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No. 67301-7-1

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

MARY SEBEK and NANCY FARNAM,

Appellants,

v.

CITY OF SEATTLE and INTERVENOR WOODLAND PARK
ZOOLOGICAL SOCIETY

Respondents.

**COMBINED OPENING BRIEF OF RESPONDENTS CITY OF
SEATTLE AND INTERVENOR WOODLAND PARK
ZOOLOGICAL SOCIETY**

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I. INTRODUCTION

The Superior Court properly dismissed Appellants' ("Sebek's") taxpayer lawsuit against Respondent City of Seattle (the "City") based on Sebek's lack of standing. Sebek does not have standing to enjoin the City's lawful contract with Intervenor Woodland Park Zoological Society ("Woodland Park") as a proxy to attack Woodland Park's elephant exhibit.

Sebek relies on her general status as a taxpayer as the basis for standing, not any assertion of direct, special, or pecuniary interest in the outcome of this lawsuit. Washington law limits general taxpayer standing to suits challenging alleged illegal acts of governments. But, as the Superior Court found, Sebek's Complaint does not plead facts which, if true, would prove that the City is acting illegally. To the contrary, the City's contract, through which the City makes annual payments for the Woodland Park Zoo's ("Zoo's") general maintenance and operations, is specifically authorized by statute: RCW 35.64.010. The Complaint does not allege that the City is violating animal cruelty laws with respect to the elephants. Nor could it; the City does not operate a zoo or maintain an elephant exhibit, and has not done so for nearly ten years. No City funds are earmarked for an elephant exhibit. Only Woodland Park is alleged to have violated the animal cruelty laws by its maintaining an elephant

exhibit. Woodland Park alone decides what animals to exhibit at the Zoo and how to exhibit them.

In an attempt to remedy the deficient Complaint, Sebek for the first time on appeal tries to establish taxpayer standing by asserting new claims and legal theories that she did not plead or argue in the Superior Court. Such arguments are untimely and unavailing. There is no viable claim that the original design and construction of the elephant exhibit were illegal. Nor is Woodland Park, a private and independent non-profit organization, a de facto City agency.

Finally, there are multiple independent grounds in the record that support affirming the trial court. Sebek cannot enforce the criminal animal cruelty statutes through a civil action. And even if those statutes did apply, the City and Woodland Park were not afforded fair notice of potential criminal activity under the statutes. At bottom, Sebek asks this Court to intervene into the policy question of whether the Zoo should contain an elephant exhibit. But there are political and regulatory venues through which Sebek can express her concerns about elephant welfare and seek relief. A taxpayer lawsuit against the City is neither a proper – nor a legally available – vehicle to do so.

The trial court should be affirmed.

II. STATEMENT OF ISSUES

1. Did the Superior Court correctly grant the City's motion to dismiss on the grounds of lack of taxpayer standing, when the Complaint fails to plead facts which, if true, would prove that the City is acting illegally?
2. Do Sebek's new arguments on appeal fail because they are untimely raised?
3. Can the City be sued for the design and construction of an elephant exhibit built in 1989 when: (a) the statute Sebek relies on did not exist at the time; (b) the language of the statute does not apply to the design or construction of an animal habitat; and (c) the claim has no relationship to the relief sought in this lawsuit?
4. Is Woodland Park a "de facto" City agency where it is a private non-profit organization that operates the Zoo as authorized by state law and independent of the City?
5. In the alternative, should the Superior Court's ruling be affirmed on other grounds supported by the record, including: (a) that there is no private right of action under the laws the City and Woodland Park allegedly violated; (b) that the animal cruelty laws cannot be interpreted to encompass or provide fair notice that Woodland Park's alleged conduct was criminally prohibited; and (c) that Sebek's claims are barred by the political question doctrine?

III. STATEMENT OF THE CASE

Sebek's Statement of the Case adequately describes the procedural history. Pursuant to RAP 10.3(b), that discussion will not be repeated here. Because Sebek's brief omitted important facts regarding the City's contractual relationship with Woodland Park, the care provided to the Zoo's elephants, and the causes of action that have actually been pled in this lawsuit, the City and Woodland Park provide the following counterstatement of the case.

A. The City Contracts with Woodland Park to Operate the Zoo.

In March 2002, consistent with a national trend toward privatizing accredited zoos, and pursuant to authority granted by state law and city ordinance, the City entered into a long-term contract (the "Management Agreement," CP 160-201) with Woodland Park to "manage and operate the Zoo as a state-of-the-art zoo, . . . with emphasis on the Zoo's scientific and educational purposes and programs." CP 169.¹ Under the Management Agreement, the City owns the land on which the Zoo operates, while Woodland Park owns and cares for the animals exhibited

¹ The Management Agreement was authorized by RCW 35.64.010 (authorizing cities to enter into agreements with non-profit corporations to operate, among other things, zoos), and by Seattle City Council Ordinance 120697 (Dec. 2001) (CP 108-58).

at the Zoo. CP 176. Only upon termination of the Management Agreement would ownership of the Zoo animals revert to the City. *Id.*

In exchange for Woodland Park's agreement to operate, manage and maintain the Zoo, including employment and supervision of all Zoo employees, and funding of Zoo operations and capital expenditures, the City contractually committed to fixed levels of financial support to the Zoo designated generally for "operations" and "maintenance." CP 169-71.² No City funds are dedicated to the display of elephants (or of any particular animal). The City plays no role in deciding what animals to exhibit, what animals to acquire or sell, or how the animals are to be exhibited or cared for at the Zoo. CP 176. As the Complaint acknowledges, Woodland Park "exclusively manages and operates the Zoo." CP 3.

B. Woodland Park Cares for the Zoo's Elephants in Compliance with National Quality Assurance Standards.

Woodland Park is licensed by the United States Department of Agriculture ("USDA") under the Animal Welfare Act, 7 U.S.C. § 2131, *et seq.* CP 205. It is also accredited by the Association of Zoos and Aquariums ("AZA"), demonstrating its compliance with the AZA's

² Sebek asserts that the City "substantially funds" the Zoo, a statement that is not supported by the record. Brief of Plaintiffs-Appellants ("Appellants' Br.") at 6.

elephant care and breeding standards. CP 203.³ The Management Agreement itself requires Woodland Park to care for the Zoo's animals in accordance with AZA standards. CP 176. The Complaint does not allege the Zoo has failed to meet USDA or AZA standards.

The three elephants residing in the Zoo's award-winning Elephant Forest – Bamboo, Watoto and Chai – are maintained in the care of five keepers, a curator who is a national expert in elephant management, a scientist who specializes in elephant reproductive physiology, and two full-time veterinarians. CP 85.

The Complaint's allegations regarding Woodland Park's treatment of the Zoo's elephants are untrue. However, because for purposes of a CR 12 motion and this *de novo* appeal those allegations must be presumed true, they will not be otherwise disputed here.

C. The 2010 Elephant Litigation.

This appeal arises from the second unsuccessful lawsuit in four years seeking to force Woodland Park into closing the elephant exhibit at the Zoo. The Complaint at issue in this appeal asserts two causes of action against the City. First, it claims the City's contractual payments to

³ AZA accredited members are zoos and aquariums that have met the AZA's high standards for veterinary care, exhibits, physical facilities, operations, safety, security, finances, staffing, education, conservation and research. CP 239.

Woodland Park are illegal government expenditures because Woodland Park's care of the Zoo's elephants allegedly violates Washington's criminal animal cruelty statute, RCW 16.52.207, and Seattle's criminal animal cruelty ordinance, Seattle Municipal Code ("SMC") 9.25.081. CP 13-14.

Second, the Complaint claims that the injuries suffered by the Zoo's elephants as a result of Woodland Park's alleged violations of RCW 16.52.207 and SMC 9.25.081: (1) constitute a waste of public property (because the City has a contractual reversionary ownership interest in the Zoo's elephants); and (2) expose the City to legal liability. CP 14. The Complaint also contends that the City's maintenance and operations payments to Woodland Park are illegal government expenditures under this "waste" theory.

Sebek's appeal brief raises new claims that were not pled in the Complaint, including that that the City acted illegally when it designed and constructed the elephant enclosure in 1989 and that Woodland Park is a "de facto" City agency.

IV. ARGUMENT

A. Sebek Lacks Taxpayer Standing.

There is no dispute about the principle that governs the issue of standing in this case. In Washington, taxpayers have general standing to

sue the government only when challenging the legality of the government's official acts. Taxpayers may sue, for example, to enjoin the performance of government contracts that are themselves illegal, or to enjoin the illegal expenditure of government funds. *See, e.g., Mincks v. City of Everett*, 4 Wn. App. 68, 73, 480 P.2d 230 (1971) (taxpayer had standing to sue to enjoin performance of city contract that violated city ordinances); *Fransen v. Board of Natural Resources*, 66 Wn.2d 672, 676-77, 404 P.2d 432 (1965) (taxpayers had standing to sue to enjoin the sale of state land to a municipality, where sale was prohibited under state law); *Barnett v. Lincoln*, 162 Wash. 613, 623-24, 299 P. 392 (1931) (taxpayer had standing to challenge illegal or *ultra vires* government contract); *State ex rel. Chealander v. Morgan*, 131 Wash. 145, 148, 229 P. 309 (1924) (taxpayers had standing to sue to restrain county from spending funds on illegal road construction contract).⁴

No such challenge is presented here. Sebek has not identified a single thing the City itself has done that is against the law. To the

⁴ In contrast, to have standing to challenge the legal, discretionary acts of a government, taxpayers must demonstrate a unique right or interest different from other taxpayers. *Kightlinger v. Pub. Util. Dist. No. 1 of Clark County*, 119 Wn. App. 501, 506, 81 P.3d 876 (2003), *dismissed by* 152 Wn.2d 1001 (2004). Sebek has not pled or otherwise alleged any unique interest in the subject matter of this litigation discrete from the interests of other taxpayers. Consequently, she lacks standing to challenge any of the City's legal, discretionary actions with respect to managing the City's contract with Woodland Park.

contrary, the City's contract with the Zoo is a lawful act for which a taxpayer has no general standing to challenge.

1. The Complaint Fails to Plead Facts Which, if True, Would Prove that the City Is Acting Illegally.

The Complaint alleges that, based on Woodland Park's allegedly unlawful treatment of the Zoo's elephants, the City's payments to Woodland Park under the Management Agreement constitute "illegal government expenditures" (the title given to both causes of action). CP 13-14. The Superior Court correctly held that attaching the label "illegal" to the City's payments was insufficient:

I do not agree with the plaintiffs that the City is doing anything illegal. The plaintiff claims that the illegal acts of the City are basically funding. The Court finds that the plaintiffs have not pled facts which, if true, would prove that the City is acting illegally. The plaintiff lacks standing because the City has not performed any illegal acts.

RP 17:6-12.

Significantly, the Complaint does not allege that the City has violated either RCW 16.52.207 or SMC 9.25.081. To the contrary, the Complaint alleges – repeatedly – that Woodland Park's care of the Zoo's elephants violates these statutes:

"The Zoo Society [i.e., Woodland Park] has violated, and continues to violate, Washington's criminal anti-cruelty statute." CP 13.

“[T]he Zoo Society’s treatment of the elephants constitutes a series of daily, ongoing violations of RCW 16.52.207.” CP 13.

“The Zoo Society has violated, and continues to violate, the City’s specific anti-cruelty ordinance.” CP 13.

“[T]he Zoo Society’s treatment of the elephants constitutes a series of daily, ongoing violations of Seattle Municipal Code section 9.25.081.” CP 14.

The Complaint does not allege that the Management Agreement itself is illegal. Nor could it, since RCW 35.64.010 grants the City authority to enter into such an agreement. The Complaint does not allege that it is illegal for the City to make operations and maintenance payments to Woodland Park pursuant to a contract authorized by RCW 35.64.010. Nor could it; neither that statute (nor any other) prohibits such payments. At most, the Complaint alleges that the City has entered into a legal, legislatively authorized contract with Woodland Park; that the City makes legal payments under that contract; but that Woodland Park’s employees are independently violating animal cruelty laws. No Washington authority confers taxpayer standing to sue under these facts.

2. The City Does Not Fund an Elephant Exhibit, “Illegally” or Otherwise.

Sebek claims that the City “illegally” funds the elephant exhibit at the Zoo. CP 14 (Seattle taxpayers “have paid and will continue to pay for an elephant exhibit that violates Washington and Seattle criminal anti-cruelty statutes”). The City does not fund an elephant exhibit. The City, pursuant to the Management Agreement, makes periodic payments to the Zoo for “operations” and “maintenance.” CP 169-71. No City funds are earmarked for the display of elephants, or of any particular animal.

Woodland Park retains full discretion to choose which animals to exhibit at the Zoo, and how they are to be exhibited. CP 176. The City owes the same amount of money to Woodland Park under the Management Agreement, whether or not there is an elephant exhibit, and does not (and cannot) tell Woodland Park how to spend its money.

For Sebek to have taxpayer standing to pursue the causes of action pled in the Complaint, this Court would have to conclude that, if Woodland Park were violating criminal animal cruelty laws, it would be illegal for the City to continue to honor its contractual commitment to make operations and maintenance payments to the Zoo. But no court has held that a taxpayer has standing to sue to enjoin payments made by a government under a legal contract, based on alleged illegal conduct by the contractor. Indeed, Sebek has cited no such authority.

3. Sebek's Reliance on *Boyles* Is Misplaced.

Sebek's heavy reliance on the Washington Supreme Court's decision in *State ex rel. Boyles v. Whatcom County Superior Court*, 103 Wn.2d 610, 614 P.2d 27 (1985) – a case that Sebek claims “controls this appeal” – demonstrates her misunderstanding of the doctrine of taxpayer standing in Washington. That decision simply reiterates the well-established principle that Washington taxpayers have general standing to sue when challenging the legality of the government's official acts. It was Sebek's failure to plead any such challenge that led the Superior Court to dismiss the lawsuit.

In *Boyles*, the court held that a taxpayer had standing to sue to enjoin county officials from assigning prisoners to a work release program that mandated religious worship. There was nothing remotely illegal about the activities of the religious organization that operated the work release program; it is not illegal to operate a church or a faith-based program. The only alleged illegality was on the part of the government officials who required inmates to participate in the program. It was this allegation – that “official government acts amount[ed] to an

unconstitutional support of religion” – that gave rise to taxpayer standing.

Boyles, 103 Wn.2d at 613-14.⁵

Boyles does not stand for the proposition, as Sebek claims, that the Washington Supreme Court has held that “taxpayer standing lies where the government agency relies on a third party to conduct the actual wrongful conduct.” Appellants’ Br. at 16. There was no “wrongful conduct” by the third party in *Boyles*, only by the government. Sebek repeatedly mischaracterizes *Boyles* in this way throughout her brief:

“The Washington Supreme Court has held that taxpayer standing lies to challenge government illegality where the actual illegal conduct is performed by a third party acting on the government’s behalf.” Appellants’ Br. at 5.

“The Washington Supreme Court has held that taxpayer standing lies even where a non-governmental third party engages in the actual wrongful conduct itself.” Appellants’ Br. at 16-17.

“[J]ust as in *Boyles*, the manner in which the third party conducts those services is unlawful.” Appellants’ Br. at 17.⁶

⁵ Sebek misstates the facts of *Boyles* by saying that the county assigned prisoners to the work release program “on what appears to have been a voluntary basis.” Appellants’ Br. at 17. After the *Boyles* lawsuit was filed, the county began offering an alternative release program that did not include mandatory religious activities. 103 Wn.2d at 612. Based on this change in facts, the court dismissed the appeal as moot. *Id.* at 615. However, because the issue of taxpayer standing had significance to future lawsuits, the court decided to address it. *Id.* at 612. It did so in the context of the original claim, with prisoners assigned on a non-voluntary basis to a release program that required religious worship.

⁶ See also Appellants’ Br. at 9, incorrectly characterizing *Boyles* as a “challenge to a privately run work-release program incorporating mandatory religious services.”

Only after pages of mischaracterizing *Boyles* does Sebek finally acknowledge the inconvenient fact that undermines her entire argument: “It is true that the Mission program [in *Boyles*] was not *per se* unlawful, unlike the Zoo’s abuse of the elephants.” *Id.* at 18. That is precisely the point. There was nothing illegal – “*per se*” or otherwise – about the conduct of the third-party in *Boyles*. The only alleged illegality was on the part of the government, which is why there was taxpayer standing. And with that concession, Sebek’s principal argument – that taxpayers can sue the government where the illegal acts are being committed by an entity with a government contract, not by the government itself – collapses.

The same fact pattern was present in *Calvary Bible Presbyterian Church of Seattle v. Bd. of Regents of the Univ. of Washington*, 72 Wn.2d 912, 436 P.2d 189 (1967), another case cited by Sebek for the proposition that the Washington Supreme Court has “repeatedly rejected” the City’s argument that taxpayer standing is limited to “instances where government officials themselves engage in the challenged conduct directly.” Appellants’ Br. at 25 (citing *Boyles* and *Calvary Bible*). In *Calvary Bible*, the court held that two ministers had taxpayer standing to sue to enjoin the University of Washington from offering a literature course on the Bible. As in *Boyles*, the teacher of the course was not alleged to have acted

illegally; the only alleged illegality was on the part of a state university using public funds and property to offer a course that purportedly supported religion. 72 Wn.2d at 914.

4. To the Extent Sebek is Still Pursuing an “Oversight” Claim, it is Without Merit.

Sebek appears to have largely abandoned on appeal an argument she made in the Superior Court, namely that the City violated RCW 35.64.010(5) by funding the Zoo without exercising “adequate oversight.” CP 216-18. The statute is mentioned only once in Sebek’s appeal brief, and Sebek says only that the City’s “failure to acknowledge and act upon” Woodland Park’s alleged crimes is “a further breach of its obligations under the law.” Appellants’ Br. at 23.

Sebek, however, has pled no facts to show that the City has violated this statute. The only oversight requirement in RCW 35.64.010(5), which granted authority for the City to enter into the Management Agreement, is that the contract “provide for the oversight of the managing and operating entity.” The Seattle City Council did this when it approved the Management Agreement, including oversight mechanisms, as part of Ordinance 120697. These oversight mechanisms include, among other things, ensuring that Woodland Park maintains its USDA licensure and AZA accreditation; receiving copies of annual

reports and annual plans; and having the right (but not the obligation) to participate in audits and to review animal records. CP 130, 132, 136-38. In the Superior Court, Sebek acknowledged that the City complied with the statute in enacting the Management Agreement. CP 217.

Because the City complied with the statute, Sebek couched her argument in the Superior Court in terms of the City's alleged failure to continue to "engage in meaningful oversight" in the years since the Management Agreement was approved. CP 217. But Sebek has not claimed that the City has failed to comply with any specific oversight mechanism set forth in the Management Agreement; there is no allegation, for example, that the City has not received any of the required reports, or failed to ensure that Woodland Park is maintaining all required permits, licenses and accreditation. Rather, Sebek apparently did not approve of the way the City has carried out oversight, and sought a court-sanctioned role as ombudsman to monitor the City's ongoing performance under the Management Agreement. Such a challenge implicates the City's discretionary authority. Only a taxpayer showing a unique interest in the subject matter of this case – a standard Sebek does not claim to meet – could have standing to challenge such decisions.⁷

⁷ See *Kightlinger* (discussed *supra* at n.4).

5. Sebek's Policy Arguments Are Mistaken.

Sebek claims that affirming the Superior Court's ruling would "erode" the doctrine of taxpayer standing in Washington, and encourage cities to outsource numerous government services in order to avoid taxpayer lawsuits. Appellants' Br. at 25, 27-28. This argument misses the mark on three counts.

First, the Superior Court's ruling did not "erode" anything. Judge Heavey applied settled Washington law that taxpayers have standing to challenge the legality of the government's official acts, and correctly found that no such challenge was presented here. According to Sebek, the City "seeks to limit taxpayer standing to instances where government officials themselves engage in the challenged conduct directly," a position that Sebek contends (incorrectly) the Washington Supreme Court has "repeatedly rejected." Appellants' Br. at 25 (citing *Boyles* and *Calvary Bible*). Sebek's repeated mischaracterization of *Boyles* and *Calvary Bible* aside, no Washington court has granted general taxpayer standing based on alleged illegality by anyone other than the government itself. That is not a limit "sought" by the City; it is one imposed by Washington courts. It is Sebek who seeks to expand existing law.⁸

⁸ Sebek's reliance on out-of-state authority is similarly unavailing. In *Vasquez v. State*, 105 Cal. App. 4th 849, 851 (2003), the court held that a taxpayer had standing to sue the State of California to compel it to discharge a statutory duty (under the California Prison

Second, Sebek suggests that affirming the Superior Court will trigger a stampede of cities seeking to outsource services to private entities. Appellants' Br. at 27-28.⁹ This argument overlooks the single most important limitation on that ability. The power of local governments to act is circumscribed by the legislature; cities have the power to privatize services only to the extent the legislature has empowered them to do so, and subject to limitations placed on that authority by the legislature.¹⁰

The City was able to enter into the Management Contract with Woodland Park only because the legislature gave it the power to do so in RCW 35.64.010. The legislature also imposed certain oversight responsibilities on cities entering into zoo and aquarium agreements; as discussed above, the City has complied with these. At the same time, the

Inmate Labor Initiative of 1990) to require employers to pay prevailing wages to inmates. The court relied on Cal. Civ. Proc. Code § 526a, which grants taxpayer standing to enforce a government's duty to collect funds that are due to it. Because 20 percent of inmates' wages were to be paid to the State, the State's failure to require the payment of prevailing wages to inmates meant that it was failing to collect funds in violation of § 526a. *Id.* at 856. Taxpayer standing existed because the State was failing to discharge two statutory duties – to require the paying of prevailing wages to inmates, and to collect funds due to the State. *Vasquez*, even if it were binding here, does nothing to advance Sebek's arguments.

⁹ See also Appellants' Br. at 2 (“[i]f the Superior Court’s ruling is allowed to stand, zoos are not the only government operations that could be outsourced and insulated from taxpayer challenge”).

¹⁰ “Municipal corporations, as creatures of the state, derive their authority and powers from the state’s legislative body.” *Skagit County Public Hosp. Dist. No. 1 v. State*, 158 Wn. App. 426, 445, 242 P.3d 909 (2010). *Accord Campbell v. Saunders*, 86 Wn.2d 572, 574-75, 546 P.2d 922 (1976); *Lutz v. City of Longview*, 83 Wn.2d 566, 569, 520 P.2d 1374 (1974).

legislature (although it could have done so) did not provide that the contracting city remains legally responsible for conditions at the zoo.¹¹

In an effort to create a slippery slope where none exists, Sebek conjures up hypothetical examples of possible future outsourcing of services – ignoring both the necessary role of the legislature, and the ability of the legislature to restrict the extent to which a government can contract out responsibility for services it can perform itself. For example, Sebek cites *Kightlinger, supra*, which held that taxpayers had standing to sue to enjoin a public utility district from engaging in the business of repairing major appliances. In *Kightlinger*, the taxpayers had standing because the PUD was acting illegally, by operating a business without statutory authority to do so. 119 Wn. App. at 510-11. Sebek then argues:

Under the City’s curtailed version of taxpayer standing, however, the [PUD] could have revived its repair program if it established a non-profit appliance repair entity, transferred its repair staff to the new entity, and contractor for repair services through that “contractor.” To state the proposition is to reveal its absurdity, and this Court should not condone such a ruse here.

¹¹ The subject of solid waste provides a telling contrast. The legislature has authorized local governments to enter into garbage collection contracts with private companies (RCW 35.21.120), but has also specified that primary responsibility for collecting garbage remains that of local government. RCW 70.95.020(1). *See also Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 40, 873 P.2d 498 (1994) (“RCW 70.95.020 provides that while private entities may contract with local government for solid waste handling, the primary responsibility is that of the local government”).

Appellants' Br. at 19. This hypothetical misses the point that in the absence of legislative authority the PUD would still be acting in excess of its legal authority, and taxpayers would still have standing to sue to stop it from doing so. Here, by contrast, the City has been given legislative authority to contract with Woodland Park, and has complied with all provisions of the statute.¹²

Granting standing to Sebek to sue the City for the alleged misdeeds of Woodland Park would constitute an unprecedented expansion of the doctrine of taxpayer standing. The result would be that every legal City contract and every legal City payment under those contracts would potentially become subject to taxpayer oversight in the courts, based on the actions of persons or entities other than the City, and potentially based on actions unrelated to the City contract. Taxpayers could place themselves in the position of monitoring the operations of every entity with which the City happens to have a contractual relationship.

¹² Sebek also cites two newspaper articles to show that other government functions in Washington may eventually be privatized (Appellants' Br. at 27), but once again overlooks the necessary role of the legislature. Sebek cites one article to show that the City's Parks and Recreation Department is considering entering into contracts with private entities to operate community centers. The City has this option, because in RCW 35.59.080 the legislature gave cities the authority to "contract for the . . . operation by any . . . person, of all or any part of" community center facilities. The other article cited by Sebek discussed Washington legislators considering privatizing certain operations traditionally handled by the State. It would accomplish that, the article makes clear, through budget legislation.

In trying to explain away the extraordinary policy implications of the expansion of taxpayer standing asserted here, Sebek misses the mark a third time, by presuming that taxpayer lawsuits are the only remedy available to address illegal conduct by city contractors. Other remedies, however, exist to address alleged illegal conduct, including the conduct alleged here. Sebek could request that the appropriate authorities identified under the State and City animal cruelty statutes initiate an investigation and prosecution, or could file a complaint with the USDA.¹³ More generally, citizen complaints about spending by state or local governments can be addressed to the Washington State Auditor. RCW 43.09.186. Violations of the City's building code (another example the City discussed in the Superior Court) can be addressed through complaints to the City's Department of Planning and Development.¹⁴ To address an extreme example offered by Sebek, complaints about physical abuse of

¹³ For example, a group called In Defense of Animals filed a complaint with the U.S. Department of Agriculture in March 2010 regarding the elephant breeding practices at the Woodland Park Zoo. See <http://www.helpelephants.com/WoodlandParkZoobreedingcomplaint.pdf> (last visited Oct. 18, 2011).

¹⁴ See <http://www.seattle.gov/dpd/Compliance/default.asp> (last visited Oct. 21, 2011). Under Sebek's view any taxpayer could sue to enjoin the City from paying its rent for office space, based on an alleged code violation (building six inches too close to a lot line, for example) that is completely unrelated to the City's use or occupancy of the premises.

inmates are addressed in a number of ways, including a grievance procedure through the Department of Corrections.¹⁵

B. Sebek May Not Raise New Legal Theories on Appeal.

In light of her failed arguments in the trial court, Sebek advances two new arguments on appeal: (1) that the original design and construction of the buildings and grounds that constitute the elephant exhibit are in and of themselves illegal and (2) that Woodland Park is a “de facto” City agency. Sebek, however, may not raise these theories for the first time on appeal. “In general, issues not raised in the trial court may not be raised on appeal.” *Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 844 (2005); *see also Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 527, 20 P.3d 447 (2001); RAP 2.5(a). This Court should conclude as did the *Demelash* court: “We generally will not review an issue, theory or argument not

¹⁵See Department of Corrections Policy 550.100, <http://www.doc.wa.gov/policies/showFile.aspx?name=550100> (last visited Oct. 21, 2011). Trying to make *Boyles* fit the facts of this case, Sebek offers a particularly tortured analogy. To hold that there was taxpayer standing in *Boyles* but not here, she argues, would mean that “a taxpayer could sue the County because Mission staff prayed with the prisoners, but it could not sue if Mission staff beat the prisoners.” Appellants’ Br. at 18. This argument again misstates *Boyles*; standing was based not on the fact that Mission staff prayed with prisoners, but rather on the fact that the County illegally required the prisoners to pray. It also suggests – without basis – that no other remedy exists to investigate and respond to abuse of an inmate by an employee of a work release program.

presented at the trial court level. . . . We decline to consider this [new] issue.” 105 Wn. App. at 527.¹⁶

C. Sebek Does Not Have Standing to Bring Claims Based on the Original Design and Construction of the Elephant Exhibit.

The Complaint is very clear in its theory of liability: Woodland Park is allegedly violating RCW 16.52.207 and SMC 9.25.081; the City is allegedly acting illegally by providing funding to and failing to exercise adequate oversight of the Zoo. CP 13-14. The Superior Court ruled, correctly, that Sebek lacked taxpayer standing to sue the City on these causes of action. Sebek now claims on appeal that in fact she is suing the City for violating the animal cruelty laws (Appellants’ Br. at 24), although that theory appears nowhere in the Complaint. This new allegation is without merit.

First, in formulating this new claim, Sebek depicts an extensive City role in caring for the Zoo’s elephants that does not exist. Under the Management Agreement, the Zoo animals are the “sole property” of Woodland Park which has “the authority to acquire or sell or otherwise dispose of” them in the course of its operations of the Zoo. CP 176.

¹⁶ This principle is subject to exceptions that are not applicable here, including lack of trial or appellate court jurisdiction, failure to establish facts upon which relief can be granted, and manifest error affecting a constitutional right. RAP 2.5(a)

While the City has a general oversight role (discussed above), no provision of the Management Agreement gives the City any role in Zoo management or operations. Yet for the first time on appeal, Sebek asserts (without support in the record) that the City has a “pervasive role” in the “ongoing operation of the Elephant Exhibit.” Appellants’ Br. at 16. The City has no role in the ongoing operations of the exhibit, let alone a “pervasive” one. The City built the exhibit 22 years ago (CP 7), turned it over to Woodland Park nearly 10 years ago, and has had no role in caring for the elephants since that time. Sebek had it right the first time when she alleged in the Complaint that Woodland Park “exclusively manages and operates the Zoo.” CP 3.

Second, the animal cruelty laws cited by Sebek have no relevance to a claim against the City based on its construction of the exhibit. SMC 9.25.081, which lists various acts of mistreatment of animals which can lead to misdemeanor prosecution by the City, cannot form the basis for any claim against the City itself:

Nothing contained in this chapter [SMC Ch. 9.25, relating to Animal Control] is intended to be, nor shall be construed to create or form the basis for any liability on the part of the City or its officers, employees or agents, for any injury or damage resulting from the failure of any person to comply with the terms of this chapter, or by reason or in consequence of any omission in connection with the implementation or enforcement of this chapter on the part of the City by its officers, employees or agents.

SMC 9.25.010(C).

RCW 16.52.207 was not enacted until 1994, five years after the construction of the Zoo's elephant exhibit. It lists various acts of animal cruelty which can be the basis of a misdemeanor prosecution against a "person" or "owner" who mistreats an animal. Constructing an animal habitat – even one later determined to be inadequate – does not violate any provision of the statute. (Nor, for that matter, does it violate any provision of SMC 9.25.081.) Only the person or owner who is confining an animal to such a habitat could ever be subject to prosecution.

Third, this newly formulated claim against the City is unrelated to the relief sought in this lawsuit. Sebek seeks only prospective injunctive relief, asking that the City's funding of the Zoo cease, and that the City be enjoined from its alleged failure to adequately oversee Zoo management. CP 15. This requested relief relates only to whether the conditions under which Woodland Park is currently caring for the elephants violate the law. (If, for example, the elephants were being poorly cared for in 1996, but are being well cared for now, what injunctive relief could the Court possibly order?) Sebek's attempt belatedly to concoct a cognizable claim against the City, when such a claim was not pled in the Complaint (and in fact is contradicted by it), cannot create taxpayer standing.

D. Woodland Park is Not a “De Facto” City Agency.

Woodland Park is a private not-for-profit organization that operates independently from the City. The Washington Supreme Court recently set forth the standard to determine when entities should be treated as “arms” of government. In *Dolan v. King County*, __ Wn.2d __, 258 P.3d 20 (Aug. 18, 2011), the Court applied a “right of control” test to determine that organizations providing public defender services to King County were “arms and agencies” of the county, thus making their employees eligible for state retirement benefits. *Id.* at 28 (“The bedrock principle upon which relationships are analyzed under the common law is the right of control.”) (citing *Hollingbery v. Dunn*, 68 Wn.2d 75, 80–81, 411 P.2d 431 (1966)). In *Dolan*, King County had “gradually extended its right of control over the defender organizations” until they became “vassal agencies of the county.” *Id.* at 31. For example, while “[g]enerally, independent contractors determine their own formal structure, such as the composition of their boards, articles, and bylaws,” the county had “imposed stringent control over the defender organizations’ formal structure.” *Id.* The county provided virtually all of the organizations’ funding. *Id.* The defender organizations could not lease or acquire property without the county’s approval. *Id.* The county established a pay scale for the organizations, and required that the organizations’ employees

receive the same cost-of-living increases as county employees. *Id.* at 31-32. Indeed, the amount paid to the organization was dependent on the county's budget process and was a line item in the county's budget. *Id.* at 26. If there was "a budget crisis where there [wa]s a countywide reduction in budget, the defender groups [had to] reduce their budgets in the same percentage as other agencies". *Id.* The organizations were restricted in how they spent money and with whom they contracted. *Id.* at 31. The county asserted that it owned equipment purchased by the organizations. *Id.* at 23. Finally, the county could terminate the existence of the organization at will. *Id.* at 32 n.19.

The relationship between the City and Woodland Park provides a stark contrast. Rather than extending its control over Woodland Park, the City has done the opposite for the very purpose of getting out of the business of running a zoo. In 2000, the Washington State Legislature passed RCW Chapter 35.64, which authorized cities to enter into contracts with private organizations for the management of city zoos and aquariums, subject only to the "oversight" of the city "to ensure public accountability of the entity and its performance in a manner consistent with the contract." RCW 35.64.010(5). In accordance with this statutory authority, the City and Woodland Park executed the Management Agreement, in which the

City transferred the management, operation, and maintenance of the Zoo to Woodland Park – an independent non-profit corporation.

Unlike the county in *Dolan*, the City here imposes virtually no control over Woodland Park. Pursuant to the Management Agreement, the City hired Woodland Park as an independent contractor to operate the Zoo. The Management Agreement explicitly states: “Nothing contained in this Agreement shall be construed to create a partnership, joint venture, or a relationship of employment or agency.” CP 192. Woodland Park has broad discretion to run the Zoo, subject to a general mandate from the City to operate a “public zoological gardens and related and incidental purposes and programs, including but not limited to conservation, education, enterprise operations, and visitor services.” CP 168. How to achieve those broad goals is left up to Woodland Park.

For example, Woodland Park may build new exhibits, structures, and visitor facilities within its discretion. CP 174. Woodland Park sets admission charges, and although increases are capped by the rate of inflation, Woodland Park retains all admission proceeds and spends them in its discretion. *Id.* Woodland Park also decides whether to offer services to the public such as souvenirs and food, determines the price of services, and determines whether to enter into franchise agreements with

outside organizations for the provision of such services. CP 179-180.

Woodland Park determines how to spend the resultant income. *Id.*

Many other aspects of the Management Agreement reflect Woodland Park's independence from the City. For the life of the Management Agreement, Woodland Park owns the zoo's animals, is responsible for their care, housing, and exhibition, and has authority to acquire new animals.¹⁷ CP 176. Woodland Park has authority to staff the Zoo, either with its own employees or independent contractors. CP 177. Further, the City assigned all Zoo-related leases to the Woodland Park, giving it "the exclusive option (if the City had such option) of renewing such leases" CP 169.

The record is silent on the percentage of funding the City provides to the Zoo. Sebek's statements about "substantial funding" are fiction without factual support. The Management Agreement requires the City to provide only \$1 for every \$2.50 Woodland Park raises on its own for major maintenance. CP 171. As noted above, the Zoo raises its own revenue from admissions and the sale of food and souvenirs. The City, unlike the County in *Dolan*, does not provide virtually all funding for the Zoo.

¹⁷ Sebek is incorrect that the City owns the Zoo's animals. CP 176 (the Zoo Animals "shall be the sole property of the WPZS."). The City retains only a reversionary right in the animals. *Id.* ("The Zoo Animals shall become the property of the City when this Agreement is terminated.").

As Sebek points out, the Management Agreement provides that three City officials sit *ex officio* on the Woodland Park Board of Directors but out of 49 total directors.¹⁸ Aside from a few minor public notice provisions, the actual structure and functions of the Board are left to Woodland Park's discretion. The City does not have any type of veto power over the Board's actions. *See* CP 183. Further, Woodland Park's President and CEO, who is responsible for all staff, reports to the Board, not to the City.

Sebek's argument that Woodland Park's reporting requirements to the City establish it is a *de facto* City agency lacks merit. As explained above, such oversight is a statutory requirement, "to ensure public accountability of the entity and its performance in a manner consistent with the contract." RCW 35.64.010(5). Moreover, the Supreme Court spoke directly to this issue in *Dolan*:

An independent contractor, whether for profit or nonprofit, does not lose its independence simply because it is providing a public service at the request of the government. Further, government can and should exact high standards of performance from its independent contractors. Prudent financial controls and careful oversight of contract compliance does not render a contractor an agency of the government.

¹⁸ A current list of the 49 directors can be found at <http://www.zoo.org/about-us/board> (last visited Oct. 18, 2011).

258 P.3d at 30 (footnote omitted). The Court concluded: ““The retention of the right to inspect and supervise to insure the proper completion of the contract does not vitiate the independent contractor relationship.”” *Id.* (citation omitted). Indeed, in *Dolan*, the defender organizations were deemed part of the county “not because the county . . . inserted supervisory provisions in the contract, but because the county . . . in actual practice expanded its control far beyond the supervision of end-level quality.” *Id.* at n.14.¹⁹

The Management Agreement’s reporting requirements are in fact more notable for what they do not require. The Management Agreement does not authorize the City to override Woodland Park’s discretionary decisions regarding the operation or expansion of the Zoo, the care of the animals, staffing decisions, relationships with third parties, or any of the other myriad discretionary functions of Woodland Park. *See Good v. Assoc. Students of Univ. of Washington*, 86 Wn.2d 94, 98, 542 P.2d 762 (1975) (finding a student organization to be an arm and agency of the University of Washington where all its acts and decisions were subject to the “final approval or disapproval” by the University’s Board of

¹⁹ Many non-governmental entities must submit reports to the City. For example, the City requires quarterly and monthly reports from taxi cab associations, in addition to regulating the associations’ maintenance of business records, their operation of business offices, and even their color scheme, among other details. *See* SMC 6.310.230. Such oversight does not transform the taxi associations into “de facto” City agencies.

Regents).²⁰ Nor does the City have the ability to dissolve Woodland Park; rather Woodland Park is an independent non-profit corporation terminable according to law. *See* RCW 24.03.220.

Finally, in *Dolan* the defender organizations were created “specifically to carry out a constitutionally mandated function of the county.” *Id.* at 31. The City is under no legal obligation, constitutional or otherwise, to operate a Zoo. That it chooses to support the operation of the Zoo through funding – and as expressly authorized by state law – is a purely discretionary policy decision.

Sebek cites no controlling, or even advisory, case law indicating that Woodland Park is a “de facto” City agency. Indeed, the only cases invoked by Sebek are those containing general “form over substance” statements of law in factually distinct situations. *See Whitaker v. Spiegel Inc.*, 95 Wn.2d 408, 623 P.2d 1147 (1981) (retail installment contract); *Morrison v. Nelson*, 38 Wn.2d 649, 658, 231 P.2d 335, 340 (1951) (assignment of lease); *Am. Sav. Bank & Trust Co. v. Helgesen*, 67 Wash. 572, 574, 122 P. 26, 27 (1912) (execution of mortgage); *Sauve v. K.C., Inc.*, 19 Wn. App. 659, 665, 577 P.2d 599 (1978) (sale of securities);

²⁰ Sebek focuses on the fact Woodland Park must comply with applicable laws. *See* CP 189. But any business entity must do the same; a contractual requirement to comply with the law does not transform independent entities into City agencies.

Tacoma Ass'n of Credit Men v. Lester, 72 Wn.2d 453, 456, 433 P.2d 901 (1967) (fraudulent conveyance of mortgage).

E. Regardless of Taxpayer Standing, the Record Contains Multiple Grounds for this Court to Affirm the Trial Court.

Notwithstanding Sebek's lack of taxpayer standing, alternative grounds were presented to the trial court that also support affirmance of the order of dismissal. Review of an order granting a motion to dismiss is *de novo*. *Yurtis v. Phipps*, 143 Wn. App. 680, 690, 181 P.3d 849 (2008). "Because review is *de novo*, an appellate court may sustain the trial court's judgment upon any theory that is established by the pleadings and supported by the record." *Id.*; *cf* RAP 2.5(a) ("A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground."). Here, Sebek's claims should be dismissed because (1) Sebek cannot enforce criminal animal cruelty statutes or ch. 35.64 RCW through a civil action, (2) even if there was a cause of action under the criminal animal cruelty statutes, Woodland Park and the City were not provided notice of potential illegal behavior under the statutes, and (3) Sebek's claims are non-justiciable political questions.

F. Sebek Cannot Enforce Criminal Animal Cruelty Statutes Through This Civil Action.

Sebek's requested relief depends upon a finding that Woodland Park has violated a criminal statute: RCW 16.52.207 and/or SMC section 9.25.081. CP 13-14. A private, civil cause of action, however, was not explicitly or impliedly included in Washington's criminal animal cruelty statutes (*see* chapter 16.52 RCW), nor in the City's animal cruelty ordinance (*see* SMC 9.25.081, SMC 9.25.100). Thus, Sebek cannot seek a private civil remedy based on either statute in this case.

To establish a private cause of action to enforce a statute, a party must show "first, whether the plaintiff is within the class for whose 'especial' benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation." *Tyner v. State*, 141 Wn.2d 68, 77-78, 1 P.3d 1148, 1153 (2000) (quoting *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990)). Sebek cannot make this showing.

First, the State's and the City's animal cruelty laws were not enacted for the benefit of Sebek. A private cause of action is implied by a statute only where a "right and the recipients of the right are explicit" in the language of the statute. *Ducote v. Dep't of Soc. & Health Servs.*, 167

Wn.2d 697, 706, 222 P.3d 785 (2009). In *Ducote*, the Washington Supreme Court held that a plaintiff lacks standing to bring an implied cause of action if the plaintiff is not “specifically mentioned” as a person entitled to a right in the statute. *Id.* at 704-05. Here, the State animal cruelty statute, ch. 16.52 RCW, is a criminal statute for the protection of animals. The statute does not provide a right of any kind to any class of persons, let alone to general taxpayers. The same is true for the City’s animal cruelty statute, SMC 9.25.081. Like the plaintiff in *Ducote*, Sebek is not granted any right by the statute for which a remedy should be implied. Rather, in this case, the “omission[.]” of Sebek from the class of persons protected by the statute is “deemed to be [an] exclusion[.]” *Ducote*, 167 Wn.2d at 704 (quotations and citations omitted).

Second, nothing in either the State’s or the City’s animal cruelty laws explicitly or implicitly supports recognizing a private civil remedy. Rather, the State statute provides that only law enforcement agencies and animal control officers certified by county superior courts (RCW 16.52.025) may enforce the provisions of chapter 16.52 RCW. RCW 16.52.015. Furthermore, nothing in either the State’s or the City’s statutory schemes resembles the provisions in other criminal statutory schemes that provide an additional private civil remedy. *See, e.g.*, RCW 70.105D.080 (authorizing private right of action for the recovery of

remedial action costs under the Model Toxics Control Act); RCW 9A.82.100 (providing civil remedy for damage from criminal profiteering activity).

Third, implying a private civil remedy is inconsistent with the underlying purpose of the animal cruelty statutes. The purpose of the statute is to allow criminal prosecution of individuals following authorized law enforcement investigation and the exercise of prosecutorial discretion whether that individual violated the animal cruelty statutes. Here, requiring this Court to resolve whether Woodland Park violated the State's and the City's animal cruelty laws would amount to a criminal prosecution of Woodland Park, without affording Woodland Park the protections provided to criminal defendants. RCW 16.52.015 specifically provides that those accused of violations of the animal cruelty statutes must be accorded constitutional and statutory protections in the execution of the State's and municipalities' police powers. Allowing a civil cause of action to prosecute crimes would undermine the criminal justice system.

Accordingly, this Court should affirm because the underlying statutes upon which those claims rely do not provide for a private cause of action.

G. The State's and the City's Animal Cruelty Statutes Cannot Be Interpreted to Apply to Sebek's Accusations Because Criminal Statutes Are Strictly Construed to Give Fair Notice of Illegal Behavior.

Even if Sebek could pursue claims based on the State's and the City's animal cruelty statutes, the statutes cannot be interpreted to apply to Sebek's allegations in this case. Courts interpret criminal statutes to give fair notice of forbidden conduct. *See McBoyle v. United States*, 283 U.S. 25, 27, 51 S. Ct. 340, 75 L. Ed. 816 (1931) ("Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."); *City of Seattle v. Rice*, 93 Wn.2d 728, 731, 612 P.2d 792 (1980) ("The touchstone of the 'fair notice' principle is that the statute or ordinance must be sufficiently specific that men of reasonable understanding are not required to guess at the meaning of the enactment.") (internal citations and quotations omitted); *State v. Dixon*, 78 Wn.2d 796, 804-05, 479 P.2d 931 (1971) ("a criminal statute . . . will be applied only to conduct clearly intended to fall within its terms") (internal

citations omitted). Woodland Park's alleged conduct does not fall clearly within the terms of the State's and the City's animal cruelty statutes.²¹

Sebek does not allege any of the specific conduct prohibited under either the State or City statute. For example, instead of alleging that the elephant area is "of insufficient size to permit the animal to move about freely" under SMC 9.25.081 (an allegation that would be unsustainable in fact), Sebek alleges generally that the size of the Elephant Forest is too small and its surface is too hard (CP 6-9, 11-12). Instead of alleging the lack of any appropriate medical attention under RCW 16.52.207, Sebek alleges that the breeding practices of Woodland Park may expose the elephants to certain types of diseases (CP 9-11). Instead of alleging a specific act that is unnecessarily or unjustifiably causing physical pain under RCW 16.52.207, Sebek alleges generally that Woodland Park engages in inappropriate behavior modification strategies (CP 10). Indeed, at most, Sebek's allegations establish that the elephants at the Zoo are receiving proper medical care of which Woodland Park keeps meticulous records. Sebek does not even establish that any medical issue

²¹ Even when a criminal statute is interpreted and construed in the context of civil litigation, the rules of interpretation for criminal statutes still apply. *See Prime Constr. Co. v. Seattle-First Nat'l Bank*, 16 Wn. App. 674, 677, 558 P.2d 274 (1977) ("Although RCW 9.54.080 is a criminal statute, Prime Construction argues that the rule of strict construction of criminal statutes does not apply because this is a civil action. We disagree. A statute cannot be strictly construed for some purposes and loosely construed for others, and will not be extended beyond its plain terms by construction or implication.") (internal citations omitted).

documented in Woodland Park's records was caused by the Woodland Park's care and treatment of its elephants or that elephants in the wild do not suffer from the same ailments. Woodland Park should not be penalized because it carefully monitors, treats and keeps records on its elephants.

The conclusion that the animal cruelty statutes do not apply to Woodland Park's alleged behavior is underscored by the fact that Sebek's goal in this litigation is not to apply existing zoo industry standards. Rather, Sebek's goal is to circumvent these standards. Woodland Park is licensed by the USDA and accredited by the AZA because Woodland Park complies with the AZA's elephant care and breeding standards. CP 203, 205. Sebek rejects these standards as lax and inadequate by arguing that compliance with them qualifies as animal cruelty. However, it is the responsibility of a regulatory commission, a state agency, or a state legislative body—not a court—to determine the standards for proper care of zoo elephants.

H. Sebek's Claims Are Non-Justiciable Political Questions.

Finally and fundamentally, Sebek's claims are not justiciable because deciding them requires political and public policy determinations properly left to the legislative and executive branches of government.

Rouso v. State, 170 Wn.2d 70, 75, 239 P.3d 1084, 1086-87 (2010).

Sebek objects as a matter of policy to Woodland Park maintaining an elephant exhibition regardless whether the exhibition is properly permitted by the USDA or in accordance with AZA standards.

The Seattle City Council passed Resolution 29386 in 1996, expressing its support for the recommendations of the 1995 Zoo Commission II that studied Zoo needs and proposed new ways to finance the Zoo's operations and continued development. CP 299-300. Zoo Commission II recommended non-profit management and continued public funding for the Zoo in order to support its educational and conservation goals. *See id.* In 2000, the Washington State Legislature adopted Chapter 35.64 of the Revised Code of Washington to authorize cities, including the City of Seattle, to contract with non-profit organizations like Woodland Park to operate city-owned zoos and aquariums. *See* RCW 35.64.010. In December 2001, the Seattle City Council enacted an ordinance authorizing the Superintendent of Parks and Recreation to enter into the Management Agreement with Woodland Park. *See* CP 110-111 (Seattle City Council Ordinance 120697). The City Council recognized:

[T]he City of Seattle and Woodland Park Zoological Society believe that [the Management] Agreement will provide the greatest opportunity for success of the Zoo in

fulfilling its mission in education, conservation of wildlife, recreation, providing benefits to the citizens of Seattle, and developing the Zoo as an important civic asset, cultural resource and attraction.

Id.

All of these municipal and state legislative decisions were made in the context of the Zoo's ongoing ownership of elephants and the Zoo's operation of an elephant exhibit for many decades. *See* CP 160-162 (Management Agreement Recitals). In fact, in the late 1980s, the City constructed a new, award-winning exhibition facility for the Zoo's elephants. *See* CP 249. The State and the City made a variety of political decisions throughout the 1990s and early 2000s to continue operating a zoo that houses and breeds elephants. The political question doctrine should bar the insertion of the judicial branch into this policy debate.

Furthermore, the disconnect between the harm that Sebek alleges in the Complaint and the remedy sought exemplifies the political nature of the suit and the inappropriateness of this Court's involvement. Rather than seeking a change in the Zoo's practices, Sebek seeks an injunction to prohibit all City of Seattle funding for the Zoo and Woodland Park. CP 15. Sebek would have this Court "making . . . public policy decisions" overturning legislative determinations of the City that improperly "would stretch the practical limits of the judiciary." *Roussso*, 170 Wn.2d at 88

(citing *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962) (“Prominent on the surface of any case held to involve a political question is ... a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;”)). To quote the Washington Supreme Court: “This [C]ourt is not equipped to legislate what constitutes a ‘successful’ regulatory scheme by balancing public policy concerns, nor can [it] determine which risks are acceptable and which are not.” *Rouso*, 170 Wn.2d at 88.

The Court does not have jurisdiction over the policy and political questions of (1) whether governments should fund zoos or elephant exhibits, generally, or (2) whether the Zoo should house elephants, specifically. Those questions are better left to elected officials. *Rouso*, 170 Wn.2d at 88 (“A reasonable person may argue the legislature can balance concerns for [elephant welfare, education, and conservation] in a ‘better’ way—but he or she must do so to the legislature.”); *Winkenwerder v. City of Yakima*, 52 Wn.2d 617, 625, 328 P.2d 873, 879 (1958).

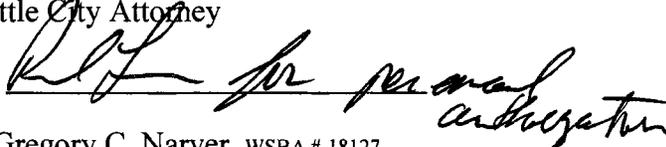
V. CONCLUSION

Sebek lacks standing to bring her claims because her Complaint fails to establish illegal activity by the City. Nor do Sebek's improperly raised new theories on appeal provide her standing. First, these arguments are not properly before the Court. Second, there is no viable claim based on the original design and construction of the elephant exhibit and Woodland Park is not a de facto City agency.

Moreover, there are multiple independent grounds that support dismissal of Sebek's Complaint. Specifically, Sebek cannot enforce criminal animal cruelty statutes through a civil action; even if there was a cause of action under the criminal animal cruelty statutes, Woodland Park and the City were not provided fair notice of potential illegal behavior under the statutes; and Sebek's claims are non-justiciable political questions. Accordingly, the City and Woodland Park respectfully request that this Court affirm the trial court's dismissal of Sebek's Complaint.

RESPECTFULLY SUBMITTED this 21st day of October, 2011.

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