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No. 96052-6

SUPREME COURT OF THE STATE OF WASHINGTON

THE BEHIND THE BADGE FOUNDATION, DANIEL J. EVANS, GARY
LOCKE, CHRIS GREGOIRE, RALPH MUNRO, KAREN FRASER, SUSAN
OLMSTED, JANE HASTINGS, MICHAEL S. HAMM, CAPITOL OLYMPIC
PARK FOUNDATION, OLYMPIA ISTHMUS PARK ASSOCIATION,
ROBERT V. JENSEN, GERALD REILLY, BOB JACOBS, THE NATIONAL
ASSOCIATION OF OLMSTED PARKS, THE FRIENDS OF SEATTLE'S
OLMSTED PARKS, THE FRIENDS OF THE WATERFRONT, AND THE
BLACK HILLS AUDUBON SOCIETY, Appellants,

vs.

CITY OF OLYMPIA; VIEWS ON 5TH, LLC; and CAPITAL VENTURE
GROUP, LLC. Respondents

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

This case involves the most important land use decision affecting the historic Washington State Capitol Campus, an asset that should be protected for every citizen of this state and the nation. Appellants ask this court to reverse the decision of the Thurston County Superior Court dismissing Appellants Petition under the Land Use Petition Act (LUPA) for lack of standing under RCW 36.70C.060(2). Appellants ask this court to remand the matter to the Thurston County Superior Court for a full hearing and review under the law to determine the unresolved issues regarding the Views on 5th project which damages the nationally historic view corridor of the State Capitol Campus. Appellants were successful in having the City of Olympia place a 35-foot height limit on the Capitol Center Building property in order to preserve the historic view corridor. The Appellants have standing under LUPA to ensure that the 35-foot height limit is applied in order to protect the nationally historic Olmsted view corridor.

II. STATEMENT OF THE CASE

A. The Former “Capitol Center Project”

The Appellants have been working for years to make sure that the 35-foot height limit on the property would be applied to prevent changes and expansion of the Capitol Center building which is commonly called “The Mistake by the Lake.”

Appellants cannot be denied standing to seek review of the development permit issued by the City of Olympia that would expand the use of property already deemed to be an unlawful non-conforming use under *Sato v. Olympia*, SHB 81-41 (1982). Respondents want this court to ignore the underlying issues involving the application of the State Environmental Policy Act (SEPA), Chapter 43.21C RCW, and the abandonment of the unlawful non-conforming structure and use which destroys the Olmsted Brothers and Wilder and White view corridor from the Temple of Justice and the Washington State Law Enforcement Memorial toward Puget Sound and the Olympic Mountains and the view corridor from Budd Inlet toward the Capitol Group. Respondents do not deny that the property also has known petroleum contamination issues, earthquake liquefaction dangers, and sea level rise dangers which need to be analyzed.

B. The Current Project Proposal

This case involves the application of the Shoreline Management Act, the State Environmental Policy Act, the Public Trust Doctrine, and the Washington State Capitol Master Plan, various sections of the Olympia Municipal Code and Comprehensive Plan. All of these laws and plans protect the view corridor through the 35-foot height limit for the Capitol Center Building property.

The Washington State Law Enforcement Memorial was sited at the Olmsted Brothers view point. (Clerk's Papers ["CP"] 625 - 635.)

The setting chosen was the Olmsted Brothers 1928 view platform connected to the borrowed landscapes of the Puget Sound and Olympics across Capitol Lake, without intrusion of the Capitol Center Building which has come to be known as the Mistake by the Lake. Family members and anyone coming to the Law Enforcement Memorial should not be subjected to the Mistake. The Mistake had a nice life, but it is now time for it to come down to perfect the view corridor as a sacred space and place.

(CP 91, Declaration of Vicky M. Stormo.)

John Charles Olmsted visited the Olympia Capitol site in 1911, and identified the need to build a robust and beautiful connection that would enhance both the Capitol and the budding City. His early plan for Capitol access laid out key features later reflected in both Wilder and White's 1921 Capitol Group plan and Olmsted Brothers final 1928 campus design. The north-south axial vista, the reflecting Capitol Lake and isthmus spanning parks linking bluff to sound are all present.

(CP 95, Declaration of Eliza Davidson.)

The Washington State Capitol Campus is a valuable cultural resource, not only for the residents of the state but for the nation as a whole. As a campus grounds of historic importance, it symbolizes our highest ideas as a democratic society, state, and nation. The campus . . . confirms some of the most valued views in the state, the Olympic Mountains, Mt. Rainier, and the Capitol Dome and the Capitol Group atop the bluff reflected by Capitol Lake. . . .

(CP 96, Declaration of Eliza Davidson, quoting the 2009 Historic Preservation Master Plan.)

Fortunately, the Capitol Center Building has thus far, not served as a precedent for any more high-rise buildings on the isthmus. The six-story building proposed to be built on the isthmus in 1981 was denied by the city. The city's denial was affirmed unanimously by the Shorelines Hearings Board in SHB 81-41, *Sato v Olympia* (1982).

(CP 107, Declaration of Robert Jensen.)

Neither the developer, nor the staff addresses the shoreline issues in this case. Instead, the proponent proposes to coat the exterior of the Capitol Center Building with aesthetic accouterments. In the isthmus environment, the aesthetics of the building are not as important as the aesthetic values, and the public use and enjoyment of the fragile shorelines on and surrounding the isthmus. It would impair the public's water and mountain views.

(CP 109, Declaration of Robert Jensen.)

In Temples of Democracy The State Capitols of the USA, Henry-Russell Hitchcock and William Seale, Harcourt Brace Jovanovich (New York and London), the remarkable character of the Capitol Campus site is described:

It was at Olympia, Washington, that the American Renaissance in state capitol building reached its climax. . . .

Such a collection of Classical buildings on a plateau surmounting a green hill 117 feet above sea level proved an irresistible vision. It would be a spectacular monument, with Mount Rainier in one direction, the Olympic Range in another, and lush forests between them, all mirrored in the blue water below. The City Beautiful, a concept of perfection evolved for dense urban scenes, seemed destined now to achieve its finest expression in the natural landscape of the Pacific Northwest. No architect or dreamer could have asked for a more splendid setting.

(CP 183-184) Hitchcock and Seale.

American Architect, November 24, 1915:

This collection of capitol buildings was to be somewhat reminiscent of the Acropolis at Athens, and indeed the natural conditions surrounding the capitol site at Olympia are in many ways quite similar to those of the Acropolis

(CP 185.)

The capitol grounds consist of a promontory projecting into the upper end of Puget Sound, and while accessible to the east at a level grade, from the adjoining streets, on all other sides rises

abruptly from the water as does the Acropolis from the surrounding plain. Just as at Athens the eye sweeps over distant views in all directions, but is most firmly held by the expanse of water and mountains to the west, so at Olympia a wide range of beauty, including Mt. Rainier to the east, fails to hold the attention long, from the panorama of Puget Sound and the magnificent Olympic mountains to the north. Even in the architecture there is a similarity in the combination of small units, no one of which has either size or importance sufficient to completely dominate the others, while the City of Olympia, lying as it does on three parallel ridges, affords distant views of the Capitol Group from every direction just as does Athens of the Acropolis. One might even compare the purposes of the two, one a sacred place set apart from immediate contact with the city, yet a place of frequent resort by the city's inhabitants; the other a seat of government for the State, properly isolated to some degree from the city in which it is placed, yet easy of access therefrom.

In its mass it is apparent the Group Plan responds primarily to the necessity of so arranging a collection of small units that they may combine to give the effect of a single structure when viewed from a distance and from all directions. Hence, the Legislative Building, slightly larger than the others and surmounted by a lofty dome, occupies the center of the group. The Temple of Justice is directly north across the Court of Honor and the four Commission Buildings are grouped on either side and to the south. The simple colonnaded treatment of these surrounding buildings will from a distance tend to make them appear as a single broad base to the central dome, while the location of the different units adequately expresses the relative importance of the departments they accommodate.

(CP 206-210.)

In an excerpt from the Guide to the Olmsted Legacy at the Washington State Capitol, it is stated:

Few Capitol grounds command equal advantages of setting. Rather than designing the capitol grounds apart from its surroundings, the Olmsteds expressed the inherent genius of place.

(CP 215.)

The Washington State Capitol Campus is shaped by the cultural, natural and economic resources of its setting. The historic West Campus is situated atop a bluff overlooking the city of Olympia, Capitol Lake and Puget Sound with the Olympic Mountains in the distance.

(CP 216.)

The location . . . on its elevated point above Puget Sound is most unique and this distinction will be quite lost unless advantage is taken of the location

(CP 217.)

The Washington State Law Enforcement Memorial, north of the Temple of Justice, is a terrace viewpoint which takes "advantage of the splendid view" Dawson described in 1927. It was a gift to the people of Washington in 2006. The serenity of the view across the lake and the sound to the mountains beyond is an integral component of this memorial. . . .

"In a republic like the United States, the richest citizens must not be allowed to monopolize the most beautiful areas for their own enjoyment. Such areas must be reserved for the public." Frederick Law Olmsted, Sr. (August 1866)

(CP 217.)

Washington State Capitol Grounds, General Plan states:

The results were well worth the effort. Better than the national Capitol, the Olympia legislative complex fulfills Thomas Jefferson's early dreams of a government center on a hill. In Olympia, Hitchcock and Seale enthuse in *Temples of Democracy*, "the American renaissance in state capitol building reached its climax."

(CP 217-219.)

Entry from publication; City of Olympia, Urban Design Vision and Strategy, October 1991, A. Nelessen Associates, Inc., Princeton and Olympia Planning Department:

Olympia is a capital city with an opportunity to strike a balance between its majestic natural setting and inspiring civic architecture. The dome of the State Capitol building is a landmark serving as a constant reference point in Olympia. The Capitol building has a great symbolic value – the rating of this image of the capitol dome floating over the surrounding tree mass is indicative of the strong local desire to balance urbanization, civic presence and the natural environment. Visions for Olympia as a capital city should include utilizing the civic design vocabulary from the State Capitol building for other monumental state government buildings.

(CP 266-267.)

Design, Master Plan for the Capitol Campus, Policy 5.1., Pages 5-6, Principle 5:

Visual Axes. Currently, the Legislative Building can be viewed from several surrounding vantage points, including northbound and southbound on Interstate 5, eastbound on U.S. 101, Puget Sound, Capitol Lake, downtown Olympia, the Cooper Point area, and the South Capitol Neighborhood. These view corridors (from outside looking in) should be protected. Likewise, there are views (from inside looking out) of the Olympic Mountains to the north, Capitol Lake to the west, and Mount Rainer to the east, all of which should be preserved. Careful placement and design of buildings and landscape features that provide cues to these view corridors will preserve and enhance these important elements of campus planning.

(CP 276.)

(CP 282.) See Governor's video. Heritage Park Foundation, <https://www.youtube.com/watch?v=p7PgH5Cs13o>

Capitol Campus was built in phases over the years with the Temple of Justice in the 1910's, the Legislative Building in the 1920's, the associated

Insurance, Cherberg and O'Brien buildings of the Capitol Group in the 1930's and 1940's, Capitol Lake in 1950, and the North Capitol Campus promenade in the 1990's and 2000's. The sandstone and marble Legislative Building was crowned by the fourth tallest dome in the world, behind only St. Peter's in Rome, St. Paul's in London, and the U.S. Capitol in Washington, D.C. Stone carvers and other artisans, working in Wilkeson sandstone, marble, brass and other materials achieved a work of art of rare excellence.

III. ARGUMENT

A. Scope of Review

Under RAP 4.2(a)(4) this is a case involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination because of the adverse effect of the project on the State Capitol Campus National Historic District involving the design of the State Capitol Campus since the Wilder and White Plan was adopted by the State Capitol Committee in 1911 and the Olmsted Brothers Landscape Plan adopted by the State Capitol Committee in 1928.

The Land Use Petition Act authorizes a superior court to reverse a local land use decision if the party seeking relief shows that: (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise; (c) The land use decision is not supported by evidence that is substantial when viewed in light

of the whole record before the court; or d) The land use decision is a clearly erroneous application of the law to the facts. RCW 36.70C.130. The appellate court reviews de novo any error claimed under RCW 36.70C.130(1)(b). The appellate court also reviews de novo issues of statutory interpretation and jurisdiction. Standing is jurisdictional. *Knight v. City of Yelm*, 173 Wn.2d 325, 267 P.3d 973 (2011).

B. Public Importance

This matter involves issues of broad public importance because the project presents “a fundamental and urgent issue of broad import which requires a prompt and ultimate determination by this court. *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 277 (2012).

C. Standing Under LUPA

LUPA Standing requirements are broad. There is no specific case law interpreting the “prejudiced or likely to prejudice” requirement of LUPA. Case law has compared the LUPA standing requirement to the State Environmental Policy Act. Under SEPA and the National Environmental Protection Act there is a two-part test for standing: (1) whether the interests that the party seeks to protect are arguably within the zone of interests protected or regulated by SEPA and (2) whether the party alleges injury in fact. To show an injury in fact, the party must allege specific and perceptible harm. If the party alleges a threatened rather than

an existing injury, the party must also show that the injury will be immediate, concrete and specific. *Suquamish Tribe v. Kitsap County*, 92 Wn. App. 816, 965 P.2d 636 (1998). An organization has standing to sue on behalf of its members when its members have standing to sue as individuals, the interests at stake are germane to the organization's purpose, and the participation of the members is not necessary to either the claim asserted or the relief requested. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977); Petitioners meet these standards.

RCW 36.70C.060(2), defines standing similarly and require either a "person aggrieved" or a person "aggrieved or adversely affected." Under LUPA, this requires a showing of injury-in-fact resulting from a land-use decision. *Chelan County v. Nykreim*, 146 Wn.2d 904, 934, 52 P.3d 1 (2002). In other words, the standing requirement will be met through a demonstration by the plaintiff that he or she "personally 'will be specifically and perceptibly harmed by the proposed action.'" *Thornton Creek Legal Def. Fund v. City of Seattle*, 113 Wn. App. 34, 47-48, 52 P.3d 522 (2002) (internal quotation marks omitted) (quoting *Trepanier v. City of Everett*, 64 Wn. App. 380, 382, 824 P.2d 524 (1992)). "Further, when a person alleges a threatened injury, as opposed to an existing injury, he or she must show an immediate, concrete, and specific injury to him or herself." *Trepanier*, 64 Wn. App. at 383.

Recreation and aesthetic interests are protected. If the harm alleged “in fact” affects the recreational or even the mere aesthetic interests” of the party, that will suffice for standing purposes. *Sierra Club v. Morton*, 405 U.S. 727, 734-36, 92 S. Ct. 1361, 31 L.Ed.2d 636 (1972); see also *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1517 (9th Cir. 1992). Appellants’ testimony demonstrated standing to challenge the harm that will be caused if the proposed project is built. (CP 89-346.)

For themselves and the public, the Appellants have a right to have the 35 foot height limit applied to protect the view corridor to and from Capitol Campus across Capitol Lake to the borrowed landscapes of Puget Sound and the Olympic Mountains. Allowing the retention of the Capitol Center Building above the 35 foot height limit and construction of additional structures will permanently and adversely impair the public’s view from the Washington State Law Enforcement Memorial and the North Capitol Campus Trail and the view from Puget Sound to the Capitol Group. The harm to the national and statewide interest would be irreparable. Appellants are current and former public servants, architects and non-profit foundations who have all worked for years to have the 35 foot height limit established to protect the view corridor. Appellants have a right to protect the public interest and raise these important issues at a full hearing before the Thurston County Superior Court.

Appellants are community members, community leaders, and public servants who were successful in obtaining the 35 foot height limit imposed by the City of Olympia to protect the Capitol Campus. CP 89 through 167 are Declarations that explain the history of Appellants' community involvement and specifically Appellants' involvement with issues impacting Capitol Campus and resulting injury in fact. Appellants are: former Governor and United States Senator Daniel J. Evans; former Governor Gary Locke; former Governor John Spellman; former Governor Chris Gregoire, former Secretary of State Ralph Munro (all former members of the State Capitol Committee); former State Senator Karen Fraser and Susan Olmsted (former members of the Capitol Campus Design Advisory Committee); Jane Hastings, the widow of the Capitol Campus Architectural Historian University of Washington Professor Emeritus, Norman J. Johnston; Michael S. Hamm, Principal Landscape Architect Emeritus at the Portico Group; former Chair of the Washington State Shorelines Hearings Board, Robert V. Jensen, President of the Olympia Isthmus Park Association and former Chair of the Olympia Planning Commission, Gerald Reilly; former Olympia Mayor Bob Jacobs; the Behind the Badge Foundation; the National Association of Olmsted Parks; the Friends of Seattle's Olmsted Parks; Friends of the Waterfront; and the Black Hills Audubon Society.

The Washington state Capitol Campus is a valuable cultural resource, not only for residents of the state but for the nation as a whole. As a campus grounds of historic importance-it symbolizes

our highest ideals as a democratic society, state, and nation-the campus was listed as a National Register Historic District in 1974 and contains some of the most valued views in the State. These include views of the Olympic Mountains, Mt. Rainier, and the Capitol Dome and Capitol Group atop the bluff, reflected by Capitol Lake and framed by the venerable heritage trees that comprise and surround the campus.

(CP 112, Declaration of Susan Olmsted.)

Wilder and White were not dummies. They envisioned the same views that my grandfather saw, but there is one more step that needs to be taken. The Capitol Center Building needs to come down. It is an obstruction to the entire plan and allowing it to be reconstructed will set us back decades. It is like a “wart on the Queen’s face.” It needs to go.

(CP 116, Declaration of Ralph Munro.)

The procedural history of Appellants’ objections to Defendant City of Olympia’s approval and Appellants’ internal administrative appeal of the development permit is contained at (CP 1-88) in Appellants’ LUPA petition, The Hearing Examiner’s Findings of Fact and Conclusions of Law were in error and ignored important cultural issues and public safety concerns that are discussed in the Declaration of Michael Hamm at (CP 119, 121, and 123):

1) Washington State Capitol Campus - Historic and Cultural Preservation The US Department of Interior and the National Park Service designated the Washington State Capitol Campus to the National Register of Historic Places (#79002564) as a “Historic District” including the “State Capitol and environs.” The proposed project must be analyzed for relevance and potential adverse effects on Washington State Capitol Campus as it relates to the National Register of Historic Places.

2) State Capitol Campus View Corridor Preservation The vision for the design of the North Capitol Campus has been part of the State of Washington and City of Olympia plans since 1911, when Wilder and White won a national design competition. Their design captured the imagination of the selection committee with their unique approach – a group of symmetrically arranged buildings in a forest, atop a bluff overlooking a fresh water reflecting lake, Budd Inlet, Puget Sound and the Olympic Mountains. An integral part of the planners' vision was that the Capitol buildings would be connected to the City by an elegant open space that would enhance the overall aesthetic character of the City and the Capitol Campus.

Therefore, if the proposed development occurs in the isthmus between 4th and 5th Avenue, the visual impact will irreparably harm the visual resource that the citizens of Olympia and the State have supported by providing public and private funds to make the North Capitol Campus Heritage Park a reality. The citizens of Washington have entrusted the State and Local public officials to be stewards of the land and preserve the standards to which the design of Heritage Park is based. The public vista is a State treasure that was envisioned to preserve the panoramic views to the north from the Capitol bluff to Budd Inlet, South Puget Sound, and the Olympic Mountains; and views south from the isthmus to the North Capitol Campus. The SEPA Environmental Checklist and DNS failed to address the adverse effect of the proposed development on the view corridor of the State Capitol Campus.

3) Non-conforming Existing Capitol Center Building The existing Capitol Center Building does not conform to the 35-foot height limit for buildings in the isthmus and has been a non-conforming use and structure for the last 12 years. An EIS with alternatives should be conducted to address the building's nonconformance.

4) City of Olympia Comprehensive Plan and State of Washington Capitol Master Plan The Comprehensive Plan PL3.3 states "Protect historic vistas from the Capitol Campus to Budd Inlet and the Olympic Mountains and from Budd Inlet to the Capitol Group." Furthermore, PL18.9 states, "Limit building heights to accentuate, and retain selected public views of the Capitol dome."

An EIS needs to address the adverse impacts on the views protected by the adopted Comprehensive Plan. . . .

9) Flood Hazard Zone The proposed isthmus development is mapped to be within the City of Olympia Flood Hazard Zone under a 100-year storm tide with a 6-inch sea level rise. An EIS should analyze the adverse effects life safety issues due to sea level rise and flooding.

10) Seismic and Liquefaction Hazard Zone The Washington DNR maps identify the proposed isthmus development to be in the high hazard and liquefaction zone. An EIS should assess the environmental hazards for the proposed development

Kenneth Neal in his Declaration, (CP 135) states:

11. The first sentence of Section 5.1 of the geotechnical report states "...the site is challenging for the purpose of development. In my judgment that is an understatement. Given the conditions encounter, it would be foolish and, in my judgment, irresponsible for the City to permit construction of a 110-foot high residential building at this site. I certainly would not, if asked, recommend anyone make this proposed building their residence. At the very least, the geotechnical report should be revised so that it is technically correct and an Environmental Impact Statement should be required.

(CP 135.)

Alan Wald, hydrologist, concurs in his Declaration at (CP 114):

9. The NWI map (USFWS, 2007. Attached EXHIBIT C) shows the lake boundary clearly within 200' of the proposed project. Figure 2 (City of Olympia, 2018. Attached EXHIBIT D) shows more than 12 storm water outfalls in the bulkhead that connect Capitol Lake to adjacent developed areas. These outfalls, particularly outlets #6 and #7 east of the Eastern Washington Butte, regularly backwater during high water on Capitol Lake and spread out landward of the bulkhead. There are several paths for high water on Capitol Lake to get around the bulkhead (WA Dept

of Enterprise Services, 2018). There are also vegetated sections of Capitol Lake shoreline nearby where the OHWM can be determined according to the approved Ecology guidance methods and the elevation surveyed to the project site for a reasonable and approvable OHWM determination. It is my opinion that the HWM on Capitol Lake is between elevation 17.05' and 17.5' and the proposed project, within shoreline jurisdiction, require a shoreline permit.

(CP 114.)

The Wilder and White, Report of Group Plan, August 29, 1911 at (CP 176), discussed the remarkable character of the Capitol Campus site:

It is more than the possibilities that it contains for expressing the character of the site that the city in general as well as the site for the capitol is remarkable, will result in an effect unequalled by any capitol in the world. The natural beauties in their combination of water, land and mountains is nothing short of superb, and the growth of the city up to the present time has been so scattered, and of such character that no problems of excessive cost are to be confronted.

(CP 176.)

D. Standing Under SEPA and SMA is Similar to Standing Under NEPA

Washington courts have found that SEPA is substantially similar to the National Environmental Policy Act (NEPA) and that Washington Courts may look to federal case law for interpretation. *International Longshore & Warehouse Union, Local 19 v. City of Seattle*, 176 Wn.App. 512, 525, 309 P.3d 654 (2013); *Public Utility District No. 1 of Clark County v. Pollution Control Hearings Board*, 137 Wn. App. 150, 158, 151 P.3d 1067 (2007).

An Environmental Impact Statement is required by the State Environmental Policy Act (SEPA) and a shoreline substantial development permit is required by the Shoreline Management Act (SMA), RCW 90.58.020 and RCW 90.58.340. Further, this case is on all fours with *Sato Corporation v. City of Olympia*, SHB No. 81-41 (1982). In *Sato* the Shoreline Board stated:

. . . the six story building on the site . . . would have its maximum visual impact on southern upland viewpoints located on or near the state capitol campus. The visual effect upon the northern shoreline vistas would be adverse. Water area views of Budd Inlet would be impaired; the building on the relatively narrow isthmus separating Budd Inlet from Capitol Lake would be out of scale. . . .

While the existing view loss associated with the Capitol Center Building may be seen as precedent for high rise structures on the narrow isthmus, it also serves as an example of adverse visual effects which should be limited.

Sato at Conclusions of Law VI concludes:

We must therefore conclude that the proposed [building] is inconsistent with the foregoing portion of RCW 90.58.020. The cumulative effect of allowing this and similar proposals on the isthmus would irreversibly damage the aesthetic views remaining.

Under *Sato v. Olympia*, SHB 81-41 (1982) and the 35-foot height limit for buildings in the isthmus, the Capitol Center Building has been a non-conforming use and structure since at least 1982. The proposed development which does not conform to the adopted laws is, by definition, inimical to the public interest embodied in those laws. *Abbey Road Group, LLC, et al. v. The City of Bonney*

Lake, 167 Wn.2d 242, 218 P.3d 180 (2009). Under the *Sato* case the proposed conversion of the Capitol Center Building is subject to the SMA and violates RCW 90.58.020. The building is a non-conforming use and structure and it has not been used in over 12 years. The building was vacated by lessee Washington State Department of Corrections in 2006.

E. Standing to Prevent Non-Conforming Uses

Appellants have standing to prevent non-conforming uses. The State Supreme Court has consistently emphasized that public policy and the intent of planning measures are “to restrict and not to increase non-conforming uses.” *Coleman v. City of Walla Walla*, 44 Wn.2d 296, 299-300, 266 P.2d 1034 (1954). This case gives the Supreme Court the opportunity to apply the non-conforming use and structure policy that has been established.

The City of Olympia’s zoning rules and planning policies are against the indefinite extension of non-conforming uses. The public policy is not to extend the life of non-conforming uses but rather to permit such a use to exist as long as necessary and then to require conformity.

Clearly, the public intent is the eventual elimination of non-conforming uses. A non-conforming use in existence when a zoning ordinance is enacted cannot be changed into some other kind of a non-conforming use. *Coleman v. City of Walla Walla*, 44 Wn.2d 296, 300-01, 266 P.2d 1034 (1954) (non-conforming rooming house cannot be changed to a fraternity house). *See, also*,

Open Door Baptist Church v. Clark County, 140 Wn.2d 143, 150-51, 995 P.2d 33 (2000) (legal non-conforming use as a church could not be resumed after intervening years as art school); *Shields v. Spokane Sch. Dist. No. 81*, 31 Wn.2d 247, 255, 196 P.2d 352 (1948) (non-conforming elementary school cannot change into a trade school). Other jurisdictions have reviewed zoning ordinances that use the word “vacant” in the same way as the term “vacated is used in a municipal code. They have viewed the term consistent with the definition found in Black’s Law Dictionary. *Choi v. Fife*, 60 Wn.App. 458, 803 P.2d 1330 (1991). When determining possible abandonment of a building, the permit applicant has the burden to demonstrate why there were, in the chronology of this site, various missed opportunities to build, including unexercised permits, and gaps where pursuit of the right to build seems not to have been pressed with much force, if at all. *Chiaraluce v. Zoning Board of Appeals of Wareham*, 89 Mass.App. Ct. 290, 48 N.E. 3rd 475 (1987).

The Capitol Center Building is non-conforming with the 35-foot height limitation and the zoning. The conversion of the building and parking lots into apartment use is inconsistent with the 35-foot height limit allowed in the Urban Waterfront Housing Zone. It is time for the non-conforming building and proposed use to be brought into conformity. OMC §18.37.060 provides that a non-conforming use not used for a year may not be resumed. The Capitol Center

Building has not been used since 2006, a period of twelve years and must not be allowed further life.

Nonconforming uses are disfavored and it is the public policy of this state to restrict such uses so that they may be ultimately phased out. A finding of compatibility cannot be based on the existence of the nonconforming use in the area in question. *Jefferson County v. Seattle Yacht Club*, 73 Wn.App. 576, 770 P.2d 987 (1994).

It is universally held that the mere purchase of property and occupation thereof are not sufficient factors, either jointly, or severally, to establish an existing nonconforming use, and a vested right to a nonconforming use cannot exist unless the particular use in question is, in fact, established. Commentators agree that nonconforming uses limit the effectiveness of land-use controls, imperil the success of community plans and injure property values because of the nonconformity. *See* 1 ANDERSON, AMERICAN LAW OF ZONING, ch. 6.02; SETTLE. WASHINGTON LAND USE, ch. 2.7. If a non-conforming building is too high, it cannot be rebuilt without a variance. *State ex rel. Edmond Meany Hotel v. City of Seattle*, 66 Wn.2d 329, 402 P.2d 486 (1965).

Appellants should have been allowed to pursue these issues through their LUPA action. The trial court erred in dismissing the case for lack of standing.

F. City Land Use Ordinances Clearly Bring the Public “Into The Zone of Interests” Protected by SEPA and the City Ordinances. Appellants Are Members of the Public

Under SEPA participation of the public is essential. RCW 43.21C.010

states that:

The purposes of this chapter are: (1) to declare a state policy which will encourage productive and enjoyable harmony between humankind and the environment; (2) to promote efforts which will prevent or eliminate damage to the environment and biosphere; (3) and to stimulate the health and welfare of human beings; and (4) to enrich the understanding of the ecological systems and natural resources important to the state and nation.

Appellants, as members of the public, will all be harmed by the damage to the State Capitol Campus view corridor. (CP 89-346.) There is no reason to have public participation if the participates are ignored.

The Superior Court needed to require that the City of Olympia engage in the reviews required under SEPA and the ordinances of the City of Olympia. The Hearing Examiner did not fulfill the SEPA requirements in the Views on 5th permit review process.

The rules and procedures simply were not followed by the Hearing Examiner. This matter needs to be remanded to Superior Court to order the Hearing Examiner to raise the environmental issues that were not considered including sea-level rise, the shoreline jurisdiction and impacts, seismic issues, and protection of the nationally historic view corridor.

Further, the network of City Ordinances contained in the City of Olympia's Municipal Code invites public participation in the land use application and decision-making process. Participation is not just limited to contiguous property owners. OMC 18.78.020 discusses the procedures of public notification of a permit application. OMC 18.78.040 discusses the requirements of public hearing notifications. Notices are published in the newspaper of general circulation in the City. Notices are mailed to property owners within a radius of 300 feet. The applicant is required to post signs in the immediate vicinity of the subject site giving further notice to the general public. OMC 18.70.060 discusses public notification of administrative process by posting a public notice on the subject property in SEPA threshold determination matters.

In every step of the way of the permitting process, the City of Olympia invites neighboring property owners and members of the public to participate in the land use review and permitting process. Appellants are doing exactly what they are allowed to do under law. The State Capitol Campus is across 5th Avenue from the proposed project and belongs to all citizens of the State of Washington.

G. Appellants Have Shown "Injury-in-Fact"

The loss or destruction of something is an "injury-in-fact." The Olympia Municipal Code contains various "protections" as a matter of law. City staff is required to enforce municipal laws. Appellants should have been given an opportunity to present their information at a full hearing under LUPA.

The loss of a protected view shed is an injury in fact to the view shed that is protected by law for members of the public under OMC 18.110.060 and OMC 18.120.030. Potential flood damage areas must be protected under OMC 16.70, OMC 16.80, OMC 18.12 and OMC 18.32.325. Areas of special historic significance must be protected under OMC 19.100.040C. (SEE: Appendix 1, CP 625-635.) Height restriction must be enforced when a building has been abandoned for twelve years under OMC 18.37.040 and OMC 18.37.060. Why does the City of Olympia have these laws on the books?

Under *Suquamish Tribe v. Kitsap County*, 92 Wn. App. 816, 965 P.2d 636 (1998), Appellants have identified numerous “injuries in fact” that violate sections of the city’s Municipal Code that were designed to prevent the described categories of loss or injury. Washington Courts follow federal law. Under federal law, an environmental plaintiff shows “injury in fact” when the party avers that the party uses the affected area and is an individual for whom the aesthetic and recreational values of the area will be lessened by the challenged activity. *Friends of the Earth Inc. v. Laidlaw Environmental Services (TOC) Inc.*, 528 U.S. 167, 183, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000); *Sierra Club v. Morton*, 405 U.S. 727, 735, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

In this matter, the injuries include damage to the 1928 Olmsted Brothers Plan and 1911 Wilder and White view corridor to and from Capitol Campus across Capitol Lake to Puget Sound and the Olympic Mountains. See Johnson,

Norman J., *Washington's Audacious State Capitol and its Builders*, University of Washington Press, Seattle and London 1988, ISBN 978-0-295-9646-6. There is injury to national and statewide interests in the preservation of the view corridor. (CP 55, and 1403-1424, 1431-1412, 1904-1911.) The injuries are tangible.

A party may demonstrate a “concrete interest” by showing a “geographic nexus” between the individual asserting the claim and the location suffering an environmental impact. *Douglas County v. Babbitt*, 48 F.3d 1495, 1500 n.5 (9th Cir. 1995); whether a party’s interests are non-economic or unquantifiable is immaterial. *Washington Utilities and Transportation Commission v. F.C.C.*, 513 F.2d 1142, 1149 (9th Cir. 1976). Nor does the attenuation of the causal link between the alleged failure to comply with the law and the possible injury to the party’s interest's defeat standing. *Id.*

The Appellants have standing to protect the 1928 Olmsted Brothers and 1911 Wilder and White view corridor to and from the Capitol Campus across Capitol Lake to the borrowed landscapes of Puget Sound and the Olympic Mountains. The harm to the national and statewide interest is palpable. The Appellants have worked for years to ensure that the 35-foot height limit was established for the Capitol Center Building by the City.

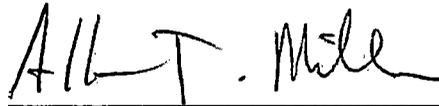
Appellants and the public will suffer injury because Respondent Views on 5th LLC and Capital Venture Group, LLC’s completed project will cause the damaging effect and detrimental impact that that the applicable law clearly seeks

to prevent. The Appellants have standing to show that the 35-foot height limit must be applied, that an Environmental Impact Statement is required by SEPA, and a shoreline substantial development permit is required by the SMA, RCW 90.58.020 and RCW 90.58.340 because of the adverse environmental effects.

IV. CONCLUSION

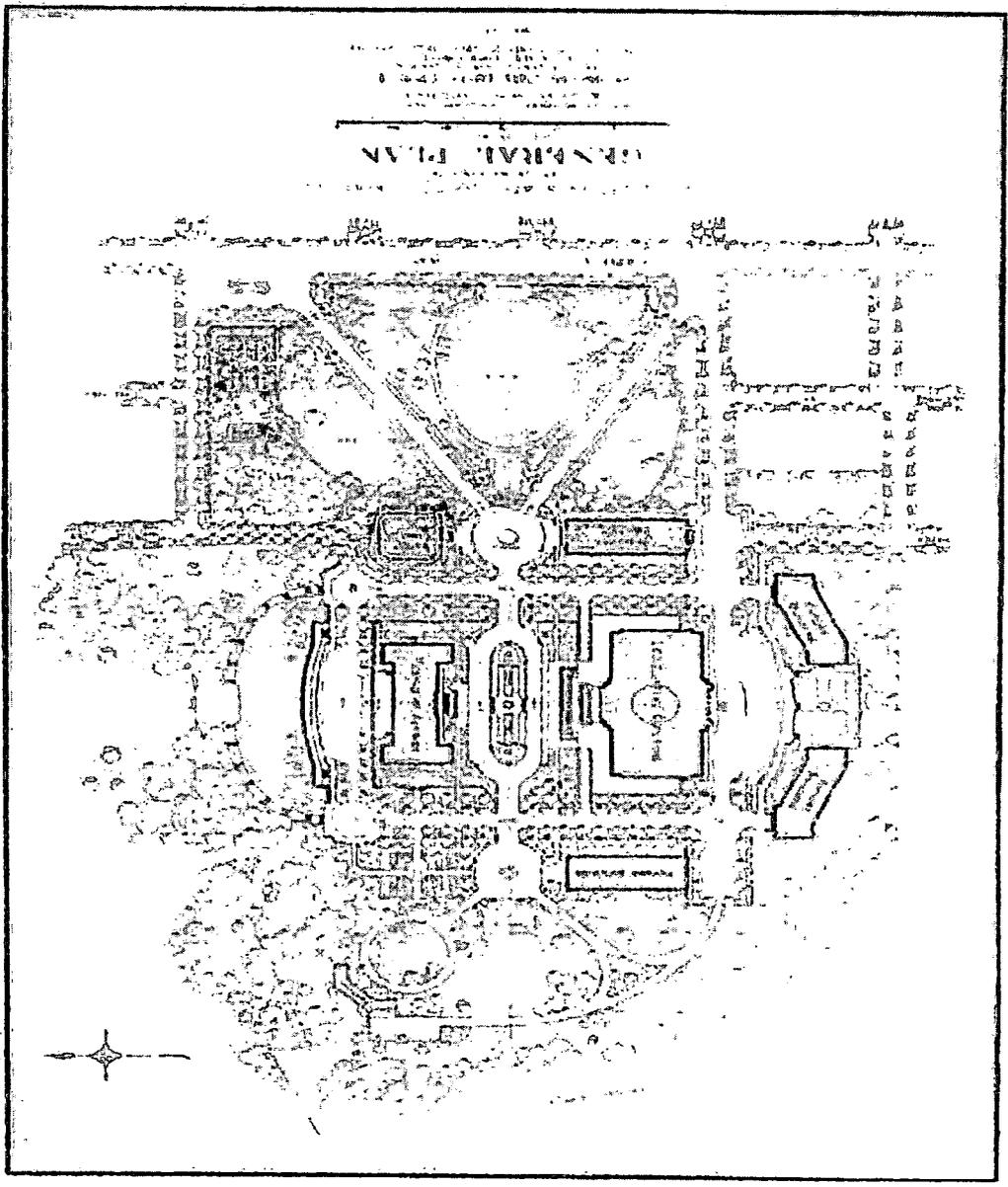
For the above stated reasons, the Appellants respectfully request that the Supreme Court determine that Appellants have standing under RCW 36.70C.060(2) and vacate the dismissal entered by the Thurston County Superior Court and remand the case for a hearing on the issues. Additionally, Appellants request an award of attorney's fees and costs pursuant to RAP 18.1 and RCW 4.84.370.

Dated this 20th day of December, 2018 at Olympia, Washington.

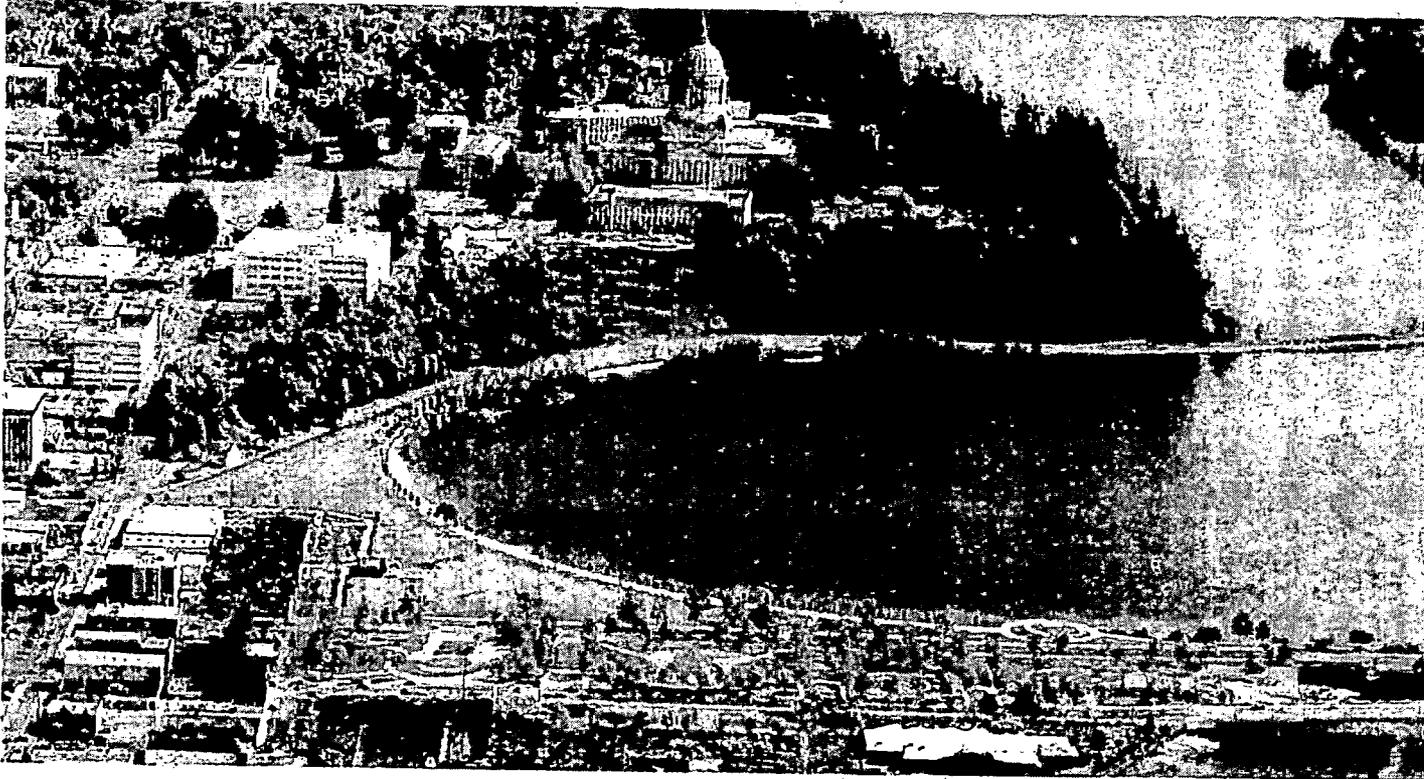


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APPENDIX I (Clerks Papers 625-635)







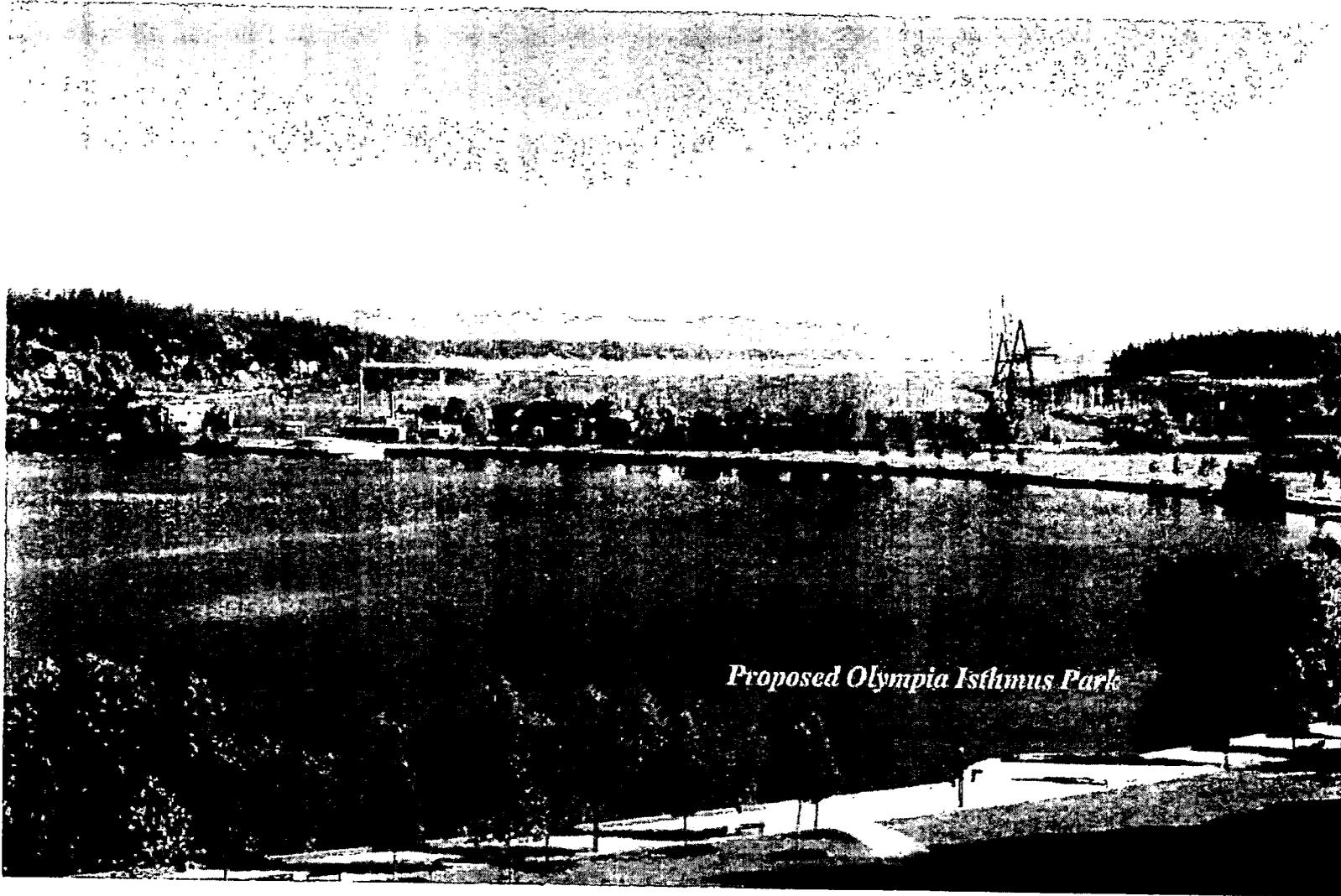
Isthmus Properties
Heritage Park Extension

Concept Design
June 23, 2010

Olympia Capitol Park Foundation
The Portico Group

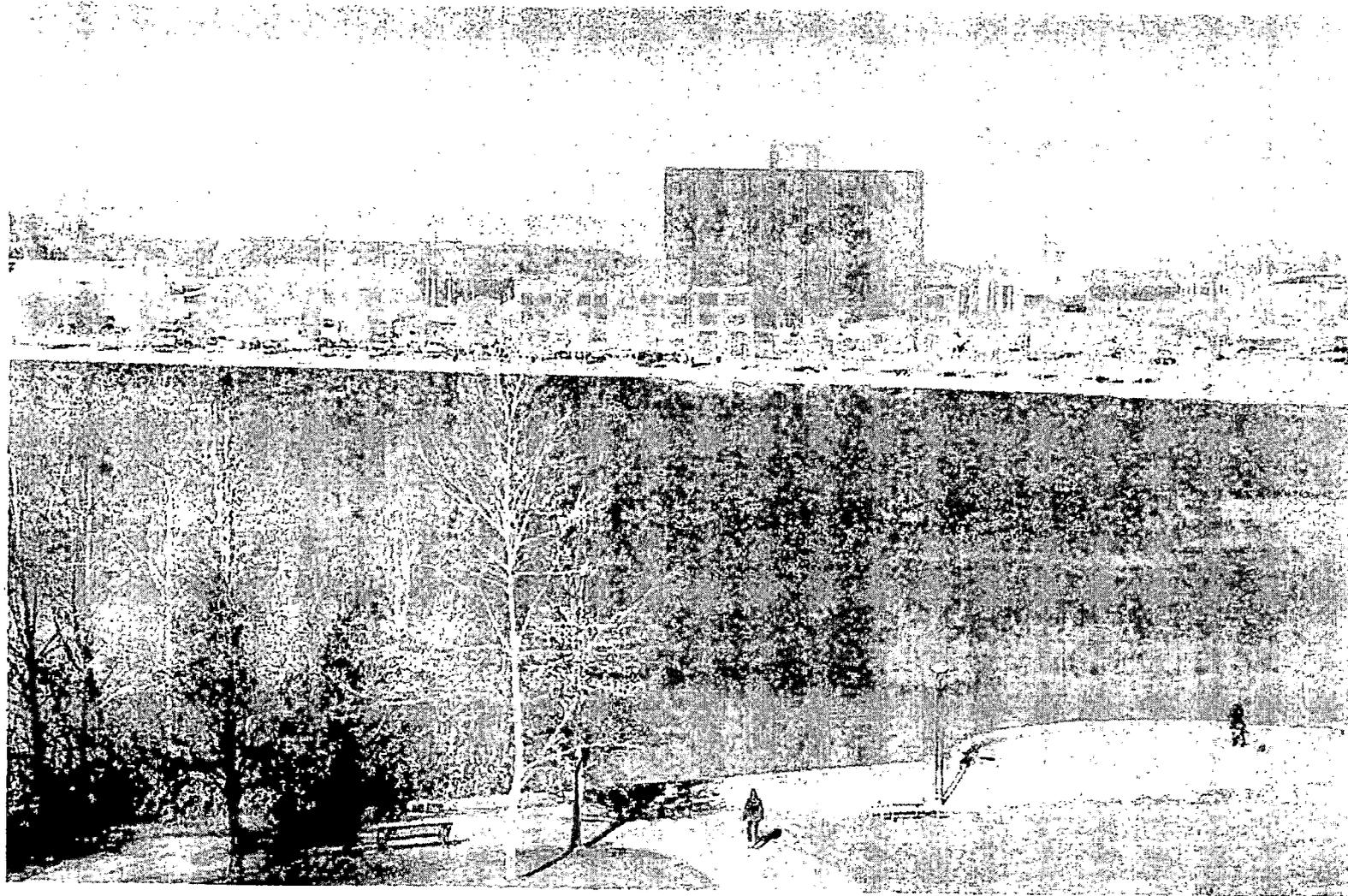


1415: Consistent with Comprehensive Plan/Zoning/SMA and Public Trust

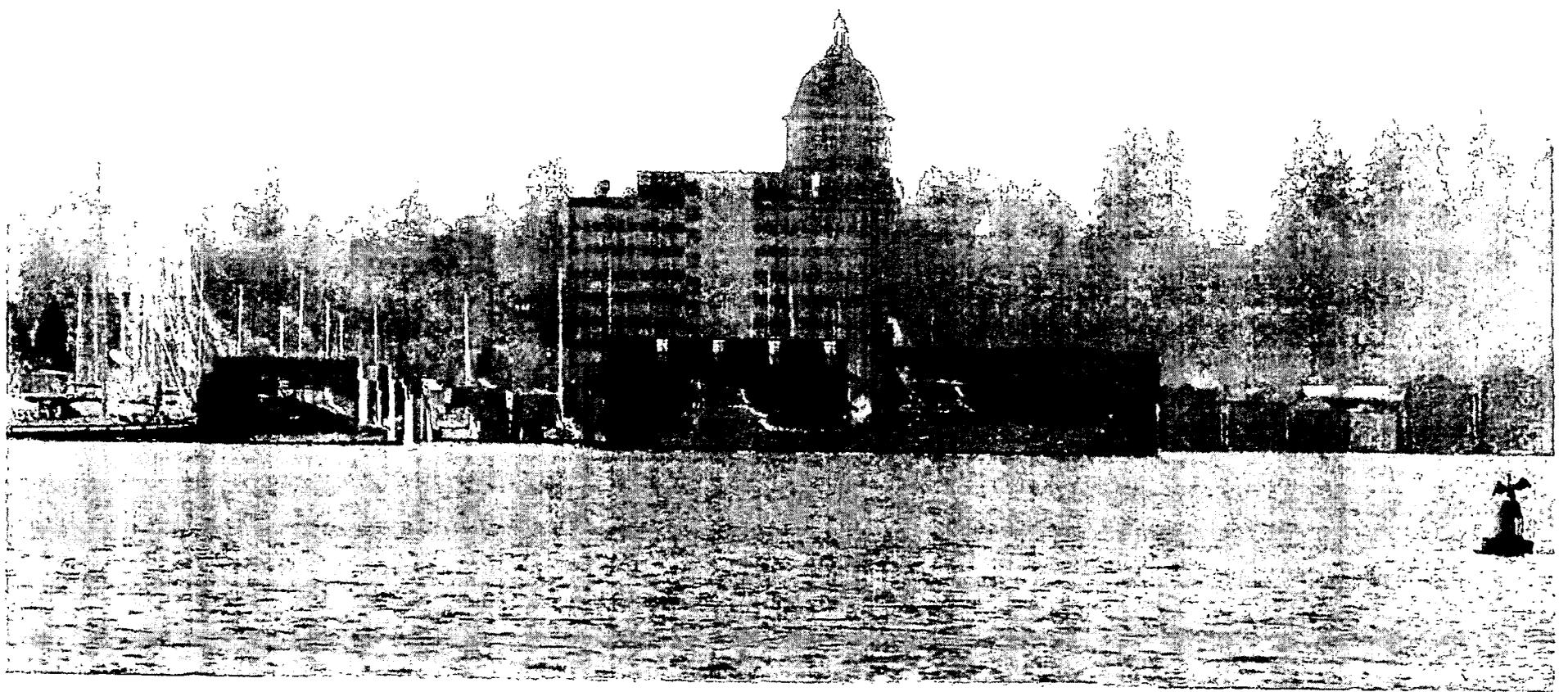


Proposed Olympia Isthmus Park

1417: Consistent with Comprehensive Plan/Zoning/SMA and Public Trust



1418: Inconsistent with Comprehensive Plan/Zoning/SMA and Public Trust



1420

1420: Inconsistent with Comprehensive Plan/Zoning/SMA and Public Trust

THE LAW OFFICES OF ALLEN T. MILLER

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Superior Court Case Number: 18-2-01487-2

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