

72413-4

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No. 92846-1

No. 72413-4

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

ALYNE FORTGANG,

Appellant,

v.

WOODLAND PARK ZOO a/k/a WOODLAND PARK ZOOLOGICAL
SOCIETY,

Respondent.

**RESPONDENT WOODLAND PARK ZOOLOGICAL SOCIETY'S
COMBINED ANSWER TO BRIEFS OF AMICI CURIAE
WASHINGTON COALITION FOR OPEN GOVERNMENT AND
ANIMAL LEGAL DEFENSE FUND**

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I. INTRODUCTION

The Woodland Park Zoological Society (“WPZS”) is a private, nonprofit organization that receives the majority of its funding from non-public sources, does not perform a governmental function, was not created by government, and is not under governmental control. Accordingly, under the four-factor “functional equivalent” test set forth in *Telford v. Thurston County Board of Commissioners*, 95 Wn. App. 149, 974 P.2d 886 (1999), WPZS is not subject to the PRA. Amici curiae The Washington Coalition for Open Government (“WCOG”) and The Animal Legal Defense Fund (“ALDF”), however, suggest redefining *Telford*’s “government funding” and “governmental function” factors in a manner unsupported either by *Telford*, the cases this Court relied upon in *Telford*, or the cases subsequently applying *Telford*. Amici’s overly-broad definitions are incorrect under Washington law and are not supported by the facts of this case. Nor do Amici’s policy arguments justify applying the PRA to WPZS.

WCOG’s claim that receipt of direct funds through a voter-approved levy, standing alone, favors application of the PRA is not supported by any authority. The PRA is not a “follow-the-money” disclosure statute such that receipt of public funds by and of itself justifies application of the PRA to a private organization. Rather, under *Telford*,

the level of government funding, regardless of the form in which it is received, is simply one factor to be weighed in the functional equivalent analysis. Moreover, under the relevant levy there already is ample citizen oversight of levy funds. The government funding factor does not support application of the PRA to WPZS.

ALDF's arguments regarding the governmental function factor are similarly unavailing. Under *Telford* and its progeny the test is not whether cities historically have operated zoos or whether zoos are civic assets. Operating a zoo is not an activity in which the government has an obligation to engage or which the legislature has declared to be a public purpose. Historically zoos have been operated both privately and by cities. WPZS's operation of the Woodland Park Zoo ("Zoo") is not a governmental function.

The issues Amici raise are without merit and the trial court should be affirmed.

II. STATEMENT OF THE CASE

WPZS incorporates by reference the Statement of the Case set forth in its merits brief to this Court.

III. ARGUMENT

A. WCOG advances a government funding analysis not found under Washington law and an oversight justification unsupported by the facts.

1. *Telford* examines the level, rather than the form, of government funding.

The *Telford* test provides a “practical”, case-by-case method for distinguishing between a private entity not subject to the PRA and a private entity subject to the Act as the “functional equivalent” of a public agency. *See Worthington v. Westnet*, 341 P.3d 995, 999 (Wash. 2015). The inquiry under the government funding element of this test is not, as WCOG posits, whether the entity receives direct funds through a taxpayer levy or whether it receives funds as payment for services rendered. Rather, the inquiry is what level of government funding the entity receives. Indeed, had the legislature wanted to expand the scope of the PRA to include entities that receive taxpayer levied funding or public funding other than payment for services, it would have so provided. *See, e.g.*, S.C. Code Ann. § 30-4-20(a) (Supp.1989) (for disclosure purposes, defining “public body” to include “any organization, corporation, or agency supported in whole or in part by public funds or expending public funds”).

Focusing on the level of funding rather than the form of funding makes sense in light of the purposes behind the PRA. The PRA was

passed in order to promote government accountability by assuring “access to information concerning the conduct of government”. RCW 42.17A.001. The form in which funds are received provides little insight into whether or not a private entity is engaged in the conduct of government. The *Telford* court acknowledged this when it considered WSAC and WACO’s argument that the publicly-funded membership dues paid to the associations were “consideration for services”. 95 Wn. App. at 164. The Court rejected the associations’ claim that the annual lump sum dues payments were consideration for services. *Id.*; RCW 36.32.350, .47.040. The Court determined what was more important was that the dues “support[ed] the associations’ entire operations”—operations wholly focused on “statewide coordination of county administrative programs, declared by the Legislature to be a public purpose.” *Id.* at 163–64. That is, the Court found significant that the associations were engaged in carrying out a public purpose and were “mostly supported by public funds.” *Id.* at 163, 165 (emphasis added).

Here, that WPZS receives a part of its funding through a voter-approved levy goes to the form of funding rather than the totality of public funding, the relevant *Telford* analysis. WCOG has not cited, nor has WPZS uncovered, any case that places additional weight on the receipt of direct taxpayer funds in examining the level-of-government-funding

factor. *Weston v. Carolina Research & Development Foundation*, 401 S.E.2d 161 (S.C. 1991), is not such a case. *Weston* did not involve a voter-approved levy at all. Further, as WPZS has already pointed out, South Carolina's FOIA (unlike Washington's PRA) is a "follow-the-money" statute and applies to any organization "supported in whole or in part by public funds or expending public funds." Br. of Respondent, pp. 14–15. Thus, *Weston* stands only for the proposition that the "intent and . . . clear meaning" of the South Carolina statute subjects an organization to that state's FOIA if it has "received support from public funds or expended public funds." 401 S.E.2d at 164. The same cannot be said for the Washington PRA.

Washington case law is clear that the *Telford* test examines the level of government funding received relative to overall revenue as one factor in determining whether an entity is engaged in the conduct of government. *See* 95 Wn. App. at 162; *Clarke v. Tri-Cities Animal Care & Control Shelter*, 144 Wn. App. 185, 194–95, 181 P.3d 881 (2008); *Spokane Research & Def. Fund v. W. Cent. Cmty. Dev. Ass'n*, 133 Wn. App. 602, 609, 137 P.3d 120 (2006); *Bd. of Trs. of Woodstock Acad. v. Freedom of Info. Comm'n*, 436 A.2d 266, 271 (Conn. 1980) (cited in *Telford*). No court has applied the *Telford* government funding factor to find that an entity receiving the majority of its funds from non-public

sources is the functional equivalent of a public agency for the purposes of the PRA. Applying the correct test here, the government funding factor weighs against applying the PRA to WPZS. Indeed, in 2013, non-City funding from public sources accounted for only 10 percent of total WPZS revenue while funding from the City accounted for 16 percent; almost three-quarters of WPZS's revenue came from non-public sources. Supp. CP at 171, 183–208. WCOG's government funding argument should be rejected.

2. Oversight of levy funds does not require application of the PRA.

WCOG next argues that WPZS must be subject to the PRA in order to ensure citizen oversight of public funds received through the 2013 King County Parks, Trails, and Open Space Replacement Levy (“King County Levy”). The King County Levy directs funds to support, *inter alia*, “environmental education, maintenance, conservation and capital programs at the Woodland Park Zoo.”¹ Initially, WCOG's oversight argument is simply a variation of its argument that the PRA applies to any private entity receiving public funds, which as discussed above, finds no support in the language of the PRA or the functional equivalent case law.

¹ King County Ordinance 17568, King County, *available at* <http://your.kingcounty.gov/dnrp/library/parks-and-recreation/documents/about/Ordinance%2017568.pdf> (“Ordinance 17568”).

Moreover, citizen oversight of King County Levy funds is accounted for in the ordinance authorizing the levy and the contract enabling the distribution of levy funds to WPZS. The ordinance provides for the establishment of a parks levy citizen oversight board. Ordinance 17568, § 7. The board is responsible for “review[ing] the allocation of levy proceeds and progress on achieving the purposes of [the levy proposition].” *Id.* The ordinance also states that distribution of levy proceeds “shall be subject to the execution of a contract between the county” and the recipient of funds. *Id.*, § 6. In turn, WPZS’s contract with King County contains several provisions that ensure public oversight for King County Levy funds. For example, the contract requires WPZS to provide the county with annual reports including a “general summary of the Zoo’s operations and a complete financial accounting for all funds, including use of County Levy Proceeds”.² App. 5, § 4.2 (emphasis added). WPZS also must provide the county with an annual certification of the total dollar amount of county funds expended by WPZS identified by category “(i.e. environmental education, conservation programs, and capital improvement projects)”. *Id.* § 4.3. The contract also requires cooperation with any state or county auditors, who may conduct audits

² The relevance of King County Levy proceeds is raised for the first time on appeal by WCOG. The contract, therefore, was not part of the trial court record. For the Court’s convenience, WPZS attaches the 2014 version of the contract at Appendix 1–22.

“during or after the Agreement period for purposes of evaluating claims by or payments to WPZS related to this Agreement and for any other reason deemed appropriate and necessary by King County” provided the reason is related to the use of levy funds. *Id.* at 16–17, § 14.4. The contract specifically contemplates that all records provided by WPZS to the county pursuant to the contract are subject to the PRA. *Id.* at 17, § 14.5. Thus, a citizen concerned with how King County Levy funds are used need only make a public records request to King County to receive a full accounting. Application of the PRA to WPZS is unwarranted.³

Finally, that the King County Levy provides for citizen oversight is not sufficient to distinguish between WPZS and other recipients of public levy funds. For example, the YMCA receives levy funds from the City’s Families and Education Levy to provide Seattle “public school students, Seattle children, and their families education-support services designed to improve academic achievement”.⁴ Like the King County Levy, the City’s levy provides for citizen oversight by way of reports and availability for audits. The fact that the YMCA receives funds for specific purposes while WPZS receives funds for general purposes is a distinction without a

³ Notably, the document requests at issue in this case do not in any way reference or seek information pertaining to use of public funds. Rather, they seek internal documents reflecting the keeping and care of the Zoo’s elephants and WPZS’s public outreach efforts related to the elephant program. CP 24–25.

⁴ City of Seattle Ordinance 123567, available at <https://your.kingcounty.gov/elections/elections/201111/measures/Seattle1.pdf>.

difference. Taxpayers are no less interested in the uses to which their funds are being put when those funds are paying for specific services rather than applied generally to support the Zoo's programs. Under WCOG's approach, the government funding factor would always weigh in favor of finding that a private nonprofit is the functional equivalent of a public agency where that nonprofit receives taxpayer funds. That is not the correct analysis under *Telford* and its progeny and should be rejected.

B. ALDF's arguments are not relevant to the *Telford* "governmental function" analysis.

1. ALDF advances an overly-broad definition of "governmental function."

ALDF devotes the bulk of its brief to arguing that operating the Zoo is a "traditional" governmental function because historically Seattle and other cities have operated zoos and because the Zoo is a civic asset. But neither of these facts informs the *Telford* governmental function analysis. ALDF would redefine this factor to include all "functions traditionally associated with government", ignoring that this language appears nowhere in Washington's functional equivalent PRA cases and is contrary to the "core government functions" language that courts have employed in PRA cases. *See Clarke*, 144 Wn. App. at 194 (emphasis added). Indeed, ALDF's proposed definition does not account for the myriad cases that apply disclosure laws only where an entity performs

obligations that specifically or uniquely belong to the government. Operating a zoo is not such an obligation therefore this factor weighs against applying the PRA to WPZS.

Not every activity a government chooses to perform is a governmental function. See *Spokane Research*, 133 Wn. App. at 609 (“While the government often provides social programs, serving public interests is not the exclusive domain of the government.”). In every case cited in ALDF’s brief in which public disclosure laws were applied to private entities under a *Telford*-like analysis, the government function at issue either was declared by the legislature to be a public purpose or is a function the government is uniquely obligated to perform. In *Board of Trustees v. Freedom of Information Commission*, for example, the function at issue was the provision of “public education at a secondary school level”, i.e., what the court described as a “basic governmental function.” 436 A.2d at 271 (emphasis added). Because the town of Woodstock had no public high school of its own, Woodstock Academy, “established by special corporate charter of the Connecticut state legislature”, was designated on an annual basis “as the facility to provide educational services for the town’s secondary school children.” *Id.* at 267. *Board of Trustees*, therefore, stands for no more than the proposition that when a town chooses to fulfill via a private entity its incontrovertible core

obligation to provide free public education to its school-age children, that private entity is engaged in a governmental function on behalf of the town.

In *Marks v. McKenzie High School Fact-Finding Team*—from whence ALDF draws the “functions traditionally associated with government” language not found in Washington’s cases—the Oregon Supreme Court decided against applying disclosure laws to a fact-finding team made up of three members of a nonprofit confederation of school administrators appointed at the direction of the local school board. 878 P.2d 417, 419 (Or. 1994). The court applied a six-factor functional equivalent test, one factor of which was the nature of the function assigned to be performed by the private entity; that is, “whether that function is one traditionally associated with government or is one commonly performed by private entities”. *Id.* at 424. The court explained that the function performed by the fact-finding team—an investigation of a public high school’s administration—was “related to the operation of that school.” *Id.* at 425. The court found it beyond peradventure that “the operation of a public school is a function traditionally associated with government.” *Id.* Nevertheless, in light of the remaining factors, the court did not apply Oregon’s disclosure laws. *Marks*, then, stands for the same

uncontroversial proposition as *Board of Trustees*: that providing public education is a core governmental function.⁵

Here, the Court is not faced with a private entity engaged in a core function the government is obligated to provide such as public education (as in *Board of Trustees* and *Marks*), public health services (as in *Webb*), or government seizure of private property in the animal control context (as in *Clarke*). Nor is it faced with a private entity performing a function declared by the legislature to be a public purpose (as in *Telford*, *Domestic Violence Services of Greater New Haven, Inc.*, and *Memorial Hospital-W. Volusia, Inc.*). Rather, WPZS is operating a zoo, which is an activity in which the government has no obligation to engage and which the legislature has not declared to be a public purpose.⁶ Accordingly, based on *Telford*, *Spokane Research*, *Clarke*, and the cases upon which *Telford* relies, WPZS is not engaged in a governmental function.

⁵ See also *Mem'l Hosp.-W. Volusia, Inc. v. News-Journal Corp.*, 729 So.2d 373, 377 (Fla. 1999) (maintenance of hospitals within the district declared by legislature to be “a public purpose which is necessary for the preservation of the public health”); *Domestic Violence Servs. of Greater New Haven, Inc. v. Freedom of Info. Comm’n*, 704 A.2d 827, 832 (Conn. App. 1998) (intent of legislature to make the prevention and treatment of family violence a governmental function demonstrated in state statutes); *Clayton Cnty. Hosp. Auth. v. Webb*, 430 S.E.2d 89, 93 (Ga. Ct. App. 1993) (hospital corporations were functioning under the direction and control of the Clayton County Hospital Authority to implement the Authority’s “duty to provide for the public health”).

⁶ The introduction of House Bill 1425 during the 2015 Washington legislative session, which would specifically have subjected WPZS to Washington’s disclosure laws, undercuts ALDF’s claim that operating a zoo is “traditionally” a governmental function for purposes of the PRA. See HB 1425 information available at: <http://app.leg.wa.gov/billinfo/summary.aspx?bill=1425&year=2015#history>.

ALDF makes much of the trial court's discussion of "services" during oral argument. But when properly examined in context, the trial court's statements demonstrate that the court correctly analyzed the governmental function factor. The court stated that it was "obliged to look at the four-part test that has been set forth by the Court of Appeals." RP 33:7–8. Next, the court correctly noted that operating a zoo "is clearly a function that could be public or private." *Id.* at 10–11. Finally, the court stated that while "other cases that have found a government function find it in matters such as actually enforcing laws and issuing citations for animal control . . . [p]roviding services are not generally thought of as a government function." *Id.* at 15–20. Given that the parties spent the entire hearing arguing *Telford*, *Spokane Research*, and *Clarke*, it takes no great leap to deduce that the trial court was talking about *Clarke* and *Spokane Research*, respectively, and that the "services" the court referred to are the types of community programs and services described in *Spokane Research*. In other words, the court properly recognized that a governmental function for the purposes of the PRA is one that specifically or uniquely belongs to the government and that operating a zoo is not such a function. ALDF's governmental function argument is without merit.

2. ALDF’s “civic asset” and history-based arguments are not relevant and do not transform the operation of a zoo into a governmental function under *Telford*.

Operation of a zoo is not a governmental function under *Telford* simply because zoos are often or historically municipally operated and offer benefits to the community. In support of its argument that operating a zoo is a “traditional” governmental function—which, as already explained above, is not the correct standard—ALDF relies on the history of American zoos generally as well as the fact that the Zoo is a “treasured community asset.” Amicus Br. in Support of Appellant (“ALDF Br.”) at 15. ALDF’s reliance on these factors is misplaced.

First, as ALDF concedes, the history of private zoos in this country stretches at least as far back as that of public zoos—if not farther. *See* ALDF Br. at 11–12 (citing 1932 survey referencing 10 privately owned zoos). In fact, the first zoo in Seattle was a “private development by the Lake Washington Cable Railway Co. in 1889 at Leschi Park”.⁷ Indeed, the Woodland Park Zoo itself started as a private and not public endeavor. Seattle founder Guy Phinney developed a private zoo at what is now Woodland Park as part of his residence estate. *Id.* Phinney’s zoo was sold to the City in 1900 and the animals at Leschi Park were given to the City for inclusion with the Woodland Park Zoo in 1903. *Id.* Regardless,

⁷ *See* <http://www.seattle.gov/parks/history/WoodlandPk.pdf> at 2.

whether or not there is a history of municipal zoo operation nationwide does not control the governmental function analysis as applied in the *Telford* line of cases because operating a zoo is neither a core governmental function nor a function the government is specifically or uniquely obligated to perform.

Second, that the Zoo is “an important civic asset, cultural resource and attraction”, *see* ALDF Br. at 15, does not determine whether operating it is a governmental function. To hold otherwise would mean that operation of any number of Seattle’s privately-owned attractions—the Space Needle, for example, or the Experience Music Project or Seattle Asian Art Museum—would also be governmental functions. The City recognizes and provides financial support (via location on City-owned park land, direct funds, or otherwise) to numerous civic institutions that benefit the region including the Seattle Art Museum, the Seattle Opera, the Pacific Northwest Ballet, and the Museum of History & Industry. None of these “civic assets” is subject to the PRA and WPZS presents no exception.

Finally, ALDF offers no support for its claim that “if the WPZS did not operate the [Zoo], the City of Seattle would do so”, *id.*, nor is that a relevant inquiry. If anything, the facts demonstrate the opposite—the City took advantage of legislation that enabled it to transfer management

and operation of the Zoo to WPZS without compromising the rights of City employees precisely so that it could get out of the business of operating a zoo. ALDF cites two cases for the dubious proposition that it is a “hallmark of functions traditionally associated with government” that a public entity will provide such functions if a private entity does not, but those cases do not support ALDF’s argument here. *Id.* The first case, *Memorial Hospital-West Volusia, Inc.*, held that a private nonprofit corporation’s operation of hospitals on behalf of a public hospital authority is a governmental function because of the authority’s legislatively-declared “inescapable” and “fundamental public mandate” to operate hospitals “necessary for the preservation of public health.” 729 So.2d at 377, 379–80. The language ALDF cites regarding whether or not the corporation is performing a function that the authority would otherwise perform is from the trial court opinion rejected by the Florida Supreme Court on appeal and describes one of Florida’s nine functional equivalent analysis factors. *Id.* at 380. *Telford* did not adopt Florida’s factors and, regardless, operation of a zoo is not a “fundamental public mandate.” The language ALDF cites from the second case, *Denver Post Corp. v. Stapleton Dev. Corp.*, also describes one of Florida’s nine factors and has no bearing on the *Telford* analysis under Washington law. 19 P.3d 36, 40 (Colo. Ct. App. 2000). The relevant inquiry is simply whether WPZS is

providing a core governmental function or one that the City is specifically or uniquely obligated to perform. The answer is no.

3. The purposes of the PRA do not support application of the Act to WPZS nor is application of the PRA necessary to promote animal welfare.

The rationale underlying *Telford*'s functional equivalent test is that the process of "getting the business of the government done" should not evade disclosure laws simply because it is performed on behalf of the government by a private entity. *Wash. Research Project, Inc. v. Dep't of Health, Educ. & Welfare*, 504 F.2d 238, 245–46 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963, 95 S. Ct. 1951, 44 L. Ed. 2d 450 (1975) (a case cited in *Telford*). Whether a private entity is engaged in a governmental function such that citizens have a right to access the entity's records is necessarily a fact-specific, case-by-case inquiry because not all public services or benefits implicate the business of government. *See Spokane Research*, 133 Wn. App. at 609. Here, the PRA does not apply because operating a zoo is not "the business of the government."

Given the fact-specific nature of the functional equivalent analysis, ALDF's omnibus citation to cases that it claims represent the "presumption of openness at the heart of . . . access laws" does nothing to clarify the inquiry here. ALDF Br. at 17. ALDF's cited cases each involve different public disclosure laws, different state-law functional

equivalent tests, and/or vastly different facts. In *State ex rel. Toomey v. City of Truth or Consequences*, for example, a private nonprofit corporation operating a public access channel under contract with the city received all of its funding from the city, operated for the city's sole benefit, and the city was "intimately involved in the regulation and procedures for access channel use" and could unilaterally cancel the contract. 287 P.3d 364, 370–71 (N.M. 2012). Furthermore, the court applied New Mexico's nine-factor functional equivalent analysis which includes factors not employed in *Telford* such as "government involvement in the promotion of the concept of a contract or project". *Id.* at 370. Given that *Toomey* involved the application of different law to different facts it is of questionable utility here.

The same is true of *Webb*, where the Court of Appeals of Georgia did not articulate a functional equivalent test but found that private hospital corporations were functioning "under the direction and control" of a public hospital authority to implement the authority's "duty to provide for the public health" and therefore were subject to disclosure laws. 430 S.E.2d at 93. The duty to provide a public health facility is unlike operation of a zoo. *Indianapolis Convention & Visitors Ass'n, Inc. v. Indianapolis Newspapers, Inc.* is similarly unilluminating as it—like *Weston*—involves a "follow-the-money" disclosure statute that applies to

any entity “maintained in whole or in part at public expense; or . . . by appropriations or public funds or by taxation.” 577 N.E.2d 208, 212 (Ind. 1991).⁸ While it certainly is true that citizens have the right to access the records of entities engaged in the business of government, simply repeating that maxim does not clarify the threshold inquiry into whether WPZS actually is so engaged. In Washington that inquiry is guided by the *Telford* factors. Under *Telford*, WPZS is not the functional equivalent of a public agency for the purposes of the PRA.

Finally, the numerous instances in which public records requests have furthered the goal of promoting animal welfare, while laudable, are inapplicable to this case. Under the Management Agreement, WPZS already makes all Zoo Animal Records, defined as “records pertaining to the veterinary management and treatment of Zoo animals in [the Zoo’s] care”, available to the public upon request. Supp. CP 231, § 20.4.2. In fact, in response to the document requests at issue in this case, WPZS made it clear that it would not only disclose Zoo Animal Records but in the interest of transparency also would answer several of Fortgang’s additional questions despite the lack of any obligation to do so. CP 27. In

⁸ See also *News & Observer Pub. Co. v. Wake Cnty. Hosp. Sys., Inc.*, 284 S.E.2d 542, 547–48 (N.C. App. 1981) (legislatively-declared public purpose; application of the federal functional equivalent test; hospital authority controlled corporations’ annual budgets); *News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Grp., Inc.*, 596 So.2d 1029, 1032–33 (Fla. 1992) (applying Florida’s nine-factor test, disclosure laws not applied to architects under professional services contract with school board).

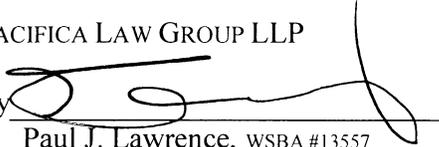
light of WPZS's existing contractual obligation to make its Zoo Animal Records public, ALDF's animal welfare argument is inapposite.

IV. CONCLUSION

Under *Telford*, this Court must apply a practical, four-factor test that weighs as one factor the level, rather than the form, of government funding WPZS receives. WCOG's argument to the contrary and concerns regarding citizen oversight of levy funds are unfounded. Moreover, operating a zoo is not a core governmental function, one of the four *Telford* factors. ALDF's animal welfare argument does not apply to this case. WPZS respectfully requests that the Court affirm the trial court's order granting summary judgment in favor of WPZS.

RESPECTFULLY SUBMITTED this 20th day of April, 2015.

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Park Zoological Society

CERTIFICATE OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, competent to be a witness in the above action, and not a party thereto; that on the 20th day of April, 2015 I caused a true and correct copy of the foregoing document to be filed with the Court of Appeals and served electronically per the electronic service agreement:

Rob Roy Smith, WSBA #33798	x via email
Christopher T. Varas, WSBA #32875	
KILPATRICK, TOWNSEND & STOCKTON, LLP	Email: rrsmith@kilpatricktownsend.com
1420 Fifth Avenue, Suite 4400	Email: cvaras@kilpatricktownsend.com
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Attorneys for Plaintiff

Margaret Pak Enslow, WSBA #38982	Via US Mail and email
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**Attorney for *Amicus Curiae*
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**Attorney for *Amicus Curiae*
*Animal Legal Defense Fund***

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2015 APR 20 PM 4:51

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Via US Mail

***Attorney for Amicus Curiae
Animal Legal Defense Fund***

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct

DATED this 20th day of April, 2015.



Sydney Henderson

APPENDIX

WOODLAND PARK ZOO SOCIETY/KING COUNTY

PARKS PROPERTY TAX LEVY AGREEMENT

This Parks Property Tax Levy Agreement (the "Agreement") is made and entered into as of May 7, 2014, 2014, by and between KING COUNTY, a Washington municipal corporation (the "County") and the WOODLAND PARK ZOOLOGICAL SOCIETY, a Washington non-profit corporation ("WPZS").

RECITALS

- A. The City of Seattle (the "City") currently owns public zoological gardens located in the City of Seattle and commonly known as the Woodland Park Zoo (the "Zoo"). The Zoo is located on certain park land owned by the City and described in greater detail in Exhibit A attached hereto.
- B. WPZS is a non-profit public benefit corporation organized in 1965 for charitable, scientific and educational purposes for the study and promotion of zoology and wildlife conservation and for the education and recreation of the public.
- C. In 1995, then-Mayor Norm Rice appointed the Zoo Commission II to review Zoo needs and to propose ways to finance the Zoo's operations and continued development into the 21st Century. The Zoo Commission II believed that non-profit management and stable public funding would result in increased private contributions and allow the Zoo to continue to develop and realize its potential for leadership in education and conservation.
- D. In Resolution 29386 adopted on July 1, 1996, the City Council expressed its general support for the recommendations of Zoo Commission II.
- E. In the 2000 state legislative session, Chapter 35.64 of the Revised Code of Washington was passed to authorize certain cities, including the City, to enter into contracts with non-profits or other public organizations for the overall management and operation of a zoo.
- F. Since March 1, 2002, WPZS has provided non-profit management of the Zoo through an agreement with the City's Parks Department (the "Management Agreement").
- G. The Zoo, which originated as a public park with a small menagerie of animals, is now an exceptional center for wildlife exhibition, education, conservation and scientific research.
- H. The Zoo is currently funded by a combination of public support and private contributions.
- I. WPZS endeavors to be a creative partner with the City and other local governments in improving and operating the Zoo for the greatest public good.
- J. Through WPZS's management, the Zoo has evolved into an important civic asset and recreational resource in the City of Seattle and the greater King County area.
- K. King County owns and operates a park system with over twenty-eight thousand (28,000)

acres of regional parks and open spaces and over one hundred seventy-five (175) miles of regional trails. In addition, King County is the provider of local parks in the rural area and is the transitional provider of local parks in the urban incorporated areas.

- L. In November 2006, the King County executive created the Parks Futures Task Force to recommend a funding plan for the current County park system, and to examine what steps should be taken, if any, regarding future park system acquisitions.
- M. Ordinance 15760 specified two contingencies for distribution of any levy proceeds to the WPZS: (1) that the WPZS modify its bylaws to provide for a board member appointed by the King County Council to monitor the expenditure of County monies; and (2) that the WPZS enter into a contract with King County regarding distribution of the levy proceeds.
- N. In a letter dated April 12, 2007, the Board of Directors of WPZS offered to take the necessary steps to modify the bylaws of the WPZS to provide for a board member appointed by the King County Council to monitor the expenditure of county monies.
- O. On August 21, 2007, King County voters approved the Special Property Tax Levy, which included funding for the Zoo. The levy expired at the end of 2013.
- P. In June of 2012, the County Executive convened the King County Parks Levy Task Force to recommend a funding plan for the current park system and to examine how to address the parks and recreation needs of King County residents in the future.
- Q. The King County Parks Levy Task Force recommended that the County replace the expiring levies and put a ballot measure before the voters in 2013 that requests a six-year inflation adjusted property tax levy lift at a total rate of \$0.1901 per one thousand dollars of assessed value with a percentage of the levy proceeds to be distributed to cities for their local parks system projects.
- R. On April 30, 2013, the King County Council adopted Ordinance 17568 which called for a special election in accordance with RCW 29A.04.321 to authorize an additional 6-year property tax levy for special park purposes, including funding for the zoo.
- S. On August 6, 2013, King County voters approved Proposition No. 1 Parks Levy that authorized an additional six year property tax levy at a rate of \$0.1877 in the first year, with subsequent levies adjusted by inflation for the purpose of: maintaining and operating King County's parks system, improving parks, recreation and mobility by acquiring open space, expanding park and recreation opportunities, continuing to develop regional trails; repairing, replacing, and improving local parks and trails in King County's cities; and funding environmental educations, maintenance, conservation, and capital programs at the Woodland Park Zoo.
- T. Section 4, paragraph E of Ordinance 17568 provides that seven (7) percent of the levy proceeds shall be distributed to the Woodland Park Zoological Society for environmental education with emphasis on accessibility to traditionally underserved populations throughout the county, horticulture and maintenance of buildings and grounds,

conservation and animal care for rare, threatened or endangered Pacific Northwest species; and board approved capital projects/campaigns in existence as of December 31, 2012.

NOW, THEREFORE, in consideration of the mutual promises and undertakings hereinafter set forth and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

AGREEMENT

1. Definitions. As used in this Agreement, the following terms shall have the following meanings:
 - 1.1 “Annual Report” shall mean the annual report prepared by WPZS as described in Section 4.2 of this Agreement.
 - 1.2 “Board of Directors” shall mean the Board of Directors of the Woodland Park Zoological Society.
 - 1.3 “Bylaws” shall mean the bylaws of the WPZS, as adopted pursuant to the Washington Nonprofit Corporation Act and the WPZS’s Articles of Incorporation.
 - 1.4 “City” shall mean the City of Seattle, State of Washington, and all of its boards, commissions, departments, agencies and other subdivisions.
 - 1.5 “County Council” shall mean the County Council of King County, State of Washington.
 - 1.6 “County Levy” or “Parks Property Tax Levy” means the annual King County property tax levy for park purposes imposed by the King County Council and authorized by Proposition No. 1 Parks Levy that was approved by King County voters on August 6, 2013 that replaces two levies expiring at the end of 2013.
 - 1.7 “County Levy Proceeds” shall mean the principal amount of the County Levy collected by the County.
 - 1.8 “Distribution Request” shall mean the WPZS’s written request to King County in a form acceptable to King County.
 - 1.9 “Executive” shall mean the King County Executive or his or her functional successor.
 - 1.10 “Existing Funds” shall have the meaning, as defined by RCW 84.55.050.
 - 1.11 “King County” shall mean King County, State of Washington.

- 1.12 "Management Agreement" shall mean that agreement between the City and the WPZS, dated March 2, 2002, and attached hereto as Exhibit B, which provides for long-term management of the Zoo by WPZS.
 - 1.13 "Parks Division" shall mean the King County Parks and Recreation Division of the Department of Natural Resources and Parks.
 - 1.14 "Parking Facilities" shall mean any parking facilities, including a Parking Garage, at the Zoo.
 - 1.15 "Parking Garage" shall mean any parking structure, structures or surface improvements to bring the Zoo's visitor parking spaces to 1,450 or such other amount as called for in the Long-Range Plan adopted by the City.
 - 1.16 "Premises" shall mean the property legally described in Exhibit A attached hereto.
 - 1.17 "WPZS" shall mean the non-profit public benefit corporation which operates the Zoo pursuant to the Management Agreement.
 - 1.18 "Zoo" shall mean the zoological gardens and related facilities currently operated on the Premises by the WPZS pursuant to the Management Agreement and owned by the City of Seattle.
 - 1.19 "Zoo Director" shall mean the Director of the Zoo, as determined by WPZS.
 - 1.20 "Zoo Proceeds" shall mean seven percent (7%) of the total County Levy Proceeds collected by King County, plus any interest earned on Zoo Proceeds by King County prior to transfer to WPZS, , and any interest earned on these funds1.21
"Zoo Projects" shall mean environmental education with an emphasis on accessibility to traditionally underserved populations throughout the county, conservation programs and animal care for rare, threatened, or endangered Pacific Northwest species, board approved capital improvement projects/campaigns at the Woodland Park Zoo in existence as of December 31, 2012, and horticulture and maintenance of buildings and grounds.
2. Term of Agreement. The term of this Agreement (the "Term") shall be for a period commencing on the Effective Date (the "Commencement Date"), and expiring on December 31, 2019 (the "Termination Date"), subject to the termination provisions in Section 11.
3. Receipt and Distribution of County Levy Proceeds for the Zoo.
- 3.1 Generally. Each year the County shall distribute the Zoo Proceeds, to the WPZS as authorized by Ordinance 17568, subject to Council appropriation. Upon execution of this Agreement, WPZS shall provide King County with its calculation of Existing Funds.
 - 3.2 Distribution of Levy Proceeds.

- A. Distribution Schedule. Beginning in 2014 and through 2019, except for the immediate distribution described in Section 3.2.C below, the County shall transfer the Zoo Proceeds on a monthly basis. The annual amounts transferred shall never exceed Zoo Proceeds actually collected and appropriated by the County.
- B. Administrative Fee. The Parties agree that King County has authority to deduct a portion from the Zoo Proceeds for eligible expenditures related to the administration of the distribution of the County Levy Proceeds, consistent with Ordinance 17568.
- C. Immediate Distribution. On the effective date of this Agreement or as soon thereafter as reasonably possible, WPZS shall provide King County with an initial Distribution Request and, consistent with Section 3.1, WPZS's calculation of Existing Funds. As soon thereafter as reasonably possible, King County shall transfer to the WPZS the Zoo Proceeds accumulated to date that are due and owing to WPZS.

4. Use of County Levy Proceeds.

- 4.1 Exclusive Use of Proceeds for Zoo Projects. WPZS represents and warrants that all Zoo Proceeds received by WPZS, and any interest earned thereon, shall be used only for purposes consistent with the requirements of the County Levy, including Ordinance No. 17568, and RCW 84.55.050, and all Zoo Projects shall be a Zoo Purpose, as defined in the Management Agreement. This section shall survive termination of this Agreement. WPZS shall maintain financial records to account separately for the Zoo Proceeds.
- 4.2 Annual Report. On or before May 31 of each year throughout the Term of this Agreement, WPZS shall provide King County an Annual Report setting forth a summary of the operations of the Zoo and the services provided by WPZS at the Zoo for the preceding year, along with a general summary of the Zoo's operations and a complete financial accounting for all funds, including use of County Levy Proceeds, and a listing of all capital investments made at the Zoo that were funded by County Levy Proceeds.
- 4.3 Annual Certification. On or before May 31 of each year throughout the Term of this Agreement, the WPZS shall also provide King County with a cover letter, signed by the Zoo Director, or his or her authorized representative, that includes: (1) a statement identifying, by category (i.e. environmental education, conservation programs, and capital improvement projects), the total dollar amounts of Zoo Proceeds expended by WPZS on Zoo Projects in the preceding year; (2) that WPZS's receipt and expenditure of the Zoo Proceeds did not supplant Existing Funds; and (3) that the signature is provided "under penalty of perjury." WPZS shall provide any further documentation reasonably requested by King County showing that the County Levy Proceeds were expended on Zoo Projects and the extent to which, if any, Existing Funds were used.

5. WPZS Board Composition. The WPZS amended the Bylaws to provide for a board member appointed by the County Council. See Exhibit C. The Bylaws will continue to provide for such appointment at all times throughout the Term.
6. Title to Improvements. All appurtenances, fixtures, improvements, equipment, additions and other property attached to or installed in the Zoo premises during the Term shall be and remain the property of the Zoo and shall not be deemed property of King County under any circumstances
7. Management Agreement/Precedence. Except as to provisions concerning the receipt and expenditure of the Zoo Proceeds, insurance and indemnification, and King County required forms identified herein, this Agreement shall at all times be construed consistent with provisions relating to the use and operations of the Zoo in the Management Agreement. In the event of any conflict concerning the use and operation of the Zoo, the Management Agreement shall be deemed to control. If the Management Agreement is amended or terminated, the WPZS shall provide King County with written notice of such amendments or termination within 30 days of execution of the amendment or termination of the Management Agreement.
8. Notices. All notices required to be given hereunder shall be in writing and either delivered personally or sent by certified mail to the appropriate address listed below, or at such other address as shall be provided by written notice. Notice by mail shall be deemed communicated upon actual receipt by King County. For convenience of the parties, copies of notices may also be given by other means; however, neither party may give official or binding notice except by personal delivery or by certified mail.

If to the WPZS:

Woodland Park Zoological Society
 601 North 59th Street
 Seattle, Washington 98103-5858
 Attn: Zoo Director

If to King County:

Kevin R. Brown, Director
 Parks and Recreation Division
 201 South Jackson
 Mailstop: KSC-NR-0700
 Seattle, WA 98104

9. Compliance with Laws. WPZS shall comply and conform with all laws and all governmental regulations, rules and orders that may from time to time be put into effect relating to, controlling or limiting the use and operation of the Zoo.
10. Miscellaneous.
 - 10.1 Hold Harmless and Indemnification.
 - A. WPZS as Grantee. In receiving the Zoo Proceeds and using such proceeds in compliance with the County Levy and this Agreement, the Parties agree that the relationship of WPZS to the County is similar to (though not the same as) that of a grant recipient and neither WPZS, nor its officers, agents or employees, are employees of King County for any purpose. WPZS shall be responsible for all federal and/or state tax, industrial insurance, and Social Security liability that

may result from the distribution and use of the Zoo Proceeds and shall make no claim of career service or civil service rights which may accrue to a County employee under state or local law.

King County assumes no responsibility for the payment of any compensation, wages, benefits or taxes by, or on behalf of, WPZS, its employees, and/or others by reason of this Agreement. WPZS shall protect, indemnify, and hold harmless King County, its officers, agents and employees from and against any and all claims, costs, and/or losses whatsoever occurring or resulting from (1) WPZS's failure to pay any such compensation, wages, benefits or taxes, and/or (2) the supplying to WPZS of work, services, materials or supplies by WPZS employees or other suppliers in connection with or support of the performance of this Agreement.

B. WPZS Indemnification of County.

- i. WPZS shall protect, defend, indemnify and hold harmless King County, its officers, employees and agents from any and all costs, claims, judgments and/or awards of damages, arising out of, or in any way resulting from, the negligent acts or omissions of WPZS, its officers, employees, contractors, subcontractors and/or agents, in its performance and/or non-performance of its obligations under this Agreement. WPZS agrees that its obligations under this subparagraph extend to any claim, demand, and/or cause of action brought by, or on behalf of, any of its employees or agents. For this purpose, WPZS, by mutual negotiation, hereby waives, as respects to King County only, any immunity that would otherwise be available against such claims under the Industrial Insurance provisions of RCW, Title 51. In the event King County incurs any judgment, award and/or cost arising there from including attorneys' fees to enforce the provisions of this article, all such fees, expenses, and costs shall be recoverable from WPZS.
- ii. Claims shall include, but not be limited to, assertions that use or transfer of software, book, document, report, film, tape, or sound reproduction, or material of any kind, delivered hereunder, constitutes an infringement of any copyright, patent, trademark, trade name and/or otherwise results in unfair trade practice.
- iii. WPZS agrees not to perform any acts that include use or transfer of software, book, document, report, film, tape, or sound reproduction, or material of any kind, delivered hereunder, that constitutes an infringement of any copyright, patent, trademark, trade name and/or otherwise results in unfair trade practice. WPZS agrees to indemnify King County for any harm resulting from unfair trade practices.
- iv. The provisions in this section shall survive the termination and/or duration of the Agreement term.

- v. Nothing contained within this provision shall affect and/or alter the application of any other provision contained within this Agreement.
- C. WPZS Agreement to Repay. The WPZS further agrees that it is financially responsible for and shall repay King County all indicated amounts following an audit exception concerning the lawful use of the County Levy Proceeds. In the alternative, if acceptable to the auditor, WPZS shall in the following calendar year expend WPZS funds on Zoo Projects in an amount equal to the amount of the audit exception. For purposes of this Section, the Parties agree that "WPZS funds" shall in no circumstance include any Zoo Proceeds. This duty to repay King County shall not be diminished or extinguished by the prior Termination of the Agreement. This Section shall supersede Section 10.2.B.

10.2 Dispute Resolution.

- A. Dispute Resolution – Other than Use of Levy Proceeds. In the event of a dispute between or among WPZS and King County regarding any term of this Agreement, except for a dispute involving alleged improper use of Zoo Proceeds, the parties shall attempt to resolve the matter informally through the following mechanism: the Executive and the Zoo Director, or their respective designee(s), shall meet to review and discuss the matter(s) in dispute; if the Executive and the Zoo Director are unable to reach a mutual resolution, the WPZS Board Chair(s) shall meet with the Executive and other County representatives, as appropriate, to review and discuss the matter(s) in dispute within fifteen (15) business days. If such persons are unable to resolve the matter informally, either party may submit the matter to a non-binding, structured mediation procedure fashioned by persons or organizations experienced in alternative dispute resolution ("ADR") procedures. The mediation may be requested by any party and shall be initiated within thirty (30) days from the date of the request unless extended by agreement of both parties. The alternative dispute resolution procedures utilized for the mediation shall include the exchange of written claims and responses, with supporting information, at least seven (7) days prior to the actual mediation. The positions expressed and mediator's recommendations shall not be admissible as evidence in any subsequent ADR or legal proceeding. If the matter is submitted to mediation and the matter is not resolved, an affected party shall be entitled to pursue any legal remedy available.
- B. Dispute Resolution – Use of Zoo Proceeds. In the event of a dispute between or among WPZS and King County regarding the alleged improper use of Zoo Proceeds, the parties shall attempt to resolve the matter informally through the following mechanism: the Executive and the Zoo Director, or their respective designee(s), shall meet to review and discuss the matter(s) in dispute; if the Executive and the Zoo Director are unable to reach a mutual resolution, the WPZS Board Chair(s) shall meet with the Executive and other County representatives, as appropriate, to review and discuss the matter(s) in dispute within fifteen (15) business days. If such persons are unable to resolve the matter informally, either party may request a determination by the County's

Chief Accountant. The County's Chief Accountant shall consult with the City of Seattle Finance Director in making his or her determination pursuant to this Section. If the County's Chief Accountant determines that WPZS did not use the funds consistent with the terms of the Parks Property Tax Levy, WPZS shall be required in the following calendar year to expend WPZS funds on Zoo Projects in an amount equal to the amount that the County's Chief Accountant finds that the WPZS did not spend consistent with the terms of the Parks Property Tax Levy. For purposes of this Section, the Parties agree that "WPZS funds" shall in no circumstance include any Zoo Proceeds. This section does not apply to disputes that arise from an audit finding.

- 10.3 No Implied Waiver. No failure by either party hereto to insist upon the strict performance of any obligation of the other party under this Agreement or to exercise any right, power or remedy arising out of a breach thereof, irrespective of the length of time for which such failure continues (except in cases where this Agreement expressly limits the time for exercising rights or remedies arising out of a breach), shall constitute a waiver of such breach or of that party's right to demand strict compliance such term, covenant or condition or operate as a surrender of this Agreement. No waiver of any default or the performance of any provision hereof shall affect any other default or performance, or cover any other period of time, other than the default, performance or period of time specified in such express waiver. One or more written waivers of a default or the performance of any provision hereof shall not be deemed to be a waiver of a subsequent default or performance. The consent of either party hereto given in any instance under the terms of this Agreement shall not relieve the other party of any obligation to secure the consent of the other party in any other or future instance under the terms of this Agreement.
- 10.4 Headings and Subheadings. The captions preceding the articles and sections of this Agreement and in the table of contents have been inserted for convenience of reference and such captions in no way define or limit the scope or intent of any provision of this Agreement.
- 10.5 Successors and Assigns. The terms, covenants and conditions contained in this Agreement shall bind and inure to the benefit of King County and WPZS and, except as otherwise provided herein, their personal representatives and successors and assigns. There are no third party beneficiaries to this Agreement.
- 10.6 Agreement made in Washington. This Agreement shall be deemed to be made in and shall be construed in accordance with the laws of the State of Washington. Venue of any action brought by one party against the other to enforce or arising out of this Agreement shall be in King County Superior Court.
- 10.7 Integrated Agreement; Modification. This Agreement contains all the agreements of the parties hereto relating to the subject matter addressed herein, and cannot be amended or modified except by a written agreement approved and mutually executed between each of the parties hereto.

- 10.8 Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument.
- 10.9 Time of Essence. Time is of the essence of each provision of this Agreement.
- 10.10 Signage. For each capital project funded with County Levy Proceeds and for which donor recognition is provided consistent with WPZS policies, WPZS shall provide a sign including the following language and one of the three “King County Parks-Your Big Backyard” logos below:

“This project was funded [or as applicable, funded in part] by the 2013 ‘Proposition No.1 Parks Levy’ to support King County Parks, regional open space, trails, & the Woodland Park Zoo.

King County Parks **Your** King County
Big Backyard



King County Parks **Your** King County
Big Backyard]”

This provision shall survive the termination of this Agreement.

11. Termination.

- 11.1 Termination due to Withdrawal of Funds. If the Levy Funds are withdrawn by actions outside of the control of the Parties prior to the termination date set forth in this Agreement or in any amendment hereto, King County may, upon written notice to WPZS, terminate this Agreement in whole or in part.
- 11.2 Termination due to Non-Appropriation. Funding under this Agreement beyond the current appropriation year is conditional upon the appropriation by the County Council of sufficient funds to support the activities described in this Agreement. Should such an appropriation not be approved, the Agreement shall remain in effect but King County shall have no funding obligation for the year in which the County Council failed to appropriate funding to support the Agreement. Alternatively, in the event the County Council appropriates funding in a given year that is less than that anticipated to be appropriated pursuant to the terms of the County Levy, the County shall only be required to provide funding up to the amount appropriated by the County Council.
- 11.3 Termination of the Management Agreement. In the event that the Management Agreement is terminated, this Agreement shall also terminate.
12. Assignment. WPZS shall not assign, transfer or subcontract any portion of this Agreement or transfer or assign any claim arising pursuant to this Agreement without the prior written

consent of King County. Said consent must be sought in writing by WPZS not less than fifteen (15) business days prior to the date of any proposed assignment, transfer or subcontract. WPZS shall deliver to King County with its request for consent, such information regarding the proposed assignee, transferee or subcontractee, including its proposed mission, legal status, and financial and management capabilities as is reasonably available to WPZS. Within fifteen (15) days after such request for consent, King County may reasonably request additional available information on the proposed assignee, subcontractee or transferee. If King County shall give its consent, this Section shall nevertheless continue in full force and effect. Any assignment, transfer or subcontract without prior County consent shall be void.

13. Insurance requirements.

13.1 Insurance Required. By the date of execution of this Agreement, WPZS shall procure and maintain for the duration of this Agreement, insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the use of the Zoo Proceeds. WPZS or contractor/subcontractor shall pay the costs of such insurance.

WPZS is responsible for ensuring compliance with all of the insurance requirements stated herein. Failure by the WPZS, its agents, employees, officers, contractor/subcontractors, providers, and/or provider subcontractors to comply with the insurance requirements stated herein shall constitute a material breach of this Agreement.

13.2 Form. Each insurance policy shall be written on an "occurrence" form; except that insurance on a "claims made" form may be acceptable with prior King County approval. If coverage is approved and purchased on a "claims made" basis, WPZS warrants continuation of coverage, either through policy renewals or the purchase of an extended discovery period, if such extended coverage is available, for not less than three years from the date of Agreement termination, and/or conversion from a "claims made" form to an "occurrence" coverage form.

13.3 Risk Assessment by WPZS. By requiring such minimum insurance, King County shall not be deemed or construed to have assessed the risks that may be applicable to the WPZS under this Agreement, nor shall such minimum limits be construed to limit the limits available under any insurance coverage obtained by WPZS. WPZS shall assess its own risks and, if it deems appropriate and/or prudent, maintain greater limits and/or broader coverage.

13.4 Minimum Scope of Insurance. Coverage shall be at least as broad as:

A. General Liability. Insurance Services Office form number (CG 00 01 or its equivalent) covering COMMERCIAL GENERAL LIABILITY.

B. Professional Liability, Errors, and Omissions Coverage. In the event that the use of the Zoo Proceeds either directly or indirectly involves or requires professional services, the WPZS shall require that the professional services

provider has Professional Liability, Errors, and Omissions coverage. "Professional Services," for the purpose of this Agreement section, shall mean any services provided by a licensed professional or those services that require a professional standard of care.

- C. Automobile Liability. Insurance Services Office form number (CA 00 01 or its equivalent) covering BUSINESS AUTO COVERAGE, symbol 1 "any auto"; or the appropriate coverage provided by symbols 2, 7, 8, or 9.
- D. Workers' Compensation. Workers' Compensation coverage, as required by the Industrial Insurance Act of the State of Washington, as well as any similar coverage required for this work by applicable federal or "Other States" state law.
- E. Stop Gap/Employers Liability. Coverage shall be at least as broad as the protection provided by the Workers' Compensation policy Part 2 (Employers Liability) or, in states with monopolistic state funds, the protection provided by the "Stop Gap" endorsement to the general liability policy.
- F. Builder's Risk/Installation Floater. In the event the use of the Zoo Proceeds is for a major capital construction project, the WPZS shall ensure that the project includes "All Risk" Builders Risk Insurance at least as broad as ISO form number CP0020 (Builders Risk Coverage Form) with ISO form number CP0030 (Causes of Loss – Special Form) including coverage for collapse, theft and property in transit. The coverage shall insure for direct physical loss to property of the entire construction project, for 100 percent of the replacement value thereof. The policy shall be endorsed to cover the interests, as they may appear, of King County, Owner, Contractor and subcontractors of all tiers with King County listed as a loss payee.

13.5 Minimum Limits of Insurance—All Activities: WPZS shall maintain limits no less than, for:

- A. Commercial General Liability: \$1,000,000 combined single limit per occurrence by bodily injury, personal injury, and property damage; and for those policies with aggregate limits, a \$2,000,000 aggregate limit.
- B. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage if the use of motor vehicles is contemplated.
- C. Workers' Compensation: Statutory requirements of the state of residency.
- D. Stop Gap /Employers Liability: \$1,000,000.

13.6 Minimum Limits of Insurance—Building Design and Construction Period. Prior to commencement of building design and construction and until construction is complete and approved by the WPZS, WPZS shall cause the construction contractor and related professionals to procure and maintain insurance against claims for

injuries to persons or damages to property which may arise from, or in connection with the activities related to this Agreement. WPZS and King County shall be a named as additional insureds on liability policies except Workers Compensation and Professional Liability and as Named Insureds on Builders Risk policies. The cost of such insurance shall be paid by the WPZS and/or any of the WPZS's contractors/ subcontractors. WPZS and/ shall maintain limits no less than, for:

- A. Commercial General Liability: \$1,000,000 combined single limit per occurrence for bodily injury, personal injury and property damage and \$2,000,000 in the aggregate.
- B. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage.
- C. Professional Liability, Errors & Omissions: \$1,000,000, Per Claim and in the Aggregate.
- D. Builder's Risk Insurance: One hundred percent replacement cost value.
- E. Workers Compensation: Statutory requirements of the State of residency.
- F. Stop Gap or Employers Liability Coverage: \$1,000,000.

13.7 Minimum Limits of Insurance—Services Agreements: WPZS and/or its contractors shall maintain limits no less than, for:

- A. Commercial General Liability: \$1,000,000 combined single limit per occurrence for bodily injury, personal injury and property damage and \$2,000,000 in the aggregate.
- B. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage.
- C. Professional Liability, Errors & Omissions: \$1,000,000, Per Claim and in the Aggregate.
- D. Workers Compensation: Statutory requirements of the State of Residency.
- E. Stop Gap or Employers Liability Coverage: \$1,000,000.

13.8 Deductibles and Self-Insured Retentions. Any deductibles or self-insured retentions must be declared to, and approved by, King County. The deductible and/or self-insured retention of the policies shall not apply to the WPZS's liability to King County and shall be the sole responsibility of the WPZS.

13.9 Other Insurance Provisions. The insurance policies required in this Agreement are to contain, or be endorsed to contain, the following provisions:

- A. Liability Policies. All Liability Policies except Professional and Workers Compensation.
- i. The County, its officers, officials, employees, and agents are to be covered as additional insureds as respects liability arising out of activities performed by or on behalf of the WPZS/Contractor in connection with this Agreement. Such coverage shall include Products-Completed Operations.
 - ii. To the extent of the WPZS's/Contractor's negligence, the WPZS's/Contractor's insurance coverage shall be primary insurance as respects King County, its officers, officials, employees, and agents. Any insurance and/or self-insurance maintained by King County, its officers, officials, employees, or agents shall not contribute with the WPZS's insurance or benefit the WPZS or contractor in any way.
 - iii. The WPZS's or contractors insurance shall apply separately to each insured against whom claim is made and/or lawsuit is brought, except with respect to the limits of the insurer's liability.
- B. Property Coverage Policies. King County shall be added as a Named Insured as their interests may appear to all Builders Risk policies.
- C. All Policies. Coverage shall not be suspended, voided, canceled, reduced in coverage or in limits, except by the reduction of the applicable aggregate limit by claims paid, until after forty-five (45) days prior written notice has been given to King County.

13.10 Acceptability of Insurers.

- A. Unless otherwise approved by King County, insurance is to be placed with insurers with a Bests' rating of no less than A: VIII, or, if not rated with Bests, with minimum surpluses the equivalent of Bests' surplus size VIII.
- B. Professional Liability, Errors, and Omissions insurance may be placed with insurers with a Bests' rating of B+VII. Any exception must be approved by King County.
- C. If, at any time, the foregoing policies shall fail to meet the above requirements, the WPZS shall, upon notice to that effect from King County, promptly obtain a new policy, and shall submit the same to King County, with appropriate certificates and endorsements, for approval.

- 13.11 Verification of Coverage. WPZS shall furnish King County with certificates of insurance and endorsements required by this Agreement. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. The certificates and endorsements for each insurance policy are to be on forms approved by King County prior to the commencement of activities associated with the Agreement. King County reserves

the right to require complete, certified copies of all required insurance policies at any time.

- 13.12 Subcontractors. WPZS shall include all subcontractors as insureds under its policies or shall require separate certificates of insurance and policy endorsements from each subcontractor. Insurance coverages provided by contractors/subcontractors, as evidence of compliance with the insurance requirements of this Agreement, shall be subject to all of the requirements stated herein.

14. Required King County Provisions.

- 14.1 Recycled Paper. During the performance of this Agreement, WPZS shall promote the purchase and utilization of recycled material and products where available. Recycled material means material and byproducts, which have been recovered or diverted from solid waste disposal for the purpose of recycling. It does not include those materials and byproducts generated from, and commonly reused within, an original manufacturing process. King County encourages WPZS to use recycled products when using the Zoo Proceeds under this Agreement.

14.2 Nondiscrimination.

- A. Nondiscrimination in Employment Related to the Use of Zoo Proceeds. During the performance of this Agreement, WPZS and any party subcontracting under the authority of this Agreement shall not discriminate nor tolerate harassment on the basis of race, color, sex, religion, national origin, creed, marital status, sexual orientation, gender identity or expression, age, or the presence of any sensory, mental, or physical disability in the employment or application for employment or in the administration or delivery of services or any other benefits under this Agreement. King County Code Chapter 12.16 is incorporated herein by reference, and such requirements shall apply to this Agreement.
- B. Nondiscrimination in Subcontracting Practices. During the term of this Agreement, WPZS shall not create barriers to open and fair opportunities to participate in WPZS contracts or to obtain or compete for contracts and subcontracts as sources of supplies, equipment, construction and services. In considering offers from and doing business with subcontractors and suppliers, WPZS shall not discriminate against any person on the basis of race, color, creed, religion, sex, age, nationality, marital status, sexual orientation, gender identity or expression, or the presence of any mental or physical disability in an otherwise qualified disabled person.
- C. Compliance with Laws and Regulations. WPZS shall comply fully with all applicable federal, state, and local laws, ordinances, executive orders, and regulations that prohibit discrimination. Unfair Employment Practices, King County Code Chapter 12.18 is incorporated by reference as if fully set forth herein and such requirements apply to this Agreement.

- D. Discrimination in Contracting. King County Code Chapter 12.17 is incorporated by reference as if fully set forth herein and such requirements apply to this Agreement. During the performance of this Agreement, WPZS and any party subcontracting under the authority of this Agreement shall not discriminate or engage in unfair contracting practices prohibited by KCC 12.17.
- E. Compliance with Section 504 of the Rehabilitation Act of 1973. WPZS shall complete a Disability Self-Evaluation Questionnaire prior to execution of this Agreement. The 504/ADA Disability Assurance of Compliance will cover all programs and services offered (including any services not subject to this Agreement) for compliance with Section 504 of the Rehabilitation Act of 1973, as amended ("504"), and the Americans with Disabilities Act of 1990 ("ADA"). WPZS shall complete a 504/ADA Disability Assurance of Compliance prior to execution of this Agreement. WPZS shall retain a copy of the completed 504/ADA and submit to King County the original final two (2) signed pages titled "504/ADA Disability Assurance of Compliance", which will be attached as Exhibit D to this Agreement.
- 14.3 Equal Benefits Requirement. King County's Equal Benefits (EB) Ordinance 14823 states that to be eligible for award of contracts at a cost of \$25,000.00 or more, firms must not discriminate in the provisions of employee benefits between employees with spouses, and employees with domestic partners. WPZS shall complete a Worksheet and Declaration form demonstrating compliance with Ordinance 14823, which compliance is a mandatory condition for execution of this Agreement.
- 14.4 Retention of Records, Audit Access and Proof of Compliance with Agreement.
- A. Retention of Records. WPZS and its Subcontractors shall maintain books, records and documents of its performance under this Agreement in accordance with generally accepted accounting principles. WPZS shall retain for six (6) years after the date of final payment under the Agreement all financial information, data and records relevant to the use of the Zoo Proceeds.
- B. Audit Access.
- i. State or county auditors shall have access to WPZS and its Subcontractors' records for the purpose of inspection, audit or other reasonable purposes related to this Agreement and the WPZS's use of the Zoo Proceeds; provided that, the Parties expressly agree that such information shall not include documents related to the WPZS's private fundraising activities and private donor information. State or county auditors shall have access to records and be able to copy such records during normal business hours. WPZS shall provide proper facilities for such access, inspection and copying.
 - ii. Audits may be conducted during or after the Agreement period for purposes of evaluating claims by or payments to WPZS related to this Agreement and for any other reason deemed appropriate and necessary by King County

where such reason is related to the WPZS's use of the Zoo Proceeds. Audits shall be conducted in accordance with generally accepted auditing principles and/or state or county audit procedures, laws or regulations. WPZS shall fully cooperate with the auditor(s).

- iii. If an audit is commenced more than sixty (60) days after the date of final payment under this Agreement, King County shall give reasonable notice to WPZS of the date on which the audit shall begin.

C. Proof of Compliance with Agreement.

- i. WPZS shall, upon request, provide King County with satisfactory documentation of compliance with the Agreement.
- ii. In addition, WPZS shall permit King County, or a duly authorized representative, to inspect all services, materials, payrolls (except for personally identifying information) and other data and records directly related to WPZS's compliance with the Agreement.

- 14.5 Public Records Requests. The Agreement shall be considered a public document and, with exceptions provided under public disclosure laws, shall be available for inspection and copying by the public as required by chapter 42.56 Revised Code of Washington.

If WPZS considers any items related to use of the Zoo Proceeds or to this Agreement, including Software, data and related materials, delivered to King County to be protected under the law, WPZS shall clearly identify such items with words such as "CONFIDENTIAL," "PROPRIETARY" or "BUSINESS SECRET." If a request is made for disclosure of such item, King County shall determine whether the material should be made available under the law. If the material or parts thereof are determined by King County to be exempt from public disclosure, King County will not release the exempted documents. If the material is not exempt from public disclosure law, King County shall notify WPZS of the request and allow WPZS ten (10) Business Days to take whatever action it deems necessary to protect WPZS's interests. If WPZS fails or neglects to take such action within said period, King County shall release the item deemed subject to disclosure. By signing this Agreement, WPZS assents to the procedure outlined in this subsection and shall have no claim against King County on account of actions taken under such procedure.

- 14.6 Internal Control and Accounting System and Audit. The WPZS shall establish and maintain a system of accounting and internal controls that comply with applicable, generally accepted accounting principles, financial and governmental reporting standards as prescribed by the appropriate accounting standards board. WPZS shall have an independent annual financial audit completed annually. WPZS shall provide King County with a copy of the annual audit.

15. Survival of Indemnities. Termination of this Agreement shall not affect the right of either party to enforce any and all Indemnities and representations and warranties given or made to the other party under this Agreement, nor shall it affect any provision of this Agreement that expressly states it shall survive termination hereof.

16. Exhibits.

- A (Zoo Premises)
- B (Management Agreement)
- C (WPZS Bylaws)
- D (King County required Exhibits)

DATED this 7th day of May, 2014.

KING COUNTY, a Washington municipal corporation

By 

Its Director

By authority of Ordinance No. 17568

WOODLAND PARK ZOOLOGICAL SOCIETY, a Washington non-profit corporation

By 

Its President / CEO

Exhibit A (Description of Zoo Premises)

Main Zoo Property:

Beginning at a point which is 30 feet north of and 280 feet east of the Southwest corner of block 69, Plat of Woodland Park Addition to the City of Seattle, Washington, Vol. 3, page 123 of plats, said southwest corner of block 69 is identical with the southwest corner of the north half of the southwest quarter of said section 7, township 25 North, R. 4 E. W.M. Said True Point of Beginning is the intersection of the east line of Phinney Avenue North, with the north line of North 50th Street;

Thence north along the east line of said Phinney Avenue North, to the intersection of the south line of North 59th Street;

Thence east along said south line of North 59th Street to the west margin of Aurora Avenue;

Thence south along said west margin of Aurora Avenue North to the north margin of North 50th Street;

Thence west along said north margin of North 50th Street to the True Point of Beginning.

Said parcel containing 90.7 acres more or less.

Offsite Property:

NE 1/4 LY N OF RIVER LESS CO RDS SUBJECT TO DEED OF AND AGREEMENT
RELATING TO DEVELOPMENT RIGHTS RECORDED UNDER 8608261178

Located at 22327 Southeast 464th Street in Enumclaw, Washington.

Exhibit B (Management Agreement)

Exhibit C (WPZS Bylaws)

WPZS Bylaws

Exhibit D (King County Exhibits)

**504/ADA Disability Assurance of Compliance
Equal Benefits Worksheet and Declaration**