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Court of Appeals
Division I
State of Washington

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

NO. 75204-9-I

THE UNIVERSITY OF WASHINGTON, a State Institution of Higher Education,

Respondent,

v.

THE CITY OF SEATTLE, a municipal corporation; and DOCOMOMO US – WEWA, a nonprofit corporation, HISTORIC SEATTLE; and THE WASHINGTON TRUST FOR HISTORIC PRESERVATION

Appellants.

REPLY BRIEF OF DOCOMOMO US – WEWA, HISTORIC SEATTLE AND THE WASHINGTON TRUST FOR HISTORIC PRESERVATION

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Richard L. Settle and Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future,* 16 U. Puget Sound L. Rev. 867 (1993) 4, 5, 6

I. A CAUTIONARY NOTE

The University seeks to minimize the precedential impact of the declaratory relief it seeks. The University argues that the decision in this declaratory action is limited to its main campus. Resp. at 43-45. But a decision in this declaratory judgment action will, necessarily, sweep far more broadly than that. *See, e.g.,* City Op. Br. at 11.

The University of Washington did not wait for a decision regarding the More Hall Annex nomination application and file a lawsuit limited to that building. It filed a declaratory judgment seeking a ruling on the meaning of state statutes of general applicability. A ruling as to whether the language in RCW 28B.20.130(1) that the regents' "full control" is "otherwise" constrained by RCW 36.70A.103 will necessarily apply to all UW property anywhere in the State and, because the "full control" language is identical for all State universities, to the properties of all other state universities, too. *See, e.g.,* RCW 28B.30.150(1) (Washington State University trustees have "full control . . . , except as otherwise provided by law"). The University's claims that the Court's construction of the statute would not apply to the State universities' properties throughout the State should be rejected. The Court should proceed with care.

II. ARGUMENT

The words of the 1985 legislation could not be clearer: The regents enjoy "full control . . . except as otherwise provided by law." The court need look no further than the plain words of the statute to glean the legislature's manifest intent.

The University says that "[n]othing in the legislative history of this amendment, or 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." Resp. Br. at 29 30. But when a statute is unambiguous, reference to legislative history is unnecessary and improper. "When a statute is unambiguous, construction is not necessary and the plain meaning controls." *Faben Point Neighbors v. City of Mercer Island,* 102 Wn. App. 775, 778, 11 P.3d 322 (2000). The Court should not hesitate to apply the unambiguous phrase "except as otherwise provided by law" exactly as it is written.

The issue then becomes whether the GMA's mandate that state agencies comply with locally adopted GMA regulations is an example of a limitation placed on the UW "as otherwise provided by law." The answer

to that seems clear enough, too: "State agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter. . . ." RCW 36.70A.103.

UW is left to argue that it is not a "state agency" and that the LPO is not a GMA regulation. The City has addressed the bulk of those arguments and we adopt its position as our own. We write separately to address UW's arguments that the Legislature acted "implicitly and silently" when it adopted RCW 36.70A.103 in 1991, Resp. at 16; that applying the LPO to University property is "antithetical" to the goals and requirements of the GMA. *Id.* at 33, n. 13; that the LPA is not a GMA "development regulation," but a procedural ordinance, *id.* at 34, n. 14; and that the LPO goes beyond the GMA goal of encouraging preservation of historic resources, *id.* at 36, n. 15.

A. The 1991 Amendment to the GMA Applying GMA Regulations to State Agencies was Explicit and Anything but "Silent"

The GMA was adopted by the Legislature in two parts in 1990 and 1991. Together, those enactments revolutionized land use planning in Washington. Previously, local governments were authorized to plan and zone, but there was very little substantive direction and few procedural

safeguards. Adjacent counties and cities made little effort to coordinate their efforts with each other or with state agencies. Washington's land use laws as of 1990 were "anachronistic."[1]

The GMA upended all of that. For the first time, substantive direction was provided by the State to the cities and counties. Urban sprawl was constrained. RCW 36.70A.110. Forests and farms of "long term commercial significance" had to be identified and conserved. RCW 36.70A.060(1). Critical areas (like wetlands, steep slopes, and wildlife habitat) had to be identified and protected. RCW 36.70A.060(2). Adjacent jurisdictions had to coordinate their plans. RCW 36.70A.210. State agencies had to comply with locally adopted plans, too. RCW 36.70A.103. But tyranny by counties and cities was prohibited because they could not adopt plans or regulations that would have the effect of precluding any essential public facility. RCW 36.70A.200. A new state agency, the Growth Management Hearings Board, was established to assure that local plans met the goals and requirements of the new state law, RCW 36.70A.250 *et seq.*, – including that local enactments could not preclude

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[1] Richard L. Settle and Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future,* 16 U. Puget Sound L. Rev. 867, 875 (1993).

essential public facilities. *See, e.g., Des Moines v. PSRC,* 98 Wn. App. 23, 988 P.2d 27 (1999) (new airport runway); *Cedar River W. & S. Dist. v. King Cy,* 178 Wn.2d 763, 773, 315 P.3d 1065 (2013) (sewer plant).

UW suggests that the Legislature would not have done something as momentous as requiring state agencies to comply with local regulations by "silently" adding section 103 to the GMA. Resp. at 16. The political and legislative process that led to the GMA's enactment in 1990 and 1991 was anything but quiet. The issues were hotly debated and involved an initial enactment, a state initiative, a legislative and gubernatorial pledge to adopt a second installment, the defeat of the initiative, and the legislature's adoption of the second installment. *See* Settle and Gavigan, *supra* at 881-896. "Silently" was not the operative phrase.

The new law was "revolutionary," completely upending long-standing land use policies and procedures. *Id.* at 940 (the "transition from Washington's anachronistic patchwork of state land use laws to a modern growth management system has been revolutionary rather than evolutionary"). When the dust settled, the new law was fairly described as having four major cornerstones – one of which featured the requirement for state agencies to comply with local land use regulations:

> The apparent central purposes are: (1) avoiding sprawling settlement patterns by concentrating new development in urban growth areas, (2) ensuring adequate public facilities to serve new development by thorough infrastructure planning and concurrency requirements, (3) protecting critical areas from environmentally harmful activities and natural resource lands from incompatible development by directing it elsewhere, and (4) achieving regional responsibility among governmental units by coordinating local plans and regulations to ensure fair and efficient allocation of locally undesirable but regionally essential facilities, **while compelling state agencies to comply with local plans and regulations.**

Id. at 904-905 (footnotes omitted; emphasis supplied).

UW's claim that the legislature's decision to make state agencies comply with local GMA regulations (safeguarded by both appeal rights and the protections for essential public facilities) was made "implicitly and silently" has no basis in reality – or the record before this Court.

B. Applying GMA Regulations to University Property is Not "Antithetical" to GMA's Goals; It Furthers Its Core Purposes

UW also asserts that applying the LPO 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 contrary to decisions in the Campus Master Plan (CMP). *See* Resp. at 33, n. 13. There are multiple flaws with this argument.

One, the argument is not supported by citation to the record or legal authority. No argument is presented in support of the bald contention. Unsupported arguments should not be addressed by the Court. *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 809, 828 P.2 549 (1992).

Two, the LPO does not undermine coordinated planning; it embodies it. As the City explains, the LPO contemplates a partnership between the property owner and the City to protect historic resources consistent with the property owner's unique interests. CP 505-06. This is the epitome of coordinated planning, not its banishment.[2]

Three, even if the University has established that the CMP is a GMA planning document (*i.e.*, a document that should be "coordinated" with the LPO), it would not preclude applicability of the LPO as a GMA development regulation.[3] It is the development regulations, not planning documents, that regulate the use of land:

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[2] While the LPO provides for a coordinated planning effort between the property owner and the City, the University did little to take advantage of it. The University made no effort to develop a project that both meets its educational needs and the historic preservation policies embodied in the GMA and the LPO. *See* CP 506-07 (Decl. of Karen Gordon (Mar. 21, 2016)). A better effort by UW could have avoided this litigation.

[3] Contrary to the unstated premise in the University's argument, the CMP should not be characterized as a GMA planning document. Indeed, that was the University's contention, accepted by a state administrative tribunal, in an earlier case:

> "*Comprehensive plans do not* control the issuance of permits nor *directly control the use of land.* Rather, *comprehensive plans are directive to development regulations* and capital budget decisions." . . . These development regulations, in turn, directly control the use of land and govern over proposal review and approval and the issuance of permits.

Id. at 7 (emphasis in original; footnotes omitted). Thus, the City's reliance on its LPO is not "antithetical," but entirely consistent with, GMA requirements.[4]

Four, when the City and the University developed the CMP, they expressly agreed to leave for another day the issue of whether the LPO applied. To now assert that applying the LPO would undermine the CMP is disingenuous. *See* City Op. Br. at 30-31.

> The [Growth Management Hearings] Board agrees with the City/UW that the UWCMP is not a subarea plan within the meaning of RCW 36.70A.080. Rather, the UWCMP is part of a permit application process resulting from a development regulation.

Laurelhurst Comm. Club v. City of Seattle, 2003 WL 22896421, Cent. Puget S. Gr. Mgmt. Hrngs. Bd., Order on Motions (June 18, 2003) at 9.

4 The GMA uses a cascading hierarchy of planning and regulatory measures to address land use issues. At the top of the flow are the State's goals, which guide the development of countywide planning policies. Those, in turn, guide the development of county and city comprehensive plans, which guide the development of subarea plans (if any are adopted), all of which guide the details of development regulations –the actual "controls placed on development." RCW 36.70A.020(7). *See Laurelhurst v. City of Seattle, supra* at 8.

In sum, utilizing the LPO to advance the GMA's historic preservation goal (RCW 36.70A.020(13)) is not "antithetical" to the GMA planning process. The LPO was adopted and amended as a GMA ordinance by the City Council to implement the GMA's historic preservation goal. It should be given effect, consistent with the GMA's historic preservation and coordinated planning goal.

C. The Procedural Aspects of the LPO Do Not Disqualify It as a GMA Development Regulation

The University makes a fleeting contention that the LPO may not be a GMA "development regulation" because it is merely a procedural ordinance that creates a process by which actual development controls are created. Resp. Br. at 34, n. 14. First, as with the prior argument, because the University provides no legal or evidentiary support for this claim, it should not be addressed by the Court. RAP 10.3(a)(6); *Nelson v. Dept. of Labor and Ind.,* 175 Wn. App. 718, 728, 308 P.3d 686 (2013).

Second, even if the claim were considered, it should be rejected. The "argument" (such as it is) ignores that many development regulations do not create explicit standards, but rather create a process by which such standards are developed for individual properties. Ordinances that establish a process by which conditions are developed to regulate specific development

proposals are routinely characterized as "development regulations" under the GMA. Indeed, one of the specific examples of a "development regulation" provided in the statute is a "planned unit development." RCW 36.70A.030(7). When a PUD is approved, it establishes conditions that apply to a specific parcel of land, distinct and different from the zoning that ordinarily would apply. *See, e.g., Wiggers v. Skagit Cy.*, 23 Wn. App. 207, 213, 596 P.2d 1345 (1979). Likewise, many jurisdictions employ conditional use permits as a means of establishing conditions that apply to specific parcels of land. These, too, are characterized as "development regulations," as are the "zoning ordinances" that authorize these processes. RCW 36.70A.030(7). The University's evanescent contention that the procedural aspects of the LPO disqualify it as a GMA development regulation should be rejected.

D. The LPO is Consistent with the GMA Goal of Encouraging Preservation of Historic Resources

The University makes one more unsupported argument about the LPO and the GMA. It seeks to contrast the GMA goal "encouraging" preservation of historic resources with the LPO which it says "actually requires" historic preservation. Resp. at 36, n. 15. As before, this

unsupported argument should not be considered. *Nelson v. Dept. of Labor and Ind., supra.*

Further, we note this claim is contrary to the one discussed immediately above. In footnote 14, the University asserts that the LPO is not a development regulation because it does not impose controls; it only establishes a process. Two pages and one footnote later, the LPO has morphed from a procedural requirement to a substantive scourge, requiring preservation without regard to any other factor.

In any event, the University's insinuations are again off the mark. As the City has detailed at length, the LPO preserves historic resources through a joint effort by the property owner and the City. *See* CP 505–07. That process does not require the preservation of every historic resource in the city. It creates a process that encourages preservation by making a nomination process available to property owners and others that can, but does not always, result in designation and can, but does not always, result in "controls and incentives" to protect the historic property. The use of "incentives" as one of the mechanisms is proof positive that the LPO "encourages" historic preservation.

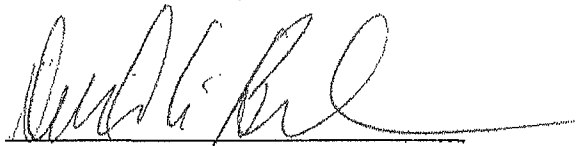
III. CONCLUSION

The GMA creates a balanced approach to the policy conundrum of whether and how state agencies should shape their plans to be consistent with local land use regulations, including those designed to protect historic resources. The Legislature's policy choice was that state agencies must comply, RCW 36.70A.103, but that the state agencies could override the local regulations in certain respects regarding "essential public facilities," RCW 36.70A.200. This balanced approach has worked for every other state agency for two decades. The University has not demonstrated that it would not work for it, too. The Court should reject the University's efforts to obtain a judicial veto of this key requirement of the GMA. The superior court should be reversed.

Dated this 24th day of October, 2016.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By: 

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IN THE COURT OF APPEALS
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THE UNIVERSITY OF WASHINGTON, a State Institution of Higher Education, Respondent, v. THE CITY OF SEATTLE, a municipal corporation; and DOCOMOMO US – WEWA, a nonprofit corporation, HISTORIC SEATTLE; and THE WASHINGTON TRUST FOR HISTORIC PRESERVATION Appellants.	NO. 75204-9-I DECLARATION OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, PEGGY S. CAHILL, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the legal assistant for Bricklin & Newman, LLP, attorneys for DOCOMOMO US – WEWA, et al. herein. On the date and in the manner indicated below, I caused the Reply Brief of DOCOMOMO US – WEWA, Historic Seattle and The Washington Trust for Historic Preservation to be served on:

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