75204-9

No. 75204-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION I

The CITY OF SEATTLE, DOCOMOMO US – WEWA, HISTORIC SEATTLE, WASHINGTON TRUST FOR HISTORIC PRESERVATION,

Appellants,

v.

The UNIVERSITY OF WASHINGTON,

Respondent.

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# BRIEF OF RESPONDENT

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## I. INTRODUCTION AND SUMMARY

This case presents the issue of who ultimately controls the use of the University of Washington campus: the University Board of Regents or the Seattle City Council. The issue is of fundamental importance to the University's ability to carry out its educational mission. The Board of Regents, the University's governing body, must consider and balance all competing considerations, including historic values, when deciding the use of the campus. In contrast, the City seeks to apply to the campus its Landmarks Preservation Ordinance ("LPO"), which makes historic preservation paramount to all competing considerations in all situations, as to any building or site listed or nominated as landmarks (i.e., any building or site that is more than 25 years old) in accordance with its provisions.

In 1980 the State Supreme Court decided *State v. Seattle* and rejected the City's prior attempt to apply the LPO to University property in the Metropolitan Tract – a ruling that, both as a matter of law and as a matter of common sense, applies *a fortiori* to the campus. The City argues that the Legislature later subordinated the Regents' statutory authority to the City Council – not to the Governor, nor to any state agency, but to the City Council – without so much as a whisper in the legislative history of an intent or reason to do so.

Since Territorial days the Legislature has maintained the independence of the Board of Regents and given it broad authority to decide the best use of University property. The City cannot demonstrate that the Legislature changed this fundamental policy of the State after *State v. Seattle*. The Legislature has never subordinated the Board of Regents' specific authority to decide the best use of the campus to the City Council's general authority to regulate development in the City.

The trial court decided this case on narrow grounds, ruling that the LPO does not apply to the University based on the LPO's plain language. The record supports multiple additional grounds for affirming the trial court, and the University asks this Court to affirm the trial court on all such grounds in order to resolve the issue of the Legislature's intent with regard to the Regent's authority over the University campus.

This Brief begins by explaining the factual circumstances that led to this lawsuit. It then argues that the LPO does not, and could not, apply to the University. As the trial court correctly ruled, the plain terms of the LPO do not apply to the University because it is not a "corporation"—unlike counties, cities, school districts, and many other municipal corporations. Even if the LPO did purport to govern the University, the City lacks jurisdiction for several reasons. First, courts resolve competing claims of jurisdiction by reference to legislative intent, and the Legislature

clearly intends for the Board of Regents to govern the University. Next, contrary to the City's argument, the GMA does not compel the University to submit to the LPO for at least three reasons: (1) the LPO is not a "development regulation adopted pursuant" to the GMA; (2) the general rule of the Growth Management Act ("GMA") does not implicitly amend the Legislature's prior specific grant of authority to the Regents; and (3) Section 103 of the GMA does not apply to state institutions of higher education, which the Legislature routinely treats as separate from "state agencies."

## II. COUNTERSTATEMENT OF THE ISSUES

1. The LPO governs only property owned by "an individual, partnership, corporation, group or association." The University is a state institution of higher education, not a corporation. Does the LPO apply to the University? **No.**

2. Where two subunits of government each claim jurisdiction, courts look to the Legislature's intent for each government. The City of Seattle is a general purpose government with no focus on education, while for over 150 years the Board of Regents has governed the University of Washington for the sole purpose of education. Did the Legislature intend for the Board of Regents to determine how best to use the campus to meet the state's educational needs? **Yes.**

3. Absent a contrary expression of Legislative intent, the GMA requires state agencies to comply with local development regulations. The University enjoys a prior specific grant of authority not amended by the general GMA, the University is not a "state agency" as that term is used in the GMA, and the City's LPO is not a "development regulation adopted pursuant to" the GMA. Is the University subject to the LPO? **No.**

## III. STATEMENT OF THE CASE

The University of Washington brought a facial challenge to the applicability of the LPO to the University of Washington campus. The underlying disagreement about the City's authority to apply the LPO to the campus has persisted for decades. Nevertheless, this litigation arose in the context of a single project: the University's new Computer Science and Engineering Building, or "CSE II." Even though the trial court's ruling resolved the specific permitting dispute affecting the CSE II project, it project provides a helpful, real-world example of the consequences that would follow if the LPO were to apply to the campus.

After painstaking study and environmental review, and after full consideration of all relevant issues including historic values, the Board of Regents made the decision to make way for the urgently needed CSE II building by demolishing the University's former nuclear reactor building, More Hall Annex (the "Annex"), which had been listed on the National Register of Historic Places.[1] The Annex was a vacant structure for which the University has had no use since the cancellation of the nuclear

[1] A National Register listing is essentially honorary in that it does not impose controls on the use or demolition of a building unless federal funds or permits are involved in the project in question. *See* C.F.R. § 60.2.

engineering program in 1992.[2] The LPO, if it applied, would have precluded the Regents' decision because, as to buildings or sites nominated for landmark status, the LPO prohibits any decision-maker – not just the Regents, but also the City Council – from considering whether other values, including the educational needs of the State, may be more important than historic preservation in a given situation.

Most of the campus is more than 25 years old and therefore eligible for nomination as a City landmark. *See* CP 250, 253.

### A. The CSE II building illustrates how the Board of Regents evaluates competing interests.

The siting of the CSE II building illustrates the thorough process the Regents employ to decide what to build and what to preserve on the University campus. The University's Computer Science and Engineering Program is one of the top five in the country, and is in urgent need of additional space to meet student and employer demand. CP 228, 233-34. CSE's current home, the Paul G. Allen Center ("Allen Center"), has no classrooms or lecture halls, and is far too small to accommodate the qualified students who apply to the program or the State economy's need for the program's graduates. *See* CP 233.

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[2] After the trial court's decision in April 2016, the City appealed but did not seek a stay. The City issued a demolition permit in July 2016, and the University then demolished the Annex. This case is a facial challenge to the applicability of the City's LPO to the University campus, and the City's appeal seeks to reapply the LPO to the campus, so demolition of the building that gave rise to the litigation does not moot the appeal.

To site the new CSE II building, the University first convened an advisory committee to review 25 potential campus development sites. *See* CP 268. This study concluded that two sites, identified in the Campus Master Plan[3] as 16C and 14C, met the goals for CSE II well enough to merit further study. *See id.* Site 16C, the preferred location for the CSE program due to its proximity to the Allen Center, was the site of the University's long-vacant Annex. *See* CP 268-69; 280-353; 585.

For any proposed project that affects a structure more than 50 years old, University staff provides the Regents with extensive documentation of historic resources. The University prepares a Historic Resources Addendum that describes in detail the historic merit of the structure. CP 276.[4] The University first prepared an Historic Resources Addendum for the Annex in 2008, *see* CP 286, after the Legislature appropriated funds in 2006 for its demolition, *see id.*; CP 222-23.

For projects on the campus, the University is the lead agency for purpose of review under the State Environmental Policy Act ("SEPA"). *See* Ch. 478-324 WAC. The University's Supplemental Environmental

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[3] The University and the City jointly developed the current Campus Master Plan after significant public participation and approval of both the Regents and the City Council. *See* CP 266, 271-72.

[4] The University also prepares an Architectural Opportunities Report for its internal process, which involves review and advice of "the Site Programming Committee, the Campus Landscape Advisory Committee, the Architectural Commission, the Provost and/or the Executive Vice President and the Board of Regents." *See* CP 276.

Impact Statement for the CSE II project studied historic and cultural preservation as one element of the environment that could be significantly affected by the project, and included an updated Historic Resources Addendum as Appendix B. *See* CP 199, 268-69, 280-353, 585-86.

The Draft Supplemental Environmental Impact Statement analyzed five alternatives and examined the impacts of each on historic resources. *See* CP 424-26, 586. Due to the importance of proximity to the Allen Center, Site 16C became the preferred alternative. The University received public comment on the Draft Supplemental Environmental Impact Statement and updated Historic Resources Addendum. *See* CP 269. The City did not comment. *See* CP 269, 586. The University responded to the public comments and issued the Final Supplemental Environmental Impact Statement in January 2016. *Id.* The University's study of environmental impacts, including impacts to historic resources, was not appealed and thus became adequate as a matter of law. *See id.* at 586.

University staff prepared, for the Regents' consideration, materials that identified and evaluated competing considerations for siting the CSE II building. *See* CP 221-22, 250. These materials included an "Explanation from the Department" authored by Hank Levy, the Chairman of the CSE Department, and by Ed Lazowska, the holder of the Bill &

Melinda Gates Chair in Computer Sciences, which summarized the reasons why selecting site 16C was essential to the future of the CSE program. *See* CP 226-48. Based on all the relevant considerations, the University's Administration advised the Regents:

> [T]he adverse impact to historic resources that will result from demolition of the Annex is substantially outweighed by the programmatic needs of the CSE Department, which are important not only [to] the Department but to the University as a whole and to the region and the State, and which can only be met by the Preferred Alternative.

CP 236. The recommendation of the Administration included, as mitigation, preparation of a virtual reality tour of the inside and outside of the Annex to be made available to the public on the Internet, as well as more traditional documentation of the structure. *Id.*

In 2015, the State Legislature had appropriated $32.5 million for construction of the CSE II building. *See* CP 223. The University has also raised millions of dollars in private donations from individuals and corporations that recognize the importance of the CSE program, beginning with a $10 million donation from Microsoft. *Id.*

On February 11, 2016, the Regents voted unanimously to demolish the Annex, and to site the CSE II building on Site 16C. *See* CP 222. This unappealed decision became final as a matter of law. *See* CP 586.

## B. The City's Landmarks Preservation Ordinance requires preservation of structures deemed to be historic, regardless of non-historic considerations.

Adopted by the City Council in 1977, the LPO sets forth a process by which any "object, site or improvement" that is more than 25 years old, in good condition, and important in one of six enumerated ways, may be designated as a landmark. SMC 25.12.350. For any structure or site that meets the criteria, the process prescribed by the LPO results in the City Council adopting an ordinance imposing controls that specify what can and cannot be done to the landmark. Before altering a landmark, the owner must obtain a project-level permit, called a Certificate of Approval, from the Landmarks Board. SMC 25.12.670, .750.

Any person may nominate a structure or site at any time, but when an application for a permit is submitted to the City's permitting department that would affect a structure that "appear[s] to meet criteria" for designation, the City itself nominates the structure before processing the application. SMC 25.12.370. The Landmarks Preservation Board ("Landmarks Board"), comprised of eleven volunteers who "shall have a demonstrated sympathy with the purposes of" the LPO, SMC 25.12.270, considers the nomination. The *only* non-historical consideration that the Landmarks Board may consider is the constitutional limitation that application of the LPO not "deprive any owner of a site, improvement or

object of a reasonable economic use of such site, improvement or object." SMC 25.12.580. None of the exclusive factors to be considered in determining the "reasonable economic use" on a site, SMC 25.12.590, have any meaningful applicability to the University's Campus. *See* CP 223-24. Thus, the LPO would allow *only* historic values to be considered if the LPO applied to the campus.

Once the Landmarks Board accepts a nomination, no changes can be made without a Certificate of Approval from the Landmarks Board. *See* SMC 25.12.670, .835. The LPO process has no outer time limit, and if an owner is dissatisfied with the controls recommended by the Landmarks Board, the owner must appeal to the Hearing Examiner, and if that appeal is unsuccessful, to the City Council. SMC 25.12.535, .620. As a practical matter, designation of a structure results in controls that require preservation of the structure's historical elements, which often includes a building's entire exterior, and can include portions of its interior.

### C. For 150 years, the Legislature has vested plenary authority in the Board of Regents to manage University property.

The thoughtful blending of new and old that marks the University's campus is the result of over a century of uninterrupted, careful stewardship by the Board of Regents. The Regents' authority over University property began when the Territorial Legislature created the

University in 1861, CP 278, and vested control of the University "in the board of regents," not in the Territorial Legislature or Governor. *See* CP 358. The Legislature maintained the Regents' independence after statehood, and has continued to do so through today. This independence was memorably demonstrated in the 1920s when the Board of Regents blocked Governor Hartley's efforts to remove University President Henry Suzzallo. Ultimately, the Governor replaced the majority of Regents with the Governor's supporters in order to achieve his objective – without this maneuvering, not even the Governor had authority to overrule the Regents' governance of the University. *See* CP 399.

In 1895, the University moved to its current campus, but the Regents retained control over the original downtown site, the Metropolitan Tract. *See* CP 397; *State v. Seattle*, 94 Wn.2d 162, 166, 615 P.2d 461 (1980). Less than a year after the City's adoption of the LPO in 1977, the new Landmarks Preservation Board accepted the nomination of a Metropolitan Tract structure – the Skinner Building. 94 Wn.2d at 164. The University challenged the City's application of the LPO to the Metropolitan Tract even though the University had no plans to demolish the Skinner Building (it still stands today, as thousands of 5th Avenue Theatre patrons can attest). *See id.* The Washington State Supreme Court agreed with the University that the City "has no power to nominate or

designate any buildings as landmarks within the University's Metropolitan Tract" and that "[t]he legislature has clearly shown its intent that the decision-making power as to preservation or destruction of Tract buildings rests with the Board of Regents." *Id.* at 166.

In 1999 (after the adoption of the GMA), the Legislature consolidated the Regents' statutory authority over University property and stated its intent that the amendments not diminish the Regents' authority over either the campus or the Metropolitan Tract:

> The purpose of this act is to consolidate the statutes authorizing the board of regents of the University of Washington to control the property of the university. *Nothing in this act may be construed to diminish in any way the powers of the board of regents to control its property* including, but not limited to, the powers now or previously set forth in RCW 28B.20.392 through 28B.20.398.

*See* CP 408 (Laws of 1999, ch. 346, § 1) (emphasis added).

### D. The Legislature adopts the Growth Management Act and the City accordingly amends its land use code, but not the LPO.

In 1990, the Legislature enacted the Growth Management Act ("GMA"), a law that requires local governments to plan for growth within each government's jurisdiction, and then adopt development regulations (e.g., zoning) consistent with those plans. One year later, the Legislature amended the GMA to provide that "state agencies" must comply with "local development regulations adopted *pursuant*" to the GMA. *See* Laws

of 1991, ch. 32, § 4, codified at RCW 36.70A.103 (emphasis added). Local governments could "adopt" their existing development regulations "pursuant" to the GMA, which the City of Seattle did with respect to its land use and building codes, but not the LPO, in a 1994 Ordinance:

> AN ORDINANCE relating to land use and zoning and the building code; implementing The City of Seattle's Comprehensive Plan; complying with RCW 36.70A.040; *amending Title 23* of the Seattle Municipal Code and Section 303 of the Seattle Building Code.

*See* CP 470-71 (first and last pages of Ord. No. 117430) (emphasis added). The LPO is, and always has been, codified in Title 25 (entitled "Environmental Protection and Historic Preservation"), not Title 23 (entitled "Land Use Code"). In the 1994 Ordinance No. 117430, the City Council declared that "the new and amendatory regulations adopted by this ordinance . . . bring the City's development regulations into compliance with RCW 36.70A.040 . . . ." CP 470 (Ord. No. 117430 § 1). Following that section are nearly 100 pages of amendments to Title 23 SMC and no changes to Title 25.

### E. DOCOMOMO US-WEWA's nomination of the Annex for designation as a City landmark prompted this lawsuit.

Both the University and the City operated in accordance with the *State v. Seattle*, *supra*, ruling for 35 years, including 24 years after enactment of Section 103 of the GMA. As a result, even though most of the structures and spaces on campus are old enough to merit nomination

under the LPO, not a single campus structure or space has been designated a City landmark. *See* CP 250, 253. This détente continued until DOCOMOMO US-WEWA nominated the Annex as a City landmark in December 2015. *See* CP 432. Had the trial court's ruling not intervened and had the Landmarks Board accepted the nomination, the Regents' unappealed decision to build CSE II would have been stayed during the City's LPO process. The LPO does not allow City decision-makers (the Landmarks Board, the Hearing Examiner, and the City Council) to consider any factors other than the historic merits of structures or sites on the campus, and the Annex was listed on the National Register of Historic Places, so the process would have resulted in the Annex's designation as a City landmark.

In this action, the University brought a facial challenge to the LPO and did not ask the trial court to make a ruling on the Annex. But the trial court's ruling nonetheless had the effect of upholding the Regents' unappealed decision about what was in the best interest of the University's educational mission in the crucially important field of computer sciences, a decision the Regents made after considering all competing factors including the historic merits of the Annex and the present and future need to educate students in Computer Science and Engineering.

## IV. ARGUMENT

For over 150 years, the Board of Regents has exercised the authority vested in it by the Legislature to govern University property. As the Territorial Legislature recognized when it created the Board of Regents, and as the State Legislature has continuously recognized since, the University's independence is critical to the its mission to deliver world-class educational programs within a limited physical space.

The Board of Regent's responsibility to educate the State's citizens requires it to make difficult and potentially controversial decisions regarding which campus buildings to preserve and which to remove to make way for facilities needed to serve present and future generations of students. Difficult decisions and trade-offs are often necessary. University facilities must be near enough to one another not only in order for students to be able to walk from one classroom to the next between classes, but, more importantly, because physical adjacencies foster critical research and educational collaboration among faculty, staff and students.[5] The Board of Regents is in the best position to decide how this limited resource – the campus – should be used. This case goes to the heart of the University's governance, and asks the Court to decide whether the Legislature intends for the Board of Regents to continue to govern the

[5] *See* Explanation from the Department, CP 226-48.

University in the best interests of the State as it has done since Territorial days, or whether the Legislature implicitly and silently in 1991, when it enacted RCW 36.70A.103, granted the City Council the authority to veto Regent decisions about the campus by deciding that one City value – historic preservation – can trump all competing values and considerations of the State University for which the Regents are responsible.

The City's Brief paints a picture of rogue Regents laying waste to forests and marshes in single-minded pursuit of uncontrolled development. Despite the City's hyperbole, the Regents do not assert that the City or any other local government lacks jurisdiction to mitigate offsite impacts, protect the environment, or enforce building and other codes that protect the public health and safety. This case is solely about the Legislature's intent with regard to the use of the campus, and whether the Legislature silently, and without expressing any intent to do so, gave to the City the authority to veto Regents' decisions about use of the campus and require that historic preservation be given priority over all other considerations.

This section begins by explaining why the trial court correctly ruled that the plain language of the LPO does not apply to the University. Affirming solely on the basis of this ruling carries the risk of wasting judicial resources because the City could amend the LPO in an attempt to regulate the University, necessitating future litigation on the more

fundamental jurisdictional questions. These questions are fully briefed here and were argued to the trial court, and because this Court may affirm the trial court on any grounds supported by the record, the Court should also decide them. For all the reasons discussed in Sections IV.A – D below, the City's application of the LPO to the University campus conflicts with State law and therefore violates Article XI, section 11 of the Washington State Constitution, which prohibits the City from making and enforcing regulations that are "in conflict with general laws."

### A. The LPO, by its terms, does not regulate state institutions of higher education.

The LPO's unambiguous language excludes entities such as the University from its coverage, and the City has established no contrary Council intent. The LPO grants procedural rights to – and is clearly intended to apply to property held by – an "owner," which it defines to include *only* an "individual, partnership, corporation, group or association." SMC 25.12.220 (defining "person"), .200 (defining "owner" as a "person"). Although the City argues that the University is a "corporation," City's Br. at 24-29, as the trial court correctly ruled, the University is none of these things.

In Washington State, a "corporation" is an entity declared in law to be a "corporation." For example, private entities organized under RCW

Titles 23 ("Corporations and Associations (Profit)"), 23B (Washington Business Corporation Act), and 24 ("Corporations and Associations (Nonprofit)") are all forms of "corporations." *See* CP 531-33. Many governmental entities, such as cities, counties, and school districts, are declared by law to be municipal corporations. In *every* example cited by the City, the State enabling legislation at least includes the word "corporate" or "corporation" when describing the government entity.[6]

By contrast, the enabling legislation for the state's institutions of higher education, including the University, does not include "corporation" or "body corporate." *See* Chs. 28B.20, .30, .35, & .40 RCW. The

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[6] *See* RCW 36.01.010 ("The several counties in this state shall have capacity as bodies corporate . . ."); RCW 35.23.440 ("The city council of each second-class city shall have power and authority: . . . for the execution of the powers vested in said body corporate . . ."); RCW 35.22.280 (giving first class cities authority over the city as a "corporation" with "corporate limits" and "corporate purpose"); RCW 28A.320.010 ("A school district shall constitute a body corporate and shall possess all the usual powers of a public corporation . . . ."); RCW 35.57.010(5) ("A public facilities district constitutes a body corporate and possesses all the usual powers of a corporation for public purposes . . ."); RCW 36.54.110 ("A ferry district is a body corporate and possesses all the usual powers of a corporation for public purposes . . ."); RCW 52.12.011 ("Fire protection districts . . . shall be held to be municipal corporations . . ."); RCW 68.52.190 ("Cemetery districts . . . shall be deemed to be municipal corporations"); RCW 86.09.148 ("A flood district . . . shall constitute a body corporate and shall possess all the usual powers of a corporation for public purposes); RCW 89.08.220 ("A conservation district . . . shall constitute . . . a public body corporate"); RCW 89.30.127 ("A reclamation district . . . shall constitute a body corporate and shall possess all the usual powers of a corporation for public purposes"); RCW 28B.07.030 ("The Washington higher education facilities is hereby established as a public body corporate and politic, with perpetual corporate succession, constituting an agency of the state . . . "); RCW 35.82.070 ("An authority shall constitute a public body corporate and politic . . ."); RCW 70.95N.280 ("The Washington materials management and financing authority is established as a public body corporate and politic . . ."); RCW 9.94A.745 ("The interstate commission shall be a body corporate . . ."); RCW 28A.705.010 ("The interstate commission shall: A. Be a body corporate . . ."); RCW 28B.70.020 ("Said Commission shall be a body corporate . . ."); RCW 43.180.040 ("There is hereby established a public body corporate . . .").

difference between corporations and state institutions is also embodied in the Washington State Constitution. Article XI, section 10 addresses the formation of municipal corporations, and Article XII, section 1 addresses corporations other than municipal. In contrast to these sections dealing with corporations, Article XIII, section 1 addresses state institutions, including educational institutions and referencing "regents," which the Constitution does *not* describe as corporations.

Had the City Council intended for the LPO to apply to the University, it could have said so; the City Council knows how to address the University in its Code. For example, SMC 23.69.006 distinguishes major institutions (i.e., hospitals and universities) regulated by Chapter 23.69 SMC, from the University, regulated by a separate City-University Agreement. In addition, where the Council intends an ordinance to apply to non-corporate governmental entities, it routinely provides a broader definition of "person."[7] Yet, the LPO does not mention the University, governmental entities, or any state institution of higher education.

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[7] *See, e.g.*, SMC 4.16.030 (the City's Ethic's Code defines "person" as "an individual, association, corporation, **or other legal entity**." (emphasis added)); SMC 21.36.014(18) (the City's Solid Waste Code defines "person" as "any governmental entity, or any public or private corporation, partnership or other form of association, as well as any individual"); SMC 6.295.040(I) (""Person"" includes any natural person and, in addition, a company, corporation, partnership, governmental entity non-profit group or unincorporated association"); SMC 10.52.010(G) ("'Person' means any individual, partnership, corporation, trust, unincorporated or incorporated association, marital community, joint venture, governmental entity, or other entity or group of persons however organized"); SMC 6.270.030(K) ("'Person' means any individual, partnership,

Similarly, the Council's intent not to regulate the University is further demonstrated by its decision to draft the LPO's "relief valve," designed to prevent undue harm from the LPO's application, in a way that cannot apply to University property. The relief valve avoids an inverse condemnation by deprivation of "economically viable use." *See* SMC 25.12.580. It does not apply to campus buildings, which are not susceptible to the type of economic analysis specified at SMC 25.12.590, such as the "market value" of property the University will never sell, the "yearly net return" of property the University does not rent out, or "net return and the rate of return" on property that does not generate revenue. *See* CP 223-24. Had the City Council contemplated applying the LPO to the campus, it would have designed the relief valve to apply to campus.

The City argues that the University is a corporation, and thus an entity to which the Council intended the LPO to apply, based on broad and inapplicable dictionary definitions, the title of an 1862 act that is inconsistent with the body of that act, an argument that the City's legislative intent can be discerned from City staff's desire to regulate University structures, and case law from other states. *See* City's Br. at 24-29. None of the City's arguments is availing.

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corporation, trust, incorporated or unincorporated association, marital community, joint venture, governmental entity, or other entity or group of persons however organized"); SMC 22.903.020(K) ("'Person' means a natural person, corporation, partnership, limited partnership, trust, governmental subdivision or agency, or other legal entity.").

Accepting the definitions advanced by the City, City's Br. at 26-27 would lead to absurd results. First, they are so broad they would include the state and federal government even though neither are corporations as that term is commonly understood.[8] In addition, the City's definitions would functionally insert the term "corporation" into the University's enabling legislation when the legislature specifically intended not to include it. This specific intent is demonstrated by the fact that one chapter of Title 28B RCW *does* create a municipal corporation: The Higher Education Facilities Authority, created "as a public body corporate and politic, with perpetual corporate succession." RCW 28B.07.030. The Court should not adopt a definition that presumes that the Legislature meant to include the word "corporate" in four other chapters of Title 28B RCW but did not, even though it managed to in a fifth chapter.

The University is, and always has been, a state institution of higher education – not a corporation. The City relies upon the title of the 1862 territorial statute that references "incorporating" the University to argue that the University is therefore a "corporation," but the City misreads both that statute and the *Hewitt* case interpreting it. Titles of statutes are not

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[8] *See Gore v. City of Tacoma*, 184 Wn.2d 30, 42, 357 P.3d 625 (2015) (stating that dictionary definitions are an appropriate source for "interpretative guidance" so long as they provide a definition "consistent with legislative intent."); *Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2003, 182 L.Ed.2d 903, 80 USLW 4375 (2012) ("That a [dictionary] definition is broad enough to encompass one sense of a word does not establish that the word is ordinarily understood in that sense").

controlling in statutory interpretation and are not considered where a statute is plain and unambiguous.[9] This is particularly the case where, as here, the reading of the title advanced by the City contradicts the body of the statute. If the 1862 statute created any corporation (and it did not), it was the Board of Regents, not the University. *See* CP 358; *accord State v. Hewitt Land Co.*, 74 Wash. 573, 584, 134 P. 474 (1913). *Hewitt* in fact concluded that the Board of Regents did not hold property as a corporation did. *Id.* at 583-85. *Hewitt* and the plain language of Chapter 28B.20 RCW establish that the Board of Regents is not a corporation, but no reasonable reading of the statute supports the notion that the Legislature conceived of the University as a corporation.[10]

*Hewitt* also establishes that neither the University nor the Board of Regents are corporations – the opposite of the proposition the City attributes to *Hewitt*. *See* City's Br. at 24 n.72. In fact, *Hewitt* held that because the University did *not* hold its lands as a corporation would, the state lands commission could sell University lands just as it could any of

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[9] *See, e.g.*, *City of Spokane v. State*, 198 Wash. 682, 690, 89 P.2d 826 (1939) ("the scope and intent of a statute is not controlled by the name given to it by way of designation or description").

[10] Even if the Territorial legislature did think of the University as a corporation prior to statehood, the adoption of the state constitution specifically addressing educational institutions separate from corporations strongly suggests the state abandoned the concept.

the state's excess property.[11] 74 Wash. 573 at 578, 580-81. The court relied in part on a 1910 *State v. Seattle* case, in which the City's attempt to establish an alley through the Metropolitan Tract failed chiefly because adverse possession cannot run against state land. *Id.* at 583-84 (citing *State v. City of Seattle*, 57 Wash. 602, 615, 107 P. 827 (1910)). Discussing that case in *Hewitt*, the court wrote:

> Now, if the board [of Regents] had been a corporate body within the meaning of the act creating it and holding the land as a corporate entity, no rule of law that we know of would have defeated the contentions of the city.

*Hewitt*, 74 Wash. at 584. In other words, had the University been a "corporation," the City would have won the *State v. Seattle* case discussed in *Hewitt*. Instead, the City lost, and the Skinner Building – the very structure the City would attempt to designate as a historic landmark in 1979, prompting the 1980 *State v. Seattle* case – now stands where in 1910 the City wanted an alley. *See State v. Seattle*, 94 Wn.2d at 167.

The City asks the Court to defer to staff's interpretation of the LPO as evidence of Council intent. City's Br. at 28-29 & n.88. "But where a statute is unambiguous, [courts] determine legislative intent from the language of the statute itself, not an administrative agency's contrary interpretation." *Pierce Cnty. v. State*, 144 Wn. App. 783, 853–54, 185

[11] The Board's inability to sell real property is a historical relic, because legislation adopted after 1913 authorized the Regents to dispose of University property. *See* RCW 28B.20.130(7), 395(2).

P.3d 594 (2008). The trial court correctly ruled the LPO was not ambiguous, and the interpretation of City staff is contrary to the LPO's plain language excluding the University. [12]

Finally, the City argues that because some other states treat their universities and colleges as "corporations," this Court should treat *this* state's institutions of higher education the same way. City's Br. at 25-26. Case law from other states is hardly uniform on this question, however. *See, e.g., Texas A&M-Kingsville v. Lawson*, 127 S.W.3d 866 (2004) (attorney's fee provision of civil code did not apply to University because it was not a corporation or an individual); *Krasney v. Curators of the University of Missouri*, 765 S.W.2d 646 (1989) (statute that applied to corporations did not apply to the University because it was a *municipal* corporation).

Further, the authority cited by the City suggests that courts have treated universities as corporations when doing so allows those institutions to function independently from government. *See, e.g., Dreps v. Bd. of Regents of Univ. of Idaho*, 139 P.2d 467, 473 (Id. 1943). The City, having castigated the trial court for relying on out-of-state authority for the proposition that universities are important, City's Br. at 23, argues that this

[12] The City points out that the University has twice allowed its property to be nominated, but in both cases the University asserted its position that the LPO did not apply. City's Br. at 7 (citing CP 176-78).

Court should import certain other states' conceptions of university governance without analysis of any historical, constitutional, or statutory differences. Under Washington law, the University is not a corporation.

The City has made no showing that the City Council intended the LPO to regulate the University. The University was not created as a corporation and it is not a corporation today. The LPO, by its terms, does not govern the University. Although this fact suffices to resolve this case, the Court should also affirm the trial court on the alternative grounds supported by the record. The rest of this brief addresses these grounds and demonstrates that the Legislature intends for the Regents to govern the University, and has never granted the City the authority to overrule the Regents' decisions about the use of the University campus.

### B. The Legislature has always intended for the Board of Regents, not the City, to decide how to develop the campus in order to carry out the University's educational mission.

The issue of the City Council's authority over the Board of Regents is one of legislative intent, as it is whenever there is a dispute between a "host subunit of government" and an "intruding subunit of government," and the courts must determine which entity's authority is paramount. *City of Everett v. Snohomish Cnty.*, 112 Wn.2d 433, 440-41, 772 P.2d 992 (1989) (rejecting four other types of analysis in favor of analysis of legislative intent); *see also Edmonds Sch. Dist. No. 15 v. City*

*of Mountlake Terrace*, 77 Wn.2d 609, 614-15, 465 P.2d 177 (1970) (requiring school district to comply with city building code, but affirming the school district's authority to carry out "the will of the sovereign state as to all matters involved in the educational processes and in the conduct, operation and management of the schools"). This legislative intent is found in the enabling statutes for each governmental entity, *Everett v. Snohomish Cnty.*, 112 Wn.2d at 441; in the purpose and mission of each entity, *Edmonds Sch. Dist.*, 77 Wn.2d at 611-12; and, where specific projects are concerned, in legislative appropriations, *Snohomish Cnty. v. State*, 97 Wn.2d 646, 650, 648 P.2d 430 (1982).

All three considerations weigh in favor of the Regents' control of the campus. First, the enabling statute for the Board of Regents specifies that it exercises "full control" over the University and its property, except as otherwise provided by law. RCW 28B.20.130. Some version of this statement has existed since the statutory formation of the University in 1862 (after the University opened its doors in 1861). *See* CP 218-20. Since 1957, the Legislature also has empowered the Regents "to provide for the construction, completion, reconstruction, remodeling, rehabilitation and improvement of buildings and facilities authorized by the legislature for the use of the university." *See* CP 385-90 (Laws of 1957, ch. 254 § 1);

RCW 28B.20.700. By contrast, the Legislature has never delegated to the City of Seattle any express authority over the University campus.

Second, the University's mission is set forth in Title 28B.20 RCW:

> The aim and purpose of the University of Washington shall be to provide a liberal education in literature, science, art, law, medicine, military science and such other fields as may be established therein from time to time by the board of regents or by law.

RCW 28B.20.020; *accord* CP 362 (1892 legislation providing that the purpose of the University "shall be to provide the best and most efficient means of imparting to young men and women on equal terms a liberal education . . ."). The City of Seattle, by contrast, is a general purpose government with no particular focus on education.

Third, the Legislature has appropriated funds both to demolish the Annex and to construct CSE II in its place. *See* CP 222-23. These appropriations, and similar appropriations for other campus buildings, directly contradict the notion that the Legislature intended to give the City the power to designate the Annex, or any other building or site on campus, as a landmark, and thus thwart the Legislature's own appropriations.

In short, since the 1860s the Legislature has assigned to the Regents the authority to decide how to fulfill the University's educational mission, which necessarily includes the authority to decide what facilities are needed on the campus and where on campus they should be sited. The

Legislature has never expressed any intent to give the City Council a veto over the Regents' decisions.

### C. Section 103 of the GMA does not implicitly amend Chapter 28B.20 RCW.

The City's argument attempts to combine the effects of two different statutes, one of which has nothing to do with the City's authority over the University campus, and the other of which is a general law that expresses no intent to overrule the specific authority granted to the Regents in Chapter 28B.20 RCW, recognized by the Supreme Court in the 1980 *State v. Seattle* case, *supra*, and re-affirmed by the Legislature in 1999, *see* CP 408 (Laws of 1999, ch. 346, § 1). For the many reasons discussed below, the unrelated and general statutes relied on by the City do not overrule the Regents' specific statutory authority to decide what use of the campus is in the best interests of the University. The LPO must yield, under Article XI, section 11 of the Washington State Constitution, to the specific authority granted to the Board of Regents by the Legislature in Chapter 28B.20 RCW.

### 1. When the Legislature enacted the 1985 statute creating the HEC board, which added the phrase "except as otherwise provided by law," it did not intend to limit the Regents' authority in any way relevant to this litigation.

Over 120 years after first entrusting the University to the Board of Regents, the Legislature created a Higher Education Coordinating ("HEC") Board to:

> provide planning, coordination, monitoring, and policy analysis for higher education in the state of Washington in cooperation and consultation with the institutions' autonomous governing boards and with all other segments of postsecondary education . . . .

CP 404 (Laws of 1985, ch. 370, § 3); *see also* CP 528-29. The HEC Board could not have exercised this authority to coordinate educational policy among the state's four-year institutions of higher education without amending the enabling statutes of each institution. CP 595-97. The Legislature added the phrase "except as otherwise provided by law" to each statute. *See* CP 405-06 (Laws of 1985, ch. 370, §§ 92 – 95). Thus, since 1985, state law has given the Board of Regents:

> . . . full control of the university and its property of various kinds, except as otherwise provided by law.

RCW 28B.20.130(1).

Nothing in the legislative history of this amendment, or that of any subsequent legislation, suggests that the Legislature ever intended the phrase "except as otherwise provided by law" to diminish the authority to

control University property that the Legislature had previously given to the Board of Regents in Chapter 28B.20 RCW. *See* CP 218-20. Rather, the Legislature's apparent purpose in amending RCW 28B.20.130(1) was to subject the Regents' authority to the limited, specific authority that the Legislature simultaneously gave to another state entity, the HEC Board – not to the City of Seattle. *See* CP 595-97. The HEC Board is now defunct, replaced by a Student Achievement Council, *see* CP 528-29, and the Legislature has not enacted any other statute that expressly, specifically, or even by necessary implication, diminishes the authority given to the Regents in Chapter 28B.20 RCW. *See* CP 528-29. The City argues that Section 103 is such a law; as discussed in more detail below, it is not.

**2. Section 103 of the GMA, RCW 36.70A.103, does not require the Board of Regents' to submit its specific authority to the City's general authority.**

In 1991 the Legislature amended the GMA to state;

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

RCW 36.70A.103. The City's argument that this passage requires the University to submit to the LPO is mistaken for three reasons. First, the LPO is not a development regulation "adopted pursuant to" the GMA. Second, a general law does not implicitly amend a prior, specific grant of

authority. Finally, as a state institution of higher education, the University is not a generic "state agency" within the meaning of Section 103.

**a. The LPO is not "adopted pursuant" to the GMA.**

Even assuming *arguendo* that Section 103 subjects the University to local GMA development regulations (and it does not, as discussed below), the Court should still affirm the trial court because the LPO is not a "development regulation" "adopted pursuant" to the GMA. It is therefore not within the scope of Section 103. It was adopted in 1977, thirteen years before the advent of the GMA. *See* Ord. No. 106348. The City argues the Council retroactively "adopted" the LPO "pursuant to" the GMA in 1994 in Ordinance 117430 that contains not a single mention of the LPO or Title 25 of the SMC (where the LPO has always been codified). *See* City's Br. at 14 n.37; CP 470-71 (first and last pages of Ord. 117430). Rather, the title of the 1994 Ordinance 117430 specifically calls out Title 23 SMC – the City's land use code, where one would expect to find laws containing "development regulations" – and contains nearly 100 pages of amendments to that title only. In Ordinance 117430, the Council declared that "the new and amendatory regulations adopted by this ordinance . . . bring the City's development regulations into compliance with RCW 36.70A.040." *Id.* § 1.

In a footnote to its Brief, the City asserts without analysis that because the LPO is a "development regulation," the bare mention of "development regulations" in its 1994 Ordinance No. 117430 must encompass the LPO even though the ordinance does not mention the LPO or the title of the code in which it is codified. *See* City's Br. at 14 n. 37. The City's argument is inconsistent with the City's own Charter which, similarly to the Washington Constitution, requires the single subject of an ordinance to be stated in its title. *See* CP 592-93 (City Charter Article IV § 7). The LPO was not the subject of the 1994 Ordinance No. 117430, and could not have been, because there is no mention of it in the title, just as there no mention of it in the body of the ordinance. *Contrast with Furhiman v. City of Bothell*, CPSGMHB Case No. 04-3-0027, Order Finding Compliance (Jul. 25, 2005), 2005 WL2227909 at *1-*2 (ordinance intended to update development regulations to comply with the GMA *expressly* amended the City's landmark preservation title).

In addition to being inconsistent with the City's own Charter, the City's position is inconsistent with the GMA's mandate to "establish procedures for early and continuous public participation in the development and amendment of comprehensive plans and development regulations." WAC 365-196-600(1)(a). *See Vinatieri et al. v. Lewis Cnty.*, WWGMHB Case No. 03-2-0020c, Compliance Order (Jan. 7,

2005), 2005 WL 3090252, at *5 ("Fundamentally, RCW 36.70A.140 requires early and continuous public participation and broad dissemination of proposals and alternatives"). These "procedures must provide for **broad dissemination** of proposals and alternatives, **opportunity for written comments**, public meetings after **effective notice**, provision for open discussion, communication programs, information services, and consideration of and response to public comments." WAC 365-196-600(1)(b) (emphasis added). The City should not be heard to claim it provided the required vigorous public process when it did not provide the public with *any* notice of what the City now claims the process was about. The City did not retroactively bless the LPO as a GMA development regulation in an ordinance that does not so much as mention the LPO.

The City's failure to identify the LPO as one of the chapters of the municipal code that the City was adopting as a GMA development regulation also deprived interested parties of the opportunity to challenge the LPO to the Growth Management Hearings Board for its inconsistency with the GMA,[13] a challenge that would have had be brought within 60 days of the publication of notice of adoption. *See* RCW 36.70A.290(2);

[13] There are multiple valid grounds to challenge the consistency of the LPO with the GMA. For example, it is antithetical to the coordinated and planned decision-making required by the GMA, and allows any citizen to thwart such decision-making by nominating a building or site on campus for designation as a landmark regardless of whether the Campus Master Plan identifies that building or site for development.

*Cave et al. v. City of Renton*, CPSGMHB Case No. 07-3-0012, Order on Motion for Reconsideration, (May 24, 2007), 2007 WL 1725387, at *3 ("RCW 36.70A.290(2) requires that petitions challenging whether a jurisdiction's actions are in compliance with the goals and requirements of the GMA must be filed within sixty days after publication"). The public had no way to determine that 1994 Ordinance No. 117430 was attempting to bless the LPO, as opposed to the zoning code, as a GMA development regulation, and the University had no way of knowing that Ordinance No. 117430 would have the effect – according to the City today – of applying the LPO to the campus. Not only did Ordinance No. 117430 not mention the LPO, but the LPO does not even meet the GMA's definition of "development regulation," which is "controls placed on development or land use activities by a county or city" such as "zoning ordinances" and others. RCW 36.70A.030(7). The LPO contains no controls.[14] *Compare, e.g.*, Ch. 25.12 SMC (the LPO) *with* Ch. 23.47A SMC (establishing development standards for commercial zone).

The LPO has been amended since 1991 (though not in ways that are material to this litigation), but each amendment created a new 60-day

[14] The LPO describes the *process* through which the City determines the controls that will govern alteration of a designated landmark. *See* SMC 25.12.490-.660 (Subchapter V, entitled "Controls and Incentives" but not establishing either). It is more properly characterized as a procedural ordinance that leads to the imposition of a "development regulation" – the designating ordinance that is imposed at the end of the process.

window for appealing only the amendment, not the LPO itself. *See Montlake Cmty. Club v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 110 Wn. App. 731, 740, 43 P.3d 57 (2002) (petitioners could not challenge portions of a comprehensive plan that were not amended by or inconsistent with a newly adopted subarea plan); *Skagit Surveyors & Engineers, LLC v. Friends of Skagit Cnty.*, 135 Wn.2d 542, 567, 958 P.2d 962 (1998) ("A growth management hearings board does not have authority, under the statute, to review all of a county's pre-existing land use regulations to determine which would comply with the Act, and then to invalidate those regulations which do not comply."). The City's post-GMA amendments created opportunities to appeal only the amendments.

The City never adopted the LPO as a development regulation, and amendment of a non-GMA regulation does not create any appeal opportunity to the Growth Management Hearings Board because pre-GMA regulations, such as the LPO, are not subject to appeal to the Growth Management Hearings Boards. *Skagit Surveyors and Eng'rs, LLC v. Friends of Skagit Cnty.*, 135 Wn.2d 542, 563-65, 958 P.2d 962 (1998) ("the definition of 'development regulations' does not provide authority for the boards to invalidate pre-Act zoning ordinances"). Because the City never retroactively blessed the LPO, it was never "adopted pursuant" to the GMA, and therefore nobody, including the University, has ever had a

chance to appeal the LPO to the Growth Management Hearings Board on the ground that it violates the GMA.

For all these reasons, the LPO is not a GMA development regulation "adopted pursuant to" Section 103 of the GMA: it is, in the City's own words, a "separate regulatory regime," *see* CP 50-51, that pre-dates the enactment of the GMA and that, because it elevates historic preservation above every other planning goal, is actually antithetical to the coordinated and planned decision-making required by the GMA.[15]

**b. Section 103 is a general law that does not amend the Legislature's specific grants of authority to the Regents in Chapter 28B.20 RCW.**

Section 103 of the GMA creates a general rule requiring "state agencies" to comply with local development regulations adopted pursuant to the GMA; it does not, however, alter prior enabling statutes that assign specific authority to individual state agencies. *See Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council (EFSEC)*, 165 Wn.2d 275, 309-10, 197 P.3d 1153 (2008). The conflict between specific statutes that serve the "discrete and specific function" of establishing a government entity to perform a particular purpose on the

[15] One of the GMA's thirteen planning goals is to "Identify and encourage the preservation of lands, sites, and structures, that have historical or archaeological significance." RCW 36.70A.020(13). The LPO goes far beyond "encouraging" and actually requires preservation, unless the owner can meet a stringent standard derived from takings jurisprudence—that preservation deprives the owner of all economic value.

one hand, and a general rule such as Section 103 on the other, is resolved by applying the "fundamental rule" of statutory interpretation that a specific statute must prevail over a general statute:

> It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act and thus conflict with it, the special act will be considered as an exception to, or qualification of, the general statute, whether it was passed before or after such general enactment.

*Id.* at 309. Even if a specific statute predates a general statute, the Washington Supreme Court "construe[s] the original specific statute as an exception to the general statute, unless expressly repealed." *Id.*

In *Kittitas Turbines*, the Washington Supreme Court applied this rule to resolve an "apparent contradiction" between the Energy Facilities Site Locations Act ("EFSLA"), Chapter 80.50 RCW, and Section 103 of the GMA. *Id.* The EFSLA authorizes the Energy Facility Site Evaluation Council ("EFSEC") to make recommendations to the governor regarding the siting of energy facilities. *Id.* at 285-86. A wind energy company tried for three years to obtain county permits to site a wind farm in Kittitas County, then asked EFSEC to recommend that the Governor preempt the County's regulations and approve the facility, which he did. *Id.* at 287-92.

Opponents argued that Section 103 of the GMA required EFSEC to comply with the County's land use regulations. *Id.* at 308. The court

held that the GMA did not supersede or repeal the previously enacted grant of authority to site energy facilities under the EFSLA. *Id.* at 311. The court reasoned that the EFSLA specifically governed the "discrete and specific function" of siting energy facilities and, therefore, was an exception to the later-enacted *general* requirements of the GMA. *Id.* at 309-11. Moreover, the GMA did not expressly repeal EFSEC's preemption power. *Id.* at 311.

Similarly, Section 103 makes no reference to state institutions of higher education or to the specific grants of authority to the Regents in Title 28B RCW. The fact that the GMA was enacted after Chapter 28B.20 RCW is inconsequential because the GMA does not expressly subordinate the Regents' exclusive statutory authority. The statutes that have vested exclusive authority in the Board of Regents to govern the University for the last 154 years, such as RCW 28B.20.100(1), RCW 28B.20.130, and RCW 28B.20.700, are specific laws serving the "discrete and specific function" of establishing a University independent from local governments. *Cf. Kittitas Turbines*, 165 Wn.2d at 309-10. While the specific grant of authority in the EFSLA contains clearer preemption language than that of 28B.20 RCW, *Kittitas Turbines* does not purport to set the floor for specific grants of authority, and the Washington Supreme

Court in *State v. Seattle*, *supra*, determined long ago that Chapter 28B.20 RCW specifically authorizes the Regents to control University property.

The most recent appellate decision to address this issue is *WSDOT v. City of Seattle*, 192 Wn. App. 824, 368 P.3d 251 (2016), in which the City of Seattle argued that Section 103 of the GMA implicitly amended the specific statutory grants of authority to WSDOT to site and build state highways. The trial court rejected the City's argument and ruled that WSDOT is not subject to the City's development regulations because of the Legislature's prior grants of specific authority to WSDOT. This Court upheld the trial court without expressly deciding this issue, but necessarily rejected the City's extensive briefing regarding the alleged effect of Section 103 of the GMA on prior, specific grants of authority:

> "[t]he only interpretation [of the City's code] that gives effect to all of the language of the exemption [for state highway right-of-ways] recognizes the definition of 'state highway right-of-way' in Title 47 RCW and the **exclusive authority** of WSDOT to develop and acquire property for state highway right-of-way . . . . Long-standing precedent and state law establish WSDOT is the **only** agency authorized to site, design, construct, and acquire land for construction of state highways . . . ."

*Id.* at 840 (emphasis added).

The instant appeal does not ask the Court to make such broad decisions regarding the Regents' authority, only to determine that the general language in Section 103 of the GMA does not implicitly amend

the specific authority granted to the Regents in Chapter 28B.20 RCW that the Supreme Court recognized in the 1980 *State v. Seattle* decision, *supra*. As described in more detail in Subsection IV.C.2.c below, the issue after enactment of Section 103 of the GMA is the same as it was before that enactment: what is the Legislature's intent? The Legislature has never expressed an intent to overrule the authority recognized by the State Supreme Court in *State v. Seattle* and thereby give to the City the authority to veto decisions by the Board of Regents about the use of the campus, and such an intent cannot be inferred from the general language in Section 103 of the GMA.

**c. The Legislature expressly specifies where it intends the broad term "state agencies" to include institutions of higher education.**

Section 103 of the GMA requires "State agencies" to comply with certain local development regulations, but it does not impose a similar requirement on state institutions of higher education. The legislative record surrounding adoption of Section 103 contains no mention of colleges or universities, and nothing in the language or history of the GMA suggests the Legislature had any intent to subordinate to the City the specific authority it previously had granted to the Regents.

Numerous statutes demonstrate that the Legislature expressly states when it intends a law to apply to a state institution of higher

education, referring to them as a separate category from "state agency" or defining "state agency" to include them. *See, e.g.*, RCW 28B.95.100(3) ("State agencies and public institutions of high education . . ."); RCW 70.175.070(2) ("state agencies including institutions of higher education as authorized under Title 28B RCW . . ."); RCW 43.19.1917 ("All state agencies, including educational institutions . . ."); RCW 28A.300.130(4) ("The superintendent may enter into contracts with individuals or organizations including but not limited to: . . . institutions of higher education; state agencies . . ."); RCW 39.10.210(14) ("'Public body' means any general or special purpose government in the state of Washington, including but not limited to state agencies, institutions of higher education . . .").[16] Section 102 of the GMA, by contrast, does not mention state institutions of higher education, and even though state law

[16] *See also* RCW 70.185.050 and 070 (Rural and Underserved Areas – Health Care Professional Recruitment and Retention); RCW 39.26.010 and 125 (Procurement of Goods and Services); RCW 39.30.060 (Public Contracts and Indebtedness); RCW 39.35C.010 (Energy Conservation Projects); RCW 39.94.020 (Financing Contracts); RCW 41.04.017, 033, 655, 720, 750 and 0331 (Public Employment, Civil Service, and Pensions); RCW 41.60.010 (State Employees' Suggestion Awards and Incentive Pay); RCW 42.04.060 (Public Officers and Agencies); RCW 42.48.010 (Release of Records for Research); RCW 43.01.150 (State Officers-General Provisions); RCW 43.09.430 (State Auditor); RCW 43.17.380 (Administrative Departments and Agencies); RCW 43.19.565 and 736 (Department of Enterprise Services); RCW 43.21A.410 (Department of Ecology); RCW 43.41.040 (Office of Financial Management); RCW 43.88.585 (State Budgeting, Accounting, and Reporting System); RCW 43.104.215 (Consolidated Technology Services Agency); RCW 44.28.005 (Joint Legislative Audit and Review Committee); RCW 44.48.150 (Legislative Evaluation and Accountability Program Committee); RCW 49.74.020, 030, 031 and 050 (Affirmative Action); RCW 51.32.300 (Industrial Insurance – Right to and Amount); RCW 51.44.170 (Industrial Insurance Funds); RCW 70.94.547, 551 (Washington Clean Air Act).

does not always distinguish between state agencies and state institutions of higher education, if the Legislature intended to limit prior specific grants of authority to institutions of higher education, it presumably would express its intent to do so as it has many times.

On the particular issue of historic preservation, Governor Christine Gregoire recognized the distinction between state agencies and state institutions of higher education when she signed Executive Order 05-05 (attached to this brief as Addendum A), which orders "all state agencies" undergoing capital improvements to coordinate with the state Department of Archeology and Historic Preservation. In the Order's final sentence, the Governor "invite[d] institutions of higher education, public schools, statewide elected officials, boards, commissions, and others" to follow the protocol laid out in EO 05-05. There would be no reason to "invite" institutions of higher education to comply with EO 05-05 if those institutions were already included within the phrase "all state agencies." The Governor knew what the City ignores: the phrase "state agencies" refers to governmental agencies that answer to the executive.

Although the precise meaning of the phrase "state agency" has never been litigated for GMA purposes, the phrase usually refers to a governmental entity created by the legislative branch to perform a specific task under the authority of the executive branch. *See, e.g.*, *State ex rel.*

*Lemon v. Langlie*, 45 Wn.2d 82, 83–84, 273 P.2d 464 (1954) (describing state agencies as "being a part of the executive department of the state").

Washington's universities are different. They are not governed directly by any elected official, executive or otherwise, but rather by independent governing boards subject to the ultimate authority of the Legislature. Although they may be state agencies for some purposes, they are more fundamentally and specifically state institutions of higher education, as at least one Washington court has acknowledged in passing. *See Carthcart v. Andersen*, 85 Wn.2d 102, 104, 530 P.2d 313 (1975) ("The University of Washington is undeniably a state educational institution created by statute.").

In light of the Legislature's broad grant of authority to the Regents, a law that limits the Regents' "full control of the university and its property" must be a law that amends the statutes that grant such full control, not a general law that applies generically to "state agencies." *Accord WSDOT v. Seattle*, 192 Wn. App. 824. Such a law, at a minimum, would need to reference Title 28B RCW or state institutions of higher education. Section 103 of the GMA does not do either.

The University seeks, and the trial court granted, a declaration that the LPO does not apply to University buildings on the University campus – no more, and no less. The City attacks a straw man that it erects at the

top of an imaginary slippery slope when it characterizes the University's position as exempting itself from all state law codified outside of Chapter 28B.20 RCW. As the Supreme Court recognized in *Edmonds School District*, *supra*, the issue is one of legislative intent, and the University does not assert that there is legislative intent to exempt it from all laws; this lawsuit is about only a law that directly usurps the authority granted to the Regents to decide what use should be made of the campus and the Metropolitan Tract. The University complies with other regulations, both local and State, including all applicable environmental laws that provide for the mitigation of impacts. The only prior instance of the of the University not complying with a City of Seattle regulation is the University's challenge to the LPO in *State v. Seattle*, *supra*, where the University obtained declaratory relief from the courts, as it has done in this case.

The University is not a scofflaw, and if the City were to apply another law in the future in such a way as to usurp the Regents' authority to control the use of the campus, the University again would seek declaratory relief, just as it is doing in this case. The issue for the court again would be one of legislative intent, just as it was in *State v Seattle* (before the GMA), and *Kittitas Turbines*, *supra* (after the GMA). The City's predictions of doom resulting from a ruling in the University's

favor are baseless. This case does not challenge any regulation other than the LPO which, if applied to the campus, would directly prevent the Regents from governing the University as the Legislature intends.

The fact that the University jointly participated with the City in creating the existing Campus Master Plan, and is actively working with the City to create a new Campus Master Plan, also belies the City's characterization of the University's argument.

### 3. Filing as-applied "essential public facility" challenges would not protect the public's interest in the University.

The City suggests that filing an as-applied challenge to landmarks designations under the GMA's provisions for essential public facilities protects the Regents' ability to make decisions on construction, renovation, and demolition. The City is essentially asking this Court to apply the Essential Public Facilities provisions as a Band-Aid rather than address the jurisdictional question directly. The City ignores the practical, and severe, impact to the University's public projects that would result. This cannot have been the Legislature's intent.

Even after 25 years, Essential Public Facilities law is almost completely undeveloped. The operative passage of the law provides only that "[n]o local comprehensive plan or development regulation may preclude the siting of essential public facilities," RCW 36.70A.200(5), yet

case law provides little guidance as to what "preclude" means, particularly in the context of a campus sited by the State 115 years ago. The *City of Des Moines v. Puget Sound Regional Council* case suggests that "preclude" means "render impracticable." 108 Wn. App 836, 847, 988 P.2d 27 (1999). Division III of this Court recently concluded that although allowing multifamily development next to the Spokane International Airport and Fairchild Air Force Base may be *inconsistent* with operations at those Essential Public Facilities, it did not *preclude* them. *City of Airway Heights v. E. Washington Growth Mgmt. Hearings Bd.*, 193 Wn. App. 282, 376 P.3d 1112 (2016). As applied to the campus, the CSE II building *could have* been built at an alternative site, but only at the cost of the CSE department's most important programmatic needs, as demonstrated by the Explanation from the Department that the Regents considered when making their decision. *See* CP 226-48. It is not clear that such a cost to the CSE program means that siting the new building elsewhere on campus was "impracticable," as opposed to simply not ideal. And the City has demonstrated no Legislative intent that the Regents' decisions of what is in the University's best interests should be subjected to an "impracticability" standard.

The effect of the City's argument would be expensive and lengthy delay, with the LPO process followed by litigation that would ultimately

result in a decision by a court (not the Regents) about "impracticability" rather than about what is in the best interest of the students. Ninety percent of the structures and sites on campus are old enough to qualify for preservation under the LPO, so almost every campus project would involve a potential landmark. Only after taking many months to navigate the process before the Landmarks Board, then appealing any adverse controls to the Hearing Examiner, then making its arguments at the City Council, then appealing the controls to superior court, could the University file its Essential Public Facility case in superior court. This would be so even if the Legislature has already appropriated funds to complete the new project, as was the case with CSE II. The LPO process would thwart the will of both the Regents and the Legislature, and make historic preservation more important than all other competing considerations of the State for the campus, no matter how important those other considerations.

### D. The Campus Master Plan demonstrates the University's commitment to a balanced approach to historic preservation as part of its campus master planning.

Contrary to the City's arguments, the University does not argue that the City waived its right to enforce its LPO when the City Council adopted the Campus Master Plan by ordinance. If the City had waived its enforcement rights as part of adopting the Campus Master Plan, this would

be an action on a contract rather than a declaratory judgment about the City's authority to enforce its LPO.

Rather, the Campus Master Plan, with its broad outlines of the University's rigorous historic preservation protocol, simply demonstrates that the University is fully committed to historic preservation by including a thorough evaluation of its historic resources in all decisions that could affect those resources. The Campus Master Plan, like the century of campus master planning that preceded it, shows how invested the Regents are in protecting the University's historic resources, and the proof is in the campus itself. No other place boasts the University's combination of cutting-edge educational and research facilities that are essential to the future of the State together with beautifully preserved historic spaces and structures, all on a campus to which the LPO has never been applied.

## V. CONCLUSION

This case arose because of the need for the Board of Regents to decide whether the University should continue to maintain a building for which it had no use and has sat empty for over 20 years, or instead should use the site of that building for its vital new Computer Science and Engineering building, which could not be built elsewhere without compromising the fundamental needs of the Department and its students. *See* CP 228-36. The Regents made their decision after considering and

weighing all competing considerations, as set forth in the documents presented to them by the University Administration, including an Environmental Impact Statement with an Historic Resources Addendum.

The issue before this Court is whether the Board of Regents will continue to have the authority to decide the best interests of the State's most important educational institution as it has for 150 years, or whether the City will apply its LPO to the campus and thereby make the single issue of historic preservation more important than any and all competing considerations for which the Regents are responsible.

Most of the campus is eligible for nomination as a landmark, so the issue is of critical importance to the future of the University. Resources are limited and geographical constraints must be taken into account. New classrooms cannot be built at locations distant from campus because students need to be able to walk from one classroom to the next, and from one academic department to another, in a reasonable amount of time.

Even before statehood, the Legislature authorized the Board of Regents to govern the University and to decide how to meet the growing educational needs of the State within the limited area of the campus, beginning on the Metropolitan Tract in downtown Seattle, then, from the 1890s through today, in the University's current location. The Legislature has never repealed, and never expressed an intent to implicitly repeal, the

statutory authority recognized by the Supreme Court in *State v. Seattle*, and the trial court's summary judgment should be affirmed for all the reasons discussed above.

Respectfully submitted this 22nd day of September, 2016,

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DECLARATION OF SERVICE

I hereby certify that on this 22nd day of September, 2016, I caused to be served **a** true and correct copy of the foregoing document by the method indicated below and addressed to the following:

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ADDENDUM A

CHRISTINE O. GREGOIRE
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# EXECUTIVE ORDER 05-05

## ARCHEOLOGICAL AND CULTURAL RESOURCES

**WHEREAS** Washington has a rich and diverse cultural heritage, as represented by the numerous archaeological and historic sites that have been identified and located throughout our state; and

**WHEREAS** preservation and protection of these sites provides educational and cultural values for all citizens and leads to better understanding between cultures of our shared history; and

**WHEREAS** many citizens of Washington contribute their time and efforts to preserve and protect Washington's unique archaeological and historic sites, and traditional cultural places; and

**WHEREAS** these sites and places hold special cultural, historical, and spiritual significance for both tribal members and citizens of Washington; and

**WHEREAS** the Department of Archaeology and Historic Preservation (DAHP) and the Governor's Office of Indian Affairs (GOIA) have key statewide responsibility to enhance the public's awareness of the need and value of protecting Washington's heritage and establish effective consultation with Native American tribal governments.

**NOW, THEREFORE**, I, Christine O. Gregoire, Governor of the state of Washington, hereby order all state agencies to:

1. Review capital construction projects and land acquisitions for the purpose of a capital construction project, not undergoing Section 106 review under the National Historic Preservation Act of 1966 (Section 106), with the DAHP and affected Tribes to determine potential impacts to cultural resources. This review shall be required on all capital construction projects unless they are categorically exempted by DAHP. Cultural resources are defined as archeological and historical sites and artifacts, and traditional areas or items of religious, ceremonial and social uses to affected tribes. This review should be done as early in the project planning process as possible. Should DAHP identify a known culturally significant site in the area of a project, or should DAHP inform the agency of the potential that such a significant site is likely to be found in a project locale, the agency shall:

**A.** Work with DAHP and affected Tribes on appropriate archaeological survey and mitigation strategies consistent with state and federal laws.

**B.** Consult with affected Tribes in a way that includes a face-to-face meeting or other agreed upon method to discuss the project before a state agency completes the project design. The agency will work with GOIA and DAHP to identify affected Tribes and, if needed, seek their help to arrange a meeting to discuss the project in question. If an agency is unable to arrange such a meeting, it will promptly notify GOIA and DAHP of the situation.

**C.** Take reasonable action to avoid, minimize or mitigate adverse effects to the archeological or cultural resource.

**D.** Notify DAHP and GOIA, in advance, of any meeting with affected Tribes during which matters concerning cultural resources related to a capital construction project will be discussed, and extend invitations to both agencies to attend any such meetings. If representatives from DAHP or GOIA cannot attend, the agencies will provide DAHP and GOIA with detailed meeting notes.

2. Submit all agreements between state agencies and affected Tribes concerning cultural resources that are developed outside the Section 106 process for review and comment to DAHP. DAHP's review and comment on any such agreement must occur before the agency can sign such agreement. Consult with DAHP and affected Tribes during project design and prior to construction on projects not undergoing Section 106 review, as a condition to receiving state grants or loans for the purposes of a capital construction project. Should either DAHP or the affected Tribes identify cultural resources affected by the proposed project, the state agency or agencies will ensure that the grant recipient finds reasonable ways to avoid, minimize or mitigate impacts to the resource before state funding is disbursed. State agencies shall take steps to insure that this type of review is incorporated into their grant and loan management process.

3. The Office of Financial Management is directed to include in its capital budget instruction a requirement that agencies consult with DAHP and GOIA, as appropriate, as part of the budgeting process for pre-design, design and construction.

4. To the extent that they have not already received training, all appropriate state agency employees managing capital construction projects or pass through capital grants will attend Government-to-Government training and Cultural Resource training provided by GOIA and DAHP.

5. By January 15, 2007, DAHP shall report back to the Governor's Office and the Office of Financial Management on the implementation of this executive order including any recommendations on ways of improving implementation.

I invite institutions of higher education, public schools, statewide elected officials, boards, commissions, and others to implement the practices herein described within their agencies.

This executive order takes effect immediately.

IN WITNESS WHERE OF, I have hereunto set my hand and caused the seal of the state of Washington to be affixed at Olympia this 10th day of November, Two Thousand and Five.

Christine Gregoire

CHRISTINE O. GREGOIRE
Governor of Washington

BY THE GOVERNOR:

Secretary of State