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No. 67301-7-I

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COURT OF APPEALS, DIVISION 1,  
FOR THE STATE OF WASHINGTON

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MARY SEBEK and NANCY FARNAM,  
Plaintiffs-Appellants,

v.

CITY OF SEATTLE and DOES 1 through 10,  
Defendants-Appellees.

and

WOODLAND PARK ZOOLOGICAL SOCIETY,  
Defendant-Intervenor.

~~FILED~~  
COURT OF APPEALS DIV 1  
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APPELLANTS' REPLY BRIEF

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George A. Nicoud III  
(admitted pro hac vice)  
Jason B. Stavers  
(admitted pro hac vice)

**GIBSON, DUNN & CRUTCHER  
LLP**  
555 Mission Street, Suite 3000  
San Francisco, CA 94105  
Telephone: (415) 393-8200

Brian A. Knutsen, WSBA #38806  
Knoll Lowney, WSBA #23457

**SMITH & LOWNEY PLLC**  
2317 East John Street  
Seattle, WA 98112  
Telephone: (206) 860-2883

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## DEFINED TERMS

For the convenience of the Court, Plaintiff-Appellants Mary Sebek and Nancy Farnam provide the following definitions of terms used in this brief:

Plaintiffs	Appellants Mary Sebek and Nancy Farnam, who were plaintiffs below
City	Appellee City of Seattle
WPZS	Intervenor Woodland Park Zoological Society
Appellees	The City and WPZS
Zoo	Woodland Park Zoo
Management Agreement	The Woodland Park Zoo Operations and Management Agreement between the City, acting through its Department of Parks and Recreation, and the WPZS, dated December 17, 2001 and in effect March 2002
Elephants	Elephants housed or formerly housed at the Zoo: Bamboo, Chai, Hansa (deceased), Sri (on loan), Watoto
Elephant Exhibit	The portion of the Zoo allocated to the captivity of the Elephants, including the barn and grounds
12(c) Motion	Defendant City of Seattle's April 25, 2011 Motion for Judgment on the Pleadings
Animal Cruelty Laws	RCW 16.52.207 and Seattle Municipal Code § 9.25.081
Br.	Combined Opening Brief of Respondents City of Seattle and Intervenor Woodland Park Zoological Society
Pl. Br.	Principal Brief of Plaintiffs-Appellants Mary Sebek and Nancy Farnam

## INTRODUCTION

Expressly conceding that the City “imposes virtually no control over Woodland Park” (Br. at 28), Appellees seek to turn the City’s abdication of its oversight obligations into a defense against taxpayer standing. This stands law and logic on their head. The City’s admitted failure to monitor not only the use of millions of dollars of City funds, but also the use of City land and the abuse of City assets is not protected discretion; rather, it is a gross dereliction of the City’s duty to husband its taxpayer-provided resources that highlights the propriety of taxpayer standing here. In any event, because the City’s Elephant Exhibit is independently unlawful, Plaintiffs have standing to challenge its continued support by the City.

Plaintiffs’ standing is, and always has been, a simple proposition. City authority is subject to an array of limitations, including the scope of the City’s charter, the civil and criminal laws of Washington, and state and federal constitutions. When the City exceeds those limits, it is subject to taxpayer challenges. Here, the City can no more fund an illegal Elephant Exhibit than it could finance criminals cooking methamphetamine on City land. And until such time as either the Elephant Exhibit operates without taxpayer support or the conditions of the Elephants’ confinement comply

with the law, taxpayers may bring a court challenge to this illegal use of their money.

Appellees seek to evade judicial scrutiny by re-inventing their relationship with one another. Appellees would have this Court believe that WPZS is a “contractor” that provides the City with certain services, like a landlord or any other vendor, (Br. at 20-21) that the City’s fees for these services are not “substantial,” (*id.* at 29) and that the Elephant Exhibit is an ancillary activity receiving no direct support from the City (*id.* at 11 (“The City does not fund an elephant exhibit.”)). Appellees suggest that the City has only limited authority to monitor WPZS’ operations (*id.* at 15-16) and they assert that “[t]he City plays no role in deciding . . . how the animals are to be exhibited or cared for at the Zoo,” (*id.* at 5) and that the City “does not (and cannot) tell Woodland Park how to spend its money.” *Id.* at 11.

Appellees adopt this position pursuant to their belief that taxpayer standing does not lie to challenge the illegal acts of government contractors. Br. at 9-11. They cite no authority for this proposition, however. Instead they seek to scare this Court with the warning that if Plaintiffs here have standing, “Taxpayers could place themselves in the position of monitoring the operations of every entity with which the City happens to have a contractual relationship.” Br. at 20. Leaving aside the

unexamined premise that taxpayers should *not* be in such a position, permitting standing here would work no “unprecedented expansion of the doctrine of taxpayer standing.” *Id.* This is not a case involving a city contractor that may have violated the law in some ancillary capacity, beyond the scope of its relationship with the City. Far from it.

While Appellees’ “virtually no control” characterization may accurately describe the City’s **actual** *laissez-faire* attitude towards WPZS, it grossly mischaracterizes the financial and legal relationship between the two entities. Under the Management Agreement, the City pays WPZS well over \$5 million per year to run the City’s Zoo, plus it charges WPZS no rent for the use of the City’s land, buildings or the animals. Unlike vendors and independent contractors that might provide the City with janitorial services, vending machine maintenance, or office supplies, WPZS has no business other than to operate the City’s Zoo. Further, the Agreement provides for the City to “retain control of the property through the conditions outlined in this Agreement,” and sets forth an array of control mechanisms: City officials sit on WPZS’ Board of Directors, the City receives regular operational and financial reports from WPZS, and the City has the authority to audit WPZS operations, determine the acquisition or disposition of animals, and terminate the Agreement on 60 days notice.

Plaintiffs' standing does not ultimately turn on the precise contours of the City's relationship with, and control over, WPZS. It is sufficient to dispose of Appellees' primary argument that the relationship established by the Management Agreement is far beyond the arms-length, vendor-customer relationship posited by Appellees—reversal here would have no bearing on the availability of taxpayer standing for challenges to attenuated contractor activities, as the City claims. Br. at 20.

In a further attempt to obscure the real issue on appeal, Appellees do as they did in the Superior Court—they knock down a series of straw men. They argue, for example, that animal cruelty laws do not provide a private right of action (Br. at 34-36) (a position Plaintiffs have expressly disclaimed once already), that the City cannot be liable under animal cruelty laws for building the exhibit (*id.* at 24) (a claim Appellants never made), that various questions not raised by this lawsuit are non-justiciable (*id.* at 39-42), and other irrelevant arguments.

None of these arguments supports the erroneous dismissal now on appeal. Plaintiffs' simple contention all along has been that the City may not continue to operate an illegal elephant exhibit with taxpayer money. The City cannot evade review of this illegal conduct by claiming impotence, and it offers no other relevant response.

## ARGUMENT

### **I. Appellees Are Flat Wrong When They Assert That “Sebek has not identified a single thing the City itself has done that is against the law”**

The core of Appellees’ argument is that Plaintiffs’ complaint does not allege any illegal conduct by *the City* (as opposed to illegal conduct by WPZS). *See, e.g.*, Br. at 1, 8-11. Appellees draw a bright line between the conduct of the City and that of WPZS, and argue that the Complaint’s allegations of illegality apply only to WPZS. *Id.* But this willfully misreads both the Complaint, which clearly alleges the manner in which City “knowingly . . . inflicts unnecessary suffering or pain” upon the Elephants, and the law, which does not deny taxpayer challenge merely because a third party plays a role in the challenged conduct.

### **A. The Complaint Makes Clear the City’s Responsibility For the Infliction of Unnecessary Suffering and Pain Upon the Elephants**

Appellees’ attack standing rests on two false premises: first, that the City plays no direct role in the illegal captivity of the elephants; and second, that WPZS acts entirely independent of the City. In service of these false premises, Appellees distort the Management Agreement that defines their relationship, as well as the facts alleged in the Complaint.

**1. The City's Direct Role In the Illegal Confinement of the Elephants Is Pervasive and Ongoing**

The Complaint pleads numerous facts demonstrating that the City plays a direct and ongoing role in the Elephants' unnecessary suffering and pain:

- “The City . . . retains ownership and control over the property and facilities of the Zoo, including its elephant exhibit.” CP 3.
- “Ownership of the Zoo animals . . . reverts to the City upon expiration or termination of the Zoo Agreement.” *Id.*
- “The City provides the Zoo Society with annual operations payments, routine maintenance payments, and other financing.” *Id.*
- “The Zoo’s elephant exhibit is too small to allow the Zoo’s elephants to roam or engage in their natural foraging behavior.” *Id.* at 7.
- “The hard-packed sand and dirt in the outdoor portion of the Zoo’s elephant exhibit is harmful to the [Elephant’s] sensitive feet.” *Id.*
- “The surface of the barn in the Zoo’s elephant exhibit is inherently harmful to the sensitive feet of the Zoo’s elephants.” *Id.*
- “The Zoo’s practices, described throughout this Complaint, combined with the Zoo’s limited space, have caused the elephants severe psychological trauma.” *Id.* at 11.

Thus, it is alleged that the City pays WPZS to keep the City’s Elephants in the City’s Elephant Exhibit, and that the inadequate nature of

the Exhibit causes the Elephants unnecessary suffering and pain, in violation of state and local law. Reclassifying the specific individuals who ensure that Elephants remain in the Exhibit from employees to contractors does not insulate the City from liability for its actions.<sup>1</sup>

**2. The City's Substantial Support of WPZS' Abuse of the Elephants Is Itself Subject to Taxpayer Challenge**

Appellees also refuse to acknowledge that taxpayer standing flows from specific conduct attributed to WPZS, not the City. *See* Br. at 9. But the distinction Appellees would make between WPZS and the City, at least in the context of the mistreatment of the Elephants, is meaningless.<sup>2</sup> WPZS uses the City's money and acts on the City's behalf when it treats the Elephants in an unlawful and inhumane way. Taxpayers thus have standing to challenge the City's continued support of WPZS.

**a) Appellees Misrepresent the Nature of the City's Funding**

At the heart of Appellees' mischaracterization of the record is the outlandish statement: "The City does not fund an elephant exhibit." Br. at

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<sup>1</sup> Appellees allege that Plaintiffs bring this argument for the first time on appeal. Br. at 22. This is not true. In fact, Plaintiffs did raise this argument in the Superior Court—and Appellees complained then that it was not raised in the Complaint. CP 225 n.6. As is evident from the portions of the Complaint excerpted here, that is not true either.

<sup>2</sup> The City did not even sign its own brief, relying on the signature of WPZS' counsel. Br. at 44.

11. This is indefensible on its face—after all, the City *owns* the Elephant Exhibit, and permits WPZS to use it rent-free. CP 3. Ignoring this fact, Appellees suggest that the only support the City provides is payment in some unspecified amount for “‘operations’ and ‘maintenance.’” Br. at 11. And they note that, “[n]o City funds are earmarked for the display of elephants, or of any particular animal.” *Id.* Finally, they level a serious, but unfounded, accusation at Plaintiffs: “Sebek’s statements about ‘substantial funding’ are fiction without factual support.” *Id.* at 29.

The picture Appellees would paint of the Zoo is a vast enterprise, largely self-funded, of which both the Elephants and the City’s support are minor components, with no overlap between them. Tellingly, they never say this outright, and they cannot, because this picture is false.

The financial support the City provides to WPZS is, by any reasonable measure, “substantial.” Since the Agreement entered into force in 2002, the City has paid an escalating “annual operations payment” that started at \$5 million and has increased ever since at 70 percent of the annual Consumer Price Index increase for the region. CP 46. In addition, the City makes the following contributions to WPZS operations: (a) \$500,000 per year “Routine Maintenance Payment” to WPZS (CP 47); (b) payments totaling \$2.5 million from the 2001 Parks Levy, and unspecified payments from the 2008 Parks Levy (CP 41, 48, 49); (c) property

insurance premiums, at no cost to WPZS (CP 74-75); (d) an exemption from any City admission taxes (CP 52); and, as mentioned, rent-free use of the land, the buildings, and the animals, including the Elephants themselves.

Appellees ignore these provisions, and point instead to the “Major Maintenance Payment” obligation, implying that this restricted, matching program is the only City funding obligation. *See Br.* at 29 (“The Management Agreement requires the City to provide only \$1 for every \$2.50 Woodland Park raises on its own for major maintenance.”). The provision to which Appellees’ refer is Section 5.4.1, which is separate from the extensive funding obligations described above, and appears to have expired. CP 48. Section 5.4.1 provides that over the first seven years of the Agreement, the City agreed to transfer up to \$6.4 million in “Major Maintenance Payments,” provided that WPZS was able to raise matching funds of \$2.50 for each \$1.00 provided under *this specific provision only*. *Id.* There is no matching requirement for any other aspect of City financing.

Further, the prominence and relative scale of the Elephant Exhibit in the context of the Zoo is unmistakable, even to the casual visitor. The Elephant Exhibit is specifically discussed in the preamble to the Management Agreement—it is the only exhibit to which the Agreement

makes more than a passing reference. CP 37-38. And Elephants are a major driver of tickets sales and donations at the Zoo (CP 9)—indeed, WPZS admits that Zoo attendance *doubled* after Hansa was born. CP 91.

**b) Appellees Misrepresent the Oversight and Control Afforded the City**

Appellees also misrepresent the control provisions built into the Agreement, which provide for substantial oversight by the City, and which would permit the City to remedy the illegal confinement of the Elephants.

The Agreement gives the City extensive access to all aspects of WPZS operations. WPZS is required to submit an Annual Report, an Annual Plan, an Annual Oversight Committee Report, Quarterly Reports and Monthly Reports to the City. CP 57-58. WPZS is also required to maintain animal records, and to make these records “available to the Superintendent [of the City’s Department of Parks and Recreation] upon the Superintendent’s request to enable the City to determine that Zoo Animals are receiving proper care and treatment consistent with the requirements of this Agreement.” CP 58. And the City (which owns the Zoo, after all) retains the right to enter the premises at its discretion. CP 69.

Should the City wish to stop illegal animal cruelty at the Zoo, it has various means at its disposal to do so. WPZS is required to “comply

and conform with all laws,” (CP 66), and upon failure by WPZS to comply with this requirement, or any condition of the Agreement, the City may terminate the Agreement on 60-days notice. CP 62. Further, the City can require WPZS to sell any animal, including the Elephants—or donate them to a sanctuary. CP 53 (providing that WPZS’ may “sell or otherwise dispose of Zoo Animals . . . in strict accordance with . . . any adopted acquisition and disposition policies approved by the City”). The illegal abuse of the Elephants continues entirely at the City’s sufferance.

**B. Appellees Cite No Authority Supporting Their Argument That the Role of WPZS Immunizes the City From Taxpayer Challenge**

Appellees point to no case law even suggesting that the presence of a non-governmental actor insulates the City from taxpayer challenge. Instead, they limit themselves to attempting to distinguish the two Washington Supreme Court cases in which taxpayer standing was found despite the essential presence of a non-governmental actor. Br. at 12-15. Their attempt to distinguish these cases fails, however, because they have no answer for the simple fact that even though a private party’s conduct was essential to the illegality, taxpayers could still challenge the government agency responsible.

**1. Appellees Fail to Distinguish *Boyles* and *Calvary Bible***

Plaintiffs cited *State ex rel. Boyles v. Whatcom County Superior Court*, 103 Wn.2d 610, 69 P.2d 27 (1985), and *Calvary Bible Presbyterian Church of Seattle v. Board of Regents of the University of Washington*, 72 Wn.2d 912, 436 P.2d 189 (1967) for the proposition that “taxpayer standing lies even where a non-governmental third party engages in the actual wrongful conduct itself.” Pl. Br. at 16-17. Attempting to distinguish those cases, Appellees seize on the fact that the illegality in both cases, promoting religion, is illegal only when done by the government, and that the conduct of the third party was not, in itself, illegal. Br. at 14. It was the assignment of prisoners to the religious program (in *Boyles*) and the funding of the religious program (in *Calvary Bible*) that was illegal, Appellees note. *Id.* at 14-15. But Appellees ignore the obvious parallels to the Elephants, who are, like the prisoners in *Boyles*, assigned by the City, and to the Elephant Exhibit, which, like the program in *Calvary Bible*, the City funds. Instead, Appellees incorrectly conclude that since the animal cruelty alleged here is illegal no matter who does it, *Boyles* and *Calvary Bible* do not apply. *Id.*

The fact that WPZS is *also* breaking the law has no bearing on the legality or illegality of the City’s conduct. In *Boyles*, *Calvary Bible* and

this appeal, a third party's conduct has rendered challenged government conduct illegal. If, for example, the Lighthouse Mission in *Boyles* had not proselytized the inmates assigned to it, the assignment of those prisoners would not have been illegal. Because each of the third parties engaged in specific conduct, however, the government's support of that conduct was challengeable by taxpayers. Appellees primary argument on appeal, that taxpayer standing does not lie to challenge the conduct of a "contractor" (Br. at 10), is incompatible with both *Boyles* and *Calvary Bible*, where the conduct of a third party was essential to the violation.

## **2. Appellees' Reliance On *Dolan* Is Misplaced and Ill-Advised**

Unable to cite case law from any jurisdiction supporting their narrow view of taxpayer standing, Appellees pluck a single paragraph from an unrelated opinion, *Dolan v. King County*, 172 Wn.2d 299, 258 P.3d 20 (2011) to serve as the basis for an extended discussion of whether or not WPZS constitutes a "de facto city agency," as Plaintiffs suggested in their opening brief. Pl. Br. at 21. But *Dolan* offers Appellees no support, and in fact seriously undercuts their position.

As an initial matter, "de facto city agency," is not a term of art in Washington law, as Appellees' lengthy refutation of Plaintiffs' use of the term might suggest. *See* Br. at 32 ("Sebek cites no controlling, or even

advisory, case law indicating that Woodland Park is a ‘de facto’ City agency.”). Webster’s Dictionary defines “de facto” as “being such in effect though not formally recognized.” *Merriam-Webster Online Dictionary*, available at <http://www.merriam-webster.com/dictionary/de-facto> (last visited Nov. 19, 2011). On this basis, Plaintiffs stand by their characterization of WPZS as a “de facto City agency.”

In *Dolan*, the phrase makes only a brief, ill-fated appearance. The issue on appeal was whether Dolan’s employer, a public defender organization, and similar organizations, were sufficiently affiliated with King County such that their employees were eligible for public employee retirement benefits. 172 Wn.2d at 308. King County termed this a “‘de facto agency’ argument,” which it claimed was “disfavored” under Washington law. *Id.* at 313. The court dismissed King County’s theory as “at best obscure and at worst nonsensical” (*id.* at 316 n.13) and it went on to hold that the employers *were* in fact “arms” of the County—or, as King County put it, “de facto” agencies.

While *Dolan* does not address taxpayer standing, it does provide a criteria for determining if a putatively independent entity can be considered an “arm” of the government—the dispositive issue is the level of control exercised by the government over the disputed entity, as Appellees acknowledge. *See* Br. at 26 (citing *Dolan*). And it is self-

evident that it is *sufficient* for taxpayer standing (but not *necessary*) for the illegally acting entity to be found an “arm” of government. Presumably, Appellees accept this proposition, given their lengthy effort to distinguish *Dolan*. See Br. at 26-33.

But *Dolan*, and the line of cases upon which it relies, supports a finding that WPZS is an “arm” of the City, at least with respect to the operation of the Elephant Exhibit.<sup>3</sup> The *Dolan* dissent would have come out the other way based on King County’s designation of the employer as independent and on the elements of independence it had carved out in its contract. See 172 Wn.2d at 322 (Johnson, J, dissenting). But the *Dolan* court rejected labeling and formalism in favor of a practical inquiry into the true nature of the entity at issue. See 172 Wn.2d at 316 n.13 (“The county’s argument is high formalism”). As the majority concluded, “government cannot create an agency to perform a government function, incorporate it into its yearly budget process and control it like any other government agency, and claim it is an independent contractor simply because of the form of name or title.” *Dolan*, 172 Wn.2d at 317.

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<sup>3</sup> See *Lynch v. San Francisco Housing Auth.*, 55 Cal. App. 4th 527, 534 (Ct. App. 1997) (“Labeling an entity as a ‘state agency’ in one context does not compel treatment of that entity as a ‘state agency’ in all contexts.”); *Johnson v. Tibbetts*, 202 Ore. App. 264, 293, 122 P.3d 66, 82 (Ct. App. 2005) (same).

Echoing the *Dolan* dissent, Appellees highlight the ways in which WPZS is allegedly less under government control than the employer in *Dolan*. See Br. at 26-32. But the *Dolan* majority rejected the notion that government control over “day-to-day activities” was required, and found it relevant that, like WPZS, *Dolan*’s employer was a single-purpose, single-client, entity. 172 Wn.2d at 318 n.15. And *Dolan* makes clear that it is the government’s *potential* control, not its actual exercise, that is at issue. See *id.* at 314 (“The fact that the city never exercised that authority did not matter—just having it was enough to make the nonprofit corporation an instrumentality of Portland.” (quoting *State ex rel. Public Employees’ Retirement Board v. City of Portland*, 69 Or. App. 117, 684 P.2d 609 (1984))). Further, *Dolan*’s employer *satisfied* the test, and *Dolan* does not determine the minimum level of control required, or establish any specific requirements.<sup>4</sup>

Here, as discussed above, the City possess substantial oversight and management authority over WPZS, far in excess of what would be

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<sup>4</sup> It also bears note that *Dolan* was decided after a bench trial, and after *Dolan* had full discovery into the true facts of King County’s control over his employer. Appellees cannot obtain a dismissal here, on their Rule 12(c) motion, by disputing inferences fairly drawn from the Complaint’s factual allegations. See, e.g., Br at 26 (asserting WPZS “operates independently from the City”); *id.* at 29 (disputing Plaintiffs’ allegations of “substantial funding”).

expected in a typical contractor-customer relationship. The City effectively created the current incarnation of WPZS, transferring approximately 170 City employees to form the operational entity that now manages the City's Zoo (CP 133), and it can effectively terminate WPZS by terminating its contract to operate the Zoo. Because of the City's substantial financial support for WPZS, ownership of Zoo property and animals, and the various control mechanisms built into the Agreement, the City has ultimate control over WPZS, making WPZS an "arm" of the City with respect to the confinement of the Elephants. While such a finding is not necessary to reverse the Superior Court, it would be sufficient.

**II. Appellees Offer a Series of Irrelevant and Meritless Arguments That Serve Only to Distract From the Issue on Appeal.**

**A. The Private Right of Action Argument Is a Straw Man—Plaintiffs Have Already Disclaimed This Position.**

Appellees argue that Plaintiffs lack standing to bring this action because the Animal Cruelty Laws do not provide a private right of action. Br. at 34-36. Plaintiffs do not require a private action under any of these laws to have standing here, have never argued that such a private right of action exists, and expressly disclaimed any reliance on a private right of action in the Superior Court. CP 354-55. The question of a private right of action in the Animal Cruelty Laws is not before this Court.

**B. There Are No “Political Questions” Implicated By This Appeal.**

Appellees assert that “[t]he Court does not have jurisdiction over the policy and political question of (1) whether governments should fund zoos or elephant exhibits, generally, or (2) whether the Woodland Park Zoo should house elephants, specifically.” Br. at 42. Plaintiffs express no opinion on either of these “policy and political questions” at this time, except to note that neither is raised by their Complaint.

Attempting to inject these purportedly political questions into the case through Plaintiffs’ sought-after remedy, Appellees incorrectly state that Plaintiffs seek to stop the City’s funding of the Zoo, “[r]ather than seeking a change in the Zoo’s practices.” Br. at 41. In fact, there are four elements to Plaintiffs’ requested injunction, of which the funding bar is only one (CP 15) and the injunction is clearly intended to bring the “Zoo’s practices” in line with the law. Neither this Court nor the Superior Court will be required to pass judgment on whether the Zoo should confine Elephants as a general matter—the only question presented is whether the conditions of their current confinement comply with the law. Nor does a request that the City cease funding *illegal* behavior raise the purportedly political question of whether the City should fund that behavior if it is made compliant with the law.

**C. Plaintiffs Are Not Suing Over Building Design**

The City's design and building of the exhibit is a component of its overall responsibility for the current and ongoing suffering of the elephants, not an independent basis for taxpayer standing. *See* Br. at 24. Further, it is the City's *ongoing ownership* of the exhibit in which elephants are illegally confined that is the more salient issue here, not the original design and construction, although that is a factor.

**D. The Existence of Other Remedies Is Irrelevant.**

Citing no authority, Appellees suggest that the existence of alternative remedies should preclude Plaintiffs' standing. Br. at 21-22. It does not. *See Robinson v. City of Seattle*, 102 Wash. App. 795, 804-05, 10 P.3d 452 (2000) (identifying elements of taxpayer standing). Further, their proposed alternative, a complaint with the United States Department of Agriculture, is illusory—the USDA does not have jurisdiction to enforce Washington state law or Seattle municipal ordinances.

**E. The Complaint's Detailed and Specific Allegations Easily Make Out Violations of the Animal Cruelty Laws.**

Appellees' argument that the Complaint does not allege facts constituting a violation of the Animal Cruelty Laws is without merit. In fact, Plaintiffs have already responded to this argument in detail in the Superior Court, and anticipated it in their opening brief in this Court. *See*

CP 357-363; Pl. Br. at 12-16. Appellees do not acknowledge this extensive briefing, or respond to any of the points made therein.

Appellees assert that Plaintiffs fail to “allege any of the specific conduct prohibited under either the State or City statute.” Br. at 38. This argument cannot be taken seriously, and Appellees’ subsequent tortured reading of both the Complaint and the statutory text demonstrates this. For example, Appellees argue that “instead of alleging that the elephant area is ‘of insufficient size to permit the animal to move about freely’ under SMC 9.25.081 . . . Sebek alleges generally that the size of the Elephant Forest is too small and its surface is too hard.” Br. at 38. This is wrong from every angle.

First, even if it were a fair description of the law and the Complaint, it would be a stretch to find that “too small” does not serve notice that something is of “insufficient size.”

Second, SMC 9.25.081 is not the only statute at issue, nor is the quoted language even all of SMC 9.25.081. In the very same subsection F, the Code provides that it is a criminal offense to “confine any animal in such a manner or in such a place as to cause injury or pain,” and Appellees ignore RCW 16.52.207, which criminalizes the failure “to provide the animal with necessary shelter [if] the animal suffers unnecessary or unjustifiable physical pain as a result of the failure.” *Those* provisions

clearly reach the conduct pled in the Complaint, regardless of whether Appellee's carefully chosen excerpt is also applicable.

Third, and most importantly, the Complaint does not merely allege that "the size of the Elephant Exhibit is too small and its surface is too hard," as Appellees claim. Br. at 38. In fact, Plaintiffs make numerous and detailed allegations about how the inadequate Elephant Exhibit causes the Elephants suffering and pain, including:

- The Elephants' "prolonged confinement to this grossly inadequate space has contributed to . . . their continued pain and suffering." CP 7.
- The Elephant Exhibit "is too small to allow the Zoo's Elephants to roam or to engage in their natural foraging behavior." CP 7.
- The Elephants suffer from osteoarthritis and foot abscesses as a result of lack of movement. CP 8.

The rest of Appellees' claims, about both the law and the Complaint, are similarly false and misleading. The most egregious example, however, is Appellees' claim that "Instead of alleging a specific act that is unnecessarily or unjustifiably causing physical pain under RCW 16.52.207, Sebek alleges generally that Woodland Park engages in inappropriate behavior modification strategies." Br. at 38. The allegation to which Appellees apparently refer is found in paragraph 66, and reads:

In June 2002, when Hansa was less than two years old, she was beaten with a bullhook for eating dirt, causing her to run away screaming in front of Zoo visitors. A bullhook is a stick with a sharp steel hook on one end that is used to puncture and prod

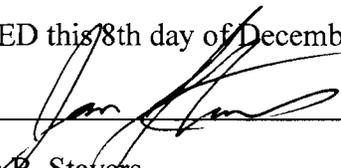
sensitive areas on the elephant's body in order to coerce elephant behavior through fear and submission. (CP 10)

It speaks volumes that Appellees characterize this allegation as "generally" describing "behavior modification strategies."

### CONCLUSION

The Superior Court's dismissal of Plaintiffs' action for lack of standing was in error. Contrary to the Superior Court's assessment, the Complaint alleges serious and ongoing illegal conduct by the City, challengeable by taxpayer action. Plaintiffs respectfully request that this Court reverse the Superior Court and reinstate Plaintiffs' action.

RESPECTFULLY SUBMITTED this 8th day of December, 2011.

By:  \_\_\_\_\_

Jason B. Stavers  
**GIBSON, DUNN & CRUTCHER LLP**  
George A. Nicoud III  
(admitted *pro hac vice*)  
Jason B. Stavers  
(admitted *pro hac vice*)

**SMITH & LOWNEY PLLC**  
Brian A. Knutsen, WSBA #38806  
Knoll Lowney, WSBA #23457