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NO. 75204-9

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

UNIVERSITY OF WASHINGTON,

Respondent,

v.

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

Appellants.

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Court of Appeals
Division I
State of Washington

**AMICUS CURIAE BRIEF OF WASHINGTON STATE
DEPARTMENT OF ARCHAEOLOGY AND HISTORIC
PRESERVATION**

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	IDENTITY AND INTEREST OF AMICUS	1
III.	ISSUE ADDRESSED BY AMICUS	3
IV.	ARGUMENT	4
	A. The Certified Local Government Program Is A Partnership	4
	1. Specific Requirements Of The Certified Local Government Program	5
	B. The Certified Local Government Program Does Not Exempt University Properties Within the Jurisdiction Of A Certified Local Government	7
	C. Affirming The Trial Court Could Impair Seattle’s Enforcement Of Its Certified Local Government Program In Three Ways.....	8
	1. Only Partial Protection Of Historically Significant Properties In Seattle Would Be Possible	8
	2. Only Partial Enforcement Of The Landmarks Preservation Ordinance Would Be Possible.....	9
	3. Public Participation Would Be Foreclosed As To University Properties	9
	D. If The Court Affirms The Trial Court, There Are Statewide Implications For Local Historic Preservation Programs	12
V.	CONCLUSION	13

TABLE OF AUTHORITIES

Statutes

54 U.S.C. § 3025.....	passim
54 U.S.C. § 30250(3)(a)(1).....	7
54 U.S.C. § 302501.....	2, 4, 8, 9
54 U.S.C. § 302501(1).....	7
54 U.S.C. § 302501(2).....	7
54 U.S.C. § 302301(3).....	1
54 U.S.C. § 302502.....	2, 8, 9
54 U.S.C. § 302503.....	2, 9, 11
54 U.S.C. § 302503(a).....	6
54 U.S.C. § 302505.....	2, 3, 4
54 U.S.C. § 302902.....	1, 2
RCW 43.21C.....	2
RCW 43.334.....	2
RCW 43.334.020.....	2

Regulations

36 C.F.R. § 61.5.....	4
36 C.F.R. 61.6(a).....	5
36 C.F.R. 61.6(b).....	5

I. INTRODUCTION

Affirming the trial court's ruling that the University of Washington (University) is exempt from Seattle's Landmarks Preservation Ordinance (LPO) would have negative implications for Washington's federally-approved state historic preservation program. Local historic preservation programs, like Seattle's LPO, are important components of the State's historic preservation program overall. They are critical for the State to meet the National Historic Preservation Act's (NHPA)'s requirement for "adequate public participation in the State Historic Preservation Program." 54 United States Code (U.S.C.) § 302301(3). A decision upholding the trial court would call into question local preservation programs elsewhere in the State, jeopardizing the eligibility of state and local governments to obtain federal historic preservation grant funds under 54 U.S.C. § 302902.

II. IDENTITY AND INTEREST OF AMICUS

The Washington State Department of Archaeology and Historic Preservation (Department) is the agency with knowledge and expertise in historic preservation. The Department advocates for the preservation of Washington's irreplaceable historic and cultural resources, including significant buildings, structures, sites, objects, and districts, in compliance with state and federal law. *See* Revised Code of Washington

(RCW) 43.334. Under the State Environmental Policy, RCW 43.21C, the Department is designated as the expert agency for cultural resources and archaeological site protections. The Director of the Department is also designated as the State Historic Preservation Officer, responsible for carrying out Washington's federal historic preservation. RCW 43.334.020.

In Washington, the State Historic Preservation Officer certifies local governments for participation in the Certified Local Government program established under the National Historic Preservation Act, 54 U.S.C. § 302501-302505 (the "CLG statutes"). Under 54 U.S.C. § 302502, the State's historic preservation program must have a mechanism for the State Historic Preservation Officer to certify local governments, in order for the State program to be approved by the Secretary of the Interior. In order for the State Historic Preservation Officer to certify a local government's program, the local government must be able to enforce its ordinance for the designation and protection of historic properties within its jurisdiction, and must provide for adequate public participation in its local historic preservation program. 54 U.S.C. § 302503.

The Secretary of Interior's approval of the State's historic preservation program makes the State eligible for federal historic preservation grant funds under 54 U.S.C. § 302902. The State Historic

Preservation Officer's approval of a local government as a Certified Local Government makes the local government eligible for a portion of the State's allocation of federal grant funds, 54 U.S.C. § 302505.

The trial court's ruling could negatively affect the structure and functioning of Seattle's and the State's historic preservation programs and potentially affect eligibility for federal funding. It is antithetical to the intent and structure of the Federal-State-Local preservation partnership under the National Historic Preservation Act for a university that controls significant numbers of historic properties within a Certified Local Government city, to be exempt from that city's historic preservation ordinance. The National Historic Preservation Act makes no exceptions for nor creates exemptions from its commands, for state agencies or state universities. For these reasons the Department and its Director, the State Historic Preservation Officer have an interest in this matter, which is addressed in this amicus brief.

III. ISSUE ADDRESSED BY AMICUS

This amicus brief addresses the following issue:

Does allowing a blanket exemption to the City's Landmarks Preservation Ordinance for University of Washington property violate the intent of the Certified Local Government program and threaten its continued viability in Washington?

IV. ARGUMENT

A. The Certified Local Government Program Is A Partnership

The National Historic Preservation Act and its implementing regulations require States to have a statewide historic preservation plan that is approved by the Secretary of the Interior in order to receive federal preservation funding. 54 U.S.C. ch. 3023; 36 Code of Federal Regulations (C.F.R.) 61.6(a), (b). States with approved state programs are eligible for matching grants-in-aid for historic preservation in the State. 54 U.S.C. § 302505, 36 C.F.R. § 61.5. Washington has such an approved state historic preservation program, administered by the State Historic Preservation Officer.

Seattle is a Certified Local Government under the Certified Local Government Program, a local historic preservation program provided for under the National Historic Preservation Act at 54 U.S.C § 302501-302505. Through the Certified Local Government Program, the NHPA creates a historic preservation partnership among the Federal, State, and local governments. The National Park Service (NPS) describes this partnership as follows:

Jointly administered by the National Park Service (NPS) and the State Historic Preservation Offices (SHPOs), each local community works through a certification process to become recognized as a Certified Local Government (CLG). Once certified CLGs become an active partner in

the Federal Historic Preservation Program. Each community gains access to benefits of the program and agrees to follow required Federal and State requirements.

National Park Service Certified Local Government website, <https://www.nps.gov/clg/>.¹

Pursuant to Federal regulations, each State develops certification procedures for its CLG program and submits them for approval to the National Park Service. 36 C.F.R. 61.6(a), (b). Once the procedures are approved, the State Historic Preservation Officer must follow them when certifying local governments. A local government seeking certification applies to the State Historic Preservation Officer, who reviews the application and, if it satisfied state criteria, forwards it to the National Park Service for final approval.

1. Specific Requirements Of The Certified Local Government Program

In order to qualify for Certified Local Government status, the State Historic Preservation Officer and the Secretary of the Interior must certify that the local government does all of the following:

- 1) Enforces appropriate State or local legislation for the designation and protection of historic properties;

¹ For additional information see U.S. Department of the Interior, National Park Service Manual for State Historic Preservation Review Boards, Part 9, Certified Local Governments; <https://www.nps.gov/nr/publications/bulletins/strevman/strevman9.htm>. The historic preservation provisions of the National Historic Preservation Act are codified in the U.S.C. Title 54, Subtitle III, Division A.

2) Establishes an adequate and qualified historic preservation review commission by State or local legislation;

3) Maintains a system for the survey and inventory of historic properties;

4) Provides for adequate public participation in the local historic preservation program; and

5) Satisfactorily performs the responsibilities delegated to local government under the National Historic Preservation Act.

54 U.S.C. § 302503(a).

The trial court ruled that Seattle's Landmarks Protection Ordinance cannot be enforced at all against the University of Washington. Moreover, a number of historic properties within Seattle—not just on the main campus—would be entirely exempted from the Ordinance, rendering Seattle unable to enforce its own legislation for the designation and protection of historic properties and to provide for adequate public participation (requirements 1 and 4 in 54 U.S.C. § 302503(a)).

If the trial court is upheld, Seattle's ability to qualify as a Certified Local Government is placed at risk, threatening its access to federal funding of its historic preservation program. Loss of that certification and funding could sharply restrict Seattle's ability to maintain its historic preservation program—including its ability to provide for meaningful

public participation and the consideration of alternatives when responding to applications to alter or demolish historical buildings.

B. The Certified Local Government Program Does Not Exempt University Properties Within the Jurisdiction Of A Certified Local Government

By its terms, the National Historic Preservation Act directs that a Certified Local Government Program is intended to protect all significant historic properties located within the borders of a Certified Local Government.

As explained above, to become certified, a local government must demonstrate that it “enforces appropriate State or local legislation for the designation and protection of historic property.” 54 U.S.C. § 30250(3)(a)(1). The term “designation” is defined in 54 U.S.C. § 302501(1) to mean “the identification and registration of property for protection that meets criteria established by a State or locality for significant historic property within the jurisdiction of a local government.” (Emphasis added). “Protection” is defined to require a “local review process under State or local law for proposed demolition of, changes to, or other action that may affect historic property designated pursuant to this chapter.” 54 U.S.C. § 302501(2).

The Certified Local Government statutes do not differentiate between property owners. The statutes contemplate that all required parts

of a Certified Local Government's historic preservation program, including its enforcement and public participation requirements, will apply to all properties within that city or town's borders. This is consistent with other parts of the National Historic Preservation Act which do not create an exception for universities or other state agency property owners.

C. Affirming The Trial Court Could Impair Seattle's Enforcement Of Its Certified Local Government Program In Three Ways

1. Only Partial Protection Of Historically Significant Properties In Seattle Would Be Possible

First, the University controls a number of the oldest and most historically significant buildings in the City of Seattle. If affirmed, the trial court's ruling means Seattle could not designate and protect these significant historic properties within the city as intended under 54 U.S.C. §§ 302501; 302502. The manifest object of the Certified Local Government program is for States to certify local governments to effectuate the historic preservation purposes of the National Historic Preservation Act at the local level in exchange for federal financial assistance: "Any State program approved under this subdivision shall provide a mechanism for the certification by the State Historic Preservation Officer of local governments to carry out the purposes of this division" 54 U.S.C. § 302502. If the trial court's ruling is upheld,

Seattle, as a Certified Local Government, cannot protect all significant historic property within its jurisdiction as intended under 54 U.S.C. §§ 302501; 302502.

2. Only Partial Enforcement Of The Landmarks Preservation Ordinance Would Be Possible

Second, it means the Certified Local Government could not fully enforce appropriate local legislation for designation and protection of historic properties, contrary to 54 U.S.C. § 302503. If the University's position is upheld, University buildings cannot even be proposed for designation much less designated as local landmarks and protected under the Certified Local Government program.

3. Public Participation Would Be Foreclosed As To University Properties

Third, it means that public participation in the local preservation program overall would be significantly impaired. The LPO provides for public participation in numerous ways. For example, any member of the public may nominate any site, object, or improvement to be designated as a landmark by filing a completed nomination form with Seattle's Historic Preservation Officer. Landmarks Preservation Ordinance (LPO), 25.12.370(A) See https://www.municode.com/library/wa/seattle/codes/municipal_code?nodeId=TIT25ENPRHIPR_CH25.12LAPR. Nominations that meet specified requirements are forwarded to the Landmarks

Preservation Board; the Board may only consider nominations at a public meeting. LPO 25.12.370(C).

After a nomination has met threshold requirements and is under further consideration, every additional step in the landmark designation process requires public meetings with an opportunity for the public to be heard. Approval of the nomination for further designation proceedings, or disapproval of the nomination, must occur at a public meeting. LPO 25.12.390; 25.12.410. After the nomination is approved for further proceedings, consideration of the nomination and approval or denial of landmark designation must occur at a public meeting, with opportunity for public comment and presentation of information to the Landmarks Preservation Board. Designation of a landmark is done by passage of an ordinance by the Seattle City Council, at a public meeting, with further opportunity for public input. LPO 25.12.110; General Rules and Procedures of the Seattle City Council (as adopted by Resolution 31619), Sec. XI (A)(1). The public may provide comment and receive notice upon request, when a designated landmark is the subject of an application for approval to make proposed alterations or significant changes to specific features or characteristics of the site, improvement or object, which are identified in the approved nomination, or the Board report on designation, or subject to controls in a controls and incentives agreement or a

designating ordinance, whichever is most recent. LPO 25.12.670;
25.12.730.

If the trial court's ruling is upheld, this considerable public participation under the LPO in regard to nomination and designation of landmarks, and proposed changes to or demolition of landmarks, would be completely foreclosed as to the multiple historic properties in Seattle owned by the University. This is contrary to the spirit and letter of 54 U.S.C. § 302503, and to the commitment the State and Seattle have made under that statute.

As explained above, the Certified Local Government Program contemplates a partnership in which local governments, in cooperation with the state and federal governments, assume responsibility for designating and protecting historically significant properties. In this partnership, local communities make local decisions about what is historically significant in their communities.

If the trial court's ruling is upheld the Seattle CLG program will be unable to fulfill these requirements relative to the many significant historic properties within Seattle that are under University control. There will be no guaranteed, enforceable opportunity for the public to weigh in on whether any University property is of such historical importance that it

deserves protection. Any public process would be solely at the grace of the Board of Trustees, who could choose to deny it altogether.

D. If The Court Affirms The Trial Court, There Are Statewide Implications For Local Historic Preservation Programs

A decision upholding the University's position may jeopardize historic preservation programs statewide. There are 53 Certified Local Governments in Washington. The University of Washington and the other state universities have branch campuses and extension programs in many of those cities with concomitant institutional control of historic properties.² Thus, 52 other Certified Local Governments have ordinances and procedures similar to Seattle's for landmark preservation, none of which would be able to designate and protect university properties in their jurisdictions under the trial court's ruling. In addition, an adverse ruling could have a chilling effect on 22 additional communities

² Examples of cities with Certified Local Government programs and university control of historic properties in the city include Tacoma, Ellensburg and Bellingham. Washington State University (WSU) has campuses in Spokane, Tri-Cities, Vancouver, and Everett, and extension programs in every county. University of Washington (UW) has numerous medical clinics and facilities scattered throughout the Puget Sound region, as well as field stations and research facilities in various places. Eastern Washington University (EWU) has its main campus in Cheney, maintains a Spokane campus, and offers programs in Bellevue, Everett, Longview, North Seattle, and Vancouver.

operating historic preservation programs.³ This consequence would run counter to the federal decision to enable local communities to protect historic resources, and undermine the ability of local governments to tailor preservation regulations to the needs of their communities.

V. CONCLUSION

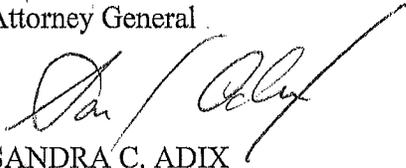
Based on the foregoing, the Department respectfully requests this Court consider the negative implications for Certified Local Governments in Washington of a ruling that the University of Washington is categorically exempt from Seattle's Landmarks Protection Ordinance. That ruling contradicts the National Historic Preservation Act's Certified Local Government program requirements, and the implementation of those requirements by the State of Washington and local governments across the State. Under those provisions, local historic preservation ordinances apply across a local government's geographical jurisdiction, to

³ In addition to Seattle, 52 other Certified Local Governments have local preservation laws that are similar to the one challenged here. They include Aberdeen, Anacortes, Auburn, Bainbridge Island, Battleground, Bellingham, Black Diamond, Bothell, Burlington, Camas, Carnation, Chehalis, Cheney, Clark County (includes interlocal agreements with six jurisdictions), Cle Elum, Colfax, Concrete, Dayton, Des Moines, Edmonds, Ellensburg, Everett, Gig Harbor, Harrington, Hoquiam, Issaquah, Kenmore, Kennewick, Kettle Falls, King County, Kirkland, La Center, Lacey, Lakewood, Langley, Longview, Lynden (pending approval), Maple Valley, Millwood, North Bend, Pasco, Pomeroy, Pullman, Redmond, Ritzville, Shoreline, Skykomish, Snohomish, Snoqualmie, Spokane, Spokane County (includes interlocal agreements with 16 jurisdictions), Steilacoom, Tacoma, Thurston County, Tumwater, Vancouver, Walla Walla, Washougal, Wenatchee, Woodinville, Yacolt, Yakima, and Yelm. Moreover, the 22 non-certified local governments with interlocal agreements involving their preservation programs would also be placed at risk if any state university controls property in the jurisdiction now or acquires control in the future.

public and private buildings alike. Under those Provisions, properties within Seattle controlled by the University, are subject to the Landmarks Protection Ordinance like any other property in the city. The Department urges this Court to reverse the trial court.

RESPECTFULLY SUBMITTED this 7th day of November, 2016.

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