

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

UNIVERSITY OF WASHINGTON,

Respondent,

v.

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

Appellants.

SUPREME COURT NO.  
94232-3

COURT OF APPEALS NO.  
75204-9-I

RESPONDENT’S  
OPPOSITION TO CITY’S  
MOTION TO TAKE  
ADDITIONAL EVIDENCE  
OR STRIKE

**TABLE OF CONTENTS**

	<i>Page</i>
I. INTRODUCTION AND RELIEF REQUESTED .....	1
II. FACTS RELEVANT TO UNIVERSITY’S RESPONSE.....	1
III. LEGAL AUTHORITY AND ARGUMENT .....	7
A. The City’s additional documents are consistent with the plain language of Ordinance 117430 and cumulative, and therefore do not satisfy the criteria in RAP 9.11(a) for admission of additional evidence on appeal.....	7
IV. CONCLUSION .....	11

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>STATUTES</b>	
Growth Management Act (“GMA”).....	passim
Landmarks Preservation Ordinance (“LPO”).....	passim
RCW 36.70A.040 .....	8, 11
RCW 36.70A.065 .....	7
RCW 36.70A.080 .....	7
RCW 36.70A.103 .....	1, 7, 8, 11
Seattle Municipal Code Title 23 .....	9
Seattle Municipal Code Title 25 .....	3, 8, 9
<b>OTHER AUTHORITIES</b>	
RAP 9.11(a).....	1, 7, 9, 11
Ordinance 106348.....	1
Ordinance 117221.....	5, 6
Ordinance 117430.....	passim

## **I. INTRODUCTION AND RELIEF REQUESTED**

The City does not need to add evidence to refute arguments the University did not make. The City also does not need to add evidence that is consistent with and cumulative of the evidence already in the record. And the City does not need to add evidence that it did not offer to the trial court and did not seek to add when it filed two briefs in Division I.

The City's request does not meet the criteria in RAP 9.11(a) for admission of additional evidence on appeal.

## **II. FACTS RELEVANT TO UNIVERSITY'S RESPONSE**

The City's Landmarks Preservation Ordinance ("LPO") was adopted in 1977. Ordinance 106348; *see also* CP 3, 20. The Growth Management Act ("GMA") was adopted in 1990, and the section of the GMA on which the City's entire case relies, Section 103, was adopted in 1991. Laws of 1991, sp. sess., ch. 32 § 4 (codified at RCW 36.70A.103); *see also* CP 219. RCW 36.70A.103 requires "state agencies" to comply with "development regulations adopted pursuant to" the GMA. In this action, the University seeks a declaration that the City may not apply the LPO to University buildings on the University campus. CP 16. The City seeks the opposite: a declaration that Section 103 of the GMA allows the City Council to designate University structures as City landmarks. Since

most of the campus is eligible to be nominated as a City landmark,<sup>1</sup> granting the City's requested declaration would deny the Board of Regents control over most of the campus.

At the trial court, the University and the City each moved for summary judgment. In its motion, the University argued that the LPO, adopted in 1977, was not "adopted pursuant to" the GMA, enacted 13 years later, and therefore was a separate regulatory regime outside the scope of Section 103 of the GMA. CP 213. In its response brief, the City asserted that it had retroactively adopted the LPO pursuant to the GMA in 1994, by means of Ordinance 117430. CP 448-51. The City attached a copy of the first and last pages of Ordinance 117430 as Appendix D to its brief. CP 469-471.

In the University's reply brief, which King County Local Rules at the time limited to five pages, the University pointed out that the City's assertion was unsupported by the plain language of Ordinance 117430, and the University pointed out that accepting the City's position would mean the Ordinance was void for violating the requirement of the City Charter that the subject of an ordinance be clearly expressed in its title. CP 581. The University also argued that neither the title nor the body of

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<sup>1</sup> Declaration of Michael J. McCormick in Support of University of Washington's Motion for Summary Judgment ¶ 4 & Ex. A, CP 249-53.

Ordinance 117430 mentioned the LPO, or stated that the Ordinance was adopting any chapter or section of Title 25 of the Seattle Municipal Code in which the LPO is codified. *Id.*

Without deciding this issue, the trial court granted judgment to the University on the ground that the LPO's plain language does not regulate the University. The City appealed.

In its opening brief on appeal, the City again cited to the first and last pages of the Ordinance that it had presented to the trial court (CP 470-71) and argued that the "City Council adopted an ordinance explaining its review of existing development regulations and declaring that those existing regulations, as amended and supplemented by other sections of the ordinance, brought the City into compliance with the GMA." Opening Br. at 13-14 & n.36 (citing Ord. 117430). The City argued that the general phrase "development regulation" must have included the LPO in Title 25. *Id.* at 14 & n.37.

In the University's Response Brief, which the RAP permits to be fifty pages long rather than the five allowed for a reply in the trial court, the University further explained its argument that the City's reading of Ordinance 117430 was not supported by the plain text of that Ordinance. Response Br. at 31-36. The University again argued that the City's new interpretation could not be accepted because it would render Ordinance

117430 void for violating the subject-in-title requirement of the City Charter. *Id.* at 31-32. And the University argued that the City's interpretation of Ordinance 117430, if accepted, also would mean that the City in 1994 had violated the GMA's requirement for "early and continuous public participation," *id.* at 32-33, which in turn would have deprived interested parties of a meaningful opportunity to challenge the LPO to the Growth Board for its inconsistency with the GMA. *Id.* at 33-34. The University did not advance the arguments the City's Motion and Supplemental Brief now say it did: that the City in fact violated the GMA's public notice requirement, or that the City violated the City Charter's subject-in-title rule. Rather, the University argued that such violations would be the necessary result of disregarding the plain language of Ordinance 117430 and accepting the City's interpretation today of what Ordinance 117430 did in 1994.

In its Reply Brief in Division I, the City reasserted its position that, because it used the phrase "development regulations," Ordinance 117430 successfully "adopted" the LPO "pursuant to" the GMA. Reply Br. at 8-10. The City did not reply to the University's arguments about the Charter and the public-participation requirements of the GMA, and did not assert that additional evidence was needed to respond to the University's arguments.

In response to this Court's request for supplemental briefs addressing whether the LPO was adopted "pursuant to" the GMA, the City not only filed a supplemental brief, it simultaneously filed its Motion to "take additional evidence" that asks this Court to accept three documents from the legislative history of Ordinance 117221 (which adopted the City's new Comprehensive Plan) and Ordinance 117430. The City's motion describes these documents as follows:

1. City Planning Department, *Final Environmental Impact Statement for the City of Seattle's Comprehensive Plan* (March 3, 1994), AE 1-8 (cover, table of contents, and pages 153-54 and 213-14). This document explains that nothing in the then-proposed comprehensive plan would require amending the LPO. This document is available from the Seattle Municipal Archives, Item No. 1399, Location D-95.
2. City Department of Construction and Land Use, *Implementing Seattle's Comprehensive Plan: Proposed Development Regulations* (March 1994), AE 9-13 (cover, table of contents, and pages 5-7). This document states: "Most of Seattle's existing development regulations essential to achieving the Plan are already consistent with the proposals in the Plan. However, a limited number of changes are proposed." This document also mentions the public participation process. This document is available from the Seattle Municipal Archives, Item No. 2815, Location D-187.
3. City of Seattle, *Implementing Seattle's Comprehensive Plan: REVISED Development Regulations; Reader's Guide* (Oct. 1994), AE 14-22 (cover for all reports and the following from the *Reader's Guide* report: cover, acknowledgements,

introductory letter, and pages 1-5). This document states: "Most of Seattle's existing development regulations are already consistent with the Plan; however, some amendments to the Land Use Code are needed. These amendments must be adopted by the end of 1994, as mandated by the GMA." document also details past and future public participation opportunities. This document comprises several reports, including the *Reader's Guide*. The complete document is available from the Seattle Municipal Archives, Item No. 10165, Location D-710.

Motion at pp. 4-6.

In sum, the City offers (1) language from the EIS for its Comprehensive Plan, adopted in July 1994 by Ordinance 117221, that says the LPO does not need to be amended to be consistent with the new Comprehensive Plan; (2) a public document from March, 1994 that says that most of Seattle's existing development regulations are "consistent" with the proposed Comprehensive Plan that will be adopted later that year; and (3) a public document from October 1994 that also says that most of Seattle's existing development regulations are already "consistent" with the recently adopted Comprehensive Plan.

### III. LEGAL AUTHORITY AND ARGUMENT

- A. **The City's additional documents are consistent with the plain language of Ordinance 117430 and cumulative, and therefore do not satisfy the criteria in RAP 9.11(a) for admission of additional evidence on appeal.**

The University's arguments regarding RCW 36.70A.103 are based entirely on the title and first section of Ordinance 117430 that the City presented to the trial court:

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

\* \* \*

**Section 1.** The Seattle City Council finds and declares as follows:

(a) The *new and amendatory regulations adopted by* this ordinance are appropriate and reasonable exercises of the police power that bring the City's development regulations into compliance with RCW 36.70A.040 and RCW 36.70A.065;<sup>2</sup>

(b) The City's development regulations, as amended and supplanted by this ordinance, are *consistent with and implement the City's Comprehensive Plan*;

(c) The regulations *adopted by this ordinance* are intended to protect and promote the health, safety, and welfare of the general public and are not intended to recognize or establish any particular person or class or group of persons who will or should be protected or benefitted by them.

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<sup>2</sup> RCW 36.70A.065 addresses time periods for issuing permits; it was amended and re-codified as RCW 36.70A.080 by Chapter 347 of the Laws of 1995, sections 409, 410, and 432.

CP 470-71 (emphasis added).

The City argues that Ordinance 117430 *adopted* the LPO pursuant to the GMA; the University argues that Ordinance 117430 could only have found the LPO *consistent* with the City's new Comprehensive Plan. As the University explained in its Supplemental Brief, the difference between "consistent with the Comprehensive Plan " and "adopted pursuant to the GMA" is the difference between complying with RCW 36.70A.040, one of the stated subjects of Ordinance 117430, and complying with RCW 36.70A.103, which was not identified in any way in the Ordinance.

The University did not and does not argue:

- that Ordinance 117430 fails to accomplish any of the subjects of the Ordinance stated in its title;
- that the LPO, which is codified in Title 25, is inconsistent with the City's Comprehensive Plan; or
- that Ordinance 117430 violates the City Charter, or the GMA, or is otherwise invalid for any reason so long as it is interpreted according to its plain terms.

The University argues, and has argued consistently, that the City's *interpretation* of Ordinance 117430 in this case is inconsistent with the plain language of the Ordinance as stated in both its title and its body, and

that the City's *interpretation* also must be rejected because this interpretation would mean the Ordinance – to the extent that it is read to have adopted the LPO – would have violated the City's Charter and the provisions of the GMA that require enhanced public participation. The University's arguments are based entirely on the language of the Ordinance and applicable law.

The three additional documents offered by the City are consistent with the plain language of Ordinance 117430, as demonstrated by the City's own characterization of the content of these documents (quoted above in the Facts). These three documents confirm that in 1994 the City determined in Ordinance 117430 that its already-adopted development regulations were consistent with its Comprehensive Plan, and this Ordinance therefore only adopted the "new and amendatory" regulations set forth in the body of the Ordinance.<sup>3</sup>

In order to supplement the record on appeal, the City must satisfy all six criteria of RAP 9.11(a), but for the reasons summarized above the City's Motion does not satisfy four of the six.

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<sup>3</sup> The Ordinance refers only to Title 23 (and section 303 of the Building Code). Even if it is interpreted to have adopted development regulations in addition to the "new and amendatory regulations" set forth in the body of the ordinance, such regulations could only be those in Title 23 of the Code, not Title 25 where the LPO is codified, because Title 25 is nowhere identified as a subject of the Ordinance.

criteria (1): “additional proof of facts is needed to fairly resolve the issues on review.” The University’s argument is based on the evidence the City itself presented to the trial court: the plain language of Ordinance 117430.

criteria (2): “the additional evidence would probably change the decision being reviewed.” The trial court did not decide this issue, but the three documents offered by the City would not change the trial court’s decision because these documents support the University’s interpretation of Ordinance 117430.

criteria (3): “it is equitable to excuse a party’s failure to present the evidence to the trial court.” The City presented Ordinance 117430 to the trial court and could have presented at the same time the twenty-year-old documents it now offers.

criteria (6): “it would be inequitable to decide the case solely on the evidence already taken in the trial court.” Neither the trial court nor Division I excluded any evidence offered by the City, and no equities weigh in the City’s favor with regard to evidence that is or is not in the record.

As the University argued in its Supplemental Brief, Ordinance 117430 treated differently two categories of “development regulations.”

The Ordinance “adopted” the “new and amendatory regulations” created by the Ordinance, and determined that the rest of the City’s development regulations were consistent with the new Comprehensive Plan. CP 469. In order to comply with RCW 36.70A.040, the section of the GMA referred to in the Ordinance, there was no need to adopt or amend development regulations that already were consistent with the Comprehensive Plan. However, the statute at issue in *this* lawsuit, RCW 36.70A.103, requires local government actually to “adopt” local development regulations “pursuant to” the GMA before they can apply those development regulations to state agencies, and nothing in the three additional documents offered by the City demonstrates any intent to do so in Ordinance 117430.

RAP 9.11(a) does not authorize the City to offer additional evidence on appeal that is entirely consistent with the evidence that the City itself presented to the trial court: the plain language of Ordinance 117430.

#### **IV. CONCLUSION**

For the reasons stated above, the University respectfully requests that the Court deny the City’s Motion and disregard those portions of the City’s Supplemental Brief that depend on evidence outside of the record.

Respectfully submitted this 15<sup>th</sup> day of May, 2017.

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## DECLARATION OF SERVICE

I hereby certify that on the 15<sup>th</sup> day of May, 2017, I caused the foregoing to be electronically filed with the Clerk of the Court by using the CM/ECF system, which will send notification of such filing to the following, and served a copy by the method indicated below:

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DATED this 15th day of May, 2017.

*/s/ Brenda Bole* \_\_\_\_\_  
Brenda Bole

**FOSTER PEPPER PLLC**

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