

75204-9

75204-9

No. 75204-9-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

UNIVERSITY OF WASHINGTON,

Respondent,

vs.

CITY OF SEATTLE, DOCOMOMO US-WEWA,
HISTORIC SEATTLE, and THE WASHINGTON TRUST
FOR HISTORIC PRESERVATION,

Appellants.

CITY'S OPENING BRIEF

PETER S. HOLMES
Seattle City Attorney

ROGER D. WYNNE, WSBA # 23399
PATRICK DOWNS, WSBA #25276
Assistant City Attorneys
Attorneys for Appellant City of Seattle

Seattle City Attorney's Office
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 233-2177

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 JUL 22 AM 11:19

CR

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND SUMMARY	1
II. ASSIGNMENTS OF ERROR.....	3
A. Assignment of Error	3
B. Issues Pertaining to Assignment of Error	3
III. STATEMENT OF THE CASE	4
A. Factual background.....	4
B. Procedural history.....	7
IV. ARGUMENT.....	8
A. UW is subject to the GMA’s balanced rule.....	8
1. The GMA rule is clear: absent an express exemption, state agencies must comply with local development regulations that do not preclude the siting of essential public facilities.....	8
2. The GMA rule requires UW (a state agency) to comply with the LPO (a GMA development regulation), except where application of the LPO would preclude the siting of a state education facility (an essential public facility).....	12
3. UW offers no valid reason for declaring independence from the GMA rule.	15
a) State university lands are subject to state law; they are not legal islands unto themselves.....	15

b)	The GMA rule can be harmonized with UW-specific legislation.	20
c)	This issue is governed by Washington law, not New York law.	23
B.	Because UW was born and remains a corporation, it is subject to the LPO.	24
C.	The Campus Master Plan did not authorize UW to demolish structures, especially not contrary to the LPO.	29
V.	CONCLUSION.....	33

APPENDICES

A. Text of select statutes (with emphasis added):

- RCW 36.70A.103;
- RCW 36.70A.200;
- RCW 28B.20.100;
- RCW 28B.20.130; and
- RCW 28B.20.700.

B. Laws of 1862 at 43–46.

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Arbitration of Mooberry v. Magnum Mfg., Inc.</i> , 108 Wn. App. 654, 32 P.3d 302 (2001).....	20
<i>Batcheller v. Com. ex</i> , 176 Va. 109, 10 S.E.2d 529 (1940)	25
<i>Burton v. Lehman</i> , 153 Wn.2d 416, 103 P.3d 1230 (2005).....	26
<i>City of Des Moines v. Puget Sound Regional Council</i> , 98 Wn. App. 23, 108 Wn. App. 836, 988 P.2d 27 (1999)	9
<i>Dreps v. Board of Regents of University of Idaho</i> , 65 Idaho 88, 139 P.2d 467 (1943)	25
<i>Edmonds School Dist. No. 15 v. City of Mountlake Terrace</i> , 77 Wn.2d 609, 465 P.2d 177 (1970).....	28
<i>Hontz v. State</i> , 105 Wn.2d 302, 714 P.2d 1176 (1986).....	12
<i>Hyde v. University of Washington Medical Center</i> , 186 Wn. App. 926, 347 P.3d 918 (2015).....	12
<i>Kitsap County v. Moore</i> , 144 Wn.2d 292, 26 P.3d 931 (2001).....	19
<i>Milestone Homes, Inc. v. City of Bonney Lake</i> , 145 Wn. App. 118, 186 P.3d 357 (2008).....	29
<i>Morin v. Johnson</i> , 49 Wn.2d 275, 300 P.2d 569 (1956).....	29
<i>Oda v. State</i> , 111 Wn. App. 79, 44 P.3d 8 (2002).....	12
<i>Orwick v. Fox</i> , 65 Wn. App. 71, 828 P.2d 12 (1992).....	12
<i>People ex rel. Bd. of Trustees of University of Ill. v. Barrett</i> , 382 Ill. 321, 46 N.E.2d 951 (1943).....	25

<i>Phoenix Development, Inc. v. City of Woodinville</i> , 171 Wn.2d 820, 256 P.3d 1150 (2011).....	29
<i>Sendak v. Trustees of Indiana University</i> , 254 Ind. 390, 260 N.E.2d 601 (1970).....	25
<i>Snohomish County v. State</i> , 97 Wn.2d 646, 648 P.2d 430 (1982).....	16
<i>State ex rel. Little v. Regents of University</i> , 55 Kan. 389, 40 P. 656 (1895).....	26
<i>State v. Chase</i> , 175 Minn. 259, 220 N.W. 951 (1928).....	25
<i>State v. City of Seattle</i> , 94 Wn.2d 162, 615 P.2d 461 (1980).....	passim
<i>State v. Hewitt Land Co.</i> , 74 Wn. 573, 134 P. 474 (1913).....	16, 24
<i>University of Alaska v. National Aircraft Leasing, Ltd.</i> , 536 P.2d 121 (Alaska 1975).....	25
<i>University of Utah v. Shurtleff</i> , 144 P.3d 1109 (Utah 2006).....	16, 25

Statutes

Laws of 1862 at 43-44 §§ 1, 5	24
Laws of 1862 at 45 § 20.....	16
Laws of 1863 at 477 §§ 1, 5.....	24
Laws of 1889-90, ch. 12, at 395 § 1.....	25
Laws of 1985, ch. 370, § 92.....	21
Laws of 1990, 1 st Ex. Sess, ch. 17	11
Laws of 1991, Spec. Sess, ch. 32, § 3(4)	13, 21
Laws of 1991, Spec. Sess, ch. 32, §§ 4-5.....	12
Laws of 1993, 1 st Spec. Sess. ch.6, § 1	13
Laws of 1993, 1 st Spec. Sess, ch. 32, § 3(4)	13
Laws 1995, ch. 370, §§ 92-95.....	20
Laws of 1999, ch. 346, § 1	23

Laws of 1999, ch. 346, § 8.....	22
RCW 9.94A.745.....	28
RCW 28A.320.010.....	28
RCW 28B.07.030.....	28
RCW 28B.10.510.....	27
RCW 28B.10.842.....	27
RCW 28B.20.130(1).....	15, 20, 21
RCW 28B.20.392(2)(b)	22
RCW 28B.20.700.....	22
RCW 28B.30.150(1).....	17, 20
RCW 28B.35.120(1).....	17, 20
RCW 28B.40.120(1).....	17, 20
RCW 35.22.280	28
RCW 35.23.440	28
RCW 35.57.010	28
RCW 35.82.070	28
RCW 36.01.010.	28
RCW 36.54.110	28
RCW 36.70A.010.....	10
RCW 36.70A.020.....	10
RCW 36.70A.020(13).....	14
RCW 36.70A.030(7).....	14
RCW 36.70A.040.....	10
RCW 36.70A.100.....	10
RCW 36.70A.103.....	9, 13, 21
RCW 36.70A.190.....	10
RCW 36.70A.200(1).....	9, 13
RCW 36.70A.200(5).....	9, 14

RCW 36.70A.290.....	14
RCW 36.102.020	28
RCW Ch. 43.21C	32
RCW 43.180.040	28
RCW 47.06.140	1
RCW 52.12.011	28
RCW 68.52.190	28
RCW 70.95N.280.....	28
RCW 70.105D.050(1).....	18
RCW 71.09.020.	1
RCW 71.09.250 (1).....	1
RCW 71.09.250(3).....	9
RCW 71.09.342(1).....	9
RCW 76.09.020(24).....	18
RCW 76.09.020(26).....	18
RCW 76.09.070	18
RCW 76.09.170(1).....	18
RCW 77.55.021(1).....	19
RCW 80.50.060	10
RCW 80.50.110(2).....	9
RCW 81.112.020	1
RCW 86.09.148	28
RCW 89.08.220	28
RCW 89.30.127	28
RCW 90.58.030(1)(e)	19
RCW 90.58.140(1).....	19
RCW 90.58.140(2).....	19
RCW 90.58.230	19

WAC 365-195-805(2).....	13
WAC 365-196-450(2)(b)(ii)	14
WAC 365-196-530(2).....	10, 12, 21
WAC 365-196-530(4)–(5)	11
WAC 365-196-530(5).....	11
WAC 478-04-020(1).....	27

Rules

CR 5(b)(7).....	1
ER 201(b).....	7

Ordinances

Ord. 106348	23
Ord. 117430	14
Ord. 121041	6
SMC 23.43 - 23.51B	32
SMC 23.69.006.B	32
SMC 23.69.032H	5
SMC 25.05.746	32
SMC 25.12.200	24
SMC 25.12.220	24
SMC 25.12.670	24
SMC 25.12.750.E.....	28
SMC 25.12.850.A	28

Other Authorities

Black’s Law Dictionary at 198 (9th ed., 2009).....	24
Black’s Law Dictionary at 391 (9th ed., 2009).....	26
Const. art. XIII § 1	16, 25
Fletcher Cy. Corp. § 62.....	26

Neil H. Hutchens, <i>Preserving the Independence of Public Higher Education: An Examination of State Constitutional Autonomy Provisions for Public Colleges and Universities</i> 35 J.C. & U.L. 272 (2009).....	25
Patricia E. Salkin, <i>American Law of Zoning</i> at 9:2 at 9-7 (5 th ed., 2015).....	32
Richard L. Settle & Charles G. Gavigan, <i>The Growth Management Revolution in Washington: Past, Present and Future</i> , 16 U. Puget Sound L. Rev. 867 (1993).....	11
The American Heritage Dictionary of the English Language at 298 (1970).....	27
Webster's Ninth New Collegiate Dictionary at 734 (1989).....	31

I. INTRODUCTION AND SUMMARY

The Growth Management Act (“GMA”) establishes a balanced rule for addressing the potential tension between local governments’ development regulations and state agencies’ construction projects. On the one hand, state agencies must comply with local development regulations, including historic preservation laws. On the other hand, no development regulation may preclude the siting of an essential public facility, including a state education facility.

The University of Washington (“UW”) rejects this rule, and not just for a particular project. UW sued *not* to press an as-applied challenge alleging the City of Seattle’s landmark preservation ordinance (“LPO”) precludes the siting of a state education facility. Instead, UW filed this facial challenge seeking a declaration that it is always free of the LPO as a matter of law, no matter the facts of any particular facility. UW declares its independence in sweeping terms. If UW is correct, the regents of each of Washington’s six universities enjoy unfettered control of their property, subject only to their respective enabling statutes, their own judgment, and “no other law.” No law mandating toxic waste cleanup. No law requiring forest revegetation. No law regarding shoreline protection. And not the

GMA or its balanced command to comply with local development regulations if they do not preclude the siting of a state education facility.

UW's declaration of independence finds no legal support. Regents' authority to control their domains can be harmonized with authority imposing limits to protect the environment and communities, including the GMA's balanced rule. No university is a legal island unto itself. If UW believes a local development regulation precludes the siting of a state education facility, it may press an as-applied claim under the GMA. But UW may not toss aside the GMA and all other environmental and land use laws beyond its enabling statute.

Although less sweeping, UW's alternative rationales for dodging the LPO are equally unpersuasive. UW argued—and the trial court agreed—that UW is not a “corporation” within the meaning and scope of the LPO. That is incorrect because the UW was born a corporation through “An Act to Incorporate the University” and retains its corporate status just like state universities across the nation.

UW also suggests the City absolved UW from complying with the LPO by adopting a campus master plan allowing UW to demolish historic structures. UW misreads the plan. It authorizes no demolition and UW,

which helped craft the plan, agreed it did not resolve whether the LPO applied to UW.

The City respectfully asks this Court to reverse the trial court and direct it to enter judgment for the City and the other defendants because: the GMA means what it says; UW is a “corporation” within the meaning of the LPO; and the City did not authorize UW to demolish buildings, especially not contrary to the LPO. Unlike UW, the City does not ask for a pass on the GMA, so a ruling in favor of the City still leaves UW the option of mounting a future, as-applied challenge based on the GMA rule. The City simply asks UW to respect the rule.

II. ASSIGNMENTS OF ERROR

A. Assignment of Error

1. The trial court erred by granting UW’s cross motion for summary judgment and denying the cross motions for summary judgment filed by the City and other defendants.

B. Issues Pertaining to Assignment of Error

1. Absent an express exemption, the GMA requires state agencies to comply with local development regulations that do not preclude the siting of essential public facilities. UW is a state agency that enjoys no express exemption, and the City’s LPO is a development regulation adopted pursuant to the GMA. Is UW subject to the GMA requirement? (Assignment of Error 1.)

2. The LPO applies to corporations. UW was created as a corporation by an “Act to Incorporate the University” and remains a corporation just like state universities across the nation. Is UW a “corporation” within the meaning of the LPO? (Assignment of Error 1.)
3. The City Council adopted the UW Campus Master Plan with an express finding that it did not authorize demolition of any structure and UW agreed the Plan did not resolve whether the LPO applied to the campus. Has UW failed to prove the Plan authorizes demolition of historic campus structures contrary to the LPO? (Assignment of Error 1.)

III. STATEMENT OF THE CASE

A. Factual background.

In 2000 UW released a draft master plan for UW’s Seattle campus (“Plan”) declaring the City lacked authority to impose its LPO there:

The University of Washington is a state agency. A state agency is not subject to local ordinances when a local ordinance is in conflict with state law. The Washington State Legislature has given the Board of Regents the exclusive authority to exercise full control over University property, including the central campus. The City landmarks ordinance is a local ordinance which is inapplicable to University property because it conflicts with the Regent’s exclusive authority over its buildings....¹

¹ CP 99 (draft Plan). The planning process was guided by an agreement between the City and UW. See CP 72–89 (City ordinance approving the most recent amendment to the agreement).

When a revised draft plan eventually came before the City Hearing Examiner for a formal recommendation in 2002,² the City planning department (then known as DCLU) summarized the disagreement over the LPO and recommended a disclaimer to reflect it:

The City has the authority pursuant to [the LPO] to designate structures qualifying as City landmarks and to preserve them through controls on the property. It is the City's position that this authority extends to buildings on the University of Washington campus. The University has stated that the University's Board of Regents is the steward of the University campus and contends that the City's historic preservation regulations do not apply to the University of Washington campus. This disagreement on the City's authority should be reflected in the master plan by inclusion of the following language:

RECOMMENDATION: By adopting and approving the Master Plan, neither the University nor the City of Seattle waives or concedes its' [*sic*] legal position concerning the scope of either party's legal authority to control or regulate University property.³

UW agreed that the parties disagreed over the City's authority to apply the LPO on the UW campus and that the disclaimer could acknowledge the disagreement. UW offered the Examiner a proposed finding to that effect:

The City and the University disagree over the scope of the City's authority to require the University, a state

² See Seattle Municipal Code ("SMC") 23.69.032.H (explaining the Examiner's role in the master plan process). The public may browse and search the current Seattle Municipal Code on a web site: https://www.municode.com/library/wa/seattle/codes/municipal_code.

³ CP 133-34.

agency, to comply with the City's SEPA policies on historic preservation and the Landmark Preservation Ordinance. DCLU recommends, and the Hearing Examiner adopts the recommendation that this disagreement should be reflected in the Campus Master Plan by inclusion of the following language:

RECOMMENDATION: By adopting and approving the Campus Master Plan, neither the University nor the City of Seattle waives or concedes any legal position concerning the scope of either party's legal authority to control or regulate University Property. The University is willing to incorporate the language proposed by DCLU.⁴

The Examiner recommended the disclaimer to the Council,⁵ which included the disclaimer as a condition of the approved Plan.⁶

The final approved Plan omits the draft's assertion that the City lacks authority to apply the LPO, but includes the disclaimer to memorialize the parties' agreement to disagree over application of the LPO on the UW campus:

By adopting and approving the Master Plan, neither the University nor the City of Seattle waives or concedes its legal position concerning the scope of either party's legal authority to control or regulate University property.⁷

⁴ CP 138.

⁵ CP 144 ¶ (n).

⁶ Ord. 121041. The public may search City ordinances on a web page maintained by the Office of the City Clerk: <http://clerk.ci.seattle.wa.us/~public/CBOR1.htm>.

⁷ CP 164. Full-text, searchable versions of the Plan's components are available on a UW web site: <http://www.washington.edu/community/?p=89%E2%80%8B> (last visited July 15, 2016).

Since adopting the Plan in 2003, UW twice agreed to submit UW property to treatment under the LPO: portions of Husky Stadium and the former Sand Point Naval Air Station.⁸ Each time UW stated it “neither waives nor concedes its position with regard to the City’s regulatory jurisdiction over [UW] as an agency of the State of Washington.”⁹

In early 2015 UW launched a planning process to update the Plan.¹⁰ UW anticipates the City Council and UW’s regents will review and approve a new plan by 2018.¹¹

B. Procedural history.

UW filed this facial challenge seeking a declaration to resolve the City’s authority to apply the LPO to UW’s Seattle campus.¹² UW named the City and DOCOMOMO US–WEWA (“DOCOMOMO”), which had filed with the City a nomination to designate a building on the UW campus as a City landmark under the LPO. Historic Seattle and the Washington

⁸ CP 176–78.

⁹ *Id.*

¹⁰ See UW Planning & Management web page entitled “UW 2018 Seattle Campus Master Plan,” <http://pm.uw.edu/campus-master-plan> (“UW 2018 Plan Site”) (last visited July 15, 2016). See ER 201(b) (allowing the Court to take judicial notice). See also CP 180 (October 2015 UW notice regarding environmental review for the Plan update).

¹¹ See UW 2018 Plan Site.

¹² CP 1–17 (UW complaint).

Trust for Historic Preservation joined DOCOMOMO in filing an amended landmark nomination and intervened in this suit.¹³

The trial court ruled for UW on cross motions for summary judgment.¹⁴ Without resolving the other issues, the trial court ruled UW is not subject to the LPO because it is not an “individual, partnership, corporation, group or association” within the meaning of the LPO.¹⁵ The City and other defendants appealed.

IV. ARGUMENT

A. UW is subject to the GMA’s balanced rule.

1. The GMA rule is clear: absent an express exemption, state agencies must comply with local development regulations that do not preclude the siting of essential public facilities.

Under the GMA, every state agency must comply with local development regulations, but no development regulation may preclude the siting of essential public facilities, including state education facilities:

State agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter....

¹³ See CP 181–84 (describing the interests of those three parties and their involvement in the nomination).

¹⁴ CP 604–11.

¹⁵ CP 609, lines 7–8.

No local comprehensive plan or development regulation may preclude the siting of essential public facilities.

Essential public facilities include...state education facilities....¹⁶

The GMA’s structure confirms the rule is part of a balanced approach to ensuring compliance with the GMA’s regulatory process while protecting important public facilities. Part of the balance comes from the GMA’s prohibition on local development regulations that preclude the siting of an essential public facility¹⁷—a prohibition UW does not invoke in this facial challenge.¹⁸ Another counterbalance is legislation exempting particular state agency activity from local development regulations. For example, laws regarding the siting of facilities to house sexually violent predators and certain energy facilities expressly “preempt” local development regulations.¹⁹ But “except where specific

¹⁶ Laws of 1991, Spec. Sess., ch. 32, §§ 4–5 (now codified as RCW 36.70A.103 and .200(1) and (5)). This excerpt presents subsections .200(1) and (5) in reverse order to enhance clarity. See Appendix A for the relevant statutory text.

¹⁷ RCW 36.70A.200(5). *See also City of Des Moines v. Puget Sound Regional Council*, 98 Wn. App. 23, 108 Wn. App. 836, 843–47, 988 P.2d 27 (1999) (construing that provision, then codified as RCW 36.70A.200(2)).

¹⁸ *See* CP 583 (UW reply: “The University’s Motion did not rely on its status as an essential public facility”). *Accord* CP 1–17 (UW complaint including no claim under essential public facility law).

¹⁹ *See, e.g.*, RCW 71.09.250(3) (“Notwithstanding RCW 36.70A.103 or any other law, this statute preempts and supersedes local plans [and] development regulations....”); RCW 71.09.342(1) (same language); RCW 80.50.110(2) (“The state hereby preempts the regulation and certification of the location, construction, and operational conditions of

legislation explicitly dictates otherwise[,] development of state facilities is subject to local approval procedures and substantive provisions....”²⁰

The underlying purpose of the GMA is furthered by respecting this rule. The GMA responds to the dangers posed by “uncoordinated and unplanned growth, together with a lack of common goals expressing the public’s interest in the conservation and the wise use of our lands....”²¹

The GMA sets planning goals and mandates, and requires local governments to adopt comprehensive land use plans consistent with the GMA and development regulations consistent with their plans.²² The GMA ensures state agencies respect the product of that coordinated, goal-driven process when managing their property:

Overall, the broad sweep of policy contained in the [GMA] implies a requirement that all programs at the state level accommodate the outcomes of the growth management process wherever possible. The exercise of statutory powers...routinely involves such agencies in discretionary decision making. The discretion they exercise should take

certification of the energy facilities included under RCW 80.50.060 as now or hereafter amended.”).

²⁰ WAC 365-196-530(2). Those regulations are issued by the Washington State Department of Commerce, which provides technical assistance under the GMA. *See* RCW 36.70A.190.

²¹ RCW 36.70A.010.

²² *See, e.g.*, RCW 36.70A.020 (GMA goals); RCW 36.70A.040(3) (GMA mandate to designate and protect critical areas and resource lands, and to adopt comprehensive plans and development regulations); RCW 36.70A.100 (comprehensive plans must be coordinated).

into account legislatively mandated local growth management programs.²³

Without a command to comply with local development regulations, state agencies could spurn the GMA's comprehensive, state-wide growth management process. For example, UW claims it owns over 7,000 acres across Washington.²⁴ Were it not for the GMA's command to state agencies, UW could expand its Friday Harbor Labs into locally designated and protected critical areas, erect a looming tower over Tacoma in violation of local height limits, and expand its President's mansion in Seattle's Madison Park without regard for single-family-neighborhood setback requirements.²⁵

The Legislature used the GMA rule to fill a gap in the original law. The Legislature originally adopted the GMA in 1990 without answering several important questions, including whether local development regulations apply to the activities of state agencies.²⁶ The Legislature

²³ WAC 365-196-530(4)–(5). *Accord* WAC 365-196-530(5) (state agency review of local development regulations “should lead to redirecting the state’s actions in the interests of consistency with the growth management effort”).

²⁴ *See* CP 475 (printed version of UW Real Estate web page entitled “Portfolio Facts”).

²⁵ *See id.* (listing those properties among the UW portfolio).

²⁶ Laws of 1990, 1st Ex. Sess., ch. 17. *See* Richard L. Settle & Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future*, 16 U. PUGET SOUND L. REV. 867, 888–89 (1993).

answered most of the questions the next year, in part by adopting the balanced approach of requiring state agencies to comply with local development regulations that do not preclude the siting of an essential public facility.²⁷

2. The GMA rule requires UW (a state agency) to comply with the LPO (a GMA development regulation), except where application of the LPO would preclude the siting of a state education facility (an essential public facility).

UW must respect the GMA rule because its terms embrace UW and the LPO. UW is a state agency within the meaning of the GMA rule—courts consider UW a state agency,²⁸ and UW asserted it is a state agency in court²⁹ and during the Campus Master Plan process.³⁰ No “specific legislation explicitly dictates” UW need not comply with the GMA’s rule.³¹ If the Legislature did not intend to subject UW and other state

²⁷ Laws of 1991, Spec. Sess., ch. 32, §§ 4–5. See Settle & Gavigan at 895–96.

²⁸ *Hontz v. State*, 105 Wn.2d 302, 310, 714 P.2d 1176 (1986); *Hyde v. University of Washington Medical Center*, 186 Wn. App. 926, 930, 347 P.3d 918 (2015); *Orwick v. Fox*, 65 Wn. App. 71, 90 n.10, 828 P.2d 12 (1992).

²⁹ *State v. City of Seattle*, 94 Wn.2d 162, 166–67, 615 P.2d 461 (1980) (“Since the University is a state agency . . . , the University argues that the Tract is immune from the City’s Landmarks Ordinance.”); *Oda v. State*, 111 Wn. App. 79, 85, 44 P.3d 8 (2002).

³⁰ “The University of Washington is a state agency.” CP 99 (draft Plan). Accord CP 138 ¶ 74 (UW’s proposed findings). Cf. CP 527–28 (UW response brief arguing UW is not a “state agency” within the meaning of the GMA).

³¹ See WAC 365-196-530(2).

universities to the GMA’s rule, the Legislature would not have included “state education facilities” among the list of essential public facilities shielded from the rule on an as-applied basis.³²

The LPO is a development regulation “adopted pursuant to” the GMA within the meaning of the GMA rule.³³ The Legislature directed large cities to adopt a comprehensive land use plan under the GMA, and development regulations implementing the plan, by 1994.³⁴ State rules advised local jurisdictions to rely, where appropriate, on existing regulations that proved consistent with their new plan.³⁵ The City followed that advice in 1994 by using its existing development regulations—supplemented with new and modified provisions—to comply with the GMA. The City Council adopted an ordinance explaining its review of existing development regulations and declaring that those existing regulations, as amended and supplemented by other sections of the

³² See RCW 36.70A.200(1) (“Essential public facilities include...state education facilities”).

³³ See RCW 36.70A.103. *Cf.* CP 581 (UW reply).

³⁴ Laws of 1993, 1st Spec. Sess., ch. 6, § 1 (amending RCW 36.70A.040(4)).

³⁵ Former WAC 365-195-805(2) (emphasis added) (reproduced at CP 467–68). *See also* Laws of 1991 1st Spec. Sess., ch. 32, § 3(4) (authorizing the Department of Community Development to adopt the rules).

ordinance, brought the City into compliance with the GMA.³⁶ Because the LPO was among those existing development regulations,³⁷ the ordinance rendered the LPO “adopted pursuant to” the GMA. Because no one timely challenged the City for using the LPO and other pre-GMA regulations to help meet its duty to adopt development regulations, those regulations must be deemed consistent with, and adopted under, the GMA.³⁸

Even though the GMA rule requires UW (a state agency) to comply with the LPO (a GMA development regulation), the rule provides balance. If application of the LPO were to preclude the siting of a state education facility, UW could block the LPO through the GMA’s protection of essential public facilities in an as-applied challenge.³⁹ Again, that aspect of the rule is not germane to UW’s facial challenge. But the

³⁶ Ord. 117430 at 1 (emphasis added) (reproduced at CP 470).

³⁷ The LPO was first codified in SMC Chapter 25.12 in 1977. Ord. 106348. Historic preservation ordinances like the LPO are “development regulations” within the meaning of the GMA. *See* RCW 36.70A.020(13) (development regulations should “[i]dentify and encourage the preservation of lands, sites, and structures, that have historical or archaeological significance”); WAC 365-196-450(2)(b)(ii) (describing “adoption of a local preservation ordinance” as a step to implement the GMA and local historic preservation goals and policies). *See also* RCW 36.70A.030(7) (“development regulations” mean “controls placed on development or land use activities by a . . . city”).

³⁸ *See* RCW 36.70A.290.

³⁹ RCW 36.70A.200(5).

protection it offers state agencies is a core component of the balance manifest in the GMA rule.

3. UW offers no valid reason for declaring independence from the GMA rule.

UW is not satisfied with the protection the balanced GMA rule provides. UW wants to avoid the rule altogether. None of the authority UW or the trial court offers puts UW above that law.

a) State university lands are subject to state law; they are not legal islands unto themselves.

UW asserts independence from the GMA rule and every statute regulating land use and the environment other than RCW 28B.20.130(1), which accords the UW's regents "full control" over UW property. According to UW, "*there is no other law that diminishes the 'full control' of the Board of Regents over the Campus.*"⁴⁰ UW claims the Legislature bestowed on its regents "the authority to decide how best to fulfill the University's statutory mission by considering and balancing *all* competing considerations."⁴¹ UW believes "the legislature has vested authority with

⁴⁰ CP 212, line 14 (UW opening brief, quoting RCW 28B.20.130(1)) (emphasis added).

⁴¹ CP 194, lines 4-5 (UW opening brief). *Accord* CP 196, lines 12-14.

the Regents,” and them alone, “to make decisions regarding the development of the Campus and its buildings.”⁴²

No state university is above the law. The Washington Constitution commands the state to foster and support educational institutions, but always “subject to such regulations as may be provided by law.”⁴³ UW is a creature of the Legislature and must abide by its enactments; UW’s Board of Regents “has no powers that are not conferred by statute, and none that the Legislature cannot take away or ignore.”⁴⁴ The Washington Supreme Court twice declined requests—one from UW—to adopt a blanket rule of immunity exempting state property and projects from local regulation. Instead, the Court looked for legislation resolving what law applies to state property and projects.⁴⁵

⁴² CP 195, lines 11–12 (UW opening brief).

⁴³ Const. art. XIII, § 1.

⁴⁴ *State v. Hewitt Land Co.*, 74 Wn. 573, 580, 134 P. 474 (1913). *See, e.g.*, Laws of 1862 at 45 § 20 (the original act incorporating UW “shall not be so construed as to prevent the legislature from making such amendments to the same, as the welfare of the University may require”). *Accord University of Utah v. Shurtleff*, 144 P.3d 1109, 1121 (Utah 2006) (“The fact that the University’s *corporate status* is beyond legislative control does not mean that the framers intended to cede the legislature’s power to control other aspects of the University.”).

⁴⁵ *Snohomish County v. State*, 97 Wn.2d 646, 650–51, 648 P.2d 430 (1982); *State v. City of Seattle*, 94 Wn.2d 162, 166–67, 615 P.2d 461 (1980).

The Legislature could not have intended to endorse UW's declaration of independence. That declaration necessarily extends beyond a debate over the City's LPO on UW's Seattle campus. Because every other state university's governing body likewise exercises "full control" over its property,⁴⁶ UW's argument covers the campuses of Washington State University ("WSU"), Western Washington University, Eastern Washington University, Central Washington University, and Evergreen State College.

UW's argument also extends to the universities' respective "property of various kinds," not just their campuses.⁴⁷ Among that property is WSU's Palouse Ridge Golf Club, UW's 4,000-acre Pack Forest near Eatonville, UW's nearly 600-acre Ellis Biological Preserve on Shaw Island, and the nearly 500-acre UW Friday Harbor Labs on San Juan Island.⁴⁸ UW's logic also extends to smaller university-owned property lacking any evident connection to an educational mission. For example, WSU listed for sale eight mostly undeveloped properties comprising about

⁴⁶ RCW 28B.30.150(1) (Washington State University); RCW 28B.35.120(1) (Western, Eastern, and Central Washington Universities); RCW 28B.40.120(1) (Evergreen State College).

⁴⁷ *Id.*

⁴⁸ See CP 473–75 (WSU Palouse Ridge Golf Club Fact Sheet and UW Real Estate web page entitled "Portfolio Facts").

70 acres across Washington, from commercial land in Richland and Longview, to Friday Harbor waterfront and a residential lot in an Ocean Shores subdivision.⁴⁹ If UW were correct, WSU could retain and develop those small lots without regard for any other law; WSU's regents would just balance the competing considerations they deem relevant and make a decision they deem appropriate.

UW's position—that “there is no other law that diminishes the ‘full control’ of the Board of Regents”—sweeps from state university land every other statute limiting state agencies' activities, not just the GMA. Under the Forest Practices Act, the Department of Natural Resources may sue another state agency that violates reforestation requirements.⁵⁰ Under the Model Toxics Control Act, the Department of Ecology may order a state agency to clean up a release of hazardous substances.⁵¹ Under the Hydraulic Code, the Department of Fish and Wildlife may require a state agency to obtain a permit to protect fish before undertaking a project in

⁴⁹ See CP 477–80 (WSU Real Estate Office, Property Listings web page).

⁵⁰ RCW 76.09.170(1) (authorizing penalties against any person violating RCW 76.09.070's reforestation requirements); RCW 76.09.020(24) (defining “person” to include a state governmental entity).

⁵¹ RCW 70.105D.050(1) (authority to order a potentially liable person to clean up); RCW 70.105D.020(24) and (26) (potentially liable person includes a state agency).

state waters.⁵² And under the Shoreline Management Act, a state agency is liable for damages arising from a failure to obtain a local permit before undertaking certain development on shorelines.⁵³ The requirements of these and other statutes diminish a university governing body’s “full control” of its property; they may even thwart a project important to a university’s mission.

If UW is correct—if “full control” blocks all other laws potentially limiting regents’ discretion to develop property—then the Legislature empowered university regents to fulfill their statutory mission by: harvesting timber without required reforestation; developing contaminated waterfront property without required permits or cleanup; and building an office tower in a single-family neighborhood in violation of local zoning laws. Because that is the necessary result of UW’s argument and the Legislature could not have intended that result, this Court should reject UW’s claim.⁵⁴

⁵² RCW 77.55.021(1).

⁵³ RCW 90.58.140(1) and (2) (requirement to comply); RCW 90.58.230 (providing damages from persons who violate the SMA); RCW 90.58.030(1)(e) (“person” includes state agencies).

⁵⁴ *Kitsap County v. Moore*, 144 Wn.2d 292, 297, 26 P.3d 931 (2001) (in discerning legislative intent, avoid a reading that results in unlikely, absurd, or strained consequences).

b) The GMA rule can be harmonized with UW-specific legislation.

None of the authority UW invokes provides evidence of legislative intent to exempt state universities from the GMA rule or accord regents unfettered dominion over university property. That authority can and must be harmonized with the GMA rule.⁵⁵

First, UW fails to concede that in 1985 the Legislature amended universities' statutory authority to subordinate regents' "full control" to other law—they now have "full control of the university and its property of various kinds, *except as otherwise provided by law.*"⁵⁶ This limitation delivers a common-sense message to university regents: you must comply with other state law beyond the confines of your respective enabling statutes. The GMA's command that state agencies comply with local development regulations is an example of state law limiting the otherwise "full control" exercised by state universities' governing bodies. Again, the

⁵⁵ "Every provision must be viewed in relation to other provisions and harmonized if at all possible. Statutes relating to the same subject are to be read together as constituting a unified whole, to the end that a harmonious total statutory scheme evolves which maintains the integrity of the respective statutes." *Arbitration of Mooberry v. Magnum Mfg., Inc.*, 108 Wn. App. 654, 657, 32 P.3d 302 (2001).

⁵⁶ RCW 28B.20.130(1) (emphasis added) (see Appendix A). *Cf.* CP 528–30 (UW response brief). This limitation is common to the governing bodies of state universities. *See, e.g.*, RCW 28B.30.150(1) (Washington State University); RCW 28B.35.120(1) (Western, Eastern, and Central Washington Universities); RCW 28B.40.120(1) (Evergreen State College). *See generally* Laws of 1985, ch. 370, §§ 92–95.

GMA rule applies to state agencies “except where specific legislation explicitly dictates otherwise.”⁵⁷ The Legislature did the opposite: adding “except as otherwise provided by law” to the universities’ authorizing legislation and removing any argument that regents’ “full control” trumps the GMA.

Second, because *State v. Seattle* applied a statutory structure that no longer exists, UW’s reliance on the case is misplaced.⁵⁸ Issued in 1980, *State* ruled the City lacked authority to designate historic landmarks within the UW “Metropolitan Tract”—site of UW’s original campus in downtown Seattle. That ruling is an historical relic because it relied on the pre-1985 and pre-GMA version of UW’s statutory authority giving the UW regents “full control of the university and its property of various kinds” with no limitation.⁵⁹ The Legislature limited that authority in 1985 by adding “except as otherwise provided by law” and in 1991 by enacting the GMA’s rule that state agencies “shall comply” with local development regulations.⁶⁰

⁵⁷ WAC 365-196-530(2).

⁵⁸ See *State v. City of Seattle*, 94 Wn.2d 162, 615 P.2d 461 (1980). *Cf., e.g.* CP 195–96, 209, 528–30 (UW briefing).

⁵⁹ *State*, 94 Wn.2d at 165–66.

⁶⁰ Laws of 1985, ch. 370, § 92 (amending RCW 28B.20.130(1)); Laws 1991, Spec. Sess., ch. 32, § 4 (adding what was codified as RCW 36.70A.103). *State* also relied on former

Third, UW finds no refuge in the 1999 act consolidating provisions addressing the regents' control of various UW properties.⁶¹ Although that law did not limit the regents' control,⁶² it also did not repeal the key phrase "except as otherwise provided by law" or the GMA rule.

Fourth, no conflict exists between the GMA rule and RCW 28B.20.700, part of a 1957 law dealing with financing of UW buildings and facilities.⁶³ Although that law empowers the regents to "provide for" construction the Legislature authorizes, the regents can provide for construction while following the GMA rule to comply with local development regulations.

Finally, the GMA rule creates no friction with RCW 28B.20.100(1), which vests "governance" of UW in its regents.⁶⁴ The

RCW 28B.20.392(2)(b), which enumerated elements of the Regents' then unfettered "full control" over the Metropolitan Tract. *State*, 94 Wn.2d at 165–67. That provision—besides being limited to the Tract and eventually subordinated to the GMA—was repealed by the 1999 law consolidating the Regents' control of UW property. Laws of 1999, ch. 346, § 8.

⁶¹ *Cf.* CP 209–10 (UW opening brief).

⁶² Laws of 1999, ch. 346, § 1 ("Nothing in this act may be construed to diminish in any way the powers of the board of regents to control its property . . .").

⁶³ *Cf.* CP 211–13 (UW opening brief). *See* Laws of 1957, ch. 254, § 1. The full text of RCW 28B.20.700 is reproduced in Appendix A.

⁶⁴ *Cf.* CP 200, 526–27. The full text of RCW 28B.20.100(1) is reproduced in Appendix A.

regents may govern the university; they just have to govern consistent with state law.

c) This issue is governed by Washington law, not New York law.

Washington law is the only law at issue. Concerned that “very few cases involve the application of preservation ordinances to university campuses,”⁶⁵ the trial judge found an unpublished New York State trial court opinion—not cited by any party—and used it as the foundation for statements about the public need for development of state universities.⁶⁶

This *dictum* is an unfortunate distraction. Each state strikes its own balance between property rights and local historic preservation goals. If this case arose in New York, a New York common law rule favoring educational needs above historic preservation might be relevant.⁶⁷ But the Washington Legislature adopted a clear, balanced rule requiring state

⁶⁵ See CP 608, line 11.

⁶⁶ CP 609–10.

⁶⁷ The trial court conceded the New York trial court opinion “holds no precedential value,” but still reasoned “it is instructive given its interpretation of the New York LPO upon which the Seattle LPO is modeled.” CP 609, line 15. That factual foundation is incorrect. The trial court relied on secondary sources to conclude the LPO was adopted in 1973 and modeled on a New York City landmark law. CP 608 nn.1–2. The model for the 1973 ordinance is irrelevant because in 1977 the City of Seattle repealed and replaced it with the foundation of the current LPO. See Ord. 106348 (repealing Ord. 102229). Moreover, the New York City landmark law was not at issue in the New York trial court opinion, which dealt with an Ithaca, NY historic district law. See CP 609–10.

agencies (including UW) to comply with local GMA development regulations (including the LPO), except where application of that regulation would preclude the siting of an essential public facility (including a state education facility). UW must respect that rule.

B. Because UW was born and remains a corporation, it is subject to the LPO.

The LPO, by its terms, applies to UW. The LPO regulates the actions of an “owner” of a designated or nominated landmark.⁶⁸ An “owner” is a “person,” defined in part as a “corporation.”⁶⁹ UW is subject to the LPO because UW was born and remains a corporation.⁷⁰

The 1862 “Act to Incorporate the University of the Territory of Washington” constituted the regents, “a body corporate” (a synonym of “corporation”), to act under the name of the university, to use a corporate seal, and to exercise various powers “necessary to accomplish the object of the corporation.”⁷¹ UW remained a public corporation after statehood yielded its current name and adjusted its governing structure.⁷²

⁶⁸ SMC 25.12.670 (reproduced at CP 57).

⁶⁹ SMC 25.12.200 (“owner”); SMC 25.12.220 (“person”). Both are reproduced at CP 56.

⁷⁰ Cf. CP 609, lines 8–9 (trial court ruling); CP 580 (UW reply).

⁷¹ Laws of 1862 at 43–44 §§ 1, 5 (see Appendix B). *Accord* Laws of 1863 at 477 §§ 1, 5. See *BLACK’S LAW DICTIONARY AT* 198 (9th ed., 2009) (defining “body corporate”).

⁷² See *State v. Hewitt Land Co.*, 74 Wn. 573, 579–80, 134 P. 474 (1913) (holding UW to be a public corporation with powers conferred and limited by statute). See *id.*, 74 Wn. at

UW's corporate status is in line with other state universities deemed to be corporations. A leading decision underscored the ease of that conclusion where, as with UW, a state university is created as a "body corporate":

Under the decisions of this court, there is little room for speculation or disagreement as to the character of the University of Illinois as a corporate entity. In [one case], where the question was directly involved, it was definitely held that while the university is not strictly a municipal corporation, it is nevertheless, a public corporation. It was organized for the sole purpose of conducting and operating the university, as a State institution.⁷³

Other courts likewise conclude their state universities are corporations.⁷⁴

Even where a state university was created without using "body corporate,"

575–78 (discussing UW's legislative history from 1862–1909). In 1889 the new Washington Constitution established the process for appointing regents and a new state statute reconstituted UW under its current name. Const. art. XIII, § 1; Laws of 1889–90, ch. 12, at 395 § 1.

⁷³ *People ex rel. Bd. of Trustees of University of Ill. v. Barrett*, 382 Ill. 321, 338, 46 N.E.2d 951 (1943) (citation omitted).

⁷⁴ *E.g.*, *University of Utah v. Shurtleff*, 144 P.3d 1109, 1121 (Utah 2006); *University of Alaska v. National Aircraft Leasing, Ltd.*, 536 P.2d 121, 125 (Alaska 1975); *Sendak v. Trustees of Indiana University*, 254 Ind. 390, 260 N.E.2d 601, 604 (1970); *Dreps v. Board of Regents of University of Idaho*, 65 Idaho 88, 139 P.2d 467, 471 (1943); *Batcheller v. Com. ex rel. Rector and Visitors of University of Va.*, 176 Va. 109, 10 S.E.2d 529, 535 (1940); *State v. Chase*, 175 Minn. 259, 220 N.W. 951, 954 (1928). *Accord* Neal H. Hutchens, *Preserving the Independence of Public Higher Education: An Examination of State Constitutional Autonomy Provisions for Public Colleges and Universities*, 35 J.C. & U.L. 271, 278 (2009) ("many states have, for instance, provided corporate status to their public colleges and universities to provide them with greater control over their internal affairs").

state courts have found the university must be a corporation to exercise its authority:

It is true that there is no express grant of authority to make it a corporation, but in view of the fact that such institutions are generally corporations, and of the difficulty, if not utter impracticability, of establishing a school authorized to receive donations, and to hold extensive properties intended for the use of each succeeding generation, without conferring corporate powers, we think it clear that the framers of the [state] constitution meant to and did authorize the establishment of the university as a corporate body.⁷⁵

UW's corporate status also follows dictionary definitions of "corporation" as a group of individuals acting collectively as a legal person, distinct from the individuals themselves, to exercise the powers bestowed upon it:

- A group or succession of persons established in accordance with legal rules into a legal or juristic person that has a legal personality distinct from the natural persons who make it up, exists indefinitely apart from them, and has the legal powers that its constitution gives it.⁷⁶
- [A] body formed and authorized by law to act as a single person and endowed by law with the capacity of succession: an entity recognized by law as constituted by one or more persons and as having various rights

⁷⁵ *State ex rel. Little v. Regents of University*, 55 Kan. 389, 40 P. 656, 657 (1895). Accord 1 FLETCHER CYC. CORP. § 62 (describing universities as public and private corporations).

⁷⁶ BLACK'S LAW DICTIONARY AT 391 (9th ed., 2009). See *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005) ("If the undefined statutory term is not technical, the court may refer to the dictionary to establish the meaning of the word.").

and duties together with the capacity of succession . . .

⁷⁷

- A body of persons granted a charter legally recognizing them as a separate entity having its own rights, privileges, and liabilities distinct from those of its members⁷⁸

UW is a corporation within these definitions. It is governed by regents with the power of succession, who appoint a president “as the chief executive officer.”⁷⁹ Although composed of those individuals, UW has a legal personality distinct from them, and it exercises the powers the Legislature gives it, including the authority to hold and manage property, accept donations, manage funds, enter into contracts, hire and fire employees, and (as this case demonstrates) sue and be sued in the name of the corporate body.⁸⁰

In its corporate status, UW is like the host of other governmental entities created by the Legislature as “bodies corporate” governed by a succession of persons with powers enumerated by law. They include

⁷⁷ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED at 510 (1993).

⁷⁸ *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* AT 298 (1970).

⁷⁹ WAC 478-04-020(1).

⁸⁰ *See, e.g.*, RCW 28B.20.130; RCW 28B.10.510 and .842.

counties,⁸¹ cities,⁸² districts,⁸³ authorities,⁸⁴ and commissions.⁸⁵ All of them, like UW, are legal entities distinct from those who govern them. All are corporations.

Consistent with their corporate status, other governmental corporations are subject to the City's LPO. The City has designated dozens of landmarks owned by the City itself, and by the Seattle School District and King County.⁸⁶ As further evidence of the City's intent to include governments as corporations within the LPO, it contains provisions tailored to Seattle School District property⁸⁷ and City officials

⁸¹ RCW 36.01.010.

⁸² RCW 35.23.440 (second class cities). *Accord* RCW 35.22.280 (first class cities discussed as corporations).

⁸³ RCW 28A.320.010 (school district); RCW 35.57.010 (public facilities district); RCW 36.54.110 (ferry district); RCW 52.12.011 (fire protection district); RCW 68.52.190 (cemetery district); RCW 86.09.148 (flood control district); RCW 89.08.220 (conservation district); RCW 89.30.127 (reclamation district). *See Edmonds School Dist. No. 15 v. City of Mountlake Terrace*, 77 Wn.2d 609, 611, 465 P.2d 177 (1970) ("In essence, a school district is a corporate arm of the state").

⁸⁴ RCW 28B.07.030 (Washington higher education facilities authority); RCW 35.82.070 (housing authority); RCW 36.102.020 (public stadium authority); RCW 70.95N.280 (Washington materials management and financing authority).

⁸⁵ RCW 9.94A.745 (interstate commission for adult offender supervision); RCW 28A.705.010 (interstate commission on educational opportunity for military children); RCW 28B.70.020 (Western Interstate Commission for Higher Education); RCW 43.180.040 (Washington state housing finance commission).

⁸⁶ CP 67-69.

⁸⁷ SMC 25.12.750.E ("In considering any application for a certificate of approval the Board . . . shall take into account the following factors: . . . For Seattle School District property that is in use as a public school facility, educational specifications"); SMC

charged with enforcing the LPO have long maintained it applies to UW.⁸⁸ That stance is correct because UW is a corporation within the meaning of the LPO.

C. The Campus Master Plan did not authorize UW to demolish structures, especially not contrary to the LPO.

Besides claiming the GMA rule and LPO do not apply, UW casts the Campus Master Plan (“Plan”) as authorizing development notwithstanding the LPO.⁸⁹ That picture is misleading. The Plan neither authorizes UW to demolish buildings nor supplants the LPO with UW’s internal historic review process.

When developing the Plan, the City Council adopted findings endorsed by UW. Because conditioning and approving the proposed Plan was a quasi-judicial action, not legislative, the Council acted on factual

25.12.850.A (“when the site or improvement nominated is Seattle School District property and is in use as a public school facilities, no new proceeding may be commenced within ten (10) years from the date of . . . termination” of the designation proceedings).

⁸⁸ See, e.g., CP 133–34 (2002 City staff recommendation); *State*, 94 Wn.2d at 164–65 (City’s contention in 1980). This is evidence of legislative intent: “It is a familiar rule of statutory construction that, in any doubtful case, the court should give great weight to the contemporaneous construction of an ordinance by the officials charged with its enforcement.” *Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d 569 (1956). Accord *Phoenix Development, Inc. v. City of Woodinville*, 171 Wn.2d 820, 830, 256 P.3d 1150 (2011); *Milestone Homes, Inc. v. City of Bonney Lake*, 145 Wn. App. 118, 127, 186 P.3d 357 (2008).

⁸⁹ See, e.g., CP 5–6 (complaint), 197–98 (UW opening brief).

findings.⁹⁰ Among those findings were that the Plan authorized no demolition of any potentially historic building and that the parties agreed to disagree about application of the LPO to UW:

Even though the University has identified the demolition of structures over 50 years old and potential development sites adjacent to structures over 50 years old, **approval of the University Campus Master Plan is not approval of any specific development proposal that could result in the demolition or alteration of a structure or site which may meet the criteria for designation as a historic landmark under the City's Historic Preservation Ordinance**

The City has the authority pursuant to SMC Chapter 25.12 to designate structures qualifying as City landmarks and to preserve them through controls on the property. It is the City's position that this authority extends to buildings on the University of Washington campus. The University has stated that the University's Board of Regents is the steward of the University campus and contends that the City's historic preservation regulations do not apply to the University of Washington campus. **This disagreement on the City's authority should be reflected in the master plan by inclusion of the following language:**

RECOMMENDATION: By adopting and approving the Master Plan, neither the University nor the City of Seattle waives or concedes its' [*sic*] legal position concerning the scope of either party's legal authority to control or regulate University property.⁹¹

⁹⁰ The Council approved the Plan with conditions "[b]ased on the foregoing findings." CP 492 (Council findings).

⁹¹ CP 133-34 (DCLU analysis and recommendation) (emphasis added). The Council adopted the Hearing Examiner's Finding of Fact No. 91, which adopted DCLU's analysis. CP 486 (Council findings); CP 495 (Hearing Examiner findings).

UW's attorneys proposed nearly identical findings during the Plan approval process.⁹²

But even if UW could erase the Council's findings, the Plan's text would not support UW's contentions. UW claims the Plan approves demolishing buildings, citing a "Preliminary Square Footage Estimates" table listing nearly 70 potential development sites, some of which offer figures for "the square footage of buildings that may be demolished on each site to accommodate new construction."⁹³ But the table appears in Chapter IV of the Plan. Unlike Chapter V, which contains development standards, Chapter IV merely describes UW's "desired development characteristics" and "recommendations" for site development.⁹⁴ Those recommendations are not binding. When Chapter IV discusses "*potentially* demolished space" and reports that "[d]emolition of current structures *may* occur prior to development," it manifests UW's desire—as in the demolition might occur.⁹⁵ Then again, it might not.

⁹² CP 138 (UW's proposed findings).

⁹³ CP 501 (Plan). *Cf.* CP 197–98 (UW opening brief). Full-text, searchable versions of the Plan's components are available on a UW web site: <http://www.washington.edu/community/?p=89%E2%80%8B> (last visited July 15, 2016).

⁹⁴ CP 499–500 (Plan).

⁹⁵ CP 501 (Plan) (emphasis added). "May" can be "used to indicate possibility or probability." *WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY AT 734* (1989).

Although the Plan describes UW’s “Historical Preservation Policies and Practices” and its “process for design and environmental review,” which include preparing a Historic Resources Addendum,⁹⁶ the description does not supplant the LPO. The detailed description of UW’s approach to historic preservation is in Chapter III on “general policies,” which are “the broader-level guidelines to be considered with development projects.”⁹⁷ That description is outside Chapter V, which contains development standards. The City Code defers to the Plan only for “zoning,” “development standards of the underlying zoning,” and “environmental review authority,” none of which covers the LPO.⁹⁸ So even the two-paragraph cameo reappearance of UW’s Historic Resources Addendum process in the introduction to Chapter v. does not trump the

⁹⁶ CP 157–61, 163–64 (Plan).

⁹⁷ CP 157–61 (Plan).

⁹⁸ SMC 23.69.006.B (reproduced at CP 56). “Zoning” is an aspect of development regulation dividing land into discrete zones. *See* 1 Patricia E. Salkin, *AMERICAN LAW OF ZONING* § 9:2 at 9-7 (5th ed., 2015). The City’s zones are listed in SMC Chapter 23.30. *See* CP 58–59 (list of Chapters in SMC Title 23 (Land Use Code)). The City’s “development standards of the underlying zoning” are in SMC Chapters 23.43–23.51B, and arguably wherever regulations are tailored to a zoning designation. By contrast, the LPO is codified in Title 25—it is not part of the Land Use Code in Title 23. *See* CP 60 (list of Chapters in SMC Title 25 (Environmental Protection and Historic Preservation)). The LPO is not tailored to any zone; it does not mention zoning or any zone designation. The LPO is independent of the underlying zoning. “Environmental review” means “the consideration of environmental factors” under the State Environmental Policy Act (“SEPA”). SMC 25.05.746. *See* RCW Ch. 43.21C (SEPA). The LPO is a separate regime. It is codified in Chapter 25.12; City SEPA regulations are in Chapter 25.05. *See* CP 60 (list of Chapters in SMC Title 25).

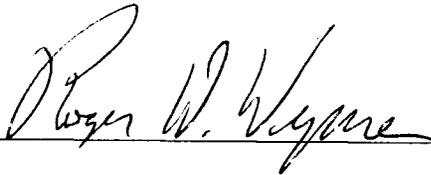
LPO, especially when that introduction ends with the disclaimer that UW and the City included to manifest their agreement to disagree over the LPO.⁹⁹

V. CONCLUSION

UW called the question on that disagreement by filing this suit. The answer is UW is subject to the GMA rule and must comply with the LPO except where UW demonstrates on a case-specific basis that application of the LPO would preclude the siting of a state education facility. Because the City and other defendants are entitled to judgment on this facial challenge alleging the LPO *never* applies to UW, the City respectfully asks this Court to reverse the trial court.

Respectfully submitted July 22, 2016.

PETER S. HOLMES
Seattle City Attorney

By: 

ROGER D. WYNNE, WSBA # 23399
PATRICK DOWNS, WSBA #25276
Assistant City Attorneys
For Appellant City of Seattle

⁹⁹ See CP 138 (UW's endorsement of the disclaimer).

APPENDIX A

APPENDIX to CITY'S OPENING BRIEF

Text of select statutes; emphasis added.

RCW 36.70A.103 State agencies required to comply with comprehensive plans.

State agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter except as otherwise provided in RCW 71.09.250 (1) through (3), 71.09.342, and 72.09.333.

The provisions of chapter 12, Laws of 2001 2nd sp. sess. do not affect the state's authority to site any other essential public facility under RCW 36.70A.200 in conformance with local comprehensive plans and development regulations adopted pursuant to chapter 36.70A RCW.

RCW 36.70A.200 Siting of essential public facilities—Limitation on liability.

(1) The comprehensive plan of each county and city that is planning under RCW 36.70A.040 shall include a process for identifying and siting essential public facilities. **Essential public facilities include those facilities that are typically difficult to site, such as airports, state education facilities** and state or regional transportation facilities as defined in RCW 47.06.140, regional transit authority facilities as defined in RCW 81.112.020, state and local correctional facilities, solid waste handling facilities, and inpatient facilities including substance abuse facilities, mental health facilities, group homes, and secure community transition facilities as defined in RCW 71.09.020.

....

(4) The office of financial management shall maintain a list of those essential state public facilities that are required or likely to be built within the next six years. The office of financial management may at any time add facilities to the list.

(5) No local comprehensive plan or development regulation may preclude the siting of essential public facilities.

....

RCW 28B.20.100 Regents—Appointment—Terms—Vacancies—Quorum.

(1) **The governance of the University of Washington shall be vested in a board of regents** to consist of ten members, one of whom shall be a student. The governor shall select the student member from a list of candidates, of at least three and not more than five, submitted by the governing body of the associated students. They shall be appointed by the governor with the consent of the senate, and, except for the student member, shall hold their offices for a term of six years from the first day of October and until their successors shall be appointed and qualified. The student member shall hold his or her office for a term of one year from the first day of July until the first day of July of the following year or until his or her successor is appointed and qualified, whichever is later. The student member shall be a full-time student in good standing at the university at the time of appointment.

....

RCW 28B.20.130 Powers and duties of regents—General.

General powers and duties of the board of regents are as follows:

(1) **To have full control of the university and its property of various kinds, except as otherwise provided by law.**

(2) To employ the president of the university, his or her assistants, members of the faculty, and employees of the institution, who **except as otherwise provided by law**, shall hold their positions during the pleasure of said board of regents.

(3) Establish entrance requirements for students seeking admission to the university which meet or exceed the standards specified under RCW 28B.77.020. Completion of examinations satisfactory to the university may be a prerequisite for entrance by any applicant at the

university's discretion. Evidence of completion of public high schools and other educational institutions whose courses of study meet the approval of the university may be acceptable for entrance.

(4) Establish such colleges, schools, or departments necessary to carry out the purpose of the university and not otherwise proscribed by law.

(5) With the assistance of the faculty of the university, prescribe the course of study in the various colleges, schools, and departments of the institution and publish the necessary catalogues thereof.

(6) Grant to students such certificates or degrees as recommended for such students by the faculty. The board, upon recommendation of the faculty, may also confer honorary degrees upon persons other than graduates of this university in recognition of their learning or devotion to literature, art, or science: PROVIDED, That no degree shall ever be conferred in consideration of the payment of money or the giving of property of whatsoever kind.

(7) Accept such gifts, grants, conveyances, bequests, and devises, whether real or personal property, or both, in trust or otherwise, for the use or benefit of the university, its colleges, schools, departments, or agencies; and sell, lease or exchange, invest or expend the same or the proceeds, rents, profits, and income thereof except as limited by the terms of said gifts, grants, conveyances, bequests, and devises. The board shall adopt proper rules to govern and protect the receipt and expenditure of the proceeds of all fees, and the proceeds, rents, profits, and income of all gifts, grants, conveyances, bequests, and devises above-mentioned.

(8) **Except as otherwise provided by law**, to enter into such contracts as the regents deem essential to university purposes.

(9) To submit upon request such reports as will be helpful to the governor and to the legislature in providing for the institution.

(10) To offer new degree programs, offer off-campus programs, participate in consortia or centers, contract for off-campus educational programs, and purchase or lease major off-campus facilities in accordance with RCW 28B.77.080.

(11) To confer honorary degrees upon persons who request an honorary degree if they were students at the university in 1942 and did not graduate because they were ordered into an internment camp. The honorary degree may also be requested by a representative of deceased persons who meet these requirements. For the purposes of this subsection, "internment camp" means a relocation center to which persons were ordered evacuated by Presidential Executive Order 9066, signed February 19, 1942.

RCW 28B.20.700 Construction, remodeling, improvement, financing, etc., authorized.

The board of regents of the University of Washington is empowered, in accordance with the provisions of this chapter, to provide for the construction, completion, reconstruction, remodeling, rehabilitation and improvement of buildings and facilities authorized by the legislature for the use of the university and to finance the payment thereof by bonds payable out of a special fund from revenues hereafter derived from the payment of building fees, gifts, bequests or grants, and such additional funds as the legislature may provide.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that, on this day, I sent a copy of the **City's Opening Brief** via e-mail by agreement under CR 5(b)(7) to the following parties:

Patrick Schneider, WSBA #11957
Steven J. Gillespie, WSBA #39538
Foster Pepper LLC
1111 Third Avenue, Suite 3000
Seattle, WA 98101
Email: pat.schneider@foster.com; gills@foster.com
Attorneys for Respondent
Brenda Bole: boleb@foster.com

Karin L. Nyrop WSBA #14809
Quentin Yerxa, WSBA #18219
Assistant Attorneys General
Attorneys for Respondent
4333 Brooklyn Avenue N.E., 18th Floor
Seattle, WA 98105
UW Mailbox 359475
Seattle, WA 98195-9475
Email: knyrop@u.washington.edu
quentiny@u.washington.edu

David A. Bricklin, WSBA #7583
Bricklin & Newman, LLP
1424 Fourth Avenue, Suite 500
Seattle, WA 98101
Email: bricklin@bnd-law.com
Attorneys for other Appellants
Peggy Cahill: cahill@bnd-law.com
Katherine Miller: miller@bnd-law.com

DATED this 22nd day of July, 2016, at Seattle, Washington.


ALICIA REISE

APPENDIX B

SESSION LAWS
OF THE
TERRITORY OF WASHINGTON:
AND THE
RESOLUTIONS AND MEMORIALS
OF THE
NINTH REGULAR SESSION OF THE LEGISLATIVE ASSEMBLY, HELD AT
OLYMPIA, 1861-2.

OLYMPIA :
A. M. POE, PUBLIC PRINTER.
1862.

SEC. 7. All laws and parts of laws in conflict herewith, be, and the same are hereby repealed, so far as the same relates to the counties herein before named.

Passed, January 23d, 1862.

JAS. LEO FERGUSON,
Speaker of the House of Representatives.
A. R. BURBANK,
President of the Council.

AN ACT

TO INCORPORATE THE UNIVERSITY OF THE TERRITORY OF WASHINGTON.

SECTION 1. *Be it enacted by the Legislative Assembly of the Territory of Washington,* That Daniel Bagley, Paul K. Hubbs, J. P. Keller, John Webster, E. Carr, Frank Clark, G. A. Meigs, Columbia Lancaster and C. H. Hale, their associates and successors in office, are hereby constituted a board of regents, a body corporate and politic, with perpetual succession, under the name of the University of the Territory of Washington, by which they may sue, and be sued, plead and be impleaded, in all the courts of law and equity.

SEC. 2. The University shall provide the inhabitants of this Territory, with the means of acquiring a thorough knowledge of the various branches of the literature, science and arts.

SEC. 3. The government of the University, is vested in the board of regents.

SEC. 4. Three regents of the University, shall be elected by the legislature each year, after the first year. The regents at their first meeting, shall determine by lot, whose term shall expire the first year, the second &c., until the term of office of the above board shall expire. In case of a vacancy, when the legislature is not in session, the Governor may appoint.

SEC. 5. The board of regents shall have a corporate seal, and the same alter or break at pleasure; may hold all kinds of estate, real, personal, or mixed, which they may acquire by purchase, donation, devise, or otherwise, necessary to accomplish the object of the corporation.

SEC. 6. The regents, shall have power to enact ordinances, by-laws and regulations, for the government of the University; to elect a President; to fix, increase and reduce the regular number of Professors and and Tutors, and to appoint the same, and to determine the amount of their salaries,

SEC. 7. They shall have power to remove the President, and any Professor or Tutors, when the interest of the University shall require it.

SEC. 8. They shall have power to appoint a secretary, librarian, treasurer, steward, and such other officers as the interests of the institution may require, who shall hold their offices at the pleasure of the board, and receive such compensation as the board may prescribe. *Provided*, That the treasurer shall not in any case, be a member of the board of regents, or board of University commissioners.

SEC. 9. The University shall consist of at least four departments.

1st. A department of literature, science and arts.

2d. A department of law.

3d. A department of medicine.

4th. A military department.

These departments may be organized and such others added, as the regents shall deem necessary, and the state of the University fund shall allow.

SEC. 10. The regents shall provide for the arrangements and selection of a course or courses of study in the University, for such students as may not desire to pursue the usual collegiate course in the department of literature, science and the arts, embracing the ancient languages and to provide for the admission of such students, without previous examination, as to their attainments in said languages, and for granting such certificates at the expiration of such course, or term of such students, as may be appropriate to their respective attainments.

SEC. 11. The immediate government of the several departments shall be intrusted to the President and the respective Faculties; but the Regents shall have power to regulate the course of instruction, and prescribe under the advice of the professors, the books and authorities to be used in the several departments; and also to confer such degrees, and grant such diplomas as are usually conferred and granted by other similar institutions.

SEC. 12. The fee of admission to the regular University course in the department of literature, science and the arts, shall not exceed ten dollars, but such course or courses of instruction as may be arranged under the provisions of section nine of this act, shall be open without fee, to the citizens of this Territory.

SEC. 13. The University shall be open to all persons residents of this Territory under the regulations prescribed by the Regents, and to all other persons under such regulations and restrictions as the board may prescribe.

SEC. 14. The moneys received from the sale of land or otherwise, shall be paid to the treasurer, and so much thereof as shall be necessary for the purpose, shall be expended by the Regents in keeping the University buildings in good condition and repair; also, in meeting the general expenses of the institution. The treasurer shall give bonds in the sum of fifteen thousand dollars, to be approved by the Governor, which shall be increased whenever he may deem the same necessary.

SEC. 15. The board of Regents shall make an exhibit of the affairs of the University in each year, to the Legislature, setting forth the condition of the University, the amount of its receipts and expenditures, the number of students in the several departments, and in the several classes; the books of instructions used, and an estimate of the expenses for the ensuing year.

SEC. 16. The meetings of the board may be called in such manner as the Regents shall prescribe, four of them shall constitute a quorum for the transaction of business, a less number may adjourn from time to time.

SEC. 17. A board of visitors to consist of three persons shall be appointed bi-ennially at the commencement of the collegiate year, by the board of Regents. It shall be their duty to make a personal examination into the state and condition of the University in all its departments, once at least in each year, and report the result to the board of Regents, suggesting such improvements as they may deem important.

SEC. 18. The Regents and visitors of the University shall each receive pay for the actual and necessary expenses incurred by them in the performance of their duties, which shall be paid out of the University fund.

SEC. 19. All orders on the treasurer shall be signed by the secretary and countersigned by the President.

SEC. 20. This act shall not be so construed as to prevent the legislature from making such amendments to the same, as the welfare of the University may require.

SEC. 21. This act shall take effect and be in force from and after its passage.

Passed, January 24th, 1862.

JAS. LEO FERGUSON,
Speaker of the House of Representatives.
A. R. BURBANK,
President of the Council.

AN ACT

AMENDATORY OF AN ACT ENTITLED "AN ACT ESTABLISHING A COMMON SCHOOL SYSTEM FOR THE TERRITORY OF WASHINGTON," PASSED JANUARY 24th, 1860.

SECTION 1. *Be it enacted by the Legislative Assembly of the Territory of Washington,* That the county commissioners of each county, be, and they are hereby authorized and directed to appoint a county school superintendent in all cases of vacancies in their respective counties, who shall hold his office, and perform the duties of county school superintendent until his successor is elected and qualified according to law.

SEC. 2. That the said superintendent is hereby authorized and directed to receive district reports of scholars &c., as by law required; and make the district apportionment of funds for the present year, and the county treasurer is hereby directed to pay the funds so apportioned, upon the order of said superintendent.

SEC. 3. The district clerk of the several school districts in each county, is hereby allowed the time of fifteen days, after the first Friday in November of each year, in which to make his report to the county superintendent according to law.

SEC. 4. All parts of the act of which this act is amendatory, in conflict herewith, are hereby repealed.