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No. 63466-6-I

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

Magnolia Neighborhood Planning Council,

Respondent,

vs.

City of Seattle,

Appellant.

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CITY'S REPLY BRIEF

THOMAS A. CARR
Seattle City Attorney

ROGER D. WYNNE, WSBA # 23399
Assistant City Attorney
Attorney for Appellant
City of Seattle

Seattle City Attorney's Office
P.O. Box 94769
Seattle, WA 98124-4769
(206) 684-8200

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I. ARGUMENT

A. MNPC has not carried its burden of proving that it has standing to maintain this case.

This case should be dismissed for lack of standing. Respondent Magnolia Neighborhood Planning Council (“MNPC”) devotes just one page of its 48-page response to standing. Resp. at 13-14. That page fails to sustain MNPC’s burden of demonstrating injury-in-fact or that MNPC is within the zone of interests protected by the State Environmental Policy Act (“SEPA”) or the Discovery Park Master Plan (“Park Plan”).

1. Injury-in-fact is not a function of proximity; MNPC alleges only conjectural or hypothetical injuries, not the immediate, concrete, and specific injuries required by Washington law.

To establish standing, MNPC must demonstrate injury-in-fact by showing that if the court does not grant the requested relief—invalidating the City’s resolution adopting the Local Redevelopment Authority (“LRA”) Application—MNPC’s members will suffer injury that is immediate, concrete, and specific, not merely conjectural or hypothetical. Harris v. Pierce County, 84 Wn. App. 222, 231-32, 928 P.2d 1111 (1996). Mere proximity to a site slated for development is not sufficient—even neighbors of such a site must demonstrate “that real, direct injury would result from the [government’s] approval of the...project” to have standing. Suquamish Indian Tribe v. Kitsap County, 92 Wn. App. 816, 830, 965

P.2d 636 (1998). Plaintiffs may “not rely on their location alone,” but on “specific harms that will result from that proximity.” Id. 92. Wn. App. at 831. Under Washington law, a claim that something bad **might** happen next door is no different from a claim that something bad **might** happen farther away. Neither claim substantiates injury-in-fact because both are speculative.

Citing two cases,¹ MNPC asserts that it has standing solely by virtue of having members who are “nearby residents.” Resp. at 13. Remarkably, one of those cases is Suquamish, the very case that warns plaintiffs not to rely on location alone. See 92 Wn. App. at 830, 831. MNPC offers no retort to the City’s portrayal of Suquamish. See Opening at 24. Instead, MNPC quotes just one sentence from Suquamish that only proves that proximity is insufficient without injury: “In general, parties owning property adjacent to a proposed project **and who allege that the project will injure their property** have standing.” Resp. at 13 (quoting Suquamish, 92 Wn. App. at 829-30) (emphasis added). Read in context of Suquamish in its entirety, that sentence means that an allegation of proximity must be accompanied by an allegation of “specific harms that will result from that proximity.” Suquamish at 831.

¹ MNPC poses this in a block paragraph that resembles a quote from case law. Resp. at 13-14. This appears to be a clerical mistake; the City could not find this paragraph in a search of Washington case law.

MNPC likewise gains no traction from Save a Valuable Environment v. City of Bothell (SAVE), 89 Wn.2d 862, 576 P.2d 401 (1978). See Resp. at 14. The issue addressed in SAVE is not present here: “whether it is appropriate for a nonprofit corporation...to represent persons who are threatened with real injury....” 89 Wn.2d at 866. The City does not question whether MNPC may represent its members, but whether those members have alleged immediate, concrete, and specific injury from City adoption of the LRA Application. The parties to SAVE did not dispute that plaintiff neighbors would suffer concrete injury from a rezone of nearby property—which would dictate future land uses there. See id. at 856-68. Here, by contrast, the City has demonstrated that its resolution adopting and submitting the LRA Application—which cannot dictate future uses of the Reserve property—can injure MNPC’s members only through rank speculation about future federal government and City action. See Opening at 24-26. MNPC does not dispute that fact or that the City lacks the legal authority—through the LRA Application or otherwise—to dictate the Department of Defense’s (“DoD’s”) decision about future uses that may be made of the Reserve property. MNPC therefore cannot demonstrate that the LRA Application will injure its members within the meaning of Washington standing law.

MNPC does not respond to the City's detailed explanation of why the Campbell Declaration alleges only conjectural injury. See Opening at 26-27. Instead, MNPC offers only the bald assertion that the Campbell Declaration "makes clear" that MNPC has standing. Resp. at 14. The only thing clear about the Campbell Declaration is that MNPC's members can convert the LRA Application into injury only through conjecture and speculation. Because the Department of Housing and Development ("HUD") could reject the Application and DoD need not embrace the Application's vision (and may even proceed in the absence of the Application), MNPC's members may or may not be injured by their proximity to the Reserve, with or without the Application. MNPC therefore lacks standing to challenge the Application.

2. MNPC fails to show how it is within the zone of interests protected by SEPA or the Park Plan in this case.

MNPC also fails to carry its burden of establishing standing by proving that the laws it claims the City violated by adopting the LRA Application—SEPA and the Park Plan—were designed to protect MNPC's members. See Grant County Fire Protection Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 803, 83 P.3d 419 (2004); Suquamish, 92 Wn. App. at 828-29.

MNPC is outside the zone of interests protected by SEPA, which excludes from the definition of “action”—and thus precludes as the subject of judicial appeal—adoption of a plan to govern a series of actions that must be approved by the federal government before it may be implemented. WAC 197-11-704(2)(b)(iii). See Opening at 28. As addressed below, that point is substantiated by the plain language of SEPA itself, not by any preemption argument. Cf. Resp. at 15.

MNPC does not question that the Park Plan has always been a self-described “policy document,” R022 and R080, that policy statements can create no enforceable rights or duties, or that the City Charter dictates that the Council may control the City’s property only through ordinances, not resolutions. See Opening at 28-29. Instead, MNPC mounts a series of unpersuasive attempts to squeeze binding law from the Park Plan (even if not necessarily law designed to protect MNPC’s members). Cf. Resp. at 40-45. MNPC gains nothing from pointing out that the Council considered the Plan “significant and important” in the 1980s; significant and important matters can still be addressed through resolutions that, by law, provide no cause of action. Likewise, MNPC cannot make the Plan binding by showing that the Council voluntarily noted how later ordinances were consistent with the 1986 Plan, or that the Council adopted yet another resolution approving the 2006 City Parks Department

“development plan,” which itself included one oblique reference to park master plans generally. MNPC cannot seriously contend that reproduction of Plan documents or text on a Parks Department web site has any legal effect, let alone the effect of creating binding law. In short, the Park Plan remains what the Council intended it to be: a statement of policy to which fidelity is enforced through politics, not litigation. MNPC—like everyone else—therefore remains outside any zone protected by the Plan and without standing to enforce it.

B. Adoption of the LRA Application is excluded from SEPA’s definition of “action.”

Even if MNPC had standing, its SEPA arguments would lack merit because adoption of the LRA Application is excluded from SEPA’s definition of “action.” MNPC cannot convert the Application into some other “action,” and misconstrues the relevance of preemption to this case.

1. Adoption of the LRA Application fits squarely within SEPA’s exclusion from “action.”

There can be no genuine dispute that the resolution adopting the LRA Application is excluded from SEPA’s definition of “action.” See WAC 197-11-704(2)(b)(iii). SEPA excludes the resolution because it constitutes: (1) “[t]he adoption of any policy, plan, or program”; (2) “that will govern the development of a series of connected actions (WAC 197-

11-060)”; (3) “for which approval must be obtained from any federal agency prior to implementation.” Id.

First, the LRA Application is a “plan” or “policy.” The heart of the LRA Application must be a “redevelopment **plan.**” BRAC Act § 2905(b)(7)(G) (emphasis added). The resolution adopting the Application states that its redevelopment plan is a statement of City “policy.” R321. Even MNPC consistently refers to the document as a “plan” and describes its details as actions the City “plans” to take. See, e.g., Resp. at 1, 7-12, 24, 29, 34.

Second, that plan could govern “a series of connected actions.” The section cross-referenced in WAC 197-11-704(2)(b)(iii) refers to “proposals that are related to each other closely enough to be, in effect, a single course of action,” and says that they must be considered together if they “are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.” WAC 197-11-060(3)(b). Consistent with this, and as required by federal law, the LRA Application brings together proposals on a range of interrelated disposal options that HUD and DoD must consider and balance as a package.

Finally, the plan cannot be implemented unless and until it becomes part of DoD’s Record of Decision (“ROD”), which cannot occur

until HUD first approves the plan and DoD considers the environmental impacts of the plan and a range of other alternatives through a comprehensive review under the National Environmental Policy Act (“NEPA”). See Opening at 15-17. MNPC does not suggest that the LRA Application can be implemented without federal approval.

Instead, MNPC twists WAC 197-11-704(2)(b)(iii) to mean “that if federal approval is required the otherwise ‘connected actions’ must be reviewed individually, as individual project actions under SEPA, ignoring cumulative impacts, rather than as a single project action.” Resp. at 37. SEPA says no such thing. It says only that the decision to adopt a plan that will govern a series of actions is itself not an “action” within the meaning of SEPA, if that plan must be approved by the federal government. If the plan is approved and the local agency later must convert the plan’s proposals into “actions” within the meaning of SEPA, those proposals (if not categorically exempt) would then be subject to SEPA review, including any required review of cumulative impacts.

MNPC then tortures from WAC 197-11-060(3)(b)—the provision that requires connected proposals to be reviewed in the same environmental document—a requirement that the connected actions must be treated as single “action” for purposes of SEPA. Resp. at 36. This is incorrect. Despite being analyzed in one environmental document,

connected proposals remain separate; an agency may convert each proposal into an “action” individually over time, not necessarily through a unified or simultaneous “action.”

Finally, MNPC attempts to set these two provisions on a collision course. According to MNPC, applying the plain language of WAC 197-11-704(2)(b)(iii) would force the “connected actions” covered by a plan to be reviewed under SEPA as individual proposals, in contravention of WAC 197-11-060(3)(b). Resp. at 3-4, 36-39. This Court must and may harmonize the two provisions. See State v. Keller, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001). As the LRA Application recognizes, if the federal process actually results in elements of the Application becoming part of the federal ROD, the City will have to conduct SEPA review before it acts on any of those elements. R299. A single review will need to cover all elements that fall within the language of WAC 197-11-060(3)(b).

2. MNPC fails to convert adoption of the LRA Application into some other type of “action.”

a) Subsection (1) of WAC 197-11-704 does not define “actions.”

MNPC asserts that adoption of the LRA Application must be an “action” under SEPA because it is a new “activity” of the type listed in subsection (1) of the definition of “action.” Resp. at 24, 33 (quoting WAC 197-11-704(1)(a)). MNPC omits the beginning of subsection (1),

which uses italics to note that the generic types of agency “activity” listed there constitute “actions” only “*as further specified below*” in subsection (2). WAC 197-11-704(1) (emphasis in the original). That a general type of “activity” might fit within subsection (1) therefore does nothing to prevent subsection (2) from excluding a specific type of activity from the definition of “action.”

- b) Adoption of the LRA Application cannot be a “decision to purchase land,” a decision that would be categorically exempt from SEPA review in any event.**

MNPC insists that the resolution adopting the Application is solely a “decision to purchase land” within SEPA’s definition of “action.” See WAC 197-11-704(2)(a)(ii). This attempt fails at multiple levels.

MNPC cannot counter the fact that, as a matter of City law and as held by the Washington Supreme Court, the City may purchase land only through an ordinance, not a resolution. See Opening at 40-41. MNPC proves nothing by noting that the LRA Application “involves” the purchase of land. Cf. Resp. at 25. Only a “decision” to purchase land may constitute a project “action” within the meaning of SEPA. WAC 197-11-704(2)(a)(ii). No “decision” has been made. The federal government has not offered any property and the City has made no decision to purchase it. It does not matter how Webster defines

“decision.” Cf. Resp. at 27-28. Webster did not write the City Charter. Only the Council has the power to make the decision to purchase land, and it may do so “by ordinance and not otherwise.” City Charter Art. 4, § 14, 4th Amend. (copy attached to Opening as App. 6).

Without citation to the record, MNPC manufactures Council intent to be bound to purchase land by the resolution. Resp. at 31-32. To the contrary, both the resolution and the LRA Application make clear that any future City involvement with the Reserve property will be dependent on the outcome of the federal government’s environmental review and decision-making process, and City negotiations with the federal government. E.g., R289, R321. If those negotiations go badly for the City, it may walk away and DoD will work with other entities. See Opening at 41-42. MNPC points to nothing in City, Washington, or federal law that forces the City to do anything at all with respect to the Reserve property.² If new, or even existing, City elected officials deem

² Even if the City had not followed through on its federally-assigned tasks as the LRA for the Reserve, no law would compel City action. Where an LRA fails to submit a timely and proper LRA Application, the only consequence is that DoD will make its decision without LRA input. See BRAC Act § 2905(b)(7)(L); 32 CFR § 174.6 (c)(2); 32 CFR § 176.40; DoD Manual at 99 ¶ C8.2.3.4. Even the “legally binding agreements” that the City had to submit with the LRA Application are drafts, subject to review and forced changes by HUD, that would bind the City and providers of services for the homeless only if the City follows through on the role assigned in DoD’s ROD and actually enters into those agreements. See 32 CFR § 176.30(b)(3)(i) (discussing the need for a legal opinion that the agreements, “when executed,” would be legally binding); 32 CFR § 176.35 (HUD review role).

that the City's best interests would be served by refraining from playing an active role in the future of the Reserve property, nothing other than political considerations would prevent them from disavowing the vision in the LRA Application.

Even if MNPC were correct that adoption of the LRA Application "is but a single action for environmental purposes, i.e., the proposal to purchase land," see Resp. at 38, and assuming that a "proposal" can be an "action" under SEPA (an assumption corrected below), then MNPC must concede that it is alleging that the City has undertaken an "action" that is nevertheless categorically exempt from SEPA review. MNPC does not argue that the SEPA categorical exemption for "[t]he purchase or acquisition of any right to real property" would not apply or that any of the reopeners found in that exemption would be relevant. Cf. Opening at 42 (discussing WAC 197-11-800(5)(a)). MNPC does not question the raft of decisions recognizing and applying this categorical exemption. Cf. id. (citing four examples).

Instead, MNPC offers two responses that fall flat. First, MNPC contends that applying the purchase exemption would "render nugatory" the definition of "action" that includes the purchase of land. Resp. at 33. MNPC simply fails to read the exemption, which lists situations—none of which is applicable to MNPC's single-action-to-purchase-land theory—

where the exemption would not apply. Nothing is left “nugatory” in a scheme that defines purchases of land as “actions” and also exempts a subset of those purchases from the requirement to conduct environmental review.

Second, MNPC claims that the LRA Application as decision-to-purchase-only is subject to environmental review, notwithstanding the categorical exemption, because of MNPC’s contention that the LRA Application will have a probable significant adverse environmental impact. Resp. at 33-34.³ Remarkably, MNPC bases this argument solely on one sentence plucked out of context from Dioxin/Organochlorine Center v. Pollution Control Hrgs. Bd., 131 Wn.2d 345, 932 P.2d 158 (1997). Dioxin, however, is the very case in which the Washington Supreme Court rejected the very contention now offered by MNPC: that an action that fits within a categorical exemption could still be subject to environmental review on the basis that the action would have significant impacts. Id., 131 Wn.2d at 356-64. Accord Clallam County Citizens for Safe Drinking Water v. City of Port Angeles, 137 Wn. App. 214, 1083,

³ In addition to being legally irrelevant, MNPC’s claims of impacts on heron habitat are factually unsupported. See Resp. at 12 (citing R180 and R212-14). Even the record cited by MNPC shows that the vision contained in the LRA Application was built around considerations of that habitat, R180, and that the vision, if implemented, would likely improve heron habitat through, among other things, “protection and enhancement of an aerial tree canopy corridor.” R214. Specifically to enhance heron and other wildlife habitat, the vision includes dedication of all forested areas of the otherwise highly developed Reserve to be conserved as park use. R240.

151 P.3d 1079 (2007). Under Dioxin, if an action fits within an exemption, SEPA review is not required even if the action would cause significant impacts.

c) **A “proposed action” cannot be an “action” within the meaning of SEPA**

Although MNPC correctly characterizes the LRA Application as a “proposal” within the meaning of SEPA, MNPC incorrectly insists that “the law is that a proposed action is itself an action.” Resp. at 27. In fact, MNPC’s characterization of the LRA Application as a “proposal” is fatal to MNPC’s contention that the Application is an “action.”

Under SEPA, a “proposal” or “proposed action” exists when an agency is preparing to make a “decision,” but a decision is necessary for there to be an “action.” “A **proposal** exists at that stage in **the development of an action** when an agency is presented with an application, or has a goal and is actively **preparing to make a decision** on one or more alternative means of accomplishing that goal...” WAC 197-11-784 (emphasis added). Both project and nonproject “actions” under SEPA must “involve a **decision.**” WAC 197-11-704(2) (emphasis added).⁴ “Proposals include....proposed actions,” WAC 197-11-

⁴ The Legislature authorizes the Department of Ecology to adopt these rules to provide the “[d]efinition of terms relevant to the implementation of [SEPA].” RCW 43.21C.100(1)(f).

060(3)(a)(i), but unless or until there is a “decision,” neither a “proposal” nor a “proposed action” can become an “action.”

This distinction is critical under SEPA and for this case for two reasons. First, there has been no “decision” here other than to approve a plan that is specifically excluded from the definition of “action” because it must be approved by the federal government. Thus, although the City is considering a “proposal,” the City has not yet taken an “action” within the meaning of SEPA. Second, without an “action,” SEPA provides no right to judicial review. MNPC does not even cite RCW 43.21C.075, let alone respond to the City’s explanation of why that section expressly bars suits raising SEPA concerns before the local government has made a “decision” that converts a “proposal” or a “proposed action” into an “action.” See Opening at 31-32.

That section bars appeals before the agency takes “substantive agency action,” which the section defines as “decision” or an “action”—not a “proposal” or “proposed action.” RCW 43.21C.075(1)(a), (8). This section is intended “**to preclude judicial review** of SEPA compliance **before** an agency has taken final **action** on a proposal, foreclose multiple lawsuits challenging a single agency action and **deny** the existence of ‘orphan’ **SEPA claims unrelated to any government action.**” State ex rel. Friend & Rikalo Contractor v. Grays Harbor County, 122 Wn.2d 244,

857 P.2d 1039 (1993). Because MNPC can allege only a City “proposal” and no City “action,” SEPA bars MNPC’s suit.

MNPC cannot pry open the courthouse doors with SEPA’s statement that an agency shall “prepare its threshold determination and environmental impact statement (EIS), **if required**, at the earliest possible point in the planning and decision-making process....” WAC 197-11-055(2) (emphasis added). By citing yet not quoting this language, see Resp. at 28,⁵ MNPC perhaps overlooks the key limitation of “if required.” Accord WAC 197-11-055(3)(a) (when reviewing an application, “begin environmental review, if required, when an application is complete”). Where environmental review is not required, an agency need not conduct SEPA review at all and the language of WAC 197-11-055(2) does not apply. PUD No. 1 v. Pollution Control Hearings Bd., 137 Wn. App. 150, 163, 151 P.3d 1067 (2007). See WAC 197-11-310(1) (an agency must perform SEPA review only “for any proposal which meets the definition of action and is not categorically exempt”). Furthermore, even where environmental review is required (which is not the case here), no suit may

⁵ MNPC summarizes this provision as providing that “SEPA compliance should occur when an idea is conceived.” Resp. at 28. This cannot be squared with the language of the rule, which says that compliance is appropriate not at the conception of an idea, but “when the principal features of a proposal and its environmental impacts can be reasonably identified.” WAC 197-11-055(2).

be brought to compel an agency to move more quickly; SEPA bars suits until the agency has taken an “action.” RCW 43.21C.075(1)(a).

MNPC lifts the following sentence from case law in a failed attempt to prove that a “proposed action” is an “action” under SEPA: “The EIS must include alternatives to the proposed action.” Resp. at 26 (quoting Barrie v. Kitsap County, 93 Wn.2d 843, 853-54, 613 P.2d 1148 (1980)). There was no question in Barrie that the suit was initiated only after the agency took “actions”: rezoning property and amending a comprehensive plan. See 93 Wn.2d at 846. The plaintiffs in Barrie did not attempt, as MNPC now does, to challenge a “proposal” under SEPA. Barrie refers to a “proposed action” in the context of an EIS because an EIS—which, where required, must be produced before an “action” occurs—necessarily can discuss only a “proposed action” and not an “action” that has yet to occur. RCW 43.21C.030(2)(c)(iii) (an EIS must describe the “proposed action”); WAC 197-11-440(5) (an EIS must describe the “proposal”). Unlike MNPC, Barrie respects the difference between a “proposed action” and an “action.”

d) Black Diamond is distinguishable.

MNPC misplaces its reliance on King County v. Boundary Review Board for King County (“Black Diamond”), 122 Wn.2d 648, 860 P.2d 1024 (1993). Resp. at 29-32. Black Diamond has nothing to do with the

issues the City raises on appeal. There was no dispute that the proposed annexation in Black Diamond was an “action” within the meaning of SEPA. See WAC 197-11-704(2)(b)(iv) (annexations are “actions”). Instead, the issue in Black Diamond was whether a city erred by determining that adverse environmental impacts from the proposed annexation were not probable such that an EIS was required in place of a mere determination of nonsignificance (“DNS”). See 122 Wn.2d at 661-67. The city argued that a DNS was sufficient simply because there were no existing specific proposals to develop within the annexation area. Id. at 662-64. The Court rejected that *per se* approach in favor of a fact-specific one and, assessing the specific facts of that case, determined that an EIS was required. Id. at 664-67.

None of this is relevant to the City’s adoption of the LRA Application. That Black Diamond rejected a *per se* approach to assessing the amount of environmental review required for an annexation (which is expressly defined as an “action”) does nothing to inform the question of whether the City’s adoption of the LRA Application (which is the type of action specifically **excluded** from the definition of “action”) is an “action” subject to any environmental review requirement in the first instance.

e) Analogizing the City to a developer only proves that SEPA does not apply now.

MNPC says that the City “is functioning like a private developer” and that a “private developer doing the same thing would have to comply with SEPA.” Resp. at 1-2. This analogy, even if appropriate, would only prove that the LRA Application is not an “action” subject to SEPA review. Under SEPA, only the agency considering an application (by analogy here, the federal government) must conduct environmental review, not the developer. See, e.g., WAC 197-11-055(3)(a) (the agency must start SEPA review when the application is complete); Clallam County Citizens, 137 Wn. App. at 223 (SEPA review was not required because “in this instance, the City is in the same position as a private applicant: it is powerless to take any action consistent with its decision until it receives approval from the permitting agency”).

3. MNPC misconstrues the relevance of preemption to this case.

MNPC imagines that “the City’s entire case depends on its preemption argument.” Resp. at 2. Because SEPA clearly excludes adoption of the LRA Application from “action,” the City repeatedly noted that there is no need for this Court to address any issue of federal preemption. E.g., Opening at 34, 39. The City raised the matter only to demonstrate that, by excluding adoption of the LRA Application, SEPA

promotes efficiency and comity and avoids the collision of state and federal law—and to criticize MNPC and the trial court for inviting that collision without addressing it.

MNPC fails in its various attempts to avoid the necessary collision between federal law and MNPC's mistaken view of SEPA. A preamble to a federal regulation disavowing any **express** preemption flowing from that **regulation** does nothing to counter the fact that, as here, **field** preemption flows from the **statute** authorizing that regulation. Cf. Resp. at 18-19. Although the City intends to explore consolidated SEPA and NEPA review of the specific proposals included in DoD's future ROD, see R299, there was no way to conduct what MNPC insisted should have been consolidated SEPA-NEPA review before the City adopted the LRA Application: DoD's NEPA review must include the plan found in the LRA Application, but the LRA Application cannot be used by DoD until it is approved by HUD, which can occur only after the City adopts the Application. See BRAC Act § 2905(b)(7)(K)(ii), (L)(iv). Cf. Resp. at 18-21. The time it might take for the City to conduct SEPA review of this particular LRA Application would be irrelevant to the issue of preemption. Cf. id. at 22. The point is that Congress occupied the field by establishing a deadline-driven framework for the express purpose of enabling the federal government to conduct environmental review and

make prompt base closure decisions, and that framework excludes any state law that would carry the prospect of years of litigation to resolve environmental review issues⁶ as a condition of taking an interim step in the federally-mandated process. Again, SEPA is not preempted in this way; only MNPC's mistaken version of SEPA.

C. MNPC has identified no standard of review, procedural duty, or substantive requirement imposed by the Park Plan and violated by adoption of the LRA Application.

Even if MNPC had standing, its Park Plan claims would fail.

Consistent with the fact that the Plan provides no cause of action, MNPC still has identified no standard of review applicable to its Plan claims.

Undeterred, MNPC offers two unpersuasive rationales for the trial court's decision to void the LRA Application resolution until the City "publicly determines" the applicability of the Park Plan. CP 190. Cf. Resp. at 42-43. First, MNPC claims SEPA as the basis for the "public determination" requirement, but adoption of the LRA Application is not subject to SEPA review. Second, MNPC cites a decision about a "comprehensive plan" adopted pursuant to the 1990 Growth Management Act ("GMA"),⁷ even though the 1986 Park Plan was adopted before the

⁶ See Opening at 39 n.12 (citing examples of protracted SEPA litigation).

⁷ Citizens v. City of Mount Vernon, 133 Wn.2d 861, 863, 947 P.2d 1208 (1997).

GMA and cannot fit the GMA's definition of "comprehensive plan."⁸ The GMA imposes no "public determination" requirement in any event: even the passage cited by MNPC speaks of a substantive duty to "conform" certain agency actions⁹ to plans, not a procedural duty to "consider" them, publicly or otherwise. Cf. Resp. at 42.

Substantively, despite three attempts, MNPC can find no inconsistency between the Plan and the vision in the LRA Application. First, MNPC suggests that the LRA Application is inconsistent with the Plan's warning not to "fragment" the park by "carving out areas of the Park" to provide space for structures. Resp. at 41. But the Reserve property is on the periphery of the park. It has never been a part "of the Park" within the meaning of the 1986 Plan. Not expanding a park is different from "fragmenting" it.

Second, although MNPC never explains how the "grand mall" vision in the unadopted 1972 Plan can be squared with the subsequent establishment of the VA Clinic or preservation of Kiwanis Ravine in the path of the erstwhile mall, cf. Opening at 7-8, MNPC still insists that the "grand mall" is part of the current Plan because the 1986 Plan

⁸ Laws of 1990 1st Ex. Sess., ch. 17 (GMA enactment); RCW 36.70A.070 (mandatory GMA comprehensive plan elements).

⁹ Those actions are land use decisions. As described below in the context of MNPC's fee request, the LRA Application is not a land use decision.

incorporated the earlier plans. Resp. at 42. But incorporation of the 1972 Plan was “except as herein revised” by the 1974 and 1986 Plans, both of which adopted maps and text that differed from, and thereby “revised,” the vision in the unadopted 1972 Plan. See Opening at 4-6.

Finally, MNPC quotes a passage from the 1974 Plan that only underscores the fact that the current Plan abandons the 1972 “grand mall” concept. Resp. at 44-45. By calling for that concept to be adopted in the future, that passage necessarily concedes that the mall concept was not adopted in the 1974 Plan. See id. Furthermore, the triggering event in that passage—the availability of the Reserve property necessary to realize the grand mall entrance—has still not occurred: the federal government intends to retain an 8.5-acre parcel directly in the path of the “grand mall.” R207. Compare R016 with R241.

D. MNPC is not entitled to an award of fees or costs on appeal.

MNPC is not entitled to attorneys’ fees or costs on appeal because it should not prevail before this Court. Moreover, the statutory basis cited by MNPC is inapplicable for two reasons.

First, the statute applies only to appeals “of a decision by a...city...to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit,

building permit, site plan, or similar land use approval or decision.”

RCW 4.84.370(1). The City’s decision to adopt the LRA Application and to submit it to the federal government was not a decision on a

“development permit,” let alone one similar to the list in the statute. A

“land use decision” is one “on [a]n application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used....”

RCW 36.70C.020(2)(a).¹⁰ Excluded from the definition are decisions on permits to use “parks, and similar types of public property” and

“applications for legislative approvals.” *Id.* Because the City made no decision on an application for a project permit or any similar land use approval, it did not make a “decision” within the meaning of

RCW 4.84.370.

Second, the statute allows a non-governmental party an award of fees and costs on appeal only if that party, in addition to prevailing in all

¹⁰ Accord RCW 36.70B.020(4) (“‘Project permit’ or ‘project permit application’ means any land use or environmental permit or license required from a local government for a project action, including but not limited to building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, site-specific rezones authorized by a comprehensive plan or subarea plan....”). The Legislature adopted RCW 4.84.370 in the same act in which it adopted definitions for a new local project review statute and the Land Use Petition Act (“LUPA”), RCW Chapters 36.70B and 36.70C. See Wash. Laws 1995, ch. 347, §§ 402, 703, and 718. All three must be read together. See, e.g., Sheehan v. Central Puget Sound Regional Transit Authority, 155 Wn.2d 790, 802-04, 123 P.3d 88 (2005) (reading together provisions on the same topic but codified in different titles).

judicial proceedings, also “was the prevailing or substantially prevailing party before the county, city, or town.” RCW 4.84.370(1). Cf.

RCW 4.84.370(2) (only the local government can be entitled to award on appeal without regard to whether it prevailed at the local-government level). Because MNPC did not get the result it desired from the City, it was not the “prevailing” party within the meaning of RCW 4.84.370.

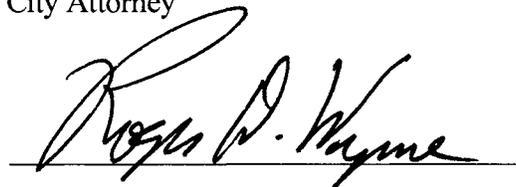
II. CONCLUSION

Because MNPC has failed to establish standing to maintain this action, and because its claims lack merit in any event, the City respectfully asks this Court to reverse the trial court and to order that judgment be entered for the City.

Respectfully submitted December 14, 2009.

THOMAS A. CARR
Seattle City Attorney

By:

A handwritten signature in black ink, appearing to read "Roger D. Wynne", is written over a horizontal line.

ROGER D. WYNNE, WSBA # 23399
Assistant City Attorney
Attorney for Appellant City of Seattle

CERTIFICATE OF SERVICE

I certify that, on this date, I caused a copy of the City's Reply Brief
to be placed in the U.S. Mail, postage prepaid, to:

John R. Neeleman and Gwendolyn C. Payton
Lane Powell PC
1420 – 5th Ave., Suite 4100
Seattle, WA 98101-2338
Attorneys for Magnolia Neighborhood Planning Council

DATED December 14, 2009.



ROGER D. WYNNE
Assistant City Attorney
Attorney for Appellant City of Seattle