements as well as those of Federal laws so that one document will comply with all applicable laws.**

(d) To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency

of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.

(Emphasis added.) Thus, far from superseding or preempting local environmental regulations such as SEPA, the NEPA regulations adopt the common sense proposition that **both** federal and local regulations are compatible and both must be honored and complied with.

That SEPA review can be rigorous and time consuming rings hollow from the City of Seattle. This does not constitute conflict with BRAC. Of course one of the reasons that the City wants to have only NEPA and not SEPA applying to its land acquisition/residential development scheme is that the NEPA process will be conducted by HUD and Department of Defense reviewers who are well removed from local concerns. Indeed, the leading commentator on SEPA makes clear that the NEPA analysis is less rigorous than SEPA:

NEPA focuses on process, fastidiously overseeing required environmental analysis while reluctant to directly intrude into the substance of agency action. SEPA is less formally demanding, but not hesitant to play a substantive role. In the words of Professor Rodgers, 'Washington will be best known as the state whose SEPA elevates substance over form.'

Prof. Richard L. Settle, *The Washington State Environmental Policy Act, A Legal and Policy Analysis* (2008 Ed.), p. 18-2.

There are no conflicts between NEPA and SEPA. Case law is clear that each recognizes the other and that the two work side by side. Indeed, the City does not cite to a single case or other authority supporting its preemption argument.

The City does cite to several federal cases concerning the BRAC process. See *Blagojevich v. Gates*, 558 F. Supp.2d 885, 888-89 (C.D. Ill. 2008); *Bredesen v. Rumsfeld*, 500 F. Supp.2d 752, 759 (M.D. Tenn. 2007); *Gregoire v. Rumsfeld*, 463 F. Supp.2d at 1220; *Corzine v. 2005 Defense Base Closure & Realignment Comm'n*, 388 F. Supp.2d 446, 450 (D.N.J. 2005). However, all of these cases deal with federal questions and federal jurisdiction. The cases hold that federal judicial review of **BRAC decisions** are limited. While that is true, all of them deal with the jurisdiction of federal courts and review of final BRAC determinations, not with state and local laws.

The City points out that BRAC process has a series of limitation periods for action and has a policy to “act expeditiously” to close bases, citing federal guidelines that have a “tight timeline.” City’s Opening Brief, p. 10. The City injects a sense of the “the sky is falling” urgency here, saying that the DOD has a “deadline-driven decision.” *Id.* The implication here is that if the City complies with SEPA it might not be able to meet the federal deadlines. However, no facts are provided. What

is known is that the process--contrary to the City's assertions--is loose enough that "DOD granted a one-year extension to submit its LRA application." City's Opening Brief, p. 19; R408-409. The City started on the process of developing the FLRP in September 2006 (R178) after having been selected as the Local Redevelopment Authority.

The City had more than three years to comply with SEPA and there is no argument that this was not enough time to meet its requirements. Indeed, as pointed out previously, the City complied with SEPA for the first step of its acquisition process, the amendment of its comprehensive plan for the Army Reserve property to allow multi-family housing.

4. As a Part of the Decision to Purchase Publicly Owned Land, the FLRP Is a "Project Action" Requiring SEPA Compliance.

The *raison d'être* of the City's efforts is to acquire the ARC property from the federal government and then to develop it in the same way a private developer might. SEPA defines "project actions and nonproject actions." *See* WAC 197-11-704. The City takes an anomalous approach to the question of whether SEPA applies to the FLRP. Instead of first tackling whether the FLRP is a "project action," the City begins by asserting that an exemption for a single type of "nonproject action" renders SEPA inapplicable to the FLRP. As discussed more fully below, if the FLRP is a "project action," the part of WAC 197-11-704 defining "nonproject actions" does not come

into play. Once it is established that the FLRP is a “project action” any exemption for nonproject actions does not apply.

The FLRP is considered an “action” under WAC 197-11-704(1)(a) because it is “new . . . activity entirely or partly financed, assisted, conducted, regulated, licensed or approved by agencies.” The FLRP is clearly a new activity which will be financed, conducted, regulated and approved by the City of Seattle, an agency. Note specifically that the FLRP has adopted a detailed “Financing Model” in the FLRP for its redevelopment proposal. R294-297.

The action will be “conducted by the City, partially through other public agencies.” *See* R295. (The City is a local agency or local government under WAC 197-11-762.) The plan is for the City to buy the property from the Department of Defense and then develop it with 199-216 residential units based on a specific layout of uses.

Under the SEPA rules the acquisition of property for development and resale is a “project action” subject to SEPA review:

(2) Actions fall within one of two categories:

(a) **Project actions.** A project action involves a decision on a particular project, such as a construction or management activity located in a defined geographic area. Projects include and are limited to **agency decisions** to:

...

(ii) **Purchase**, sell, lease, or exchange natural resources, including **publicly owned land, whether or not the environment is directly modified.**

WAC 197-11-704(2)(a) (emphasis provided). Demonstrably, the City's proposal to acquire public property from the federal government is a project action and requires SEPA compliance. The City's Plan is a "project action" because it involves the "purchase . . . of publicly owned land" and will involve its sale to private developers, meeting the definition of "action" under WAC 197-11-704(2)(ii). As that section says, it is a project action "whether or not the environment is directly modified." In fact, the City did extensive environmental review, and prepared Draft and Final Environmental Impact Statements for the DPMP (and an Addendum) when that Plan was last reviewed and revised. *See* R58, 72-106.

An environmental checklist and a threshold determination are therefore required for adoption of the FLRP. As the City has done neither, its actions are illegal and the Superior Court properly determined that they were void.

The City claims that the FLRP is not a project action because it is only a "proposed action":

A proposal is nothing but a "*proposed* action." [WAC 197-11-784.] An "action" does not exist until the agency actually makes a final, substantive decision on a proposal. RCW 43.21C.075(8); WAC 197-11-704(2).

City's Opening Brief, p. 31. But that is the point: "***The principal purpose of SEPA is to provide decisionmakers and the public with information***

about potential adverse impacts of a proposed action.” *Glasser v. City of Seattle*, 139 Wn. App. 728, 736, 162 P.3d 1134 (2007). SEPA therefore manifestly applies to “proposed actions”:

The *State Environmental Policy Act of 1971* (SEPA) (RCW 43.21C) applies to the actions of both the County and the City. The actions in question are “major actions significantly affecting the quality of the environment”. RCW 43.21C.030(2)(c). Thus, SEPA policy is to ensure through a detailed environmental impact statement (EIS) the full disclosure of environmental information so that it can be considered during decision making. *Sisley v. San Juan County*, 89 Wn.2d 78, 84, 569 P.2d 712 (1977); *Norway Hill Preservation & Protection Ass’n v. King County Council*, 87 Wn.2d 267, 273, 552 P.2d 674 (1976). **The EIS must include alternatives to the proposed action.** RCW 43.21C.030(2)(c)(iii). And see 43.21C.030(2)(e).

Barrie v. Kitsap County, 93 Wn.2d 843, 853-54, 613 P.2d 1148 (1980) (emphasis added). Indeed, SEPA has a specific definition of “Proposal” at WAC 197-11-784, which states that: “‘Proposal’ means a proposed action.” A **proposal** to purchase publicly owned land is an action under the circumstances identified in WAC 197-11-784; the inquiry ends there.

Likewise, the City also argues that “the trial court’s ruling is internally inconsistent” because “[i]mmediately after stating that the LRA Application is a ‘decision’ to purchase land within the meaning of SEPA, the trial court described the City as merely harboring an ‘intent’ manifest in a ‘proposal’”:

‘The City clearly has an **intent** here and it has never been shy about saying so, which is to acquire the [Reserve] and use it for

residential development. This is a **proposal** to purchase natural resources’

City’s Opening Brief (quoting the Superior Court & citing CP 168-69 (emphasis original)).

But the City’s semantic quibble is meaningless because the law is that a proposed action is itself an action. Indeed, the City’s admission that the FLRP is a proposal (as well as, it seems, a “Plan”) itself constitutes an admission that the FLRP is a project action.

The City also argues that the FLRP does not constitute a project action because purportedly the City can only acquire real estate by ordinance, whereas it adopted the FLRP by resolution. But project actions are defined as “agency **decisions** to . . . purchase, sell, lease, or exchange natural resources,” not the actual acquisition. Moreover, manifestly, “decision” embraces a broader concept than “ordinance”; indeed it can embrace a resolution **or** an ordinance.

In fact, *Webster’s* includes “resolve” as a synonym of “decide.” See <http://www.merriam-webster.com/dictionary/Decide>. *Webster’s* in pertinent part defines “resolution” as “a formal expression of opinion, will, or intent voted by an official body or assembled group.” See <http://www.merriam-webster.com/dictionary/Resolution>. “Decision,” undefined in SEPA, is defined in *Webster’s* in pertinent part as “**the act or process** of deciding b: a

determination arrived at after consideration.” <http://www.merriam-webster.com/dictionary/decision>. (Emphasis added.)

Clearly the City has made a decision to acquire the subject property. The FLRP calls itself a “Plan”; even by characterizing it as a proposal the City concedes it is a project action. The City is well on its way to its objective of acquiring this property. It sought, and was approved as the “local redevelopment agency” or “LRA,” the only agency qualified to acquire the site. In addition, the City has changed its comprehensive plan designation of the ARC property to facilitate its acquisition and further development.

The purpose of SEPA is to have environmental information that can be used throughout the agency review processes. The SEPA Rules make very clear that SEPA compliance should occur when an idea is conceived. Thus, WAC 197-11-055 says that SEPA review should occur “at the earliest possible point in the planning and decision-making process.” Indeed, the City knew that when, before deciding to change course and disavow SEPA, it did SEPA review of the comprehensive plan amendment which was completed to facilitate the City’s purchase. WAC 197-11-055 goes on to say that:

A proposal exists when an agency . . . has a goal and **is actively preparing to make a decision on one or more alternative means of accomplishing that goal**, and the environmental effects can be meaningful evaluated . . .

(Emphasis added.) Again, a proposed action is an action. WAC 197-11-055 describes exactly what the City is doing: it has a goal to acquire the federal property and is actively preparing to make a decision. Indeed, the FLRP makes very clear that the City is considering “one or more alternative means of accomplishing that goal.” The FLRP discusses “three Redevelopment Plan alternatives that explored various combinations of these elements.” R252. Indeed, the FLRP has detailed discussion of various alternatives for transportation and access options at R242-246. The “environmental effects” can be meaningfully evaluated as the FLRP presents a detailed plan. The City is on a course to purchase publicly owned land to develop its own housing project. SEPA defines such actions as project actions requiring SEPA compliance.

The City also complains that “the trial court’s ruling cannot be squared with the fact that the City might not follow through on the intent reflected in the LRA Application.” City’s Opening Brief, p. 41. But our courts have specifically rejected the argument that environmental review is not required until the government is irrevocably committed to a proposal or even where the details of the proposal are still uncertain or at a conceptual phase (of course here there is a specific fleshed out proposal under consideration). In *King County v. Washington State Boundary Review Bd. for King County and City of Black Diamond*, 122 Wn.2d 648, 860 P.2d 1024,

(1993), (*Black Diamond*), an annexation proposal was before the court. The annexation proponent and the City of Black Diamond (the municipality that would annex the property) argued that an environmental impact statement was not appropriate for an annexation decision because there was no definite proposal for actual development of the annexed territory. However, the court concluded that to allow such decision making without SEPA compliance at the annexation stage would thwart the very purpose of SEPA:

One of SEPA's purposes is to provide consideration of environmental factors at the earliest possible stage to allow decisions to be based on complete disclosure of environmental consequences. *Stempel v. Department of Water Resources*, 82 Wn.2d 109, 118, 508 P.2d 166 (1973); *Loveless v. Yantis*, 82 Wn.2d 754, 765-66, 513 P.2d 1023 (1973). Decision-making based on complete disclosure would be thwarted if full environmental review could be evaded simply because no land-use changes would occur as a direct result of a proposed government action. Even a boundary change, like the one in this case, may begin a process of government action which can "snowball" and acquire virtually unstoppable administrative inertia. See Rodgers, *The Washington Environmental Policy Act*, 60 Wash.L.Rev. 33, 54 (1984) (the risk of postponing environmental review is "a dangerous incrementalism where the obligation to decide is postponed successively while project momentum builds"). **Even if adverse environmental effects are discovered later, the inertia generated by the initial government decisions (made without environmental impact statements) may carry the project forward regardless. When government decisions may have such snowballing effect, decisionmakers need to be apprised of the environmental consequences before the project picks up momentum, not after.**

122 Wn.2d 648 at 663-664 (emphasis added). The described "snowballing effect" is no doubt just what the City hopes for here. Based on the foregoing conclusion, the *Black Diamond* court held:

We therefore hold that a proposed land-use related action is not insulated from full environmental review simply because there are no existing specific proposals to develop the land in question or because there are no immediate land-use changes which will flow from the proposed action. Instead, an EIS should be prepared where the responsible agency determines that significant adverse environmental impacts are probable following the government action.

122 Wn.2d at 664 (emphasis added).

In the present case, while there may be land use review down the way, there is no question that Resolution 31086 (implementing the FLRP) is intended to bind the City. In fact, the City Council intends that the FLRP will be adopted as a condition by the federal government to the transfer of the property to the City and thus the City would be powerless to change the Plan in any event.

Indeed, the present case presents stronger facts than *Black Diamond* for the following reasons.

First, in *Black Diamond*, at least the project proponents had prepared an environmental checklist describing the environmental impacts of the proposal. 122 Wn.2d at 656. Further, the City had actually prepared a Determination of Non-significance for its action. In the present case, the City has not prepared a checklist or a DNS for its proposal notwithstanding all of the effort which has gone into the FLRP, including public input and hearings. In short, the City has not undertaken SEPA compliance of any kind: no environmental checklist or threshold determination.

Second, in *Black Diamond*, there was no pending development proposal or scenarios as described at 122 Wn.2d 656 (“these checklists indicate there is no existing proposal to develop the annexation properties. Palmer Coking’s checklist, however, indicates the preferred use of its property is ‘Single family residential’, and an alternative use is ‘Residential/Golf Course Community’”). However, as described above, there is a very detailed proposal in the FLRP including the number of residential units approved, the layout of the uses and information indicating that there will be environmental impacts. It is a project proposal involving the City’s purchase of property and resale to private developers.

Third, the annexation decision did not bind the *City of Black Diamond* to any development type for the annexed property. Here however, the FLRP is intended as a binding decision.

The City also argues that “even if the [FLRP] were [a project] ‘action’ . . . it would be an action that is categorically exempt from SEPA review” under WAC 107-11-310(1), i.e., “[t]he purchase or acquisition of any right to real property. . .” (City’s Opening Brief, p. 43 (quoting WAC 197-11-800(5)(a))). In other words, the City argues that even if the FLRP is a “project action” because the agency “has made a decision” to . . . [p]urchase, sell, lease, or exchange natural resources, including publicly owned land, whether or not the environment is directly modified” under

WAC 197-11-704, the City's action is "categorically exempt" under WAC 107-11-310(1) because it constitutes "[t]he purchase or acquisition of any right to real property. . ."

Obviously, this is nonsense. The City's argument would render nugatory WAC 197-11-704. According to the City, an action by an agency involving acquisition of real property is categorically exempt, even though acquisition of real property is identified by WAC 197-11-704 as potentially a project action.

Again, the FLRP is a project action not just because it involves acquisition of real property. The FLRP is considered an "action" under WAC 197-11-704(1)(a) because it is "new . . . activity entirely or partly financed, assisted, conducted, regulated, licensed or approved by agencies." The City is trying to invert the meaning and purpose of SEPA. "The entire purpose of the system of categorical exemptions is to avoid the high transaction costs and delays that would result from case by case review of categorically exempt types of actions **that do not have a probable significant adverse environmental impact.**" *Dioxin/Organochlorine Center v. Pollution Control Hearings Bd.*, 131 Wn.2d 345, 932 P.2d 158 (1997) (emphasis added). The FLRP, which is now fleshed out in considerable detail, most emphatically would have a potentially significant impact on the environment, by the City's own admission. Applying the categorical exemption for

acquisition of real estate here would not only be illogical from a statutory interpretation standpoint, it would thwart, not advance SEPA's purposes.

If an environmental checklist and a threshold determination had been prepared for the adoption of the FLRP, it is possible that the City could have issued to itself a Determination of Non-significance, a decision not requiring an EIS. That decision would have been appealable to the Seattle Hearing Examiner pursuant to SMC 25.05.680. Given the clear identification of impacts in the FLRP, it is likely that an EIS will be required. However, a decision to do nothing about SEPA, as was the case here, is not appealable to the Hearing Examiner.

Thus, City's deliberate avoidance of SEPA would mean that there would be no environmental review at this critical stage of the approval of the City's development of a large housing development (between 199 and 216 units). The City has approved the plan and has submitted it to the Department of Defense for review. If the DOD approves the plan, then the ARC property will be deeded to the City and will be required to conform to the FLRP. Later environmental review is likely to be little more than lip service given that the decision about the kind, type and extent of the development was made when the City Council approved the FLRP. This is the very "snowballing effect" about which the *Black Diamond* court expressed concern.

The City is not simply the permitting body acting on a private developer's application. Rather, there is a significant element of self interest. The City is essentially the developer, buying property, getting permits (the City giving itself permits) and building out infrastructure, all to sell to private builders who will be able to build homes without any of the permitting and infrastructure construction time and expense. *See* FLRP, R295. Particular attention is required when a local government acts as the developer and a decision maker on the developer's proposal.

Given the foregoing, it is not surprising that the City stubbornly forges ahead with its proposal. Once this decision is made, it will bind the City into the future and pave the way for its entrepreneurial enterprise. Any future NEPA or SEPA review will largely be meaningless because the key decisions are being made now in Resolution 31086 and the FLRP. The Superior Court properly ruled that the City acted illegally in not complying with SEPA for adoption of the FLRP, and voiding Resolution 31086 and the FLRP.

5. Even If Not a Project Action, the FLRP Is Not Exempted From SEPA Review.

As described above, the proposal, goal and action of the City is to acquire publicly owned property. Under WAC 197-11-704, that is a project action subject to SEPA and the inquiry into SEPA's applicability should end there. However, the City attempts to escape SEPA review by

alleging that the FLRP represents a “nonproject action” comprised of “development of a series of connected actions.” Thus, the City contends, the FLRP “falls within that definition’s express exclusion” for nonproject actions of “any policy, plan, or program for which approval must be obtained from any federal agency prior to implementation” WAC 197-11-704(2)(b)(iii).

Again, the City mischaracterizes the regulation and attempts to thwart its very purpose. SEPA treats a series of connected actions as a single nonproject action in order that SEPA review can capture the cumulative impacts of the connected actions. *See Gebbers v. Okanogan County Public Utility Dist. No. 1*, 144 Wn. App. 371, 380, 183 P.3d 324 (2008):

The issue is whether the [Environmental Impact Statement] is legally deficient for failing to consider rebuilding the existing transmission line as a “connected action” to Alternative 2 under a cumulative impacts analysis. The SEPA regulations require agencies to consider certain “connected” or “closely related” actions together in a single EIS.

The rationale is that cumulative impacts may be greater than what would be determined if the SEPA review were done piecemeal, i.e., greater than the sum of their parts. *See id.* (quoting and applying by analogy 40 C.F.R. § 1508.7, the NEPA regulations’ definition of “cumulative impact”: “the impact from the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions”). The clarification that “connected actions,” taken

together, would, absent federal involvement, require single environmental compliance is emphasized in WAC 197-11-792, which defines actions as “single, connected or similar.”

All WAC 197-11-704(2)(b)(iii) is saying is that if federal approval is required the otherwise “connected actions” must be reviewed individually, as individual project actions under SEPA, ignoring the cumulative impacts, rather than as a single nonproject action. The regulation does not exempt from SEPA all actions that may be connected in some way. It does not provide a wholesale exemption for project actions that may be susceptible to division into distinct phases or components (by the self-interested developer). Indeed, any large scale project action may be made up of component parts or phases.

Ironically the developer is usually the entity resisting treatment of its actions as connected. The City is standing the purpose of on its head.

But here the connected question does not arise. The City has treated the FLRP as one action. It was presented to the City Council as a single “Plan” (or proposal). The City contends:

The LRA Application addresses a series of connected potential actions including, to name a few: expanding a park, constructing market-rate and self-help housing, implementing a financing scheme to provide assistance to the homeless, altering site access and circulation, disposing federal personal property, and outlining governmental actions needed for implementation.

City's Opening Brief, pp. 32-33. But here the City has treated the FLRP as a single proposed action. This is but a single action for environmental purposes, i.e., the proposal to purchase property. Under SEPA, an action or proposal is a "decision" which has environmental consequences. The FLRP is a single proposal, not separate proposals to "expand a park," "construct market rate housing," or to "alter site access and circulation."

The City is simply trying to divide it into segments to try to fit it into its perverse reading of WAC 197-11-704(2)(b)(iii). But if it succeeded, all that would happen is that SEPA review would occur piecemeal, as multiple project actions, and the analytical construct of "connected actions" would not come into play.

Attempts to separate a single project into multiple parts to avoid SEPA review have been rejected by our courts:

There is nothing in the record before us to indicate that the contemplated construction has ever been anything but one project. The question, therefore, is whether the Port may take a single project and divide it into segments for purposes of SEPA and SMA approval. The frustrating effect of such piecemeal administrative approvals upon the vitality of these acts compels us to answer in the negative.

Merkel v. Port of Brownsville, 8 Wn. App. 844, 850-851, 509 P.2d 390, 395 (1973). In *Merkel*, the applicant wished to cut trees and clear the uplands before compliance with SEPA. Since the FLRP is a single project action, the agency need not consider the implications of its being a series

of connected actions. The entire FLRP will be reviewed in any event. As a project action, the FLRP is not affected by any part of WAC 197-11-704(2)(b). Because the FLRP does not involve a series of actions, but a single action, the so-called federal exemption does not apply.

B. The Superior Court Correctly Decided that the City Must Publicly Consider that Discovery Park Master Plan.

1. The Trial Court’s “Public Determination” Requirement has a Foundation in Law—as the applicable Comprehensive Plan it Must be Considered, and such Consideration is Required by and Integral to SEPA.

The DPMP was the basis for intensive study, including the preparation of an EIS for the 1986 Amendments, as described above and more fully below. The DPMP was a part of the commitment of the City to the federal government as the first (and largest part) of Fort Lawton was decommissioned and turned over to the City. R2-41. The plan was revised in 1974 when the City adopted Resolution 24674 on August 26, 1974. See R43-53.

In 1980, the City decided to adopt a process to revise and update the 1974 plan. Thus, the City adopted Resolution 26307 on May 12, 1980. See R56. That Resolution approved the attached “Discovery Park Master Plan Update Review Process.” R57-63. This process included the requirement that “[t]he Department of Parks and Recreation will complete environmental review processes on proposed revisions to the Discovery

Park Master Plan.” R57. The Review Process included the preparation of an addendum to the previously prepared environmental impact statements, including a Final Environmental Impact Statement for Discovery Park which “contained recommendations for proposed revisions to the Master Plan outside the Historic District as well as a discussion of proposed capital improvements and management policies.” R58.

Reviews of the revisions to DPMP were to include review by several advisory and citizen committees including Discovery Park Advisory Committee, the Board of Park Commissioners, the Design Commission and the Landmarks Preservation Board. The goal of the update process was City Council approval of a “single revised Discovery Park Master Plan.” R57. A detailed schedule was adopted by Resolution 26307 leading to the adoption of a final Master Plan for the Park. 58-60.

This careful and detailed review process, which included compliance with SEPA, demonstrated that the adoption of the DPMP was considered a significant and important matter. The DPMP was finally readopted in 1986 by City of Seattle Resolution 27399 (R73-74) and the 1986 Plan itself (R76-107). Since 1986, the City has not amended, modified or repealed Resolution 27399.

The City’s website makes clear that the DPMP is the governing document for Policies and Planning for Discovery Park. *See* Discovery

Park Website R312-313. The City website has a page for the DPMP, which includes the 1974 plan and 1986 plans. R316. The City website is also clear that the DPMP was to be followed in developing the Park:

The master plan, we believe, lays down guidelines which, **if followed faithfully**, cannot fail to create on this site a park which will be one of the great urban parks of the world—and a joy to this city forever.

(Emphasis supplied) R316.

As relates to the present proposal to develop housing within the park, the 1986 and earlier versions of the DPMP (from 1972) were prescient:

DESIGN AND DEVELOPMENT OBJECTIVES

The 1972 Plan contains two statements, which are adopted in this plan for the development of the Park:

In the years to come there will be almost irresistible pressure to carve out areas of the Park in order to provide sites for various civic structures or space for special activities. There will in the future be structures and activities without number for which, it will be contended, this Park can provide an “ideal site” at no cost. The pressures for those sites may constitute the greatest single threat to the Park. They must be resisted with resolution.

If they are not, the park will become so fragmented that it can no longer serve its central purpose. Only those activities and only those structures should be accepted which are in harmony with the overall theme, character and objective of the park. There must be a deep commitment to the belief that there is no more valuable use of this site than as an open space.

R81-82.

The City's DPMP webpage contains a full color map showing the layout and specification of uses for the park. R316. R317-318. This map is substantially similar to the Master Plan Map adopted in the 1972 Plan at R16. As the Court can see, in its northeast corner the DPMP includes an area is that is now the ARC. The plan map shows the ARC as parkland, with a portion of the property devoted to the main entrance to the park.

The 1986 Plan indicated that the 1974 Plan would be incorporated and remain a part of the plan: "It is intended that all features and policies of the November 1972 and February 1974 Plans shall be part of the plan for Discovery Park except where herein revised." R80.

Accordingly, the DPMP is the applicable comprehensive plan, and the City must therefore take the DPMP into consideration. Absolute precise compliance with a master plan is not necessarily required, but at least a showing of consistency is necessary:

In *Barrie v. Kitsap County*, 93 Wash.2d 843, 613 P.2d 1148 (1980), we held comprehensive plans generally are not used to make specific land use decisions. Instead, we stated a comprehensive plan is a "guide" or "blueprint" to be used when making land use decisions. 1215 *Barrie*, 93 Wash.2d at 849, 613 P.2d 1148. Although the court confirmed there need not be "strict adherence" to a comprehensive plan, **any proposed land use decision must generally conform with the comprehensive plan.** *Barrie*, 93 Wash.2d at 849, 613 P.2d 1148.

Citizens for Mount Vernon v. City of Mount Vernon, 133 Wn. 2d 861, 873, 947 P.2d 1208 (1997) (emphasis added). In the case at bar, references to

the DPMP as a “guide” is not an excuse to completely ignoring and failing to even mention a master plan that has been adopted by City Council resolution.

Moreover, one of the particular problems with the City’s repudiation of SEPA is that the City has not addressed the alternative of developing the ARC property as a part of Discovery Park. The SEPA Rules and the Seattle SEPA Ordinance make clear that consideration of alternatives is at the heart of SEPA review as shown in the Seattle SEPA ordinance at SMC 25.05.655:

1. The alternatives in the relevant environmental documents shall be considered.
2. The range of alternative courses of action considered by decisionmakers shall be within the range of alternatives discussed in the relevant environmental documents. However, mitigation measures adopted need not be identical to those discussed in the environmental document.
3. If information about alternatives is contained in another decision document which accompanies the relevant environmental documents to the decisionmaker, agencies are encouraged to make that information available to the public before the decision is made.

Thus, the City must consider the DPMP as the applicable Comprehensive Plan and in considering alternatives under SEPA and this was the legal basis for the Superior Court’s ruling.

2. **The City Violated the DPMP, Resolution 27399, by Adopting the FLRP.**

The DPMP clearly states that Discovery Park is to be an area devoted to open space, not to the construction of private homes and facilities. The 1974 Plan speaks directly to the development of the main entrance to the park and the use of the ARC:

MAIN PARK ENTRY AND ITS RELATION TO CONTIGUOUS NEIGHBORHOOD

The new Army Reserve buildings and related site developments have postponed the possibility of making the proposed Main Entry via West Lawton Street within the foreseeable future. Six different solutions were examined in search of an appropriate and acceptable major vehicular access route from 36th Avenue West at West Government Way gate to the principal parking area in the Mall. A route was selected whereby park traffic could be routed consistent with the Park plan intent, preserving vegetation and using gentle grades along the easterly edge of the Rhododendron Glen. With the selected route, engineering standards and traffic capacities could be met adequately and at lower cost than with other routes; encroachment upon Army property and disruption of operations and security would be minimal. In addition, the selected route which would use a Government Way Entrance would have less detrimental vehicular impact upon the community alongside 36th Avenue West than would a route using a different main entrance.

The planners feel strongly that the concept of a clear and strong Main Entrance from the city to the east on the axis of the Mall, via a direct noble landscaped Gilman Avenue West across a bridge at Kiwanis Ravine, should not be abandoned permanently. **If and when the Army Reserve property becomes available at a later time, the plan to create a grand axis main entry should be adopted, and the first route from Government Way entrance retained as a secondary entrance to the Park.** In any event, every effort should be exerted to make the Park approaches as beautiful as the Park itself. In particular, Gilman Avenue and Government Way

should become tree-lined boulevards with underground utilities; the commercial zone near the East Gate should be unobtrusive as befits the character of a portal to a major park.

R47. (Emphasis added.) The plan therefore makes clear that if the Army Reserve property is surplus and available for City acquisition it should then become a part of Discovery Park.

As with SEPA compliance, the FLRP does not even discuss the DPMP. This deficiency was pointed out by commenters during the public review process. *See* Letter from Magnolia Community Club at R305-310. The DPMP is not even mentioned as a “Reference” in the References Section of the FLRP. *See* R302-303.

The City never made a record of any kind as to consistency of the FLRP with the DPMP. Given the circumstances, the City Council is at a minimum required to explain why it ignored and violated the DPMP, the applicable comprehensive plan. Indeed, Seattle Parks and Recreation 2006 Development Plan as adopted by City Council Resolution 30868 (R109-133), is applicable to all Seattle Parks includes specific “Development Policies” at R120. Included is Policy 6 which states:

Pursue improvements to existing parks in accordance with Department planning for major maintenance (capital replacement), park master plans, and neighborhood planning.

Since adoption of the DPMP in 1986, the City has cited Resolution 27399 in making decisions in Discovery Park. For example, These

decisions included the City's decision to acquire the Capehart housing property in Discovery Park from the federal government. In adopting Ordinance 122502 in September, 2007 (R166-173), which authorized City acquisition of the Capehart property:

WHEREAS, Resolution 27399, adopted in 1986, supported the adoption of the Discovery Park Plan; and

WHEREAS, the Discovery Park Plan calls of the eventual acquisition of military housing areas remaining in Discovery Park; and. . . .

R166.

The DPMP establishes the master plan for the Park. It includes the Army Reserve property and designates the park as a whole as a place for quiet and tranquility. The City violates the plan proposing intensive residential development without consideration, or even a passing reference to the plan. The Superior Court correctly held that failure of the FLRP to reference and consider the plan is illegal.

C. The MNPC is Entitled to Attorney's Fees On Appeal.

"RCW 4.84.370 governs fee awards for appeals of land use decisions." *Moss v. City of Bellingham*, 109 Wn. App. 6, 29, 31 P.3d 703 (2001).

The statute provides that 'reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals' for a local government's decision to issue, condition, or deny a development permit. The court shall award fees and costs if the prevailing party on appeal

was also the prevailing party (a) before the local government or (b) **in all prior judicial proceedings.**

Id. at 29-30 (quoting RCW 4.84.370(1)) (emphasis added). The statute does not define development permit, but the FLRP constitutes the City's resolution authorizing itself to proceed with the planned or proposed development. It is a development permit.

Here, MNCP was the prevailing party before the trial court. Once the MNCP prevails on appeal, an award of reasonable attorney fees and costs to the MNCP against the City "is mandatory." *Id.* at 30. This supports an award of fees on appeal under RAP 18.1(a). *See Equitable Life Leasing Corp. v. Cedarbrook, Inc.*, 52 Wn. App. 497, 506, 761 P.2d 77 (1988). If this Court affirms the trial court's decision in all material respects, an award here is appropriate and mandatory.

V. CONCLUSION

The City's proposal is to purchase publicly owned property, clearly a "project action" subject to SEPA compliance. The City has failed to demonstrate that there are any laws or regulations that prohibit or preempt SEPA compliance. Similarly, the City offers no justification for completely ignoring the Discovery Park Master Plan. The 38-year promise of that plan to provide open space and tranquility is trampled by the City's proposal to adopt an intensive residential housing project.

RESPECTFULLY SUBMITTED this 13 day of November, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2009, I caused to be served a copy of the foregoing RESPONDENT'S BRIEF on the following person(s) in the manner indicated below at the following address(es):

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- by **CM/ECF**
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- by **Facsimile Transmission**
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- by **Hand Delivery**
- by **Overnight Delivery**



Leah Burrus